



**DIPARTIMENTO DI GIURISPRUDENZA  
CATTEDRA DI EU INTERNAL MARKET**

**THE INFLUENCE OF PUBLIC PROCUREMENT RULES IN THE EVOLUTION  
OF EU COMMON COMMERCIAL POLICY**

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## ***INTRODUCTION***

The aim of the work is to examine European public procurement's principles and their implications in two different areas of the European Union: The Internal Market, and the Common Commercial Policy (CCP) and foreign investment related aspects, with a specific regard to recent Free Trade Agreements stipulated by EU in order to find out whether there are common aspects or divergences. Public procurement is traditionally a matter strictly related to the functioning of the Internal market; therefore, the objective of this work is to evaluate whether the aforementioned principles have influenced the European policies in the trade external action with third countries. The present analysis involves both the regulation of the matter in the Internal Market and the external action.

Since the institution of European Economic Community, the role of the CCP has been evolved: if the Treaty of Rome established uniformity and trade liberalisation of trade as principles, nowadays the role of CCP is wider. In particular, the position among External Action gives to CCP a deeper importance that goes further than liberalisation aims. As a result, today negotiating trade agreements means deeper integration and positive approach and the agreements aim to cover not only elimination of trade barriers but to gain market access through regulatory cooperation too.

The “*deeper integration*” pursued by CCP is reflected on public procurement chapters in Free Trade Agreements: negotiating dispositions that regulates public procurement between EU and third countries means granting market access by giving specific rules.

Public procurement can be defined, using the OECD notion that inspires EU public procurement law<sup>1</sup> as “[...] *the purchase by governments and state-owned enterprises of goods, services and works.*”<sup>2</sup>.

Article 207 TFEU, which regulates CCP, states that CCP regards “[...] *the achievement of uniformity in measures of liberalisation*”; actually, public procurement is one of the objectives of trade negotiations because it represents one of the issues negotiated in trade agreements in order to favour Market access in third countries.

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<sup>1</sup> Organization for Economic Cooperation and Development

<sup>2</sup> “*Public procurement refers to the purchase by governments and state-owned enterprises of goods, services and works. As public procurement accounts for a substantial portion of the taxpayers’ money, governments are expected to carry it out efficiently and with high standards of conduct in order to ensure high quality of service delivery and safeguard the public interest.*”

As regards the Internal Market, attention should be paid to the recent EU law framework in the matter. Nowadays, in fact, public procurement, in Internal Market, is regulated by three directives: Directive 2014/24 on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, Directive 2014/23/EU on the award of concession contracts that entered into force in 2016 and reformed public procurement legal framework.

In order to carry out the aforementioned objective of this work, the two issues examined are CCP and in general the External Action of the EU in trade matters, and Directive 2014/24, as one of the three Directives that establish the legal framework of public procurement within the Internal Market.

With reference to Directive 2014/24, the aim is to present the principles governing public procurement- transparency, equal treatment, non discrimination and proportionality but, at the same time, we try to illustrate how the principles founding the TFEU influences the legal regime of public procurement: specifically, Article 34 TFEU on free movement of goods, Article 56 TFEU on freedom to provide services and Article 49 (ex-Article 43 TEC) on freedom of establishment.

With regard to CCP, is provided an overview of CCP with a particular attention in its role in the external action: as Article 21 TFEU states that “*The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement [...]*”, CCP as part of external action has to pursue EU interests and principles which influence and guide trade negotiations.

As a result, the examination is related to the principles governing public procurement: by analysing Public Procurement in CCP and in Internal Market, in order to find out similarities and the differences between the two areas.

Generally, the question is to understand whether EU Internal and External policies go hand to hand or if, at the contrary, they differ. Specifically, Public Procurement reveals to be an issue relevant to both External Action and Internal Market and helps to answer to the question whether the same matter's principles differ or not and if it exists a link between CCP and Internal Market Public Procurement's principles.

The work is structured in four chapters.

The first chapter is an illustration of EU Common Commercial Policy: in the first part, it is introduced the evolution of the matter, from the provisions of Treaty of Rome to Lisbon Treaty. The aim is to analyse the way in which CCP was regulated and how and in which measures has been changed in order to understand its current structures provided

in Article 207 TFEU. Through the illustration of the structure of CCP, the aim is to provide for a description of CCP from two different point of view: from one side, how EU acts in multilateral framework and, specifically, with WTO; from the other, the current bilateral aspect of EU CCP. In this respect, first we present a brief overview of EU 's agreements. In conclusion, we introduce Free Trade Agreements

The second chapter is a general presentation of EU public procurement. After a general description of the process of reform of public procurement that led to the current structure and, secondly, the chapter is concentrated on the examination of Directive 2014/24, with an attention to the principles governing EU public procurement in that Directive; in addition, a general overview of some of the most peculiar and innovative aspects is provided. At the end of the chapter, it is introduced the link between EU public procurement and CCP: the aim is to underline the external side of the discipline, by presenting two international instruments regarding public procurement: from a multilateral side, Agreement on Government Procurement (GPA); from a bilateral side, the International Procurement Instrument.

The third chapter is concentrated on Free Trade Agreements (FTAs): after a brief introduction to the nature of FTAs, there is an analysis of four agreements: EU – South Korea FTA, EU- Canada Comprehensive Economic and Trade Agreement (CETA), EU – Japan Economic Partnership Agreement (EPA) and a general presentation of the state of play of EU-USA Transatlantic Trade and Investment Partnership. After a brief discussion of the peculiar aspects of each agreement, the chapter is focused on the public procurement chapters of them. The aim is to show how the discipline's regulation has changed from the first example of “new generation” of FTAs (EU- South Korea) to the last and the most recent ones, in order to underline common points and differences.

The fourth and last chapter is a focus on CETA: in fact, this is the most innovative and at the same time discussed FTA that EU has negotiated until now. As a result, after a briefly description of the structure of the agreement, the work puts the attention to Chapter 8 regarding Investment and Investor- state dispute settlement (ISDS): the aim is to present the reason of the provisional application of the agreement. The final part of the chapter is an excursus over the inclusion of provisions regarding trade and sustainable development: the aim is to underline how the debate around sustainable growth has become as important and fundamental as it is regulated and included in an agreement between two of the world most powerful economy. A traditionally matter linked to both CCP and internal market is the regulation of public procurement; in particular, public

procurement is objective of the negotiation conducted by multilateral as well bilateral way: in the first case, EU is part of the Agreement of Government Procurement (GPA), which aim is to open government procurement market along “ [...]to *mutually open government procurement markets* .

## **CHAPTER I**

### **THE COMMON COMMERCIAL POLICY OF THE EUROPEAN UNION**

#### **1.1 Common commercial policy from the Treaty of Rome to Lisbon treaty**

Common Commercial policy (CCP) scope and definition has changed since the Treaty of Rome to the entry into force of the Lisbon Treaty; its evolution has deeply influenced the internal policies of the European Union.

Article 21 of the Treaty of the Function of the European Union (TFEU) includes common commercial policy as part of the external action of the Union;<sup>3</sup> moreover, the EU has become member of the World Trade Organizations (WTO) and this event makes CCP crucial to define which is the role of the EU as a unitary subject in the global economic and political context<sup>4</sup>, both in multilateral and in its bilateral relations with third parties.

CCP has influences on EU international trade relations as well as in the internal market: the reason is that the consequences of a measure restricting trade and delaying liberalization can be suitable to have repercussion within the industrial sector of EU Member States and in consequence in the internal market.<sup>5</sup>

A traditionally matter linked to both CCP and internal market is the regulation of public procurement; in particular, public procurement is objective of the negotiation conducted by multilateral as well bilateral way: in the first case, EU is part of the Agreement of Government Procurement (GPA), which aim is to open government procurement market along “ [...] *to mutually open government procurement markets among its parties.*”<sup>6</sup>; bilaterally, since 2012 public procurement chapters are part of the of the “*new generation*” of Free Trade Agreements: the first example is the South Korea-EU free trade agreements while the most significant in terms of economic and political relationship is the inclusion of a chapter regulating Public Procurement in the

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<sup>3</sup> See intra §

<sup>4</sup> “È rilevante in termini politici ed economici poiché impronta di sé le relazioni esterne dell'Unione in una economia mondiale in forte evoluzione e nella quale essa tende a presentarsi quale soggetto unitario.” In Roberto Baratta, “La politica commerciale comune dopo il Trattato di Lisbona” In Roberto Baratta, *La politica commerciale comune dopo il Trattato di Lisbona*, in Diritto del Commercio Internazionale (2012), at1

<sup>5</sup> “[...] incidono direttamente sugli interessi dell'industria europea e in definitiva sulle politiche di produzione manifatturiera degli Stati membri.” In Roberto Baratta, “La politica commerciale comune dopo il Trattato di Lisbona” in, Roberto, “La politica commerciale comune dopo il Trattato di Lisbona” in Diritto del Commercio Internazionale (2012), at1

<sup>6</sup> See WTO website [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

Comprehensive Economic and Trade Agreement (CETA) signed with Canada: the aim is to avoid that public procurement become a “*trade barrier*” for economic operators in third countries and for third countries operator in the EU.

In this chapter it is examined the CCP of the European Union with the aim is to give a general prospect of the development of the CCP in order to illustrate its origins, its development and the context in which operates.

On the first part, it is illustrated the CCP, starting by the creation of the European Community by the Treaty of Rome to the new perspective and aims pursued by the Junker commission:<sup>7</sup> for this purpose, it is presented an overview of the relevant provisions contained in the Treaty of Rome<sup>8</sup> and in Maastricht treaty<sup>9</sup> regarding Common Commercial Policy (CCP).

Second, there is an examination of the provisions contained in Lisbon Treaty about Common Commercial Policy; in particular, Article 3, letter *e* TFEU in order to evaluate the role of the Common Commercial Policy as a key factor of the external action of the EU and Article 207 TFEU that contains the objectives of CCP and the legislative procedures and the relationship between the European institutions s.c. “*trialogue*” (Commission, The Council of the EU and the European parliament).

In the last part, there is a description of the evolution and of the current structure of the CCP: in particular, the process of evolution that occurred in the CCP and brings to consider it as falling in the exclusive competence of the EU.

In conclusion, it is analysed the multilateral and the bilateral aspects of the CCP: from one side, the relationship between EU and WTO and how it has influenced the current structure of the CCP; from the other side, the trade agreements that EU negotiates and concludes with third countries.

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<sup>7</sup> With the name of “*Junker Commission*” we make reference to the commission held by the Chairman Jean-Claude Juncker; the commission has stated its mandate in 2014, November and its mandate will end 2019. Current Commissioner to Trade is Mrs. Cecilia Malmström

<sup>8</sup> The Treaty of Rome is the treaty signed March 25<sup>th</sup>, 1957 by the government of Belgium, France, Germany, Italy, Luxemburg and the Netherlands which constituted the European Economic Community.

<sup>9</sup> The Treaty of Maastricht is the treaty signed February 7<sup>th</sup>, 1992 by the government of Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxemburg, the Netherlands, Portugal, the U.K. and that established the European Union.

### 1.1.1 From the Treaty of Rome to Maastricht Treaty

The Treaty of Rome contains several provisions regarding CCP; a first reference to the issue is in the preamble<sup>10</sup> and an express reference to CCP is contained in Article 3<sup>11</sup>.

Specifically, there are two important provisions which contribute to design the future intent of the new born community in the field of CCP: in Article 3 letter *a* it is provided the elimination of the custom duties and of quantitative restrictions and Article 3 letter *b* provided for a common custom tariff and a common commercial policy for the third countries.

It seems clear that the dispositions above mentioned expresse the important role of a common commercial policy for the aim of cutting off all the obstacles in trade: in particular, it emerges that the first aim of the CCP was to give a contribution to the dialogue of the EU in a future global context.<sup>12</sup>

Generally speaking, in the treaty of Rome CCP can be recognized in two principles that sum up the mandate of the CCP:<sup>13</sup> first, uniform principle<sup>14</sup> contained in

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<sup>10</sup> “*DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade*”, preamble of the Treaty of Rome

<sup>11</sup> Article 3 Treaty of Rome: “*For the purposes set out in the preceding Article, the activities of the Community shall include, under the conditions and with the timing provided for in this Treaty: (a) the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the importation and exportation of goods, as well as of all other measures with equivalent effect; (b) the establishment of a common customs tariff and a common commercial policy towards third countries; [...]*”

<sup>12</sup> “*The Common Commercial Policy has been one of the most important and dynamic fields of EU external relations. Since its inception in 1957, the scope of the Common Commercial Policy has been significantly changed in order to adapt to the new realities of international trade and economic relations*” In Angel, Dimopolous, *the common commercial policy after Lisbon: Establishing a parallelism between Internal and External Economic policy?* In Croatian Yearbook of European Law and Policy, 4 (2008), at.1. On the issue see also Wade Jacoby, Sophie Meunier. Europe and the management of globalization. Journal of European Public Policy 17:3, (2010) pages 299-317

<sup>13</sup> The definition of the objective in Rome treaty and in Maastricht treaty is not so wide. However, it is possible to include non -trade objective of the CCP referring to TEC. “[...] *In that respect, the CCP had been used for the adoption of trade measures pursuing objectives other than regulating trade flows and trade restrictions, linked for example with environmental protection and development cooperation. [...]*”. It will be in Lisbon treaty and especially in Trade for all strategy how themes as environment, sustainability and human rights have a fundamental role in the policy making of CCAT” In Dimopolous, Angel “*The common commercial policy after Lisbon: Establishing a parallelism between Internal and External Economic policy?*”, In Croatian Yearbook of European Law and Policy, 4 (2008), at. 8

<sup>14</sup> “*In historical terms two objectives of the CCP may be said to have been explicitly mandated by the Treaty of Rome, and they are still present in the TFEU. The first is perhaps not so much an objective in itself as a reflection of the underlying rationale of the CCP: the CCP is to be based on “uniform principles”. The purpose of the CCP was to ensure the functioning of the customs Union, common market and later the internal market by ensuring the uniformity of external trade rules for all Member States. This was the basis from which the Court in opinion 1/75 derived the exclusive nature of CCP powers, in which the common market was linked to the*

Article 111 TEEC: “*After the transitional period has ended, the common commercial policy shall be based on uniform commercial policy..*”; second, liberalisation of international trade,<sup>15</sup> that according to Article 111 TEEC consists in : “*principles “changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.”*” As a result, the EU had the competence regarding trade in goods

Furthermore, the ECJ in opinion 1/75 stated that the provision in Articles 114 and 144 of the TEEC shall be of the exclusive power of the Commission and that a situation of “*concurrent power*” would have led to “*distort the institutional framework*” : in that way, uniformity of position of the EU with third countries would not be granted<sup>16</sup>: the general interest of Treaty should have prevailed in order to grant the economic and social purposes of the EU.<sup>17</sup>

The two criteria were confirmed in Maastricht treaty too<sup>18</sup>; Article 133 TEC stated that “*The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation.*”<sup>19</sup>

The two criteria regulate both internal and external action of the EU: regarding the principle of uniformity, it states that in the field of commercial policy Member States have to follow common rules in order to preserve uniformity within the internal

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*common interest.*” In Marise Cremona, “*Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy*”, European Yearbook of International Economic Law, 2017, at 8

<sup>15</sup> “*Little was said in the Treaty of Rome about the content of the uniform principles on which the policy was to be based, except that the Union was to “aim to contribute” to the liberalisation of world trade.*” In Marise Cremona, *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy*, European Yearbook of International Economic Law, 2017, at 8

<sup>16</sup> Opinion 1/75 “*The provisions of Articles 113 and 114 concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible. To accept that the contrary was true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, reform commercial policy.*”

<sup>17</sup> “*Se non prevalesse l’interesse generale dell’Unione, il gioco istituzionale risulterebbe falsato e l’Unione non potrebbe assolvere il compito di salvaguardare e perseguire i comuni obiettivi economico-sociali.*” In Roberto Baratta, *La politica commerciale comune dopo il Trattato di Lisbona*, in *Diritto del Commercio Internazionale* (2012), at 1

<sup>18</sup> Angel Dimopolous, *the common commercial policy after Lisbon: Establishing a parallelism between Internal and External Economic policy*, in *Croatian Yearbook of European Law and Policy*, 4 (2008): 102-131

<sup>19</sup> Article 133 TEC “*1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.*”

market<sup>20</sup>: the rules that were necessary to harmonize should have been the same that were harmonized in the internal market.<sup>21</sup>

The opinion given by the Court was aimed by the doubts that a restrictive interpretation of CCP could cause negative consequences in the internal market: in this respect, the Court made an effort in opening the possibility to make the definition of CCP wider.<sup>22</sup>

Regarding the principle of liberalization, the only substantive criteria<sup>23</sup> expressed in Article 133 TEC is that the aim of the CCP was (and is nowadays) to contribute to the international trade liberalisation. Nevertheless, liberalisation was never included as an objective- or better an interest of the EU<sup>24</sup>: normatively speaking, we have to say that this principle has to be considered as a sort of guidance principle of the policy making.<sup>25</sup>

Although during the period between the two treaties the principles of uniformity and liberalisation were confirmed, the debate on the nature of competence regarding CCP had continued.

In particular, Opinion 1/78 opened again the debate and stated that the list of competences in Article 113 TEC was “*conceived as a non-exhaustive enumeration*

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<sup>20</sup> “Aiming to protect the unity of the common market by avoiding distortions in competition and risks of trade deflection that could arise if Member States pursued their individual external trade policies, the principle of uniformity required the adoption of common rules throughout the EU in the field of the CCAT” In Angelos Dimopoulos, , The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy (2010), European Foreign Affairs Review, Issue 2, at 2

<sup>21</sup> “Consequently, the principle of uniformity had only ‘instrumental’ value, determining the areas of the CCP where common rules had to be adopted. In areas that were not harmonized internally, uniformity was no longer an imperative but merely a tool that could be used by Community institutions.” In Dimopoulos, Angelos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy (2010), European Foreign Affairs Review, Issue 2, at 2

<sup>22</sup> “La Corte aggiunse più tardi che la nozione di politica commerciale era suscettibile di evolversi nel tempo e non poteva ridursi ai classici aspetti della liberalizzazione degli scambi.” In Roberto Baratta, La politica commerciale comune dopo il Trattato di Lisbona in Diritto del Commercio Internazionale (2012), at 1

<sup>23</sup> “The only substantive objective that was provided in the TEC and could affect the content of the CCP was trade liberalization.” in Angelos Dimopoulos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy (2010) 15 European Foreign Affairs Review, Issue 2, at 6

<sup>24</sup> “This approach, balancing liberalisation against other EU interests, has enabled trade policy instruments to be used for non-trade purposes which are not necessarily facilitative of trade, ranging from environmental protection to public health, and even economic sanctions.” In Marise Cremona, Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy, in “European Yearbook of International Economic Law” (2017) at.8. In the article above mentioned, there is also a quote from the sentences of the CJEU and of the ECJ CJEU, case C-150/94, UK v Council, ECLI:EU:C:1998:547, para. 67 that contributes to a better comprehension of the concept

<sup>25</sup> “Consequently, liberalization constituted only an aspirational objective that offered guidance to the political institutions in the formation of the CCAT” In Angelos Dimopoulos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy (2010) European Foreign Affairs Review, Issue 2, at 3

*which must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade “.*<sup>26</sup>

The Opinion given by the Court was aimed by the doubts that a restrictive interpretation of CCP could cause negative consequences in the internal market. In this sense, the opinion of the court made an effort in opening the possibility to make the definition of CCP wider.<sup>27</sup>

A turning pointing in the question was given by the ratification of the WTO agreements by the EC:<sup>28</sup>The “*vertical fragmentation*”<sup>29</sup> created by the shift of competence brought to a modification for the competence in CCP in Treaty of Amsterdam and in Treaty of Nice, where the Member States accepted to transfer some competence in trade in services and commercial aspects of intellectual property to EU institutions.

However, the actual changing in principles and competences occurred with Lisbon Treaty: first, CCP became part of the External Action expressly; second, the competence in trade of goods, trade in services and commercial aspects of intellectual property fell within exclusive competence of the EU.

### **1.1.2 Common commercial policy and Lisbon Treaty**

The first statement about CCP policy is contained in Article 3<sup>30</sup> letter *e* of the TFEU, which lists the exclusive competence, that includes CCP.

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<sup>26</sup> Opinion 1/78 “*The same conclusion may be deduced from the fact that the enumeration in Article 113 of the subjects covered by commercial policy (changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade) is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade. A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non- member countries.*”

<sup>27</sup> In Roberto Baratta, *La politica commerciale comune dopo il Trattato di Lisbona* in *Diritto del Commercio Internazionale* (2012)

<sup>28</sup> More in the next paragraphs

<sup>29</sup> “*EU Common commercial policy in context: opportunities and challenges of a changing landscape*” in Chiara Cellerino, *EU Common commercial policy in context: opportunities and challenges of a changing landscape* in *Diritto del Commercio Internazionale*, fasc.3, (2015)

<sup>30</sup> Article 3 of the TFEU: “1. *The Union shall have exclusive competence in the following areas:(a) customs Union;(b) the establishing of the competition rules necessary for the functioning of the internal market;(c) monetary policy for the Member States whose currency is the euro;(d) the conservation of marine biological resources under the common fisheries policy;(e) common commercial policy.*”2. *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.*”

Moreover, Article 3 paragraph 2 provides that the Union has the duty to negotiate international agreements in the matters of exclusive competence<sup>31</sup>. The subject matter and the objectives that fall within EU exclusive competence<sup>32</sup> of the CCP are listed in Articles 206<sup>33</sup> and 207<sup>34</sup> TFEU.

In particular, Article 206 makes reference to the objectives that have been already established in TEC- liberalisation and uniformity- while 207 TFEU clarifies the scope of such competence as including, without further qualification <sup>35</sup>and introducing the changes made by Lisbon treaty.

Firstly, Article 207 introduces intellectual property and foreign direct investment (FDI) as new as objects of for CCP: paragraph 1 of Article 207 states that CCP is about *“the conclusion of tariff and trade agreements relating to trade in goods*

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<sup>32</sup> They replaced of articles 131 and 133 TEC

<sup>33</sup> Article 206 TFEU: *“By establishing a customs Union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, 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.”*

<sup>34</sup> Article 207 TFEU *“The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. 2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy. 3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations. 4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them. 5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218. C 326/140 EN Official Journal of the European Union 26.10.2012 6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation”*

<sup>35</sup> *“Secondly, art. 207(1) TFEU clarifies the scope of such competence as including, without further qualification.”* In Chiara Cellerino, *EU Common commercial policy in context: opportunities and challenges of a changing landscape* in *Diritto del Commercio Internazionale*, fasc.3, (2015), at 6

and services, and the commercial aspects of intellectual property, foreign direct investment [...]”<sup>36</sup>. As a result, Lisbon Treaty makes the competence of CCP broader.

From that moment ahead, CCP has been falling within the exclusive competence of the Union: in this way, the question of the competence that had started in the 1994 with the ratification of WTO’s agreements has ended; the only question that persists is the one regarding FDI<sup>37</sup>.

Regarding External Action, the link between CCP and External Action is already given by the position of the provisions: Articles 205, 206 and 207 are listed under Title II (“Common commercial policy”), Part Five of the TFEU which reforms Articles 131 and 133 of the Maastricht treaty<sup>38</sup>. The inclusion of the provision in part 5 suggests that the nature of the CCP is strictly connected to the External Action<sup>39</sup> of the EU, intending as the diffusion of the values and principles on which the EU is founded out of EU<sup>40</sup>, into territories which are not part of the Union.

In particular, a connection between CCP and External Action is present in Article 21 TFEU<sup>41</sup> which states that “*encourage the integration of all countries into*

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<sup>36</sup> *Ivi* 22

<sup>37</sup> See *infra* §

<sup>38</sup> In particular, Lisbon Treaty abolishes the part of the provision that contains a reference to the favourable effects of the abolition of custom duties. Further in Markus Krajewski, *The Reform of the Common Commercial Policy.* EU Law after Lisbon, Oxford University Press, (2012), Oxford.

<sup>39</sup> “One way in which the draft Treaty seeks to integrate the Community and the Union, and their differing policies is by establishing a framework of principles, values and objectives, on which the Union is based. The statement of values in particular, perhaps, is also designed to establish an identity for the Union; a defining identity which will be promoted both to its citizens and to the outside world.” In Marise Cremona, *The Draft Constitutional Treaty: External Relations and External Action*, Common Market Law Review, vol. 40, no. 6, (2003), at 1348

<sup>40</sup> “A series of Treaty articles establishes principles, values and general objectives which are to guide, or constrain, EU external action in general and its external economic policy in particular.” In Marise Cremona in *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy*. in European Yearbook of International Economic Law” (2017), at 10

<sup>41</sup> Article 21 TEU “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law [...]”

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

*the world economy, including through the progressive abolition of restrictions on international trade.*” In this way, CCP was included in external action of the EU.

The role of the CCP in the External Action is reaffirmed in Article 207 TFEU which states that: “[...] *The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*” In this way and for the first time, Lisbon treaty expressly connected common commercial policy to the external action of the EU<sup>42</sup> and recognizes as its objective the role of vehicle of EU principles.

Starting from this statement, we can divide the objectives of Lisbon Treaty in two categories<sup>43</sup>: specific policy objective and general external objective.<sup>44</sup>

The specific policy objective of the CCP is confirmed in uniform principle which corresponds to the inner nature of the CCP<sup>45</sup>. In this respect, Article 206 TFEU states that “*the harmonious development of the world trade, the progressive abolition of restrictions on international trade and lowering of customs or other barriers.*”<sup>46</sup>

Now, trade liberalization is mandatory<sup>47</sup> for the Union and the Union is bound to pursue it as an objective of the CCP<sup>48</sup> and in accordance with the general principles of the Union too.<sup>49</sup>

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(h) *promote an international system based on stronger multilateral cooperation and good global governance.*3. *The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.*”

<sup>42</sup> “*The Lisbon Treaty for the first time gives the EU an explicit mandate for external action, and a set of objectives to which that action should be directed and principles by which it should be guided.*” In Marise Cremona, in *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU's Common Commercial Policy*, in *European Yearbook of International Economic Law* (2017), at 7

<sup>43</sup> One of the objectives of the common commercial policy can be recognize in the internal objective. In this sense, the common commercial policy pursues to a uniformity of the internal rules as to achieve a regulatory framework that assure the access to third country goods, and investors in EU. On the topic see Marise Cremona, in *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU's Common Commercial Policy*, in *European Yearbook of International Economic Law* (2017).

<sup>44</sup> On the topic see Markus Krajewski, *The Reform of Common Commercial Policy*, in *EU after Lisbon*, edited by Andrea Biondi and Piet Eeckhout with Stefanie Ripley, Oxford University Press, (2012)

<sup>45</sup> “*The first is perhaps not so much an objective in itself as a reflection of the underlying rationale of the CCP: the CCP is to be based on “uniform principles”*” In Marise Cremona, *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU's Common Commercial Policy*, *European Yearbook of International Economic Law* (2017), at 8

<sup>46</sup> In Markus Krajewski, *The Reform of Common Commercial Policy*, in *EU after Lisbon*, edited by Andrea Biondi and Piet Eeckhout with Stefanie Ripley, Oxford University Press, (2012)

<sup>47</sup> “*The mandatory nature of the objective of liberalization becomes obvious, if Article 206 TFEU*”. “*This is emphasised by the recognition of an exclusive competence of the EU in the field as stated in article 3 (1) TFEU [...] The requirement of uniformity obtains further importance in light of the explicit recognition of the exclusive nature of Union competence in the field of the CCAT.*” In Angelos Dimopoulos, *The Effects of the Lisbon treaty on the Principles and Objectives of the Common Commercial Policy* 15 *European Foreign Affairs Review*, Issue 2, (2010) at 160

<sup>48</sup> “*The change of the verb indicates that the drafters of the Lisbon Treaty intended to modify the aspirational character of the liberalization objective.*”<sup>48</sup> First, the linguistic difference between the words ‘aim’ and ‘shall’

As the general external policy objective of the CCP, both Articles 3(5) TEU<sup>50</sup> and 21 TEU<sup>51</sup> make reference to classic trade policy objective<sup>52</sup>: the aim to provide a “*fair and free trade*” and the pursue to “*integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade*” are recognized as objectives of CCP. Although there is not a constitutional significance, this statement provides to connect CCP and economic development in order to create a broader integration.<sup>53</sup>

Moreover, not only the provision presents CCP as a tool for economic development but trade liberalisation as in Article 21 is a tool for granting development objectives.<sup>54</sup>

In conclusion, Lisbon Treaty introductions and novelties help to have a clear general framework of the CCP<sup>55</sup>: first, CCP is one of the pillars of the External Action: consequently, the policy and the negotiations that EU conducts in the matters that fell within CCP are the expression of the values and objectives of the EU in third

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*indicates that liberalization is no longer a non-binding objective of the CCP, the pursuance of which rests in the hands of the Union political organs. On the contrary, Union institutions are bound to formulate the CCP in a way that has positive effects on trade and FDI liberalization.”* In Angelos Dimopoulos, *The Effects of the Lisbon treaty on the Principles and Objectives of the Common Commercial Policy*, (2010) 15 *European Foreign Affairs Review*, Issue 2, at 160

<sup>49</sup> See note 41

<sup>50</sup> Article 3(5) TEU “*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*”

<sup>51</sup> Article 21 TEU “*The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*”

<sup>52</sup> “*It should be noted that articles 3(55) and 21 TEU contain references to classical trade policy objective: article 3(5) refers to “free and fair trade” and article 21 TEU calls for an encouragement of the integration of all countries into the world economy which shall be achieved inter alia “[...] through the progressive abolition of restriction international trade”.* In Krajewski Markus, *The Reform of Common Commercial Policy*, in *EU after Lisbon*, edited by Andrea Biondi and Piet Eeckhout with Stefanie Ripley, Oxford University Press, 2012

<sup>53</sup> “[...] *provide that the Union shall contribute to ‘free and fair trade’ and pursue the. The progressive abolition of trade restrictions is explicitly recognized as an objective. However, trade liberalization as such is not an objective of EU external action of constitutional significance, as it is linked with the broader objective of integrating third countries into the world economy.*” In Angelos Dimopoulos, , *The Effects of the Lisbon treaty on the Principles and Objectives of the Common Commercial Policy'* (2010) 15 *European Foreign Affairs Review*, Issue 2, at 171

<sup>54</sup> “*Given that the latter objective has been one of the objectives of development cooperation,*<sup>54</sup> Article 21 TEU suggests that trade liberalization is the basic tool for serving a development objective.” In Angelos Dimopoulos, , *The Effects of the Lisbon treaty on the Principles and Objectives of the Common Commercial Policy'* (2010) 15 *European Foreign Affairs Review*, Issue 2, at 171

<sup>55</sup> “*First, it definitely resolves the issue of the nature of common commercial policy by listing it among the a priori exclusive competences of the Union under art. 3(1)(e) TFEU. Secondly, art. 207(1) TFEU clarifies the scope of such competence,*” In Chiara Cellerino, *EU Common commercial policy in context: opportunities and challenges of a changing landscape* in *Diritto del Commercio Internazionale*, fasc.3, 2015, pag. 788

countries. Second, including intellectual property and services was the expression of harmonisation of EU CCP in the context of international trade for a of WTO.

### 1.1.3 Scope and structure of Common commercial policy: trade and investment

The scope of CCP as provides by Article 207(1) TFEU are trade in goods, services, commercial aspects of intellectual property and Foreign Direct Investment (FDI).<sup>56</sup>

While trade in goods has recognized within the exclusive competence of the EU since Rome Treaty, the novelties are represented by the inclusion of trade in services, intellectual property and foreign direct investment.<sup>57</sup>

As said, trade in services was excluded originally: in Opinion 1/78, the ECJ only clarified that the provisions regarding services under Article 1.2 GATS were to be included in the Community competence pursuant to Article 133(5) TEC. The exception was the one of «sensitive services», which fell under the shared competence of the Community and Member States pursuant to Article 133(6).<sup>58</sup> Lisbon Treaty included trade in service within the CCP and with the only exception of transport sector.<sup>59</sup>

Regarding Intellectual Property<sup>60</sup>, Article 207 TFEU refers to the “commercial aspect” of the matter; it means that the only aspect of intellectual property that falls within the CCP- and consequentially in the exclusive competence of the Union- are the

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<sup>56</sup> “The first sentence of article 207(1) TFEU holds that the scope of the common commercial policy includes trade agreements relating to trade in goods and services and the commercial aspects of intellectual property as well as foreign direct investment.” In Markus Krajewski., *The Reform of Common Commercial Policy*” in *EU after Lisbon*, edited by Andrea Biondi and Piet Eeckhout with Stefanie Ripley, Oxford University Press, (2012), at 299

<sup>57</sup> On the competence regarding FDI see also Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment—How will the New EU Competence on FDI affect the Emerging Global Regime?* Journal of International Economic Law, Volume 15, Issue 1, 1 March 2012, Pages 51–84,

<sup>58</sup> In Chiara Cellerino, *EU common commercial policy in context: opportunities and challenges of a changing landscape* in *Diritto del Commercio Internazionale*, fasc.3, 2015, pag.783,

<sup>59</sup> “A significant exception remains the transport sector, according to the exclusion provided under art. 207(5) TFEU.” In Chiara Cellerino, *EU Common Commercial Policy in context: opportunities and challenges of a changing landscape*, in *Diritto del Commercio Internazionale*, fasc.3, 2015, at 790

<sup>60</sup> On this topic, see DG trade website available at <http://ec.europa.eu/trade/>

ones that refer to international trade<sup>61</sup>; moreover, it has been underlined the link between commercial aspect of intellectual property and WTO' s TRIPS.<sup>62</sup>

Regarding the exclusive competence of the EU for Foreign Direct Investment, the question is still in progress: before Lisbon Treaty entered into force, the discipline of Investment was competence of the Member States which used to stipulate Bilateral Investment Treaties (BIT) in order to protect investments through a clear and shared discipline in accordance with the third state.<sup>63</sup>

The necessity to provide a common action is the ratio that justifies the inclusion of FDI in the Article 207 TFEU, providing that an exclusive competence of the EU does not mean a complete exclusion of the Member States but that the negotiation is completely conducted by the Commission in accordance of Article 218 TFEU.<sup>64</sup>

Although Member States cannot be excluded, however the autonomy of the EU in External Action as to be granted.<sup>65</sup> As a result, the new competence will be implemented gradually. In fact, nowadays there are numerous BITs still valid between Member states and third countries and the shift of competence will be occurred only when those BIT's will end.<sup>66</sup>

The necessity of coordinate the legal provision of Article 207 TFEU with the prerogative of Member States led to ask the ECJ to give an opinion on the matter

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<sup>61</sup> "Applying this to IPR, only those rules "with a specific link to international trade" would fall within the scope of the CCP" in Marise Cremona, *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU's Common Commercial Policy*. In: Bungenberg M., Krajewski M., Tams C., Terhechte J., Ziegler A. (eds) *European Yearbook of International Economic Law* 2017. *European Yearbook of International Economic Law*, vol 8. Springer, Cham, at 19

<sup>62</sup> For someone it is a dynamic link whose function is to connect exclusive competence to all the pillars. "It is therefore more appropriate to assume that article 207 TFEU contains a dynamic reference to the TRIPS agreement. In conclusion, the treaty of Lisbon extends the exclusive competence of the European Union to all their "pillars" of the WTO (trade in goods, trade in services, trade-related aspects of intellectual property rights)." In Markus Krajewski, *The Reform of Common Commercial Policy*, in *EU after Lisbon*, edited by Andrea Biondi and Eeckhou, Piet t with Stefanie Ripley, Oxford University Press, (2012), at 301

<sup>63</sup> In Elena Sciso, *Appunti di diritto internazionale dell'economia*, Giappichelli Editore (2016), Giappichelli Editore 2016, at 196

<sup>64</sup> "Esclusiva" non significa necessariamente che gli Stati siano esclusi tout court dalla conclusione degli accordi commerciali e di tutela degli investimenti. Competenza esclusiva implica che la Commissione detiene il monopolio nella conduzione di negoziati di accordi la cui ratifica" In Daniele Gallo, *Portata, estensione e limiti del nuovo sistema di risoluzione delle controversie in materia d'Investimenti nei recenti accordi sul libero scambio dell'Unione Europea*, in *Diritto del Commercio Internazionale*, fasc.4, (2016), at 828

<sup>65</sup> "A prescindere dalla delimitazione del concetto di "investimento estero diretto", va rilevato che, in ragione del principio delle competenze attribuite, l'attività autonoma sul piano esterno degli Stati membri non può ostacolare, né pregiudicare l'esercizio di una competenza dell'Unione, né tanto meno il suo *acquis*" In Roberto Baratta, *La politica commerciale comune dopo il Trattato di Lisbona* in *Diritto del Commercio Internazionale* (2012),at 5

<sup>66</sup> "La politica commerciale comune prospettata dalla Commission non potrà che essere realizzata in modo graduale, negoziando con gli Stati terzi nuovi e più comprensivi accordi i man mano che quelli in vigore verranno in scadenza. ", In Elena Sciso, "Appunti di Diritto Internazionale dell'Economia", Giappichelli editore (2016), at 208

In particular, the EU classifies the FDI in two types<sup>67</sup>: foreign direct investment (FDI), where an investor sets up or buys a company in another country; portfolio investment, where an investor buys equity in or debt of a foreign company.<sup>68</sup> The question arose about the competence to conduct the first type of the investment and it was answered by Opinion 2/15<sup>69</sup>

The exclusive competence in CCP reflected in the decision-making procedure too. The decision-making procedure when dealing about commercial policy- both in multilateral or bilateral context- is an inter-institutional one, which involves Commission, Council and Parliament. (the “trialogue”).<sup>70</sup>

The procedure is explained in Article 218 TFEU and starts with the authorization to negotiate made by Council.<sup>71</sup>

During the rounds of negotiation, the Commission refers about the ongoing negotiation both to Council and to European Parliament (EP). The role of the EP in the process of decision is one of the relevant aspect introduced by Lisbon Treaty<sup>72</sup> for two reasons: one is that EP together with the Council acts as a Legislator<sup>73</sup> and two because the EP has to approve the ratification of international agreements.

Regarding the Council, the Commission refers to the Trade Policy Committee<sup>74</sup>- which is a special committee to which the Commission reports about

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<sup>67</sup> “Foreign investment is when businesses or individuals invest in another country. There are two main types of foreign investment:

foreign direct investment (FDI) – where an investor sets up or buys a company in another country

portfolio investment: where an investor buys equity in or debt of a foreign company. The investor does not necessarily have a long-term interest in the company or an influence over its management.” In DG trade website available at <http://ec.europa.eu/trade/policy/accessing-markets/investment/>

<sup>68</sup> DG Trade Website <http://ec.europa.eu/trade/policy/accessing-markets/investment/>. On Foreign Direct investment’ s notion in EU see 140. Ortino, Federico, and Piet Eeckhout, *Towards an EU Policy on Foreign Direct Investment*, in *EU Law after Lisbon*, Oxford University Press, (2012).

<sup>69</sup> More infra chapter 3

<sup>70</sup> Article 207 TFEU “The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.”

<sup>71</sup> Article 207(3) TFEU indicates the procedure lists in article 218 TFEU as valid.

<sup>72</sup> “Uno degli sviluppi di maggior rilievo imposti dal Trattato di Lisbona riguarda il processo decisionale, nel quale un ruolo molto più incisivo è stato conferito al Parlamento europeo che si è quindi rafforzato sotto due profili. Da un lato, gli atti normativi di politica commerciale sono soggetti alla procedura legislativa ordinaria: Parlamento europeo e Consiglio agiscono quindi in veste di legislatori; dall'altro, all'istituzione parlamentare è chiesto di partecipare all'approvazione degli accordi internazionali dell'Unione. Un'accresciuta democraticità della disciplina ne è la conseguenza più evidente.” In Roberto Baratta, *La politica commerciale comune dopo il Trattato di Lisbona* in *Diritto del Commercio Internazionale* (2012), at 7

<sup>73</sup> As in Article 207 TFEU (2): “The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.” Baratta, Roberto, “La politica commerciale comune dopo il Trattato di Lisbona”

<sup>74</sup> As in article 207 (3) TFEU trade policy committee (TPC) is “...a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress

the negotiation. It is appointed by the Council and it is composed by representatives of the Member States in order to coordinate its work with the Member States positions. On the other side, the Commission refers about the negotiations to the Parliament discussing with the European Parliament's International Trade Committee (INTA)<sup>75</sup>.

The conclusion of negotiation has to be authorised by the Council and the European Parliament. The Council acts in qualified majority throughout the procedure.<sup>76</sup>

The result is that CCP in Lisbon Treaty is characterized by exclusive competence of the EU: the Commission conducts negotiation multilaterally as well as bilaterally.<sup>77</sup> The multilateral forum is represented by WTO;<sup>78</sup> on the other side, bilateralism refers to the negotiation between the EU, represented by the Commission,<sup>79</sup> and third countries.

## 2. 1 Multilateralism: A general overview of Common Commercial Policy and WTO

In this paragraph it is presented the role of EU in the multilateral context. First, it is provided for an illustration of the relationship and the role of EU in World Trade Organization (WTO); second, it is provided a presentation of the EU strategy in the multilateral context after the last round of negotiation in the WTO forum (Doha round).

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of negotiations.” More about TPC in Council website available at <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/trade-policy-committee/http://ec.europa.eu/trade/policy/eu-and-wto/>

<sup>75</sup> “The Commission regularly informs the European Parliament of key WTO issues, by reporting to the International Trade Committee (INTA)” From DG Trade website available at <http://ec.europa.eu/trade/policy/eu-and-wto/>

<sup>76</sup> Article 218 (8) TFEU “The Council shall act by a qualified majority throughout the procedure.”

<sup>78</sup> “The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world’s trading nations and ratified in their parliaments. The goal is to ensure that trade flows as smoothly, predictably and freely as possible.” From WTO website available at [https://www.wto.org/english/thewto\\_e/thewto\\_e.htm](https://www.wto.org/english/thewto_e/thewto_e.htm)

<sup>79</sup> “Trade outside the EU is an exclusive responsibility of the EU, rather than the national governments of member countries. This means the EU institutions make laws on trade matters, negotiate and conclude international trade agreements.” DG Trade website available at <http://ec.europa.eu/trade/policy/policy-making/>

### 2.1.1 European Union: role and trade power in the international and multilateral context

EU joined the WTO as original member in 1995<sup>80</sup>, together with the Member States. The enter of EU in WTO was made more complicated by the new shape that WTO assumed at the end of negotiations.

