Professor Mylly,

Thank you for a most structured and logic presentation.

I understand you to suggest that the Lisbon Treaty opens a new avenue for the Commission when the internal legislative pathway becomes too complex – demanding unanimity in decision-making. (As an example, just consider the protracted discussion on the EU patent.) An alternative route would, as you suggest, be to benefit from the competence to enter into international agreements, where qualified majority is enough. The agreements may be phrased in such a way that they have direct effect and thereby introduce the legislation through the back door.

Articles 215 – 219 TFEU and the CJEU case law seem to support your position. Even if the international agreement is not self-executing, it may mandate an interpretation in conformity with its content and thereby affect the legislative environment in the Union.

Would it be acceptable if the Commission deliberately selected this route to introduce new legislation in the Union? Professor Mylly abstains from drawing conclusions from his reasoning – perhaps it is self evident.

I think not. It would to my mind be the perfect example of when a Union act could be attacked. Article 263 stipulates four bases for such an attack – one of them being “Detournement de povoir”. Would the Commission not misuse its powers if it can be established that the purpose with entering into an international agreement was only to evade the procedure established for internal law making.

My first question is therefore if a strong argument could not be made against such a practice.

It is, however, less likely that this would be the result of a deliberate action. On the other hand it may be the consequence of a fully legitimate endeavor to harmonize international law. Would that make a difference? Our discussion today on ACTA provides a solid example.

It is not only on the EU level that it is difficult to arrive at a consensus on how to shape new rules. The situation in the WTO provides even stronger examples. Take the Doha Round as an example. One may wonder if the Round is ever going to conclude its negotiation. Among other things, the Members have agreed to amend Article 31 of the TRIPS agreement to facilitate access to medicines in the developing world. The agreement was made in 2003. The precise text was established a couple of years later and is today in force as a “provisional measure”. In spite of these agreements and a consensus that the change is required, the TRIPS agreement itself still remains unchanged. The revision process is simply too burdensome as a result of the tensions between the developed and the developing world.

### If you cannot join them – beat them!

The US started to enter into so called TRIPS Plus agreements on a bilateral basis. Using its superior economic power it required developing countries to accept more far-reaching obligations than contained in TRIPS as a condition for entering into trade relations. Developing countries in bad need for trade and support accepted. The EU has since started to follow suit.

Pressured by a large and vocal lobby organization, developed countries seek to improve the enforcement mechanisms in the field of IPR through these bilateral agreements. Little by little the WTO/TRIPS standard has been replaced by stricter terms in the bilateral TRIPS agreements.

As an alternative to these tendencies, Japan initiated a discussion between certain developed countries on an “Anti-Counterfeiting Trade Agreement” (ACTA). It was done amongst a small group of friends. The negotiating parties wanted no interference and the discussions were initially performed under secrecy. Stiff rules – common to the IPR enforcement – were gradually watered down as the scheme started to become public. The final result was presented in 2011. For a country like Sweden ACTA added very little and it was questionable if any changes in Swedish legislation was required. For others it may have been different.

### Checks and balances

Still the procedure created an uproar on the Union level. The Council had given the Commission a formal mandate in 2007 to participate in these discussions. The objective was a mixed agreement, which would have to be issued by the Council and presented to the Member States and the European Parliament for their approvals.

The procedure establishes an inbuilt system of checks and balances in the EU procedure, which prevents any “quick fix”, which may affect the internal situation. As we all know, several Member States were hesitant and with an overwhelming majority the European parliament in July 2012 refused their approval of the questionable agreement.

### Court control

In an effort to persuade the opinion, the Commission officially announced that it had referred the agreement to CJEU for an opinion of conformity with fundamental principles of law – the Charter and the Convention on human rights. Whatever happened to that referral is unclear to me. I have never been able to find it on the courts dockets. Was it simply silently withdrawn by the Commission after the voting in the parliament? Was the opposition simply too strong.

In any event the Court is the final interpreter and has shown a certain reluctancy to give self-executing status to international agreements such as WTO and TRIPS. I especially believe that Microsoft case is revealing. In spite of the sometimes very clear language in TRIPS, the Court – in line with its stance on WTO, declared that it lacked direct effect and could not be invoked by Microsoft. It went even further by stating

1192 In any event, there is nothing in the provisions of the TRIPS Agreement to prevent the competition authorities of the members of the WTO from imposing remedies which limit or regulate the exploitation of intellectual property rights held by an undertaking in a dominant position where that undertaking exercises those rights in an anti-competitive manner. Thus, as the Commission correctly observes, it follows expressly from Article 40(2) of the TRIPS Agreement that the members of the WTO are entitled to regulate the abusive use of such rights in order to avoid effects which harm competition. Article 40(2) provides as follows:

‘Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.’

Accordingly, the WTO and TRIPS agreements are not self-executing and leaves a wide discretion to the Member States.

This interpretation is almost back-firing. If the EU is free to interpret international agreements based on its internal needs, this is, of course, also the case for others. Developing countries are now in a moiré aggressive way starting to apply their own competition laws for their own needs against developed countries larger companies. In spite of TRIPS the need for international agreements is increasing to avoid such tendencies.

### Conclusion

The state of the world affairs is simply such that smart maneuvering will backfire and the world simply must to come to grips with international problems in for a where all actors are represented and act reasonably and then dutifully implement them in national legislation. Succeeding with that type of legislation requires careful preparation on the EU and Member State level where legal consequences are carefully determined up front. There is no reason to fear that such an agreement in the end will have direct effect in Union Law in line with the logic that professor Mylly has presented.