The competence of the European Union regarding investment chapters in international trade agreements
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1. **State of play**

1.1 Background

Free trade agreements that the EU concludes are a special form of international agreements. Legally they are located in the crossroads of international law and EU law. International law and EU law collapse in the relation of the constitutional identity of the Union and specific legislation in certain internal matters is not always drafted to be compatible with external relations. But as always when talking about contract law in any legal field, the agreement text itself is one of the most important elements of the whole puzzle.

Traditionally trade agreements have been characterised as technical, even bureaucratic, legal texts, which main purpose has been a fluent trade in the field of goods. For the past decades also trade in services has been in the core of these agreement. But as globalisation has brought the furthest corners of the globe together, the need and possibilities to broaden the scope of trade agreements has actualised. Global competition has opened new doors for European businesses, which has created the need to conclude trade agreements with these third countries when more and more countries provide new market area opportunities. On the other hand, globalisation has created a need to consider trade in a wider perspective as globalisation has brought along various influences such as labour and environmental aspects from which no country can be excluded.

The increased number of new markets, each providing various possibilities for companies has naturally led to increased levels of competition. The EU is now competing with other global market areas for investments. The EU’s position is not the most favourable as labour costs in Europe are expensive; we are dependent on imports for many raw materials (which in turn affects the price of the goods that EU produces), and most of all, for third country companies, the EU presents itself as a regulatory chaos. Entering the single market area is beneficial for companies as this provides access to the (for now) 28 EU Member States, but like access to any foreign market area, the bureaucratic burden without assisting trade deals is a heavy and expensive procedure.
Due the increased global competition trade deals should be now designed to attract also foreign investments, because private funding has been evermore important after the global financial crisis when public funding is more difficult to get. Due to this trend, investments are increasingly linked to the trade.

As the EU cannot often compete on price, the European Commission has started to push value-based trade policy by including various elements into trade agreements. One of these elements is regulatory cooperation as globalisation has also created the need for mutual recognition, and understandably, the harmonisation of technical standards globally is not easy. Regulatory cooperation can be achieved via bilateral trade agreements, and being a leader in this field could provide a huge advantage for the Union as it can, as a result, play a bigger role in developing and setting standards that global markets use.

Due to these types of changes in the global trade scene, a common trend in the EU’s current commercial policy is to combine investment chapters into free trade agreements (FTA).\(^1\) Prior to this new trend, it was common practise to negotiate bilateral investment agreement (BIT), which typically only covered issues relating to investment between individual Member states and third countries. There are currently over 2300 global investment treaties in force\(^2\) but more and more of these provisions are being added to free trade agreements.

The EU has pursued for more liberalized market access for years by concluding association agreements with third countries. The goal of these agreements is to provide access for third countries to the single market area. This liberalisation has usually been based on the free movement of capital between EU Member states and third countries but - crucially - leaving investment under different rulings of separate investment agreements.

One of the problems regarding this new trend is that currently there is no one specific international investment law. Instead, the treaties are read together with various international conventions\(^3\) leaving the agreement text as one of the main sources. From a legal framework point of view the bigger problem that EU faces is that investment

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\(^1\) Edit. Frankel and Kolsky Lewis, p. 118  
\(^2\) http://investmentpolicyhub.unctad.org/IIA  
\(^3\) for example GATS which regulates foreign investment in the field of services
regulation in the context of the external relations has not been in the founding treaties for very long. The Lisbon treaty entered into force in 2009 introducing new rulings on international trade, yet it provides only few direct rulings on investment. More precisely, these provisions refer to the direct investments and foreign direct investment therefore differing from the terminology taken into investment chapters of the trade agreements. For perhaps well justified reasons, the EU has adopted a practice to use the term *investment* in its comprehensive trade agreements instead of the more narrow term used in founding treaties.

The above creates first of all two levels of legislation to be applied: international and EU level regulation, which in itself requires a deep legal consideration that all possible aspects of international and EU law have been taken into account. Secondly, the treaties leave a lot of room for interpretation as EU law does not provide a clear framework to the issue.

The mentioned problem of need for interpretation is based on the fundamental questions related to the purpose of the EU. EU is a system where Member states have voluntarily given up their powers to act in certain fields where it is seen that the EU can work more efficiently for the benefit of all Member states. To find if the specific field is in the following chapters of the paper it will be explained, when the EU has a competence to act in one specific field and what are the requirements to allocate competence in field which is not fully covered by the EU competence by the Treaty.

After the entry into force of the Lisbon Treaty, the European Union has had an exclusive competence in common commercial policy. According to the Treaty on the Functioning of the European Union (TFEU) the common commercial policy shall be based on uniform principles and commercial aspects of foreign direct investment. Before the Lisbon Treaty, investment was not mentioned in the Treaties, but the adoption of the Treaty of Lisbon changed the scope of the European Union’s competence in commercial policy including “foreign direct investment” to this competence. This wording has now created a grey area in EU investment law, especially in relation to the EU’s external competence on the matter.

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4 Treaty of Lisbon Article 2(b) (e)
5 Treaty of Lisbon preamble 158, Article 188 C (1)
The purpose of increasing EU’s competence in investment was to strengthen its position as an international actor in negotiations on investment policy. As most of the current BITs usually cover both foreign direct investments and portfolio investments, it is argued that negotiating future trade agreements with investment provisions with the same level of protection and scope than previous BITs is not necessary for those agreements as the Union competence do not cover all the fields. At the same time, it has questioned how it would be practical to only conclude investment provisions with foreign direct investment (FDI), which currently are seen as falling under the EU competence.

Another issue of adding investment provisions into FTAs lies in the dispute settlement as investment chapters commonly contain an investor to state dispute settlement which enable foreign investors to proceed with claims against the state. Due to this possibility, trade and investment treaties are criticized for too broad liberalisation.

To understand the meaning of the discussion, it must be remembered that international agreements are seen as an integral part of the EU law, which mean that they are binding without any further implementation. It is also necessary to take an actual agreement text as an example, because as said already, the agreement text is one of the most important sources of the interpretation.

The European Council gave its mandate to the Commission to start negotiations on free trade agreements with ASEAN countries on April 24th 2007. This mandate also included a provision in the case of the Commission being unable to conclude a common free trade agreement with these countries multilaterally, the Commission has the power to negotiate individual bilateral agreements with each country. Based on this mandate the Commission has successfully negotiated a free trade agreement between the Union and Singapore, which includes a chapter on investment.

The Commission decided on October 30th 2014 to prepare an application for the opinion from the Court of Justice of the European Union regarding the free trade agreements.

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6. Bungenberg, Griebel, Hindenlang, p 36
7. Bungenberg, Griebel, Hindenlang, p 41
8. Bungenberg, Griebel, Hindenlang, p 49
9. Lester, Mercurio, Davies: p.684
10. C-181/73, para 5
11. Council document 8600/07
agreement between the European Union and the Republic of Singapore.\textsuperscript{13} The Commission wanted to request the Court’s opinion on the Union competence regarding this agreement.\textsuperscript{14}

This agreement is suitable as a reference text due to two reasons. It has a new broad investment chapter and secondly as the Commission has requested an opinion from the Court there is already an opinion from the Advocate General of the European Court of Justice to provide some perspective to this discussion.

1.2 Research problem and Selection of research methods

The purpose of this paper is to provide an introduction to the complex legal entity that the investment chapters in free trade agreement bring along. Given the limitations related to length of this paper alone a comprehensive presentation of all the elements is not possible. The elements chosen to be raised in this paper are either regarded as the main issues relevant to solving the problem, or they have received considerable interest from the public.

This paper is based on the EU competence to conclude FTAs with investment provisions as this is a basic requirement to conclude such agreements. To understand the issue it must be remembered that an international agreement is always a ‘two-way street’: at the same time as the EU provides access to foreign investments into its own internal market together with a certain level of protection, the rights of EU investments in third countries are equally guaranteed. Investment is, to a large extent, a substantive question, and in order to tackle the competence issue, there is a need to take one step back and consider the main legal rulings as these will set the framework that will allow us to solve the substantive question.

The main purpose of this paper is to find a possible outcome of the opinion that the ECJ will give on the free trade agreement between the European Union and the Republic of Singapore (EUSFTA), which was originally expected to come during the spring 2017, but by the May 2017 it was not given out. As the agreement in question is the first time that the Union has sought the opinion of the Court after the entry into force of the Lisbon treaty, there are no previous cases on the application of the current legislation.

\textsuperscript{13} http://europa.eu/rapid/press-release_IP-14-1235_en.htm
\textsuperscript{14} http://europa.eu/rapid/press-release_IP-14-1235_en.htm
The method chosen to study this problem is the examination of jurisprudence which is based on the systemising the sources and interpreting the existing rules.\textsuperscript{15} For the purposes of this study, the practical method is seen as most suitable to study possible interpretations of the law. The legal problem is not largely discussed among official legal literature and the case law is limited, so to give broader overview on the issue, the public debate will be analysed as well.

During the mandate of the current Trade Commissioner, Cecilia Malmström, the EU has pursued more ambitious trade agreements. The new trade policy strategy “Trade for all”\textsuperscript{16} published in 2015 sets the framework for future EU trade agreements. This framework expanded the scope of the traditional trade agreements, which has created a need to find a sustainable solution to the competence problem of this study. The legal framework of the issue regarding EU competence in international trade agreements is not exhaustive in the context of current broad trade agreements that the EU pursues to conclude. In this study I will examine EU legislation which in this case means the founding treaties of the European Union (Treaty on the European Union and Treaty on the Functioning of the European Union), but also consider legal literature and previous case law of the ECJ on interpretation of the mentioned treaties. As the legislation on this matter isn’t exhaustive and there are matters such as terminology that are not examined by the Court before, the trade agreement between EU and the Republic of Singapore (EUSFTA) will be an important precedent of the interpretation of the EU law.

Trade policy falls in between juridical and political science as the agreements are complex entities with detailed provisions of a continuously larger field of trade. Furthermore, they frequently go beyond traditional trade issues. Unquestionably, they are also based on political relations. A purely legal or political analysis of the agreement will not provide a comprehensive understanding of the agreement. This is the principle reason why political aspects are taken into account in this paper.

This paper is constructed in such a way that I will first introduce the main legislation of the European Union relevant to the study. Then I will introduce the case law of the European Court of Justice and present how it has interpreted the main ruling of the founding treaties, and further, what is the discussion among the legal literature. As the

\textsuperscript{15} Aarnio, p.52
\textsuperscript{16} European Commission: Trade for all- towards a more responsible trade and investment policy (2015)
issue of dispute settlements is one the most controversial issues at the moment, I will shortly present the main the elements of the commonly used Investor-to-State-dispute-settlement (ISDS) and the newly proposed Investment Court System (ICS). The second part of the paper focuses on the current agreement text which I have chosen as an example in order to demonstrate the trend of where the actual text of the agreements seem to be going and further present what is the opinion of the Advocate General of the ECJ on the topic given in December 2016. The last part of the paper presents the conclusion and summarises all the presented material and evaluates the possible outcome of the Court regarding the opinion on EU-Singapore Free trade agreement which is expected to published soon.

The very last chapter – Chapter 6- of the paper which follows the legal conclusion, is dedicated to brief political conclusion and an analyse on the legally possible opinions provided by the ECJ in the political context. As suggested previously, the problem examined in this paper underlines that even political and legal discussions are not commonly combined in legal papers, and yet the problem this study examines is inevitably in this grey area, and politics has a large effect how different EU institutions want to interpret the issue in varying situations.

1.3 Introducing the problem

Investment as a part of an international trade agreement is a large and detailed part of the agreement text. It has various specific rulings and as a new element of those agreements a lot is to be cleared regarding the interpretation of the EU competence. Taking account the advised length of this paper I do not have the possibility to look into all of those aspects in detail. Due this limitation I have decided to look into one character of the investment which I see as a key question. That is the definition of an investment and how this defines the competence of the European Union to conclude FTAs with investment chapter. From later chapters this will be seen also the main issue of the example agreement EU-Singapore trade and investment agreement. After defining how the concept of investment is understood under EU law I will look into the possibility of the Union to conclude international agreements regarding investment on
behalf of Member states. The natural choice is to use the EU-Singapore free trade agreement for an example as it is in procedure of the Court of Justice of the European Union for an opinion regarding also this competence.

Answering the question about the definition of ‘investment’ and who has the external competence on it is mandatory as this competence has a crucial importance to the Member states. As mentioned in the introduction this defines the group of the investments foreign investors have the possibility to enter dispute settlement against the Member states where the investment is made, making Member state liable for applying the agreement accordingly.

In the application for an opinion to the Court of Justice of the European Union the Commission has asked broadly if the EU has a competence to conclude EUSFTA.\(^{20}\) And further, which are the provisions of the agreement that fall into the exclusive competence of the Union, which are shared and if there are any provisions that are solely in the competence of the Member states.\(^ {21}\) Therefor the whole agreement is under the examination of the Court regardless the fact that some parts do clearly fall under the exclusive competence of the European Union based on the clear treaty-based competence as later explained.

The question set by the Commission to the ECJ is broad. Even the agreement is one totality, in this study I will focus only on the investment part of the agreement as it is the new element now added to the free trade agreements and has raised public discussion especially when it comes to the investment protection and dispute settlement. Larger public gain awareness of this problem during fall 2016 when the EU-Canada Comprehensive Economic and Trade agreement (CETA) was under ratification in the Council and Wallonia as a national parliament of the Kingdom of Belgium delayed signing of the agreement basing on issues related to the investment provisions of that agreement. This proves the actuality of the question that must be solved to guide the Commission in future free trade agreement negotiations.

In order to have a full picture of the question in hand I will first explain the legal basis on what the Union can establish its competence regarding investment provisions. Investment provisions in trade agreements are closely linked to the competence on

\(^{20}\) Opinion of advocate general on procedure 2/15, para.1
\(^{21}\) Opinion of advocate general on procedure 2/15, para 47
common commercial policy. This justifies why these provisions of the Treaties are in the centre of the attention. After giving an introduction to legal framework I will go into more detailed questions searching for a definition to the investment and finding the difference of ‘foreign direct investment’ which is used as we see later in the Treaty on the Functioning of the European Union and 'portfolio investment' which is the term used commonly referring to the other forms belonging under the term investment.

I acknowledge that the entity of investment provisions in trade agreements consist of rather complex rulings and to have a perfectly clear overview of the issue, it would require lengthy study on the issue. But as there is a limitation on this study regarding the length I must exclude some elements out of it. I will look into one element which I see is the base of the whole issue and then further some closely linked issues that have been also in the core of the public debate on the matter.

2. **The competence of the European Union**

2.1 **Competence of the European Union based on the Treaty of the functioning of the European Union and Treaty on European Union**

The paradigm of the increasing federalisation of the European Union is the lack of a clear scope of a competence in certain legislative fields. The EU has been shaped by a federalist ideology for years and this has created a problem of increased competence of the Union without clear clarification. The changes introduced by the Lisbon Treaty have provided some clarification, but a clear definition in many issues regarding competence is still lacking. When the ECJ has given interpretation of the situations in its judgements and opinions, the relation between internal and external competence is left without specific rules or not taken into consideration. This situation usually is followed by a situation where Member states often interpret the situation differently from the European Commission. Before going into the main problem of the paper, it is relevant to introduce the related rulings of the two main treaties regarding the issue and how the Court has interpreted these rules in its case law.

The rules on the Union competence are set in two founding treaties (later Treaties): Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU), which are the primary source of the EU law and also constituting primary legislation.
In Article 6 TEU it is ruled that the Union shall pursue its objectives by appropriate means within the competences which are conferred upon the Treaties. In the Article 5(2) TEU it is ruled that the Union shall act only within the limits of the competences conferred upon it by Member States in the Treaties to attain the objectives set out in the Treaties. The principle of subsidiarity defines the competence as Article 5(3) TEU rules that in the areas which do not fall under the exclusive competence, the Union shall act only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states. The article 5(3) TEU must be read together with the rulings of TFEU and cannot be seen as a base of the competence.