WTO is formed by five multilateral agreements and all of them are binding for all the states that become parties of WTO<sup>81</sup>: not only the trade in goods was regulated (GATT '47<sup>82</sup>) but also trade in services (GATS<sup>83</sup>) and intellectual property rights (TRIPS<sup>84</sup>).<sup>85</sup>

The European Community became party of the GATT '47 thanks to exception for custom Unions and free trade areas provided by Article XXIV of GATT '47.<sup>86</sup> Nowadays, Article XXIV GATT '94, GATT'94's principles<sup>87</sup> and Article V GATS grant the possibility to be part of the agreements for regional trade areas: in the Articles is set a system of control of the compatibility within regional trade areas. Until 1994, the situation was that both Member States and the Community were members of GATT; as a result, there was a tacit consent of the others party that allow to a *de facto* change shift of the change of Community in the works of GATT.<sup>88</sup>

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<sup>80</sup> "The European Union (until 30 November 2009 known officially in the WTO as the European Communities for legal reasons) has been a WTO member since 1 January 1995. The 28 Member States of the EU are also WTO members in their own right. The EU is a single customs Union with a single trade policy and tariff. The European Commission — the EU's executive arm — speaks for all EU member States at almost all WTO meetings." From WTO website available at <http://ec.europa.eu/trade/policy/policy-making/>

<sup>81</sup> "At the contrary, plurilateral agreements as GPA did not reach the consensus of all the states; they are not binding, and new members can accept or not. More in Elena Sciso, "Appunti di Diritto Internazionale dell'Economia", Giappichelli (2016)

<sup>82</sup> General Agreement on Tariff and Trade signed in 1994 integrated the normative text of GATT'47, which was the agreement that regulated international trade since 1947. The fundamental principles governing GATT are reciprocity and non-discrimination.

<sup>83</sup> General Agreement on Trade in services is the first multilateral agreement that regulated the international trade in services. The general principles applicable are most favourite nations and principle of transparency. Specific principles are provided for each sectors or supply provided. On the topic see Elena Sciso, *Appunti di diritto internazionale dell'economia* pagina Giappichelli Editore (2016)

<sup>84</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights. As in Elena Sciso, *Appunti Di Diritto Internazionale dell'economia*, Giappichelli Editore (2016), the difference with the others multilateral agreement is that the TRIPS is an example of "positive approach": not only imposed what not to do but give a decline that the parties must apply.

<sup>85</sup> Public procurement negotiations started only in 1994. Further in chapter 2

<sup>86</sup> "Il GATT consentiva (com'è tutt'ora previsto nel sistema OMC) l'instaurazione tra le parti di questi vincoli di integrazione economica, in deroga al generale principio del trattamento n.p.f., purchè tali accordi contribuissero effettivamente a favorire la liberalizzazione degli scambi tra i paesi parti dell'accordo regionale[...]" In Elena Sciso, *Appunti Di Diritto Internazionale Dell'economia*, Giappichelli Editore, (2016) at 285

<sup>88</sup> In Sciso Elena, "Appunti Di Diritto Internazionale Dell'economia", Giappichelli Editore, 2016

As said, the Community held exclusive competence on in Trade in goods but to have the membership of WTO it is requested to ratify all the five agreements due to their binding nature.

Consequently, when Uruguay Rounds started, the ECJ was called by the Commission to give an opinion on the competence regarding the new multilateral agreements. There were to different opinions: from one side, the Commission sustained that the competence fell within the exclusive one of the EU; from the other side, the Council sustained that the GATT sectors stayed in the competence of the Member States while it was questionable the competence on the new agreement on services and tariff.

With Opinion 1/94, the Court adopted the thesis of the Council: only GATT sectors fell within the exclusive competence of the EU.<sup>89</sup> Although the exclusive competence of the EC was limited to GATT'94 and a shared competence was recognized for the issues regulated by GATS and TRIPS, the EU has the exclusive competence in WTO while GATS and TRIPS still fell within shared competence with Member States.<sup>90</sup>

The result was that both Member States and the EU were part of the WTO, but GATT sector was exclusive competence of the EU and GATS and TRIPS of shared competence; the result was that this situation contributes to emphasised the question of the effective matters of CCP.<sup>91</sup> The situation ended with Lisbon Treaty: as mentioned above, Article 207 TFEU recognizes as part of CCP the “[...] *conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment*”.<sup>92</sup>

As a result, in the multilateral context the EU is represented by the Commission in the Ministerial Conference of the WTO and in the other organs of the WTO e.g. General Council and Dispute Settlement Body.

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<sup>89</sup> The single undertaking approach imposed to ratify all of the five agreements that compose WTO; as a consequence, the European Community ratified the five agreements as an original member of the Organization. More on the topic in Elena Sciso, *Appunti Di Diritto Internazionale Dell'Economia*, Giappichelli Editore (2016)

<sup>90</sup> From DG Trade website available at [http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_150988.pdf](http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150988.pdf)

<sup>91</sup> On this issue, see Roberto Baratta, *La politica commerciale comune dopo il Trattato di Lisbona*, in *Diritto del Commercio Internazionale* (2012),

The EU adopted the aim of liberalization of trade as well as WTO<sup>93</sup>; moreover, in its CCP, the EU demonstrated to have adopted as its objectives the so called “non-trade values” as the promotion of a fair and sustainable trade: the aim is to conduct these objectives through a common system of rules.<sup>94</sup>

Recently the EU has released a document<sup>95</sup> in which the Commission stands for the modernisation of WTO.

In fact, the role of forum of discussion of WTO decreased. In the last years:<sup>96</sup> after Doha, many have called for a fall in multilateral system represented by WTO<sup>97</sup>; as a result, the EU presented three possible directions to modernise WTO and to solve the crisis.

The first one is about a new system of rules in order to balance the system, to improve the action of removing barrier to trade and investment and to improve the spread of the sustainability<sup>98</sup>; the second one is about to re-enforce the transparency in notification system; the third is a proposal to innovate Dispute Settlement Body<sup>99</sup> mechanism and in particular, the Appellate body<sup>100</sup>, which nowadays is in stall.

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<sup>93</sup> “The World Trade Organization (WTO) is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.” [...] Lowering trade barriers is one of the most obvious ways of encouraging trade; these barriers include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively.” From WTO website available at [https://www.wto.org/english/thewto\\_e/thewto\\_e.htm](https://www.wto.org/english/thewto_e/thewto_e.htm)

<sup>94</sup> “The EU’s objectives at the WTO are to: keep the world’s trading system fair, predictable and based on common rules; modernise the world’s trade markets so European goods, services and investment can benefit; follow the common WTO rules, and make sure others also play by the rules; make the WTO more open by interacting with both non-members and other international organisations; bring developing countries into the WTO, its decision-making, and the global economy reinforce the WTO’s support for sustainable trade policies worldwide. The European Commission has also put forward a first set of ideas to modernise the WTO and to make world trade rules fit for the challenges of the global economy. Without prejudice to the EU’s final position, these ideas relate to three key areas: updating the rule book on international trade to capture today’s global economy; strengthening the monitoring role of the WTO; overcoming deadlock on the WTO dispute settlement system.” In DG Trade website available at <http://ec.europa.eu/trade/policy/eu-and-wto/>

<sup>95</sup> From Concept paper to modernise WTO” available at [http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)

<sup>96</sup> “Unfortunately, the rules-based multilateral trading system is facing its deepest crisis since its inception. For the first time, the basic tenets of the WTO, both in setting the essential rules and structure for international trade and in delivering the most effective and developed dispute settlement mechanism of any multilateral organisation, are threatened.” In Concept paper to modernise WTO [http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)

<sup>97</sup> “The failure of the Doha Round, and ultimately of multilateralism in international trade relations, has led developed countries to explore alternative means to achieve their goals.” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016).

<sup>98</sup> From Concept paper to modernise WTO

Available at [http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)

<sup>99</sup> The issue started with the block of the appointment of a judge acted by the USA: “The dispute settlement function of the WTO is at grave danger, and swift action by Members is needed to preserve it. If the United States’ blockage of Appellate Body appointments continues, it will undermine the WTO dispute settlement at the latest by December 2019. At that point in time, there will be less than 3 Appellate Body members left, which is the minimum number required for the Appellate Body to hear an appeal. Without a functioning Appellate Body, any party to the dispute may attempt to block the adoption of panel rulings (by appealing it), so – if no action is taken – this may undermine the operation WTO dispute settlement as a whole.” In Concept Paper to modernise WTO

The crisis of the Appellate body started when the United States declared that their position in WTO is of “*disengagement*”<sup>101</sup>; as a result, the USA are blocking the procure of the nomination of the new judges of the Appellate Body. Apparently, the reason seems to be a general complaint of the USA against a system too much “active” that impedes them to solve some difficulties with other countries that are their “competitors”.<sup>102</sup>

In respect to the correct function of DSB, the EU proposal for the issue is based on a general revision of the rules<sup>103</sup> concerning the functioning of the Appellate Body contained in the Dispute Settlement Understanding. For instance, changing the 90-days rule in Article 17.5 of the DSU<sup>104</sup>, transitional rules for outgoing Appellate Body members<sup>105</sup>, findings unnecessary for the resolution of the dispute<sup>106</sup>, the meaning of municipal law as the issue of fact<sup>107</sup>. Despite all this issue, the EU continues to considerate WTO as the forum of international trade discussion.

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Available at [http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)

<sup>100</sup> “*The Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It is a standing body of seven persons that hears appeals from reports issued by panels in disputes brought by WTO Members. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel, and Appellate Body Reports, once adopted by the Dispute Settlement Body (DSB), must be accepted by the parties to the dispute. The Appellate Body has its seat in Geneva, Switzerland.*” From WTO website

available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm)

<sup>101</sup> Giorgio Sacerdoti, *Multilateralismo in crisi? L'Organizzazione Mondiale del Commercio di fronte alla sfida di Trump*, in *Diritto del commercio internazionale*, fasc.2, 1 giugno 2018, at 385

<sup>102</sup> “*Non sono chiari i motivi specifici di tale atteggiamento se non un segnale di insoddisfazione verso un sistema globale di regole (“rule-based”), che impedirebbe agli Stati Uniti di gestire confronti e scontri coi loro antagonisti (leggi: Cina) sul piano puramente bilaterale (soluzioni “power-based”, come era il GATT). Ammesso e non concesso che in un mondo globale multipolare i più forti, almeno commercialmente, siano tuttora gli Stati Uniti. Gli Stati Uniti si dichiarano insoddisfatti del funzionamento dell'Appellate Body, lamentando un non meglio precisato suo “attivismo giudiziario”, nonostante la serie di vittorie riportate di recente contro Cina, India, Messico, Indonesia. Tuttavia, non precisano quali riforme vorrebbero.*” In Giorgio Sacerdoti, *Multilateralismo In Crisi? L'organizzazione Mondiale Del Commercio Di Fronte Alla Sfida Di Trump*, *Diritto Del Commercio Internazionale*, Fasc.2, 1 Giugno 2018, at 392

<sup>103</sup> “*First stage: comprehensive amendment of the provisions of the DSU relating to the functioning of the Appellate Body addressing all points of concern with the “approach” of the Appellate Body*”

<sup>104</sup> “*Changing the 90-days rule in Article 17.5 of the DSU by providing an enhanced transparency and consultation obligation for the Appellate Body. In particular, Article 17.5 could be amended to provide that “In no case shall the proceedings exceed 90 days, unless the parties agree otherwise”.*” Ivi at 18

<sup>105</sup> “*Codifying Rule 15 (or similar) in the DSU, thereby addressing head on the US concern that this Rule was not approved by WTO Members. For example, the DSU could provide that an outgoing Appellate Body member shall complete the disposition of a pending appeal in which a hearing has already taken place during that member's term.*” Ivi at 18

<sup>106</sup> “*Modifying Article 17.12 of the DSU, according to which the Appellate Body “shall address each of the issues raised” on appeal. For instance, it could be added “to the extent this is necessary for the resolution of the dispute”. This would address concerns about Appellate Body making long “advisory opinions”, or “obiter dicta”, not necessary to resolve the dispute. Indirectly, this would also address the concern related to Article 17.5 DSU (90 days).*”

<sup>107</sup> “*It could be clarified that “issues of law covered in the panel report and legal interpretations developed by the panel” do not include the meaning of the municipal measures (even though they do and should include their legal characterisation under the WTO law). To that end, a footnote could be added to Article 17.6 of the DSU “For greater certainty [...]”*” Ivi at 18

### 2.1.2 Common commercial policy and Doha development agenda

The EU is committed in pursuing the aims that are settled in WTO; CCP is engaged in the promotion of the so called “non-trade values” and in the sustainment to least developed countries.

In particular, the EU position regarding WTO is of total recognition of its role of centre of international trade policy.<sup>108</sup>

The commitment of the EU was confirmed in the last round of trade negotiation that took place in Doha, known also as “Doha agenda development”.<sup>109</sup> Although someone stated that the commitment resulted after Doha are now “*dead letters*” and that new themes should be at the attention of discussion -such as e-commerce or trade in services – Doha declaration is an interesting prospect to understand the EU’s CCP.

Two points of the declaration require particular attention: point 3 on the aids to least developed countries and point 4 on the sustainable development.

At point 3<sup>110</sup> of the Ministerial declaration it is stated that WTO is committed “[...] *to addressing the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system.*”

The statement finds a reflection in EU CCP: as an example, EU adopted a version of the Generalised System of preferences (GSP) and Generalised System of Preferences+ (GSP+). GSP are concessions made by EU to developing countries to pay no duty or fewer ones in order to grant access to EU market in more favourable conditions. GSP+ are the concessions made by EU to not to pay duty over 66% tariff

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<sup>108</sup> “...together with other WTO Members, will work in the coming months to make sure that the WTO reaffirms its role as the centre of international trade policy and delivers on the issues that are most urgent for traders worldwide.” Ivi at 18

<sup>109</sup> “The work programme covers about 20 areas of trade. The Round is also known semi-officially as the Doha Development Agenda as a fundamental objective is to improve the trading prospects of developing countries.” From WTO website

available at [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm#development](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development)

<sup>110</sup> “We recognize the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We recall the commitments made by ministers at our meetings in Marrakesh, Singapore and Geneva, and by the international community at the Third UN Conference on Least-Developed Countries in Brussels, to help least-developed countries secure beneficial and meaningful integration into the multilateral trading system and the global economy. We are determined that the WTO will play its part in building effectively on these commitments under the Work Programme we are establishing.” WTO Ministerial Declaration, WT/MIN (01)/DEC/W/114 November 2001 (01-5769)

Available at [http://www.sice.oas.org/trade/WTODoha/mindecl\\_e.asp](http://www.sice.oas.org/trade/WTODoha/mindecl_e.asp)

line. In order to be eligible for the exemption the country must fulfil two criteria: the sustainable criteria and the development criteria.<sup>111</sup>

In point 4<sup>112</sup>, Doha declaration puts an important brick in the wall of a sustainable and environmental-friendly trade policy: “[...] *We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement [...] and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.*”<sup>113</sup>

As a result, sustainable development is one of the pillars of the CCP: “*Trade for all*” states that “*The EU Treaties demand that the EU promote its values, including the development of poorer countries, high social and environmental standards, and respect for human rights, around the world.*”

In conclusion, the EU in its 2016-2020 strategic plan recognizes the key role of WTO and is keen to collaborate with it<sup>114</sup>: the objectives adopted by EU and that recalled the ones of WTO are the same that characterized the bilateral policy of the EU. In particular, “*Trade for all strategy*” recognises that Free Trade Agreements have a key role in trade and non-trade values promotion.

### **3. Bilateralism: common commercial policy as external action of the European Union**

As in the above section, Article 21 TFEU and Article 206 TFEU have put an effort in promoting the role of the CCP in the context of External Action of the EU.

In this section, it is illustrated the role of the EU in the relationship with the third countries.

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<sup>111</sup> For more about GSP and GSP + see DG Trade website available at <http://trade.ec.europa.eu/tradehelp/gsp>

<sup>112</sup> “*We recognize the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We recall the commitments made by ministers at our meetings in Marrakesh, Singapore and Geneva, and by the international community at the Third UN Conference on Least-Developed Countries in Brussels, to help least-developed countries secure beneficial and meaningful integration into the multilateral trading system and the global economy. We are determined that the WTO will play its part in building effectively on these commitments under the Work Programme we are establishing.*” Ivi 20

<sup>113</sup> Ivi 20

<sup>114</sup> “*As the EU's prime negotiator and guardian of an effectively implemented EU trade policy, DG Trade's mission is largely dependent on close working relations with its partners, both inside and outside the Commission. In playing its role in trade policy, DG Trade works very closely with the European Parliament and the Council of the European Union and other international organisations, such as the WTO and OECD*” Ibidem

First, it is examined Europe 2020 Strategy, the document promoted by Barroso Commission<sup>115</sup> and that pursued a new approach to External Action after Lisbon Treaty and after the global economic and financial crisis; second, the application of Europe 2020 Strategy's principles in trade policy within the "*Trade for all strategy*". Then, it is provided an overview of the types trade agreements that EU negotiates with third countries; in conclusion, some aspects of the Free Trade Agreements are introduced.

### **3.1.1 Europe 2020 strategy and Trade for all strategy: common commercial policy sustainable and growth-oriented**

Europe 2020 is the name of the strategy presented by the EU Commission in 2010 and that established the guidelines for the EU policy for the decade 2010-2020.<sup>116</sup>

As a result of the negative mark left by the global finance and economic crisis of 2008<sup>117</sup>, the EU Commission stated that a "*business as usual*"<sup>118</sup> approach had not been working anymore and indicated five targets in order to move on from the stall. These targets are employment, research and innovation, climate change and energy, education and combating poverty.<sup>119</sup>

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<sup>115</sup> Barroso Commission's, chaired by José Manuel Barroso, stated its mandate from 2010 to 2014.

<sup>116</sup> "*The Europe 2020 strategy is the EU's agenda for growth and jobs for the current decade. It emphasises smart, sustainable and inclusive growth as a way to overcome the structural weaknesses in Europe's economy, improve its competitiveness and productivity and underpin a sustainable social market economy.*"

From European Commission website available at

[https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/europe-2020-strategy\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/europe-2020-strategy_en)

<sup>117</sup> "*The crisis is a wake-up call, the moment where we recognise that "business as usual" would consign us to a gradual decline, to the second rank of the new global order. This is Europe's moment of truth. It is the time to be bold and ambitious.*" In European Commission COM (2010) 2020Brussels, 3.3.2010

"COMMUNICATION FROM THE COMMISSION EUROPE 2020 A strategy for smart, sustainable and inclusive growth."

<sup>118</sup> "*Mainly, starting to move on from Lisbon strategy. Compared with the latter, EU promote the objects contained and aimed in Lisbon but with a major control upon Member state compliance to it. As in Annette Bongardt and Francisco Torres "The competitiveness rational, sustainable growth and the need to an enhanced economic cooperation", the main divergence between Lisbon Strategy and EU 2020 is "The Europe 2020 Strategy's main innovations with respect to the Lisbon Strategy can be resumed as a stronger recognition of interdependencies between national budgetary policies and national reform programmes (competitiveness and growth potential) and the attempt to increase pressure on bad performers."* Ibidem

<sup>119</sup> "*The Commission is proposing five measurable EU targets for 2020 that will steer the process and be translated into national targets: for employment; for research and innovation; for climate change and energy; for education; and for combating poverty. They represent the direction we should take and will mean we can measure our success.*" Ibidem

The key point of strategy is based on growth in three different shapes: smart growth<sup>120</sup> as to promote innovation and research; sustainable growth, as to promote a more competitive and greener economy; finally, an inclusive growth<sup>121</sup>, to foster high employment and territorial cohesion.<sup>122</sup>

These objectives were adopted in Commission to Trade's "*Trade for all strategy*"<sup>123</sup>. In these documents, Commissioner to Trade recognizes the role of trade - and of investment too- as a vehicle for sustainable, inclusive and smart growth; in general, it expresses the recognition of CCP key role in external action of the Union.<sup>124</sup>

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<sup>120</sup> "Smart growth means strengthening knowledge and innovation as drivers of our future growth. This requires improving the quality of our education, strengthening our research performance, promoting innovation and knowledge transfer throughout the Union, making full use of 2 The European Council of 10-11 December 2009 concluded that as part of a global and comprehensive agreement for the period beyond 2012, the EU reiterates its conditional offer to move to a 30% reduction by 2020 compared to 1990 levels, provided that other developed countries commit themselves to comparable emission reductions and that developing countries contribute adequately according to their responsibilities and respective capabilities. 3 The national poverty line is defined as 60% of the median disposable income in each Member State. EN 10 EN information and communication technologies and ensuring that innovative ideas can be turned into new products and services that create growth, quality jobs and help address European and global societal challenges. But, to succeed, this must be combined with entrepreneurship, finance, and a focus on user needs and market opportunities." *Ibidem*

<sup>121</sup> "Inclusive growth means empowering people through high levels of employment, investing in skills, fighting poverty and modernising labour markets, training and social protection systems so as to help people anticipate and manage change, and build a cohesive society. It is also essential that the benefits of economic growth spread to all parts of the Union, including its outermost regions, thus strengthening territorial cohesion. It is about ensuring access and opportunities for all throughout the lifecycle. Europe needs to make full use of its labour potential to face the challenges of an ageing population and rising global competition. Policies to promote gender equality will be needed to increase labour force participation thus adding to growth and social cohesion." *Ivi* 22

<sup>122</sup> "Europe 2020 puts forward three mutually reinforcing priorities: – Smart growth: developing an economy based on knowledge and innovation. – Sustainable growth: promoting a more resource efficient, greener and more competitive economy. – Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion." *Ivi* 22

<sup>123</sup> "However, trade policy can only help if supported by domestic reform. Structural reforms, less red tape, better access to finance and more investment in infrastructure, skills and research and development are essential to further strengthen the Union's capacity to take advantage of open markets. The EU's investment plan brings together these reforms at the EU level and will make European businesses, particularly SMEs, still more competitive. At the same time, recent experience has shown that structural reforms implemented by Member States also pay off in improved trade performance. The European Semester is thus an important tool to maximise synergies between trade and domestic policies." In Communication 'Trade for all – Towards a more responsible trade and investment policy' COM (2015) 457 14/10/2015

Available at [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>124</sup> "An effective trade policy should, furthermore, dovetail with the EU's development and broader foreign policies, as well as the external objectives of EU internal policies, so that they mutually reinforce each other. The impact of trade policy has significant repercussions on the geopolitical landscape — and vice versa. Furthermore, trade policy, combined with development cooperation, is a powerful engine of growth in developing countries. The EU will continue its longstanding commitment to sustainable development in its trade policies, contributing to the newly agreed global sustainable development goals (SDGs) under the 2030 Agenda for Sustainable Development. Finally, trade policy reinforces the functioning of the EU Internal Market linking its rules with the global trade system." *Ibidem*

The pillars of “*Trade for all strategy*” are creation of jobs<sup>125</sup>, implementation of a more efficient regulatory framework, a more transparent trade policy<sup>126</sup>, a trade and investment policy based on values and a new approach to negotiation.

Better implementation is to be intended in two different ways. First, better implementation means a better mechanism of negotiation and implementation of FTAs as a joint responsibility of all the European actors- Member States, Commission, European Parliament and stakeholders.<sup>127</sup> Second, better implementation refers to one of the objectives of the trade policy: to guarantee the fulfilment of EU rights and the avoidance of bad commercial practises<sup>128</sup> by EU partners.<sup>129</sup>

A trade and investment policy based on values reflects the role of CCP as a key element of the External Action of the EU. First, one of the aims of the Commission’s strategy in CCP is to promote its values, as human rights, environmental protection, high labour standards and health security<sup>130</sup>.

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<sup>125</sup> “*The EU and Member States have a responsibility to ensure that active labour market policies enable those who lose jobs to find new ones quickly, either in more competitive firms within their sector or in a new occupation altogether. The Commission pursues a strategy for jobs and growth aimed at facilitating the creation of new and sustainable jobs in the EU. Education policies are one key element and must support continuous skills development to prepare workers for future jobs. The EU’s Structural and Investment Funds support this objective.*” Ibidem

<sup>126</sup> “*Transparency is fundamental to better regulation. Lack of transparency undermines the legitimacy of EU trade policy and public trust. There is demand for more transparency in trade negotiations, particularly when they deal with domestic policy issues like regulation. The Commission has taken unprecedented steps in response to this demand, in particular in publishing EU negotiating proposals. In the same way, the Council has published the TTIP and TiSA negotiating directives. Furthermore, the Commission publishes on its website information on meetings with interested representatives held by all Members of the European Commission, their cabinets and directors-general.*” Ibidem

<sup>127</sup> “*Better implementation is a joint responsibility of the Commission, Member States, the European Parliament and stakeholders. The Commission should tackle issues like complex rules of origin and customs procedures, as well as insufficient information and support. Member States have a critical role to play in managing and implementing the EU’s customs regime and conducting trade and investment promotion. The European Parliament’s role will be particularly important for the implementation of the sustainable development chapters of trade agreements (see 4.2.2).*” Ibidem 23

<sup>128</sup> “*The EU also needs to stand firm against unfair trade practices through anti-dumping and anti-subsidy measures. This is necessary to uphold the EU’s commitment to open markets. The EU is one of the main users of trade defence instruments globally. It ensures that procedures are followed rigorously and takes all the Union’s interests into account.*” Ibidem 22

<sup>129</sup> In the respect, it is important to stress the key role that EU recognize to WTO as a forum of discussion: “*The EU must ensure that its partners play by the rules and respect their commitments. This is an economic as well as a political imperative. Constant monitoring and engagement by the Commission and Member States with partners is the basis for that. When diplomatic interventions fail, the EU does not hesitate to use the dispute settlement procedures of the WTO. The EU is one of the most active and successful users of WTO dispute settlement, prioritising cases based on legal soundness, economic importance and systemic impact.*” Ibidem 22

<sup>130</sup> “*The EU Treaties demand that the EU promote its values, including the development of poorer countries, high social and environmental standards, and respect for human rights, around the world. In this regard, trade and investment policy must be consistent with other instruments of EU external action. One of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection. This applies to external as well as internal policies, and so also includes trade and investment policy.*” Ibidem 23

Second, the Commission's aim is to promote a sustainable growth and inclusive growth.<sup>131</sup> the pursue of sustainable growth is translated into the pursue of sustainable development through four ways.

First, the revision of GSP + as a useful tool to promote human rights, sustainable development and good governance<sup>132</sup>; second the revision and negotiation at a multilateral level (WTO) of the EGA<sup>133</sup> in order to promote greener technology<sup>134</sup>; third to foster these objectives in FTAs' negotiations in order to include in the agreements specific provisions on these issues<sup>135</sup> and fourth, monitoring the implementation of those provisions.<sup>136</sup>

### 3.1.2 EU trade agreements: from custom Unions to Free Trade Agreements

EU agreements in CCP may have different nature: EU and third parties may sign an agreement to build up a custom Union, Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements and Economic Partnership Agreements; Partnership and Cooperation Agreements.

A Cooperation agreement provides for a general framework for bilateral economic relations between EU and third parties and leaves the tariff as they are.<sup>137</sup> Generally, this agreement goes beyond classical trade agreement: its legal basis it is

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<sup>131</sup> See *supra* 2.2

<sup>133</sup> "Eighteen participants representing 46 WTO members are engaged in negotiations seeking to eliminate tariffs on a number of important environment-related products. These include products that can help achieve environmental and climate protection goals, such as generating clean and renewable energy, improving energy and resource efficiency, controlling air pollution, managing waste, treating waste water, monitoring the quality of the environment, and combatting noise pollution. The participants to these negotiations account for the majority of global trade in environmental goods. The benefits of this new agreement will be extended to the entire WTO membership, meaning all WTO members will enjoy improved conditions in the markets of the participants to the EGA." From WTO website available at [https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm)

<sup>134</sup> "The aim is to facilitate trade in vital green technologies like renewable energy generation, waste management and air pollution control and contribute to combatting climate change and protecting the environment."

<sup>135</sup> "The aim is notably to maximise the potential of increased trade and investment to decent work and to environmental protection, including the fight against climate change, and engage with partner countries in a cooperative process fostering transparency and civil society involvement. Provisions also allow for independent and impartial review."

<sup>136</sup> "This is a crucial step in bringing about change on the ground. Respecting the commitments on labour rights and environmental protection can be a significant challenge for some of our trading partners. The Commission stands ready to assist trading partners Transparency is fundamental to better regulation. 24 Trade for all - Towards a more responsible trade and investment policy to improve the situation. Coordinating aid and cooperation programmes better in these areas will allow the EU to use the opportunities and leverage a closer trade relationship to promote this value-based agenda"

<sup>137</sup> DG Trade website <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>

Article 207 TFEU plus another depending on and changes depending on the nature of the objectives in negotiations.<sup>138</sup>

An Association agreement provides for the removing or reduction of custom tariff: its legal basis is Article 217 TFEU<sup>139</sup> and they usually include various types of economic, financial or technical cooperation, and a political dialogue.<sup>140</sup>

According to Articles XXIV of GATT, a custom union is an agreement between two customs territory to eliminate duties or others restriction to commerce and to apply the same duties to territories that are not parties of the Union<sup>141</sup>: EEC was an example of custom union; another example of an in place custom Union is the EU- Turkey custom union agreement that enter into force in 1995 and provides that:

According to Article XXIV of GATT, a free trade area is an area settled by an agreement between two or more custom territories to eliminate all or the majorities of the barriers to trade.<sup>142</sup> After the extent of the competences in CCP made by Lisbon Treaty, FTAs became ones of the main instruments of the CCP negotiations.<sup>143</sup> If “Lamy doctrine” of 1999 put a stress of the importance on the use of multilateral negotiation to

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<sup>138</sup> “[...] Cooperation agreements go beyond classical trade agreements and thus need, depending on their precise nature, another legal basis in addition to Art. 207 TFEU. If the agreement includes a part on development cooperation, for example, Art. 209 TFEU would be added. Other provisions could relate to sectoral cooperation [...]” in Gstöhl, Sieglinde, and Dominik Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014), at 738

<sup>139</sup>Article 217 TFEU: “The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.”

<sup>140</sup> In Gstöhl, Sieglinde, and Dominik Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014)

<sup>141</sup>Article XXIV (8) GATT “. For the purposes of this Agreement:(a) A customs Union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the Union or at least with respect to substantially all the trade in products originating in such territories, and,(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the Union to the trade of territories not included in the Union;”

<sup>142</sup> “A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.” *Ibidem*

<sup>143</sup>“The Treaty of Lisbon substantially modified external relations in general and FTAs in particular by enlarging the field of application of the common commercial policy, which is an exclusive competence of the Union (Article 3 TFEU). Article 207 TFEU (former Article 133 TEC) now provides that ‘the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy, and measures to protect trade such as those applicable in the event of dumping or subsidies.’” In Van Waeyenberge, Arnaud, and Peter Pecho. *Free Trade Agreements After the Treaty of Lisbon in the Light of the Case Law of the Court of Justice of the European Union: Free Trade Agreements in the Case Law of ECJ*, *European Law Journal*, vol. 20, no. 6, (2014), at 749

manage globalization<sup>144</sup>, EU global strategy 2006 shifted the strategy to a more trade-oriented dialogue rather than a political one<sup>145</sup>.

In doing so, Global Europe<sup>146</sup> emphasized the role chose to seek trade negotiation with bilateral instruments and above all FTAs.<sup>147</sup>

### 3.3.3. E.U. new generation agreements: what is new in Free Trade Agreements

According to Article XXIV GATT's definition of a free trade area, a free trade agreement is the agreement that build up a free trade area between one or more countries or territories.

Regarding EU CCP, the context in which FTAs are negotiated and implemented is a bilateral one: it means that FTAs are related to trade business out of the WTO forum, but it is possible that the third parties are members of WTO as well.<sup>148</sup>

Regarding the so called "*new generation*" of FTAs, they are the ones that are have been signed after 2012; as it has expressed yet in Global Europe of 2006, FTAs were recognized as the more useful and more suitable instrument for regulating matter

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<sup>144</sup> Pascal Lamy, EU trade commissioner, in its speech at European parliament emphasized the lead role that Europe should conduct in a globalized context ("*managed globalization*"). The instrument to focus on should have been the multilateral context of negotiation in WTO instead that the bilateral one. This doctrine was overcome by the followed position. For instance, both Global Europe 2006 and EU 2020 strategy specifically made reference to trade strategy: "*An emphasis on concluding on-going multilateral and bilateral trade negotiations, in particular those with the strongest economic potential, as well as on better enforcement of existing agreements, focussing on non-tariff barriers to trade; – Trade opening initiatives for sectors of the future, such as "green" products and technologies, high-tech products and services, and on international standardization in particular in growth areas; "recognize bilateral negotiation in trade as key role in external action. In particular, if the former stated that "International and bilateral regulatory co-operation is a key tool to this end."* For more about Lamy doctrine see Sophie Meunier, *Managing Globalization? the EU in International Trade Negotiations*, in JCMS: Journal of Common Market Studies, vol. 45, no. 4, 2007, pp. 905-926.

<sup>145</sup> "*This doctrinal shift was perceived as a return to the roots of trade policy, with the EU now back to pursuing economic instead of normative foreign policy objectives.*" Sophie Meunier, *Managing Globalization? the EU in International Trade Negotiations*, in JCMS: Journal of Common Market Studies, vol. 45, no. 4, 2007, pp. 906

<sup>146</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006 "Global Europe: Competing in the world" COM (2006) 567 final

<sup>147</sup> "*Global Europe' trade strategy put an end to the 'Lamy doctrine' of 1999, a de facto moratorium on new bilateral FTAs in favour of the multilateral trade round. The new strategy aimed at reinforcing the EU's competitiveness by opening up more, and in particular emerging markets by means of FTA.s.*" In Gstöhl, Sieglinde, and Dominik Hanf, *The EU's Post-Lisbon Free Trade Agreements Commercial Interests in a Changing Constitutional Context*, in European Law Journal, vol. 20, no. 6, (2014), at 734

<sup>148</sup> In order to respect the no discrimination principle of WTO, there are three set of rules that WTO members that negotiate a regional agreement shall respect: art XXIV GATT, Text of GATT Art XXIV, Ad Art XXIV and its updates, including the 1994 "Understanding". More in WTO website available at [https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm#rules\\_ita](https://www.wto.org/english/tratop_e/region_e/region_e.htm#rules_ita)

such as Intellectual property but, as said before<sup>149</sup>, negotiations issues as the ones at the time of the Communication did not fall within the exclusive competence of the Union.

“*Europe 2020 Strategy*” gave an important recognition of the role of FTAs; as it has already underlined, trade was recognized as an instrument to external policy in both bilateral and multilateral context; plus, it is stressed the necessity to start new negotiations and to review the old ones.<sup>150</sup>

As a result, “*Trade for all strategy*” promotes FTAs as well and states that: “*FTAs must provide reciprocal and effective opening, based on a high level of ambition. This requires tackling barriers in a comprehensive way, along with effective implementation and enforcement, without leaving room for new barriers to replace old ones. Nonetheless, the EU needs to keep a flexible approach to FTA negotiations to take account of the economic realities of its partners.*”<sup>151</sup> Lisbon Treaty has been reinforcing the role of the CCP and the introduction of non- trade objectives<sup>152</sup> as part of negotiation.

All these issues and policy strategies led to the so -called “*new generation*” FTAs.

For EU Commission, FTAs of new generation are all that “*New generation*” FTAs negotiated after 2006 when the Commission announced in its “*Global Europe*” Communication<sup>153</sup> that it would have started negotiating comprehensive FTAs with

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<sup>149</sup> See *supra* 1.2

<sup>150</sup> “*In reaction to the global economic and financial crisis that hit Europe in 2008, the ‘Europe 2020’ strategy for smart, sustainable and inclusive growth further called for a trade strategy that emphasises the conclusion of ongoing trade negotiations and a better enforcement of existing agreements, as well as new trade opening initiatives for sectors of the future and proposals for high-level strategic dialogues with key partners.*” In Gstöhl, Sieglinde, and Dominik Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014), at 734

<sup>151</sup> *Ibidem* 23

<sup>152</sup> “*The Treaty of Lisbon substantially modified external relations in general and FTAs in particular by enlarging the field of application of the common commercial policy, which is an exclusive competence of the Union (Article 3 TFEU). Article 207 TFEU (former Article 133 TEC) now provides that ‘the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy, and measures to protect trade such as those applicable in the event of dumping or subsidies (. . .) Furthermore, as the Treaty now includes aspects related to the trade of cultural, audiovisual, educational and health services as within the common commercial policy, difficulties in the formation and execution of mixed agreements should theoretically be eliminated.*” In Van Waeyenberge, Arnaud, and Peter Pecho. *Free Trade Agreements After the Treaty of Lisbon in the Light of the Case Law of the Court of Justice of the European Union: Free Trade Agreements in the Case Law of ECJ*, *European Law Journal*, vol. 20, no. 6, (2014), at 749

<sup>153</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006 “*Global Europe: Competing in the world*” COM (2006) 567 final

selected third countries: among the agreements applied currently, FTAs with South Korea (Korea), Colombia-Peru and Central America (CA) belong to this category.”<sup>154</sup>

Therefore, after the enter into force of Lisbon Treaty and the inclusion of those matters in CCP, from the South Korea- EU FTA subjects as trade in services, intellectual property, investment and public procurements have been starting to be negotiated.<sup>155</sup>

The general criteria governing the negotiation and, in consequence, the structure of an FTA are “*reciprocity, comprehensive in scope and aim at the highest possible degree of liberalization in most economic sectors, including services and investments*”.<sup>156</sup> As an example, from 2012 and above, matters as geographical indications, sanitary and phytosanitary started to have specific provisions in the agreements.<sup>157</sup>

For example, regarding investment, agreements may also include investment protection clauses, such as the fair and equitable treatment clause, or provisions on expropriation of investments.<sup>158</sup> Moreover, Public procurement, capital movement, competition rules, and sustainable development are also dealt with in the agreements.

The role of the FTAs, along with multilateral negotiations, is to improve the relationship with third parties, especially developing countries: in doing so not only trade objectives are discussed in table of negotiations but the more recent FTAs contain special clauses about non -trade objectives, as human rights clauses, labour clauses and sustainable development chapters.

“*Trade for all strategy*” underlines that the EU trade treaties shall promote EU values as part of the EU External Action<sup>159</sup>; human rights clauses are now been introducing in more than 50 agreements.<sup>160</sup> The nature of the clause is non - executive one: in case of breach, it means that there will be not a procedure against the country. The rationale of human rights clause in trade agreements is that in this matter EU preferred to

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<sup>154</sup> In *EU commission working document Report from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions on Implementation of Free Trade Agreements 1 January 2016 - 31 December 2016* COM/2017/0654 final

<sup>155</sup> In Chiara Cellerino, *EU Common commercial policy in context: opportunities and challenges of a changing landscape*, in *Diritto del Commercio Internazionale*, fasc.3, (2015), pag. 783

<sup>156</sup> In Chiara Cellerino, *EU Common commercial policy in context: opportunities and challenges of a changing landscape*, in *Diritto del Commercio Internazionale*, fasc.3, (2015), pag. 791

<sup>157</sup> Further analysis in chapter 3

<sup>158</sup> In Chiara Cellerino, *EU Common Commercial Policy in Context: Opportunities and Challenges of a Changing Landscape*, In *Diritto del Commercio Internazionale*, Fasc.3, (2015), Pag. 783

<sup>159</sup> “*The EU Treaties demand that the EU promote its values, including the development of poorer countries, high social and environmental standards, and respect for human rights, around the world. In this regard, trade and investment policy must be consistent with other instruments of EU external action.*” *Ibidem* 23

<sup>160</sup> “*Human rights clauses have currently been introduced in more than 50 agreements (of which the large majority contain a suspension clause) and apply to more than 120 countries.*” In Gstöhl, Sieglinde, and Dominik Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014), at 740

adopt a “*positive approach*”, where the clause shall be a path for dialogue and of openness to EU values rather than a “*negative approach*” (sanctions).<sup>161</sup>

The labour clause is part of exporting EU values as well.<sup>162</sup> The most recent FTAs contain provision regarding at least the respect of the core labour standard affirmed in International Labour Organization Convention<sup>163</sup>. As for human rights clause, the labour clauses have not binding force; the respect and implementation of the clauses is left to counterparts or are “soft” for nature.<sup>164</sup>

One of the key points in “Trade for all” strategy is sustainable development: the inclusion of sustainable development is due to the importance that EU law gives to all relevant policy. For sustainable development are intended all that policies for the respect and spread of social justice, human rights, high labour standards, high environmental standards.<sup>165</sup> The promotion of them is made through instruments such as EU trade agreements and trade and development policy<sup>166</sup>, special incentives for developing countries.

In the more recent FTAs<sup>167</sup>, there are chapters regarding sustainable development: despite of the commitment, the rules contained in the chapters have no binding force and it is usually provided that the implementation is established and decided by the counterparts as well for the above-mentioned clauses.<sup>168</sup>

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<sup>161</sup> “Regarding the application of human rights clauses, the EU has a long-standing, marked preference for positive measures (dialogue and incentives) over negative measures (sanctions), and suspension has only been a measure of last resort.” In Gstöhl, Sieglinde, and Dominik Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014), at 740

<sup>162</sup> Trade “... prioritise work to implement effectively the core labour standards (abolition of child labour and forced labour, non-discrimination at the workplace, freedom of association and collective bargaining), as well as health and safety at work in the implementation of FTAs and GSP;” *Ibidem* 23

<sup>163</sup> International Labour Organization was founded in 1919. It is committed to promote human and labour standards. It set labour standard to evaluate the correct respect of the core labour rights of the workers of the Member states that ratified the convention. More in <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>

<sup>164</sup> In Gstöhl, S. and Hanf, D. (2014), “The EU's Post-Lisbon Free Trade Agreements. *European Law Journal*”, 20: 733-748.

<sup>165</sup> [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>166</sup> Trade and development policy are a strategy made by the EU to give an impulse to trade and investment in developing country. The aim is to boost their production, diversify infrastructure and economy and improve governance. The initiative involve are Economic and Partnership agreements, bilateral agreements with developing countries; GSP; Aid for trade that aims to help partners country to develop trade in order to defeat poverty. For more <http://ec.europa.eu/trade/policy/countries-and-regions/development/>

<sup>167</sup> Canada, Central America, Colombia, Peru, and Ecuador, Georgia, Moldova, Singapore, South Korea, Ukraine, Vietnam

<sup>168</sup> In Gstöhl, Sieglinde, and Dominik Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014),

In conclusion, Trade agreements' contents can be summarized in accessing market and trade defence both for classic goods and services and for the new items after Lisbon: Intellectual property, investment and public procurement.<sup>169</sup>

Public procurement is particularly interesting for CCP because of its possible nature of trade barrier<sup>170</sup>: nowadays, public procurement is object of negotiations in order to prevent discriminatory procurement.<sup>171</sup>

As a result, not only is relevant to underline that both in multilateral and bilateral context there are agreement that contain public procurement's chapters; regarding EU the negotiation of public procurement means giving more opportunity to EU firms to enter into third countries markets and in this respect is important to guarantee legal certainty to firms of third countries that want to take part in EU market tenders.

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<sup>169</sup> As "Deep trade agenda" we make reference to those objects of the CCP that go beyond trade in goods. On this topic see In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016).

<sup>170</sup> "In so far as procurement policies favour domestic firms and products, they can be equivalent to trade barriers. The market access dimension of discriminatory procurement practices is generally the main rationale for negotiating disciplines on government procurement in international trade agreements." In

<sup>171</sup> "Discriminatory public procurement practices are high on the agenda of recent trade negotiations and agreements." In Hoeckman, Bernard, "Trade agreements and International Cooperation on Public Procurement Regulation

## **CHAPTER II**

### **THE INFLUENCE OF PUBLIC PROCUREMENT RULES IN THE EVOLUTION OF EU COMMERCIAL POLICY.**

#### **2.1 Public Procurement in the European Union: a brief overview**

Public procurement is the purchase of goods, services, works by governments authorities.<sup>172</sup> The European Union creates a set of rules with the aim of harmonising public procurement rules<sup>173</sup> within the Single Market.<sup>174</sup>

Public procurement is a central sector in settling EU policies; as we stated in the previous chapter, the relevance of public procurement is expressed in the external action of the EU as well as in the internal one.

