

# Foreword

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This book aims at addressing the constitutional challenges arising from the negotiation and implementation of the new-generation free trade agreements concluded by the EU ('EUFTAs'). Along with the traditional but increasingly relevant questions of mixity and the provisional application of EUFTAs, new issues of constitutional significance emerging from the latest developments of the common commercial policy are addressed, such as the level of transparency and democratic scrutiny and the development of new dispute settlement mechanisms and their compatibility with Union law.

To this end, the theory and recent practice of EU trade policy are viewed through the lens of the general principles of EU law, starting from the assumption that they contribute to defining the essential characteristics of the Union legal order, but they are also the source of its specificities vis-à-vis those of its Members and contracting parties.

In the first part of the book, these general principles emerge as a 'constitutional skeleton' that gives form to the common commercial policy, allowing the Union to pursue its objectives while facing the ambiguities of its legal framework for the external action that the new free-trade approach has brought out (Chapter 1).

The first principle to be taken into consideration, in this respect, is that of conferral of powers. On the one hand, this principle underlies the so-called ERTA doctrine of implied exclusivity and its latest application by the Court of Justice in its Opinion 2/15 on the free trade agreement with Singapore and in the subsequent *COTIF* judgment (Chapter 2). On the other hand, the principle of conferral should constitute the only possible legal basis for mixed agreements in the field of common commercial policy (Chapter 3). The recourse to mixed agreements, as part of a dynamic interpretation of the Union's external competence, could indeed be regarded as an expression of – and a means to protect – the autonomy of EU law vis-à-vis third countries. By enabling the Union to preserve the unity and coherence of the external action, mixity can also reinforce its international presence without exposing the internal division of competences between the EU and the Member States to third parties (Chapter 4).

Another essential principle of EU law, which emerges from the book as even more fundamental in the field of common commercial policy, is that of loyal cooperation. The book shows how this principle, by virtue of its bidirectional application, may offer a constitutionally sound getaway to the risks of disintegration of the EU external action. This applies in particular to the relationship between the EU and Member States' legal orders in the conduct of trade policy, thanks to the bridging and bonding role of loyalty (Chapter 5). In the same vein, the principle of loyal cooperation could be of paramount importance in circumscribing the potential empowerment of the UK to negotiate trade agreements with third countries during the withdrawal process (Chapter 6).

Lastly, the principle of democracy, in its representative and participatory dimensions, comes into play, to define the most appropriate methods and level of democratic control over the EUFTAs. The EU, especially after the Lisbon Treaty, is founded on representative democracy in which policy choices and international agreements are effectively subject to the democratic scrutiny of the European Parliament. The role the principle of democracy is playing in the process of 'parliamentarization' of the EU commercial policy at both the EU (Chapter 8) and national (Chapter 7) level is therefore primarily highlighted. However, attention is also paid to new democratic empowerment tools, such as the citizens' initiative, and their possible extension from the internal to the external action (Chapter 9).

The second part of the book focuses on the implementation of EUFTAs. In so doing, it touches upon a number of seemingly technical subjects, ranging from provisional application to disputes settlement, which instead have proved to be the most sensitive issues for both the negotiation and the national transposition of these agreements. Here too, the general principles of EU law are, at the same time, the constitutional frame in which the often innovative legal instruments envisaged by the new-generation free trade agreements are placed and the parameters of legality against which these legal solutions are measured.

The distribution of competences and division of powers between the legislature and the executive, both at national and European level, are indeed the underlying issues of the chapters dealing with the provisional application of EUFTAs (Chapter 10) and the legal basis (Chapter 11) and legitimacy (Chapters 12) of the joint bodies set up by these agreements.

The debate over the competence for and termination of provisional application of EUFTAs, in particular, shows the close interdependence between the principles of conferral, loyal cooperation and autonomy. The provisional application of these agreements by the EU may provide a (temporary) remedy to the delays and uncertainties stemming from the national ratification processes imposed by facultative mixity, thus reinforcing the substantive autonomy of the EU legal order, while loyal cooperation should mitigate the

possible negative consequences of such provisional application, including its early termination. Similarly, the EU competence to establish joint committees in the framework of EUFTAs requires close coordination between the EU and the Member States under the principle of loyal cooperation. This, in turn, contributes to ensuring the respect of the institutional and constitutional constraints flowing from the treaties – including the principle of (representative) democracy and its procedural implications concerning the delegation of powers – thus preserving the autonomy of the EU legal order.

The principle of effective legal protection and the principle of autonomy of EU law, in both its regulatory and jurisdictional dimension, are then at the centre of the chapters dedicated to the actual (Chapters 13 and 14) and possible (Chapter 15) dispute settlement mechanisms that are envisaged by the new-generation free trade agreements.

Regardless of whether these contributions plead in favour or against the compatibility of such mechanisms with EU law, they share the same premise as to the underlying rationale of their development. What clearly emerges from the various analysis is in fact that the general constitutional principles and values of the Union, such as democracy and judicial independence, are both the drivers and the sources of inspiration for the significant innovations brought about by these agreements. In this respect, the Opinion 1/17 on the Investor-State Dispute Settlement mechanism established by CETA has clearly shown that, insofar as the EUFTAs are destined to become an integral part of the law of the Union, they are meant to comply with the EU fundamental principles, under the attentive scrutiny of the EU Court of Justice.

The thoroughness and completeness of each contribution certainly make this book a significant input to the academic debate over the EU common commercial policy. The book also provides concrete solutions to the foreseeable problems related to the conclusion and implementation of the existing and future new-generation EUFTAs. In so doing, it has the merit of addressing the concerns and objections raised by these agreements, thus contributing to an informed debate among stakeholders and European citizens.

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