The European Union has a power to act only within the competence attributed by the Member States in the founding treaties of the European Union.\textsuperscript{22} When the Union has an exclusive competence in specific area, it means that only the Union can adopt legally binding acts in this field.\textsuperscript{23} TFEU acknowledges three levels of competences. First level is the mentioned exclusive competence, which means for example in the field of international agreements that only the EU can ratify an agreement.\textsuperscript{24} Second possibility is that EU has a shared competence with the Member states – known as a mixed competence - which means that in order to create legally binding agreement apart from the Unions ratification, also the Member states’ governments must ratify an agreement.\textsuperscript{25} Third level is the supportive competence of the EU, which refers to areas where only the Member states can adopt legally binding agreements without any influence of the EU. Article 4 TFEU states that the competence is shared in the areas where the competence is not an exclusive Union competence according to Articles 3 and 6 that rule on specific areas where the competence is either exclusive or supportive. This ruling on Article 4 TFEU gives guidelines for the situations where the specific matter is not covered by the clear rules on exclusive or shared competence. It applies to situations where all the substantive elements of the agreement do not fall under exclusive competence providing mixed agreements as the EU is not competent to conclude the whole agreement without the influence of the Member states.\textsuperscript{26}

\textsuperscript{22} TEU Article 5(2) \\
\textsuperscript{23} TFEU Article 2(1) \\
\textsuperscript{24} TFEU Article 2(1) \\
\textsuperscript{25} TFEU Article 2(2) \\
\textsuperscript{26} Eeckhout, p.213
In addition to exclusive, shared and supportive competence, the competence is divided into two levels: internal and external. Internal competence means that the competence is within the EU and between the Member states. As an example internal market rulings are often based on the EU’s exclusive competence where only EU has the power to regulate. External competence refers to the issues between EU and third countries. In this issue the main question is to examine if the EU has an exclusive external competence to conclude an international agreement.

After the entry into force of the Lisbon Treaty in 2009, the EU has had an exclusive competence in the field of common commercial policy. The Article 3 TFEU provides a non-exhaustive list of the areas where the EU has an exclusive competence. In the Article 3(e) TFEU common commercial policy is specifically mentioned falling under this competence. Therefore, in the area of common commercial policy, informally introduced as trade policy, the European Union has an exclusive competence according to the Treaty on the Functioning of the EU.\(^27\) As ruled in the Treaty, the common commercial policy of the European Union shall be based on uniform principles and trade agreements relating to trade in goods and the commercial aspects of foreign direct investment and achieve uniformity in measures of liberalisation [of trade].\(^28\)

Article 21(2) TFEU defines that the Union shall pursue common policies and work for a high degree of cooperation in all fields of international relations in order to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.\(^29\) This provision can be interpreted as a supportive ruling while establishing a competence for trade agreements as free trade agreements do abolish restrictions on international trade and creates further integration in the world economy. In itself this article anyhow cannot establish the competence.

As mentioned, TFEU provides specific rulings on common commercial policy. Article 216(1) TFEU establishes the scope of the Union competence to conclude international agreements to achieve the objectives set in the Treaties or when the power to conclude such agreement is provided in a legally binding act or when a conclusion of such an

\(^{27}\) TFEU Article 3 (1) (e)  
\(^{28}\) TFEU Article 207 (1)  
\(^{29}\) TEU Article 21(2)(e)
agreement is likely to affect common rules.\textsuperscript{30} This ruling should be read together with Articles 206 and 207 TFEU which set the objectives of the common commercial policy, including foreign direct investment within that scope.

Article 206 TFEU repeats mainly the ruling in Article 21(2) TEU by setting the objective to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers. Article 207 TFEU basis the common commercial policy on the trade agreements relating to trade in good and commercial aspects of foreign direct investment among other issues.

To remind of the legal problem of this paper it must be mentioned that commercial policy is not exhaustively defined in the TFEU. As a safeguard mechanism for the Union itself and for Member states, to clarify the meaning of the Treaties in unclear situations, there is the possibility to ask for an opinion from the European Court of Justice if the envisaged agreement is compatible with the Treaty or not.\textsuperscript{31} If the Court finds that the envisaged agreement is not compatible with the Treaty the agreement cannot enter into force\textsuperscript{32} without including the modifications the Court proposes.

All the introduced rulings provide the basic legal framework within the competence can be established. A problem arises when the wording of the international agreement do not fall unambiguously into one field of the competence. On this precise question it must be then examined if the competence can be found in more general set of rulings that could be interpreted to cover the situation establishing so called implied powers. Additionally, the ruling on the Article 216 TFEU offers a possibility to examine if there are some objectives that can only be achieved by international agreements or that concluding of an international agreement effects on common rules or is there a legally binding Union act that provides the Union competence.

Related to the issue of interpreting the competence of the EU in relation to all forms of investment, TFEU declares that all the restrictions regarding the free movement of capital between Member states and between Member states and third countries must be prohibited.\textsuperscript{33} Further Article 64 of the same Treaty creates a competence to the EU to

\begin{footnotes}
\item[30] TFEU Article 216(1)
\item[31] TFEU Article 218(11)
\item[32] TFEU Article 218(11)
\item[33] TFEU Article 63 (1)
\end{footnotes}
adopt measures, which secure the free movement of capital including direct investment. Here we see that free movement of capital does not cover investment in general but specifically mentions direct investment without using the same term as Art. 207 TFEU does mentioning only foreign direct investment (FDI). This can be justified by the reasons discussed later in Chapter 2.6 after the terminology of a foreign direct investment and a portfolio investment is analysed.

From the TFEU it can be read unambiguously that the Union has an exclusive competence on common commercial policy and foreign direct investment. This outcome can be read from Article 207 TFEU where common commercial policy is ruled to be based on, among other provision, commercial aspects of foreign direct investment.

As it is seen the Treaty refers only to this one specific type of an investment, which leaves open the question what is the competence regarding other types of investments. The Treaty makes it clear that any competence should be established in the Treaty. To create an exclusive competence regarding other forms of investments, it must be examined if this competence can be derived from other provisions of the Treaty.

The main question when defining the competence of the Union, in the area where it is not clearly defined, requires deep interpretation of the aim of the legislator and the possibilities derived from the legal framework. EU law is divided into two levels: primary and secondary legislation where the Treaties are considered to be primary. Secondary legislation refers to the legislation that is derived from the principles and objectives set out in the Treaties. International agreements fall in between as international agreements enjoy primacy over secondary law meaning that in case international agreement and EU secondary legislation are incompatible, the secondary legislation may be annulled.

Looking on the issue of the competence on investment in the international agreements this competence can be decided by the basis of Article 3(2) TFEU as there is no specific direct ruling on the issue. Article 3(2) TFEU states:

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34 TFEU Article 64 (1)  
35 TFEU Art. 3(1)(e)  
36 TEU Article 5(2)  
37 https://europa.eu/european-union/law_en  
38 C-61/94  
39 Legal Opinion of the European Parliament’s Legal Service, para 36
The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Establishing a competence under Article 3(2) TFEU can be done when one the mentioned elements is fulfilled. It must be examined if there is a legislative (Union) act establishing this competence or if concluding an international agreement is necessary for the acting within the Union’s internal competence or that a competence on the matter could effect on common rules. The interesting issue is that the common rules are not defined in the Treaties nor has the Court to provide a clear definition where to this term is referring and what are its limitations.

The Article 3(2) relates only to an external competence, but as can be found later in case law examples in Chapter 2.2, internal and external competences cannot be always distinguished from each other. Already this article makes it clear that there is a strong connection between internal and external competence when we are interpreting the possibility of EU’s external competence under the Treaties when this area is not specifically ruled. The same principle is found in Article 216 TFEU where it is directly linked to the common commercial policy.

Referring to the above presented analyse, it is justified to examine a if implied powers could be used as a legal base for the competence. The Article 216 TFEU is not discussed yet in the Courtin the relation to investment meaning, so the judgements of the case law related to Article 3(2) TFEU are used to find the rule for the interpretation. When the competence is based on these more general provisions it is called an implied power of the Union.

It must be defined what can be seen as creating a common rule in the meaning of Article 3(2) TFEU and what level of connection between external and internal competence is required that the internal competence will establish the external competence.

Together with Article 216(1), Article 3(2) TFEU sets the main rulings on EU’s competence regarding trade agreements as they are naturally international agreements. It is characterised that 216(1) TFEU is about the existence of the competence and
Article 3(2) TFEU about the nature of such competence as Article 216(1) TFEU only provides the competence to conclude international agreements. It will defined by the Article 3(2) TFEU if this competence is actually exclusive.

For the EU to be competent to conclude an international agreement, there must be either an exclusive external competence or in case all of the substantive aspects of the proposed agreement text do not fall under the exclusive competence of the Union, there should be at least shared competence in the meaning of Article 4 TFEU. Under shared competence the EU is not able to conclude the agreement effectively by itself but the Member states must also ratify the agreement as explained above. Later in Chapter 2.7.it will be explained from the international law point of view, what is the legal consequence of agreements falling under the shared competence.

2.2  **Implied powers: interpretation of Competence of the European Union based on the Treaty of the functioning of the European Union**

The previous chapter provided a list of the rulings relevant to the issue of this paper, but listing of different articles of the Treaty do not open the issue as the wording of the Treaties is hard to interpret without any substantive context. The rulings on implied powers can be found in the current TFEU in Articles 3(2) and 216(1). To see how the ECJ has read these rulings the case law must be presented.

The ECJ has interpreted implied powers of the Union in the meaning of Article 3(2) TFEU in few cases and there are two main cases of the ECJ that are commonly linked to the discussion of an EU competence and implied power. First one is the Commission vs. Council C-22/70, so called AETR case, regarding an international agreement in the field of transport and the other one is the Opinion 1/94 on the EU competence to conclude international agreements in the field of services. These two cases create the ground for the discussion and explains the rules of the interpretation on the relevant Treaty rules. These two cases are also closely linked as the later given opinion refers largely to the AETR case.

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40 Koutrakos, p. 76
2.2.1 AETR case

The main case when discussing on implied powers of the Union it’s the so called AETR\textsuperscript{41} judgement\textsuperscript{42} of the ECJ. It is one of the first cases where the Court has interpreted the rules on implied powers. In this case the Member states saw themselves being competent to conclude the European Transport Road Agreement, but the Commission brought the case to the Court as it saw that the competence belonged to the Union as transport policy was under EU’s competence and the Regulation 543/69 passed the competence completely to Union.\textsuperscript{43} It is stated in the very beginning of the judgement that the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty, but [the capacity] may equally flow from other provisions of the Treaty and from measures adopted within the framework of those provisions.\textsuperscript{44} This statement of the Court proves that the external competence is not only limited to the specific objectives but can be flown from other provisions as well.

The Court states that the right to undertake obligations individually or collectively, which can affect the common rules, cannot be exercised by Member states after the Community adopts provisions laying down those common rules.\textsuperscript{45} Further when these common rules come into being the Community alone is in a position to carry out contractual obligations towards third countries.\textsuperscript{46} This ruling of the Court can be read to create an exclusive competence of the EU as the Member states have no longer the right to act when the common rules can be affected. The Court is referring to the ruling of the Treaty that prohibits Member states to take measures that might jeopardize the fulfilment of the objectives set in the Treaty.\textsuperscript{47}

The ECJ states in a paragraph 27 of the judgement that “the power of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned” referring to the

\textsuperscript{41} Eeckhout p. 71-72: The case was brought to the Court, because the AETR agreement signed in 1962 did not come into force as there was not enough ratifications. This lead to the Court’s proceedings to decide who was competent to conclude this international agreement, EU on behalf of the Member states or Member states themselves.
\textsuperscript{42} C-22/70
\textsuperscript{43} C-22/70
\textsuperscript{44} C-22/70, para 16
\textsuperscript{45} C-22/70, para 17
\textsuperscript{46} C-22/70, para 18
\textsuperscript{47} C-22/70, para 21
provision on transport, which was relevant to the case present. In addition to provide background to the Court’s ruling, it should be mentioned that the Court was referring to the regulation that existed regarding the substance.

To conclude the Court’s rulings in this case, in the area of common rules the EU has external competence exclusively when the obligations towards third countries might affect to the common rules. This ruling justified the statement that internal measures cannot be separated from the external powers as it is also linked to the implementation of Treaty provisions, because when EU concludes an agreement it becomes contractually obligated to implement the agreement. Often the measures used to implement an international agreement require an internal competence in addition to the external competence.

If the above mentioned statement is read in the light of the Article 3(2) TFEU it can be understood that when internal actions are required to fulfil the obligations, it is justified that the Member states are not able to act within this field as the harmonisation of internal rules would be necessary. In case the Member states maintained the power to act, there would be a risk of contradiction of the international agreement and the secondary legislation of the Union. The question whether the existence of secondary legislation in the present case was needed to establish the competence is again formulated in an unclear way. It is argued that the existence of the competence was flown from the primary legislation and only expressly recognised by the secondary legislation.

The main findings of the judgement are that as the substantive questions fell under the EU’s competence and that the provisions of the Treaty extended to non-member states, there could be an external competence. In addition as the Treaty provided the Council a power to adopt appropriate measures the agreement fell under EU’s competence. But the exclusive nature of the competence could only exist because there was an EU regulation on the matter that provided the competence to conclude an international agreement. This judgement creates the first rule on implied powers: when there is a

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48 C-22/70, para 27
49 C-22/70, para 28
50 Eeckhout, p. 73
51 Koutrakos, p. 82
52 Eeckhout, p. 75-76
community legislation at internal level that is exercised before the conclusion of the international agreement and this regulation provides a power to conclude an international agreement, EU can have an exclusive external competence.\(^{53}\) The rule is supported by the Article 218 TFEU that provides the EU to conclude international agreements, which can be understood in the same way as the Treaty ruling ‘appropriate provisions’ from the time of the judgement.

2.2.2 Opinion 1/94

The principle of article 3(2) TFEU has been applied also in the Opinion 1/94 of the ECJ where the question was if the EU had the competence based on the Article 113 EC to conclude two WTO agreements\(^{54}\): the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights.\(^{55}\) Commission has claimed that an exclusive external competence could be lead from the internal powers.\(^{56}\) Further, the Commission claimed that when there is no specific provision declining the power to adopt measures in internal level, the external competence can be flown from that assumed competence.\(^{57}\) The Court denied this justification by claiming that external competence cannot be flown from the competence of freedom of establishment and freedom to provide services.\(^{58}\)

A clear limit to the extent when internal powers can establish external competence is set strictly to the Treaty provisions. The Court has stated in the Opinion 1/94 that if the sole purpose of the Treaty ruling is to establish competence within Member states and not towards third countries this provision cannot be used in establishment of external competence.\(^{59}\)

The Opinion 1/94 of the ECJ is one of the defining cases of the EU competence in foreign direct investment. But it must be noted that this opinion was given before the

\(^{53}\) The nature as a preliminary ruling in the sector can be seen also from the fact that there are not many Court’s own rulings it refers in the justifications, which indicates that the ruled issue is in the proceedings of the Court for the first time.

\(^{54}\) This opinion is a good base to understand the legal connections between multilateral agreements and bilateral trade agreements as the case is based on the two main WTO cases GATT and GATS. Bilateral trade agreements are commonly known as WTO plus agreements meaning that the provisions and offers within those agreements go beyond the multilateral WTO level.

\(^{55}\) Opinion 1/94

\(^{56}\) Opinion 1/94, para 73-74

\(^{57}\) Opinion 1/94, para 74

\(^{58}\) Opinion 1/94, para 75

\(^{59}\) Opinion 1/94, para 81
entry into force of the Lisbon Treaty after which foreign direct investment was added in the Treaty text. Still, already from this opinion it could be read that the Commission interprets the concept of common commercial policy widely as in this opinion the question was about services and this competence has not been clarified at the time of the Opinion.\textsuperscript{60}

In the opinion it was also investigated what is the relation between exclusive competence on common commercial policy and other rights provided in the Treaties. It is stated that the free movement of people between Member states cannot be seen linked to the common commercial policy.\textsuperscript{61} The Court finds that nothing in chapters on right to establishment and freedom to provide services extends the competence to relations arising from international law.\textsuperscript{62} The Court underlines that the purpose of those chapters [the chapters on the right of establishment and on freedom to provide services] do not contain any provision expressly extending the competence of the Community to ‘relationship arising from international law’.\textsuperscript{63} The Court continues that the sole objective of those chapters is to secure the mentioned rights to nationals of Member states and they do not contain anything on the problem of those rights regarding third country nationals.\textsuperscript{64} This is an interesting argument from the Court because later we will look into the possibility of the free movement of capital in the connection of investment\textsuperscript{65} which as a right is guaranteed at the same level as the free movement of people.