Public procurement in the internal market is regulated by three Directives: Directive 2014/24 on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and Directive 2014/23/EU on the award of concession contracts; Member States had implemented the Directives by October 2016.

In this chapter, it is examined public procurement's principles and scope: the aim is to give a general overview of its relevance in the internal market and in the external action. In this respect, "*Europe 2020 Strategy*" represents the mile stone of the legislation and of the design of the fundamental principles governing public procurement in the external and in the internal dimension.

Regarding the internal market, it is illustrated Directive 2014/24 on public procurement sector.

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<sup>172</sup> "Public procurement, the purchase of goods, services and works by governments and state-owned enterprises [...]" OECD (2017), *Government at a Glance 2017*, OECD Publishing, Paris.

<sup>173</sup> "To create a level playing field for all businesses across Europe, EU law sets out minimum harmonised public procurement rules. These rules organise the way public authorities and certain public utility operators purchase goods, works and services. They are transposed into national legislation and apply to tenders whose monetary value exceeds a certain amount. For tenders of lower value, national rules apply. Nevertheless, these national rules also have to respect the general principles of EU law." [https://ec.europa.eu/growth/single-market/public-procurement\\_it](https://ec.europa.eu/growth/single-market/public-procurement_it)

<sup>174</sup> "The new generation of public procurement Directives, adopted in 2014, provides a framework for procuring in a more flexible way. They simplify public procurement procedures, improving access of SMEs to procurement. The overall objective is to obtain better value for public money, to deliver better outcomes for societal and other public policy objectives while increasing efficiency of public spending. Finally, the Directives' stronger provisions on integrity and transparency target corruption and fraud." From Strasbourg, 3.10.2017 COM (2017) 572 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS *Making Public Procurement work in and for Europe*, available at <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-572-F1-EN-MAIN-PART-1.PDF>

In the first part, there is a presentation of the historical evolution of the reform of public procurement Directives; the aim is to understand the *ratio* of the reform and the novelties introduced by the new regime.

The second part is dedicated to Directive 2014/24: in particular, the examination regards the scope of the Directive, its objectives and the principles governing public sector.

The “*external*” side of public procurement is the object of the last part of the chapter: in particular, it is introduced the relationship between public procurement and international trade policy as well of EU CCP.

In this respect, WTO Agreement on Government Procurement (GPA) is illustrated by giving a general presentation and an overview of the principles governing public procurement in the main international trade *forum*, in order to understand the common points or the divergences between the GPA and the principle included in 2014/24 Directive.

Regarding the role of public procurement in EU CCP, it is presented the International Procurement Instrument that was object of a proposal from Commission and whose aim is to give an instrument in order to grant access to government procurement market to EU firms: the aim is to show that public procurement can represent a huge trade barrier, both for EU firms that want to enter in third countries as well as for third countries firm that want to join tenders in the EU territory

In this respect, public procurement is strictly linked to CCP, specifically regarding market access policy: regulating procurement means to grant access to EU firms in third States territories and to promote a better improvement of trade relationship between EU and third countries as well as better incomes for EU firms.

### **2.1.1 Evolution background: modernisation of public procurement**

Modernisation of public procurement is the process that, by replacing the previous Directives<sup>175</sup>, led to the adoption of the new Directives governing public procurement: Directive 2014/24, Directive 2014/25 and Directive 2014/23.

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<sup>175</sup> Directive 2004/17 and Directive 2004/18.

The process of modernisation started in 2011 when the Commission proposed to amend Directives 2004/17/EC on procurement in the water, energy, transport and postal services sectors and 2004/18/EC on public works, supply and service contracts, “as well as for the adoption of a Directive on concession contracts.”<sup>176</sup>

The new Directives were adopted by the European Parliament and the Council of the European Union on 26 February 2014 and EU countries had until April 2016 to transpose the new rules into national law.

The Commission in 2011 has expressed the intention to modernise public procurement legal framework in the “*Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*” communication that is useful to understand the current structure of the new Directives.

According with the Communication, the aim of the modernisation was to create a simplified legal framework which granted a series of objectives which could help to create a framework that would have responded to the challenges of an in changing economic and social context.<sup>177</sup>

In fact, the previous Directives were implemented before two fundamental facts in the history of the Union: the ratification of Lisbon Treaty, on one side, and the global financial and economic crisis of 2008, on the other<sup>178</sup>.

As a consequence, the EU found out to create a legislative background that was capable to answer to the call for integration to a single market<sup>179</sup> that had been evolved: the result was that the Commission aimed to promote a reform that would have contributed to the efficiency of the public spending<sup>180</sup> and a public procurement which

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<sup>176</sup> “The 2004 Public Procurement Directive” available at [http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation\\_en](http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en)

<sup>177</sup> “Given the key role of public procurement in coping with today’s challenges, the existing tools and methods should be modernised in order to make them better suited to deal with the evolving political, social and economic context.” From Brussels, 30.4.2004 COM(2004) 327 final GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN>

<sup>178</sup> “The difficult economic and social situation following the financial crises which had started in the US and swept through much of the world, Europe included, was what prompted the Commission into action.” In, Roberto Caranta, *The Changes to The Public Contract Directives and The Story They Tell About How Eu Law Works* ‘subscribed, 52 Common Market Law Review, Issue 2, Published: 2015, at 394

<sup>179</sup> “Public procurement in the European Union has been significantly influenced by the internal market project” Christopher Bovis, *The principles of public procurement regulation* in Christopher Bovis, H. *Research Handbook on EU Public Procurement Law*, Edward Elgar, Northampton, MA; Cheltenham, UK;, (2016), at 1

<sup>180</sup> “The first objective is to increase the efficiency of public spending. This includes on the one hand, the search for best possible procurement outcomes (best value for money).” From Brussels, 30.4.2004 COM(2004) 327 final GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN>

would have set rules that reflected the common goals of the EU, such as environment protection.<sup>181</sup>

Not only was interested the reform prospected by the Commission in pursuing internal integration but also, at the same, public procurement's regulation includes the fundamental principles of the European treaties such as free movement of goods and service, right of establishment and the prohibition of discrimination on nationality ground.

So far, it was important to set a ground of rules that would have helped to avoid creating a public procurement as non-tariff barrier; in other words, a set of rules that responds to the challenge of a more accessible procurement.

Not only was found the public procurement modernisation to be important for internal issue: the awareness of a more globalised world is reflected to the importance given to the existence of international agreements<sup>182</sup>.

So far, the Communication called to put attention in the international instrument such as GPA and to bilateral instruments.<sup>183</sup>

A third objective listed in the communication regards the integrity of public procurement: it is expressly recognized that the modernisation of public procurement the should been keen into the fighting of corruption<sup>184</sup>.

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<sup>181</sup> "Another complementary objective is to allow procurers to make better use of public procurement in support of common societal goals: These include protection of the environment, higher resource and energy efficiency and combating climate change, promoting innovation and social inclusion, and ensuring the best possible conditions for the provision of high quality public services." From Brussels, 20.12.2011 COM (2011) 896 final 2011/0438 (COD) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on public procurement available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0896&from=EN>

<sup>182</sup> "Furthermore, the scope for possible legislative modifications is not unlimited. Legislative changes will have to be consistent with EU international commitments or may require the opening of appropriate negotiations with all partners concerned on possible requests for compensation. These commitments, as defined in a plurilateral agreement and seven bilateral agreements, therefore may have the effect of limiting the scope of any legislative adjustments. This concerns in particular the thresholds for application of the EU public procurement rules, the definitions of purchasing activities and public purchasers and certain procedural issues such as the setting of technical specifications and time periods." From 30.4.2004 COM(2004) 327 final GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN>

<sup>183</sup> "This is related to the on-going debate on possible ways to strengthen the EU's leverage in international negotiations with a view to ensuring a more balanced and reciprocal access to EU and foreign procurement market[...] The Commission is currently undertaking an impact assessment examining the various possible policy options, building on the implementation of our international commitments such as the Government Procurement Agreement, as well as in relation to third countries with which the EU does not yet have such agreements." From 30.4.2004 COM(2004) 327 final GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN>

<sup>184</sup> "Further developing EU public procurement law could also be envisaged to tackle important issues that are so far not sufficiently addressed, such as preventing and fighting corruption and favouritism (part 5) ...In addition, the review of the legislative framework will also be an public procurement to examine if certain basic

Transparency International reported that public procurement is suitable to be the field of corruption bribery and collusion.<sup>185</sup> The reform is prospected to modernise procedures in order to avoid the risk that public authorities in charge could perpetrate one of these conducts. It is clear that the key role of transparency<sup>186</sup> is to achieve integrity of public procurement in order to prevent the conduct<sup>187</sup>: giving a clear framework of the procedure by providing rules can help to prevent those conduct and to recognize it.

Furthermore, another aspect of public procurement is the suitable of the matter to be the ground to distortion of competition: the fact that in public contract one party is a public authority makes possible to infringe state aid rules:<sup>188</sup> so far, the importance role of competition and avoiding state aid is another pillar.<sup>189</sup>

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*notions and concepts should be refined to ensure better legal certainty for contracting authorities and undertakings (part 1). In this context, the review may present certain opportunities to increase convergence between the application of the EU public procurement and State aid rules.”* From 30.4.2004 COM(2004) 327 final *GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS* available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN>

On the issue Popescu A., *Public Procurement Corruption in the European Union*, Journal of Public Administration (2014) Finance and Law, issue 1/2014

<sup>185</sup> On collusion see Partà, Sara. *Appalti pubblici e criminalità organizzata*, Rivista di Studi e Ricerche sulla criminalità organizzata, [S.l.], v. 2, n. 3, p. 24-45, nov. 2016, and 126. Scomparin, L. (n.d.). *Corruzione e infiltrazioni criminali negli appalti pubblici: Strumenti di prevenzione e contrasto* /. Torino, [Italy]: G. Giappichelli Editore; Miranzo Diaz, Javier, *A Taxonomy of Corruption in EU Public Procurement*, European Procurement & Public Private Partnership Law Review (EPPPL) vol. 12, no. 4 (2017): p. 383-395. Hein Online, <https://heinonline.org/HOL/P?h=hein.journals/eppl2017&i=425>

Moukiou, Chrysoula P., *The Principles of Transparency and Anti-Bribery in Public Procurement: A Slow Engagement with the Letter and Spirit of the EU Public Procurement Directives*, European Procurement & Public Private Partnership Law Review (EPPPL) vol. 11, no. 2 (2016): p. 72-87. HeinOnline,

<sup>186</sup> “On the one hand, the rising levels of corruption in the sector are a major incentive to refocus the role of transparency in public procurement.” In Irena Georgieva, *Using Transparency Against Corruption in Public Procurement: A Comparative Analysis of the Transparency Rules and their Failure to Combat Corruption* vol. 11; 11., Springer, Cham, Switzerland, 2017,

<sup>187</sup> “The procurement principle thus slowly develops from being an information pillar for the nationwide distribution of resources into a serious anti-corruption tool. From this perspective, the original meaning of transparency shifts to be a useful mechanism for determining the basic and most common corruption scenarios to select a contractor in violation of procurement rules.” In Georgieva, Irena. *Using Transparency Against Corruption in Public Procurement: A Comparative Analysis of the Transparency Rules and their Failure to Combat Corruption*. vol. 11; 11., Springer, Cham, Switzerland, 2017, at 32

<sup>188</sup> Article 107 TFEU “1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. 2. The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point. 3. The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; 9.5.2008 EN Official Journal of the European Union C 115/91 (c) aid to facilitate the development of certain economic activities or of certain economic areas, where

Therefore, others two key points of reform are public spending and sustainability both from an internal and external perspective: the aim is making public procurement more accessible by preventing discrimination and, from an external point of view, by making it more accessible for third parties.

Firstly, a more accessible public procurement should have been granted to business firms in EU: in this respect, from one side, the Communication called for more flexibility in the procedure and to a general modernization in favour of both contracting authorities<sup>190</sup> as for the bidders such as start up or SMEs;<sup>191</sup> from the other side, it has been recognized the urgency to create new rules to grant transparency<sup>192</sup> with the aim to assure the avoidance of corruption and distortion of competition through a well set procedure.<sup>193</sup>

Secondly, according to communication sustainable procurement had to play a key role: in this respect, there is a clear link with CCP: the Communication emphasised how “*Europe 2020 Strategy*” is the basis for public procurement too.

In particular, the key point should have been a more efficient procurement, a greener and sustainable procurement and, in this respect, “*Europe 2020 Strategy*” s values and purposes have been the guideline for the new Directives.<sup>194</sup>

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*such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”*

<sup>189</sup> On the issue see Blauberger, Michael, and Rike U. Krämer., *European Competition Vs. Global Competitiveness Transferring EU Rules on State Aid and Public Procurement Beyond Europe*, Journal of Industry, Competition and Trade, vol. 13, no. 1, 2013, pp. 171-186; also, Nicolaides, Phedon; Schoenmaekers, Sarah, *Public Procurement, Public Private Partnerships and State Aid Rules: A Symbiotic Relationship*, European Procurement & Public Private Partnership Law Review (EPPPL) vol. 9, no. 1 (2014): p. 50-69. HeinOnline; Bhagat, G. (n.d.). *Public Procurement: A Competition Perspective*. The Indian journal of public administration: quarterly journal of the Indian Institute of Public Administration., 63(2), 176–186

<sup>190</sup> “Contracting authorities sometimes complain that the regulatory instruments provided by the EU rules are not fully adapted to their purchasing needs. In particular, they claim that leaner and/or more flexible procedures are needed.” From 30.4.2004 COM (2004) 327 final *GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS* available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN>

<sup>191</sup> “The purpose of the Public Procurement Directives is to open up the public procurement market for all economic operators, regardless of their size. However, special attention needs to be paid to the issue of access to those markets by small and medium-sized enterprises (SMEs)” In “Commission Staff Working Document *European Code of Best Practices Facilitating Access By Smes To Public Procurement Contracts*”

<sup>192</sup> On this topic see Delimatsis, P, *Transparency and Domestic Regulations in Services*. In (Ed.), *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity*, 2007-12-27 Oxford University Press., Retrieved 6 Aug. 2018,

<sup>193</sup> On the issue see Garzaro, Noemí A., *Competition within EU Public Procurement Regulation and Practice: When EU Competition Law Remains Silent, EU Competition Policy Speaks*, Romanian Journal of European Affairs, vol. 16, no. 1, 2016, pp. 44-56.

<sup>194</sup> “Improve framework conditions for business to innovate, making full use of demand side policy<sup>194</sup>, support the shift towards a resource efficient and low-carbon economy, e.g. by encouraging wider use of green public procurement, and improve the business environment, especially for innovative SMEs.” From 30.4.2004 COM

According to the Communication, public procurement's framework should have been green and sustainable oriented, innovative and more accessible to small and medium enterprises (SMEs).

The modernisation of public procurement's Directives is outlined by following those principles: all these pillars were transposed to be the guideline of the reform and influence the scope, the objectives, the principles within the Directive.

### **2.1.2 The reform of public procurement Directive: what has changed**

As in the previous paragraph, the two fundamental pillars prospected by Commission's Communication were to appoint a legislation capable to grant more flexibility and more sustainability: the rationale of the reform was that the new public procurement Directive should have been an instrument to contribute to an open market by creating a system of coordination between Member States' procurement rules; it is useful to assume that the key words to describe the *ratio* of the reform can be modernise and simplify.<sup>195</sup>

It is important to say that the public procurement legal framework was based on principles contained in the Treaty of the European Union originally; as public procurement can be a barrier to trade, having applied single market principle meant avoiding discrimination of firms based in other Member States<sup>196</sup>. The original role of the public procurement was to promote a deeper integration of the internal market<sup>197</sup> and, as a result, the provisions that interest the public procurement are Article 34 TFEU on free movement of goods, Article 56 TFEU on freedom to provide services and Article 49 (ex-Article 43 TEC) on freedom of establishment.<sup>198</sup>

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(2004) 327 final *GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS* available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN>

<sup>195</sup> "The idea that moved the Commission to present a reform package was to simplify and update the European public procurement legislation." Roberto Caranta, *The Changes to The Public Contract Directives and The Story They Tell About How EU Law Works* 'subscribed, in *Common Market Law Review*, Issue 2, Pp. 391–459 Published: 2015, at 395

<sup>196</sup> "Most public procurement contracts are governed by the TFEU (ex-TEC). Certain provisions of the TFEU prohibit, in general, government action which discriminates against firms or products from other Member States, and this includes discriminatory public procurement." In Arrowsmith S, Termer S, Fejø J, Jiang L., "Public procurement regulation: an introduction." "EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 76

<sup>197</sup> On the public procurement in the internal market see Telles, Pedro, *The Good, The Bad, And The Ugly: The Eu's Internal Market, Public Procurement Thresholds, And Cross-Border Interest*, *Public Contract Law Journal*, vol. 43, no. 1, 2013, pp. 3–27. JSTOR, [www.jstor.org/stable/24430311](http://www.jstor.org/stable/24430311).

<sup>198</sup> More *infra*

As in “*Public procurement regulation: an introduction*” by Arrowsmith, Treumer S, Fejø, Jiang L, the evolution of the legal framework of public procurement can be divided in 5 phases<sup>199</sup>:

The first phase in the history of the Directives was the adoption of Directive 71/305/EEC that regulated public works contracts and Directive 77/62/EEC that public procurement lied similar rules to public supply procurement contracts.<sup>200</sup>

The regulation of public procurement started to be a priority since the 1986 Single European Act with the affirmation of public procurement as a key element of integration and the aim to avoid a public procurement regulation that could work as a non-tariff barrier. In fact, in the late 80s and 90s more than one reform occurred: as an example, Directive 71/305/EEC on works and Directive 77/62/EEC on public procurement that were revised by Directives 89/440/EEC on works and 88/295/EEC.<sup>201</sup>

All these provisions were consolidated in two texts: Directive 93/36/EEC on public procurement contracts and Directive 93/37/EEC on public works contracts.<sup>202</sup>

The third phase marked a change that can be recognize as a first sign in the intersection between public procurement and trade: in 1994 the EU became part of the Agreement on Governing Procurement of the WTO (GPA): this is one example of the importance that public procurement started to have in international trade.

The necessity to create an open market was again declared in the 2011 “*Green paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market*”<sup>203</sup> and led to an amendment of the Directive.

This was done by two Directives: Directive 97/52/EC, for the public sector, and Directive 98/4/EC, amending the Utilities Directive. Under the GPA, the EU and Member

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<sup>199</sup>In Arrowsmith S, Treumer S, Fejø J, Jiang L, *Public procurement regulation: an introduction*, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011.

<sup>200</sup>*Ibidem* 22

<sup>201</sup>More on this issue at paragraph 2.3 *Development of the directives and the 2004 reforms*, in In Arrowsmith S, Treumer S, Fejø J, Jiang L., “*Public procurement regulation: an introduction.*”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011 at 63

<sup>202</sup>“We have to add 2. Extension of the regulatory system to works and supply contracts awarded in previously excluded “utilities” sectors in 1990, by Directive 90/531/EEC; 3. Extension of the regulatory system to public services contracts in 1992, by Directive 92/50/EEC and to services contracts awarded by utilities in 1993, by Directive 93/38/EEC; 4. Adoption of the two Directives on remedies referred to above (in 1989 for the public sector and 1992 for the utilities sector” In Arrowsmith S, Treumer S, Fejø J, Jiang L., “*Public procurement regulation: an introduction.*”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 65

<sup>203</sup>“The Commission is currently undertaking an impact assessment examining the various possible policy options, building on the implementation of our international commitments such as the Government Procurement Agreement, as well as in relation to third countries with which the EU does not yet have such agreements.” From 30.4.2004 COM (2004) 327 final *GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS* available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0327&from=EN>

States started to provide access to EU procurement markets to some third countries: the 1997 Directives were enacted to prevent this (e.g. by adding to the Directives certain obligations found in the GPA but not previously in the Directives). They also aimed to ensure that entities complying with the Directives automatically comply with the GPA.

In 1996 “*Green Paper, Public Procurement in the European Union: Exploring the Way Forward*”, it has been pushed the change of the reform: in particular, the aim of the Green Paper was to create a uniformity in the existence of a value framework of public procurement.<sup>204</sup>

Moreover, in another soft law instrument, “*White paper for the competition of the internal market*” was recognized the role of the public procurement as a non-trade barrier.<sup>205</sup> Consequently, the challenge was to use public procurement’s application of the three main principles of public procurement- Transparency, non-discrimination and objectivity- in order to the competitiveness in the public sector market.

At that moment, the regulation of public procurement was recognized as necessary in respect of the principle governing the Union: right of establishment and no discrimination.

The reformed was a consequence of a general reform of the internal market and took a long time before coming out; public procurement was recognized as a fundamental aspect for the integration and, as regards, the conceptual origin of public procurement legislation can be found in the necessity to grant a well- function competitive internal market.

The result was a dichotomy between the public sector and the utilities sector.<sup>206</sup> The 2004 Directives package was formed by Directive 2004/18 regulating works, public procurement and services procurements and to works concessions and Directive 2004/17

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<sup>204</sup> “What the Green Paper did was to identify a number of issues for consideration, that focused mainly on ensuring that entities applied the existing rules and that firms were able to take advantage of them.” In Arrowsmith S, Treumer S, Fejø J, Jiang L., *Public procurement regulation: an introduction.*, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 66

<sup>205</sup> “Practices in public procurement that do not allow for free competition from other states to serve the public market are a possible source of distortion in the natural patterns of trade, and thus may be detrimental to maximising national and global economic welfare, as discussed above. Various types of practices can be identified that fall into this category.” In Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 56.

<sup>206</sup> The scope of Directive 2014/25 as the s.c. “utilities sectors” which provide for the regulation of public procurement of utilities, which are water, energy, transport and postal services that, as a consequence, are excluded by the application of Directive 2014/24: More on utilities sector Directive in Christopher Bovis, H. *Research Handbook on EU Public Procurement Law*, Edward Elgar, Northampton, MA;Cheltenham, UK;., (2016)

Directive 2004/17/EC regulated public procurement in the utilities sectors (water, energy, transport and postal services).

According to Directive 2014/24, the principles governing public procurement are the ones listed in Article 2, which expressly<sup>207</sup> announces three main principles: transparency<sup>208</sup>, equal treatment<sup>209</sup> and no discrimination.<sup>210</sup> In this respect, it is interesting to underline the fact that at the very bottom of the discipline it is re-established the intention to grant an open and transparent market and that transparency is seen as a key element to grant competition.<sup>211</sup>

The process was the result of the necessity to respond to the shift in the utility market from public to private ownership occurred in the decade before the reform and aimed to give a methodical procedure to contracting authorities in their procurement procedure and to give a more legal certainty of the framework.<sup>212</sup>

Not only was the reform a result of the Commission's work, but it was largely influenced by principles given by the European Court of Justice during the years: throughout the years, ECJ put a widely effort into the matter and before the "codification" and can be described both as positive and restrictive.

In this respect, the Court's judicial positivism in the observance of the principle of no discrimination and objectivity has preserved the integral role of public procurement by protecting the principle of establishment and the principle of freedom of providing

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<sup>207</sup> "Express inclusion of the general principles of equal treatment, non-discrimination and transparency, which the CJEU has held to underlie the Directives, in the Directives in the same manner for all contracting authorities/contracts." In Arrowsmith S, Treumer S, Fejø J, Jiang L., *Public procurement regulation: an introduction*, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 72

<sup>208</sup> In lack of a definition given by the ECJ, See Arrowsmith S, Treumer S, Fejø J, Jiang L., "Public procurement regulation: an introduction.", EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 145: "*The CJEU has not yet given a general definition of the principle of transparency[...] has suggested, however, that in general in public procurement this concept as four distinct dimensions, namely: publicity for contracts; publicity for the rules of the process; limits on discretion; and provision for verification and enforcement.*"

<sup>209</sup> "...the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified" Joined Cases C-21/03 and C-34/03, *Fabricom v Belgium* ("Fabricom")

Water

<sup>211</sup> On the issue see Marique, Y., & Wauters, K. (2016). EU directive 2014/24 on public procurement: a new turn for competition in public markets? . Bruxelles: Larcier.Bovis, C. (2015). *The law of EU public procurement* (Second edition.). Oxford [etc.]: Oxford University press; on the relation between transparency and competition see Kirsi-Maria Halonen, (2017) "Disclosure rules in eu public procurement: Balancing between competition and transparency", *Journal of Public Procurement*, Vol. 16 Issue: 4, pp.528-553"

<sup>212</sup> In BOVIS, CHRISTOPHER H., *Research Handbook on EU Public Procurement Law*. Edward Elgar, Northampton, MA; Cheltenham, UK;, 2016., at 3

service.<sup>213</sup> It is important to underline the Court has been recognizing to public procurement the role in the process of integration and in this respect the Court has held through the year the recognition of direct effect of public procurement regime.

So far, the recognition of a direct effect contributed to determine one of the most recognizable characteristics of the public procurement regulation framework: flexibility. In fact, the Court pursued this result by developing a *ratio* in which had recognized a certain amount of discretion to contracting authorizers.<sup>214</sup>

As a result, the necessity to integrate the internal market, the necessity of flexibility and the respect of the three main principle of public procurement in accordance with the principle of the Community are the main elements of the reform of 2004: in fact, the two fundamental basis that came out in the previous paragraphs make clear that the reforms that occurred had as their aim to simplify the public procurement legal basis in order to prepare a more flexible framework for the matter<sup>215</sup> and in order to pursue what Bovis indicated as “*simplification and modernization.*”<sup>216</sup>

Another example regarding flexibility was the inclusion of the competitive procedure, in order to provide for a more flexible award procedure for awarding complex contracts<sup>217</sup> that is describe in Article 1 (11)c of the Directive 2004/18 as<sup>218</sup>: “[...] “*a procedure in which any economic operator may request to participate and whereby the*

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<sup>213</sup> *Ibidem* 41

<sup>214</sup> *Ibidem* 41

<sup>215</sup> “The reform has however made the definition of the rationale for EU public contract rules more complex.”<sup>24</sup> The 2011 Green paper appears have challenged the internal market rationale of EU public contract legislation.<sup>25</sup> The necessity to keep the EU wide market open is recalled almost as an afterthought: in the face of challenging times, “there is a greater need than ever for a functioning and efficient European Procurement Market”.<sup>26</sup> The idea that moved the Commission to present a reform package was to simplify and update the European public procurement legislation “so as to make the award of contracts more flexible and enable Public contracts to be put to better use in support of other policies”. Roberto Caranta, *The Changes To The Public Contract Directives And The Story They Tell About How Eu Law Works*, subscribed 52 Common Market Law Review, Issue 2, Pp. 391–459 Published: 2015, at 395

<sup>216</sup> Christopher Bovis, H. *Research Handbook on EU Public Procurement Law*, Edward Elgar, Northampton, MA;Cheltenham, UK;, (2016), at 3

<sup>217</sup> “Addition of competitive dialogue procedure to Directive 2004/18, in order to provide a more flexible award procedure for awarding complex contracts (aimed particularly at contracts for privately financed infrastructure).” In Arrowsmith S, Treumer S, Fejø J, Jiang L., *Public procurement regulation: an introduction*, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 73

<sup>218</sup> Article 1(11) Directive 2004/18: (a) “Open procedures’ means those procedures whereby any interested economic operator may submit a tender. (b) ‘Restricted procedures’ means those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender. (c) ‘Competitive dialogue’ is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.”

*contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender[...]*”

Notable introductions were added in the field of corruption: as an example, introduction of a requirement for public bodies to exclude from public contracts firms convicted of certain criminal offences connected with organised crime, money laundering, fraud on the EU and corruption in public contracts.

Transparency principle not only was included explicitly for the first time but provides for an important provision regarding information: The Directive 2014/24 added new transparency requirements requiring weighting of award criteria and disclosure of weightings and disclosure of criteria for selection, no confidentiality of explicit new rules on confidentiality of information.

As we explained in the first subparagraph, the changes that have occurred in the economic context caused the necessity to provide new rules for public procurement and the result was the Directive 2014/23 Directive 2014/25 and Directive 2014/24.

For the purposes of the work, in the next paragraph it is presented the Directive 2014/24 which is the Directive on public sector procurement.

### **2.1.3 Directive 24/2014: Scope and Objectives**

Directive 2014/24 (“The Directive”) is the legal provision that regulates the public sector procurement and it is the result of process of reform started in 2011; Member States implemented the Directive in October 2016.

The scope of the Directive is contained in its Article 1 which states that *“This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.”*

Article 1 paragraph 2 gives a definition of procurement for the purposes of the Directive. It states that: *“Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, subpublic procurement lies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, subpublic procurement lies, or services are intended for a public purpose.”*

Regarding the types of contract that are covered by Directive of public procurement, these contracts are provided in Article 2 which states that “*means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply procurement of products or the provision of services;*” and the public contracts that are suitable to fall within the scope of Directive are public contracts of works, supply and services.<sup>219</sup> Moreover, Recital 1 of the Directive reaffirms the central role that public procurement plays in the context of “*Europe 2020 Strategy*”<sup>220</sup> and the application of the fundamental principles contained in TFEU.<sup>221</sup>

It is important to say that the public procurement legal framework was constituted by principles contained in the Treaty of the European Union: the rationale is to avoid discrimination of firms based in other Member States.<sup>222</sup>

The reason is that the original role of the public procurement was to promote a deeper integration of the internal market: as a result, the provisions that interest the public procurement are Article 34 TFEU on free movement of goods, Article 56 TFEU on freedom to provide services and Article 49 TFEU on freedom of establishment.

Article 34 provides for the prohibition of “[...]all quantitative restrictions on imports and all measures having equivalent effect” between Member States.”<sup>223</sup> In particular, the measures prohibit in Article 34 are three: Measures that discriminate directly between domestic and imported products, measures which equally to domestic

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<sup>219</sup> Article 2.1 (5), (6),(7),(8),(9) Directive 2014/24: “ ‘public contracts’ means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services; (6) ‘public works contracts’ means public contracts having as their object one of the following: (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II; (b) the execution, or both the design and execution, of a work; (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work; (7) ‘a work’ means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function; (8) ‘public supply contracts’ means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations; (9) ‘public service contracts’ means public contracts having as their object the provision of services other than those referred to in point 6;

<sup>220</sup> Recital 1 Directive 2014/24 “Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020, a strategy for smart, sustainable and inclusive growth’

<sup>221</sup> Recital 1 of Directive 2014/24: “The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU) [...]”

<sup>222</sup> “Most public procurement contracts are governed by the TFEU (ex-TEC). Certain provisions of the TFEU prohibit, in general, government action which discriminates against firms or products from other Member States, and this includes discriminatory public procurement.” In Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 76

<sup>223</sup> In Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 77-90

and imported products but which have the effect of favouring domestic products as against imports measures that have an equal impact on domestic and imported products.<sup>224</sup>

Article 56 TFEU “[...]is concerned to open the market for nationals of one Member State who wish to provide services (including construction) in another, whilst based in their home State”: the provision application in public procurement aims to prevent that an EU enterprise is excluded from participation in government contracts within the territory of a Member State different from its original one<sup>225</sup>. Specifically, there are three types of measures: Measures that discriminate directly on grounds of nationality of the service provider, Measures which apply equally to domestic firms and those from other Member States, but which have the effect of favouring domestic firms, Measures that have an equal impact on domestic and non-domestic firms.<sup>226</sup>

Article 49 TFEU “[...]is concerned with the freedom of persons from one State to set up business ("establish") on a permanent basis in another State: States must allow persons from other Member States both to establish in their territory and to operate under the same conditions as nationals”: in this respect, there are two important aspects to underline: first, public procurement is recognized as an integration instrument and second, at the same time, the nature of public procurement lets to provide derogations to those principles.<sup>227</sup>

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<sup>224</sup> The classification is made by Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, pages 77-90

<sup>225</sup> “Article 56 TFEU (ex-Article 49 TEC) is concerned to open the market for nationals of one Member State who wish to provide services (including construction) in another, whilst based in their home State. It covers both those who wish to base themselves temporarily abroad (for example, a consultant travelling to work on a project in another State) or send their employees abroad, as well as those who propose to carry out services in other States whilst remaining in their home State. The provision prohibits a Member State from preventing EU enterprises from other Member States from providing services within its territory. This includes restricting their participation in government contracts.” In Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 80

<sup>226</sup> *Ibidem* 45

<sup>227</sup> “Article 49 TFEU (ex-Article 43 TEC) is concerned with the freedom of persons from one State to set up business ("establish") on a permanent basis in another State: States must allow persons from other Member States both to establish in their territory and to operate under the same conditions as nationals. Measures that restrict access to public contracts for such persons may infringe this provision: see, for example, *Re Data Processing* case above, which concerned Italian legislation limiting participation in certain data processing contracts to firms wholly or mainly in Italian public ownership. This contravened Articles 49 and 56 TFEU (ex-Articles 43 and 49 TEC): although non-Italian firms could be owned by the Italian government, in practice all data processing firms in Italian public ownership were Italian, and the provision thus discriminated against nonnationals, both those established in Italy (Article 49 TFEU (ex-Article 43 TEC)) and those in other Member States (Article 56 TFEU (ex-Article 49 TEC)).” In Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011.

The first derogation is explicit and is provided in Article 36 that states that a member state can derogate from Article 34 TFEU in case of “[...]on grounds of ‘public morality, public policy or public security, the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial policy’”. The derogation has to pass a proportionality test to check that the measure is suitable and necessary for the object in the provision.<sup>228</sup> The derogations for Articles 49 and 56 are provided in Articles 52 and 62 TFEU provide for express on grounds of public policy, public health or public morality.<sup>229</sup>

Another derogation is the general interest without the scope of the TFEU<sup>230</sup>: if the object of general interest referred to as “mandatory requirements” - recognised by the CJEU- includes protection of consumers, environment, the effectiveness of fiscal supervision and improvement of working conditions, there will be no infringements of the provision. The public procurement application of the principle public procurement requests also that there is the proof of the general interest.<sup>231</sup>

For the purposes of the Directive, a contracting authority is defined by Article 2 paragraph 1 as “(1) ‘contracting authorities’ means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;”.

The Directive provides for listing three types of public authority which are states, regional and local authority in order to provide for a more suitable procurement which fulfils the necessity to be flexible.

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<sup>228</sup> “As mentioned above, a measure considered a hindrance to trade under Article 34, 49 or 56 TFEU (ex-Article 28, 43 or 49 TEC, respectively) is not automatically prohibited. It is recognised that there are many legitimate reasons that states may wish to restrict to their markets – for example, to prevent the import of products that are not safe, or which damage the environment and that the interest in free access to the market must be balanced against these other interests. The question of exactly how this balance between trade and other national interests should be struck is one of the most difficult for trade regimes. There are two types of justification that may be relied on under the free movement rules: explicit derogations and implicit limitations.” In Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011

<sup>229</sup> “Articles 52 and 62 TFEU (ex-Articles 46 and 55 TEC) provide for express derogations from Articles 49 and 56 TFEU (ex-Articles 43 and 49 TEC) on grounds of public policy, public health or public morality. (Article 52 sets out these derogations for Article 49 and Article 62 then provides for the same derogations for Article 56 by cross reference to Article 52).” In Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011 at 84

<sup>230</sup> “[...] the additional grounds mentioned there can be relevant as grounds of general interest, as discussed below. Similar conditions regarding justification apply. In” See Arrowsmith S, Treumer S, Fejø J, Jiang L., “Public procurement regulation: an introduction.”, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation; 2011, at 84

<sup>231</sup> *Ibidem* 50

The public contracts have to provide for a remuneration whose quote has to be not less than the threshold provides in Article 4 which are:

- EUR 5 186 000 for public works contracts;
- (b) EUR 134 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities
- (c) EUR 207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities;
- (d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV

Regarding the introduction made by the Directive, the most interesting points of reform are linked to two different premises: first, the preamble of the Directive gives us the guide principle of the Directives itself, which are the principles governing the public sector procurement and the general framework in which the Directive is set.

Regarding the principles, they are the classical one provided in Directive 2004/18 EC<sup>232</sup> and the preamble of the Directive underlines the concept of the role of public procurement in “*Europe 2020 strategy*”.

Adopting flexibility and modernisation as guidelines, it is provided a summary of the main introduction made by the Directive with the purpose of preparing a discussion over specifics aspects: the principles governing public procurement and the consequences of the novelties that result by the discipline provided by it.

The first introduction made a change regarding the procedure that can be used for the tenders<sup>233</sup>: Article 29 of the Directive provides the competitive procedure with negotiation that replaces negotiated procedure with prior notice contained in Article 56 of Directive 2004/18.

The procedure is a sort of hybrid procedure of the other two mechanism of and it can be defined as a “*progressive negotiation*”.<sup>234</sup>

The novelty relies on the fact that after having submitted all the information requested by the contracting authorities, only those bidders that “[...]invited by the

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<sup>232</sup> Transparency, equal treatment and non -discrimination. As we mentioned above, for the first time transparency has been expressly mentioned.

<sup>233</sup> The procedure list in the Directive are open procedure (Article 27), restricted procedure (Article 28), competitive dialogue (Article 30)

<sup>234</sup> Pierluigi Mantini, et al. “*Nel Cantiere Dei Nuovi Appalti Pubblici: Semplificazione, Efficienza, Concorrenza, Anticorruzione.*” Giuffrè, Milano, 2015, at 216

*contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations.*”<sup>235</sup> ; in other words, the contracting authorities make a first selection of the bidders in order to choose only those who are not suitable to be excluded and that the bidder have the requirements to join the tender effectively.<sup>236</sup>

The selective economic operators will negotiate with authority all the aspects of the tender exception made for the minimum requirements and the award criteria that shall not be subject to negotiations.

Article 31 of the Directive lists the “innovation partnership” that allows the contracting authorities to call for tenders for the resolution of specific problems<sup>237</sup> with the aim of “[...] *development of an innovative product, service or works and the subsequent purchase of the resulting supply, services or works*” at a price level and with minimum standards in accordance with the partners.

Article 32 provides the private procedure that consists in the possibility for public authorities to negotiate a procedure without a prior publication; the conditions that allow this procedure are listed in Articles from 2 to 5 and are different according to the type of contracts.

Another introduction regards the deadlines, that are fixed in a minimum 35 days for open procedure and 30 days instead of 37 for restricted procedure.

The exclusion ground<sup>238</sup> and the selection criteria reflected the necessity to grant the public application of the principle.<sup>239</sup>

Selection criteria are listed in Article 58 of the 2014/24 Directive which lists “[...] *suitability to pursue economic and financial standing; technical and professional abilities professional activity*”. The criteria are a sort of positive test: the contracting authorities shall verify that the bidders comply with those criteria; on the other hand, exclusive grounds are a negative test: if the contracting authorities verify that one of the conditions listed in article 57<sup>240</sup> is present, the bidders must be excluded.

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<sup>235</sup> Article 29(2) Directive 2014/24

<sup>236</sup> Mantini, Pierluigi, et al. *“Nel Cantiere Dei Nuovi Appalti Pubblici: Semplificazione, Efficienza, Concorrenza, Anticorruzione”*, Giuffrè, Milano, 2015, at 216

<sup>237</sup> Article 31.1 Directive 2014/24: *“In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for quality.[...]”*

<sup>238</sup> Article 57 Directive 2014/24

<sup>239</sup> See *infra*

<sup>240</sup> Article 57(1) Directive 2014/24: *“Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons: (a) participation in a criminal organisation, as defined in Article 2 of*

The conditions of exclusions are participation in a criminal, corruption, fraud, terrorist offences or offences linked to terrorist activities, money laundering or terrorist financing, child labour and other forms of trafficking in human beings.

Regarding selection criteria, the main introduction is provided in the preamble: paragraph 89 states that it would be more functional to substitute the concept of “*best quality price option*” with a terminology more suitable to render the concept of “*most economically advantageous tender*” as expressed in Directive 2004/18. The solution proposed is to use the term “*economically best solution*” among those offered.

Article 46 of the Directive provides that the contracting authorities have the possibility to split the tender in lots and decide the subject matter and the size<sup>241</sup>; in case in which the contracting authority decides to not split the tenders a motivation has to be provided.

In order to provide a significant simplification of the procedure, Article 22 provides that contracting authorities have to provide the communication of the information and of the documents via electronic means: the *ratio* of this introduction was first of simplification of communication through a cut of the tradition cost.<sup>242</sup>

Article 59 introduces the European Single Procurement Document that is an electronic formal statement in which the economic operator provides that it fulfils with the selection criteria as well as the ground of exclusion does not apply, and the information requested by the contracting authority.<sup>243</sup>

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*Council Framework Decision 2008/841/JHA (1); (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (2) and Article 2(1) of Council Framework Decision 2003/568/JHA (3) as well as corruption as defined in the national law of the contracting authority or the economic operator; (c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests (4); (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA (5) respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision; (e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council (6); (f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council (7).*

<sup>241</sup>Article 46 (1) Directive 2014/24: “Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.”

<sup>242</sup>Recital 72 Directive 2014/24: “Electronic means of communication are particularly well suited to supporting centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of 30 months.”

<sup>243</sup>Article 59 (1) Directive 2014/24: “The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal

This selected short list of the main changes helps us to gather the main principles that govern the Directive 2014/24. In the analysis, it can be made a division between the principles included in the Directive and the ones that are deducted from the general context.

The former are transparency, no discrimination, proportionality and equal treatment. The latter are the scope of the EU in its policy which are sustainable development, environmental and labour standard's protection and help us to find a link to the objectives of CCP.

## **2.2 Directive 24/2014 Principles**

In this paragraph it is provided a presentation of the principles Directive 2014/24 governing public sector and the structure of this examination it is based on two different approaches.

The first one is to describe the principles included in the Directive: transparency, proportionality, equal treatment, no discrimination.

The second step it is an illustration of the practical consequences that those principles have in the provisions of the Directive.

The conclusion is concentrated on the consequences of the “*non-legislative*” principles introduced by the Directive and how they are related to the principles that we have mentioned. In particular, it is examined the role of sustainable development, corruption and competition as general aims of the public sector Directive in relation to equal treatment, no discrimination, proportionality and transparency.

### **2.2.1. The principle governing public procurement: general overview**

The preamble of the Directive 2014/24 at paragraph 1 states that “ *The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.*”

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*statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.”*

From the letter of the provision, the principles governing public procurement are both the ones directly provided by the TFEU and the ones deducted by them.

The principles that derive from TFEU are free movement of goods, freedom of establishment and the freedom to provide services. The *ratio* of these application is the role of the public procurement in the internal market: as affirmed previously, public procurement's principles and regulations correspond to the intention to start a process of integration in the Internal Market.

The other principles included in the Directive are equal treatment, non-discrimination and transparency: the mere fact that the principles above mentioned are the governing principle of the public sector Directive is not a novelty.

Article 2 of the Directive 2004/18 stated that: "*Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.*" However, it is important to notice a difference between the letters of the Article above mentioned and the Directive: if Directive 2004 used a general expression to make reference to equality and no discrimination, Directive 2014 is more specific.

In fact, Article 18 states that: "*Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner*": it is clear the intention to add two more principles: transparency and proportionality.

