

External trade policy and the Lisbon Treaty: An enforcement of liberalisation of european commercial policy

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The joint declaration of the european governments, adopted in Berlin at the occasion of the fifth anniversary celebration of the signature of the Treaties of Rome, sets as its aim to « place the European Union on a renewed common basis before the European parliamentary elections in 2009 ». Everything was to be done to avoid that the European elections become a chance for political debate about the future of the Union. The European Summit on 21 - 22 June confirmed that agenda.

The European Summit repeated the worst moments of the of the European architecture, with its negotiations behind closed doors that, yet again, were unintelligible to the citizens of the Union.

One month later, the Portuguese Presidency hands in a draft that has to be adopted by the Council 18 - 19 October, 2007. In barely two months, everything is supposed to be sealed. The speed with which these affairs have been bungled says a lot about the conception of Europe and the democratic spirit of the European leaders. The French/Dutch double No vote against the *Treaty establishing a Constitution for Europe* (TECE) was, among other things, a rejection of the way Europe had been built: secret negotiations at the state-level, lack of transparency about what was at stake, and refusal of any public debate.

One would have thought that, after the incident with the TECE, the governments would not act this way any more. However, the opposite took place and we see a clear will to exclude the European citizens from any discussion about the future of the Union. The French/Dutch double No has shocked the European leadership to such an extent that they do not want to take the slightest risk any more: everything has to happen very fast to pre-empt a possible citizen reaction. And obviously we can count on the fingers of one hand the governments that will dare to hold a referendum on whether such a treaty should be ratified. France will not be one of them, as the new President of the Republic has already decided.

This process is very far from democratic aspirations and normal rules on this subject. The new Treaty is not going to be legitimated by referenda in any member states.

A content that follows the same trend as before The "Reform Treaty" amends the two existing treaties, the Treaty on European Union (TEU) and the Treaty establishing the European Community, entitled "Treaty on the Functioning of the European Union" (TFEU). Remember that the Treaty on European Union is the Maastricht Treaty, amended by the Amsterdam Treaty and the Treaty of Nice, and that the Treaty establishing the European Community is the Treaty of Rome, amended by the subsequent treaties since 1957.

The preamble of the TEU has been amended by an addition that the Union is to draw inspiration from the religious inheritance of Europe.

The EU trade policy has as an objective to "encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade" (new Article 10A TEU). Generalised free trade remains the horizon for European policies that cannot be exceeded.

This objective is reinforced and expanded in Article 188B of the TFEU, which indicates that the EU « shall contribute to (...) the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers ». This article amends the current text to allow for even greater liberalisation: foreign direct investment and the « other » barriers are not mentioned in the original article. The latter expression refers to "non-tariff trade barriers" like environmental standards or consumer protections regulations, which are a target for the liberalisation policies of, among others, the WTO.

The Reform Treaty does, of course, not limit the free circulation of capital, not only among Member States but also between these and third countries (Art. 56 TFEU), and unanimity is required for any measure to restrict the free movement of capital (Art. 57-3 TFEU).

Common Trade policy

It is important to understand that, excepted about "non-tariff trade barriers", broadly nothing has changed between the Constitution Treaty and the Reform Treaty on common trade policy. The article III-315 and III-325 of the Constitution Treaty are now the 188B, C and N of the new treaty.

In that respect, most of the analysis made about the Constitutionnal Treaty are relevant.

The new article 188B-1 specifies the scope of the common commercial policy and would explicitly extend its scope to services, commercial aspects of intellectual property rights and foreign direct investment: « 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 ». Article 188B-2 holds: « European laws shall establish the measures defining the framework for implementing the common commercial policy. »

It is clear that the common commercial policy according to the Lisbon Treaty would include the negotiation and conclusion of agreements (external competence) as well as the implementation of these agreements (internal competence), because Article 188B-2 explicitly refers to implementation. This not only covers measures of the autonomous trade policy, but also implementation of trade agreements. Trade in services and commercial aspects of intellectual property rights will be covered by the exclusive external and internal competence of the Union.

It has been said that the competence relating to services and commercial aspects of intellectual property rights is limited to the external competence because of the unanimity rule in article 188B-4. However, competence issues cannot be affected through voting rules in the Council. Article 188B-1 and 2 confers a uniform competence, which is only limited through article 188B-6.

Trade in services and commercial aspects of intellectual property rights

Unanimity among the States is, however, required for the conclusion of trade agreements « in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity » and « in the field of social, educational and health services, where these agreements risk seriously disturbing the national organisation of such services ». One question remains however open : who will decide whether the aforementioned risks exist?

Foreign direct investment

The extension of the competence to foreign direct investment should be analyzed in the context of attempts in the WTO and other international organizations (such as the OECD) to negotiate multilateral rules on investment. An interpretation of the inclusion of « foreign direct investment » in the scope of the common commercial policy should begin with the term itself. It should be noted that foreign direct investment usually refers to long-term investment in a foreign country and can be distinguished from short-term portfolio investment. Therefore, article 188B would only apply to agreements or parts of agreements which cover foreign direct investment. Agreements which would cover all forms of investment, because of a broad definition of the term "investment" such as the failed Multilateral Agreement on Investments (MAI) of the OECD would therefore not fall within the scope of the exclusive commercial competence. Though the Community would be exclusively competent in relation to those aspects of the agreement which relate to foreign direct investment, the Member States would remain competent in relation to portfolio investments.

The extension of the common commercial policy to foreign direct investment has the potential to establish a whole new competence area in external relations of the EU.