The Court sets a rule of interpretation regarding the matter of relations between external and internal competence in paragraph 77 of the Opinion. The Court concludes that Community’s exclusive external competence does not automatically flow from its power to lay down rules at internal level.\textsuperscript{66} Here the Court refers to the AETR case where this principle was already presented.\textsuperscript{67} The Court explains that the exclusion of Member states competence to act towards third countries is lost to the extent that the

\textsuperscript{60} Opinion 1/94
\textsuperscript{61} Opinion 1/94, para. 10
\textsuperscript{62} Opinion 1/94, para 81
\textsuperscript{63} Opinion 1/94, para 81
\textsuperscript{64} Opinion 1/94, para 81
\textsuperscript{65} This paper Chapter 2.6
\textsuperscript{66} Opinion 1/94, para 82 the Commission on the contrary saw the possibility to flow external powers from the internal ones to larger extent than the Court saw possible
\textsuperscript{67} Opinion 1/94, para 77 reference to C-22/70 para 17 and 18
common rules can be affected. The exclusive nature of the Unions competence is exclusive only in the areas where the common rules are established.68

The rule when the competence can exist is that when the Community has included in its internal legislative acts provision on the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member counties, it acquires exclusive external competence in the spheres covered by those acts.69 The same rule applies where the Community has achieved complete harmonization of the rules governing access to a [self-employed] activity as the common rules adopted could be affected if the Member states retained freedom to negotiate with non-member countries.70 In the present case the main question to be answered was whether there were a risk that common rules could be affected in case Member states had the competence to participate.71

The clarity of this reasoning from the Court on this case is questioned among legal literature.72 The main problem of the justification lies in the fact that in the present case the Court looked directly to the exclusive external competence even there was no exclusive internal competence.73 The Court’s statement that “where internal powers can only be effectively exercised at the same time as external powers ..., internal competence can give rise to exclusive external competence only if it is exercised”74 is not clearly reasoned. It would have been advisable for the Court to justify this statement in detail, because in this form it provides a possibility for an interpretation.

One of the elements that is not often taken into the discussion regarding the present case is the justification that the Commission provided on the relation of services and common commercial policy. Because one of the reasons presented by the Commission was that the trend of common commercial policy was changing as services had become a dominant sector of economy.75 The Court did not accept this idea in its entirety, but admitted that having regard to this trend of international trade, following from the open nature of the common commercial policy within the meaning of the Treaty, that trade in

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68 Opinion 1/94, para 77  
69 Opinion 1/94, para 95  
70 Opinion 1/94, para 96  
71 Opinion 1/94, para 102  
72 Eeckhout, p.88  
73 Eeckhout, p. 91  
74 Opinion 1/94, para 89  
75 Opinion 1/94, para 40
services cannot immediately be excluded from the scope of the Article 113 EC. Later in the opinion the Court detailed this question and stated that all of the aspects regarding GATS cannot be covered by common commercial policy. The point taken from this reasoning is that the Court was willing to take the common trend as a matter of fact into account when examining the final outcome. Equal argument could be used regarding ‘investment’ as it is to a larger extent grown as a part of the trade policy and included nowadays to the common commercial policy rulings. The automatic response from the Court to this justification would be that the inclusion of ‘investment’ in common commercial policy is limited to the foreign direct investment. Later in Chapter 2.5 where the terminological differences are explained an argument in favour of the common trend justification will be presented. The Court also commented the necessity issue in the opinion. The precise quote related to the issue of TRIPs being “unification or harmonization of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective”. From this very short-worded statement of the Court there has still been readings, especially in the connection to the statement Court presented that “external powers may be exercised and thus become exclusive, without any internal legislation having first been adopted”, that conclusion of an international agreement as a facilitator to for attainment of internal objectives is irrelevant, but the term ‘necessity’ refers to the principle that the conclusion of the agreement is the only way to exercise internal competence.

This opinion of the Court is indeed an interesting reading of the implied powers of the EU. Form this Opinion there can be found set of interpretation rules. First being, that the internal competence should be exercised by harmonisation of the internal rules creating an exclusive competence. Secondly, that the implied power can be established only when the internal competence cannot be exercised without external competence, which is also accepted by the legal literature. In some cases the internal harmonisation

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76 Opinion 1/94, para 41
77 Opinion 1/94, para 47
78 One of the possible conditions to conclude an international agreements according to the TFEU is necessity without any further clarification how the necessity is qualified. Also in paragraph 82 in the justifications it is stated that “It is enough that the Community’s participation in the international agreement is necessary for the attainment of one of objectives of the Community”
79 Opinion 1/94, para 100
80 Opinion 1/94, para 85
81 Koutrakos, p. 108
would not be effective and the policy aim not achieved without the external competence.\textsuperscript{82}

2.2.3 Other case law

The consistent approach of the Court to see that implied powers can be flown also from Treaty provisions was presented also in the Court’s opinion 1/76.\textsuperscript{83} The justification of the Opinion referred to the Court’s Joined cases 3, 4, and 6/76, where the Court had found that when Community law has created powers to the Community institutions in internal system for attaining a specific objective, the Community has authority to enter into international commitments necessary for the attainment of the specific objective even in the absence of the specific provisions in that connection.\textsuperscript{84} Further it was stated that this conclusion is particular in cases where internal power has been already used to attain specific objectives, but that it is not eventually limited to that.\textsuperscript{85} The opinion takes no position on exclusivity of the Union competence on the matter, but the Court has justified the participation of some Member states in the agreement based on the fact that they were already parties to Conventions discussed.\textsuperscript{86} The need to specifically justify Member states’ participation indicates that the competence of the Member states was questioned even it was not written down.

Analysis of this case among legal literature questions the exclusivity of the Union powers as compared to the AETR case where the Court found that exclusive implied power resulted namely from the internal legislation, which could have affected common rules. But as there was no legislation, the Court had found that the power to conclude agreements belonged to Member states. It is questioned that why the Court would not have been more precise if the intention was to change its recent approach and see the competence as exclusive.\textsuperscript{87} The exclusivity of the competence is only vaguely expressed in the paragraph 4 of the case, where the Court stated that in so far as the participation of the Community in the international agreement…is necessary for the attainment of one of the objectives of the Community.\textsuperscript{88}

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\textsuperscript{82} Eeckhout, p. 93
\textsuperscript{83} Opinion 1/76, para 3
\textsuperscript{84} Opinion 1/76, para 3
\textsuperscript{85} Opinion 1/76, para 4
\textsuperscript{86} Opinion 1/76, para 4 and 7
\textsuperscript{87} Eeckhout, p. 81
\textsuperscript{88} Opinion 1/76, para 4
\end{flushleft}
In the Opinion 1/76 the Court also specifically justified the participation of six Member States in the Agreement by the fact that they were already parties of that agreement, but underlined that this fact did not encroach on the external power of the Community. This statement could be easily read to support the exclusive nature of the Union competence. But as rightly pointed out in the analysis of this Opinion, the substantive questions was about transport policy, which didn’t provide exclusive competence.

The issue of external competence is discussed in Court’s opinion on the Lugano Convention where ECJ states that the competence of the Community to conclude international agreements may equally to conferment by the Treaty flow implicitly from other provisions of the Treaty and from measures adopted by the Community institutions within the framework of those provisions. This outcome seems to differ from the outcome of the Opinion 1/94 presented earlier. Further the Court stated that whenever the Community law created powers for those institution within its internal system for the purpose of attaining specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect. This statement should be read together with the following paragraph which refers to the distinction of shared and exclusive competence. Regarding the exclusive competence the Court refers to the opinions 1/76 and 1/94 where the Court has held that in which internal competence may be effectively exercised only at the same time as external competence, the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.

European Court of Justice has also interpreted the possibility of international agreement effecting on common rules or alter their scope” in a case Commission v. Member States where the Member states wanted to clarify if there was an exclusive external competence of the Union to negotiate international agreements on broadcasting rights.

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89 Opinion 1/76, para 7
90 Koutrakos, p.92
91 Opinion 1/2003: para 1: on the issue of competence to conclude a convention on recognition and enforcement of civil and commercial matters. The debate on the jurisdiction and recognition on judgements has been raised also on the CETA agreement discussion as the CETA is the first FTA introducing the investment court system. This is discussed Chapter 3 of this paper.
92 Opinion 1/2003, para. 114
93 Opinion 1/2003, para. 114
94 Opinion 1/2003, para. 115
95 C-114/12
Firstly, the Court notes that, *any competence, especially where it is exclusive, must have its basis in conclusions drawn from a specific analysis of the relationship between the envisaged international agreement and the EU law in force, from which it is clear that such an agreement is capable of affecting the common EU rules or of altering their scope.*

Furthermore, the Court stated in this judgement given before the entry into force of the Lisbon Treaty that the analysis is not affected by the entry into force of the Lisbon Treaty which was one of the arguments of the Member States. In addition, the Court underlined that Member states cannot enter into force such commitments outside the framework of the EU institutions even there would not be any contradiction between those commitments and the common EU rules. This supports the idea of the wide interpretation of the EU competence by excluding the possibility of Member states to make such commitments.

ECJ has been interpreting this competence from the point of view, which abolish the competence from the Member states. One clear argument of the Court in this case was that there were already a harmonised EU level legislation on this issue as was the case in AETR judgement.

To prove the somehow consistent interpretation of the Court, the Court has justified this outcome by the obligation of the Member states to facilitate the achievements of the Community’s tasks and to abstain any measure which could jeopardize the attainment of the objectives of the Treaty. The objectives of the Treaty would be compromised if the Member states were able to enter into international commitments containing rules capable of affecting rules already adopted in areas falling outside common policies or of altering their scope. This interpretation was also presented already in the AETR judgement.

The Court’s opinion 1/03 has been under legal debate as it is seen to clarify that the Court sees existence and exclusivity of implied powers to be two different stages of this discussion. Further the requirement of necessity is seen as establishing parallelism and

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96 C-114/12, para. 74
97 C-114/12, para 72
98 C-114/12, para 71
99 C-114/12, para 79
100 Opinion 2/91
that implied external powers are Treaty-based and not confined to areas where the EU has already legislated.101

2.2.4 Summary of the case law chapter

The list of the cases related to the subject is not exhaustive. The case law is largely from the time before the Lisbon Treaty, but the main rules are still relevant and can be interpreted in the light of the provisions introduced by the Lisbon Treaty. The main finding is that if there are common rules on the matter, there can be an exclusive external competence of the Union, but only to the extent the common rules are applied. The common rule should be established before conclusion of the agreement so that this rule creates the competence. Alternatively, the competence can be based on the regulation adopted within the EU. Remarkable is the EU ruling in TFEU, which does not require an actual effectiveness on common rules but only requires that there is a possibility to that.102 This wording can be seen in the meaning that the legislator has wanted to provide an opportunity to avoid contradictions of external and internal obligations, which could jeopardize the fulfilment of the objectives of the Treaty.

The substantive issues and question of competence are often presented separately in the Court’s case law, but the reasoning to see competence as exclusive or shared is never separated from the fact. The requirement to attain specific policy objectives is a relevant factor when discussing about the implied power of the Union. These policy objectives are often seen as a common rules, but the concept of common rules is not fully clear from the case law. To find a ground for an implied power the common rules should be identified, which require understanding of the substantive problem in discussion.

Opinion 1/76 has been seen to establish a clear distinction between the principle of an implied competence and the exercise of internal competence.103 The Court managed to make a distinction between these two principles, but the exclusivity of the competence was left without a clear clarification, which can be seen as a way to avoid a controversial outcome.

In most of the cases the Court has not made a clear distinction between existence of implied powers and exclusivity. Further the requirement of necessity is often left

101 Eeckhout, p. 99
102 TFEU Article 3(2)
103 Koutrakos, p. 91
without further reasoning. It can be understood that the Court is reluctant to go into this topic as it is seen to be controversial. The only time the Court has actually used the argument of necessity is in the Opinion 1/76 where the Court saw the measures adopted necessary for the attainment for the objective. The necessity principle as introduced in the actual wording of the Treaty has been seen as a vague expression as it refers not only to the objectives of common commercial policy, but to “one of the objectives referred to in the Treaty”. Even without this one case of the ECJ, the interpretation could have taken another direction as the legal literature has presented that the wording of the second condition presented in Article 216(1) would lead to broadening the scope of the application of the necessity principle.

There are some guidelines to be read from the Court’s rulings on the issue, but there are still many questions to be answered regarding the conditions that create implied competence. There is also some conflicting readings of these principles and the Court’s case law has been criticized largely by the legal professionals.

2.3 Interpretation of the investment based on the Treaty of the functioning of the European Union and the case law of the European Court of Justice

Even Article 207 TFEU mentions foreign direct investment, this definition and the scope in the Treaty leaves room for interpretation. The European Court of Justice has interpreted the scope of common commercial policy in its case law. In the judgement of the Court in case C-137/12, Commission vs Council, the Court defines that the act of the European Union is liable to have implications for international trade is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that [common commercial] policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade. In the following paragraph, the Court continues that only those acts of the European Union with a specific link to international trade are capable of falling within

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104 Opinion 22/70, para 83
105 Koutrakos, p. 126
106 Koutrakos, p. 126
107 Koutrakos, p. 109 referring to Dashwood and Tridmans opinions of the case law
108 See for example Koutrakos
109 C-137/12, para 57
the field of the common commercial policy.\textsuperscript{110} What is a specific link that shall be decided case by case.

Consistent case law before the entry into force of the Lisbon Treaty supports non-restrictive interpretation of the common commercial policy.\textsuperscript{111} Already in 1979 the Court supported the idea that the question of external trade must be governed from a wide point of view.\textsuperscript{112} Also in the opinion 1/94 the Court referred to the open nature of the common commercial policy.\textsuperscript{113} The mentioned examples of the case law supporting the wide interpretation of the common commercial policy are given much before the time the Lisbon Treaty was concluded.\textsuperscript{114} This indicates that the systematic interpretation of the common commercial policy and its scope would be that the Treaty does not exhaustively define the concept of common commercial policy. Yet the investment is not traditionally seen as falling under the rulings of common commercial policy, because as a common fact, it is until now agreed in separate bilateral agreements. Due this justification it is not possibly to see the investment falling directly under the common commercial policy, but there should be another provision of the agreement that can be seen as including investment and further to establish competence.

2.4 Exclusivity of competence

From the case law of the ECJ the legal professionals have established two test for the exclusivity. First one of these tests is called AETR exclusivity that is based on the Court’s opinion on the AETR case which was presented earlier\textsuperscript{115}. The criteria is based on the common rules and the need to avoid the conflict between internal legislation and external actions that could affect on those common rules. These common rules usually relate to the total harmonization of rules within EU. This test can be applied in situation when both EU and Member states have a power to legislate in certain field.\textsuperscript{116}

\textsuperscript{110} C-137/12, para 58
\textsuperscript{111} C-70/94, C-83/94
\textsuperscript{112} Opinion 1/78, EU:E:1979:224
\textsuperscript{113} Opinion 1/94, EU:C:1994:384, para.41
\textsuperscript{114} In the opinion 2/15 (16.5.2017) the Court gave a large set of justifications how certain elements of the trade agreements can be seen as an integral part of the trade policy based on their immediate affect on trade. See for example Court’s reasoning to include sustainable development under the common commercial policy in paras 146-149 of the opinion.
\textsuperscript{115} ECJ 22/70
\textsuperscript{116} Dimopoulos, p.72-73
The situation when the common rules can be affected was discussed in the Court’s judgement of Open skies case and this has been taken into account when setting the requirements of AETR test. In the Open skies case the Court refers to its own previous case law where it has found that the common rules can be affected. It repeats the position taken in AETR case that when international commitments fall within the scope of the common rules or in any event within an area which is already largely covered by such \[\text{common}\] rules. In the Opinion 2/91 the Court has also ruled that even if there is no contradiction between Member states’ commitments and common rules, Member states are not allowed to enter into international commitments. When the Community has included provisions relating to the treatment of non-member state nationals in its internal legislative acts, it acquires an exclusive external competence in the spheres covered by those acts.