As a result, the disposition of the Directive results to be governed by the necessity to create an open market and to avoid that public procurement could assume the role of a barrier against the integration and, in addition, to achieve the objects of the EU policies.

This statement is linked to the aim of liberalization and open access that the public procurement's reform aimed to pursue since the first step in the Green Public procurement of 2011.

In this respect, the Directive at paragraph 2 recalls the "*Europe 2020 Strategy*": in particular, it is stated that "*ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council (4) and Directive 2004/18/EC of the European Parliament and of the Council (5) should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate*

*certain aspects of related well-established case-law of the Court of Justice of the European Union.”*

The main ratio governing public procurement results to be the realization of a more open and harmonised market: the result can be achieved by the Directive that represents a work of consolidation of the rules of public procurement and the connection of them to the necessity of a social and economic context that evolves.

In the first paragraph of “*Europe 2020 Strategy*” is expressly stated that the objective of it was to create a framework that would let the creation of an efficient communication between and to “*lessening the administrative burdens of contracting authorities, contracting entities and economic operators, not least small and medium-sized enterprises.*”

Communication of the Commission on public procurement of 2017 remarked the important role of the public procurement and the necessity to have an efficient public procurement : the aim was to have a better public money value public funding as well to deliver economic and social goals.<sup>244</sup> Commission outlined six strategic points :Ensuring wider uptake of strategic public procurement, Professionalising public buyer, Improving access to procurement markets, Increasing transparency, integrity and better data and Boosting the digital transformation of procurement.

Paragraph two connects the matter of public procurement to “*Europe 2020 strategy*”: in particular, it states that: “*Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020, a strategy for smart, sustainable and inclusive growth’ (‘Europe 2020 strategy for smart, sustainable and inclusive growth’), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while.*”

Public procurement is designed to be sustainable<sup>245</sup> and smart: a smart procurement means a procurement flexible and accessible and for this reason, although

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<sup>244</sup> “*The new generation of public procurement Directives, adopted in 2014, provides a framework for procuring in a more flexible way. They simplify public procurement procedures, improving access of SMEs to procurement. The overall objective is to obtain better value for public money, to deliver better outcomes for societal and other public policy objectives while increasing efficiency of Public Spending. Finally, The Directives’ Stronger Provisions On Integrity And Transparency Target Corruption And Fraud.*” From 3.10.2017 COM(2017) 572 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Making Public Procurement work in and for Europe, available at <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-572-F1-EN-MAIN-PART-1.PDF>

<sup>245</sup> On the issue see Ceruti, Marco, *Sustainable Development and Smart Technological Innovation within PPPs: The Strategic Use of Public Procurement*, European Procurement & Public Private Partnership Law Review (EPPPL) vol. 12, no. 2 (2017): p. 183-191. HeinOnline,

the Directive does not include a precise definition of sustainable procurement,<sup>246</sup> however the Directive connects the concept of sustainability to the aim to make a procurement more efficient and innovative, e.g., through a better implementation responds to the aim of create a procurement more digital and more electronic. In this respect, two examples are eCertis and the electronic procedure.

All the provisions are based on four principles: equal treatment, no discrimination, proportionality and transparency. From these principles, other two cardinal points of the reform can be deduced: competition<sup>247</sup> and corruption.

Regarding corruption, public procurement is a well ground in which various type of corruption conducts can be performed: the fact that a public procurement is a public sector activity which redistributes public funds makes the line between procurement and corruption thinner.<sup>248</sup>

The aim of the Directive is to create a legislative framework that can prevent phenomena as collusion, bribery that can be manifested in operation such as public tenders.

In the next paragraph the main definitions of the principles are exposed in order to see how they work to grant a functional use of public procurement's dispositions and to achieve the related objectives.

### **2.2.2 The four principles of public procurement: equal treatment, non-discrimination, proportionality and transparency**

Article 18 expressly provides contracting authorities to act "*equally and without discrimination*": the letter of the provision seems to suggest that equal treatment and no discrimination are the same side of one aspect. As for the other principles of public

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<sup>246</sup> "The Directive does not include definitions; it refers to the subject matter of sustainability in relation to innovation and efficiency" In Tünde Tátrai "Stages of Development Towards Sustainable Public Procurement, In: Thai K. (Eds) International Public Procurement. Public Administration, Governance And Globalization, Vol 14. (2015) Springer, Cham, at 281

<sup>247</sup> On the affection of equal treatment and transparency on competition see Çetinkaya, Özhan. *Evaluation of Public Procurement System Considering the Principles of Competition, Transparency and Equal Treatment*, Business and Economics Research Journal, vol. 5, no. 3, 2014, pp. 97.

<sup>248</sup> "Understanding government procurement as a public sector activity which operates with the state budget and redistributes public funds to the private sector (in most cases) in return for the supply of goods and services readily brings to mind the 'thin line' between procurement and corruption." Irena Georgieva, *Using Transparency Against Corruption in Public Procurement: A Comparative Analysis of the Transparency Rules and their Failure to Combat Corruption*, vol. 11;11, Springer, Cham, Switzerland, (2017), at 61

procurement, principle of equality<sup>249</sup> and principle of no discrimination are expression of the fundamental principles of the Union.

The equal treatment principle under the procurement Directives has been defined by Joined Cases C-21/03 and C-34/03, *Fabricom v Belgium* (“Fabricom”)<sup>250</sup>: “*the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified*”.

In addition, the case states at paragraph 26 that: “*Furthermore, it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified...*” and “*The concept of equal treatment can be seen as an objective in its own right concerned with the equal right of firms to benefit from opportunities to do business with the public sector, or as a means to other objectives such as ensuring value for money and preventing corruption.*”

No discrimination is functional to the aim of avoiding form of protectionism and aiming liberalization of public procurement: Article 18 states that the contracting authorities shall act without discriminating actions. Considering that contracting authorities are local entities acting in behave of public authority, the disposition means that the treatment of the economic operators that enjoy the tenders must be the same one adopted for national bidders.

Discrimination and equal treatment appear essential for the electronic procurement<sup>251</sup>: Recital 70 states that: “*In line with the requirements of the rules for electronic means of communication, contracting authorities should avoid unjustified obstacles to economic operators’ access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment*”

Proportionality is mentioned in the preamble and in Article 18; it is directed to contracting authorities too and it means that the contracting authorities shall act having regard to proportionality when doing an action, e.g. the award criteria. As a result, there

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<sup>249</sup> On Principle of equality see Rossi, Lucia S., and Federico Casolari. *The Principle of Equality in EU Law*, Springer Verlag, Cham, 2017, doi:10.1007/978-3-319-66137-7.

<sup>250</sup> In Arrowsmith S, Treumer S, Fejø J, Jiang L., *Public procurement regulation: an introduction*, EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation, (2011), at 144 ff.

<sup>251</sup> On the role of electronic procurement see Ferk, Petra, *Can the Implementation of Full E-Procurement into Real Life Address the Real Challenges of EU Public Procurement*, European Procurement & Public Private Partnership Law Review (EPPPL) vol. 11, no. 4 (2016): p. 327-339. HeinOnline

are various provisions within the Directive that refer to proportionality; for example, Article 19 on the economic operators<sup>252</sup>, Article 47 par. 3 on time limits to the tender.

An interesting application of proportionality to contracting authorities is given by Article 58 on selection criteria: it provides that, when applying the criteria for economic operators, the Contracting authorities will indicate requirements that “*shall be related and proportionate to the subject-matter of the contract.*”.

In addition, proportionality is central in case of the grounds of exclusion too: in particular, in the application of the criteria contained in Article 57 proportionality is central: “*In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality.*”

For the first time, “transparency” is mentioned as a principle governing public procurement: Article 18 of the Directive 2014/24 states that: “Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.”

Principle of transparency is fundamental for the purposes of the Directives: it requires that the contacting authorities and the economic operators act in a manner that guarantees a proper exchange of information and the protection of the confidential ones.

As we said, one of the aims of the public procurement reform as set in “*Green Public procurement*” communication was to guarantee transparency to gain legal certainty, to help competition and to avoid corruption: as a result of the relevance of this principle, it is important to underline that there are many provisions that recall transparency.

As an example, in the Recital of the Directive there are lots of passages that mention transparency: regarding the procedures, Recital 45 claims for transparency: “*The competitive procedure with negotiation should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency.*”

About the way of communication, the electronic communication has to be performed having regarded of transparency “*The competitive procedure with negotiation should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency.*”

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<sup>252</sup>Article 19 Directive 2014/24: “Any conditions for the performance of a contract by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.”

Interesting note is that the recital 58 provides that for the communication of essential element documents has to be preferred to oral communication in order to have the necessary transparency to verify the adherence with equal treatment principle: *“while essential elements of a procurement procedure such as the procurement documents, requests for participation, confirmation of interest and tenders should always be made in writing, oral communication with economic operators should otherwise continue to be possible, provided that its content is documented to a sufficient degree. This is necessary to ensure an adequate level of transparency that allows for a verification of whether the principle of equal treatment has been adhered to.”*

Article 58 of the Directive calls for the contracting authorities to specify *“the methods and criteria for such consideration in the procurement documents. Such methods and criteria shall be transparent, objective and non-discriminatory.”*

Transparency is seen as a key element in the public procurement between contracting authorities and economic operators that are based in a different Member States: two of the aims are to guarantee the possibility to SMEs and to avoid distortions of competition.<sup>253</sup> In this sense, transparency is a key element of the fighting of corruption, that was indicated as one of the objectives of the public sector Directive reform. In this respect, recital 126 states that *“The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud.”*

Transparency appears to be the basis of the objective’s criteria necessary to verify the tender winner, as in recital 89 : *“Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender.”*

All the provision seems to have three elements in common: specifically, competition, corruption and information. The relationship between the Directive and the principle makes transparency as a sort of safeguard measure to achieve the most relevant objectives of the Directives.

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<sup>253</sup> Recital 59 Directive 2014/24 : *“ However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.”*

The examination upon the principles make a clear depiction of the aims and of the ratio of their presence: from one side, granting the liberalization and opening access of public procurement: in this respect, equal treatment, no discrimination are the best example; from the other, transparency appears to be the most useful to achieve those aims: the legal exchange of information would help to guarantee that all the bidders will receive the same treatment not caring if they are seated in different country and that the award criteria are suitable to be checked in order to prevent phenomena such corruption and competition.

In conclusion, the principles help to understand the novelties introduced by the reform and the new framework of public procurement.

### **2.2.3 New issues in public procurement: Sustainability, Innovation procurement and e-procurement**

In this paragraph are illustrated the most relevant introduction made by Directive 2014/24 and the relationship with equal treatment, no discrimination, proportionality and transparency. The aim is to provide for a connection between the most innovative aspect of the reform to “*Europe 2020 Strategy*” and, in general, to illustrate in which measure public procurement and CCP are connected.

First, the themes of electronic procurement and sustainable procurement are introduced: these two themes are recalled in both “*Trade for all strategy*”<sup>254</sup> and in “*Green paper of public procurement*”.<sup>255</sup> The relevant aspect of these issues is that they represent the mechanism of the two *facies* of the current Union- internal and external action: although the direction and the aims are different, the instruments to achieve the objectives seem to be the same.

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<sup>254</sup> See *supra* §

<sup>255</sup> “The “*Europe 2020 strategy for smart, sustainable and inclusive growth*” sets out a vision of Europe's competitive social market economy over the next decade that rests on three interlocking and mutually reinforcing priorities: developing an economy based on knowledge and innovation; promoting a low-carbon, resource-efficient and competitive economy; and fostering a high-employment economy delivering social and territorial cohesion.” In COM (2011) 15 “*EU Green paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market.*” available at <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF>

There is not a definition of sustainable public procurement<sup>256</sup> but it has been considered as an objective of public procurement since “*Green paper*” communication. In particular, the communication made reference to “*Europe 2020 strategy*” and stated that: “*the Commission stated that energy criteria (regarding efficiency, renewables and smart networking) should be used in all public procurement of works, services or supplies*”.

Sustainability was indicated in the Communication as guidance for the contracting authorities in the moment of selection of “*what to buy*”<sup>257</sup>: one goal of the Directive is to make public procurement strategic to innovation purposes and one of the instruments is sustainable development. In this respect, the challenge is to foster public procurement in order to be in compliance with environmental standards.<sup>258</sup>

In addition, the Communication reserved to sustainability a special attention regarding the process of production: in this respect, it made reference to “*Under the current rules it is not possible to require process and production methods that do not relate to the manufacturing of the product and are not reflected in the characteristics of the product*”; in addition, the attention should have put the process of production too: the aim is to let the contracting authority to check the standards used in production in case that are not related to technical specification but in the phase of award too.

So far, the Communication has suggested that “*However, using criteria that relate to the environment, energy efficiency, accessibility or innovation in the award phase rather than only in the technical specifications or as contract performance conditions can have the benefit of prompting companies to submit bids that go further than the level set in the technical specifications and thereby promote the introduction of innovative*

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<sup>256</sup> “Sustainable procurement has according become an established term, without any authoritative definition of the concept.” The author uses the definition given by United Nations Environment Programme that defined PUBLIC PROCUREMENT as a way “to achieve the appropriate balance between the three pillars of sustainable development economic, social and environmental contracting authority taking into account all of the three pillars when procuring goods service and works.” In Sjøfjell, Beate, et al. *Sustainable Public Procurement Under EU Law: New Perspectives on the State as Stakeholder*. Cambridge University press, Cambridge [etc.], 2015, at 2

<sup>257</sup> “Another way of achieving policy objectives through public procurement could be to impose on contracting authorities’ obligations on “what to buy”. For example, this could be done by imposing mandatory requirements or criteria governing the characteristics of the goods or services to be provided (e.g. maximum levels for energy and resources use, environmental harmful substances, minimum levels of recycling), or alternatively by setting targets (e.g. 60% of public purchases must be environmentally friendly)”

In COM (2011) 15 “*EU Green paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market.*” available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF>

<sup>258</sup> “[...]sustainable public procurement poses challenges of how to identify and define environment or social consideration in a manner that will be possible to include in the procurement conditions as these needs to be linked to subject matter of the contract.” In Andreka, Marta in Sjøfjell, Beate, et al. *Sustainable Public Procurement Under EU Law: New Perspectives on the State as Stakeholder*. Cambridge University press, Cambridge [etc.], 2015, at 140

*products on to the market.*”: the aim was to grant that new criteria shall have a look upon in order to choose “*how to buy*”.

The Directive 2014/ 24 received the suggestion and it was set a public procurement legal framework that represents a good ground for two different aspect of sustainable development: environment and labour works.<sup>259</sup> As a result, the aim contained in the Recital is to create a disposition that have regard to the challenges of sustainable growth.

The Directive recognizes the important of the achievement of a public procurement sustainable and for this reason calls for a modernisation of the previous Directive: Recital 74 states that “*The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability.*”

In this respect, sustainability is strictly connected to the achievement of another key purpose of the reformed legislation: competition. The intent is to build up a public procurement framework that, while modernising the procedure in order to respect and guarantee a sustainable growth, grants the functionality of an open and competitive market. In order to do it, recital 95 confirms the necessity to adapt the Directive in order to empower contracting authorities to pursue the objective in “*Europe 2020 strategy*”<sup>260</sup>.

Furthermore, innovation is among one of the strategic objectives listed in Directive 2014/24: Recital 69 states that “*the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth.*”<sup>261</sup>

The importance of the observance of sustainable growth, environmental protection and attention to social aspect is translated in Article 76 of the Directive: in the provision

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<sup>259</sup> Recital 41 Directive 2014/24: “*Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU*”

<sup>260</sup> “*It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth. In this context, it should be recalled that public procurement is crucial to driving innovation, which is of great importance for future growth in Europe.*” In COM (2010): “*2020 COMMUNICATION FROM THE COMMISSION EUROPE 2020 A strategy for smart, sustainable and inclusive growth*”, available at <http://ec.europa.eu/eu2020f>

<sup>261</sup> Moreover, Recital 47 Directive 2014/24: “*It should be recalled that a series of procurement models have been outlined in the Commission Communication of 14 December 2007 entitled ‘Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe’, which deals with the procurement of those R&D services not falling within the scope of this Directive. Those models would continue to be available, but this Directive should also contribute to facilitating public procurement of innovation and help Member States in achieving the Inno-vation Union targets.*”

is stated that: *“Member States shall ensure that contracting authorities may consider the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made based on the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.”*

Moreover, the Directive recognizes the most important international regulation in the subjects.

Environment protection is a fundamental principle and its regulation is central in EU policies. The provision is contained in the Recital 95 which recalls Article 11 TFEU<sup>262</sup> which states that: *“Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts”*; the reference to TFEU is a clear signal that the reform wanted to adapt public procurement to general policies of the EU.

The Directive makes continuing reference to environmental protection: first, it invites the contracting authorities to have a look to environmental management of the production by the economic operators, e.g., looking the systems of certification adopted;<sup>263</sup> as a result, Article 63 of the Directive expressly provides that contracting authorities shall look to the labels when evaluating environmental standards.<sup>264</sup>

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<sup>262</sup> Article 11 TFEU: *“Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.”*

<sup>263</sup> Recital 88 of Directive 2014/24: *“Contracting authorities should be able to require that environmental management measures or schemes be applied during the performance of a public contract. Environmental management schemes, whether or not they are registered under Union instruments such as Regulation (EC) No 1221/2009 of the European Parliament and of the Council ( 1 ), can demonstrate that the economic operator has the technical capability to perform the contract. This includes Ecolabel certificates involving environmental management criteria. Where an economic operator has no access to such environmental management registration schemes or no possibility of obtaining them within the relevant time limits, it should be allowed to submit a description of the environmental management measures implemented, provided that the economic operator concerned demonstrates that those measures ensure the same level of environmental protection as the measures required under the environmental management.”*

<sup>264</sup> Article 62.2 Directive 2014/24 *“Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to the Eco-Management and Audit Scheme (EMAS) of the Union or to other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States.”*

Environmental standards can be crucial to the choice of economic operators too: Article 67 links the award criteria to theme of environmental protection and states that the most advantageous criteria should be considerate also in the light of “*on the basis of criteria, including qualitative, environmental*”. As a result, Article 70<sup>265</sup> lists environmental criteria for the evaluation of contract performances.

Although the importance of sustainable development, Recital clarifies that it was preferable not to provide for a mandatory rule to respect such provision: the ratio was to respect the differences that can occur between individuals and market sectors. In particular, Recital 95 states that, although the achievement provided in “*Europe 2020 Strategy*” are crucial, it is “*not be appropriate to set general mandatory requirements for environmental, social and innovation procurement*.”<sup>266</sup>

Regarding the social aspects, the Directive includes provisions that assure a proper integration of the requirement and obligations “*of environmental, social and labour requirements into public procurement procedures by “provided and result from laws, regulations, decrees and decisions, at both national and Union level”, and the target are both Member States and contracting authorities.*”<sup>267</sup>

As for environmental protection, the best destination for perpetrate this aim are award criteria and selection and exclusion criteria.

Recital 40 states that: “*Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders.*”

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<sup>265</sup> Article 70 Directive 2014/24: “*Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.*”

<sup>266</sup> “*It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth. In this context, it should be recalled that public procurement is crucial to driving innovation, which is of great importance for future growth in Europe. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement.*” In COM (2010): “*2020 COMMUNICATION FROM THE COMMISSION EUROPE 2020 A strategy for smart, sustainable and inclusive growth*”, available at <http://ec.europa.eu/eu2020f>

<sup>267</sup> Recital 37 Directive 2014/24: “*With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apparently at the place where the works are executed or the services provided and result from laws, regulations, decrees and decisions, at both national and Union level[...]*”

As a result, when listing the principle governing public procurement, Article 18 includes labour protection too: *“Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. The necessary verification for that purpose should be carried out in accordance with the relevant provisions of this Directive, those governing means of proof and self-declarations.”*

As for environmental protection, Articles 43 and 67 make reference to about protection.

The most interesting introduction is that, when providing for an evaluation of the most economical advantageous offer, a contracting authority should have a look on *“provisions concerning abnormally low tenders”*: the aim is to protect the so called *“dumping social”* and excludes from the tender those bidders that do not comply with labour standard’s in order to fix lower prices.<sup>268</sup>

Another key sector is the electronic transformation that started with Directive 2014/24: the communication on the strategy procurement individuated, firstly, electronic system as better opportunity to collect and interpret data in order to improve better quality in public procurement; secondly, one of the objectives of the strategy is the digitalisation of public procurement.

The Directive offers tools to improve electronic procurement: Recital 52 states that: *“Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes.”* In addition, Recital 53 provides that: *“Contracting authorities should, except in certain specific situations, use electronic means of communication which are non-discriminatory”*; it is clear that the first aim of electronic means of communication<sup>269</sup> responds to the necessity to grant the application of two of the fundamental principles of public procurement: transparency, from one side, and no discrimination from the other.

Providing for the use of electronic means of communication is a sort of warrant that a better control of the procedure and the right of information and access to public

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<sup>268</sup> In Mantini, Pierluigi, et al., *“Nel Cantiere Dei Nuovi Appalti Pubblici: Semplificazione, Efficienza, Concorrenza, Anticorruzione”*, Giuffrè, Milano, (2015), at 18

<sup>269</sup> Article 2 of Directive 2014/24 defines electronic means as: *“electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means [...]”*

procurement are provided; the result is contained in Article 22 which puts in charge the Member States to check that “*Member “all communication and information exchange under this Directive, electronic submission, are performed using electronic means of communication in accordance with the requirements of this Article”*<sup>270</sup> ; in addition, Article 53 states that contracting authorities “*shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents*”.

The practical aspects of these provisions can be found in two instruments: eCertis and the European Single Procurement Document (ESPD).

eCertis is an online system that helps companies that want to join a tender in one of the EU Member States to collect information of certificates and documents necessary to participate<sup>271</sup>: Recital 87 expresses that, although it is not mandatory to update eCertis platform currently, a future mandatory provision will be useful.

Regarding ESPD, it is provided to be on electronic form and that Member States has to update eCertis to grant a better performance.<sup>272</sup>

The necessity to grant flexibility<sup>273</sup> and transparency is reflected also in the objective of facilitating access to Small and Medium Enterprises in the tenders (SMEs).

In particular, Recital 78 of Directive 2014/24 states that: “*Public procurement should be adapted to the needs of SMEs.*”<sup>274</sup> In order to pursue this aim, the Directive provides

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<sup>270</sup> Article 22 Directive 2014/24 provides for four exceptions: “*Four exceptions are listed: (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally application (b) the application supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available application or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority; (c) the use of electronic means of communication would require specialised office equipment that is not generally available to contracting authorities; (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.*”

<sup>271</sup> See EUROPEAN COMMISSION eCertis website available at <https://ec.europa.eu/tools/ecertis/about>

<sup>272</sup> Article 46 Directive 2014/24: “*Member States shall make available and up-to-date in eCertis a complete list of databases containing relevant information on economic operators which can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to the databases referred to in this Article.*”

<sup>273</sup> “*It was also stated that a revised and modernized public procurement legislative framework would make the award of public contracts more flexible and enable the contracts to be put to better use in support of other policies*”. In Anna Górczyńska, *The Role of Small and Medium-Sized Enterprises in a Sustainable Public Procurement System*, in *International Public Procurement*, Springer International Publishing Switzerland, (2015), at 307

<sup>274</sup> Recital 78 Directive 2014/24: “*Public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled ‘European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts’, providing guidance on how they may adapt the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots. Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs or in accordance with different*

some measures: in fact, Recital 124<sup>275</sup> itself recognizes the important role that SMEs have and the advantages that they can bring in terms of innovation and growth.<sup>276</sup>

Although a regulation “*SMEs friendly*” can create doubts regarding state aid in the form of procurement preferences,<sup>277</sup> the measures in favour of SMEs can be considered as an application of principles of non-discrimination and proportionality.

As a result, there are some measures provided to facilitate access of SMEs: as an example, Recital 78<sup>278</sup> considers that the possibility to divide the procurement in lots as provided by Article 46 is a way to favour SMEs; in fact, dividing tenders in lots imposes contracting authorities to give detailed explanation<sup>279</sup> relating at least to the object of the contract and /or criteria of choice<sup>280</sup>; another important instrument to grant access to SMEs is the electronic procurement that can grant an easy access to information to SMEs.<sup>281</sup>

As it said at the beginning of this paragraph, the main challenges and the principles of public procurement are connected to the external challenges of a modified and more global market: the interaction of the divergences between the two ground of

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*subsequent project phases.”*

<sup>275</sup> Recital 124 Directive 2014/24: “*Given the potential of SMEs for job creation, growth and innovation it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level.*”

<sup>276</sup> “*In a period of economic crisis, the promotion of small and medium-sized enterprises (SMEs) seems to be an important issue as they constitute almost 99 % of European enterprises and play a key role in economic growth*” In Anna Górczyńska, *The Role Of Small And Medium-Sized Enterprises In A Sustainable Public Procurement System*, In *International Public Procurement*, Springer International Publishing Switzerland, (2015), at 301

<sup>277</sup> “*The question still remains whether SMEs could be the object of state aid in the form of procurement preferences. SMEs are the main business beneficiaries of the EU structural funds.*” Anna Górczyńska, *The Role of Small and Medium-Sized Enterprises in a Sustainable Public Procurement System*, in *International Public Procurement*, Springer International Publishing Switzerland, (2015), at 317

<sup>278</sup> Recital 78 Directive 2014/24: “*Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions. With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.*”

<sup>279</sup> “*SMEs. This legal regulation even points out that if a contract is not subdivided into lots, the contracting authority will be obliged to provide a detailed explanation.*” In Anna Górczyńska, *The Role of Small and Medium-Sized Enterprises in a Sustainable Public Procurement System*, in *International Public Procurement*, Springer International Publishing Switzerland, (2015), at 308

<sup>280</sup> “[...]at least at the level of specification of the object of the contract, so that also the qualification criteria should be adequate to the partial value and scope of the contract.” In Anna Górczyńska, “*The Role of Small and Medium-Sized Enterprises in a Sustainable Public Procurement System*”, in *International Public Procurement*, Springer International Publishing Switzerland, (2015), at 309

<sup>281</sup> “*Moreover, the platform is also supposed to be especially relevant to SMEs that want to tender in the EU, easing access to information on notices and fostering SME participation in cross-border public procurement procedures across Europe*” In Anna Górczyńska, *The Role of Small and Medium-Sized Enterprises in a Sustainable Public Procurement System*, in *International Public Procurement*, Springer International Publishing Switzerland, (2015), at 316

play- Internal and External- should be examined to find out if the External Action of the Union corresponds to the international instruments provide for public procurement.

### **3.2 Public procurement and external action: Public procurement and Common commercial policy**

In this section it is examined public procurement using the lens of CCP.

The aim is to find out how the two dimensions of CCP - multilateral and bilateral- deal with this field: regarding the multilateral context, it is introduced the Agreement on Government Procurement (GPA) which is a WTO plurilateral agreement which regulates public procurement with the aim to avoid barriers to trade by using WTO principles.

In the second part, it is presented a general overview of the International Procurement Instrument (IPI, that was an instrument proposed by the Commission in 2016 in order to create a public procurement regulation accessible to third parties.

The third part it is an overview of the role that public procurement plays in the commercial relations: as said, public procurement is part of new generation agreements: which include a part regarding public procurement.

In conclusion, it is provided an analysis of the most interesting chapter of some FTAs: as we said, public procurement is part of the negotiated issues in trade agreements and it is part of Common Commercial Policy of the EU.

In particular, negotiating public procurement provisions means liberalising market: as said, public procurement can work as a trade barrier and as a result, achieving a common legal framework in the issue means providing for a better function of international trade.

#### **3.3.1 Public procurement in a multilateral context: Agreement on Government Procurement**

The Agreement on Government Procurement (GPA) was negotiated with the aim of “[...] *to ensure open, fair and transparent conditions of competition in the government*

*procurement markets*”<sup>282</sup>. The GPA is an agreement within the WTO framework; in particular, it is a plurilateral agreement and it means that not all members of WTO have signed GPA.

The first time that public procurement was introduced among arguments of discussion in the framework of GATT was at Tokyo Round of 1976: as a result, the first agreement on government procurement (the so-called “Tokyo Round Code on Government Procurement”) was signed in 1979 and entered into force in 1981 and was amended in 1987.<sup>283</sup>

During the Uruguay Round, Parties to the agreement decided to extend the scope and coverage of the agreement and signed a new agreement in 1994, which entered into force on 1 January 1996.<sup>284</sup>

A new cycle of negotiations started, and the results of the negotiations were formally adopted in March 2012<sup>285</sup>: the result was a revised Agreement that entered into force on 6 April 2014.<sup>286</sup>

The scope of the GPA is provided by Article II that states that: “*This Agreement applies to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means.*” ; paragraph 2 states that the covered procurement is made by a contractual means<sup>287</sup> by a procurement entity that covered

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<sup>282</sup> “To ensure open, fair and transparent conditions of competition in the government procurement markets, a number of WTO members have negotiated the Agreement on Government Procurement (GPA).” From WTO website, available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

<sup>283</sup> “As a result, the first agreement on government procurement (the so-called “Tokyo Round Code on Government Procurement”) was signed in 1979 and entered into force in 1981. It was amended in 1987 and the amendment entered into force in 1988.” In *Evolution of GPA* from WTO website, available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

<sup>284</sup> “Parties to the agreement then held negotiations to extend the scope and coverage of the agreement in parallel with the Uruguay Round. Finally, a new Agreement on Government Procurement (GPA 1994) was signed in Marrakesh on 15 April 1994 — at the same time as the Agreement Establishing the WTO — and entered into force on 1 January 1996”. In *Evolution of GPA* from WTO website, available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

<sup>285</sup> On the issue Arrowsmith, Sue, *Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha*, *Journal of International Economic Law*, vol. 5, no. 4, Dec. 2002, pp. 761

<sup>286</sup> “Within two years of the implementation of GPA 1994, the GPA parties initiated the renegotiation of the Agreement according to a built-in provision of the 1994 Agreement. The negotiation was concluded in December 2011 and the outcome of the negotiations was formally adopted in March 2012. Instruments of acceptance, often based on the completion of domestic ratification procedures, had to be submitted by two-thirds of the GPA parties in order for the revised Agreement to enter into force 30 days later. This requirement was fulfilled on 7 February 2014, with the tenth instrument of acceptance of the Agreement being deposited by Israel. The revised Agreement consequently entered into force on 6 April 2014.” In *Evolution of GPA* from WTO website, available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

<sup>287</sup> Specifically, Article II GPA includes “[...] purchase; lease; and rental or hire purchase, with or without an option to buy;”

goods, service and any combination not under of a certain threshold<sup>288</sup> as specified in the Annexes to the Agreement.<sup>289</sup>

The fundamental aim of the GPA is to mutually open government procurement markets among its parties ensuring the prevention of discrimination.<sup>290</sup> As a result, Article IV that indicates “The general principles” of GPA reflects those objectives and makes clear that the aim of GPA is to foster transparency<sup>291</sup> and no discrimination between its parties.<sup>292</sup>

No Discrimination means that the parties shall act according to the principle of treatment no less favourable: in particular, Article IV states that: “*With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities and “treat a locally established suppliers less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.”* In fact, discrimination is one of the goals of the revised GPA<sup>293</sup> and is connected to another principle: transparency.

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<sup>288</sup> Indicated in the annexes and not excluded by Annex I GPA

<sup>289</sup> Article II.2 GPA: “*This Agreement applies to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means.*

*For the purposes of this Agreement, covered procurement means procurement for governmental purposes: of goods, services, or any combination thereof: as specified in each Party’s annexes to Appendix I; and not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;*

*by any contractual means, including purchase; lease; and rental or hire purchase, with or without an option to buy;*

*for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party’s annexes to Appendix I, at the time of publication of a notice in accordance with Article VII;*

*by a procuring entity; and that is not otherwise excluded from coverage in paragraph 3 or a Party’s annexes to Appendix I.”*

<sup>290</sup>: “*Recognizing the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade.*” In GPA Preamble, available at [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm#articleI](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleI)

<sup>291</sup> On the issue see WOLFE, R. (n.d.). Regulatory transparency, developing countries and the WTO. World trade review., 2(2), 157–182; Arrowsmith, Sue, *Towards a Multilateral Agreement on Transparency in Government Procurement*, International and Comparative Law Quarterly vol. 47, no. 4 (October 1998): p. 793-816. HeinOnline

<sup>293</sup> “*A second, related, goal of the GPA is non-discrimination in the procurement process.*” Schefer, KN, and MG Woldeesenbet, *The Revised Agreement on Government Procurement and Corruption*, Journal of World Trade, vol. 47, no. 5, (2013), at 1148

Article IV <sup>294</sup> connects these two goals<sup>295</sup> and in particular states that: “A *procuring entity shall conduct covered procurement in a transparent and impartial manner.*”: the role of transparency in GPA should grant open market access and secondly prevents corruption.<sup>296</sup>

As lack of transparency is seen as a way to create a barrier to trade<sup>297</sup>, granting transparency means to provide all the information related to laws and procedures in order to simplify the access to particular complex procurement.

<sup>298</sup>As a result, Article IV explicitly relates transparency that: “[...]is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;”. Not is only transparency relevant to prevent discriminatory behaviour but can help to prevent illegal behaviour such as corruption. Moreover, Article IV states that impartial and transparent manner of conduct procurement help to “[...] prevents corrupt practices”. Corruption can cause a distortion of the market by not including foreign bidders into the tenders. As a result, granting transparent means avoiding distortion and has the important role to require fair and transparent condition of competition.

Regarding the relation with the EU public procurement, and similar GPA to EU public sector Directive, the Directive 2014 /24 makes a reference to GPA in Article 25 that states that: “*In so far as they are covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union’s Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting authorities shall accord to the works, subpublic procurement lies, services and economic operators of the signatories to*

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<sup>294</sup> In addition to transparency and no discrimination, Article 4 provides as principles of GPA Article IV established the general principles of GPA, use of Electronic means, conduct of Procurement, Rules of Origin. See GPA text available at [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm#articleI](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleI)

<sup>295</sup> “Article IV.4(c)’s explicit reference to impartiality connects transparency with the second main principle of non-discrimination in procurement.” In Schefer, KN, and MG Woldeesenbet, *The Revised Agreement on Government Procurement and Corruption*, Journal of World Trade, vol. 47, no. 5, (2013), at 1150

<sup>296</sup> On the issue see Krista Nadakavukaren Schefer, Mintewab Gebre Woldeesenbet, *The Revised Agreement on Government Procurement and Corruption*, Subscribed 47 Journal of World Trade, Issue 5, pp. 1129–1161 Published: 2013

<sup>297</sup> “In all markets lack of transparency in the sense of absence of information on rules and practices operates as a distinct barrier to trade, and often affects foreign suppliers disproportionately.” In Sue Arrowsmith, *Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization*, (2003) 37 Journal of World Trade, Issue 2, at 294

<sup>298</sup> “This function of transparency is potentially important in government procurement, which is often characterized by complexity and bureaucracy (caused by, inter alia, lack of resources and commercial incentives, as well as concerns over public accountability). To participate, suppliers need information on general laws and procedures, rules apply to specific awards (such as selection/award criteria), and contract opportunities.” In Sue Arrowsmith, *Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization*, (2003) 37 Journal of World Trade, Issue 2, at 294

*those agreements treatment no less favourable than the treatment accorded to the works, subpublic procurement lies, services and economic operators of the Union.”*

The Directive adopts the principle of treatment no less favourable and in this way, it confirms the application of the international obligations. Moreover, the Directive recalls the reference to GPA <sup>299</sup> e.g., recalling the alignment of the threshold to the one provided in GPA.

An important reference is made by Recital 98 that underlines the commitment to the GPA in the application of the principles regarding: “*It is essential that award criteria or contract performance*”<sup>300</sup>

One interesting interaction and parallelism between Directive 2014/24 and GPA is lied upon use of Electronic Means. The meaning of that provision ensures the integrity of requests for participations and tenders as a way to ensure transparency. <sup>301</sup>As a result, the conduct of procurement requests to the entities to act in a *transparent and impartial manner*” in order to using tender methods (open, selective and limited), avoiding conflicts of interests and preventing corruption practice.

In conclusion, Directive 2014 /24 was influenced by the principles of GPA. The commitment of Directive to such international instrument is a signal of the role that GPA plays in trade relationships with third parties: this purpose is emphasised by International Procurement Instrument.

### **3.3.2 Public procurement and granting access to market: International Procurement Instrument (IPI)**

International Procurement Instrument (IPI) was a proposal made by the EU Commission for the first time in 2012 and responds to the necessity of creating open access for EU firms to foreign market.<sup>302</sup> The Commission held that, although EU

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<sup>300</sup> Recital 98 Directive 2014/24: “*It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract. In addition, they should be applied in accordance with Directive 96/71/EC, as interpreted by the Court of Justice of the European Union and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the GPA or to Free Trade Agreements to which the Union is party.*”

<sup>301</sup>See Article IV GPA available at

[https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm#articleI](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleI)

markets were opened to international firms, there were no reciprocity and European firms encounter difficulty in accessing to public procurement market of third countries for the fact that “*the procurement markets for foreign goods and services in third countries remain to a large extent closed de iure or de facto.*”<sup>303</sup> As a result, the main objective of the 2012 proposal was to promote reciprocity<sup>304</sup> with third countries in the field of public procurement.

The way to assess this objective was to create a legal framework clear and accessible to foreign bidders and to create condition “[...]to *strengthen the position of the European Union when negotiating the terms of access of EU goods, services and subpublic suppliers to the public procurement markets of third countries*”.

In 2014 European Parliament Commission INTA proposed some amendments and the European Parliament endorsed the mandate for *trialogue* with a large majority together with a list of amendments. As a result, the Commission decided to modify the proposal for two reasons: it appeared to exist an imbalance between the openness of procurement markets and third countries market and that the EU companies should enjoy and that European companies should enjoy better access to procurement public opportunities abroad.

In the report, the Commissions stated that: “*The amendments presented in this proposal aim at eliminating, all possible negative consequences of the instrument in its original form, such as in particular the total closure of the EU procurement market, the administrative burden and the risk of a fragmentation of the internal market.*” From this statement can derive an important correlation between internal market and external action: the openness of public procurement not only grant better access to EU companies but was considerate to have positive consequences in internal market too.

In fact, the Commission tried to answer to those Member States that were worried that IPI could be a way of closing the markets entirely and that it would have caused form of retaliations.

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<sup>303</sup> “*The proposal on an International Procurement Instrument (IPI) is the EU response to the lack of level playing field in world procurement markets. While our public procurement market is open to foreign bidders, the procurement markets for foreign goods and services in third countries remain to a large extent closed de iure or de facto. The IPI aims at encouraging partners to engage in negotiations and opening participation for EU bidders and goods in third countries' tenders.*” In COM (2016) 34 final 2012/0060(COD) “Amended proposal for a Regulation Of The European Parliament And Of The Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries”

<sup>304</sup> “*The 2012 European Commission proposal was designed to encourage greater reciprocity on the part of trading partners, vis-à-vis access to the public procurement contracts.*” In Kamala Dawar, *the 2016 European Union International Procurement Instrument's Amendments to the 2012 Buy European Proposal: Retrospective Assessment of its Prospects.* *Journal of World Trade*, vol. 50, no. 5, (2016), at 848

The IPI is instrument that can be applied in CCP with whom is connected for two reasons: first, both them have the same legal basis and second, they are connected to GPA and WTO obligations.

Regarding the first point, the legal basis of the proposal is recognized in Article 207 TFEU: the fact that Article 207 TFEU regards CCP and the IPI proposal fall within this Article makes the matter of exclusive competence of the EU<sup>305</sup>.

Recital 1 of the regulation states that *“In accordance with Article 21 of the Treaty on European Union, the Union is to define and pursue common policies and actions and improve cooperation in all fields in international relations in order, inter alia, to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.”* And secondly, Article 206 TFEU: *“Pursuant to Article 206 of the Treaty on the Functioning of the European Union, the Union, by establishing a customs union, is to contribute, in the common interest, 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.”*<sup>306</sup>

Regarding the relationship with WTO and GPA, Recital 6 of the IPI 2016 states that: *“Within the context of the WTO and through its bilateral relations, the Union advocates an ambitious opening of international public procurement markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.”*

As a result, there is an important correspondence between Article 1 of IPI and Article III.8 (a) of GATT:<sup>307</sup> Article 1.2 of IPI states that the regulation shall not apply in case of government procurement in which the goods and service are purchased

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<sup>305</sup> “Article 207 of the Treaty on the Functioning of the European Union. Subsidiarity principle The proposal falls under the exclusive competence of the European Union. The subsidiarity principle therefore does not apply.” In COM (2016) 34 final 2012/0060(COD) Amended proposal for a Regulation of The European Parliament and Of the Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries

<sup>306</sup> Article 21 of the Treaty on European Union provides that the Union is “[...] define and pursue common policies and actions, and work for a high degree of cooperation in all fields in international relations in order, inter alia, to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.”

Pursuant to Article 206 of the Treaty on the Functioning of the European Union (TFEU), “The Union, by establishing a customs union, is to contribute, in the common interest, 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.”

<sup>307</sup> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

*“with a view to commercial resale or with a view to use in the production for commercial sale.”*

The statement is identical with the one provides in mentioned GATT Article as intended that GATT and in general WTO framework are considered as benchmark for the instrument: the message for third countries which are part of WTO is to expand on the EU public procurement.<sup>308</sup>

The relevance of the IPI is given by the fact that it is a real example of the fact that EU is conscious of the key role that the public procurement has in external action as well as the external role of public procurement has influence to the Internal Market. Another important parallelism between “external Public procurement” and “internal one” and how the one reflects to the other, is given by SME’s treatment as we discussed, one of the objectives of the Directive 2014/24 us to grant access to SMEs;<sup>309</sup> the SMEs purpose is bought on by IPI.

In particular, Article 5 provides for an exemption for SMEs from the regulation:<sup>310</sup> the ratio is that it has been noticed that SMEs have had problem with respecting burdensome procedures. On the other hand, it can be said that the IPI involved such an amount of threshold that it is found difficult that SMEs can be involved by the instrument.<sup>311</sup>

In sum, public procurement has become central in the commercial relations with other countries and IPI is a perfect example of the commitment of public procurement in international trade; moreover, the regulation’s legal basis itself makes clear how Public procurement is considered as a new instrument of external policy. The result is that public

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<sup>308</sup> “The 2016 IPI Amended Proposal sends out warning signals to its bilateral trading partners, fellow GPA parties and acceding- and observer-status GPA parties alike, to incentivize them to expand on their EU government procurement market access commitments.” In Kamala Dawar, *The 2016 European Union International Procurement Instrument’s Amendments to the 2012 Buy European Proposal: A Retrospective Assessment of Its Prospects*, Journal of World Trade, vol. 50, no. 5, 2016, at 853

<sup>309</sup> “In the legislative procedure leading to the adoption of the 2014 Procurement Directives, one of the main focuses of the EU was to improve the possibilities and conditions for participation of SMEs<sup>309</sup> in public procurement covered by the EU rules.” In Kamala Dawar, *The 2016 European Union International Procurement Instrument’s Amendments to the 2012 Buy European Proposal: Retrospective Assessment of its Prospects*, Journal of World Trade, vol. 50, no. 5, 2016, at 862

<sup>310</sup> “[...] Tenders submitted by SMEs<sup>25</sup> established in the Union and engaged in substantive business operations entailing a direct and effective link with the economy of at least one Member State, shall be exempted from this Regulation.” In Kamala Dawar, *the 2016 European Union International Procurement Instrument’s Amendments to the 2012 Buy European Proposal: A Retrospective Assessment of its Prospects*, Journal of World Trade, vol. 50, no. 5, 2016, at 853

<sup>311</sup> “However, this exclusion is of questionable value in promoting SME participation in procurement markets either in the EU or abroad. From the outset, the high value threshold makes it unlikely that smaller companies would be concerned by the instrument.” In Kamala Dawar, *the 2016 European Union International Procurement Instrument’s Amendments to the 2012 Buy European Proposal: A Retrospective Assessment of its Prospects*, Journal of World Trade, vol. 50, no. 5, 2016, at 865

procurement started to have a new role: in this respect, new generation agreements started to be included public procurement chapters.