The second possibility is so called 1/76 exclusivity basing on the justification on the Court’s opinion. This test builds on the necessity to attain the objectives set by the founding Treaties. According to this test there is no need for an existing internal legislation in certain field but entering into international agreement is necessary for the EU to effectively exercise its internal competence.

Both test are established on one of the main principles of the EU law: subsidiarity. As a basic element of the EU law, I will not look into more detail of the concept or how it is interpreted among the case law. But this key principle is crucial to bear in mind as the EU law and possible options of the interpretation are discussed. In the test presented it is kept as a main principle that the exclusivity arises only when Member states action cannot be seen as an alternative means of international action.

The conditions to establish EU competence according to common rules the objectives of the EU law must be examined. These rules are founded in the primary EU law. The Article 5 TFEU rules, as presented in the first introductory chapter, the main rules of the
framework in which EU can act. This framework is set by the objectives. After the entry into force of the Lisbon Treaty, the Treaty provides some guidelines and objectives, but the framework still remains incomplete. The objectives are related also to the ruling of internal market, but often the external competence and internal market are not based on the same principles.\textsuperscript{127}

The main objective of EU’s external policy regarding investment can be found in Article 206 TFEU, which rules that the aim is an abolition of restrictions of foreign direct investment. One again we can find that specific objectives in the provisions of common commercial policy do not offer means to include investment as such under these provisions so the common rule should be found elsewhere.

2.5 \textbf{Definition of an investment}

The core problem of the new era trade agreements the Commission pursues to conclude is the definition of investment. The Commission has put investment on the top of the agenda in many sectors during current legislative mandate and in trade department this means new broad trade agreements that include not only rules on trade in goods but also provisions on investment. The conflict lies in the used terms as at this point there is no one clear definition for foreign investment or foreign direct investment. The definition depends of the wording of the investment chapter of the agreement.

EU law mentions foreign direct investment in the context of common commercial policy and foreign investment within the rulings of internal market. In the TFEU article 207 point 1 it is ruled that common commercial policy shall be based on commercial aspects of foreign direct investment. The legal framework of the investment in commercial policy mentions only this one specific investment, but in the agreement texts the Commission has used term ‘investment’ which naturally is interpreted as a larger concept as a foreign direct investment. To clarify the difference it is important to look more closely what is the difference between these two terms.

According to judicial literature direct investment means investment that covers the following elements: transfer of funds, long-term project, regular gaining of funds, some level participation in the project management of the party transferring the funds and

\textsuperscript{127} Dimopoulos, p.199
financial risk. Requirement of project management creates the difference between direct investment and so-called portfolio investments. Same conclusion is supported by the International Monetary Fund (IMF). According to IMF direct investment is a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence in the management of an enterprise that is resident in another economy.

The Organisation for Economic Co-operation and Development (OECD) follows the definition of IMF. The OECD definition for foreign direct investment states that it is a category of investments with an objective of establishing a lasting interest in an enterprise that is resident in an economy other than that of the direct investor. The motivation is a strategic long-term relation with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise. Further, the lasting interest is established when the direct investor owns at least 10% of the voting power of the direct investment enterprise. The common characteristic for these terms is the managerial control over the company and the requirement of a long-lasting link.

Modern investment agreements do not provide a list of assets that can be seen as an investment but usually solve the issue of interpretation by introducing certain characteristics to describe investment. For example, according to the US-Singapore free trade agreement ‘investment’ must include commitments of capital, an expectation of profit and the assumption of risk. This follows to some extent the definition of OECD’s definition.

Among the EU legislation there is no one clear source where the definition can be derived from. Nevertheless, there are some regulations that provide guidelines to the definition. The regulation of the European Union on Community statistics concerning balance of payments, international trade in services and foreign direct investment

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133 OECD Benchmark definition of foreign direct investment 4th edition, s. 17 (2008)
134 US-Singapore FTA Art. 15
135 Regulation (EC) No 184/2005
preamble paragraph 8 refers to the OECD Benchmark definition presented above. More specific definition can be found in a Council directive 88/361/EEC on the implementation of the Treaty before the adoption of Lisbon Treaty where the Council has represented four points to describe a direct investment.\[136\]

First point is that establishment and extension of branches or new undertakings belonging solely to the person providing the capital and the acquisition in full of existing undertakings. Second point is close the element also IMF and OECD has used in their definitions as the Council has required participation in new or existing undertaking with a view to establishing or maintaining lasting economic links. Third point is a long-term loans with a view to establishing or maintaining lasting economic links. Last possibility is reinvestment of profits with a view to maintaining lasting economic links.\[137\]

From the regulation of the EU it can be seen that the key element for foreign direct investment is a lasting economic link. But from the interpretation of the Court below we can see that the Court hasn’t seen that only the economic link is enough but a certain level of management of the company is required in foreign direct investment.

Commission has made a distinction between foreign direct investment and portfolio investment in its communication to other institutions.\[138\] Commission defines that the foreign direct investment includes any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity.\[139\] Like in IMF’s and OECD’s definition also Commission requires that direct investment enables shareholder to participate effectively in the management of the company or in the control of the company.\[140\] Portfolio investment has been characterised as a foreign investment where these is no intention to influence to the management of the company.\[141\]

In this Commission’s definition the wording can create a possibility of a misinterpretation. In the definition of foreign direct investment the Commission refers

\[136\] Regulation 88/361/EEC Annex 1, point 1
\[137\] Regulation 88/361/EEC Annex 1, point 1
\[138\] COM(2010)343
\[139\] COM(2010)343
\[140\] COM(2010)343, p.2
\[141\] COM(2010)343, p.2
only that investment enables the participation on management but takes no comment on the actual intention of the investor. But in the portfolio investment the Commission refers purely to the fact that there is no intention to influence but states nothing about the possibility that shares would enable the influencing on the management.

ECJ has taken a position on the issue of defining different forms of investment and the description of the OECD is not fully supported by the ECJ. In the judgement of the ECJ in the case *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue* the Court interprets that to establish lasting economic link presupposes that the shares held by the shareholder enable, either pursuant to the provisions of the national laws relating to companies limited by shares of otherwise, to participate effectively in the management of that company or in its control. Consistent line of the Court would require that this will be the interpretation also in the future.

Returning to the problem of making a separation between direct foreign investment and other forms of investments, in this particular case the other form being portfolio investment, the ECJ has ruled in the joined cases C-282/04 and C-283/04 about the difference of the foreign direct investment and portfolio investment. The ECJ states that direct investment includes the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in the management and control of the undertaking. When the portfolio investment only is the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking. Accordingly, a portfolio investment is not connected to the management of the undertaking but only the financial connection.

So far the portfolio investment is not largely discussed among the judicial literature, but Dr. Dimopoulos has presented an interesting view on the issue. He underlines that the portfolio investment represents a passive holding of the financial assets oppose to the idea of foreign direct investment where managerial control over the company is required. Further his review on the matter is that portfolio investment is often limited by the duration of the holding. Duration of the investment is not taken into consideration in

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142 C-446/04 para 182
143 Joint cases C-282/04 and C-283/04
144 Joint cases C-282/04 and C-283/04, para 19
145 Joint cases C-282/04 and C-283/04
OECD’s definition of foreign direct investment but can be seen as a natural characteristic when management is created. Dr. Dimopoulos states that portfolio investment can have all the characteristics of an investment. His conclusion is that the need to protect only foreign direct investment has lost importance and there should no longer be distinctions of level of protected investments. This idea would support more the developing scene of investment and the need of an equal protection for all forms of investments. To expand the protection to all investments is more of a political decision because as already discussed there is no common definition of the investment and the level of protection depends on the wording of each individual agreement.

To conclude and summarise all the above mentioned possibilities to define foreign direct investment and portfolio investment, the common rule regarding the foreign direct investment should be the definition used be the OECD as this is where to the legislation of the Union refers. But from the point of the case-law this should be softened as the ECJ has not used the precise 10% requirement on the shares of the management but speaks only about effective management. When it comes to the portfolio investments it can be concluded that investment can be described as a portfolio investment when the investor has no intention to influence to the management of the company.

Definition of these two types of investments is relevant when the competence is decided as the TFEU do not clearly establish competence on investment as such but only refers to foreign direct investment in the common commercial policy provisions. It is to be examined if portfolio investment can be seen as falling under some other Treaty objective which according to the principles introduced earlier could establish an external competence.

2.6 Relation between right to free movement of capital according in TFEU and investment

To some extent an investment has been seen to falling under the principle of free movement of capital within the meaning of Article 63 TFEU, namely foreign investments. Yet there is no clear legal interpretation if portfolio investment can be seen as a capital movement within the meaning of TFEU Article 63. Justification for

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146 Dimopoulos, p. 31-32
147 Dimopoulos, p. 76
this interpretation could be found in the definition of the portfolio investment. Portfolio investment as defined in earlier chapter is a foreign investment where there is no intention to influence to the company which shares are being bought. From judicial background without deeper economic interpretation it would seem possible to see portfolio investment as a capital movement when there is only some form of capital moving cross-border without any interest to influence to the company itself.

In the judicial literature whether the free movement of capital falls under an exclusive external competence is questioned. The main question relies on the fact if the free movement of capital between Member States and third countries has the same level protection as it has between Member States in single market. This discussion may seem irrelevant as the wording of the Article seems to be unambiguous.148

The arguments against the Union’s competence and the protection of capital movement between Member States and third countries are based on the Member States’ interest in the capital movement. One of the main reasons is the influence on taxation as domestic tax rules can be considered as a restriction to capital movement.149 And as it is commonly known taxation falls under the competence of the Member States.150 Before the entry into force of the Lisbon Treaty the relation of free movement of capital towards Union’s external competence was mainly discussed in the light of taxation.151

After the entry into force of the Lisbon Treaty ECJ has ruled in two judgements on joint cases Bordessa152 and Sanz de Lera and others153 that the rule of free movement of capital has a direct effect irrespective of the type of the capital or if the movement of capital is made between Member States or between Member States and third countries. This interpretation of the Court cannot be questioned as the wording of the TFEU clearly makes no distinction if the capital is moving between Member states or between Member state and third country. Further it supports the idea that the Union could have an external competence in this matter.

148 Art. 63(1) TFEU: Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
149 Eriksson, p. 18
150 TFEU Article 65(1)(b)
151 for example C-101/05
152 Joint cases C-358/93, C-416/93
153 Joint cases C-163/94, C-165/94, C-250/94
When only the foreign direct investment is specifically mentioned in the Treaty, categorising portfolio investment as a capital movement seems to be the possible interpretation to include also this form of investment under the competence of the EU. It must be still remembered that always in case of interpretation there is a second opinion. In the judicial literature it has been argued that not even foreign direct investment can be seen as a free movement of capital.\textsuperscript{154} After the entry into Lisbon Treaty this argument is irrelevant in the context of foreign direct investment as it already is clearly ruled to fall under the exclusive external competence of the EU.

According to the literature Community secondary legislation may specify the treatment of portfolio investment to be accorded to third-country direct investment in the Single Market.\textsuperscript{155} Within the regulation of internal market the term foreignness has a slightly different meaning as it has in the context of trade agreements and investments coming outside the EU borders which makes it crucial to separate this two categories from each other.\textsuperscript{156} Contrary to the international law, EU legislation do not include place of managerial control as one of the criteria creating a nationality of the company.\textsuperscript{157} This ruling can be seen as an intention to exclude investors from the scope of the EU legislation. The importance of this issue lies on a relation of the free movement of capital to the idea of internal market of the Union, which is one of the key elements of the questions deciding if the free movement of capital can be seen as a right that can be used by the EU in the relation of the investment provisions in the trade agreements.

Free movement of capital does not make a difference between capital movements between Member states and Member states and third countries\textsuperscript{158} but it must be underlined that this article is related to the two other articles of the TFEU that provide Member states power to legislate certain matters. Member states have the power to legislate among issues related to taxation and public policy. In addition, the article 4(2)(a) TFEU defines issues related to internal market falling under shared competence. To achieve the objective of free movement of capital in the relation to third countries Article 64(2) rules that the European Parliament and the Council shall adopt measures on the movement of capital to or from third countries involving direct investment. From

\textsuperscript{154} Strik, p. 75
\textsuperscript{155} Strik, p. 74
\textsuperscript{156} Dimopoulos, p. 41
\textsuperscript{157} TFEU Article 54
\textsuperscript{158} Joint cases C-358/93, C-416/93, ECJ joint cases C-163/94, C-165/94, C-250/94
the Article 64(2) TFEU it can be read that foreignness is not the key factor, but that the investment is direct. This is justified as the main provision of the Treaty\textsuperscript{159} where this article is linked doesn’t make this distinction either.\textsuperscript{160}

Legal literature has stated without hesitation that the EU competence regarding FDI in the context of free movement of capital is shared.\textsuperscript{161} This interpretation seems to differ from the one that ECJ has: the article 345 TFEU rules that Treaties shall not prejudice the rules in Member states governing the system of property right. This is one of the rulings that the Court seems not to accept in the context of free movement of capital. In the case Ospelt v. Schlössle Weissenberg Familiednstiftung the Court has stated that systems of ownership remain subject to fundamental rules of Community law including free movement of capital.\textsuperscript{162}

Currently EU is the main legislator in the field of capital movements, but Member states still have power to act within the limits set by the Treaty.\textsuperscript{163} The new wording of the Treaty regarding capital movements has been seen including broader scope than the previous in Article 67 EEC. The scope is not limited anymore to discriminatory measures, but could been seen as providing larger scope of protection.\textsuperscript{164} This specific issue is out of the scope of this paper, but as it will be seen from the specific provision included in the agreement texts, to the entity of the agreement this scope has an important connection.

Free movement of capital is often linked to the right of establishment\textsuperscript{165}. Yet these two rights differ in from each other. The free movement of capital is not linked to the nationality. The precise wording of the article 63(1) TFEU prohibits all restrictions of movement of capital between Member states and Member states and third countries when right of establishment is linked to the nationality.

Right of establishment is established on the article 49 TFEU. Even Article 49(a) makes it clear that this right is only for the benefit of the nationals of the Member states, paragraph (b) links the freedom of establishment on capital movements. In addition

\textsuperscript{159} TFEU Article 63
\textsuperscript{160} See Chapter 7
\textsuperscript{161} Dimopoulos, p. 78
\textsuperscript{162} C-452/01, para 24
\textsuperscript{163} TFEU Article 64 and 65
\textsuperscript{164} Dimopoulos, p. 76
\textsuperscript{165} TFEU Article 49
articles 64(2) and 65(2) refer to freedom of establishment in the relations of free movement of capital. It can be read that these two rights are strongly linked.

The Court has taken a position regarding the right of establishment and has stated that provisions on right of establishment is to secure this right to nationals of the Member states. Further ECJ clarified that EU has no exclusive competence to establish this right to non-member states. But how can the competence issue be interpreted if the scopes of the two rights collapse, is still an open question.

Legal experts have seen the possibility to extend the scope of freedom to establish to third country nationals in situation where conditions of establishment fall under the scope of free movement of capital. In this case the primary right secured should clearly be the free movement of capital as it would seem unjustified to extend the scope if the prior right related to the matter would be freedom of establishment which is not extended to non-Member state nationals.

As it was already presented earlier when introducing the legal framework for the EU competence, the secondary legislation when it is established before the entry into force of the agreement can be seen as a legal base for EU’s external competence when this can affect on common rules. As TFEU article 63 in itself does not clearly mention what is the relation of this ruling to the competence and can be seen mainly as a ruling regarding the internal market. As a Treaty provision this right seems is a primary ruling but so far it has not been used as creating an external competence. But as a common factor of internal market of the EU, the legislation among capital movement is harmonised to large extent.

Currently the legislation regarding the foreign investment and capital movements are not anyway fully harmonised. As an example in Spain foreign investment is ruled by Royal Degree 664/1999 on foreign investment and Law 19/2003 on the legal regime of capital movements and economic transactions with other countries, which include the ruling on free movement of capital from TFEU and TEU to national legislation. These

166 Opinion 1/94, para 15
167 Opinion 1/94, para 15
legislations provide detailed rulings regarding foreign investments and prove that this area is not fully harmonised as national exceptions still exist.

If discussion of free movement of capital is separated from the context of free trade agreements, it would seem justified that this provision is something that nationals of third countries can invoke as the wording clearly creates the right of free movement of capital also the situations when the capital is moving between third countries and Member states. But when we combine this the issue of competence to conclude free trade and investment agreements between EU and third countries it shall be defined if this ruling can be seen as a common rule within the meaning of TFEU 3(2) or according to the same article necessary for the Union to exercise its internal competence. As the Spanish example proves, the Member states have still power to rule on the matter when it concerns capital movement and foreign investment. Link with the internal competence can be drawn but it is still to be established if the provisions of Article 63 TFEU were intended to create also external competence of the Union.

2.7 Trade agreements in the relation to international law

To understand the importance of defining EU’s competence in any specific field among international agreements, it is useful to remind that international agreements do also fall under the international law that has a significant influence on the matter. The question of the relation between EU and international law is another question, but necessary to bear in mind to see the whole large picture of the complex legal network international trade agreements, where EU is part of, construct. How the international law affects on EU and Member states depends on the nature of the agreement. Exclusively concluded agreement only by EU has a slightly different affect on Member states than a mixed agreement has. When it comes to agreements concluded under shared competence the question is: what is the legal consequence of these agreements towards Member States?

According to the TFEU agreements concluded by the EU are binding upon the EU institutions and its Member states. 169 This Treaty provision anyhow does not refer to the international law, but EU law only. The international law will be directly applicable towards Member states regarding international agreements only when Member states

\[^{169}\text{TFEU Article 216(2)}\]
are part of the agreement. This means that the agreement must be a mixed agreement for Member states to be part of it.170

The complexity of the issue regarding investment and free movement of capital in agreements between Union and third countries is that previous rulings of the Court are based on issues where the matters have been more clearly in the competence of the Member States or Union. But as investment and capital movements are closely linked to the single market is drawing a line more difficult in the context of free trade agreements.

The discussion in this paper is focused more on the concluding of the agreement, but from the international law point of view the bigger question relating to sovereignty of the state is the termination of an agreement. In case of a shared competence free trade agreements are ratified by both the Union and its Member States. This means that both EU and Member States are parties of the Agreement. The problem this raises is that the termination of these agreements would require decision from all of the parties.171 Due this aspect also it must be clear who the parties of the agreement are.

This issue on the requirement on termination by each party will possibly come into discussion later regarding the Comprehensive Economic and Trade Agreement concluded between the EU and Canada as this agreement falls under the shared competence and at the moment EU has officially ratified the agreement as the European Parliament voted for the agreement in the plenary on 15th February 2017. The agreement will now require a ratification of each national parliament of Member states before being fully concluded and applied. The problem of the binding effect of the agreement might become as a topic of further discussion in case some of the Member states ratify the agreement and one or more will decline it. Would the agreement be then technically binding towards Member states who have already ratified the agreement or would it end up binding only to EU on the parts that fall under EU’s exclusive competence? At this point the consequences of this situations has not been discussed and hopefully, for the sake of predictability of EU’s trade policy, will not actuate. But this is one more element of the discussion regarding the exclusive and shared competence, which should not be forgotten.

170 Eeckhout, p.325
171 Vienna Convention Article 59(1)(a)
One of the main issues when drawing line of the competence is the question of right to regulate, which has been raised in several public discussions on this topic. There have been concerns that concluding comprehensive free trade agreements with investment protection chapters violates the State’s right to regulate. This right has not been specifically recognised in international law as it is an inherent right of sovereign state itself.\footnote{Hindelang, p.18}

2.8 **European Parliament’s position**

In the introductory chapter it was underlined that trade policy is not only a legal, but also a political matter. The Lisbon Treaty did not only introduce foreign direct investment as a new element to the TFEU, but it also established a procedural changes on the ratification procedures of international agreements among the EU institutions. From the trade policy point of view the most significant was the Article 218(6)(a)(v), which now requires that in ordinary legislative procedures Parliament’s consent is required in order to conclude trade agreements with third countries. From a purely legal point of view this means only that Parliament has to accept the proposed agreement according to its internal procedures. But politically this means that Parliament must be now included to the negotiation procedures much more effectively as its consent is needed to conclude the agreement. This has provided more political discussion to the trade issues also at the European Parliament when the trade policy has before been mostly technical discussion.\footnote{Eeckhout, p. 459} This can be one of the reasons why the current trade negotiations get more publicity as they are publicly debated in the committee and plenary sittings of the Parliament.

The European Parliament and the Council adopted on December 2012 regulation on bilateral investment agreements between Member states and third countries.\footnote{Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012} The resolution recognises the exclusive competence of the EU in foreign direct investment underlining that Member states have power to conclude binding acts in this field only by the Union permission.\footnote{Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 preamble 1} It is noted in the preamble 2 of this resolution that TFEU sets rules on movement of capital including in respect of capital movements including
investment and this freedom can be affected by international agreements relating to foreign investment concluded by Member states. The Council and The European Parliament see the possibility of Member states to conclude agreements with a reference to movement of capital, which indicates that this would not belong to the exclusive competence of the Union. But also, the Council has here taken a position that free movement of capital in TFEU refers also to investments and in this wording the used term in investment, not foreign direct investments.

The regulation admits that there is a possibility that international agreements can affect on the free movement of capital where the Member states have competence. Couldn’t there then be the same situation equally to the other direction that the actions taken by Member states regarding the free movement of capital could affect on international agreements? This reading of the statement would mean that there is a possibility to see the third option of Article 3(2) TFEU to apply even it would also require that the primary legislation is considered as creating a common rule.

This regulation will be most likely seen as one of the documents the ECJ refers in its opinion as there is limited amount of official documents on this referred matter.

3. **Dispute settlement**

Investment protection and especially investment dispute settlement are key elements of investment provisions in new comprehensive trade agreements and have raised a lot of public discussion. Dispute settlement is one of the main elements related to the investment protection. Foreign investors are not only interested in market access, which is the first stage of investment provisions, but are equally interested in the protection of their investment in foreign market against for example expropriation. It is then unjustified to distinguish these two elements from another in the discussion on investment provisions.\(^\text{176}\)

The Commission launched a new Investment Court system in September 2015 as part of the Tran-Atlantic Trade and Investment Partnership agreement between EU and United States.\(^\text{177}\) This proposal presents a new dispute settlement model for investment disputes between investors and states. The investment court system (ICS) consisting of a first

\(^{176}\) Eeckhout, p. 64-65

instance tribunal and appeal tribunal is to replace the Investor-State Dispute Settlement (ISDS) used commonly in investment disputes deriving from investment agreements. Under this old model the investment disputes were solved via arbitration according to the Convention of dispute settlements between state and nationals of other states and Uncitral Arbitration rules. The new Investment Court System is the first step in the Union’s long-term plan to create a multilateral investment court system. The new investment court model is included in the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Due to the new balance of powers between EU institutions, one of the reasons ICS was taken into CETA was also the strong pressure from the European Parliament.

Investment protection is one of the most controversial elements in trade agreements and there has been even large number of oppositions towards investment protection in public discussion. Investment protection is said to provide an opportunity for foreign investors to take part in the legislative procedures of Member states and so affect on national legislation. The concern has been raised that national regulation on for example environment protection would be jeopardised as the investors have the possibility to enter into legal proceeding against the state hosting the investment if the legislation would reduce the expected profit. Answers to these concerns are presented below after explaining the main provisions of the ICS in CETA.

The competence to decide on the dispute settlement mechanism is accessory to the substantive competence of the agreement. ECJ has stated that when an international agreement provides a system of courts it is in principle compatible with the Community law underlining that the legal basis for the substantive competence must be found in

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178 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965
180 Concept paper of the Commission: Investment in TTIP and beyond – the path for reform, 5.5.2015
181 CETA, Chapter 8 Section F
183 Stop-TTIP: Legal statement on investment protection and investor-state dispute settlement mechanism in TTIP and CETA
184 https://stop-ttip.org/what-is-the-problem-ttip-ceta/
185 Opinion 1/91, para. 40
Nevertheless, the compatibility of the investment dispute settlement provisions with the Treaties has never been under the review of the ECJ.

Creating a new court system has raised many questions of the compatibility with the Treaties. The ECJ has stated in its opinion on international courts that when the proposed provisions do not alter the essential character of power of the Community nor affect the autonomy of the Community legal order the international agreement may affect to the powers of the ECJ. In addition, the ECJ interpreted that the establishment of an international court outside the judicial framework of the European Union that would interpret and apply the European law in one specific field would deprive the Member states courts’ the power to interpret the EU law and further the ECJ its power to reply to questions referred by national courts. ECJ found that an international court in this context would be incompatible with the Treaties. One more aspect of this discussion is the statement of the Court that an international court cannot breach the principle that ECJ has an exclusive jurisdiction to interpret EU law so any restriction to the right to interpret the secondary law of the EU makes an international court incompatible with the Treaties.

From the opinions of the ECJ it can be read that establishing an international Court by an agreement it is not itself necessarily incompatible with the treaties and EU legal order but this court cannot deprive the right from the ECJ to exclusively interpret EU legislation nor it can affect on the legal order of the Union.

3.1 **Provisions in CETA Agreement on ICS**

EU-Canada Comprehensive Economic and Trade Agreement is the first agreement concluded by the EU where the presented Investment Court System is included to the agreement text. This system has yet not being applied as the final conclusion of the agreement is waiting for ratification of national parliaments of the Member States. Yet when discussing the compatibility of the ICS with Treaties the natural selection for the

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186 Opinion 1/91, para. 70 (see also Opinion 1/09, para 74)
187 Opinion 2/13, para 183
188 Opinion 1/09, para 89
189 Opinion 1/09
190 Opinion 2/13, para 246
example agreement text is the one in CETA as the earlier also mentioned EUSFTA still has the ISDS and not ICS model.

Concerns have been raised about the fact how does the ICS influence on national courts and the interpretation of the national law. During the EU’s ratification procedure on CETA, the Council and the Member states adopted a Joint Interpretative Instrument to clarify some of the concerns Member states had regarding the CETA. This joint interpretative instrument was given according to the Vienna Convention Article 31.191 This document clarifies some of the questions the agreement text raised also in the relation to ICS. Discussion was raised on the legal nature of this document and its binding effect towards the parties. Not going into this discussion into detail it can be summarised that the outcome of this discussion is that the statements are binding towards the party given it.

CETA Chapter 8 rules on investment protection setting down rules on for example non-discriminatory treatment192, establishment of investments193 and investment protection including rules on expropriation194. As most of the provisions introduced in these chapters are commonly used also in ISDS I will focus on the aspects related to the new Court system. Even once again it must be stated that these provisions should be also studied to have a complete overview of the legal totality of investment provisions.

An Article 8.31 sets rules on the applicable law and its interpretation. Article 8.31.1 states that when rendering its decision the Tribunal shall apply this [CETA] agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties and other rules and principles of international law applicable between the parties. Further, in the same article in paragraph 2 it is underlined that the tribunal has no jurisdiction to determine the legality of a measure alleged to constitute a breach of the agreement under the domestic law of the disputing party. This means that the tribunal has no jurisdiction to interpret neither the EU law nor the domestic law of the Member state. The jurisdiction to interpretation of EU law and domestic laws is left to the ECJ and national courts of Member states. In the same paragraph, it is ruled that the tribunal is

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191 Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States para 1(e)
192 CETA, Chapter 8 section C
193 CETA, Chapter 8 section B
194 CETA, Chapter 8 section D
bind to the interpretation of national authorities regarding the interpretation of domestic laws. The provisions are formulated to strictly maintain the interpretation of national legislation among Member states, which will be one of the key questions to Member states when they ratify the agreement.

In addition to the individuality of the ICS from the legal system of Member states and the Union, European Parliament’s legal service underlined in its informal opinion of the compatibility with the Treaties of investment dispute settlement provisions in EU trade agreement that CETA does not create any direct effect in the legal systems of the EU and its Member states as the Article 30.6 of CETA sets the provisions of a possible claim of investment protection declining this possibility.195

One commonly disputed element in investment protection agreements is that they breach the States’ right to regulate and even amend their regulation. According to the Article 8.9, the parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives. Further in the same article in paragraph 2 it is ruled that regulating in a manner that constitutes a negative impact on investment or interferes with an investor’s expectations, including expectation of profits does not amount to a breach of an obligation under CETA. In the chapter on the issues relating to the international law, the problem of right to regulate was introduced as it has been one large topic regarding CETA, but as it is seen from the agreement text, this right is now specifically recognised and even underlined that even the negative impact of the profit expectations do not limit this right.

The criticism is based to the fear of the possibilities the agreement provides for multinational companies’. There is a discussion on the possibility of multinational companies to take over some of the public services of a state. This among many other issues was clarified in the joint interpretative instrument196 and it was stated that the parties affirm and recognise the right of governments at all levels to provide and support the provision of services that they consider public services including for example purification and distribution of water.197

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195 Legal Opinion of the European Parliament’s Legal Service, para 14
196 Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States
197 Joint Interpretative Instrument on the Comprehensive Economic and Trade
One of the main arguments from the opponents of the new investment court system is that multinational companies would gain the possibility to influence on national legislators via the judgements of the court. ICS rulings include the prohibition of parallel proceedings\textsuperscript{198} so that the same claim cannot be under proceedings in any other form of dispute settlement provided under the agreement which means that national courts do not have the jurisdiction to proceed a claim based on a same breach of the agreement when it is under a proceeding of ICS. But as it is already pointed out ICS do not have a jurisdiction to interpret national laws but it may take the national law as a matter of fact.\textsuperscript{199} The legal interpretation of this ruling is that there is no possibility for a so called spill over effect of the judgements of ICS to national courts.

In legal analysis regarding the assumption that the new Court system would gain more investor influence on the matters, it is seen that there are elements speaking against this. Oppose to the arbitration, in the ICS the parties of the dispute are not allowed to select the arbitrators but they are appointed by the CETA Joint Committee.\textsuperscript{200} Further there is a still open required rotation system for three Members of the tribunal elected by the President of the Tribunal, which is only described as a random and unpredictable by the agreement wording.\textsuperscript{201} In legal literature this selection of Members of the tribunal is seen to minimalize the investor influence.\textsuperscript{202}

As this investment dispute model has not been applied yet the questions remain open until there is first proceedings of the court. Positive elements of the new court system are the open procedure which is not the character of an ISDS as arbitration is not a public procedure. Also the appeal tribunal is a step forward to more transparent dispute resolution. Considering these elements as a part of the procedure it can be questioned why there is so significant opposition to this system as it rather creates openness and gives the public a possibility to see the reasoning of the judgements and how they are justified by the court. In the arbitration this is not part of the public record.

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\textsuperscript{198} Agreement (CETA) between Canada and the European Union and its Member States, para 4 (a)
\textsuperscript{199} CETA article 8.22 para 1(f) and (g)
\textsuperscript{200} CETA Article 8.31 para 2
\textsuperscript{201} CETA Article 8.27 para 2
\textsuperscript{202} Reinisch: p.764
The wording of the CETA agreement seems to support the opinion that there is no justified fear of this new court system to jeopardise the legal order of the Union or its Member states as there is no justification to the ICS to interpret the domestic legislations. The Legal Service of the European Parliament has already taken a position that the ICS as introduced in CETA is compatible with the Treaties. Yet until the court is in function there is as equally justified reason to question this system as there is to support it. Time will only tell if the judgements of the Court can be seen influenced to the national legislation which some of the NGOs has raised as a key problem of the new court system.