### **CHAPTER III**

#### **PUBLIC PROCUREMENT AND FREE TRADE AGREEMENTS**

##### **3.1 E.U. Free Trade Agreements: general overview and challenges**

In this chapter it is provided for a general overview of Free Trade Agreements and with the aim of examining Public Procurement in Free Trade Agreements (FTAs).

The first subparagraph contains a general overview of four free trade agreements: South-Korea- EU FTA, Comprehensive and Trade Agreement Canada and EU, Transatlantic Trade and Investment Partnership and Japan Economic Partnership Agreements.

They are four examples of the so- called “*new generations agreements*” which are those agreements signed after 2012.

The free trade agreements were, along with custom union, an exception to the *most favourite nation*<sup>312</sup> rule, provided in Article I of GATT<sup>313</sup>. The rule states that a party which is part of the agreement must grant “*any advantage, favour, privilege or immunity*”<sup>314</sup> to all the like products imported, whichever is the originated country. The *ratio* of the rule echoes the objective of fostering liberalization of trade which consists in the promotion of free trade “*by focusing on the removal of border measures constituting barriers to trade, such as tariffs and import quotas.*”<sup>315</sup> ; this model represents a form of “*negative integration*”<sup>316</sup> which will have been the approach for other two decades.<sup>317</sup>

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<sup>312</sup> Article I GATT’ 47: “ *With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*”

<sup>313</sup> GATT ’94 included the text of GATT’47

<sup>314</sup> Ibidem 1

<sup>315</sup> In in Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 1

<sup>316</sup> “*This model for economic integration—where countries enter into international cooperation arrangements to remove exclusively discriminatory barriers to trade—has been referred to alternatively as ‘negative integration’ (Tinbergen (1954), p. 4) or ‘shallow integration’ (Lawrence, Bressand, and Ito (1996b), p. 5).*” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016). at 1

<sup>317</sup> “*Negative integration remained the predominant model for the regulation of international trade relations for the two decades that followed the conclusion of GATT 1947, with successive rounds of GATT negotiations.*” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 2

At the contrary, a custom union<sup>318</sup> or a free trade area provides for a different regime of duties and tariff: in fact, according to the definition contained in Article XXIV GATT a free trade area is “[...] *a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade.*”

Article XXIV is an exception to the rules of no discrimination embedded by Article II and sets legal requirements that justify the exception.<sup>319</sup> In particular, Article XXIV paragraph 4 expressly requires that Article XXIV applies to those agreements among contracting parties that: “*facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.*”<sup>320</sup>

Despite having been structured as an exception, FTAs (or preferential trade agreements) have become the rule at least for two reasons: failure of control by WTO and lack of clarity of the term “*substantially all the trade*”.<sup>321</sup>

Therefore, not only was a problem of interpretation but the crisis of multilateralism has given a significant contribution to the spread of FTAs in the context of WTO too.<sup>322</sup>

Since the negotiations in WTO after Doha round had resulted in stall, it has been occurring a shift in favour of bilateral approach based on “*positive integration*”<sup>323</sup>: in this respect, positive integration consists in “[...] *putting a greater emphasis is placed on disciplining domestic regulation, particularly through the development of common or*

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<sup>318</sup> According Article GATT a custom union is “ [...] the substitution of a single customs territory for two or more customs territories, so that [...] duties and other restrictive regulations of commerce (except, where necessary, those permitted under are eliminated” The European Community founded by Treaty of Rome was a custom union and was a beneficiary of the exceptional clause of Article, par. 2 GATT.

<sup>320</sup> Article GATT (4)

<sup>321</sup> “*Despite these restrictions, PTAs have become ubiquitous in the world trading system. The control mechanisms put in place by the WTO to assess the legality of PTAs have simply not worked (Devuyt and Sedarevic (2007), p. 44; Mavroidis (2011), pp. 377–8) and, even if they had, such controls would be fraught with difficulties in light of the ongoing lack of clarity surrounding the requirement that FTAs should liberalize ‘substantially all trade’ (Mitchell and Lockhart (2005), pp. 232–5).*” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 9

<sup>322</sup> “*The shift from a multilateral for a of negotiation to the choice of bilateral and multilateral fora: “However, it also undermined its future progress. Without a common foe, there was no longer an incentive to push for multilateral trade liberalization, and countries began exploring bilateralism and regionalism as means to promote their economic and political interests.*” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 7

<sup>323</sup> In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 2

*harmonized market rules and policies*<sup>324</sup>; the result is a regionalism in trade that is still now a “*deep integration*”<sup>325</sup> model.

However, this approach drawn criticism. In particular, the ones in favour of a multilateral approach of negotiations stand that a bilateral approach to trade could cause a “*fragmentation*”: in particular, it means that the result of regionalism approach could led to a broader diversification in rules regarding trade that could prevent rather than foster a common approach to the matter.<sup>326</sup>

In the second paragraph of this chapter it is provided for a description of the government procurement chapters of the above-mentioned FTAs.

In the last section, there is a comparison between the regulations of public procurement in FTAs and the EU public procurement: the aim is to try to understand how much in common and how many differences are between them.

In this respect, after the abandonment of the Lamy Doctrine<sup>327</sup>, due to the fall of multilateral seat of negotiation and, at the same time , after the incrementation of FTAs concluded by USA<sup>328</sup>, EU shifted to negotiations of FTA: from one side, it appeared as the most suitable approach to international trade relations and, from the other, FTAs’

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<sup>324</sup> In Billy Melo Araujo, *The EU deep trade agenda: law and policy (First edition.)*, Oxford: Oxford University Press. (2016), at 14

<sup>325</sup> “Therefore, starting with the Tokyo Round negotiations in the 1970s, which introduced minimal and voluntary disciplines in areas such as TBTs, subsidies, and public procurement (Heikkinen (2004), pp. 5–6), and culminating with regional and multilateral economic integration arrangements such as the EU’s internal market and the WTO agreements, more recent attempts to liberalize international trade have increasingly moved away from the negative integration approach associated with GATT 1947 and focused on ‘positive integration’ (Tinbergen (1954), p. 4) or ‘deep integration’ (Lawrence (1996a)) models, where greater emphasis is placed on disciplining domestic regulation, particularly through the development of common or harmonized market rules and policies (Jovanovic (1998), pp. 5–10).” In Billy Melo Araujo, *The EU deep trade agenda: law and policy (First edition.)*, Oxford: Oxford University Press. (2016), at 2

<sup>326</sup> “Political and legal fragmentation: As Hoekman and Mavroidis observe, PAs were a common feature of the GATT regime after the Tokyo Round. During the Uruguay Round, policy-makers however decided to limit the use of PAs and to largely transpose existing PAs into the WTO Agreement. Policy-makers worried that overlapping and contradictory provisions and interpretations might hinder rather than help world trade; and shift the political momentum out of multilateral discussions. This concern remains valid today. Yet, the much greater heterogeneity of WTO membership has created the impression that ‘differentiation’ is necessary.” In Robert Basedow, *The WTO And the Rise of Plurilateralism—What Lessons Can We Learn from The European Union’s Experience with Differentiated Integration?* in *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, Pages 411–431, at 10

<sup>327</sup> See *supra* chapter 1

<sup>328</sup> “First, the implausibility of achieving any considerable progress at WTO level in the short- to medium-term has become all too evident, with the Singapore issues being moved off the negotiating table in response to objections from developing countries. In 2006, with little progress being made, Lamy—by then WTO Director General—announced the suspension of negotiations.<sup>8</sup> Secondly, while the EU put all of its eggs in the multilateral basket, its main competitor, the US, pursued a policy of ‘competitive liberalization’ which favoured the negotiation of FTAs (Hilaire and Yang (2005), p. 603; Evenett and Meier (2007).” In Billy Melo Araujo, *The EU deep trade agenda: law and policy (First edition.)*, Oxford: Oxford University Press. (2016), at 10

deep integration was considered as a way to going beyond Doha Agenda <sup>329</sup> in the harmonization of rules.<sup>330</sup>

Apart from this criticism, the widespread of FTAs and the stall and unsolved problematics at WTO<sup>331</sup> played in favour of bilateral approach to trade in a deeper way. In addition, during the years the jurisprudence of the Court expressed in favour of a “WTO approach” to trade issues<sup>332</sup>.

Moreover, “2006 Global Europe strategy” stands in favour of free trade agreements as a way to “*faster in promoting openness and integration*” than multilateral fora but at the same time based on “WTO and other international rules”: *by going further and by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation.*”<sup>333</sup>

### **3.1.1 South Korea – European Union free trade agreement: first new generation agreement**

South Korea- EU FTA is recognized as the first “new generation” agreement whose aim is to “*to promote a “deeper integration” in trade policy*”.<sup>334</sup> This agreement represents the intent of opening discussion about new issues<sup>335</sup> using FTAs rather than multilateral fora as crystallised in “Free Global Europe 2006”: the communication

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<sup>329</sup> See supra chapter 1

<sup>330</sup> “However, the abandonment of multilateralism as the exclusive venue for trade negotiations and the emphasis on commercially or interest-driven EU Deep and Comprehensive Free Trade Agreements (DCFTAs) provide a different slant to the EU’s deep trade agenda. References in EU trade policy statements to the ‘WTO plus’ nature and the various methods of ‘regulatory convergence’ that will be explored in the EU DCFTAs support the suspicion that the EU uses its economic leverage to include in these agreements disciplines that go further than those proposed in the context of the Doha Round.” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 10

<sup>331</sup> E.g. Dispute Settlement Body. See supra Chapter 1

<sup>332</sup> E.g. Opinion 1/94

<sup>333</sup> “Free Trade Agreements (FTAs), if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation.” From Global Europe 2006

<sup>334</sup> In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016),

<sup>335</sup> “Third, these trade agreements have changed in character. They attempt to go beyond WTO levels of liberalisation, especially in services, and to include new trade-related policies such as regulatory cooperation, investment, competition, intellectual property and procurement.” In Marise Cremona, *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy*, in *European Yearbook of International Economic Law*, (2017), at 15

indicated that FTAs had to be the basis for “ [...]ASEAN, Korea and Mercosur (with whom negotiations are ongoing) emerge as priorities.”<sup>336</sup>

Article 1 paragraph 2 of the text of the agreement indicates as its aim “to liberalise and facilitate trade”<sup>337</sup> in goods between the Parties, in conformity with Article XXIV of the General Agreement on Tariffs and Trade 1994 “[...] trade in services and investment between the Parties, in conformity with Article V of the General Agreement on Trade in Services[...]”.<sup>338</sup> The benchmark for EU-South Korea is still the WTO framework and it demonstrates that EU continued to move through the legal framework of the multilateral agreements.

In addition, paragraph 2 continues stating that: “ to further liberalise, on a mutual basis, the government procurement markets of the Parties; (e) to adequately and effectively protect intellectual property rights; (f) to contribute, by removing barriers to trade and by developing an environment conducive to increased investment flows[...]to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties.”<sup>339</sup>

In this respect, the inclusion of issues like intellectual property right, foreign direct investment, government procurement and the link to environmental and social standards shows how the agreement is a tool not only to liberalise trade but to discuss further “[...] wider policy concerns that have emerged over time.”<sup>340</sup>

First, the agreement receives the jurisprudence of the Court<sup>341</sup>, which had recognized the scope of GATS and TRIPS within the exclusive competence of the Union: in this way, the agreement is a way to pursue Lisbon’ strategy objectives of creating a structural reform not only to grant market access but also to “enhance the EU’s global competitiveness by promoting further market integration and fostering internal policies

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<sup>336</sup> “Free Trade Agreements (FTAs), if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation. Based on these criteria, ASEAN, Korea and Mercosur (with whom negotiations are ongoing) emerge as priorities.” Global Europe 2006

<sup>337</sup> On the role of the agreement, see Won-Mog CHOI; *Aggressive Regionalism in Korea–U.S. FTA: The Present and Future of Korea’s FTA, Policy*, in *Journal of International Economic Law*, Volume 12, Issue 3, 1 September 2009, Pages 595–615

<sup>338</sup> Article 1, paragraph 2 South Korea -EU Free Trade agreements

<sup>339</sup> Ivi 2, note 23

<sup>340</sup> “While Regional Trade Agreements (RTAs) have traditionally been geared towards the abolition or reduction of formal trade barriers between participants, they are now increasingly being used as fora to address wider policy concerns that have emerged over time.” In Rudolf Adlung, Mamdouh Hamid, *Plurilateral Trade Agreements: An Escape Route for the WTO?*, in *Journal Of World Trade*, 2018 Issue 1, at 90

<sup>341</sup> Opinion 1/94 on the competence about intellectual property

on competition, research and development, and education.”<sup>342</sup>; second, the agreement’s issues correspond to the scope of CCP as provided in Article 207 TFEU<sup>343</sup> and include foreign direct investment and government procurement.

Moreover, there is a specific link between trade liberalisation and environmental and social and labour standards as a confirmation of the link between EU CCP and external action: in fact, “Article 21 TEU enhances the importance of environmental goals as nontrade objectives of the CCP”.<sup>344</sup>

In this way, trade objectives of CCP reported in FTAs not only are trade issues but also provisions that aim to pursue development cooperation, as in the inclusion of social and environmental standards in trade relationship.<sup>345</sup>

This approach to the agreements can be defined as one of the elements that expressed the “constitutional dimension”<sup>346</sup> of the FTAs : in particular, the “new generation” agreements have the aim to export the EU fundamental values and, in this respect, FTAs has become the instrument.<sup>347</sup> In this way, the EU acted as an “exporter” of rights and values, by imposing that trade relationship will be conducted under a system structured in order to respect the fundamental principle of the EU<sup>348</sup>.

This *modus operandi* can be recognized as a “normative power”<sup>349</sup> of the European Union: instead of acting as a military power<sup>350</sup> as after second world war, EU <sup>351</sup>

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<sup>342</sup> “[...]which focused on enhancing the EU’s global competitiveness by promoting further market integration and fostering internal policies on competition, research and development, and education.[...] Trade liberalization is not just viewed as a tool to gain access to foreign markets but also as a means to expose EU firms to international competition and emphasize the need for the type of structural reforms envisaged by the EU in the Lisbon strategy (Hay (2007), p. 32).” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 17

<sup>343</sup> On the competence of the EU in CCP, see supra chapter 1

<sup>344</sup> In Angelos Dimopoulos, *The Effects of the Lisbon treaty on the Principles and Objectives of the Common Commercial Policy*, in *European Foreign Affairs Review*, Issue 2, 2010, at 22

<sup>345</sup> On this topic, see Angelos Dimopoulos, *The Effects of the Lisbon treaty on the Principles and Objectives of the Common Commercial Policy*, (2010) 15 *European Foreign Affairs Review*, Issue 2, pp. 153–170

<sup>346</sup> In Sieglinde Gstöhl, Dominik Hanf, *The EU’s Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014), at 3

<sup>347</sup> “The ‘new generation’ agreements have at least three constitutional dimensions: first, they aim to some extent at ‘exporting’ the Union’s fundamental values to the partner countries and can therefore enhance non-Union citizens’ second, by setting such standards as pre-condition for more ambitious trade liberalisation, the Union seeks also to have an internal impact by protecting its own (citizens’) rights; third, this has to be seen in the light of the modifications of the Union’s constitutional charter operated by the Lisbon Treaty, which has both explicitly subordinated trade policy to a wide range of Union objectives and considerably modified the Union’s decision-making rules with regard to the conclusion and the implementation of trade agreements.” In Sieglinde Gstöhl, Dominik Hanf, *The EU’s Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014), at 3

<sup>348</sup> See supra chapter 1

<sup>349</sup> In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016)

<sup>350</sup> “The Union’s aspiration in the post-Cold War period to act as a ‘normative power’ through trade has further been reinforced by the Lisbon Treaty.” In Sieglinde Gstöhl, Dominik Hanf, *The EU’s Post-Lisbon Free Trade*

has started to spread its own rules of law and fundamental principle in various manner<sup>352</sup> in order to promote its own identity and to fertilize non – EU countries with EU values.

In particular, if these contaminations can occur simply because third countries recognize EU as a model for legislative provisions (“contagion”)<sup>353</sup>, however it is possible that the expression of normative power of the EU can be in the form of “transfer”, which is e.g., trade and development cooperation.<sup>354</sup>

Moreover, it is recognized that EU- South Korea FTA can be considered as a “mixed agreement” because its inclusion of rules that are beyond the CCP objectives included in Article 207 TFEU.<sup>355</sup>

Two examples are the inclusions of dispositions regulating Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary measures (SPS).

Chapter Four of the agreement is dedicated to TBT entirely: Article 4 paragraph 1 states that : “*The Parties affirm their existing rights and obligations with respect to each other under the Agreement on Technical Barriers to Trade, contained in Annex 1A to the WTO Agreement (hereinafter referred to as the ‘TBT Agreement’) which is incorporated into and made part of this Agreement, mutatis mutandis*”: in this way, it recognizes the

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Agreements: *Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014), at 14

<sup>351</sup> Former EEC

<sup>352</sup> “Besides the traditional use of civilian or military power, the EU also acts as a normative power (‘Normative Power Europe’ or ‘NPE’), disseminating its norms, and therefore its very identity, across the globe.” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 21

<sup>353</sup> “As an economic giant’, the EU has potentially the leverage to credibly endorse international environmental norms or human and labour rights abroad by means of its Common Commercial Policy. Nevertheless, the EU mainly relies on dialogues to change the behaviour of its trade partners. Value-based provisions in trade agreements also allow different actors to monitor compliance, raise awareness and contribute to socialisation processes.” In Sieglinde Gstöhl, Dominik Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, vol. 20, no. 6, (2014), at 14

<sup>354</sup> “The normative basis of the EU—that is, the fact that its conception is based on the development of normative values—shapes its identity as an international actor. Besides the traditional use of civilian or military power, the EU also acts as a normative power (‘Normative Power Europe’ or ‘NPE’), disseminating its norms, and therefore its very identity, across the globe. The dissemination of EU norms occurs in a variety of ways. For instance, EU norms can have an impact abroad just by existing, a process known as ‘contagion’, whereby norms are adopted by non-EU actors who view the EU as a regulatory model to aspire to. EU norms can also be promoted through policy documents or in the context of institutionalized international cooperation formats (‘procedural diffusion’). More clear-cut forms of norm diffusion are the promotion of norms in the context of trade, development and cooperation relations (‘transference’), the institutional presence of the EU abroad (‘overt diffusion’), and the development of international norms (cultural filter).” In Billy Melo Araujo, *The EU deep trade agenda: law and policy* (First edition.), Oxford: Oxford University Press. (2016), at 21

<sup>355</sup> “Natura mista potrebbero avere ad esempio i free trade Agreement di nuova generazione[...]Ne è un esempio il recente accordo di libero scambio firmato dall’Unione con la Corea del Sud il 6 ottobre 2010 ed entrato per una parte provvisoriamente in vigore il 1° luglio 2011, che prevede una progressiva e reciproca liberalizzazione degli scambi di beni e servizi, nonché una serie di regole comuni su questioni collegate al commercio, ma non rientranti nella nozione di politica commerciale.” In Roberto Baratta, *La politica commerciale comune dopo il trattato di Lisbona*, in *Diritto del commercio internazionale*, (2012), fasc. 2, at 4

application of the TBT agreement which is an instrument that urges WTO member states to improve harmonization of rules in line with international standards.<sup>356</sup>

Chapter 5 is dedicated to SPS and Article 5 paragraph 1 defines the objective: “[...]to minimise the negative effects of sanitary and phytosanitary measures on trade while protecting human, animal or plant life or health in the Parties’ territories. 2. Furthermore, this Chapter aims to enhance cooperation between the Parties on animal welfare issues, taking into consideration various factors such as livestock industry conditions of the Parties.”

The relevant aspect of the inclusion of TBT and SPS can be assumed also to underline the novelty of the normative cooperation that EU-South Korea as the first of “new generation” agreement has introduced<sup>357</sup>: the relevance to coordination<sup>358</sup> and implementation of the rules regarding the matter and the reference to WTO agreements can be seen as clearest examples of international cooperation.<sup>359</sup>

Article 8 of the Council Decision 2011/265/EU about provisional application of the EU- South Korea FTA states that: “*The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals.*”.

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<sup>356</sup> “The Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS) are also geared towards regulatory harmonization, as they both incentivize WTO Members to adopt regulations that are in line with existing international standards ([Marceau and Trachtman \(2002\)](#), pp. 811–82).” In Billy Melo Araujo, *The EU deep trade agenda: law and policy (First edition.)*, Oxford: Oxford University Press. (2016), at 3

<sup>357</sup> “Norme significative sulla cooperazione nel campo normativo sono incluse anche in altri accordi dell’Unione Europea successivi all’entrata in vigore del Trattato di Lisbona, come quello con la Corea del sud — firmato il 6 ottobre 2010 ed entrato in vigore il 13 dicembre 2015 — che rappresenta il primo esempio significativo degli accordi di libero scambio di nuova generazione dell’Unione Europea.” In Pia Acconci, *La Cooperazione Nel Campo Normativo Negli Accordi In Materia Di Commercio Internazionale Dell’unione Europea Dopo Il Trattato Di Lisbona*, in *Rivista di Diritto Internazionale*, fasc.4, (2016), at 2

<sup>358</sup> “Le parti contraenti di tale Accordo si sono impegnate altresì a individuare, realizzare e promuovere « trade facilitating initiatives » tra cui: il rafforzamento della cooperazione nel campo normativo — mediante, per esempio, scambi di informazione, prassi e dati —; il miglioramento della qualità delle rispettive normative tecniche attraverso la cooperazione nel campo tecnico e scientifico, nonché l’impiego in maniera efficiente delle risorse a disposizione per la realizzazione di attività di carattere normativo.” In Pia Acconci, *La Cooperazione Nel Campo Normativo Negli Accordi In Materia Di Commercio Internazionale Dell’unione Europea Dopo Il Trattato Di Lisbona*, in *Rivista di Diritto Internazionale*, fasc.4, (2016), at 6

<sup>359</sup> “In effetti, alcuni accordi conclusi al termine dell’Uruguay Round e inclusi tra gli accordi internazionali che costituiscono un Single Undertaking con l’Accordo istitutivo dell’Organizzazione mondiale del commercio (OMC) nata al termine di tale Round, come il TBT e l’Accordo sulle misure sanitarie e fitosanitarie, rappresenterebbero, ad avviso di una certa dottrina, il dato della prassi internazionale più rilevante in tema di cooperazione e coerenza nel campo normativo” In Pia Acconci, *La Cooperazione Nel Campo Normativo Negli Accordi In Materia Di Commercio Internazionale Dell’unione Europea Dopo Il Trattato Di Lisbona*, in *Rivista di Diritto Internazionale*, fasc.4, (2016), at 6

Despite of the fact that FTAs after South Korea have maintained this structure, the decision to exclude direct effect and the enforcement of the provisions in front of internal courts may indicate that there is no interest of the EU to provide for enforceability<sup>360</sup>.

In conclusion, another important aspect of EU- South Korea is that from this agreement above, the Court started to not recognize a direct effect to international trade agreements.

### **3.1.2 Comprehensive Economic and Trade Agreement between European Union and Canada (CETA)**

The Comprehensive Economic and Trade agreement between EU and Canada was the result of rounds of negotiations that ended with the approval of the text of the agreement by the Council in July 2016 and the vote of the European Parliament in February 2017; the agreement entered into force in September 2017.

The agreement is structured in thirty chapters and its nature of free trade agreement makes it one the highest example of EU FTA<sup>361</sup>, both for its classical trade issue- trade of goods and trade in services- but also for the result of the chapter regarding the others CCP subjects.<sup>362</sup>

Article 1 paragraph 4 states that: “*The Parties hereby establish a free trade area in conformity with Article XXIV of GATT 1994 and Article V of the GATS.*” with the scope of liberalising trade of goods (chapter 2), trade in service (chapter 9); in addition to regulate aspect that go beyond trade such as intellectual property( chapter 20), investment (chapter 8), public procurement (chapter 19)<sup>363</sup>. This structure corresponds to the exclusive competence matters as in Article 207 TFEU. Moreover, some chapters that had been introduced by EU- South Korea FTA are included here: in particular, SPS and TBT provisions.

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<sup>360</sup> “*This suggests that enforceability of trade agreements, whether through courts or via arbitration or other quasi-judicial dispute settlement processes, is not a priority in EU trade policy*” In Marise Cremona, *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy*, in *European Yearbook of International Economic Law*, (2017), at 16

<sup>361</sup> “*CETA covers trade in goods and services in greater depth than other contemporary FTAs. It opens services and procurement markets of both parties in ways that go well beyond other FTAs to which they are parties.*” In Armand de Mestral, *Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties*, In: Bungenberg M., Krajewski M., Tams C., Terhechte J., Ziegler A. (eds) *European Yearbook of International Economic Law*, vol 8. (2017), Springer, Cham, at 440

<sup>362</sup> Chapters 4 is dedicated to a specific examination of CETA.

<sup>363</sup> For the text of CETA, see DG trad website available at <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>

Despite of it, CETA's innovative aspects go beyond CCP competence and that justify the "mixed agreement" nature of the FTA.

Although the agreement has entered into force, only some parts of it are applied: for other issues, there is the necessity of the approval of the Member states parliament. The reason is based on the choice that for some is more of the Commission that decided to present the CETA as a "*mixed agreement*".<sup>364</sup>

Regarding the competence to ratify the agreement, the debate and was caused by chapter 8<sup>365</sup> of the agreement that provides for an investor-state arbitration system that should work in controversial raised in the context of foreign direct investment. In particular, if from one side the Commission sustained that the agreement fell into the exclusive competence of the EU<sup>366</sup> because of the fact that Article 207 TFEU lists foreign direct investment expressly, from the other side this thesis found an opposition in nationals' governments.

National government claimed that the agreement had a mixed nature because of the broader regulatory scope of CETA<sup>367</sup> and in particular because investor- state arbitration should have not been included in CETA; the existence of various BITs<sup>368</sup> made the resolution of dispute between investors in a third state competence of the member states.<sup>369</sup>

The point of the discussion was whether the signing, the ratification and the application was or not the one regulated in Article 218 TFEU. Paragraph 5 and 6 state that the procedure for the ratification would have been the one that provides that the Council "[...]shall adopt a decision authorising the signing of the agreement and, if

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<sup>364</sup>On the issue, see *infra* chapter 4

<sup>365</sup>Chapter 8, Section F CETA

<sup>366</sup> "*The Commission initially defended its position in favour of the FTAs as negotiated and sought to defend the integrity of its exclusive competence over the common commercial policy (CCP), including foreign direct investment, which had been added in 2009.*" In Armand de Mestral, *Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties*, In: Bungenberg M., Krajewski M., Tams C., Terhechte J., Ziegler A. (eds) *European Yearbook of International Economic Law*, vol 8. (2017), Springer, Cham, at 5

<sup>367</sup> "*Many national governments claim that the broad regulatory scope of CETA (e.g. regarding subsidies, investments, movement and professional qualifications of natural service suppliers, telecommunications, intellectual property, labour rights, environmental protection) requires its parliamentary ratification as a "mixed agreement."* In Ernst-Ulrich Petersmann, *Democratic Legitimacy of the CETA and TTIP Agreements?* in Thilo Rensmann, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 50

<sup>368</sup> Bilateral Investment Treaties. See *supra* in chapter 1

<sup>369</sup> "*A number of member states were involved in a complex legal debate over the continued legal validity of some 190 bilateral investment agreements concluded with new member states before their entry into the EU, when they had been members of the communist bloc of states.*" In Armand de Mestral, *Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties*, In: Bungenberg M., Krajewski M., Tams C., Terhechte J., Ziegler A. (eds) *European Yearbook of International Economic Law*, vol 8. (2017), Springer, Cham, at 5

*necessary, its provisional application before entry into force[...]*The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.”<sup>370</sup> As a consequence, the agreement should be considered as an act of the EU without any involvement of the civil society nor Member States.

On the other side, if the Member states thesis had approved, the application of CETA should have required the ratification of all the Parliament of the 28 Member States along with the unanimity approval of the Council.<sup>371</sup>

The ECJ solved the question: in Opinion 2/15, requested by the Commission in the field of competence of the investment chapter in EU-Singapore FTA, from one side, the Court confirmed that matters like transport services, sustainable development or intellectual property were competence of the EU, from the other side, regarding FDI, only matters regarding FDI falls within the exclusive competence of the EU: in consequence, portfolio investment and any kind of matters different form FDI are not be covered.<sup>372</sup>

The Opinion exercised influence in CETA too; as a result, CETA needed the unanimity approval of the Council for the provisional application of the text of the agreement that fall within the exclusive competence of the EU and needs the ratification by all the 28 Member States of the parts that fell within the competence of Member States.<sup>373</sup>

As a result, the text has partially applied since 30 October 2016; the mechanism of provisional application provided in Article 218 does not granted the speediness that justified its provision: in fact, the question can be considered more “*political*” than

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<sup>370</sup> Article 218 TFEU paragraphs 5 and 6

<sup>371</sup> “*The consequence of this position is that the adoption of CETA could not simply follow the procedures set out in the Article 218 TFEU but would require joint ratification by both the EU and by each member state.*” In Armand de Mestral, *Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Parties and Agreements with Third Parties*, In: Bungenberg M., Krajewski M., Tams C., Terhechte J., Ziegler A. (eds) *European Yearbook of International Economic Law*, vol 8. (2017), Springer Cham, at 6

<sup>372</sup> “*The Court found that the EU has exclusive competence in all matters covered by the EU-Singapore FTA, including transport services, sustainable development or intellectual property. Notably as far as transport services are concerned, the Court found that rail, road but also maritime transport services fall by now under EU’s exclusive competence. Overall, the Court confirmed the assumption of many that at the current stage of integration and treaty evolution, the substantive scope of the CCP has significantly expanded. Having said this, the EU competences in investment matters remain limited. In this regard, the Court interpreted strictly Article 207:1 TFEU to find that the term ‘foreign direct investment’ does not cover portfolio investment or any matter other than FDI.25 The Court went on to find that investor– state dispute settlement but also dispute settlement among EU and Singapore also constitute a competence shared by the EU and its Member States.*” In Panagiotis Delimatsis, *The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit*, in *Journal of International Economic Law*, Volume 20, Issue 3, 1 September 2017, at 590

<sup>373</sup> On the issue see infra chapter 4

“legal”<sup>374</sup> and so the provision application had to face the mechanism of ratification of 28 Member States.<sup>375</sup>

Another controversial provision that has moved criticism is Article 30.6<sup>376</sup> which provides that CETA is not directly applicable in domestic jurisdiction.

The provision states that: “*Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.*”.

This provision can have two different consequences: first, forbidding the direct application of CETA can deprive citizens of an important protection from the consequences that such a huge agreement can have in the economics of EU member states: it seems that provision in Article 11. 2 that requests for a “*open, transparent and regular dialogue with civil society*” is not apply.

The result is that the approach to CETA results to be more power-oriented than “*cosmopolitan*”<sup>377</sup>; in other words, it seems that the “*public reason*” is preferred to a “*cosmopolitan legal order*” of FTAs, in which citizens have the possibility of “*of equal rights and remedies of all citizens [...]*”<sup>378</sup>: a sort of “sacrifice” of democracy.<sup>379</sup>

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<sup>374</sup> “*The CETA and other trade agreements like it are mixed treaties. But is the decision to declare a treaty “mixed” a political or a legal decision? Is unanimity required for both the signature and the formal ratification of a mixed treaty?*” In Armand de Mestral, *Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties*, In: Bungenberg M., Krajewski M., Tams C., Terhechte J., Ziegler A. (eds) *European Yearbook of International Economic Law*, vol 8. (2017), Springer Cham, at 444

<sup>375</sup> Moreover, each Member States has a different legislative procedure and can happen that a Member States could have more than one legislative organ that make the process even more difficult: Belgium is a clear example and a practical demonstration of the consequences of it.

<sup>376</sup> On the issue see Armand de Mestral, *When Does the Exception Become the Rule? Conserving Regulatory Space under CETA*, in *Journal of International Economic Law*, Volume 18, Issue 3, 1 September 2015, Pages 641–654 and Narine Ghazaryan, *Who Are the ‘Gatekeepers’? In Continuation of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements*, *Yearbook of European Law*, Volume 37, 1 January 2018, Pages 27–74,

<sup>377</sup> “*As the EU Commission negotiated CETA as a potential model for its TTIP negotiations without adequately engaging in “an open, transparent and regular dialogue with [...] civil society” as required by Article 11(2) TEU, citizens and parliaments have reasons to insist on democratic accountability and clarification of why CETA negotiators opted for a of intergovernmental trade regulation rather than for a transformative “cosmopolitan FTA” protecting rights of citizens in their transatlantic economic cooperation*” In Ernst-Ulrich Petersmann, *Democratic Legitimacy of the CETA and TTIP Agreements?*, in Thilo Rensmann, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 51

<sup>378</sup> In Ernst-Ulrich Petersmann, *Democratic Legitimacy of the CETA and TTIP Agreements?* in Thilo.Rensmann, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 65

<sup>379</sup> “[...] *than power-oriented approaches to interpreting GATT rules and FTAs as excluding individual rights to invoke the relevant GATT and FTA rules in domestic courts and hold governments accountable for illegal, welfare-reducing trade restrictions.*” In Ernst-Ulrich Petersmann, *Democratic Legitimacy of the CETA and TTIP Agreements?* in Thilo.Rensmann, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 43

The second consequence of the provision regards the effectiveness in remedies;<sup>380</sup> In particular, not having the possibility to invoke the text of the agreement not only represents a risks for democratic rights of individuals, but also there is no point in Investor State Dispute Settlement (ISDS): even if a ratification from Member States that turns into a positive result, states or investors may prefer BITs ' resolution instruments rather than ISDS.<sup>381</sup>

In opposition of the criticism to the ISDS system and to general problem of a pretended lack of democracy, CETA contains provision that are a constructive example of positive affection.

One is the provision regarding regulatory cooperation: Chapter 21 provides a serious of measure to grant “[...] *contribute to the protection of human life, health or safety, animal or plant life or health [...] build trust, deepen mutual understanding of regulatory governance and obtain from each other the benefit of expertise and perspectives [...] facilitate bilateral trade and investment [...] contribute to the improvement of competitiveness and efficiency of industry [...] through the application of regulatory approaches which are technology-neutral; and the recognition of equivalence or the promotion of convergence.*”<sup>382</sup>

Article 21 paragraph 4 lists a serious of instruments that help to achieve a coordination of best practices and methods in the fields of “ *the Parties' regulatory authorities that are covered by, among others, the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and Technical Barriers to Trade[...] Sanitary and Phytosanitary Measures[...] Cross-Border Trade in Services [...]Trade and Sustainable Development [...]Trade and Labour and [...] (Trade and Environment).*”: the aim of the provision is to promote harmonisation of rules between the two regions.<sup>383</sup>

If the question of applicability of the provisions and the competence created long debate, the regulatory cooperation appears to expose the idea of cooperation between

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<sup>380</sup> “The exclusion of direct invocation of CETA provisions in domestic legal systems by Article30.6 CETA risks rendering domestic legal and judicial remedies ineffective for resolving CETA-related, transatlantic disputes.” In Ernst-Ulrich Petersmann, *Democratic Legitimacy of the CETA and TTIP Agreements?* in Thilo.Rensmann, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 53

<sup>381</sup> “[...] foreign investors might have incentives to use the bilateral investment treaties between EU and North American Free Trade Agreement (NAFTA) states rather than the new CETA and TTIP rules on investment adjudication.” In Ernst-Ulrich Petersmann, *Democratic Legitimacy of the CETA and TTIP Agreements?* in Thilo.Rensmann, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 46

<sup>382</sup> Article21.3 CETA

<sup>383</sup> “[...] CETA mira al coordinamento e allineamento dell'attività normativa di carattere tecnico posta in essere dalle parti contraenti.” In Pia Acconci, *La Cooperazione Nel Campo Normativo Negli Accordi In Materia Di Commercio Internazionale Dell'Unione Europea Dopo Il Trattato Di Lisbona*, in *Rivista di Diritto Internazionale*, fasc.4, (2016), at 1078

Canada and EU not only in the field of trade *strictu sensu* but a collaboration that, through no binding instruments that promote consultation and evaluation, pursues a synchronization between Canadian and European law.<sup>384</sup>

Moreover, regulatory chapter gives relevance to transparency: the principle of transparency is seen both as a method of works as well as a purpose of the coordination<sup>385</sup> between Canada and EU in order to reinforce democratic principle in regulatory cooperation.<sup>386</sup> So far, if the choice of reaffirm the no direct applicability as in EU-South Korea CETA has caused claim regarding a lack of respect of democracy, here in chapter 21 appears that democracy is the assumption.

### 3.1.3 The Transatlantic Trade Investment Partnership TTIP: European Union and United States of America's first attempt

The Transatlantic Trade and Investment Partnership would have created the largest free trade area in the world.<sup>387</sup>

The negotiation has started formally in 2013 but in 2011 a High-Level Group of works for job and growth was created. The group has been formed by European and American experts with the aim of “[...] *identify policies and measures to increase U.S.-EU trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness.*”. The area of study of the group would have been both

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<sup>384</sup> “Si tratta nell'insieme di strumenti prevalentemente informali, in quanto privi di natura vincolante e volti a orientare i risultati dell'esercizio delle competenze normative ad opera delle istituzioni competenti. Rileva la previsione di consultazioni, scambi di informazioni e valutazioni per assicurare su base volontaria la sincronizzazione, nella misura del possibile, ex ante tra il modo di essere del diritto canadese e quello dell'Unione Europea.” In Pia Acconci, *La Cooperazione Nel Campo Normativo Negli Accordi In Materia Di Commercio Internazionale Dell'Unione Europea Dopo Il Trattato Di Lisbona*, in *Rivista di Diritto Internazionale*, fasc.4, (2016), at 1078

<sup>385</sup> “[...] negotiating bilateral trade agreements with developing countries in order to promote its own transparency rules or otherwise mandate harmonization of those countries' regulatory policies with the EU standards; thus, the principle of transparency is an important element in both aspects of conditionality.” In Ljiljana Biuković, *Transparency Norms, the World Trade System and Free Trade Agreements: The Case of CETA*, in *Legal Issues of Economic Integration*, vol. 39, no. 1, (2012), at 97

<sup>386</sup> “Un'altra tendenza ricorrente negli accordi qui considerati consiste nel fatto che essi mirano a instaurare un collegamento tra la cooperazione nel campo normativo e il ricorso al principio della trasparenza, riferendosi a quest'ultima quale presupposto, nonché risultato, della suddetta cooperazione, al fine della garanzia di un certo controllo democratico.” In Pia Acconci, *La Cooperazione Nel Campo Normativo Negli Accordi In Materia Di Commercio Internazionale Dell'Unione Europea Dopo Il Trattato Di Lisbona*, in *Rivista di Diritto Internazionale*, fasc.4, (2016), at 1076

<sup>387</sup> “A deal on the TTIP would create the largest free-trade area in the world. It would involve significant deepening of transatlantic economic ties and the removal of trade barriers at the transnational.” In Edouard Bourcieu, *The Strategic Dimension of the Transatlantic Trade and Investment Partnership*, In Rensmann, Thilo. *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 28

traditional ones as barriers to trade in good and in services, non – tariff barriers but also innovative objectives as regulatory and standards compatibility and cooperation on the development of rules on global issues.<sup>388</sup>

If we think of the dimension of the economic power, USA and EU are the largest economics in the world and the influence of an agreement that regulates the trade flow and, generally speaking, the economy interaction between the two regions could affect all the others economic actors.

First, the agreement would have a huge impact to WTO as an international forum: the intention expressed by both the two sides of enhancing a cooperation in the field of regulations and standards could have been a powerful influence in the international trade law and rules of law. Moreover, having considered the stall of the multilateral discussion in WTO, the TTIP would have embodied a possible forum of discussion.<sup>389</sup>

Unfortunately, the negotiation has been suspended since 2016 and the current USA's commercial policy<sup>390</sup> does not give positive signal of a recovery.

However, the structure of the agreement as in the last rounds of negotiation gives an idea of the influence that the agreement would have had: in particular, the agreement should have had 24 chapters divided in four macro- areas: market access, regulatory cooperation<sup>391</sup>, rules and Institutions.

Market access would have included classical trade agreements objectives as trade of goods, trade in services, public procurement and rules of origin.

The most interesting chapters, which more than other chapters have caused some problematics, are regulatory cooperation and rules.

As provided during the negotiation, Regulatory chapter has included a horizontal cooperation, regarding “[...] *new economic opportunities and greater consumer choice. It*

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<sup>388</sup> “Conventional barriers to trade in goods, such as tariffs and tariff-rate quotas; Reduction, elimination, or prevention of barriers to trade in goods, services, and investment; Opportunities for enhancing the compatibility of regulations and standards; Reduction, elimination, or prevention of unnecessary “behind the border” non-tariff barriers to trade in all categories;

Enhanced cooperation for the development of rules and principles on global issues of common concern and for the achievement of shared economic goals relating to third countries.” In MEMO/11/843 “EU-US Summit: Fact sheet on High-Level Working Group on Jobs and Growth “Washington, 28 November 2011

<sup>389</sup> “[...] A successful TTIP would contribute significantly to the multilateral process by becoming a benchmark for the kind of deep and comprehensive trade agenda that the WTO still needs to develop. [...]” In Edouard Bourcieu, *The Strategic Dimension of the Transatlantic Trade and Investment Partnership*, In Rensmann, Thilo. *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 30

<sup>390</sup> e.g. the position of USA administration in the question of the Dispute Settlement Body. See supra in chapter 1

<sup>391</sup> On the issue Herwig, Alexia, *TTIP Regulatory Cooperation*, in *European Journal of Risk Regulation (EJRR)* vol. 7, no. 2 (2016): p. 262-268. HeinOnline

*should also lead to better quality, more thoroughly enforced regulation, and increase our ability to influence the quality of global rules.”*

As a result, TTIP was design as a “benchmark” for the global system of rules with the aim of gaining a coordination in rules provisions in order to grant and to reach better quality a through a better regulation.<sup>392</sup>

Having considered the purpose, the chapter would have been divided in the regulation cooperation in sectors like Chemicals, Cosmetics, Food Safety and Animal and Plant Health (SPS), TBT, Engineering, Medical devices, pesticides, Information and communication technology, Vehicles, Pharmaceuticals, textiles.