The Kingdom of Belgium will most likely ask the ECJ about the proposed investment protection provisions of CETA to clarify its compatibility with the treaties before ratifying the agreement. This future opinion will hopefully clarify the situation and give indications whether ICS can be taken into future trade agreements.

This presentation of the new court model is not exhaustive as there is wide range of elements that should be looked into detail. And as the Article 8.31.1 of the CETA rules, the Court gives its rulings only on the application of CETA agreement. It means that to see actually how far the rulings of the Court can go, the substantive provisions of the agreement text should be studied in detail. Once again there is a part of the investment provisions of the trade agreement that can be explained as a principal in a separate provision, but leaving the final outcome dependent of the other provisions of the agreement.

4. Singapore FTA

As the previous introduction to dispute settlement proved, including investment to trade agreements has created a new paradigm of the Union’s trade policy. More detailed and deeper understanding of the issue requires knowledge of the specific provisions taken into the agreement text. As there is already an opinion from the Advocate General regarding the free trade agreement between European Union and the Republic of

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203 Legal Opinion of the European Parliament’s Legal Service, para 93
Singapore, this text is the most practical one to present when discussing other provisions than dispute settlement.

Objective of the Free trade agreement between European Union and Republic of Singapore (EUSFTA) is to liberalise and facilitate trade and investment between these two parties\textsuperscript{205} by establishing a free trade area consistent with Article XXIV of GATT 1994 and Article V of GATS.\textsuperscript{206} This objective is line with the objectives set for the Union’s common trade policy set in TFEU Article 206, which is to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers. Difference being here that in TFEU the scope of the competence on investment is a defined more narrowly than in the Agreement as TFEU only refers to “foreign direct investment” and the Agreements objective is to facilitate “investment”. In the agreement investment is mentioned throughout the text. In Chapter 7 on renewable energy of the EUSFTA in article 7.1 it is mentioned that to achieve the objectives this should happen particularly through facilitating trade and investment.\textsuperscript{207}

Chapter 9 of the EUSFTA deals with investment in two sections. Section A includes substantive provisions on investment protection similar to the ones introduced in CETA and section B on investor-to-state Dispute Settlement. One of the key issues regarding the EU competence in this area lies in the definition of an investment as explained in a previous chapter of this paper. The section B is here left without further attention as the Union has introduced the new model for dispute settlement.

In the beginning of the chapter nine of the EUSFTA there is a definition for “covered investment” and for “investment”. In the agreement “covered investment” is “an investment which is owned, directly or indirectly, or controlled, directly or indirectly, by a covered investor of one Party in the territory of the other Party”\textsuperscript{208} Further to define the term, according to the agreement “investment means every kind of asset which has the characteristics of an investment, including such characteristics as the

\textsuperscript{205} Free trade agreement between the European union and the republic of Singapore, Article 1.2
\textsuperscript{206} Free trade agreement between the European union and the republic of Singapore, Article 1.1
\textsuperscript{207} Free trade agreement between the European Union and the republic of Singapore, Article 7.1. In article 7.4. It is prohibited to adopt measures requiring the formation of partnership with local companies is an obvious restriction of foreign direct investment which falls directly under the exclusive competence of the union.
\textsuperscript{208} EU Singapore Free trade agreement 9.1
commitment of capital or other resources, the expectation of gain or profit, the assumption of risk or a certain duration. Forms that an investment may take include..."\(^{209}\) This definition builds on World Trade Organisation’s (WTO) General Agreement on Tariffs and Trade 1994 (GATT) article XXIV and General Agreement of Trade and Service (GATS) article V. Same definition of an investment is also included in CETA which proves the consistent approach.\(^{210}\)

Comparing this definition introduced in EUSFTA to the definition found in previous chapters of this study there can be found some similarities like the economic link. But as the form of ownership is also possible indirectly this makes it clear that in this agreement also portfolio investments are seen to be included.

Chapter 9 section A goes further in detail. An article 9.3 rules about National treatment, article 9.4 rules on standard of treatment, article 9.5 rules on compensation for losses, article 9.6 rules on Expropriation, article 9.7 on transfer article 9.8 on subrogation, article 9.9 on termination and article 9.10 on relationship with other agreements. From this list it can be seen that the ruling on investment in this agreement goes deeply into details. But as explained in the beginning of the paper going more into specific legal questions of each article is not possible due the length limitation. In the later chapter on opinion of the Advocate General I will raise some single issues which are inextricably linked to the main problem of this paper.

As there is a consistent approach by the EU to define the investment more broadly in the free trade agreements than the Treaties clearly provide competence, it is crucial that the future opinion of the ECJ will clarify this relation between the current definition and the Treaties.

4.1 Opinion of the Advocate General

This chapter is based on the released opinion of the Advocate General Eleanor Sharpston on procedure 2/15 aka EUSFTA-case.\(^{211}\) The opinion was released during the writing procedure of this study on December 21\(^{st}\) 2016. Without having a primary source to the official statements of the Commission nor the Council in the hearings on

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\(^{209}\) EU Singapore Free trade agreement 9.1
\(^{210}\) CETA article 8.1. definition
\(^{211}\) Court of Justice of the European Union, press release No 147/16
the Court procedure the conclusions represented in this chapter are relying on the points the advocate general has raised in her opinion.

This opinion is not binding but it will most likely present the same line as the final opinion of the Court. The final conclusion of this opinion is that EUSFTA as a whole is under shared competence. This means that the agreement as a whole cannot be concluded without the EU and Member States acting jointly. The opinion goes deeply into details of the core question of all EU policies: who is competent to act? As the opinion is rather lengthy I will only represent the points that are linked to the problems raised in this paper.

Ms. Sharpston points out the obvious fact that the Commission is of the opinion that EU has an exclusive competence to conclude this agreement according to Article 207 TFEU namely the exclusive competence on common commercial policy.212 The method that Sharpston has used to find her conclusion is to first look into possibilities of competence under article 3(1) TFEU, then Article 3(2) that establish EU exclusive competence and only after these two options to look into the shared competence according to the article 4 TFEU.213 From this opinion it can also be seen what the reasoning of the Commission in the case is.

General note on the opinion of the Advocate General is that she has quite clearly left some of the aspects out of the speculation or stated them to be irrelevant to the case. One of these being the discussion on how was the agreement negotiated. She has briefly looked into the special procedure of signing of the agreement in the Council only accompanied with the approval of the European Parliament which is according to the TFEU214 possible.215 Later she states that as the question assigned to the Court is more about on competence of the substance rather than the procedure and further that it is not relevant to look into this problem more closely.216 Even it could be studied further what is the meaning of the Council approval on the negotiation mandate.

212 Opinion of advocate general on procedure 2/15, para 2
213 Opinion of advocate general on procedure 2/15, para 4
214 TFEU Article 218
215 Opinion of advocate general on procedure 2/15 para 74
216 Opinion of advocate general on procedure 2/15 para 83
4.1.1 Investment

First of all, from the opinion of the Advocate General it can be established that the Commission accepts the fact that portfolio investment do not fall under the competence of common commercial policy, because the common commercial policy refers only to the FDI. Further the Commission claims that portfolio investment is a capital movement according to Article 63 TFEU and so following Article 3(2) TFEU it falls under the exclusive competence of the EU. The Commission refers to AETR case law relying on the uniform application of the EU law. The justification for this interpretation is that unless Union has exclusive competence it is not ensured that common rules of Article 63(1) are applied consistently.

Further the Commission argues that free movement of capital between EU and third countries cannot be guaranteed without international agreements. The opinion is clear as according to the last sentence of the opinion paragraph 278: *The Commission insists that it is not arguing that, because Chapter 9 is necessary to enable the European Union to exercise its external competences, the European Union enjoys exclusive competence.* This statement, even not a directly from the Commission but via the interpretation of the Advocate General, indicates that the Commission admits that investment as presented in the EUSFTA does not in all circumstances fall under the exclusive competence of the Union. Justification to this statement is that liberalisation of capital movements between EU and third countries cannot be effective as it requires not only that EU removes the barriers to capital flows, but that third countries also remove their restrictions to capital movements. And this is to achieve the objective set in the Treaty.

European Parliament supports the outcome of the Commission and sees the possibility to apply Article 3(2) in a situation when EU primary law could be affected. Further the Parliament interprets the EUSFTA Chapter 9 in a way that the aim of the chapter cannot be achieved without including portfolio investment within the competence.

217 Opinion of the advocate general on procedure 2/15 para. 276
218 Opinion of the advocate general on procedure 2/15 para. 276
219 C-22/70
220 C-22/70, para 31
221 Opinion of the advocate general on procedure 2/15 para. 277
222 Opinion of the advocate general on procedure 2/15 para. 277
223 Opinion of the advocate general on procedure 2/15 para. 278
224 Opinion of the advocate general on procedure 2/15 para. 279
The Council argues that portfolio investment cannot be seen as a movement of capital in a meaning the Commission claims.\textsuperscript{225} It is admitted that portfolio investment may involve free movement of capital. Further the Council states that Treaties\textsuperscript{226} do not establish an exclusive competence to the Union in portfolio investments but the Member States have a competence in this area.\textsuperscript{227} The articles the Council is referring are 4(1) and 5(2) TFEU. First point rules that there is a shared competence in the areas where the competence is not exclusively EU’s nor EU having supportive competence only.\textsuperscript{228} This article clearly speaks for the shared competence but the connection of the later one Art. 5(2) referring to the employment policies should be explained in more detailed to see the connection.

Third point the Council present to support its interpretation of the Treaty is that even the portfolio investment would be accepted as a movement of capital, there is not adopted legislation by the Union under Article 63(1) TFEU regarding portfolio investment.\textsuperscript{229} From the paragraph 291 of the opinion it can be found that the Council admits that there is secondary legislation regarding portfolio investment as well but none of these rulings are based on the Article on free movement of capital. The Council is denying the possibility that ruling on portfolio investment can be relied on the Art 63(1) TFEU.\textsuperscript{230}

Fourth point with the most powerful reasoning is that Article 63(1) TFEU is not a common rule in the meaning of the Article 3(2) TFEU.\textsuperscript{231} The Council claims that, based on the case law of the ECJ, Union should have exercised internal competence by adopting secondary legislation in this matter. The Council is referring to the paragraph 39 on the Court’s opinion 1/92\textsuperscript{232} and repeats that internal competence must be exercised before an implied competence to conclude an internal agreement arises or that the implied competence is expressly conferred by the Treaties.\textsuperscript{233}

As there is no secondary legislation on portfolio investment based on Article 63(1) TFEU, the core question in solving this problem is if the Court will accept the

\begin{itemize}
  \item[225] Opinion of the advocate general on procedure 2/15 para. 289
  \item[226] referring to the Treaty on the European Union and Treaty on the Functioning of the European Union
  \item[227] Opinion of the advocate general on procedure 2/15 para. 290
  \item[228] TFEU Article 4(2)
  \item[229] Opinion of the advocate general on procedure 2/15 para. 291
  \item[230] Opinion of the advocate general on procedure 2/15 para. 291
  \item[231] Opinion of the advocate general on procedure 2/15 para. 292
  \item[232] Opinion 1/92
  \item[233] Opinion of the advocate general on procedure 2/15 para. 292
\end{itemize}
interpretation of the Article 63(1) TFEU as a common rule in the meaning of the Article 3(2) TFEU. The Advocate General excludes this possibility by stating that common rules in Article 3(2) TFEU refers to secondary law, not primary law as the Commission claims.\(^\text{234}\)

The Council has also looked into the option of shared competence that the Commission apparently proposes based on the Article 216(1) TFEU. Justification to this is that to attain a specific Treaty objective requires that the competence has been admitted internally to the Union to achieve that objective. The Council finds that the Commission hasn’t argued that this objective would be pursued only by concluding international agreements. Last argument on this point of the Council is that even if the Commission would be correct on the fact that Article 63(1) TFEU applies to the portfolio investment, this is guaranteed directly by the mentioned article and so for there is no reason to conclude international agreements to secure free movement of a capital.\(^\text{235}\)

The final outcome of the Council is that the competence regarding Chapter 9 of the EUSFTA and so for the portfolio investment is shared between the Union and the Member States. Final statement on this point of the Council is that regardless the fact that the competence on portfolio investment would be shared, the way this competence is used meaning if the EUSFTA is the way to exercise this competence is a political decision.\(^\text{236}\)

As pointed out in the beginning of this chapter, there is no primary source to the Council’s opinion on this matter. But relying on the word of the Advocate General it can be found that the Council is of the opinion that the final decision whether this agreement can be concluded is on the Member States.

One interesting point raised by the Advocate General goes a bit further that the issues I have taken into this paper but to have a clear overview of the competence I find this point relevant to raise. On paragraph 298 of the opinion Advocate General states that even the Union has an exclusive competence regarding foreign direct investment, this competence is limited only to abolish limitations to this type of investment. According

\(^{234}\) Opinion of the advocate general on procedure 2/15 para. 301
\(^{235}\) Opinion of the advocate general on procedure 2/15 para. 294
\(^{236}\) Opinion of the advocate general on procedure 2/15 para. 295
to the Advocate General protection of such investments falls out of the scope of Article 207(1) TFEU.\textsuperscript{237}

Relating to the point of on wider protection of (even) foreign direct investment, naturally the Advocate General also raises this point regarding portfolio investment stating that even there would a competence to abolish restrictions on portfolio investments based on Article 63(1) TFEU the scope of the EUSFTA would go too far on the other elements in Chapter 9 of the agreement as protection of such investments is definitely out of the scope of the Art. 63(1).\textsuperscript{238} By other elements the Advocate General means the provisions presented in the previous chapter where the main provisions of the EUSFTA were presented.

In paragraph 85 Advocate General states that the Court is not asked to consider if the dispute resolution mechanisms provided by the agreement are compatible with the Treaties but who has the competence to decide on dispute resolution. This question was not raised perhaps because first of all ISDS mechanism has been commonly used in international trade agreements and secondly as the Commission is proposing a new ICS mechanism for the new trade agreements. In addition, the advocate general looks into this issue and states that the competence on deciding a mechanism for dispute resolution is accessory to the substantive competence.\textsuperscript{239} Going into details of this issue would require an equally lengthy study so within this paper it is not possible.

4.1.2 Analyse of the Advocate General on the competence on foreign direct investment and portfolio investment

The analysis part regarding the issue on competence on portfolio investment towards third countries is a lengthy explanation, which underlines the complexity of the issue. The Advocate General looks into the definition of an investment and a foreign direct investment in detail and refers to the points already discussed in this paper. When interpreting direct investment Advocate General refers to the Directive 88/361 which is also explained in the previous chapter of this paper\textsuperscript{240}.\textsuperscript{241}

\textsuperscript{237} Opinion of the advocate general on procedure 2/15 para. 298
\textsuperscript{238} Opinion of the advocate general on procedure 2/15 para. 302
\textsuperscript{239} Opinion of the advocate general on procedure 2/15 para.523
\textsuperscript{240} See Chapter 2.5
\textsuperscript{241} Opinion of the advocate general on procedure 2/15 para.318
Reasoning on the definition of foreign direct investment relies on the definitions of OECD and IMF. The interpretation of Advocate General is that foreign direct investment is “investment made by natural or legal persons of a third State in the European Union and investments made by EU natural or legal persons in a third State which serve to establish or maintain lasting and direct links, in the form of effective participation in the company’s management and control, between the person providing the investment and the activity”.

As the EUSFTA includes aspects that not only able foreign investment but also provisions protecting them (these provisions are for example protection against expropriation and compensation for losses) the Advocate General explains why she finds these provisions are also relevant. According to her view on the matter, the regulation on foreign direct investment could actually turn against the foreign investor without these provisions, because without these protective measures the whole investment could be for example expropriated without a compensation. This justification follows a common sense on the matter and cannot be questioned. Her statement on this matter is that referring to Chapter 9 Section A liberalisation and protection of FDIs falls under the exclusive competence of the Union based on TFEU Article 207(1).

Member States concern is that limiting their powers based on Article 345 TFEU regarding Member States power governing the system of property ownership is not infringed by concluding international agreements with third countries. According to the Advocate General the agreement merely limits the circumstances of expropriation not the right itself. She underlines that as long as we are in the context of foreign direct investment the right is not denied as it only sets the conditions this right can be exercised and also that this does not even harmonise the conditions of expropriation.

Legally more complicated case is the competence regarding other forms of investment and it is seen from the opinion that the Commission has interpreted Article 3(2) TFEU broadly. The Advocate General points out that the Courts rulings on how to interpret the

242 Opinion of the advocate general on procedure 2/15 para.322
243 Opinion of the advocate general on procedure 2/15 para.333-336
244 Opinion of the advocate general on procedure 2/15 para.337
245 Opinion of the advocate general on procedure 2/15 para.341
246 Opinion of the advocate general on procedure 2/15 para.341
247 Opinion of the advocate general on procedure 2/15 para.341
option of justifying the competence from the exercising internal competence is not clear.\(^\text{248}\) The Court has given an Opinion 2/92 where the exercise of an internal competence can give rise to an exclusive external competence but also on Opinion 1/94 stating that exclusive external competence does not automatically flow from the Union’s power to lay down rules at internal level.\(^\text{249}\) It is argued that the interpretation the Commission uses to support EU’s competence would go beyond what Article 3(2) TFEU originally meant. This article allows the interpretation towards an exclusive competence as long as it affects the secondary legislation but it cannot be seen to create a competence when these rules in international agreements would affect to primary legislation on Treaties. Treaties can only be changed accordance with Article 48 TEU.\(^\text{250}\)

The Commission has seen that the Pringle\(^\text{251}\) case has set a preliminary ruling in this relation in favour of resulting exclusive competence from the Article 3(2).\(^\text{252}\) In the Pringle judgement the Court found that this article only prohibits Member states to conclude international agreements between themselves if the agreement might affect common rules or alter their scope.\(^\text{253}\) The Advocate General concludes that this cannot be seen a base for Union’s exclusive competence as this judgement only clarifies the relation between primary and secondary law.\(^\text{254}\) The argument of the Commission would mean that the effect on common rules reasoning could be used even internal competence is not practised which is not in line with the Court’s judgement.\(^\text{255}\) The Advocate General states that common rules cannot be seen to mean Treaty provisions as it would have not been a correct wording from the lawdrafters if their intention would have been this interpretation. So her final conclusion is that Treaty provisions cannot be seen as a common rules under Article 3(2) TFEU.\(^\text{256}\)

It is then established that the Union doesn’t enjoy exclusive external competence regarding portfolio investments under Article 3(2) TFEU as there is no secondary legislation on this matter under Article 63(1) TFEU and the Commission has not argued

\(^{248}\) Opinion of the advocate general on procedure 2/15 para.353  
\(^{249}\) Opinion of the advocate general on procedure 2/15 para.354  
\(^{250}\) Opinion of the advocate general on procedure 2/15 para.354  
\(^{251}\) C-370/12  
\(^{252}\) Opinion of the advocate general on procedure 2/15 para.354  
\(^{253}\) C-370/12, para. 101  
\(^{254}\) Opinion of the advocate general on procedure 2/15 para.356  
\(^{255}\) Opinion of the advocate general on procedure 2/15 para.357  
\(^{256}\) Opinion of the advocate general on procedure 2/15 para.358-359
any other justification for this competence.\textsuperscript{257} Next the Advocate General examines the possibility of shared competence.

According to the opinion, the Commission argues that unless it has an exclusive external competence regarding portfolio investments, it has a shared competence under Article 216(1) TFEU.\textsuperscript{258} The Advocate General states that this article is relevant if the Union enjoys internal competence on a matter.\textsuperscript{259} This internal competence can be found in Article 63(1) TFEU and the Advocate General finds that liberalisation and protection of other types of investment than foreign direct investment is clear when these investments present capital movements between Member States and third countries. She admits that the definition of the ‘capital’ is not clear in the Treaties but states that as the Court has interpreted under Directive 88/361 the list of capital movements is not exhaustive\textsuperscript{260} and gives then a possibility for a broad interpretation.\textsuperscript{261}

The Advocate General finds that the free movement of capital within the internal market has both internal and external components and when an agreement is seeking to liberalise that movement between the Member states and third countries it falls within the policy of internal markets. As the commitments from third countries cannot be achieved without an international agreement, the Advocate General sees that it might be necessary to conclude an international agreement under Article 216(1) TFEU to achieve this objective.\textsuperscript{262}

Under this justification the Advocate General comes to the conclusion that as the Union can have an internal competence on portfolio investments under Article 63(1) TFEU and achieving the objective to guarantee the right to the free movement of capital requires an international agreement to obtain commitments from third countries it is justified that there is a shared competence on this matter under Article 4(2)(a) TFEU.\textsuperscript{263}

\begin{itemize}
\item \textsuperscript{257} Opinion of the advocate general on procedure 2/15 para.361
\item \textsuperscript{258} Opinion of the advocate general on procedure 2/15 para.363
\item \textsuperscript{259} Opinion of the advocate general on procedure 2/15 para.364
\item \textsuperscript{260} C-105/12 to C-107/12, para. 40
\item \textsuperscript{261} Opinion of the advocate general on procedure 2/15 para.367
\item \textsuperscript{262} Opinion of the advocate general on procedure 2/15 para.369
\item \textsuperscript{263} Opinion of the advocate general on procedure 2/15 para.370
\end{itemize}
5. **Analyse of the material**

In this paper I have focused on the EU’s external competence regarding investment especially focusing on defining the scope the term ‘investment’ used in the agreement texts cover and what type of competence is needed to conclude international agreements with third countries within that scope. It must be borne in mind that as seen from the aspects included in the investment chapter for example in presented EUSFTA, the final answer would require much more comprehensive study as all the elements regarding investment protection should be studied. But before those issues can be considered it is necessary to find a conclusion if there is even an external competence on investment as such within the possibilities TFEU provides.

As presented, the competence specifically established in the TFEU regarding investment under common commercial policy is clear and it does not cover investment as a larger concept including portfolio investment, but creates external competence only on FDI. This statement relies on Court’s definitions on FDI and portfolio investment which corresponds to the definitions presented in this paper as well. In addition, TFEU Article 207 refers to foreign direct investment solely. Following that there is no questioning of the competence of the EU when it comes to foreign direct investment as a principle. Another discussion is the scope of measures that can be seen falling under the competence based on common commercial policy. To start with, it can be concluded that TFEU does not directly create external competence to the EU regarding portfolio investment and the exclusive competence provided by the Article 207 TFEU without hesitation covers only foreign direct investment.

As discovered in the definition of the investment, in this paper foreign direct investment goes beyond portfolio investments. This conclusion itself does not create a competence to the EU but strongly supports the interpretation that any other form that is more purely financial relation could be seen belonging under the competence.

The justification to see foreign direct investment going beyond than portfolio investment is that portfolio investments do not require any interest to manage the company the shares are owned but only invest capital. This outcome do not necessarily mean that portfolio investments should be entitled to same level of protection under

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264 C-171/08, para 49
265 See Chapter 2.5
trade agreements as there obviously is not as influential link towards the investor as there is in the case of the foreign direct investment. On the one hand it can be seen that as FDI goes further this means that any other form of the investment can as well be entitled to protection. But on the other hand there is also the reasoning speaking on behalf of the more narrow interpretation. This would be that there is no actual need to protect other forms of investments this heavily. At the end, this all depends on what is the intention of the law maker on this issue and in this case what have the negotiators of the agreement meant, which usually is the core issue in case of interpreting any form of legal documents.

So far in the legal context discussion hasn’t taken place on what level of protection is required, which predicts that there is a need for a more detailed legal ruling to create a competence. There has been opinions supporting the idea that in the future there would be no need to make a distinction between FDI and portfolio investments. It seems irrelevant to this outcome to discuss about the need of the protection of different forms of investment. This is another political debate that cannot itself establish competence in any field but it is relevant in the future debates on the matter and could be studied also further how the legislator has drawn a line to this one form of investment.

There are two big legal issues that must be solved to find out the final answer to the question if the European Union has an (exclusive) external competence on investment as larger concept than only foreign direct investment. TFEU offers two possibilities that also ECJ has supported establishing implied power of the Union.

To find an answer to the question on implied power, first it must be examined what can be seen as a common rule creating competence based on implied powers according to 3(2) TFEU on the issues where the competence otherwise is established in primary legislative level. The relation of common rules that can be affected if Member states maintain power to act is discussed in AETR case.267

Second question is what kind of internal competence can be seen creating also external competence as this internal competence could not be exercised without external competence as well. This is the issue discussed in the ECJ opinion 1/94.

266 Dimopoulos: EU, p. 31-32
267 C-22/70
The most complicated legal problem in this case is if the portfolio investment is seen as a capital movement according to the Article 63(1) TFEU and what is the relation of this outcome to the Article 3(2) TFEU. Can the free movement of capital ruling be seen as a legislation that could be sufficient to create clear competence to the EU by the rules regarding the relation of external and internal competence or is there a possibility that this could be seen as common rule within the meaning of Article 3(2) TFEU?

Firstly it is clear that currently there is no clear source of law that the first possibility of Article 3(2) TFEU could be used in the relation to investment as it requires an act that would provide the EU an external competence to conclude an international agreement in this field. This issue is not discussed in this paper more in detail as it is common fact that such a legislation do not exist.

Second option is the necessity to conclude an international agreement that Union can exercise its internal competence. Like it was stated in the Courts opinion 1/94 exclusive external competence do not automatically flow from the Union competence to lay down rules in internal level. The legal interpretation requires that there is a harmonisation of rules that the internal competence could be seen effective within this meaning. Advocate General underlined that the second ground of the Article 3(2) TFEU would be relevant only when the internal power to act is not yet exercised, which can be supported based on the case of the ECJ. If the internal competence is already exercised it would indicate that the external competence is not needed to exercise internal competence. It is commonly known the Single market of the Union is based on the principle of free movement of capital and as this is the only possibly provision relating to portfolio investment, this power is already exercised at internal level. So it can be seen that as the aim of this provision is to secure free movement of capital within internal market this right as been exercised effectively without concluding international agreement. Yet there is the element that free movement of capital is also right of non-member state nationals, so it should be discussed if this right towards nationals of non-member states can be fully secured only by the internal market rules.

268 Opinion 1/94, para 77
269 Eeckhout, p. 93
270 ECJ Opinion of the advocate general on procedure 2/15 para.357
The question remains, as the Article 63(1) TFEU do not only cover capital movement within the Member states but also between the Member states and third countries, is this a right that is not fully exercised and could be used as a ground to establish EU external competence. Further as Article 64(2) TFEU provides, EU has a competence to legislate among this field to secure the free movement of capital between Member states and third countries in order to achieve this policy aim. Yet the Commission did not raise this point in its reasoning, which it provided to the Court according to the statements of the Opinion of Advocate General most likely due the fact that the mentioned article refers only to the foreign investment, leaving once again investment as it is introduced in the agreement texts out of the scope. Also this idea could fall under the third option in Article 3(2) as the purpose of the ruling in Article 64(2) is to secure a policy aim which could be seen as a common rule.

The possible ground for the Union exclusive external competence is on the third part of Article 3(2) TFEU, which is based on the assumption that conclusion of an international agreement would affect on common rules.

Looking into the wording of the two main rulings of the TFEU regarding the third option it can be found that they are to a large extent similar. These rulings are Articles 3(2) and 216(1). The biggest difference is that Article 3(2) doesn’t refer to the objectives of the Treaties as the Article 216(1) does. Otherwise the conditions to imply the competence fall under same requirements. It can be found due this fact that actually Art. 216(1) is broader than Art. 3(2), but this do not constitute a significant difference. As already explained Article 216(1) TFEU sets the conditions when the Union has the competence to conclude international agreements and Article 3(2) TFEU creates the rules when this competence can be exclusive.

If we look into the two test method presented by Dr. Dimopoulos it can seen that in both tests the question regarding investment comes problematic. The first option seems to be incompatible to the situation as it was based on the idea that internal competence cannot be exercised effectively without international agreement. In the second test there should be common objectives which could not be achieved unless EU has an exclusive external competence. The second test does not necessarily require existing internal rules on the matter.
In addition to the cases that the two test methods are based on, the Opinion 1/94 of the Court provides rules what to interpret. The opinion of the Court 1/94 limited the possibility to establish implied external powers on the Treaty provisions which are intended towards Member states and not towards third countries.\textsuperscript{271} And further to rely on the justification the Court provided in its opinion, the Court used the argument that freedom of establishment is not a right the non-member state nationals can invoke to justify why there cannot be an exclusive competence of the Union.\textsuperscript{272} But as the free movement of capital is a different type of right in that sense and also third country nationals do have that right, this could speak on behalf of the interpretation that there is a possibility that the EU has an exclusive competence on the matter. This interpretation would be a consistent reading from the Court. This also indicates that there are rules which could be affected by actions of Member states as international agreements with investment provisions can have an effect on investment in the internal market and further on capital movement.

There is a possibility that the AETR test creates a way to see the competence derived. This option would actualise if the Court would allow the Commission to use its reasoning that investment is a capital movement in the meaning of Art. 63(1) TFEU and in addition that the freedom of establishment as provided in Art. 64(2) TFEU being applied as by denying this right would create a restriction on movement of capital. Then there would be a competence to adopt measures also covering issues related to establishment in the context of investment as a broader concept. The reason for this interpretation is that the free movement of capital is the primary right and establishment secondary, but both necessary to achieve the objective of the Treaty. As establishment is a right that EU has only internal competence would the conclusion of an international agreement be necessary to exercise this competence.

The problem with this interpretation lies in the wording of Art. 64(2) TFEU which mentions only direct investment. So it can be found that this is not an option to solve competence issue relating to portfolio investment which remains to be the key problem. The right of establishment is also outlined from the possibilities to offer a solution in the

\textsuperscript{271} Opinion 1/94, para 81, 86
\textsuperscript{272} Opinion 1/94, para 81
context of international agreements as this right is only guaranteed directly to nationals
of Member states.\textsuperscript{273}

Yet the right of free movement of capital cannot be overlooked. This is a right that both
nationals of Member states and non-Member states can invoke. The conclusion of
Advocate General summarises that as a primary law this right cannot be seen as a
common rule of the Union.\textsuperscript{274} The Commission and the Parliament see that primary
legislation could be seen as a common rule within the meaning of Article 3(2) TFEU.\textsuperscript{275}
Also this right can be seen falling under the Article 216(1) TFEU as primary legislation
is a legally binding act. Article 216 TFEU introduces Union competence to conclude
international agreements, but this ruling do not specifically mention if the Union has an
exclusive competence to do so. To find the final solution this specific ruling must be
examined within the first Articles of the TFEU and find the area under the legislative
act falls.

The rulings on free movement of capital are located under the part of ‘Union policies
and internal actions’. It can be read that the legislator has meant this ruling to be
understood as part of the legislation of internal market. This indicates that rulings fall
under the Article 4(2)(a) TFEU, which clarifies that internal market issues fall under the
shared competence of the Union and the Member states supporting the reading of
Advocate General who based the shared competence on the fact the competence of the
material question is under the internal competence of the Union.\textsuperscript{276}

Coming back to the case law, in AETR judgement paragraph 16 the Court clearly stated
that the authority to conclude international agreements may equally flow from other
provisions of the Treaty and measures adopted, which naturally means that the implied
power should base on the Treaty provisions or secondary legislation.\textsuperscript{277} There is no
questioning of the level of legislation that can be seen as a base for implied powers.

The term ‘common rule’ is still the most relevant term, which causes a headache to legal
professionals. What does this term stand to? ECJ states in the AETR that ‘each time the
Community, with a view to implementing a common policy envisaged by the Treaty,

\begin{itemize}
\item \textsuperscript{273} TFEU Article 49(1)
\item \textsuperscript{274} Opinion of the advocate general on procedure 2/15 para.359
\item \textsuperscript{275} Opinion of the advocate general on procedure 2/15 para.276, 279
\item \textsuperscript{276} Opinion of the advocate general on procedure 2/15 para.364
\item \textsuperscript{277} C-22/70
\end{itemize}
adopts provisions laying down common rules...the Member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. This wording is a true masterpiece as it can be interpreted as the reader wishes.