The aim of the regulatory cooperation was both to establish and to reinforce a bilateral cooperation<sup>393</sup> but despite of it, the necessity of maintaining autonomy as regards internal policy and domestic regulation is expressed by Article1 point 3: *“Nothing in this Chapter shall affect the ability of each Party to: adopt, maintain and apply measures without delay, in accordance with deadlines under its respective regulatory or administrative procedures, to achieve its public policy objectives such as those referred to under paragraph[...]apply its fundamental principles governing regulatory measures in its jurisdiction[.]*

In addition to chapter on regulatory cooperation, there was prepared a set of rules that included a focus on sustainable development: in particular, rules chapter provided for a regulation of sustainable development, including environmental and labour standards to set out in trade relations ship between that.

In particular, the text of EU proposal states that: *“The Parties reaffirm their commitment to pursue sustainable development, the dimensions of which – economic development, social development and environmental protection – are inter-dependent and mutually reinforcing, and are committed to promote the development of international trade and investment in such a way so as to contribute to this overarching objective.”*<sup>394</sup>; as a result, the text quotes ILO convention<sup>395</sup> as a benchmark to labour standards and it is a clear example of the role of the TTIP in setting rules in international trade relationships.

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<sup>392</sup> Ivi 15, note 71

<sup>393</sup> Article1 EU- TTIP text proposal *“The objectives of this Chapter are: a) To establish and reinforce bilateral regulatory cooperation in areas where the Parties identify common interests and where this cooperation would benefit citizens, entities subject to regulation, in particular small and medium sized enterprises, as well as the public interest”*

<sup>394</sup> Article1 EU Proposal

<sup>395</sup> See *supra* chapter 1

Despite of it, from one side the intention of EU to bring into the agreement values and policies adopted in the internal regulation occurs<sup>396</sup> but from the other side, the regulation is intended to respect the domestic standards of each party: Article 3 clarifies that, although international standards are the benchmark, the parties conserve the right “[...] *The to determine its sustainable development policies and priorities, to set and regulate its levels of domestic labour and environmental protection, and to adopt or modify relevant policies and laws accordingly.*”

This sort of opposition between the necessity of the recognition of a “meeting of intent” but the opposite road of autofocus application of regulations seems to be a contrast between two different models of rulemaking: EU has maintained the “*economic constitutionalism view*”, which consisted in a deeper integration but with the intent of safe guard the inner diversity of the Union <sup>397</sup>.

At the stake, the negotiations are interrupted because of contrast in the field of textile and regulatory issues regarding agricultural products.

### **3.1.4 European Union and Japan Economic Partnership Agreement (EPA)**

The EU and Japan have finalised a new trade agreement that boosts trade and economic partnership between the two regions. The negotiation has started in 2013 and EU governments instructed the European Commission to start negotiations with Japan. On 6 July 2017 the European Union and Japan reached an agreement in principle on the main elements of the agreement.

On 8 December 2017, the negotiations were finalised: the European Parliament gave its consent in December 2018, clearing the way for the trade agreement's conclusion, which entered into force on the January 31<sup>st</sup>.

The entry into force of the Economic Partnership Agreement also requires the ratification by EU countries, but a large part of the agreement can be provisionally applied in early 2019.

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<sup>396</sup> As an example, Directive 2014/24 on public procurement contains provision that make expressly reference to sustainable development

<sup>397</sup> “[...] *successfully extended rights-based “economic constitutionalism” and multilevel rule of law to other constitutional democracies in Europe, again with due respect for their diverse constitutional traditions. [...]*” In Ernst-Ulrich Petersmann, *Democratic Legitimacy of the CETA and TTIP Agreements?* in Thilo Rensmann, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, 2017, at 39

As in Article 1 of the Economic Partnership Agreement, the aim is to “*to liberalise and facilitate trade and investment, as well as to promote a closer economic relationship between the Parties.*”

In this respect, the structure<sup>398</sup> of the agreement assumes the well-known layout of an FTA and is composed by both trade issues like trade of goods, trade in services chapters but also “Lisbon issues” like intellectual property, investment chapters and public procurement.

Moreover, chapters 16 is dedicated to provisions governing trade and sustainable development: it is an important footstep to the road paved by “*Trade for all strategy*”, which has called for an inclusion of environmental and labour standard towards a sustainable growth.

In comparison with CETA and TTIP proposed text, EPA is more “traditional”: there are not particular innovative aspects and appears as a typical “tariff cut” trade agreement

In opposition with the former two, EPA did not encounter the opposition that has surrounded them. The first reason is that the aim of both parties was to foster a deeper liberalisation on the Japan side: in particular, the point was tariff dismantling<sup>399</sup> in motor vehicles, automotive parts, and electronics while from the EU side, the interest was in dismantling tariff regarding exporters of textiles, clothing, cosmetics, and chemical products;<sup>400</sup> along with it, the elimination of non-trade barrier was an objective too, together with service liberalisation.

As CETA and TTIP, EPA contains provisions regarding regulatory cooperation, competition and a dispute settlement mechanism. Regarding Regulatory cooperation, EPA appears to be easier to negotiate and the protests against the agreement were less than the ones regarding CETA and TTIP.

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<sup>398</sup> The agreement is made up of 23 chapters.

<sup>399</sup> “*EU and Japan already having relatively liberal custom regimes, one of the most controversial negotiating areas was dismantling tariffs. Japan’s core demands for the duty-free export of motor vehicles, automotive parts, and electronics were met by Europe’s demand for a liberalization of Japanese agricultural imports. On the European side, exporters of textiles, clothing, cosmetics, and chemical products will also benefit.*” In Günther Hilpert Hanns, *The Japan-EU Economic Partnership Agreement—economic Potentials and Policy Perspectives*, in *Asia Europe Journal*, vol. 16, no. 4, (2018), at 440

<sup>400</sup> “*The elimination or at least reduction of non-tariff trade barriers (NTBs) was a key European objective and was, therefore, negotiated in parallel to dismantling tariffs. In the course of the negotiations.*” In Günther Hilpert Hanns, *The Japan-EU Economic Partnership Agreement—economic Potentials and Policy Perspectives*, in *Asia Europe Journal*, vol. 16, no. 4, (2018), at 441

In particular, one of the reasons is the traditional oriented structure of agreement<sup>401</sup>: as said before, EPA is more concentrated on typical trade issues like tariff and there are less innovative aspects. In addition, there is a different amount of trade involved than the one regarding CETA and TTIP<sup>402</sup>.

All these considerations make EPA a good benchmark in terms of FTAs' shapes: the easy way of regulation can be taken as an example for the future relations and can make EU and Japan to the same side in multilateral discussions.<sup>403</sup>

### **3.2 Public procurement in Free Trade Agreements: South Korea- EU, CETA, TTIP, EPA**

After a presentation of four FTAs, in this part of the chapter the aim is to give an overview of the public procurement's chapters of the FTAs illustrated in the above subparagraphs. As said before, public procurement is a matter strictly related to CCP as well as to Internal Market: in this respect, if the Directive 2014/24 shows the main aspects of public procurement within the Internal Market, the examination of FTAs can give the general idea of how it is regulated in the External Action.

In particular, we put the attention on chapter 9 of EU- South Korea FTA, chapter 19 of CETA, the EU text proposal for TTIP and to Chapter 10 of EPA.

The aim of this examination is to provide for a general overview of the regulation of public procurement in those agreements that serves as a term of comparison for two different analysis: from one side, to find out common points between the chapters and from the other, to outline the differences between them.

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<sup>401</sup> "[...] that the focus of the EPA is still on 'old' issues such as tariff reduction of motorcars, electronics and agricultural products [...] The second reason, related to the first, is the relative lack of innovative proposals compared to those found in the TTIP and the CETA. Japanese" In Hitoshi Suzuki, *The new politics of trade: EU-Japan*, in *Journal of European Integration*, 2017, 39:7, at 875

<sup>402</sup> "Finally, the scale of EU-Japan trade compared to the TTIP is modest and therefore fails to attract the interests of CSOs in Europe." In Hitoshi Suzuki, *The new politics of trade: EU-Japan*, in *Journal of European Integration*, 2017, 39:7, at 886

<sup>403</sup> "Cooperation should, therefore, be easier than with the US. The trade rules agreed in the FTA, such as on sustainability, property rights, industrial standard regulation, competition, and procurement, should serve as the basis for future trade agreements with third countries and become a joint position that both sides represent in the World Trade Organization (WTO). If the Trump administration attempts to isolate the US import market by means of arbitrary commercial measures or even disregards the authority of the WTO's dispute settlement mechanism, EU and Japan should act together and oppose such measures jointly instead of acting in isolation." In Günther Hilpert Hanns, *The Japan-EU Economic Partnership Agreement—economic Potentials and Policy Perspectives*, in *Asia Europe Journal*, vol. 16, no. 4, (2018), at 448

As we said, all the four FTAs contain provisions that are different between them: the reason can lay on the fact that each region has different economic relationship with EU.

For instance, if CETA points to reach full economic exchange with the EU, EPA has returned to an agreement in which the first aim is to liberalise trade and the main reason is the different economic amount of trade that involves EU.

Moreover, the comparison between FTAs aims to show the differences that occur from FTAs that are been negotiated and approved during different moments too: if EU-South Korea is the first example of a regulation of public procurement that goes beyond the simple “*trade liberalisation aims*”, from the other side a different regulation can be implement in CETA or TTIP.

Regarding trade liberalisation, the inclusion of a broader regulation framework for public procurement in FTAs is the answer to Global Strategy’s call for a “*comprehensive in scope, provide for liberalization of substantially all trade [...] and go beyond WTO disciplines*’: in this respect, the strategy aim is to open markets and provide for a better suit access for EU firms but to export “*[...]a preferred model of liberalization, governance and multilateral regulation*” too.<sup>404</sup>

As a result, FTAs’ public procurement regulation results to be a mix between of EU regulations in the multilateral framework of rules represented by WTO GPA.

The creation of the Single market in 1985 has pushed to the aim of liberalisation of services by removing preferential treatment of national industry<sup>405</sup> but the “*international cooperation*” in liberalising public procurement was considered as fundamental to achieve better public procurement rules for EU firms.

As a result, while exporting its own set of rules, EU looked carefully to GPA systems of rules<sup>406</sup> in order to create a proper international cooperation which aims is to avoid discrimination against foreign bidders.

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<sup>404</sup> “Encapsulated in this are dual aims – an interest-led motivation-n to open markets and further business opportunities for EU firms; and a normative aspiration to export.” In Sangeeta Khorana, Maria Garcia, *Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?*, in *Journal of World Trade*, 2014, Issue 3, at 1

<sup>405</sup> “In the European case, a further imperative for the externalization of GP liberalization derives from the creation of its single market. Since the Single European Act (1985), the EU has applied a regime of procurement liberalization, removing preferential treatment of national industry in government purchasing.” In Sangeeta Khorana, Maria Garcia, *Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?* In *Journal of World Trade*, Issue 3, (2014) at 1

<sup>406</sup> “The EU has made attempts to ‘externalize’ its regulatory regime by encouraging expanded membership of the GPA, and acceptance of GPA-standard regulations in FTAs. It has extended to the international arena the same arguments used to justify EU procurement liberalization, such as the claim that benefits to domestic suppliers of protected markets are offset by increased procurement costs.” In Sangeeta Khorana, Maria Garcia,

In fact, liberalising public procurement means to annul the potential form of “trade barrier” that public procurement rules could assume<sup>407</sup> and, so far, the *ratio* of the inclusion of provision regarding public procurement is to achieve the aim of dismantling trade barriers represented by public procurement through a common set of rules and provisions based on national treatment principle which are the basis both of EU public procurement Directives<sup>408</sup> and GPA.<sup>409</sup>

At the same time, public procurement’s rules try to go deeper, not only aiming trade liberalisation based on market access but exploring the field of regulatory coordination through innovative instruments as technical and financial assistance too.<sup>410</sup>

### 3.2.1 EU-South Korea

EU- South Korea FTA contains provisions regarding public procurement in chapter 9; Article 1 states that the basis for public procurement regime between the two regions are the ones provided by GPA: “*The Parties reaffirm their rights and obligations under the Agreement on Government Procurement contained in Annex 4 to the WTO Agreement (hereinafter referred to as the ‘GPA 1994’) and their interest in further expanding bilateral trading opportunities in each Party’s government procurement market.*”

In this sense, EU-South Korea agreement provides for regulation that reaffirms a cooperation in the field of public procurement under GPA principles but does not go deeper in the integration: the aim of a cooperation is a liberalization of public

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*Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?*, in *Journal of World Trade*, Issue 3, 2014, at 13

<sup>407</sup> “Insofar as procurement policies favour domestic firms and products, they can be equivalent to trade barriers. The market access dimension of discriminatory procurement practices is generally the main rationale for negotiating disciplines on government procurement in international trade agreements.” In Hoekman, Bernard, *Trade Agreements and International Cooperation on Public Procurement Regulation*, 2017, at 319

<sup>408</sup> Directive 2014/24

<sup>409</sup> “The main discipline imposed by the GPA on covered entities is non-discrimination—national treatment and the most-favoured nation principle.” In Hoekman, Bernard, *Trade Agreements and International Cooperation on Public Procurement Regulation*, 2017, at 322

<sup>410</sup> “Deeper integration in some PTAs may be accompanied by complementary measures, including provision of technical and financial assistance to bolster institutional capacity in partner countries. Some PTAs establish timetables for deliberation and review processes.” In Hoekman, Bernard, *Trade Agreements and International Cooperation on Public Procurement Regulation*, 2017, at 327

procurement under GPA.<sup>411</sup> Although this agreement does not go further on integration, it represents the first step to a path that can lead to multilateral cooperation in public procurement in the context of “[...]structured partnerships facilitate mutual understanding and rapprochement, boost multilateral efforts and allow partners to address shared concerns on global challenges.”<sup>412</sup>

EU-South Korea FTA applied GPA 1994 at the moment of the signatory but Article 9.2 at paragraph 1 affirms expressly that the text to apply should have been the new revision too: “*The procurement covered by this Chapter shall be all procurement covered by each Party’s Annexes to the GPA 1994 and any note attached thereto, including their amendments or replacements.*”

As a result, Article 9.1 excludes that application of the part of the GPA 1994 regarding most favourite treatment for goods, services and suppliers, Article V on special and differential treatment for developing countries, paragraph 2 of Article VIII (condition of participation), institutions and final provisions.<sup>413</sup>

Article 9.3 of the agreement sets up a Working Group on Government Procurement which is established in Article 15.3.1 of the agreements as part of the Institution Provision.

According to the disposition, the aim of the group is to “[...] consider issues regarding government procurement and BOT contracts or public works concessions that are referred to it by a Party, [...] exchange information, [...] any other matters related to the operation of this Chapter.”

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<sup>411</sup> “*The EU-Korea FTA resonates the intention of additional liberalization by extending Korea’s coverage of entities beyond those listed under the GPA.*” In Sangeeta Khorana, Maria Garcia, *Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?* in *Journal of World Trade*, Issue 3, 2014, at 497

<sup>412</sup> “[...] structured partnerships facilitate mutual understanding and rapprochement, boost multilateral efforts and allow partners to address shared concerns on global challenges. Within this context, EU FTAs can be seen as a stepping stone for multilateral procurement liberalization in that the agreements have.” In Sangeeta Khorana, Maria Garcia, *Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?* In *Journal of World Trade*, Issue 3, 2014, at 500,

<sup>413</sup> Article 9.1 EU- South Korea FTA: “*For all procurement covered by this Chapter, the Parties shall apply the provisionally agreed revised GPA text (49) (hereinafter referred to as the ‘revised GPA’), with the exception of the following: (a) most favoured treatment for goods, services and suppliers of any other Party (subparagraph I(b) and paragraph 2 of Article IV of the revised GPA); (b) special and differential treatment for developing countries (Article V of the revised GPA); (c) conditions for participation (paragraph 2 of Article VIII of the revised GPA) which shall be replaced by: ‘shall not impose the condition that, in order for a supplier of a Party to participate in a procurement or be awarded a contract, the supplier has previously been awarded one or more contracts by a procuring entity of the other Party or that the supplier has prior work experience in the territory of that Party, except when prior work experience is essential to meet the requirements of the procurement;’; (d) institutions (Article XXI of the revised GPA); and (e) final provisions (Article XXII of the revised GPA)*”

The agreement recognizes the importance of collaboration and of exchange of information to arrive to a liberalisation and to an implementation of the chapter<sup>414</sup>: in fact, although the agreement has that aim<sup>415</sup> under GPA only, the negotiation was facilitated thanks to the fact that South Korea has ratified GPA.<sup>416</sup>

### 3.2.2 CETA

Chapter 19 of CETA regulates public procurement between Canada and EU: the scope and the coverage are listed in Article 19.2 that states that the chapter applies in case of “*covered procurement*” which is a procurement of a good, service or any combination, listed in Annexes to Market Access relating to the chapter not with aim of commercial sale or resale, by any contractual means<sup>417</sup> by a procuring entity<sup>418</sup> not excluded by paragraph 3 or a party’s annexes.<sup>419</sup>

Paragraph 3 of the Article 19.2 lists the exceptions to the application, which are: “[...] *the acquisition or rental of land, existing buildings or other immovable property or*

<sup>414</sup> “The EU-Korea FTA establishes a working group to consider issues on government procurement and on any other issues related to the implementation of this Chapter.” In Sangeeta Khorana, Maria Garcia, *Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?*, in *Journal of World Trade*, Issue 3, 2014, at 499

<sup>415</sup> “[...] however, has been easier with some partners like South Korea, which share the commitment to liberalize in addition to the WTO GPA.” In Sangeeta Khorana, Maria Garcia, *Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship ?*, in *Journal of World Trade*, Issue 3, (2014) at 501

<sup>416</sup> “In the case of the EU-Korea agreement, which was concluded before the revision of the GPA, the EU was able to add build-to-operate contracts to the coverage and thus an extent the then coverage of the GPA.” In Stephen Woolcock, *The European Union’s Policy on Public Procurement in Preferential Trade Agreements*, in *European Yearbook of International Economic Law*, (2017), at 369

<sup>417</sup> Article 19.2, b CETA: “[...] by any contractual means, including purchase; lease; and rental or hire purchase, with or without an option to buy;”

<sup>418</sup> Article 19.1: “[...] procuring entity means an entity covered under Annexes 19-1, 19-2 or 19-3 of a Party’s Market”

<sup>419</sup> Article 19.2: “Application of this Chapter

1. This Chapter applies to any measure relating to a covered procurement, whether or not it is conducted exclusively or partially by electronic means

2. For the purposes of this Chapter, covered procurement means procurement for governmental purposes: (a) of a good, a service, or any combination thereof: (i) as specified in each Party’s Annexes to its Market Access Schedule for this Chapter; and

(ii) not procured with a view to commercial sale or resale, or for use in the production or supply of a good or a service for commercial sale or resale;

(b) by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy;

(c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party’s Annexes to its Market Access Schedule for this Chapter, at the time of publication of a notice in accordance with Article 19.6;

(d) by a procuring entity; and

(e) that is not otherwise excluded from coverage in paragraph 3 or a Party’s Annexes to its Market Access Schedule for this Chapter

*the rights thereon; (b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives; (c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities; (d) public employment contracts; e) procurement conducted: (i) for the specific purpose of providing international assistance, including development aid; (ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or (iii) under the particular procedure or condition of an international organisation, or funded by international grants, loans or other assistance if the applicable procedure or condition would be inconsistent with this Chapter.”*

Moreover, Article 19.3 provides for a series of exceptions: in particular, it states that the parties can not disclose information about procurement of arms, ammunition, or war material, procurement indispensable for national security; for national defence purposes, in case of which it appears “ *[...] necessary for the protection of its essential security interests relating to the procurement[...]*”.

The actual novelty regarding public procurement in CETA is the aim of the EU to arrive to sub-federal procurement tenders.

Canada is a federal state and it is divided in 10 provinces and 3 territories and their inclusion in the government procurement coverage was one of the major’s aims. As a result, Article 19.2 paragraph 4 extends the application of the provisions in chapter 19 to “*[...] (b) in Annex 19-2, the sub-central government entries[...]*”

Annex 19.2 clarifies who are the contracting authorities and which are the threshold: in particular, contracting authorities are the administrative units according to regulation 1059/2003 (NUTS Regulation)<sup>420</sup>, while “regional contracting authority” and “local contracting authority” are the ones listed respectively under NUTS 1 and 2 and NUTS 3.<sup>421</sup> It is clear that CETA shows to go further than the other FTAs: although the

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<sup>420</sup> Annex 19.2: “*All contracting authorities of the administrative units as defined by Regulation 1059/2003 – NUTS Regulation*”

<sup>421</sup> Annex 19.2: “*For the purposes of this Chapter, 'regional contracting authorities' shall be understood as contracting authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation 1059/2003 – NUTS Regulation. 3. For the purposes of this Chapter, 'local contracting authorities' shall be understood as contracting authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation 1059/2003 – NUTS Regulation.*”

objectives are the same, the way in which it is made goes deeper than other agreements.<sup>422</sup>

In this respect, the most significant achievement was the inclusion of the so-called MASH sector (municipal, academic institutions and school board and hospitals) in the coverage.<sup>423</sup> In particular, annexes 19.2 expressly provides for the threshold in case of procurement of goods and services regarding MASH sector<sup>424</sup>: as a result, CETA commitments on opening procurement do not simply stop at liberalisation but “*were unprecedented and exceed those made in other Canadian PTAs.*”<sup>425</sup>

Despite of it, the rules governing CETA’s government procurement are modelled on GPA principles: Article 19.4 lists principles governing public procurement: no discrimination, use of electronic means, rules of origin, conduct of procurement “*transparency and impartial*”, offset.

Article 19.4 provides for no discrimination in procurement intended as the application of measures by each party to the other one which is “*treatment no less favourably*” and that not “*discriminate*”, and rules apply to both federal and a local entity. It means that the term of comparison is not only the central government but also provinces and territories shall grant to EU bidders the same treatment granted to local firms, avoiding any discrimination.

Moreover, CETA adopts the rules on transparency designed in GPA: in particular, paragraph 4 provides that a procurement shall be conduct in “*transparent and impartial manner*” in order to achieve three aims: using methods as open tendering, selective tendering or limited tendering in conducting procurement, respecting the provisions in the chapter: in avoiding conflict of interest and preventing corruption.<sup>426</sup>

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<sup>422</sup> “CETA covers trade in goods and services in greater depth than other contemporary FTAs. It opens services and procurement markets of both parties in ways that go well beyond other FTAs to which they are parties.” In Armand de Mestral, *Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties*, in *European Yearbook of International Economic Law*, (2017), at 440

<sup>423</sup> “The most significant extension comes at the sub-federal level and in particular to the coverage of the so-called MASH sector (municipal, academic institutions, school boards and hospitals).” In Stephen Woolcock, *The European Union’s Policy on Public Procurement in Preferential Trade Agreements* in *European Yearbook of International Economic Law*, (2017), at 370

<sup>424</sup> Annex 19.2 SDR 200.000 for a contracting authority governed by public law; SDR 350.000 for the others.

<sup>425</sup> In Hoekman, Bernard, *Trade Agreements and International Cooperation on Public Procurement Regulation*, (2017), at 328

<sup>426</sup> Article 19.4 “A procuring entity shall conduct covered procurement in a transparent and impartial manner that: (a) is consistent with this Chapter, using methods such as open tendering, selective tendering and limited tendering; (b) avoids conflicts of interest; and (c) prevents corrupt practices.”

Moreover, as in GPA, CETA provisions open to the use of electronic means stating that the communication has to “[...] *the integrity of requests for participation and tenders* [...]”<sup>427</sup>.

As a result, principles of CETA bear a resemblance with GPA provisions and the chapter is very similar to GPA regulation.<sup>428</sup>

Although GPA was the benchmark for the chapter, CETA went beyond the multilateral framework: as an FTA, the result of the negotiation was deeper than the ones set in multilateral framework.<sup>429</sup> In this respect, bilateral instruments became the preferred instruments of negotiation.

CETA government procurement includes provisions regarding all the steps of a tender.

First, Article 19.5 provides for a system of regulatory cooperation in the matter, establishing that entities may assure information regarding “*any law, regulation, judicial decision, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation [...] and provide an explanation thereof to the other Party, on request.*”

Article 19.7 establishes condition for participation, that must be “[...] *essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.*” Moreover, it lists exclusions: “[...] *bankruptcy; false declarations; significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts; final judgments in respect of serious crimes or other serious offences; professional misconduct or acts or omissions that adversely reflect on the commercial*

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<sup>427</sup> Article 19.4 “*Use of Electronic Means* 3. When conducting covered procurement by electronic means, a procuring entity shall: (a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and (b) maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access.”

<sup>428</sup> “The GPA by including coverage of procurement by the Canadian sub-federal entities. There remain some general exceptions or exclusions in CETA, but these are in line with those in the GPA. On rules, the procurement chapter of CETA (chapter 21) is very closely modelled on the GPA. For the most part the GPA text is simply carried over into CETA. This means that CETA would be consistent with eventual TTIP chapter on procurement.” In Stephen Woolcock, *The European Union’s Policy on Public Procurement in Preferential Trade Agreements*, in “*European Yearbook of International Economic Law*”, (2017), at 370

<sup>429</sup> “CETA is following trends in the growth and development of PTAs by moving beyond WTO negotiated trade policy to cover a wider range of issues, such as services, TBT, SPS, investment, and intellectual property in greater detail and to include issues currently excluded from multilateral negotiations such as competition, sustainable development, and government procurement.” In Ljiljana Biuković, *Transparency Norms, the World Trade System and Free Trade Agreements: The Case of CETA*, in *Legal Issues of Economic Integration*, vol. 39, no. 1, (2012), at 107

*integrity of the supplier; or failure to pay taxes.*”. Other examples are registration system, that each party must have (Article 19.8); tender documentation, that has to include information regarding all aspects of procurement as nature and quality aspects of the objective of procurement, terms and evaluation criteria (Article 19.9); transparency of information (Article 19.5).

Article 19.16 regulates disclosure of information: parties shall provide information in case of the necessity of “[...] *determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter [...]*”; moreover, it provides that an exception is the case in which the information can cause a prejudice to competition in future tenders.<sup>430</sup>

On the other side, it is not forbidden to a party to not disclose information if the disclosing “[...] *would impede law enforcement; (b) might prejudice fair competition between suppliers; (c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or (d) would otherwise be contrary to the public interest.*”

Article 19.17 provides for a domestic review of the tenders: the parties shall ensure that there will be a domestic administrative or judicial review procedure in case of breach of the chapter; or in case of the supplier does not have a right to challenge directly a breach of the Chapter under the domestic law of a Party or a failure to comply with a Party's measures implementing this Chapter; moreover, the parties may make available writing rules. In one of the above-mentioned cases, the entity authority shall invite the entities involved to seek resolution and each supplier shall have time to submit the challenge.

In case of challenge, the suppliers must not have less than 10 days to prepare and submit the claim and each party may have designated an impartial authority. The review proceeding must be conducted not in front of a court; the parties involved can participate and be listened with assistance and can submit writing documents. The authority shall submit a writing decision in a reasonable time and can provide, during the period between the hearings and the decisions, interim measures. The function of the interim measure is

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<sup>430</sup> Article 19.16.1 CETA “*Provision of Information to Parties. On request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the consent of, the Party that provided the information.*”

to preserve the right to participate to the procurement to the challenging suppliers and consists in suspend of the procurement.

Article 19.19 establishes a Committee Group, composed by representative of both parties to discuss question regarding the chapter.

### 3.2.3 TTIP

The three achievement of EU regarding public procurement's regulation in TTIP can be listed in three objectives: *"removal of legal barriers, lowering and reciprocating the financial thresholds, extension of coverage."*<sup>431</sup>

The first aim is the extending of coverage to sub-federal entities: TTIP text's proposal indicates that the aim of public procurement chapter should be to *"maximise the opportunities for EU and US firms to participate in public tenders at all government levels, whether central/sub central, federal or sub-federal, without being discriminated against."*

As for CETA, the aim of EU was to permit EU firms to participate in biddings at both federal and Sub-federal level<sup>432</sup>: as a result, EU text proposal indicates both the principles and the objectives of the chapter.

Regarding the principles, as for CETA discrimination and transparency are the main principles to apply; moreover, as for the previous FTAs, EU and USA are both parts of the GPA which is *"The GPA is the starting point for the public procurement negotiations under the TTIP."*<sup>433</sup>

As a result, the text proposal makes express reference to discrimination and transparency: in particular, *"agree on rules which will ensure that EU or US companies are not discriminated against when tendering for public contracts on each other's"*

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<sup>431</sup> In Raczkiwicz Zbigniew, *Public Procurement within the Framework of a Transatlantic Trade and Investment Partnership*, in *European Procurement & Public Private Partnership Law Review (EPPPL)* vol. 11, no. 4 (2016) HeinOnline, at 267

<sup>432</sup> *"The Canada-EU CETA, provincial and municipal procurement was opened in Canada, with some exceptions, along with central and sub-central procurement in Europe.21 Both sides considered the agreed terms to be their most ambitious concessions to date. The European Union puts a high priority on parallel achievements in TTIP."* In Gary Clyde Hufbauer, Cathleen Cimino-Isaacs, *how will TPP and TTIP Change the WTO System?*, In *Journal of International Economic Law*, Volume 18, Issue 3, 1 September 2015, at 689

<sup>433</sup> *"The GPA is the starting point for the public procurement negotiations under the TTIP."* In Raczkiwicz Zbigniew, *Public Procurement within the Framework of a Transatlantic Trade and Investment Partnership*, in *European Procurement & Public Private Partnership Law Review (EPPPL)* vol. 11, no. 4 (2016), HeinOnline, at 265

*market” and “agree on rules to maximise transparency in tendering for public contracts to ensure EU and US firms are aware of opportunities across the Atlantic”*<sup>434</sup>

In this respect, TTIP can be in accordance with EU public procurement: from one side, it guarantees a treatment no discriminatory and conducted with a certain level of transparency; from the other side, themes as environmental protection, social progress and labour law enforcement are recalled.<sup>435</sup>

Removing legal barriers is directly connected to the extension of the coverage: as the contracts award is controlled by governing authority affected<sup>436</sup>, there are some legal instruments in USA that prevent EU firms to compete in tenders locally<sup>437</sup> and EU aims to remove these restrictions to market access of public procurement.

However, there are some obstacles: first, the opening to sub-federal tenders has to face manifold legislative acts<sup>438</sup>: each city has the possibility to set the rule governing the contractual award and as a result, due to the extension of USA territories, this framework makes more difficult to reach uniformity of rules.

In consequence, another limit to overcome is the difference of evaluation: in fact, in the USA one of the criteria is represented by the past performances of the tender.<sup>439</sup>

The negotiation of TTIP are not going further; it seems clear that some difficulties would be found in the field of public procurement rules and CETA is a very ambitious benchmark because “[...]it will not miraculously solve all the hurdles related to bidding in a different country and under a different public procurement.”<sup>440</sup>

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<sup>434</sup> In *Factsheet on Public procurement in TTIP* available at

[http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153000.3%20Public%20Procurement.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153000.3%20Public%20Procurement.pdf)

<sup>435</sup> “We’re not currently aware of any issues which are especially sensitive or where people have raised specific concerns. We want to open up public tendering markets on the basis of rules on transparency and non-discrimination similar to those that apply under EU law [...] environmental protection, social progress, labour law enforcement” Ivi at 28, note 112

<sup>436</sup> “[...] contracts to outside competition is negotiated at international level. The main issue here is the contracts awarded by contracting authorities belonging to the non-centralised government.” In Raczkiewicz Zbigniew, *Public Procurement within the Framework of a Transatlantic Trade and Investment Partnership*, in *European Procurement & Public Private Partnership Law Review (EPPPL)* vol. 11, no. 4 (2016), HeinOnline, at 264

<sup>437</sup> For more on this topic see Raczkiewicz Zbigniew, *Public Procurement within the Framework of a Transatlantic Trade and Investment Partnership*, in *European Procurement & Public Private Partnership Law Review (EPPPL)* vol. 11, no. 4 (2016), HeinOnline: p. 263-269

<sup>438</sup> “The first is lack of a uniform set of rules governing the award of government contracts.” In Raczkiewicz Zbigniew, *Public Procurement within the Framework of a Transatlantic Trade and Investment Partnership*, in *European Procurement & Public Private Partnership Law Review (EPPPL)* vol. 11, no. 4 (2016) HeinOnline, at 269

<sup>439</sup> “There is also a significant difference in the evaluation of the tenders. In the USA one of the main award criteria is past performance of the tenderer as contractor [...]” In Raczkiewicz Zbigniew, *Public Procurement within the Framework of a Transatlantic Trade and Investment Partnership*, in *European Procurement & Public Private Partnership Law Review (EPPPL)* vol. 11, no. 4 (2016), Hein Online, at 270

<sup>440</sup> In Raczkiewicz Zbigniew, *Public Procurement within the Framework of a Transatlantic Trade and Investment Partnership*, in *European Procurement & Public Private Partnership Law Review (EPPPL)* vol. 11, no. 4 (2016): p. 263-269. Hein Online,

### 3.2.4 EPA

With regards to EPA, Government Procurement is regulated in chapter 10.

When negotiating public procurement, the EU's aims were three: avoiding discriminatory conduct against EU firms, providing for access at regional level and obtaining a proper level of transparency.<sup>441</sup>

As a result, the EU has obtained better access at regional and local government in key sector for EU: in particular, one of the aim was to gain market access in the railway sector and in particular it was requested to Japan to remove the "*Operational Safety Clause*", which provides for security standards in railways but at the same time precluded to foreign suppliers from participate to the tenders.<sup>442</sup>

The result was positive, and Japan and EU agreed cooperate through "Railway Industrial Dialogue and the "Technical Expert Group on Railways". By EU side, Japanese bidders gained access to tenders regarding Hospitals and academic institutions (87 entities) and Electricity distribution (29 entities).

The most complicated issues were fair access, discriminating and transparency: European Commission claimed lack of transparency in railway sector<sup>443</sup> and as a result EU' bidders had difficulty in access Japanese procurement market.<sup>444</sup>

The chapter is a compromise between EU and Japan interest. In addition, Japan is part of GPA and the negotiation pushed to take GPA as a reference. The result is that chapter 10 of EPA is a text prepared on GPA and that promotes cooperation form EU and Japan.

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<sup>441</sup> "Agreed on rules that prohibit unfair discrimination by one side against bidders from the other side; agreed on rules to maximise transparency in tendering for public contracts to ensure EU firms are aware of opportunities in Japan; maximised the opportunities for EU firms to participate in public tenders at all government levels – national, regional and municipal." In *Factsheet EU-Japan Economic partnership agreement*." From An introduction to the EU-Japan Economic Partnership Agreement, available at [http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155719.pdf](http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155719.pdf)

<sup>442</sup> "Japan's Operation Safety Clause on the procurement of equipment, whose deliberately broad interpretation regularly led to European offers being disregarded, is to be lifted one year after the agreement comes into force." In Günther Hilpert Hanns, *The Japan-EU Economic Partnership Agreement—economic Potentials and Policy Perspectives*, in *Asia Europe Journal*, vol. 16, no. 4, (2018), at 441

<sup>443</sup> "The public procurement of railway carriages is another revealing case where lack of transparency has been criticised by the European Commission." In Hitoshi Suzuki, *The new politics of trade: EU-Japan*, in *Journal of European Integration*, 39:7, (2017) at 883

<sup>444</sup> "EU suppliers have been much less successful in accessing the important Japanese rail sector. In terms of access to the Japanese market therefore confidence in the effective application of transparency and non-discrimination is vital if EU suppliers are to invest." In Stephen Woolcock, *The European Union's Policy on Public Procurement in Preferential Trade Agreements*, in *European Yearbook of International Economic Law* 2017, at 372

Article 10.1 states expressly that all GPA applies to public procurement between EU and Japan: “*The GPA is incorporated into and made part of this Chapter, mutatis mutandis.*”

Moreover, public procurement is extended both to central and regional level: Article 10.3 states that “*Each Party shall apply Articles 10.4 to 10.12 to both the procurement covered by its annexes to Appendix I to the GPA and the procurement covered by Part 2 of Annex 10.*” In fact, Annex 2 of GPA includes coverage of sub-central government entities.

GPA’s adoption helps to ensure more transparency in public procurement: in particular, EU and Japan agreed to introduce rules that provide for transparency, electronic tender specification and mutually recognition of test result and selection criteria.<sup>445</sup>

Some principles apply entirely: regarding condition for participation, Article 10.5 refers to Article VIII GPA.

Another example is Article 10.4, that recalls Article VII of the GPA which regulates notice of intent, in which each party provide information regarding the tender, e.g. the name of the entity, the nature of procurement<sup>446</sup>;

Article 10.6 regulates qualification of suppliers and establishes that, when an EU firm undergoes the “ Business Evaluation (*Keiejikoshinsa*) (also known as *Keishin*)

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<sup>445</sup> “In addition to the WTO Public Procurement Agreement signed by both sides, the EU and Japan have also pledged to transparent, electronically supported tender specifications, mutually recognizing test results and selection criteria.” In Günther Hilpert Hanns, *The Japan-EU Economic Partnership Agreement—economic Potentials and Policy Perspectives*, Asia Europe Journal, vol. 16, no. 4, (2018), at 441

<sup>446</sup> Article VII GPA: “[...] the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;  
a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;  
for recurring contracts, an estimate, if possible, of the timing of subsequent notices of intended procurement;  
a description of any options;  
the time-frame for delivery of goods or services or the duration of the contract;  
the procurement method that will be used and whether it will involve negotiation or electronic auction;  
where applicable, the address and any final date for the submission of requests for participation in the procurement  
the address and the final date for the submission of tenders;  
the language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than an official language of the Party of the procuring entity;  
a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;  
where, pursuant to Article IX, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender; and  
an indication that the procurement is covered by this Agreement”

under the Construction Business Law of Japan (Law No. 100 of 1949)” Japanese authorities grant for “*assess in a non-discriminatory manner and, where appropriate, recognise as equivalent to those in Japan, indicators of the supplier realised outside Japan[...]take due account of indicators of the supplier realised outside Japan.*”

As a result, both parties may require a test report: Article 10.9 states that the test report is prepared by a conformity assessment body and is a means of proof of the “[...] *conformity with the requirements or the criteria set out in the technical specifications, the evaluation criteria or any other terms or conditions*”

In order to maintain the results, chapter 10 provides for mechanism that affords and consolidates cooperation between EU and Japan: Article 10.16 reaffirms the necessity of cooperation, stating that “[...] *shall endeavour to cooperate with a view to achieving enhanced understanding of their respective government procurement markets [...]*: in this respect, cooperation means a mutual exchange information in order to make each public procurement’ s rules comprehensible.

In conclusion, Article 10.16 establishes a “Committee on Government Procurement” which aim is to check the correct implementation of the rules provided in the chapter and to make recommendations to modify or rectify the provisions as in Article 10.14.

### **3.3 FTAs Public Procurement and E.U. public procurement rules: divergences and similarities**

After the examination of some FTAs and of their public procurement chapters, it is possible to make a comparison between public procurement in EU Internal Market and public procurement rules contained both in GPA and FTAs.

As said at the beginning of these work, the aim is to try to evaluate what aspects are in common and which are- if there are- divergences between the regulation of public procurement.

In accordance with Article 21 TFEU, CCP is now one of the instruments of External Action of the EU: its role is to promote EU values “[...] *including the*

*development of poorer countries, high social and environmental standards, and respect for human rights, around the world. by trade and investment treaties”*<sup>447</sup>

As a result, it was underlined how values like sustainable growth, environment, labour standards are included in negotiated FTAs as South Korea and CETA and are the benchmark of negotiation of new agreement as TTIP.

Apart from bilateral instruments, it was underlined the important role of WTO instruments in CCP and, specifically, in public procurement: WTO and EU have been influenced each other but at the same time, EU has tried to overcome WTO's role by exporting its own rules and acting like a “legislator”. In this respect, public procurement is a perfect example: if Directive 2014/24 has been influenced by GPA, at the same time EU plays the role that WTO is failing to act.

The first subparagraph outlines the measure of the influence that GPA has exercised on the negotiation and final version of the public procurement chapters.

In the second part there is a comparison between the chapters of the FTAs that have been examined: the aim is to find the common rules and the differences in order to understand the changes that have occurred during the years in CCP: in fact, from the first new generation agreement EU- South Korea and the last example of EPA are passed 7 years; moreover, in the meantime, CETA was signed.

The aim of these two parts of this last subparagraph is to evaluate the external regulation of public procurement and the Internal Market provisions: the question to answer to is whether the Internal Market and External Actions influence each other.

Thinking to the role of CCP as to guarantee the function of “*customs union, common market and later the internal market*” by ensuring uniformity of action<sup>448</sup>, it appears logical that the two dimensions of EU may have a common point in legislative regulation too.

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<sup>447</sup> “*The EU Treaties demand that the EU promote its values, including the development of poorer countries, high social and environmental standards, and respect for human rights, around the world. In this regard, trade and investment policy must be consistent with other instruments of EU external action.*” In Communication ‘*Trade for all – Towards a more responsible trade and investment policy*’ COM (2015) 457 14/10/2015

Available at [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>448</sup> “*The purpose of the CCP was to ensure the functioning of the customs union, common market and later the internal market by ensuring the uniformity of external trade rules for all Member States.*” In Marise Cremona, *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU's Common Commercial Policy*, in *European Yearbook of International Economic Law*, (2017), at 8

### 3.3.1 The role of WTO: the influence of GPA

GPA's influence on EU public procurement is directly proportional to the relationship between EU and WTO.

In their role as “legislators” EU and WTO have become a sort of “*clubs of clubs*”<sup>449</sup>: the shift of international trade from multilateralism to plurilateralism in WTO<sup>450</sup> has produced the spread of differentiated integration. In these respects, we have moved from the classical agreements based on “*negative integration*”<sup>451</sup> to a positive integration in which agreements are negotiated as a form of regulatory cooperation<sup>452</sup>.

In this respect, GPA is a consequence of this changing and is considered one of the plurilateral agreements (PAs) in the framework of WTO, which are agreements that the parties of WTO sing for boosting cooperation “[...]deepen existing WTO market access commitments and rules.”<sup>453</sup>: as a result, they provide for regulation in multisectoral fields and bring advantages in WTO system.<sup>454</sup>

As example, this deeper regulation has at least two economic advantages; reducing tariff and gaining trade liberalisations and contributing to a better allocation of economic resources.<sup>455</sup>

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<sup>449</sup> In Robert Basedow, *The WTO and the Rise of Plurilateralism—What Lessons can we Learn from the European Union's Experience with Differentiated Integration?* *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, at 433

<sup>450</sup> “The rise of plurilateralism implies the transformation of the WTO into a ‘club of clubs’ of differentiated trade integration.” In Robert Basedow, *The WTO and the Rise of Plurilateralism—What Lessons can we Learn from the European Union's Experience with Differentiated Integration?* *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, at 411

<sup>451</sup> See supra chapter 1, subparagraph 3.1

<sup>452</sup> “Modern trade policy proceeds through ‘positive’ rather than ‘negative’ integration in the form of regulatory cooperation.” In Robert Basedow, *The WTO and the Rise of Plurilateralism—What Lessons can we Learn from the European Union's Experience with Differentiated Integration?* *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, at 414-415

<sup>453</sup> “WTO-plus PAs deepen existing WTO market access commitments and rules. WTO-extra PAs extend the scope of WTO market access commitments and rules to new areas. Signatory countries may apply PAs on a discriminatory basis.” In Robert Basedow, *The WTO and the Rise of Plurilateralism—What Lessons can we Learn from the European Union's Experience with Differentiated Integration?*, *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, at 417

<sup>454</sup> “[...] they dealt with particular policy issues on a cross-sectoral basis: The Agreement on Government Procurement (GPA) as well as further five Codes concerning Technical Barriers to Trade, Subsidies and Countervailing Duties, Anti-Dumping, Customs Valuation, and Import Licensing.” In Rudolf Adlung, and Hamid Mamdouh, *Plurilateral Trade Agreements: An Escape Route for the WTO?*, *Journal of World Trade*, vol. 52, no. 2, 2018, pp. 85-111, at 94

<sup>455</sup> “A key advantage of PAs and CMAs is of economic nature. PAs and CMAs may promote growth through two channels. PAs and CMAs providing for tariff reductions liberalize economic relations between countries and thereby allow them to tap on their respective comparative advantages and resources. PAs and CMAs—much like multilateral or bilateral agreements—thus provide for a more efficient allocation and use of countries’ production capacities and resources” In Robert Basedow, *The WTO and the Rise of Plurilateralism—What Lessons can we Learn from the European Union's Experience with Differentiated Integration?* *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, at 419

Another positive advantage is that these new ways of making agreements contribute to modernise WTO and its rules: negotiating rules at plurilateral level aiming regulatory cooperation and different integration means to create new sets of trade rules that better suit the changing that occurred in economic and political context since the sign of Marrakesh Agreements.<sup>456</sup>

At last, another example of the positive aspects is the possibility of keeping WTO in a context of manifold bilateral agreements<sup>457</sup>; however, EU ponders WTO as the chosen forum for international trade approach.

In this respect, plurilateral assessment of the debate should be the best approach to make in contact bilateral and multilateral discussion: in this respect, EU and WTO become “*clubs of clubs*”<sup>458</sup>: both the Union and WTO unify international trade discussions and rules improvement, the former by negotiating bilateral agreements and the latter by its multilateral, plurilateral agreements and dispute settlement body.<sup>459</sup> As a result both of them influence political and legislative process of each other.

GPA’s influences on Directive 2014/24 is a flawless example: Article IV of the Agreement regulates most favourite nation treatment stating that: “*With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not: treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.*”

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<sup>456</sup> “Streamlining governance and modernising trade rules: In addition to the ‘classic’ economic benefits tied to trade integration, PAs and CMAs are promising governance tools to update rules. WTO law reflects the economic, political, and legal realities of the 1980s. For the moment being WTO dispute settlement body has sought to apply and elaborate WTO law in line with new challenges. This practice, however, triggers questions over legitimacy, accountability, and effectiveness. Plurilateralism is a promising strategy to elaborate new modern rules for salient trade issues.” In Robert Basedow, *The WTO and the Rise of Plurilateralism—What Lessons can we Learn from the European Union’s Experience with Differentiated Integration?* *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, at 419

<sup>457</sup> “[...] In the light of cumbersome multilateral trade negotiations, many countries have turned towards bilateral trade agreements in the past 15 years. The turn towards bilateral agreements endangers the WTO as a focal point of global trade governance. It increasingly shifts rule-making and policy debates from the WTO to bilateral fora. PAs and CMAs are firmly rooted in the legal, political and institutional setting of the WTO. They may keep the WTO alive as legal and political hub for the global trade regime.” In Robert Basedow, *The WTO and the Rise of Plurilateralism—What Lessons can we Learn from the European Union’s Experience with Differentiated Integration?* *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, at 419

<sup>458</sup> *Ivi* at 34 note 127

<sup>459</sup> “Trade policy-makers should take advantage of the EU’s greater experience and experimentation with ‘differentiated integration’ to develop a carefully crafted approach to plurilateralism in the WTO.” In Robert Basedow, *The WTO and the Rise of Plurilateralism—What Lessons can we Learn from the European Union’s Experience with Differentiated Integration?* *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, at 433

The provision states that a party of GPA shall not discriminate or treat less favourable a product or a services provided from a foreigner supplier.<sup>460</sup> As a result, Directive 2014/24 recalls Article IV explicit: making reference to Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and the other international agreements, Article 25 states that: “[...]contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.”

Directive 2014/24 mentions GPA at the very beginning: Recital 17 states that the Union is bound to the commitment established by GPA <sup>461</sup>; moreover, Recital 18 establishes that the threshold in the Directive will be at the same level of the one in GPA:<sup>462</sup> “[...]The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the GPA.[...]”

GPA uses transparency for ensuring and granting that procurement procedure shall respect competition<sup>463</sup>: as an example, Article XVI provides for transparency in procurement information and states that each party shall respond to answer regarding award of contract, maintain the documentation regarding the procurement or , if the notice<sup>464</sup> was published by electronic means, it has to be accessible of a reasonable time.<sup>465</sup>

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<sup>460</sup> “Moreover, contracting states may not discriminate against foreign suppliers by applying rules of origin that differ from those they apply in general to MFN-based trade.” In Bernard Hoekman, *Trade Agreements and International Cooperation on Public Procurement Regulation*, in Rensmann, Thilo, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 322

<sup>461</sup> Recital 17 Directive 2014/24: “Council Decision 94/800/EC (1) approved in particular the World Trade Organisation Agreement on Government Procurement (the ‘GPA’). The aim of the GPA is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union’s Appendix I to the GPA, as well as by other relevant international agreements by which the Union is bound, contracting authorities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.”

<sup>462</sup> Recital 18 Directive 2014/24: “The GPA applies to contracts above certain thresholds, set in the GPA and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the GPA. Provision should also be made for periodic reviews of the thresholds expressed in euros so as to adjust them, by means of a purely mathematical operation, to possible variations in the value of the euro in relation to those special drawing rights. Apart from those periodic mathematical adjustments, an increase in the thresholds set in the GPA should be explored during the next round of negotiations thereof.”

<sup>463</sup> “To ensure that potential bidders can participate the GPA has many transparency provisions. Thus, notices of intended or planned procurement must be published” In Bernard Hoekman, *Trade Agreements and International Cooperation on Public Procurement Regulation*, in Rensmann, Thilo, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 322

<sup>464</sup> Article VII GPA regulates notice of intended and states that “For each covered procurement, a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Appendix III, except in the circumstances described in Article XIII. Such medium shall be widely disseminated,

Transparency is a pillar<sup>466</sup> of Directive 2014/24 as well: as said<sup>467</sup> the Directive has mentioned for the first time transparency among principles of public procurement: Article 18 states that contracting authorities shall treat economic operators in “*a transparent and proportionate manner*”.

In Directive 2014/24, transparency is recognized to have a central role; in particular, granting a certain level of transparency should help the fighting to corruption and anti- competitive practice in public procurement<sup>468</sup>.

In conclusion, GPA and Directive 2014/24 mirrors the relationship between EU and WTO: both of them have influenced each other in different manner.

EU is a clear example of deeper and differentiated integration<sup>469</sup> because its policy of negotiating a variety of disciplines that go further than trade barriers boosts its role of exporter of rules of law regarding international trade; at the same time, GPA appears a cardinal point in the making and structure of Directive 2014/14.

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*and such notices shall remain readily accessible to the public, at least until expiration of the time-period indicated in the notice.”*

<sup>465</sup> ArticleXVI GPA: “*A procuring entity shall promptly inform participating suppliers of the entity’s contract award decisions and, on the request of a supplier, shall do so in writing. Subject to paragraphs 2 and 3 of ArticleXVII, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier’s tender.* Publication of Award Information

*Not later than 72 days after the award of each contract covered by this Agreement, a procuring entity shall publish a notice in the appropriate paper or electronic medium listed in Appendix III. Where the entity publishes the notice only in an electronic medium, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information: a description of the goods or services procured;*

*the name and address of the procuring entity; the name and address of the successful supplier;*

*the value of the successful tender or the highest and lowest offers taken into account in the award of the contract; the date of award; and the type of procurement method used, and in cases where limited tendering was used in accordance with ArticleXIII, a description of the circumstances justifying the use of limited tendering.*

*Maintenance of Documentation, Reports and Electronic Traceability*

*Each procuring entity shall, for a period of at least three years from the date it awards a contract, maintain: the documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under ArticleXIII; and data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.”*

<sup>466</sup> “*It could be said that flexibility, sustainability and transparency are the three new “pillars” of the recent secondary European legislation on public procurement law. New stipulations of guaranteeing transparency and fighting corruption, fraud and collusion in the field of public procurement are included in the EU Directive 2014/24*” In Chrysoula P Moukiou, *The Principles of Transparency and Anti-Bribery in Public Procurement: A Slow Engagement with the Letter and Spirit of the EU Public Procurement Directives* European Procurement & Public Private Partnership Law Review (EPPPL) vol. 11, no. 2 (2016), HeinOnline,

<sup>467</sup> See supra chapter 2

<sup>468</sup> “*A certain level of transparency of public procurement procedure is necessary in order to fight corruption, enhance trade opportunities and ensure effective legal remedies. On the other hand, too much transparency may have certain anticompetitive effects.*” In Kirsi-Maria Halonen, *Disclosure Rules in Eu Public Procurement: Balancing Between Competition and Transparency*, *Journal of Public Procurement*, Volume 16, Issue 4, at 528

<sup>469</sup> “*The EU has long been the foremost example of a subset of WTO members agreeing to far-reaching disciplines on discrimination in procurement.*” In Bernard Hoekman, *Trade Agreements and International Cooperation on Public Procurement Regulation*, in Rensmann, Thilo, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 327

At the same time, EU shown to prefer a flexible approach to public procurement in negotiation that goes beyond GPA: in fact, GPA tends to promote market access<sup>470</sup> while EU pushes to negotiate rules that promote market integration: somehow, it emphasizes the interaction between EU and WTO<sup>471</sup>, which seems to conducted international trade legislation through two ways: deeper integration in a plurilateral context, in which EU acts to promote the role of WTO.<sup>472</sup>

### 3.3.2 Differences between FTAs' approach to public procurement

Each FTAs' approach to public procurement present different elements: the reasons behind can be more than one but at least for two elements: time and context.

First, each of them – South Korea, CETA, TTIP and EPA- have been negotiated in different time: EU- South Korea was signed in 2012, two years after “*Europe 2020 strategy*” and 6 years after “*Global strategy*”; in the meantime, a global crisis has occurred and therefore, the economic context has changed.

In particular, “*Global Europe 2006*”’s CCP was keen in “[...] *new FTA partners should be market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non-tariff barriers)*.”<sup>473</sup>: as a result, the new FTAs – ASEAN, Mercosur and South Korea- should have been modelled on the two criteria of market potential and market protection.

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<sup>470</sup> “What the recent PTAs reveal is that it is possible to go beyond the GPA approach, which is essentially limited to promoting market access.” In Bernard Hoekman, *Trade Agreements and International Cooperation on Public Procurement Regulation*, in Rensmann, Thilo, *Mega-Regional Trade Agreements*, Springer, Cham, Switzerland, (2017), at 327

<sup>471</sup> “Like in the EU context, the institutional embedding of plurilateralism in the WTO requires finding a compromise on the allocation of costs to prevent resistance from ‘outsiders.’” In Robert Basedow, *The WTO And the Rise of Plurilateralism—What Lessons Can We Learn from The European Union’s Experience with Differentiated Integration?* in *Journal of International Economic Law*, Volume 21, Issue 2, 1 June 2018, Pages 411–431, at 433

<sup>472</sup> “The EU needs to pursue bilateral and regional agreements in a manner that supports returning the WTO to the centre of global trade negotiating activity. FTAs can serve as a laboratory for global trade liberalisation. The EU should develop future WTO proposals to fill the gaps in the multilateral rulebook and reduce fragmentation from solutions achieved in bilateral negotiations.” In Communication ‘Trade for all – Towards a more responsible trade and investment policy’ COM (2015) 457 14/10/2015

<sup>473</sup> “The key economic criteria for new FTA partners should be market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non-tariff barriers). We should also take account of our potential partners’ negotiations with EU competitors, the likely impact of this on EU markets and economies, as well as the risk that the preferential access to EU markets currently enjoyed by our neighbouring and developing country partners may be eroded. Based on these criteria, ASEAN, Korea and Mercosur (with whom negotiations are ongoing) emerge as priorities.” In *Global Europe 2006*

Chapter 9 EU- South Korea FTA is strictly directed to promote market access: Article 9.1 specifies that: “[...] *The Parties reaffirm their rights and obligations under the Agreement on Government Procurement further expanding bilateral trading opportunities in each Party’s government procurement market. [...]*”: it is based on GPA and it shared with GPA the aim to grant market access; there are not sign of deeper integration.

“*Europe 2020 Strategy*” pushed for a more inclusive and leading role for EU which make EU as “[...] *playing a leading role in shaping the future global economic order*”.<sup>474</sup>

As a result, CETA’s public procurement chapter goes further<sup>475</sup> than South Korea FTA: not only aims EU to tackle trade barriers by promoting procurement liberalisation but also allows EU firms to participate in tenders at sub federal level and provides for a regulation that aims to define rules of the proceeding of public procurement between Canada and EU.

As a result, if EU- South Korea FTA remained in the framework of GPA, CETA overcomes it and enhances a cooperation that covers regulation between Canada and EU by affirming a mechanism of control (Article 19.17), by promoting mechanism of control and cooperation (Article 19.19) and a proficiency system of transparency: Article 19.15 states that information about “*procuring entity shall promptly inform entity's contract award*” and “[...] *explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender.*” shall be provided by the contracting authority.

CETA’s public procurement chapter is the expression of the “legislative colonization” that EU has been starting to foster in trade negotiation and the symbol of deeper integration which means regulatory cooperation in different issues.

TTIP and EPA play a different role: the former should have been implemented following the example of CETA; above all, the aim was to enter into sub federal procurement market. EPA is the biggest FTA negotiated after CETA economically speaking; on the other side, Japan and EU commitments were bound to the one in GPA.

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<sup>474</sup> “*At the same time, the EU must assert itself more effectively on the world stage, playing a leading role in shaping the future global economic order through the G20, and pursuing the European interest through the active deployment of all the tools at our disposal.*” In European Commission COM (2010) 2020Brussels, 3.3.2010“*COMMUNICATION FROM THE COMMISSION EUROPE 2020 A strategy for smart, sustainable and inclusive growth.*”

<sup>475</sup> “*CETA commitments on opening procurement were unprecedented and exceed those made in other Canadian PTAs.*” In Bernard Hoekman, *Trade Agreements and International Cooperation on Public Procurement Regulation*, in Rensmann, Thilo, *Mega-Regional Trade Agreements*. Springer, Cham, Switzerland, (2017), at 328

The main difference between EPA and CETA's government procurement chapters relies on the interaction with GPA: in Article 10.1 EPA affirms that "*The GPA is incorporated into and made part of this Chapter, mutatis mutandis.*". In this respect, EU and Japan agreed to liberalise trade but included provisions that aim to modernise public procurement rules too.<sup>476</sup>

As a result, chapter 10 of EPA contains provisions that enhanced a regulatory cooperation as well as in CETA: as an example, Article 10.12 provides for a domestic review of public procurement tenders and includes transparency too. In particular, both Article 10.6 on qualification suppliers and Article 10.8 on Technical specification require both of the parties to set out clear rules and information.<sup>477</sup>

The result is that FTAs procurement chapters evolved and has been evolving: EU-South Korea is a prototype, in which from one side, public procurement was still bound to GPA and WTO but, from the other side, with aspiration to move forward.

The role that CCP has acquired under Article 21 TFEU and the new competences established by Article 207 TFEU have promoted deeper integration: consequently, the result is that promoting a regulatory cooperation in public procurement means promotion of trade liberalisation by using rules that resemble EU rules and affect not only the External Action but also the Internal Market prospection too

CETA represents this new trend: the implementation of public procurement rules that achieve sub-federal market brings more opportunity to EU firms that want to enter Canadian government procurement market.

Moreover, the common ground in which both CETA and EPA are built is transparency: in this way, the competition is granted both for EU firms that for foreign firms whose act in EU. In fact, transparency of rules means clarity of how the legislative framework of each other country or region works.

In this respect, achieving a better cooperation in the external market means granting better quality in Internal Market: as a result, FTAs' rules regarding public procurement show similarities with the provision contained in public procurement rules in EU.

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<sup>476</sup> "In particular, the two parties agreed on better market access (tariff dismantling, reduction of non-tariff barriers to trade, liberalizing service trade, opening up public procurement markets) and modernizing trade rules" In Günther Hilpert Hanns, *The Japan-EU Economic Partnership Agreement—economic Potentials and Policy Perspectives*, Asia Europe Journal, vol. 16, no. 4, (2018), at 440

<sup>477</sup> See supra sub-paragraph 2.4 on EPA public procurement chapter.

As affirmed previously<sup>478</sup>, GPA is the benchmark for Directive 2014/24 as well as for South Korea: EU promotes and fosters deeper integration by endorsing its own set of rules as benchmark because of the fact that CCP falls within exclusive competence of the EU and acts to ensure harmonization of position of EU after the creation of this single market too.<sup>479</sup>

As a result, FTAs and EU public procurement can have some common aspects.

### 3.3.3 Differences and common aspects between internal regulation and external one

Recital 17 of Directive 2014/24 states that contracting authorities have to fulfil the obligation arisen from the “[...] *other relevant international agreements by which the Union is bound*”<sup>480</sup>.

At the same time, international agreements with third countries are excluded from the coverage of the Directive: Article 9 states that the Directive does not apply for procurement procedure established by “[...] *a legal instrument creating international law obligations, such as an international agreement, concluded in conformity with the Treaties, between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories.*[...]”

Article 25 of the Directive reaffirms that the contracting authorities shall respect the obligation under both GPA and international agreements: in particular, contracting authorities shall accord to work, supplies or services as well as economic operators of the parties of international agreement, “[...] *no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.*”<sup>481</sup>

As a result, not only takes Directive 2014/24 into account GPA but also reaffirms its commitment to international agreements: in this respect, from one side EU’s role of rule -maker promotes a public procurement that bears the resemble with GPA and from the other side takes Directive itself as a reference.

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<sup>478</sup> See supra chapter 2

<sup>479</sup> Single European Act 1985

<sup>480</sup> Recital 2017 Directive 2014/24 “[...] *as well as by other relevant international agreements by which the Union is bound, contracting authorities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.*”

<sup>481</sup> Article 25 Directive 2014/24: “*In so far as they are covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union’s Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.*”

The EU is assuming the role of promoting an internationalization for public procurement<sup>482</sup>: through instruments like trade agreements and the new proposal for an IPI <sup>483</sup>, EU is playing a leading role in international fora<sup>484</sup> in the definition of public procurement access and regulation: in particular, EU is “[...] *actively co-shaping the global agenda on public procurement*”<sup>485</sup> through its presence , capability and opportunity in international context.<sup>486</sup>

The result is that EU Internal Market’s rules for public procurement and public procurement in trade agreements report to have some common aspects.

First, the reference to GPA is essential: although GPA is still concentrated in market access, neither EU Directive 2014/24 and international agreements cannot take it as a reference.

Nevertheless, the difference is in the way in which it is acted: if some agreements copy and paste GPA- above all South Korea- others simply adopt the principles established in there.

Thus, talking about the principles, both Directive 2014/24 and FTAs adopt the ones listed in GPA: above all, a key role in both the regulations is assumed by no discrimination and transparency.

The FTAs examined and the Directive 2014/24 itself are based upon transparency: in particular, the role of transparency is functional to enhance a better cooperation between each party’s procurement rules; in this respect, EPA is the better example. At the same time, both CETA and Directive 2014/24 recall the use of transparency in order to prevent events like corruption, conflict of interest and collusion; moreover, both CETA and EU conduct of procurement includes that it has to be conduct in transparent and impartial manner.

Another interesting common point is represented by the using electronic means: there are lots of CETA provisions that apply the use of electronic communication: as an

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<sup>482</sup> “*The internationalization of EU public procurement regulation, which combines liberalization with environmental and social requirements, is a telling example of the coexistence of normative, market, trade, and regulatory attributes in EU actorness.*” In Stella Ladi and Dimitris Tsarouhas, *International Diffusion of Regulatory Governance: EU Actorness in Public Procurement*, in *Regulation & Governance*, vol. 11, no. 4, (2017), at 390

<sup>483</sup> See supra chapter 2

<sup>484</sup> On this topic see Stella Ladi and Dimitris Tsarouhas, *International Diffusion of Regulatory Governance: EU Actorness in Public Procurement*, in *Regulation & Governance*, vol. 11, no. 4, (2017), pp. 388-403

<sup>485</sup> In Stella Ladi and Dimitris Tsarouhas, *International Diffusion of Regulatory Governance: EU Actorness in Public Procurement*, in *Regulation & Governance*, vol. 11, no. 4, (2017), at 388

<sup>486</sup> “[...] *we argue that the EU is actively co-shaping the global agenda on public procurement, mainly as a result of the “opportunity” and “presence” dimensions of its global actorness and its role in the horizontal diffusion of public procurement regulations between international organizations.*” *Ibidem* note162

example, Information on the procurement (Article 19.5), Notices (Article 19.6), Conditions for participation (Article 19.7), Qualification of suppliers (Article 19.8). At the same time, we see that Directive 2014/24 provides for a communication that is to be performed by using electronic means, as in Article 22.

As a result, there is a convergence between public procurement in the Internal Market and the External Action in the field; one of the reasons of this similarities can be relied in the essence of the function of CCP in relation to internal market: as said, CCP was born to grant the well function of the custom union by ensuring a uniformity policy in the external context: in these respect, ECJ in Opinion 1/75 started the process to affirm the exclusive nature of CCP, which corresponds to the idea that “[...]the common market was linked to the common interest.”<sup>487</sup>

In this respect, not only has EU CCP the role of “[...]enabling the EU to engage and play in the development of intentional trade”<sup>488</sup> by promoting values and interest of EU; at the same time, CCP is strictly connected to the Single Market because of this function of external face of EU internal interest.<sup>489</sup> As a result, Internal Market provides for regulations, such as Directive 2014/24, which grants access by establishing rules as no discrimination in trade policy<sup>490</sup>

As a result, public procurement is the best example of the relationship between external and internal policies: both of them are two sides of the same argument; they are committed in promoting EU rules and values in order to promote EU internal interest in order to make work “[...]the process of economic integration both within the EU and at a multilateral/bilateral level has broadened and deepened to cover a wider range of economic activity and different types of regulatory trade barrier”.<sup>491</sup>

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<sup>487</sup> “[...]in which the common market was linked to the common interest [...]” In Marisa Cremona *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy*, in *European Yearbook of International Economic Law*, (2017), at 7

<sup>488</sup> In Marisa Cremona, *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy*, “*European Yearbook of International Economic Law*” (2017), at 19

<sup>489</sup> See note 167

<sup>490</sup> “The Single Market offers the EU a distinct advantage in formulating non-discrimination trade policies and opening up procurement markets to firms from throughout the EU.” In Stella Ladi and Dimitris Tsarouhas, *International Diffusion of Regulatory Governance: EU Actorness in Public Procurement*, in *Regulation & Governance*, vol. 11, no. 4, (2017), at 395

<sup>491</sup> “[...] are in practice closely connected as the process of economic integration both within the EU and at a multilateral/bilateral level has broadened and deepened to cover a wider range of economic activity and different types of regulatory trade barrier”. In Marisa Cremona *Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy*, “*European Yearbook of International Economic Law*” (2017), at 19

## CHAPTER IV

### **COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA): CONTROVERSIAL AND INNOVATIVE ASPECTS**

#### **4.1 The road to CETA**

CETA represents the most length and complicated FTA that was ever drafted: it is listed among the “*new generation*” free trade agreements but its structures and matters regulated go further:<sup>492</sup> although its structure recalls NAFTA<sup>493</sup> provisions and “*classical*” matters like goods, services and investment are regulate, CETA can be recognized as an innovative agreement for chapters regarding sustainable development commitment or mutual recognition of professions.

In this chapter, it is provided for a focus on CETA in order to understand and find out why CETA can be a benchmark for FTA.<sup>494</sup>

In the first part, there is a presentation of the agreement; first, it is illustrated the road that brought to CETA: Canada is the EU second trading partner<sup>495</sup> and the impact of a free trade area is crucial for EU trade.

As in the document announcing the start negotiation in 2009, the aim of EU and Canada was to improve the trade relations<sup>496</sup> between the two regions by setting a trade that regulates sector as goods, services, investment, public procurement, intellectual property and, at the same time, affirms engagement in matter as sustainable development and sustainable growth.<sup>497</sup> The process of negotiation clarifies the current structure which includes the latter matters and adds new items.

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<sup>492</sup>492 “*The Comprehensive Economic and Trade Agreement (CETA)*1 is in all probability the most lengthy and complex free trade agreement (FTA) ever drafted.” In Armand De Mestral, Armand. “When does the Exception Become the Rule? Conserving Regulatory Space Under CETA.” *Journal of International Economic Law*, vol. 18, no. 3, (2015), at 641

<sup>493</sup> North America Free Trade Agreement is the FTA signed by USA, Canada and Mexico in 1994. The agreement was phased between 1994 and 2008 and provides for tariff cut between the signatory parties. On the Comparison between public procurement in USA, in Canada and EU see Cravero, Carol. “*Socially Responsible Public Procurement and Set-Asides: A Comparative Analysis of the US, Canada and the EU.*” *Arctic Review on Law and Politics*, vol. 8, 2017, pp. 174-192.

<sup>494</sup> As a result, in chapter 3 we have discussed about the important role of CETA in negotiating TTIP.

<sup>495</sup> According to DG website, The EU is Canada's second-biggest trading partner after the United States, accounting for 9.6 % of its trade in goods with the world in 2016.

<sup>496</sup> On the issue, see Kiselbach, Daniel L., *The Canada – EU Free Trade Agreement Demystified: New Opportunities for Trade, Investment and Government Procurement*, *Global Trade and Customs Journal*, vol. 9, no. 2, 2014, pp. 52-60.

<sup>497</sup> In EU and Canada start negotiations for economic and trade agreement - Montreal, 10 June 2009 available at

As said in the previous chapters, Article 207 TFEU is the result of both the process of reform acted by the political action of the European Commission and the Opinions of the ECJ: as a result, investment, intellectual property and public procurement became part of the negotiation of the FTAs: moreover, objectives like maritime and air transport started to be regulated.

CETA is the highest result of this process: as we examined in chapter 3, public procurement regulation goes beyond GPA and beyond any other agreement since 2016; however, one of the most discussed question was the investment chapter.

In the second part it is illustrated Investment Chapter: in particular, the ratification of this chapter by Member States created and has been creating discussions. The question has arisen after Opinion 2/15 of the ECJ regarding EU-Singapore FTA, which affirms that the ratification on an investment chapter needs the approval of national parliaments. As a result, CETA was presented to the sign by the European Commission as a mixed agreement: the provisional application excluded investment chapter.

Moreover, another question related to investment is the new instrument for dispute resolution introduced by CETA: Investor- State Dispute Settlement Body (ISDS). The ISDS is a novelty in the resolution of controversy between the investor and the state in which the investment is directed; as specified in the first chapter, the resolution of those types of controversy was- and in some cases is- regulated by provisions contained in BITs: each BITs between states provide the best instrument for resolving disputes that could arise. The new competences settled by Lisbon Treaty generated a contrast between competences regarding investment that requires a solution: in particular, the question is about the balance between competence referred to Member states as in BITs (Bilateral Trade Agreements) and the competence that now falls within the exclusive competence of the Commission: in this respect, it is provided for a general overview of the instrument in relation to the question regarding investment.

In the last part, there is a presentation of the regulation of non-trade objectives and CETA regarding the presence of rules regarding sustainable growth in the aspects of labour and environmental protection in relation to chapter 19 CETA too.

#### 4.1.1. Relation between Canada and EU: from negotiation to agreements

In 2009, Commissioner for Trade EU Catherine Ashton and Canadian Minister of International Trade Stockwell Day, launched negotiations for a Comprehensive Economic and Trade Agreement (CETA).

The decision to start negotiations was a consequence of the “*Joint Scoping Group*” held by EU and Canadian experts and that prepared a report in which it was aimed to pursue an enhanced bilateral cooperation between the two regions.

Although the spirit of such works should have been within the framework of WTO and “[...] *within the context of the Doha Development Agenda*.”<sup>498</sup>, the report affirmed that it was possible to start to improve further bilateral commitments; as a result, the report indicated the areas of intervention<sup>499</sup>.

The conclusion was that achieving a comprehensive agreement should have delivering “[...] *the maximum degree of benefit to both sides would result from a maximum degree of liberalisation*”<sup>500</sup>: so far liberalisation of trade and non - trade objectives could have resulted in economic benefits.

In the beginning of the negotiation, Canada appears to be more flexible and, from the other side, EU committed to take further steps<sup>501</sup>: in fact, from a Canadian perspective, negotiating an agreement with EU, which represents the second largest partner<sup>502</sup> for Canada, and signing an agreement mean to find out an alternative road<sup>503</sup> to NAFTA<sup>504</sup>.

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<sup>498</sup> In Joint Report on the EU-Canada Scoping Exercise March 5, 2009 available at [trade.ec.europa.eu/doclib/html/142470.htm](http://trade.ec.europa.eu/doclib/html/142470.htm)

<sup>499</sup> See *supra* chapter 1

<sup>500</sup> *Ibidem* note 6

<sup>501</sup> “In 2009, Canada and EU released a joint report on the EU-Canada scoping exercise, laying out a negotiating agenda on trade and investment. Thereafter, they announced negotiations toward a CETA, which was to build on the abandoned enhancement agreement. The basic issues-agriculture, regulation, commercial arbitration, environment, and sanitary and phytosanitary standards, to name but a few-still remain, and Canada seems more flexible now than it was previously. For its part, the EU has taken a major step by agreeing to negotiations on something that, while not called free trade, is at least “comprehensive.”

In Christian Deblock, Michele Rioux, *From Economic Dialogue to CETA: Canada's Relations with the European Union*, International Journal vol. 66, no. 1 (Winter 2010-11), HeinOnline, at 15

<sup>502</sup> “The EU is Canada's second largest trading partner, with bilateral trade in goods amounting €64.3 billion in 2016. The top three categories of products which the EU and Canada exported to each other in 2016 were: machinery, transport equipment, chemical and pharmaceutical products, The EU is also Canada's second-largest investment partner, with total bilateral investment stocks at nearly €440 billion.” The EU is Canada's second largest trading partner, with bilateral trade in goods amounting €64.3 billion in 2016. The top three categories of products which the EU and Canada exported to each other in 2016 were: machinery, transport equipment, chemical and pharmaceutical products, The EU is also Canada's second-largest investment partner, with total bilateral investment stocks at nearly €440 billion.” From European External Action website available at

Therefore, the fact that Canada used EU to find an alternative to the relationship with USA could be considered as the wrong reason to negotiate<sup>505</sup>, because relying upon a trade agreement with EU to counterweight US economic relationship can be too ambitious<sup>506</sup>.

Nevertheless, from EU perspective reaching an agreement with Canada could have meant to open the path to negotiating with US: as seen in previous chapters, regarding public procurement, CETA represented the benchmark for TTIP negotiations: as a result, the text of the agreement goes beyond NAFTA.

#### 4.1.2 The structure of the agreement

CETA is structured in 24 chapters; regarding trade objectives, it includes national treatment and market access for goods, trade remedies, technical barriers to trade, sanitary and phytosanitary measures, custom and trade facilitation, subsidies, investment, cross border trade services, mutual recognition of professional qualifications, domestic regulation, international maritime transport services, telecommunications, electronic commerce, competition policy, state enterprises and monopolies, government procurement, intellectual property, regulatory cooperation, dispute settlement.

Regarding non-trade objectives, chapter 22 is dedicated to trade and sustainable development, chapter 23 to trade and labour, chapter 24 trade and environment, transparency.

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[https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/13530/EU-Canada%20relations](https://eeas.europa.eu/headquarters/headquarters-homepage_en/13530/EU-Canada%20relations)

<sup>503</sup> “Canada finds nowhere else to turn but Europe in its last attempt to reduce its dependence on the US economic and to look for a new engine for growth, competitiveness and prosperity.” In Deblock, Christian; Rioux, Michele. *From Economic Dialogue to CETA: Canada's Relations with the European Union*,” International Journal vol. 66, no. 1 (Winter 2010-11): p. 39-56. HeinOnline

<sup>504</sup> ON 30<sup>th</sup> November 2018, Canada and Mexico USA have signed Canada USA Mexico Agreement (CUSMA). The parties are starting now their process of implementation and CUSMA goes beyond NAFTA and included chapters regarding textile and agriculture, digital trade, competition policy, good regulatory cooperation, anticorruption, dispute settlement. For the text of agreement <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>

<sup>505</sup> “The fundamental problem with CETA is that Canada is mostly getting closer to Europe for the wrong reasons-i.e., NAFTA's weakness and trade diversification away from the US.” In Christian Deblock, Michele Rioux, *From Economic Dialogue to CETA: Canada's Relations with the European Union*, International Journal vol. 66, no. 1 (Winter 2010-11), HeinOnline, at 18

<sup>506</sup> “A Canada-EU CETA will never be a counterweight to US influence on the Canadian economy and politics if Canada does not truly develop a European policy and a comprehensive economic development strategy.” In Christian Deblock, Michele Rioux, *From Economic Dialogue to CETA: Canada's Relations with the European Union*, International Journal vol. 66, no. 1 (Winter 2010-11), HeinOnline, at 19

The extension of the matters covered by the agreement make it an example of deeper integration<sup>507</sup> in the WTO framework.<sup>508</sup>

Market access is regulated by chapter 2 which provide for liberalisation of trade: “The Parties shall progressively liberalise trade in goods [...]”<sup>509</sup>. Moreover, national treatment rules shall apply: “Each Party shall accord national treatment to the goods[...]”<sup>510</sup> as well as for trade in service: Article 9.3 states that: “Each Party shall accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to its own service suppliers and services.”

Chapter 14 regulates international maritime transport: the chapter provides that the parties shall permit<sup>511</sup> maritime transport and, in addition, extends the application of investment and cross services’ provisions to it; moreover, Article 14.3<sup>512</sup> provides for the obligation to the parties to not “[...] Party shall not adopt or maintain a measure that requires all or part of any international cargo to be transported exclusively by vessels registered in that Party or owned or controlled by nationals of that Party.”

The inclusion of this chapter, along with other sectors like recognition of profession, e-commerce regulations, telecommunications service, makes CETA one other most ambitious FTAs in WTO framework.<sup>513</sup>

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<sup>507</sup> On the issue, see *supra* chapters 3

<sup>508</sup> “CETA is a GATS-plus agreement in that it builds on the WTO framework to also call for deeper integration.” In Delimatsis Panagiotis, *The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit*, Journal of International Economic Law, Volume 20, Issue 3, 1 September 2017, at 597

<sup>509</sup> Article 2.1 CETA: “The Parties shall progressively liberalise trade in goods in accordance with the provisions of this Agreement over a transitional period starting from the entry into force of this Agreement.”

<sup>510</sup> Article 2.3 CETA: “Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994. To this end Article III of the GATT 1994 is incorporated into and made part of this Agreement.”

<sup>511</sup> Article 14.3 CETA: Each Party shall permit the international maritime transport service suppliers of the other Party to re-position owned or leased empty containers that are carried on a non-revenue basis between the ports of that Party.

2. A Party shall permit the international maritime transport service suppliers of the other Party to supply feeder services between the ports of that Party.

3. A Party shall not adopt or maintain a cargo-sharing arrangement with a third country concerning any international maritime transport services, including dry and liquid bulk and liner trades.

4. A Party shall not adopt or maintain a measure that requires all or part of any international cargo to be transported exclusively by vessels registered in that Party or owned or controlled by nationals of that Party.

5. A Party shall not adopt or maintain a measure that prevents international maritime transport service suppliers of the other Party from directly contracting with other transport service suppliers for door-to-door or multimodal transport operations.

<sup>512</sup> Ivi 5 note 18

<sup>513</sup> “In incorporating various WTO legal provisions by reference but also by including institutionalized mechanisms for regulatory cooperation and by addressing trade-related issues not yet picked up at the WTO level, the CETA is the most ambitious WTO-plus agreement that the EU concluded to date.” In Panagiotis

The result is in the structure of the agreement: CETA is a mixed between classical trade objective and new issues.

Among the classical one there are the s.c. trade objective: trade in goods, trade in service are here regulated and the reference to WTO is maintained: as an example, Article 3.1 regarding antidumping measures makes an recall GATT 1994.<sup>514</sup>

The result is that CETA is an example of the importance that EU's CCP gives to WTO and the novelties introduced by Article 207 TFEU and ECJ.

In particular, in chapter 1 we mentioned that Opinion 1/94 of the ECJ recognized the exclusive competence in negotiating at multilateral level and the possibility to include regulations regarding GATT, GATS and TRIPS. Moreover, in Opinion 2/15 the Court has recognized the competence of the European Commission in negotiating FTAs<sup>515</sup>: as a result, CETA includes regulation regarding financial services, e-commerce, international maritime services, mutual recognition of professions, telecommunications, government procurement.

In addition, one of the most innovative part of CETA is the regulatory collaboration the agreement wants to reach: in particular, chapter 27 is completely dedicated to transparency and Article 27.2 states that: *“Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or made available in such a manner as to enable interested persons and the other Party to become acquainted with them.”*

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Delimatsis, *The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit*, Journal of International Economic Law, Volume 20, Issue 3, 1 September 2017, at 597

<sup>514</sup> Article 3.1 CETA: *“The Parties reaffirm their rights and obligations under Article VI of GATT 1994 the Anti-dumping Agreement and the SCM Agreement.”*

2. *The Protocol on rules of origin and origin procedures shall not apply to antidumping and countervailing measures.”*

<sup>515</sup> Opinion 2/15 recognizes the exclusive competence of the Union to negotiate FTA in all sectors with the exception of: “ -The Free Trade Agreement between the European Union and the Republic he provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to non-direct investment between the European Union and the Republic of Singapore;

– the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9; and

– the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) of that agreement, in so far as those provisions relate to the provisions of Chapter 9 and to the extent that the latter fall within a competence shared between the European Union and the Member States.

of Singapore falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States”. More *infra*

In particular, the chapter provides for a system of notification in case of the request to the party: the aim is to make it possible to “*respond to questions*”<sup>516</sup> regarding modification of new measures affecting the agreement. In addition, Article 27.3 provides for administrative procedure in case of the application of a measure applied to one person in “*consistent, impartial and reasonable manner*”.<sup>517</sup>

In this way, not only promotes CETA liberalisation of trade between two regions but also promotes the interchange of information and good practices<sup>518</sup> in a way to reach harmonization and to evaluate the performances under CETA<sup>519</sup>.

In this respect, an example of the way in which transparency acts in order to grant exchange of information is in TBT’s chapter<sup>520</sup>: Article 4.6 for TBT states that: “*Each Party shall ensure that transparency procedures regarding the development of technical regulations and conformity assessment procedures[...]*” ; in addition, paragraph 6 states that “[...]Each Party shall, upon request of the other Party, provide information regarding the objectives of, legal basis and rationale for, a technical regulation or conformity assessment procedure, that the Party has adopted or is proposing to adopt.”.

As a result, the chapter, along with chapter 5 regarding SPS, includes a system of notification with the aim of collaboration and a correct implementation:

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<sup>516</sup> Article 27.2 CETA: “*At the request of the other Party, a Party shall, to the extent possible, promptly provide information and respond to questions pertaining to any existing or proposed measure that materially affects the operation of this Agreement.*

2. *Information provided under this Article is without prejudice as to whether the measure is consistent with this Agreement.*”

<sup>517</sup> Article 27.3 CETA: “*To administer a measure of general application affecting matters covered by this Agreement in a consistent, impartial and reasonable manner, each Party shall ensure that its administrative proceedings applying measures referred to in Article 27.1 to a particular person, good or service of the other Party in a specific case:*

(a) *whenever possible, provide reasonable notice to a person of the other Party who is directly affected by a proceeding, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of the issues in controversy;*

(b) *provide a person referred to in subparagraph (a) a reasonable opportunity to present facts and arguments in support of its position prior to any final administrative action, when permitted by time, the nature of the proceeding, and the public interest; and*

(c) *are conducted in accordance with its law.*”

<sup>518</sup> Article 25.5: CETA “*The Parties agree to cooperate in bilateral, regional and multilateral fora on ways to promote transparency in respect of international trade and investment.*”

<sup>519</sup> “*Transparency provisions related to sustainable development could be regarded as specific regulatory transparency provisions that would have considerable impact on external transparency related to the performance of CETA.*” In Ljiljana Biuković, “*Transparency Norms, the World Trade System and Free Trade Agreements: The Case of CETA*,” Legal Issues of Economic Integration, vol. 39, no. 1, 2012, at 102

<sup>520</sup> “*Considering the importance of trade in food and agricultural goods between the EU and Canada and the impact that safety and technical standards have on market access, the CETA’s TBT and SPS specific provisions on regulatory transparency are particularly important topics in the negotiations.*” In Biuković, Ljiljana. “*Transparency Norms, the World Trade System and Free Trade Agreements: The Case of CETA.*” Legal Issues of Economic Integration, vol. 39, no. 1, 2012, at 103

Article 5.11 provides that a party “[...] endeavour to exchange information on other relevant issues including.”<sup>521</sup>

One of the most innovative aspect of CETA is Chapter 11 on Mutual recognition of professions: Article 11.2<sup>522</sup> states that the objective is to set the condition for facilitating the condition to a mutual recognition of professions “*fair, transparent and consistent*” which can lead to a negotiation of Mutual Recognition of Professions agreements (MRAs) which should be applied in both European and Canadian territories.

As a result, Article 11.3 sets a Joint Committee on Mutual Recognition of Professions<sup>523</sup> in order to promote negotiations of MRA and that will prepare a recommendation in which “[...]an assessment of the potential value of an MRA, on the

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<sup>521</sup> Article 5.11 CETA: “1.A Party shall notify the other Party without undue delay of a:

(a) significant change to pest or disease status, such as the presence and evolution of a disease listed in Annex 5-B;

(b) finding of epidemiological importance with respect to an animal disease, which is not listed in Annex 5-B, or which is a new disease; and

(c) significant food safety issue related to a product traded between the Parties.

2. The Parties endeavour to exchange information on other relevant issues including:

(a) a change to a Party's SPS measure;

(b) any significant change to the structure or organisation of a Party's competent authority;

(c) on request, the results of a Party's official control and a report that concerns the results of the control carried out;

(d) the results of an import check provided for in Article 5.10 in case of a rejected or a non-compliant consignment; and

(e) on request, a risk analysis or scientific opinion that a Party has produced and that is relevant to this Chapter.3. Unless the Joint Management Committee decides otherwise, when the information referred to in paragraph 1 or 2 has been made available via notification to the WTO's Central Registry of Notifications or to the relevant international standard-setting body, in accordance with its relevant rules, the requirements in paragraphs 1 and 2, as they apply to that information, are fulfilled.”

<sup>522</sup> Article 11.2: “is Chapter establishes a framework to facilitate a fair, transparent and consistent regime for the mutual recognition of professional qualifications by the Parties and sets out the general conditions for the negotiation of MRAs.