Firstly, ‘laying down common rules’ is a vague impression. Does it mean only implementing already existing rules or can it mean establishing rules based on the Treaty? This is relevant was we try to find the definition for the common rules. Can common rules refer also to Treaty provisions?

The AETR case has two main features: implied powers and exclusivity of those powers. The distinction where these two elements are constituted isn’t explained clearly. Exclusive nature of the competence in EU external relations is seen as a priori concept, which produces its legal effects irrespective of any Union action. The implied power on the matter basis on the Article 216(1) TFEU and the exclusivity is determined according to Article 3(2) TFEU. Reading of those two articles purely based on the case law or purely according to the wording of the Treaty provide to different readings, where the Treaty text actually would provide an opportunity to far broader scope of the competence than probably was the intention of the lawdrafters shaking the constitutional balance of the Union. Yet the case law of the Court, even with limited reasoning in most of the cases, speaks for rather narrow scope of implied powers. In the legal interpretation these two cannot be separated from each other, but the legal reasoning should take both elements into account giving the primacy being of course on the Treaty provisions that are primary law.

One of the many issues the Court has not either clarified is the necessity where Article 3(2) TFEU refers to. Necessity is taken as a fact in the case law and used the term as a justification leaving the term without any further reasoning. Even understandably necessity arises in every case from a specific reasons, the Court has not been clear what are those reasons in each case it has used necessity as an argument.

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278 C-22/70, para 17
279 Finnish version of the text uses the term ’ottaa käyttöön’, which refers more to the direction of implementing already existing rules. Swedish version of the text uses the verb genomföra, which also refers more to the idea of implementing.
280 Koutrakos, p. 83
281 Koutrakos, p. 129
The Advocate General is not going into too much of details regarding the other provisions of the agreement introduced. But it is rightly argued that actually the measures adopted for example regarding protection against expropriation are the ones, which actually define the competence. So to find an ultimate answer to the question if the EU has an exclusive external competence over investment as it is provided in the provisions set in the EUSFTA Investment Chapter, all of the aspects of investment protection should be studied in detail.

There is one point that should not be forgotten in the Opinion of the Advocate General. In her final statement regarding the question of the exclusive competence she points out that as the Commission has not argued any other basis for the exclusive competence, the conditions for Article 3(2) TFEU common rule application are not satisfied. This wording leaves open the question if the Advocate General did see there another possibility to establish a competence that the Commission did just not use?

It can be seen from the analysis of the presented material that to have the final answer, many questions are to be answered. The main question being the term common rules. TFEU offers possibilities to see investment including FDI and other forms of investment under the EU’s exclusive competence, but an equal amount of provisions that speak on behalf of shared competence.

6. Conclusion

6.1 Conclusion of the legal problem

Even there has been a criticism among legal literature that even FDI could fall under the capital movement from all the presented facts it could be still concluded that the majority supports the idea that portfolio investment can be seen as a capital movement within the meaning of TFEU. Also the opinion presented in the literature can be questioned as currently TFEU specifically mentions direct investment in the provisions on capital movement, so the critic seems unjustified and contradicting with the legislators will.

282 Koutrakos, p. 47
283 Opinion of the advocate general on procedure 2/15 para 361
284 Strik, p. 75
Taking into account the provisions of the Treaty and substantive questions, the answer to the question of the paper could follow the conclusion of the Advocate General that portfolio investment falls under the shared competence of the Union and Member states. This would require that primary legislation cannot be seen as a common rule within the meaning of the Article 3(2) TFEU that could establish EU’s exclusive external competence on the matter.

But as the Court of Justice hasn’t taken on a position yet on the issue, if the common rule can be seen as referring to the primary legislation as well, there is an equal possibility that the outcome is the opposite. This would be equally justified as comparing to the other case law examples, free movement of capital between Member states and third countries is an issue that seems challenging to achieve without international agreement. But as the Advocate General correctly points out, including primary legislation under the term common rules would be against the other provisions of the Treaty as the Treaty can only be changed according to the Article 48 TEU. The main argument to support this reasoning is the question the Advocate General raised that why would have legislators used the wording now chosen in the Treaty if the intention was to extend this also the primary legislation. European Union is an unique model where the Member states has given their competence on certain matters to the Union, but it would seem short-sighted from the Member states to accept a Treaty provision that could turn against them later.

It would be indeed unjustified to assume that international agreement could affect on primary legislation or alter the scope of it. Even this would have been the intention of the legislator, it should have been more precisely worded. The possibility that international agreements could affect on primary legislation would create unpredictability when the scope of primary rulings could be changed without actually amending the Treaty itself. Therefor including primary legislation under the term ‘common rule’ wouldn’t be possible.

The discussion on the relation between establishment and capital movement seems to offer more help when we talk about foreign direct investment and other forms of investment. Even this paper do not focus largely to the competence of FDI it must be

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285 The Opinion of the ECJ was given on 16th May 2017
286 ECJ Opinion of the advocate general on procedure 2/15 para.358
remembered that this discussion still has a role regarding trade agreements’ investment provisions. This discussion could be looked into more detail on defining how far the trade agreements regarding internal market issues can go. So far the ECJ hasn’t taken any position on this, but it will be most likely discussed in the opinion of the Court regarding the EUSFTA. It can be concluded that the discussion regarding establishment do not provide a solution to the problem.

The reasoning the Commission has provided in the case of EUSFTA it is seen, that the Commission is strongly supporting the interpretation that there is an EU competence to conclude trade agreements with investment provisions covering both FDI and portfolio investments. Yet it seems that the justifications for this interpretation are not supported by the Advocate General, which indicates that it is unlikely to see the final opinion of the ECJ to support this position either. Even the fact that the objectives of the trade policy could maybe be achieved more efficiently under the exclusive competence of the Union should have a value in the consideration of the ECJ.

Ruling on this issue will also have an impact on the bilateral investment agreements Member states have concluded with the Republic of Singapore as the concluding of this agreement will also replace the existing bilateral investment agreements between Singapore and Member States.287

One of the main principles of the law is the predictability. The outcome of the Court and interpretation of the legislation should be more or less predictable and especially in the case of economic activities this is crucial to create a stable environment for businesses. Creating a new court system changes the balance at the legal system even it would not be directly linked to the domestic legal system. Even the Court has taken a position earlier that creating a new court system is not necessarily contradictory to the Treaties it is interesting to see how this new model will be interpreted in the most likely future procedure brought by Member states under the CETA agreement. It must be borne in mind the opinion of the Court is binding towards the agreement according to the TFEU as the agreement cannot enter into force if the Court finds it adverse.288

The investment provisions presented based on the Chapter 9 A of EUSFTA remind that even there would be an exclusive external competence of the Union based on the pure

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287 Article 9.10 EUSFTA
288 Treaty on Functioning of the European Union art. 218(11)
capital flows, the provisions of the chapter cannot be separated from the final conclusion. Protection of investments and possible dispute settlement\textsuperscript{289} go further from the primary principle of free movement of capital. To solve the competence problem regarding the whole agreement provisions such as property ownerships\textsuperscript{290} should be discussed among numerous other issues bearing in mind the principle of subsidiarity.

Implied power is strongly linked to the political situation and as the rules on this matter are not strictly defined, the case law of the Court will develop this interpretation constantly as there is need to keep up with the changing political relations.\textsuperscript{291} The Court has been reluctant to provide too detailed justification on the matter, but now it seems to be obliged to once again open the complex issue of implied powers, which is not legally, but also politically delicate issues currently among the EU and Member states.

The main issue that the Court will hopefully take a clear position is the question on what can be seen as a common rule. This does not affect only on the future trade agreements but will most likely be referred in various other legal discussions where the implied power is discussed. As it is seen the Court hasn’t been willing to open this discussion and many times when implied powers have been discussed, the justification has been unsatisfactory. Also most of the case law is given before the entry into force of the Lisbon Treaty, which gives another good reason to provide an update on the framework of implied powers.

There is probably still as many questions to be answered as there is answered ones regarding the issue presented in this paper. Purely terminological discussion on investment does not take us to the final conclusion. Even the opinions on the case law ECJ has provided on implied powers is questioned regarding the justification, one thing is clear, the terms on investment used are always related to the measures they are linked to. The substantive question is the most relevant one when finding the final outcome. That’s why no matter what the used wording is, it should always be studied within the measures it is related to. In this case it is primary the agreement text and even further the precise measure. To examine the legal basis for that competence, the presented

\textsuperscript{289}EUSFTA Chapter 9 Section B
\textsuperscript{290}Article 345 TFEU
\textsuperscript{291}Koutrakos, p. 130
study is relevant and necessary background as this proves that the trade agreement with investment provisions fall within more than one legally undefinable area.

The Court has no possibility to give its opinion on the ICS within the procedure of the EUSFTA, but this issue will be most likely also discussed in the Court proceeding soon as some of the Member states have given unofficial statements that they want to ask the opinion of the Court on ICS before ratifying CETA. In the chapter on the dispute settlement it was presented that the compatibility of the Court with the Treaty is linked to the provisions set in CETA as the Court has a jurisdiction to only interpret the provisions of that agreement and EU law and national legislation of the parties can only be taken account as a matter of fact.

The final answer to the question what will be the opinion of the ECJ regarding the EU’s competence on investment within the context of the EUSFTA is most likely that the competence is shared. The Court can easily admit that investment including both FDI and other forms of investment can be seen falling under the exclusive competence of the Union based on the interpretation to see other forms of investment as a capital movement and that this right cannot be guaranteed to third country nationals cannot be exercised without conclusion of international agreement. But due the detailed measures that establish investment protection and dispute settlement the Court will not most likely be able to extent the interpretation to see all of the substantive measures falling under this competence. The Court will not accept the idea that primary legislation is seen as a common rule are this would contradict with the rules how the Treaty can be changed. But no matter what the reasoning of the Court is, any legal reading by the Court on this issue is not done without political consideration.

### 6.2 Political conclusion

Even this a paper is written from the legal point of view the issue cannot be separated from the political background it has. There is no such thing as a purely legal or even purely economic free trade agreement. Trade agreement is always an entity of a broader picture. Agreeing on deeper trade relations requires deep will from the decision makers and like said it is never a purely economic need, but also a political signal. How could it be possible otherwise to justify the fact that EU is currently negotiating or it already has concluded a free trade agreement with most of the significant global economies apart from China? Even EU is negotiating an investment agreement with China, which
ironically would be the first investment agreement concluded by the EU since the adoption of the Lisbon Treaty. But the progress do not predict this agreement to be concluded any time soon. This is to prove that discussion on international trade agreements cannot be held without the political consideration. Political positions were also included in the opinion of the Advocate General, which proves this point.

The current discussion and unpredictability of the ratification process has raised concerns in possible future trade partners. In unofficial discussions with the presentative of third countries the concern is related to the internal political situation of the EU and how the coming elections in many Member states will effect on their trade policy. The mixity of the trade agreements is always a more unpredictable solution than trade agreement the EU is capable of concluding without the participation of Member states that are required to take the political situation into consideration while ratifying any agreement. And as it is seen, the political situation may change rapidly.

Depending of the outcome of the Court, there are couple of possibilities how the future EU trade policy can be seen as developing.

First option is that EU continues to pursue to have these new era trade agreements which include, in addition to rules regarding trade in goods and services, also rulings on for example sustainable development and investment. If the Court sees that these broad trade agreements cannot be seen as falling under the exclusive external competence of the Union, the future agreements will be mixed agreements. This means that the final ratification of these agreements depend on the national governments of the Member States and in some Member States it is not only one government, but like in the Kingdom of Belgium, five different governments that have to ratify the agreement before it can be fully applied. This means that the procedure will take years as it was seen in EU- South Korea agreement where the final ratification took four years.

This first option will make EU less desirable trade partner as the benefits of the agreements can be achieved only years after the end of the negotiations. Not forgetting that also the negotiation procedure usually takes several years. When other countries are able to have binging agreements more efficiently will this in a longer run mean that EU is excluded from the global trade circles and one don’t have to be an economist to understand what that means to the economic growth of the Union.
Being excluded from the front row of the global trade scene would also be harmful as like explained in the introductory chapter, EU couldn’t be the one setting the standards of global markets, but it would be obliged to follow the standards set by other economies.

Second possibility is that EU will give up on aim to conclude ambitious trade agreements and takes one step backwards by negotiating only within the guaranteed and clear exclusive competence of the Union. This decision won’t probably harm the possibilities of an economic growth but is definitely a hard strike for the Union and especially to the Commission that has worked years to negotiate ambitious agreements. This would most likely remain a long-standing mark on Commission’s forehead standing for a period when it pushed its powers too far. Even here is again the question that how we can interpret the situation as the Council has provided the mandate to negotiate these current agreements.

Third and most unlikely possibility, in the light of the likely outcome that these comprehensive agreements are not under EU’s exclusive competence, is that the Treaty is changed so that EU unequivocally has broader exclusive competence that would allow it to negotiate the agreements it has worked for the past years. Legally as it seen for example from Maastricht and Lisbon Treaties it is not impossible to amend the Treaty. Unfortunately or luckily the current political situation in the Europe is unlikely to support the miracle of the Member States to approve this radical change and extension of the Union’s competence. The coming years and the next elections in Member States may increase the support of EU criticism which already was seen and proved by Brexit.

The Court of Justice of the European Union holds now a huge power on deciding how is the competence of the Union defined and scoped. This opinion will have regardless of the outcome long-lasting effects on the common commercial policy of the Union and via that also on the economic growth. This decision will be without question referred numerous times and will set the direction of the Union’s trade policy for a long time.
7. **Remarks**

7.1 **The opinion of the ECJ on EUSFTA**

While this study was being finalised the ECJ gave its long waited opinion of the EU-Singapore Free Trade Agreement on 16 May 2017. Surprisingly the Court went further in its interpretation of the EU competence than the Advocate General did in her opinion. The finding of the Court was that the agreement was mainly falling under the exclusive competence of the Union, but the portfolio investment fell out of this competence and is under the shared competence of the EU and the Member states. The justification of the Court is based on the firstly to the common rule principle that the Treaty provision cannot be seen as a common rule within the meaning of the article 3(2) TFEU. Secondly, the Court saw that conclusion of an international agreement is not necessary for EU to enable its internal competence.

Last point of the Court’s justification was that free movement of capital, which the portfolio investment can be seen as, is a part of the internal market legislation and this right is not formally binding towards third countries and then cannot be used as a base of the EU exclusive competence.

This opinion of the Court was largely discussed among the press, but to have a comprehensive understanding of it, the wording should be looked into detail. The main finding is that the investment remains to be the most problematic part of the trade agreements. In addition, the dispute settlement model fell out of the Union competence. One interesting point to be researched is the obligatory and facultative mixities of the trade agreements.

The interesting finding was that this opinion was seen as a first guideline towards the future EU- UK FTA as it is predicted that this agreement will have similar elements. This ruling would mean that also EU-UK FTA should be ratified by not only the EU but also by the 27 Member states.

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292 Opinion 2/15, ECLI:EU:C:2017:376 para 238
293 Opinion 2/15, ECLI:EU:C:2017:376 para 234-235
294 Opinion 2/15, ECLI:EU:C:2017:376 para 237
295 Opinion 2/15, ECLI:EU:C:2017:376 para 240
297 https://www.ft.com/content/9a0c9d04-9c6d-34f8-a7e2-dba202d29c25
This opinion of the Court is an interesting topic to be studied in the future and it will provide guideline for the future trade policy of the Union. Most likely this will actualise during the EU-UK trade agreement procedure which most likely will create a need to look into the rulings on trade competence again.\textsuperscript{298}

\textsuperscript{298} EU-UK agreement will also require a large knowledge on WTO trade regulation which was not looked into detail in this study, but should not be forgotten when talking about international trade as the WTO regulation establish the base for most of the global trade.