2. This Chapter applies to professions which are regulated in each Party, including in all or some Member States of the European Union and in all or some provinces and territories of Canada.

3. A Party shall not accord recognition in a manner that would constitute a means of discrimination in the application of its criteria for the authorisation, licensing or certification of a service supplier, or that would constitute a disguised restriction on trade in services.

4. An MRA adopted pursuant to this Chapter shall apply throughout the territories of the European Union and Canada.

<sup>523</sup> Article 11.3 CETA: “The MRA Committee responsible for the implementation of Article 11.3 shall:

(a) be composed of and co-chaired by representatives of Canada and the European Union, which must be different from the relevant authorities or professional bodies referred to in Article 11.3.1. A list of those representatives shall be confirmed through an exchange of letters;

(b) meet within one year after this Agreement enters into force, and thereafter as necessary or as decided;

(c) determine its own rules of procedure;

(d) facilitate the exchange of information regarding laws, regulations, policies and practices concerning standards or criteria for the authorisation, licensing or certification of regulated professions;

(e) make publicly available information regarding the negotiation and implementation of MRAs;

(f) report to the CETA Joint Committee on the progress of the negotiation and implementation of MRAs; and

(g) as appropriate, provide information and complement the guidelines set out in Annex 11-A.”

*basis of criteria such as the existing level of market openness, industry needs, and business opportunities, for example, the number of professionals likely to benefit from the MRA, the existence of other MRAs in the sector, and expected gains in terms of economic and business development. In addition, it shall provide an assessment as to the compatibility of the licensing or qualification regimes of the Parties and the intended approach for the negotiation of an MRA.”*

In December 4<sup>th</sup>, 2018<sup>524</sup>, the Joint Committee met for the first time and the agenda of the meeting listed discussion about mutual acknowledgment of documents regarding mutual recognition of professions submitted by EU and Canada; the regulation of recognition of professions<sup>524</sup>.

## 4.2. CETA and Investment chapter

In this chapter it is provided for the presentation of two of the more discussed part of CETA: Investment and Investment protection. Investment is regulated in Chapter 8 whose sector F regulates investor- state dispute settlement (ISDS) which provides for a tribunal to whom the parties may submit “[...] *a claim that the other Party has breached an obligation*”<sup>525</sup> respect to the rules of national treatment and investment protection.

In the first part, it is analysed Investment chapter: as said, Article 207 TFEU includes investment as a matter fallen within exclusive competence of the EU.

The new competence caused a debate regarding the division of competence between EU and Member states: the reason is the contrast between a new competence recognized to the EU and that gives to it the power of negotiate trade agreements in the

<sup>524</sup> “Official acknowledgement of documents submitted by the Canadian Architectural Licencing Authorities (CALA) and Architects’ Council of Europe (ACE) on a Mutual Recognition Agreement (MRA), as per Chapter 11: Mutual recognition of professional qualifications 3. Discussions related to the CALA – ACE supporting documents: a. Exchange of comments and views on the supporting documents submitted to the MRPW Committee, with reference to the terms for MRA adoption under CETA, as set out in Chapter 11” In Proposed Agenda of 1<sup>st</sup> Meeting of The Mutual Recognition of Professional Qualifications (MRPQ) Committee December 4, 2018 (By Videoconference) available at

[http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc\\_157559.pdf](http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157559.pdf)

<sup>525</sup> Article 18.18 CETA: “1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under:

(a) Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment, or

(b) Section D,

where the investor claims to have suffered loss or damage as a result of the alleged breach.”

matter and the existence of Bilateral Investment Agreement<sup>526</sup> between Member states and third states.

Regarding investment, “*Trade for all strategy*” sets at least three aims: respect and include public interests of Member states; setting out clearer rules regarding protection of investment and setting a public investment court system to solve disputes.

In part two of this subparagraph it is presented an overview of Section F of Chapter 8 which explains the mechanism of Investor States dispute which is set in order to solve the dispute between investors and State.

In the last part of the subparagraph it is given a general overview of Opinion 2/15 and the nature of “mixed agreement” of CETA: in particular, Opinion 2/15 of the ECJ was pronounced in reference to the negotiation of EU- Singapore FTA. The ECJ was asked to answer about the competence to conclude the agreement and, specifically, if the Union has the exclusive competence or if there is a shared competence.

The answer of the ECJ has influenced CETA implementation: as a result, the agreement is now provisionally applied ex Article 218 (5) TFEU.<sup>527</sup>

So far, in the conclusion it is illustrated the context in which the request was delivered to ECJ and what the opinion has decided.

#### 4.2.1 Investment Chapter

Although EU countries have been negotiating foreign investment in BITs, which were considered as “*best practices*” for the matter,<sup>528</sup> after the ratification of Lisbon Treaty, Article 207 TFEU expressly recognizes Foreign Direct Investment as

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<sup>526</sup> “[...]inoltre, vi è la cornice più ampia rappresentata dal trattato internazionale, il BIT appunto (o più genericamente IIA - International Investment Agreement), che costituisce un accordo quadro applicabile, in generale, a tutti gli investimenti effettuati dai nazionali di uno Stato parte nel territorio dell'altro Stato parte.” In Mauro Maria Rosaria, “*Conflitti Di Competenza E Coordinamento Tra Fori Nel Diritto Internazionale Degli Investimenti: Contract Claims V. Treaty Claims*” in *Diritto del Commercio Internazionale*, fasc.3, 2016, pag. 725

<sup>527</sup> Article 218 (5) TFEU: “*The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.*”

<sup>528</sup> “*For about half a century, the European investment treaty model has been associated with European Union (EU) member states’ bilateral investment treaty practice, often referred to as their ‘best practices’*” In Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, *European Journal of International Law*, Volume 26, Issue 3, 1 August 2015, at 639

part of CCP<sup>529</sup> of the EU: as a result, Investment Chapters started to be negotiated in EU FTAs.<sup>530</sup>

Chapter 8 of CETA regulates investments made within the territories of EU and Canada as well: in particular, Article 8.2 defines the scope of applications as “[...] *measure adopted or maintained by a Party in its territory*” relating

to:

(a) *an investor of the other Party;*

(b) *a covered investment; and*

(c) *with respect to Article 8.5, any investments in its territory.”*

The subjects excluded from the application of the chapter are financial services, regulated in chapter 13, nor to services covered by cross – border services chapter investment regarding air services and investment pursued by governmental authority<sup>531</sup>; moreover, in case of investment within EU territory, rules regarding investment do not apply to audio-visual why for investment within Canada territory, Section B and C do not apply to cultural industries.<sup>532</sup>

Section B regulates market access rules and establishes a measure that imposes limitations regarding investments or imposes restrictions regarding the types of enterprises is forbidden: in fact, Section C provided to apply to investment national treatment and most favourite nation rules to investments.

In particular, Article 8.6 states that each party shall grant to covered investment “[...] *treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment*

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<sup>529</sup> Opinion 2/15 has established a particular division of competences; more *infra*

<sup>530</sup> “In contrast with EU FTAs, which are generally cognizant of the state’s right to regulate, EU member state BITs contain some of the last vestiges of international economic law’s laissez-faire liberalism.<sup>68</sup> They are for the most short instruments,<sup>69</sup> one-sidedly focused on investment protection, and do not incorporate exceptions relating to essential security,<sup>71</sup> human rights, the environment or other public interests.” In” In Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, European Journal of International Law, Volume 26, Issue 3, 1 August 2015, at 647

<sup>531</sup> Article 8.18.2 CETA “With respect to the establishment or acquisition of a covered investment<sup>6</sup>, Sections B and C do not apply to a measure relating to:

(a) *air services, or related services in support of air services and other services supplied by means of air transport*<sup>7</sup>, other than:

(i) *aircraft repair and maintenance services;*(ii) *the selling and marketing of air transport services;*

(iii) *computer reservation system (CRS) services;*

(iv) *ground handling services;*

(v) *airport operation services; or*

(b) *activities carried out in the exercise of governmental authority.”*

<sup>532</sup> Article 8.2 CETA “For the EU Party, Sections B and C do not apply to a measure with respect to audio-visual services. For Canada, Sections B and C do not apply to a measure with respect to cultural industries”

*and sale or disposal of their investments in its territory. “The application of the provisions is extender, regarding Canadian territory, to sub federal level too.*

Chapter 8 provides for the application of most favourite nation rules too; in particular, Article 8.7 states that parties shall apply “*treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.*”

The investment chapter contains a section dedicated to investment protection: section D is structured in order to grant that each party of the agreement might be able to protect their interest regarding “ [...] *policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.*”<sup>533</sup> Article 8.9 allows each parties to modify laws in a manner in which it will affect investment or modify provisions regarding subsided without breaching chapters provisions; in this way CETA shows a certain degree of protection to states while, at the same time, gives guarantees to investors too.

First, it provides that each party shall grant a “[...] *fair and equitable treatment and full protection and security*” to investments and investors of the other parties; second, paragraph 2 of Article 8.10 lists the case in which paragraph 1 is breached: in particular, the case are measures which: a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in

judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious

belief;

(e) abusive treatment of investors, such as coercion, duress and harassment; or

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<sup>533</sup> Article 8.9,1 CETA: “1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.”

(f) a breach of any further elements of the fair and equitable treatment obligation.

In addition, chapter 8 provides for protections against measures of expropriation: Article 8.12 forbids to parties to adopt measures equivalent to expropriations or nationalisation with the exception of case in which following conditions are provided: public purpose, due process of law, non-discriminatory manner; and on payment of prompt, adequate and effective compensation.<sup>534</sup>

All the breaches regarding obligation under Section C and Section D have to be claimed in front of the Tribunal for Investor State Dispute Settlement in Section F.

Section F of investment chapter regulates a tribunal for the resolution between investors and host state: in particular, Article 8.18 states that an investor may invoke the tribunal with a “[...] *claim that the other Party has breached an obligation*” contained in provisions listed in Sections C and D.

The tribunal shall have an appellate phase too and the law applicable will be CETA provisions “ [...] *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* ”<sup>535</sup>; moreover, Article 8.31 excludes expressly the application of domestic law which can only be considered by the Tribunal “[...] *as a matter of fact.*”

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<sup>534</sup> Article 8.12 CETA: “1. A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (“expropriation”), except: (a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and (d) on payment of prompt, adequate and effective compensation.

For greater certainty, this paragraph shall be interpreted in accordance with Annex 8-A.

2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.

4. The affected investor shall have the right, under the law of the expropriating Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.

5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, to the extent that such issuance is consistent with the TRIPS Agreement.

6. For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with the TRIPS Agreement and Chapter Twenty (Intellectual Property), do not constitute expropriation. Moreover, a determination that these measures are inconsistent with the TRIPS Agreement or Chapter Twenty (Intellectual Property) does not establish an expropriation.”

<sup>535</sup> Article 8.31 CETA: “1. When rendering its decision, the Tribunal established under this Section shall apply this

The rationale behind ISDS<sup>536</sup> can be found in the necessity to grant impartiality and depoliticization of disputes.<sup>537</sup> In particular, Article 8.27 provides that the tribunal will be composed by 15 judges, 5 appointed by Canada, 5 from EU and 5 by third countries.<sup>538</sup>

As a result, the mechanism allows private parties to claim in front of Tribunal for breaching of Agreement obligations regarding investment: at the same time, some criticisms against ISDS rely upon the possibility given to private parties<sup>539</sup> and moreover, one question can be why this kind of protection is given to investor only and others stakeholder are excluded.<sup>540</sup>

The creation of ISDS seems to be the first step to the creation of a Multilateral Investment Court: investment chapter contains a provision that affirms “*The Parties shall pursue with other trading partners the establishment of a multilateral investment*

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*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.*

2. *The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.*

3. *Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.”*

<sup>536</sup> On the issue see also Ohler C. (2017) *Democratic Legitimacy and the Rule of Law in Investor-State Dispute Settlement under CETA*. In: Bungenberg M., Krajewski M., Tams C., Terhechte J., Ziegler A. (eds) *European Yearbook of International Economic Law 2017*. European Yearbook of International Economic Law, vol 8. Springer, Cham

<sup>537</sup> “*The rationale for the inclusion of investor-State arbitration in the form of ISDS<sup>3</sup> ° in the free trade and investment agreements under negotiation or conclusion by the EU lies in the need to ensure impartiality and the de-politicization of disputes.*” In Daniele Gallo and Fernanda G. Nicola, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*”, *Fordham International Law Journal*, vol. 39, no. 5, 2016, at 1090

<sup>538</sup> Article 8.27 CETA: “*The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen*

*Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada<sup>11</sup> and five shall be nationals of third countries.*”

<sup>539</sup> “*There is another group of ISDS critics, who might accept a chapter on international investment protection in TTIP and other bilateral agreements, but who reject that such standards can be relied upon by private parties. In other words, for them the only acceptable remedy against a violation of investment protection rules included in a treaty like TTIP or CETA is government-to-government litigation.*” In Marco Bronckers, *Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, *Journal of International Economic Law*, Volume 18, Issue 3, 1 September 2015, at 659

<sup>540</sup> “*These agreements now include minimum standards of protection for foreign investors, alongside rules on trade, environment and labour regulation. What is somewhat surprising though, is that foreign investors enjoy a privileged position compared to other private stakeholders (such as traders, environmental organizations, labour unions, or even domestic investors) who can also have a direct interest in proper compliance.*” In Marco Bronckers, *Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, *Journal of International Economic Law*, Volume 18, Issue 3, 1 September 2015, at 673

*tribunal and appellate mechanism for the resolution of investment disputes.” ; in particular, European Commission has presented MIC as “an international court empowered to hear disputes over investments between investors and states that will have accepted its jurisdiction over their bilateral investment treaties.”<sup>541</sup>*

The aim is to shift the resolution of dispute regarding trade agreements from a “domestic resolution”<sup>542</sup> to an international and multilateral context; in this way, EC wants to create a unique system which would be the reference for all the dispute in order to achieve transparency of the resolution and clarity of the resolutions.<sup>543</sup>

Despite of the efforts made by the Union to negotiate provisions which favour the implementation of investment chapter of international inspiration and that aims to bring the question of investment to Union, this area of competence has to faced Opinion 2/15.

As we will see, the ECJ has opened a debate regarding investment chapter and recognizes the nature of mixed agreement of CETA.

#### 4.2.2 Nature of “mixed agreement”: Opinion 2/15 of the ECJ

The impact of the Opinion 2/15 is the last step of a series that has competence as main actor: in particular, establishing the nature of mixed agreement is first of all a “question of competence”<sup>544</sup>. The question raised form a request of the European Commission in the context of EU- Singapore Free Trade Agreement.<sup>545</sup>

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<sup>541</sup> From Factsheet on Multilateral Investment Court available at [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156042.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf)

<sup>542</sup> For more regarding the relation between ISDS and domestic court see Bronckers, Marco, *Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, Journal of International Economic Law, Volume 18, Issue 3, 1 September 2015, Pages 655–677; about EU investment law in its external dimension, see Daniele Gallo and Fernanda G. Nicola, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, Fordham International Law Journal, vol. 39, no. 5, 2016, pp. 1081.

<sup>543</sup> For more see Factsheet on Multilateral Investment Court available [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156042.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf); on the issue, see also 75. Rob Howse, *Designing a Multilateral Investment Court: Issues and Options*, Yearbook of European Law, Volume 36, 1 January 2017, Pages 209–23

<sup>544</sup> “Il problema della natura mista o meno degli accordi sul libero scambio, quindi, è una questione di competenze. In quest’ottica va inquadrata la domanda di parere presentata dalla Commissione, ai sensi dell’articolo 218, par. 11 TFUE, alla Corte di giustizia dell’UE.” In Daniele Gallo, *Portata, Estensione E Limiti Del Nuovo Sistema Di Risoluzione Delle Controversie In Materia D’investimenti Nei Recenti Accordi Sul Libero Scambio Dell’unione Europea*, Diritto del Commercio Internazionale, fasc.4, 2016, at 827

<sup>545</sup> On the issue see Yotova, R. *Opinion 2/15 of the Cjeu: Delineating the Scope of the New Eu Competence in Foreign Direct Investment*, Cambridge Law Journal, vol. 77, no. 1, 2018, pp. 29-32.

On June 26<sup>th</sup> the European Commission presented agreement to Trade Policy Committee but the discussion about nature of the competence has pushed the EC to ask ECJ for an Opinion.

In particular, the questions asked by the EC was whether the Union has the competence to negotiate the agreement and in particular:

“1. *which provisions of the agreement fall within the Union’s exclusive competence?*

2. *which provisions of the agreement fall within the Union’s shared competence? and*

3. *is there any provision of the agreement that falls within the exclusive competence of the Member States?’’<sup>546</sup>*

So far, the centre of the discussion was which parts of the agreement fall within the exclusive competence of the Union and for which part the ratification of Member States is compulsory.

The position of the Commission was in favour of exclusive competence: in particular, the Commission based its position on three statements: first, that all the provisions of the agreement fall within exclusive competence of the EU with exception of cross-border transport services and non-direct foreign investment; second, that cross-border transport services fall within EU exclusive competence as in article 3(2) TFEU; finally, that regarding non-direct foreign investment the Union has exclusive competence between the overlap between the provision contained in the agreement and the prohibition of restrictions on movements of capital and on payments between Member States and third States is in Article 63 TFEU.<sup>547</sup>

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<sup>546</sup> Opinion 2/15 “Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically,

1. *which provisions of the agreement fall within the Union’s exclusive competence?*  
2. *which provisions of the agreement fall within the Union’s shared competence? and*  
3. *is there any provision of the agreement that falls within the exclusive competence of the Member States?’’*

<sup>547</sup> Opinion 2/15 “It contends, first, that all the provisions of the envisaged agreement, with the sole exception of those concerning cross-border transport services and non-direct foreign investment, fall within the scope of the common commercial policy as defined in Article 207(1) TFEU and, therefore, within the European Union’s exclusive competence pursuant to Article 3(1)(e) TFEU.

14. *It maintains, secondly, that cross-border transport services fall within the European Union’s exclusive competence referred to in Article 3(2) TFEU, in the light of the rules of secondary EU law which are in force in that field.*

15. *In this connection, the Commission cites in particular:*

– *Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1);*

– *Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (OJ 2009 L 300, p. 51);*

At paragraph 305 of the Opinion, the Court has expressed its position: in particular, the Court while has been recognizing that “[...] *the envisaged agreement falls within the exclusive competence of the European Union*, at the same time has affirmed that the provisions regarding investment protection, investment related to no Direct foreign Investment between EU and Singapore were excluded from exclusive competence; moreover, the Court affirms that Investment, Investment protection, together with chapters regarding objectives and general definitions, transparency, dispute settlement, mediation mechanism and institutional and final provision fall within a shared competence between EU and Member States.<sup>548</sup>

The presence in CETA of an investment chapter, which includes investment protection and ISDS mechanism, extended the opinion to CETA too: the result is that CETA was considered as a “mixed agreement”: the main difference between an EU only agreement and a mixed agreement is in the role of EU parliament and of the Member States parliament.

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– Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72);

– Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (OJ 2009 L 300, p. 88); and

– Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

16. It submits, finally, that, in so far as the envisaged agreement relates to non-direct foreign investments, the European Union likewise has exclusive competence pursuant to Article 3(2) TFEU, because of the overlap between (i) the commitments contained in that agreement concerning those investments and (ii) the prohibition of restrictions on movements of capital and on payments between Member States and third States that is laid down in Article 63 TFEU.”

<sup>548</sup> Opinion 2/15 “*The Free Trade Agreement between the European Union and the Republic of Singapore falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States:— the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to non-direct investment between the European Union and the Republic of Singapore;— the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9; and— the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) of that agreement, in so far as those provisions relate to the provisions of Chapter 9 and to the extent that the latter fall within a competence shared between the European Union and the Member States* Free Trade Agreement between the European Union and the Republic of Singapore falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States:— the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to non-direct investment between the European Union and the Republic of Singapore;— the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9; and—the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) of that agreement, in so far as those provisions relate to the provisions of Chapter 9 and to the extent that the latter fall within a competence shared between the European Union and the Member States.

In EU only agreement, Member States' parliaments have not a "practical" role: in particular, the seat in which national level can have influence is the Council; in that case, it is European Parliament that can exercise a veto power to the agreement<sup>549</sup>.

At the contrary, a mixed agreement is an agreement that requests the participation of both EU and Member States to be ratified because the scope of the agreement regards matter that fall within a shared competence between Union and Member States<sup>550</sup>: as a result, the agreement has to be ratified by all the Member States' parliaments.<sup>551</sup>

At the end of negotiation, European Commission has presented the ratification of CETA as a mixed agreement: as a result, on October 28<sup>th</sup>, 2016, by virtue of Article 218 paragraph 5, the Council approved the provisional application<sup>552</sup> of CETA: if at the beginning all the provision were decided to be applied, the Council voted for a partial application. Investment protection and ISDS were excluded.<sup>553</sup>

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<sup>549</sup> "Rather, the procedures that apply to the conclusion of 'EU-only' and 'mixed' agreements provide for a qualitatively different involvement of Member State parliaments in the ratification process. In a mode of vertical integration in multilevel EU governance, parliamentary control rights at the national level shape the voting behaviour of Member States' governments in the Council during the making of 'EU-only' agreements. At the same time, the 'EU-only' procedure elevates the role of the European Parliament (EP), which holds a veto right, in the democratic process. The conclusion of mixed agreements, in contrast, requires the horizontal participation of Member States' political institutions. Mixed agreements endow all Member State parliaments with decision-making rights that can, under certain circumstances, resemble the veto right of the EP and thus result in an extremely cumbersome and lengthy political process that sets incentives for political paralysis." In David Kleimann and Gesa Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15*, Legal Issues of Economic Integration 45, no. 1 (2018): © 2018 Kluwer Law International BV, The Netherlands, at 16

<sup>550</sup> In Paul P Craig, et al., *EU Law: Text, Cases, and Materials*, Oxford University press, Oxford [etc.], 2015.

<sup>551</sup> More about mixed and only agreement see, David Kleimann and Gesa Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15*, Legal Issues of Economic Integration 45, no. 1 (2018): 13–46. © 2018 Kluwer Law International BV, The Netherlands

<sup>552</sup> "Provisional application describes a situation where the governments of the states that sign an international agreement decide to give effect to the rights and obligations of the said agreement as a whole or in part, upon signature or on an agreed date, pending the entry into force of the treaty. Hence, provisional application covers the time period between the signature of a treaty and its entry into force." In David Kleimann, and Gesa Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15*, Legal Issues of Economic Integration 45, no. 1 (2018): 13–46. © 2018 Kluwer Law International BV, The Netherlands, at 25

<sup>553</sup> "The Commission formally proposed the provisional application of CETA in its entirety. The CETA text itself explicitly provides for either full or partial provisional application of its provisions. After intensive discussion in the Council's Trade Policy Committee: on 15 July 2016, the Commission agreed with the Member States on the exclusion of certain parts of CETA from provisional application.<sup>4</sup>" In David Kleimann and Gesa Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15*, Legal Issues of Economic Integration 45, no. 1 (2018): 13–46. © 2018 Kluwer Law International BV, The Netherlands, at 30

### 4.3 Public procurement and CETA: sustainable development

Sustainable development<sup>554</sup> is one of key aspects of trade negotiations: as an example, EU- Japan EPA's trade and sustainable development chapters includes a reference to United Nation 2030 Agenda for sustainable development stating that : *"The Parties recognise the importance of promoting the development of international trade in a way that contributes to sustainable development, for the welfare of present and future generations, taking into consideration... "Transforming our world: the 2030 Agenda for Sustainable Development" adopted by the General Assembly of the United Nations on 25 September 2015"*<sup>555</sup>; moreover, Paragraph 4 of Article 16.1 affirms the commitment of the agreement to the Paris Agreement<sup>556</sup>: *"[...]The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session.[...]"*<sup>557</sup>

United Nations defines<sup>558</sup> Sustainable development as *"[...] development that meets the needs of the present without compromising the ability of future generations*

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<sup>554</sup> On the relation between public procurement and sustainable development see Chave, John. "EU Public Procurement Takes on a Greener Hue: Developments in the Application of Social and Environmental Factors in Public Procurement, Business Law Review, vol. 24, no. 1, 2003, pp. 2-4.

<sup>555</sup> Article 16.1.1 EU-Japan EPA : *"The Parties recognise the importance of promoting the development of international trade in a way that contributes to sustainable development, for the welfare of present and future generations, taking into consideration the Agenda 21 adopted by the United Nations Conference on Environment and Development on 14 June 1992, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference on 18 June 1998, the Plan of Implementation adopted by the World Summit on Sustainable Development on 4 September 2002, the Ministerial Declaration entitled "Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development" adopted by the Economic and Social Council of the United Nations on 5 July 2006, the ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference on 10 June 2008, the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want" adopted by the General Assembly of the United Nations on 27 July 2012, and the outcome document of the United Nations summit for the adoption of the post-2015 development agenda, entitled "Transforming our world: the 2030 Agenda for Sustainable Development" adopted by the General Assembly of the United Nations on 25 September 2015."*

<sup>556</sup> Paris agreement entered into force on November 4<sup>th</sup>, 2016 and affirms the commitment of the party to make efforts in order to control Earth temperature and fight climate change. Specifically, the agreement was related to the United Nations Framework [Convention](#) on Climate Change.

<sup>557</sup> Article 16.1.4 CETA: *"The Parties recognise the importance of achieving the ultimate objective of the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 (hereinafter referred to as "UNFCCC"), in order to address the urgent threat of climate change, and the role of trade to that end. The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session. The Parties shall cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development. The Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement."*

<sup>558</sup> The principle of sustainable development was defined expressly by Rio Conference in 1992. Principle of The Rio Declaration on Environment and Development affirms as that: *"Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."*

to meet their own needs”<sup>559</sup>. In this respect, in 2015, the UN General Assembly has adopted the 2030 Agenda for sustainable development which set 17 goals<sup>560</sup> with the aim of “[...] *We resolve also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.*”<sup>561</sup> The pillars of the agenda are environment, labour rights, sustainable growth and aim to end poverty, to tackle environmental protection and to promote the development of least developed countries.

EU adopts the challenge of a sustainable growth and in “*Trade for all strategy*” affirms clearly how Commercial Policy and trade negotiations “*goes hand in hand*”<sup>562</sup> with social justice, respect for human rights, labour and environmental standards<sup>563</sup>: the result is that not only trade and investment issues have been negotiated but sustainable growth and development are now part of trade agreements.

CETA contains chapters regarding sustainable development too: in particular, Chapter 22 is dedicated to trade and sustainable development, chapter 23 to trade and labour and chapter 24 to trade and environment and are perfect examples of regulatory

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<sup>559</sup> From United Nations Website, “What is sustainable development? available at <https://www.un.org/sustainabledevelopment/development-agenda/>

<sup>560</sup> “*End poverty in all its forms everywhere*

*Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture Goal 3. Ensure healthy lives and promote well-being for all at all ages Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all Goal 5. Achieve gender equality and empower all women and girls Goal 6. Ensure availability and sustainable management of water and sanitation for all Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all Goal 8. Promote sustained, inclusive and sustainable economic growth,*

*full and productive employment and decent work for all Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation Goal 10. Reduce inequality within and among countries Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable Goal 12. Ensure sustainable consumption and production patterns Goal 13. Take urgent action to combat climate change and its impacts\* Goal 14. Conserve and sustainably use the oceans, seas and marine*

*resources for sustainable development Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all level Goal 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development* “In In “*Resolution 70/1. Transforming our world: the 2030 Agenda for Sustainable Development*”

<sup>561</sup> From “*Resolution 70/1. Transforming our world: the 2030 Agenda for Sustainable Development*” available at [http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf)

<sup>562</sup> “*One of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection. This applies to external as well as internal policies, and so also includes trade and investment policy. The EU has been leading in integrating sustainable development objectives into trade policy and making trade an effective tool to promote sustainable development worldwide. The importance of the potential contribution of trade policy to sustainable development has recently been reaffirmed in the 2030 Agenda for Sustainable Development, including the SDGs, which will guide global action in the next 15 years*” In Communication ‘*Trade for all – Towards a more responsible trade and investment policy*’ COM (2015) 457 14/10/2015

Available at [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>563</sup> *Ibidem* note 66

cooperation between the two regions: in fact, regulatory cooperation chapter affirms clearly that a regulatory cooperation is to be applied in trade and labour<sup>564</sup>, environmental and sustainable development chapters.<sup>565</sup>

Chapter 22 defines the context of the chapters and, after having recognized the most relevant agreements regarding sustainable development, affirms that “[...] *The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future*”<sup>566</sup>: for achieving these aims, the parties have chosen to use the instruments of cooperation, exchange of information and transparency.

In particular, paragraph 2 of Article 22.1 affirms that the parties promote a cooperation in order to endorse an enhanced integration and coordination of each part labour, environment and sustainable growth that are implemented in the respective territories; moreover, a central role is given to instrument of consultations both of stakeholders and citizens.<sup>567</sup>

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<sup>564</sup> On the issue see Semple, Abby, “*Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements*,” *European Procurement & Public Private Partnership Law Review (EPPPL)* vol. 12, no. 3 (2017): p. 293-309. HeinOnline,

<sup>565</sup> Article 21.1 CETA: “*This Chapter applies to the development, review and methodological aspects of regulatory measures*

*of the Parties' regulatory authorities that are covered by, among others, the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and Chapters Four (Technical Barriers to Trade), Five (Sanitary and Phytosanitary Measures), Nine (Cross-Border Trade in Services), Twenty-Two (Trade and Sustainable Development), Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment).*”

<sup>1</sup> Article 22.1 CETA: “*The Parties recall the Rio Declaration on Environment and Development of 1992, the Agenda 21 on Environment and Development of 1992, the Johannesburg Declaration on Sustainable Development of 2002 and the Plan of Implementation of the World Summit on Sustainable Development of 2002, the Ministerial Declaration of the United Nations Economic and Social Council on Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development of 2006, and the ILO Declaration on Social Justice for a Fair Globalisation of 2008. The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations.*”

<sup>567</sup> Article 22.1 .2 CETA: “*a) sustainable development through the enhanced coordination and integration of them*

*respective labour, environmental and trade policies and measures;*

*(b) promote dialogue and cooperation between the Parties with a view to developing their trade*

*and economic relations in a manner that supports their respective labour and environmental protection measures and standards, and to upholding their environmental and labour protection objectives in a context of trade relations that are free, open and transparent;*

*(c) enhance enforcement of their respective labour and environmental law and respect for labour and environmental international agreements;*

*(d) promote the full use of instruments, such as impact assessment and stakeholder consultations,*

Regarding transparency, Article 22.2<sup>568</sup> recognizes transparency as” [...] *a necessary element to promote public participation and making information public.*”; again, transparency is recognized as fundamental in chapters 23 and 24 too.

Chapter 23 affirms the relation between trade and labour and states that labour has to be considered as central in international trade in respect to globalisation context and that better<sup>569</sup> regulation of labour standards and rights means better economic efficiency: as a result, the chapters in Article 23.2 reaffirm its commitment<sup>570</sup> to the International Labour Standards convention; in this way, the recognition of a multilateral instrument such as ILO<sup>571</sup> demonstrates the aim to promote regulatory cooperation regarding rules of laws as well as best practices in order to serve as an example of good way and positive influence of international trade.

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*in the regulation of trade, labour and environmental issues and encourage businesses, civil society organisations and citizens to develop and implement practices that contribute to the achievement of sustainable development goals; and*

*(e) promote public consultation and participation in the discussion of sustainable development issues that arise under this Agreement and in the development of relevant law and policies.”*

<sup>568</sup>Article 22.2 CETA: “*The Parties stress the importance of ensuring transparency as a necessary element to promote public*

*participation and making information public within the context of this Chapter, in accordance with the provisions of this Chapter and Chapter Twenty-Seven (Transparency) as well as Articles 23.6 (Public information and awareness) and 24.7 (Public information and awareness).”*

<sup>569</sup>Article 23.1 CETA: “*The Parties recognise the value of international cooperation and agreements on labour affairs*

*as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation. They recognise the contribution that international trade could make to full and productive employment and decent work for all and commit to consulting and cooperating as appropriate on trade-related labour and employment issues of mutual interest.*

*2. Affirming the value of greater policy coherence in decent work, encompassing core labour standards, and high levels of labour protection, coupled with their effective enforcement, the Parties recognise the beneficial role that those areas can have on economic efficiency, innovation and productivity, including export performance. In this context, they also recognise the importance of social dialogue on labour matters among workers and employers, and their respective organisations, and governments, and commit to the promotion of such dialogue.”*

<sup>570</sup>Article 23.3 CETA: “*1. Each Party shall ensure that its labour law and practices embody and provide protection for*

*the fundamental principles and rights at work which are listed below. The Parties affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the members of the International Labour Organization (the "ILO") and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session:*

*(a) freedom of association and the effective recognition of the right to collective bargaining;*

*(b) the elimination of all forms of forced or compulsory labour;*

*(c) the effective abolition of child labour; and*

*(d) the elimination of discrimination in respect of employment and occupation.*

*2. Each Party shall ensure that its labour law and practices promote the following objectives included in the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization 2008 adopted by the International Labour Conference at its 97th Session, and other international commitments:*

<sup>571</sup> See *supra* chapter 1, note 623

The same scheme is repeated in Chapter 24: in Article 24.1 the parties recognizes environment as a “*fundamental pillar of sustainable development*”<sup>572</sup> and their aim to cooperate to the promotion of sustainable development by regulatory cooperation and collaboration in respect of environmental issues: in this way, the parties commit themselves to make efforts in promoting an environmental friendly negotiation of trade and investment issues.<sup>573</sup>

A link between CETA’s public procurement chapter and sustainable development, is in Article 19.9 about technical specifications: in particular, paragraph 9 lists environmental criterion among evaluation criteria: “*The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.*”

In EU public procurement, sustainable development became a pillar: Directive 2014/24 (“the Directive”) states that public procurement plays a key role in sustainable growth<sup>574</sup> and that innovative procurement represents the best way to achieve that aim: recital 22 of the Directive states that innovation means: “*the implementation of a new or significantly improved product, service or process, [...] with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth.*”

Considering that environmental protection is seen as a key factor in the achievement of sustainable development, EU internal market policies are implemented in order to respond to that challenge: regarding public procurement, an “*Buying*

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<sup>572</sup>Article 24.1 CETA: “*The Parties recognise that the environment is a fundamental pillar of sustainable development and recognise the contribution that trade could make to sustainable development. The Parties stress that enhanced cooperation to protect and conserve the environment brings benefits that will:*  
(a) *promote sustainable development;*  
(b) *strengthen the environmental governance of the Parties;*  
(c) *build upon international environmental agreements to which they are party; and*  
(d) *complement the objectives of this Agreement.*”

<sup>573</sup> Article 24.9 CETA: “*The Parties recognise that the environment is a fundamental pillar of sustainable development and recognise the contribution that trade could make to sustainable development. The Parties stress that enhanced cooperation to protect and conserve the environment brings benefits that will:*  
(a) *promote sustainable development;* “  
(b) *strengthen the environmental governance of the Parties;*  
(c) *build upon international environmental agreements to which they are party; and*  
(d) *complement the objectives of this Agreement.*”

<sup>574</sup> Recital 2 Directive 2014/24 : “*Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020, a strategy for smart, sustainable and inclusive growth’ (‘Europe 2020 strategy for smart, sustainable and inclusive growth’), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth[...]*”

*Green! Handbook on green public procurement*” was published in April 2016 in order to assist public authorities in the purchasing of environmentally friendly products.<sup>575</sup>

The promotion of “*collateral objectives*”<sup>576</sup> finds its highest peak in Article 18 of the Directive which lists environment, social labour law as a reference for Member States when evaluating the performance of economic operators: “*Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.*”<sup>577</sup>

The provision is the result of jurisprudence of the ECJ too: in particular, in “*Concordia bus*”, ECJ affirmed for the first time that evaluation criteria not only has to have an economic nature but also can have a different nature<sup>578</sup> either the only condition of being “[...] *in conformity with the fundamental principles of Community law, in particular the principle of non-discrimination and the four freedoms, and with*

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<sup>575</sup> “*Buying Green: A Handbook on green public procurement is available in all official languages of the EU, and it is the main guidance document to assist public authorities in the process of buying goods and services with a lower environmental impact. It is also a useful reference for policy makers and companies responding to green tenders. It includes: guidance on how environmental considerations can be included at each stage of the procurement process; sector specific approaches and more than 100 good examples on green public procurement from across the EU Member States. Guidance for Bio-Based products in public procurement* Guidance materials include: a training handbook, a dynamic meta database and case studies on the uptake of innovative bio-based products in procurement and factsheets on the innovation potential of bio-based product groups.” From DG Growth website

<sup>576</sup> “*These policies are generally referred to as 'horizontal', 'secondary' or 'collateral' and include sustainable development objectives.*” In Luca Tosoni, *The Impact of the Revised WTO Government Procurement Agreement on the EU Procurement Rules from a Sustainability Perspective*, European Procurement & Public Private Partnership Law Review vol. 8, no. 1 (2013): at 41

<sup>577</sup> Although some critics affirms that the efficient of the provisions is strictly dependent to the national transposition of that obligations: “*Depending on how the obligations of Article 18(2) have been transposed into national law, the obligation contained therein may be passed from Member States down to the contracting authorities, which then act as enforcing mechanisms for those legal obligations. This is bound to be problematic in practice for at least two reasons. First, all contracting authorities - irrespective of their capacity - are now under the obligation to check the compliance with these legal obligations at the award stage and then during contract performance.*”<sup>7 6</sup> *Second, it increases the transaction costs for economic operators since they will actively have to prove their compliance with a myriad of legal provisions they may not know in advance whether they apply to them or not, and logic dictates that smaller economic operators will find this more difficult.*” In Pedro Telles and Grith Skovgaard Olykk, *Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law*, European Procurement & Public Private Partnership Law Review (EPPPL)vol. 12, no. 3 (2017): at 248

<sup>578</sup> Case C-513/99 “*Point 2 “municipality which organises, as the contracting entity, a tender procedure concerning the operation of an urban bus transport service may include, among the criteria for awarding the contract on the basis of the economically most advantageous tender, a criterion such as the one in the present case relating to low nitrogen oxide emissions and low noise levels. That criterion must be applied in conformity with the fundamental principles of Community law, in particular the principle of non-discrimination and the four freedoms, and with all the procedural rules laid down in the relevant directive, in particular the rules on advertising.*”

*all the procedural rules laid down in the relevant directive, in particular the rules on advertising.*<sup>579</sup>

As a result, environment standards and , generally, sustainable development are a cardinal point both in CETA- and in trade agreements- as well as in Internal Market: a better use of public procurement can be a vehicle that both EU and Canada can use to promote a sustainable growth, using exchange of information and best practices as a way to collaborate to create a common framework in this respect and to become a benchmark for all trade and investment negotiation oriented to sustainable development.

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<sup>579</sup> *Ivi* 25, note 79

## *CONCLUSIONS*

Public Procurement is an important part of Market access' regulation in Internal as well External Action of the EU.

In the Internal Market, a legal framework of Public Procurement was necessary to grant harmonisation within the Internal Market itself: as a result, the potential function of Public Procurement as trade barrier was prevented by providing a common framework of rules: the process of reform that started by the consolidation of principles formulated by ECJ found its final dimension in the Directives, which last form are represented by Directive 2014/24, Directive 2014/23 and Directive 2014/25.

On the other side, the external dimension of Public Procurement, regarding multilateral and bilateral sides of international trade, it results to be strictly connected to Internal Market: the unification of the Internal Market of the EU has been followed by the first steps toward a global representation of EU as a uniform, unilateral and unique voice represented by External Action.

So far, the External Action could be an external projection of the reached Internal harmonisation and the inclusion of Common Commercial Policy (CCP) among External Action is a suitable example.

In fact, a consolidated Internal harmonization could have not led to profitable results if the external dimension of the EU had been a fragmentation of different national interests: consequently, a single commercial policy was necessary to EU to act as a single entity in international trade negotiations.

This aspect is underlined by the new CCP competences, listed in Lisbon Treaty and recognized by ECJ.

Because one of the reasons that lead to Internal harmonisation of Public Procurement was to avoid its role of trade barrier and because of the parallelism between Internal Market, negotiating Public Procurement externally became a way to avoid that it could be a trade barrier in international trade as well.

In this sense, Public Procurement shows how Internal Market and External Action need to act guided by the same principles and purposes: in fact, if the scope is different, the interests are in common.

The result is the external dimension of Public Procurement is a commingling and a contamination of principles and provisions that reflects both Internal instruments, such as Directive 2014/24 but includes and is influenced by international legal provisions too.

In particular, the question whether there is a connection between principles contained in Directive 2014/24 and principles contained in multilateral for a as GPA and in Free Trade Agreements can be answered positively.

As regards, principles like transparency, equal treatment, no discrimination are the basis of both European Directive and GPA: moreover, we can say that the latter has influenced the former.

First, some of the key aspects of Public Procurement in GPA has been adopted by European directive too: an example is the use of electronic communication, which is now regulated in Directive 2014/24 and, at the same time, is among the main principle in GPA. Second, with the last process of reform, transparency has become one of the main principles of European Public Procurement and, as in GPA, it is used to grant a clear set of rules to whoever approach EU tenders and to avoid episodes of corruption and collusion.

This deep relation between GPA's principles and EU Procurement marks Free Trade Agreements too; a clear example in EU- Japan EPA, in which there is an expressed reference to GPA provision.

From the other side, the role of vehicle of fundamental values of EU required to CCP by its inclusion in external action, is perfectly plays in others FTAs: CETA's Chapter 19 is an example of a Public Procurement regulation that starts to move forward to an EU that is a witness and a divulgator of EU rules of law and values and that aims to arrive to be, together with one of its most important economic partner- Canada- the reference for rules of law in international context.

The fact that CETA's Public Procurement's provisions have gone further than GPA could be a way to find an alternative road to the stall in multilateral fora: as we said in chapter one, WTO is now blocked by an international trade "*crisis*" in which duties are not objective of negotiation but has become weapons.<sup>580</sup>

In this context, EU can and probably aims to assume a leading role in multilateral discussion while is continuing to move forward in its plurilateral policies: so far, importing its best practices as well rules of law in international trade negotiations demonstrates it.

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<sup>580</sup> USA international trade policies is the benchmark of this "*war*": President Trump "State of Union 2019" speech has talked about "[...] *structural change to end unfair trade practices, reduce our chronic trade deficit, and protect American jobs*" and prospect a foreign trade policy still based on protectionism with a bilateral approach. Nowadays, WTO DSB is not functioning, and USA has still not intention to appoint a judge.

All of this is reflected in Public Procurement policies: the proposal for a regulation specifically addressed to international procurement tenders means a step ahead in improving a harmonised framework of rules that, through clarity and transparency of norms has two specular aims: from one side, attracting investors in EU tenders; from the other, advocating EU firms by avoiding third states' discriminative behaviours.

In conclusion, Public Procurement's regulation in Internal aspects and External is specular and parallel: the aim is to grant Market access that is based on transparent legal framework in order to grant a proportional and equal treatment of bidders in a way that prevents a discrimination between bidders. For this purpose, principles provided in Internal Market and contained in Directive 2014/24 are the same applied in international instruments as trade agreements or plurilateral agreement as GPA.

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