Traditionally, there is a clear distinction between international trade agreements and international investment agreements in international economic law. Both types of agreements cover different aspects of international transactions: trade agreements concern the exchange of goods and services across borders, whereas investment agreements concern protection of investment in a particular country. In practical terms, trade agreements are often regional or multilateral agreements, whereas investment agreements are often bilateral agreements. This does not deny that investment and trade are closely linked and the scope of agreements may overlap. For example, the WTO's Agreement on Trade-Related Investment Measures (TRIMs) aims at investment measures, which restrict trade. Nevertheless, investment treaties and trade agreements generally have distinct areas of application.

The extension of the common commercial policy to foreign direct investment therefore raises the question whether the Lisbon Treaty intends to give the EU the exclusive competence to negotiate and conclude investment agreements. Until now, EC bilateral agreements did not contain provisions on investment protection. Bilateral investment treaties remained within the competence of the Member States. Extending the competence to conclude such agreements to the Union would have remarkable practical consequences: Some Member States, such as Germany and the UK, are currently parties to more than 100 bilateral treaties with different countries.

Assuming an exclusive competence for the Union would mean that Member States would lose the

competence to negotiate, conclude and implement these agreements and the Union would be responsible for the negotiation of new or the re-negotiation of old investment agreements.

It is, however, submitted that the extension of the common commercial policy to foreign direct investment could and should be read more narrowly. As pointed out above, there are already a number of areas, where international trade law and international investment law overlap. This concerns not only the TRIMs-Agreement of the WTO, but also certain aspects of GATS and discussions in the WTO on trade and investment. The inclusion of foreign direct investment in article 188B-1 should therefore be understood to refer only to those aspects of foreign direct investment which have a direct link to international trade agreements.

Limitation of the exercise of competences

Article 188B-6 contains a limitation of the exercise of the competences of the common commercial policy:
« The exercise of the competences conferred by this Article in the field of commercial policy shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of Member States insofar as the Treaty excludes such harmonisation. »

Even if the expression "shall not affect" is not really accurate, it could be understood as the Union would not have the exclusive competence to negotiate, conclude, and implement an international agreement which covers aspects on which the Union does not have the power to legislate internally. It seems that the Union can only implement international agreements insofar as it enjoys internal legislative competence. In EU law, a similar requirement of the Union to consult the Member States before the conclusion of an agreement which requires implementation by the Member States could be based on the principle of loyal cooperation between Union and Member States which is expressively laid down in article 4-3 of the Lisbon Treaty. Accordingly, "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaty" (Constitution Treaty previous Article I-5 (1)). This requires the Union to respect the national identities of the Member States and their essential state functions.

Despite the comparatively limited implementing competence of the Union, the factual impact on an international agreement concluded by the Union should not be underestimated. The legal necessity to implement an international agreement will put political pressure on the Member States, even if they remain formally responsible for the implementation. The competence to implement an international agreement may therefore in many cases be little more than an administrative competence, which does not leave the Member States with a lot of legislative discretion on a de facto basis.

Decision-making in the Council

Article 188B-4 holds:

"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." In the areas of trade in services, commercial aspects of intellectual property and foreign direct investment, the Lisbon Treaty thus applies the principle of parallelism concerning voting requirements: The conclusion of international agreements shall be governed by the same decision-making procedures as internal legislation with the same content.

The subparagraph 3 of Article 188B-4 states :

"The Council shall also act unanimously for the conclusion of agreements:

- (a) in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity;
- (b) in the field of trade in social, education and health services, where these risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them."

This subparagraph raises a number of questions. At the outset it should be noted that it only covers the conclusion of agreements, and not the negotiation, which distinguishes it from subparagraphs 1 and 2. Hence, the negotiating process will not be influenced by the unanimity rule of subparagraph 3. Another aspect of the scope of subparagraph 3 concerns its sectoral coverage, which could be determined on the basis of the standard classification of services (CPC) used by the WTO .

The interpretation of the term "cultural and linguistic diversity", which is new in the context of the common commercial policy, poses a more difficult interpretative problem. The term can currently only be found in Article 149 (1) EC. The Constitution Treaty also uses it in Article I-3 (3) (same numerotation in the Lisbon Treaty) which states that the Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

However, neither the ECT nor the Constitution nor the Lisbon Treaty define this term. The exception from qualified majority voting in subparagraph 3 requires a Member State calling for a unanimous vote to specifically invoke either subparagraph 3 (a) or 3 (b) and explain why and how the agreement concerned would pose a risk to the Union's cultural and linguistic diversity or to the provision of health, social, education services. If the other Council members do not share this view and the decision is taken by qualified majority voting, only a judgement by the EC Justice would provide ultimate clarity.

Arguably, the interpretative uncertainties could render subparagraph 3 non-operational. As a consequence the Council could either decide to conclude all agreements involving audiovisual, cultural, health, and education services by unanimous vote in order to avoid risking a violation of the voting requirements or Member states could refrain from invoking subparagraph 3 in the first place. The actual practice will most likely depend more on the political context of the issues concerned and less on legal niceties. In any event, a trade agreement which includes issues requiring unanimity and issues requiring only a qualified majority will be concluded in its entirety by unanimous vote in the Council according to the "Pastis" principle. This could in particular be the case for agreements concluding future rounds of multilateral trade negotiations, which typically include a large variety of subjects. The differentiated rules on decision-making in the Council could therefore be of greater practical importance for the conclusion of single issue trade agreements.

Role of the European Parliament

The role and the function of the European Parliament in the field of the common commercial policy remains complex according to the Lisbon Treaty, because two different articles need to be taken into consideration. Article 188B only mentions the European Parliament once, and 188N.

The new requirement of parliamentary consent to the conclusion of international agreements is an improvement from the perspective of democratic legitimacy and ought to be welcomed. The apparent limitation of this right to agreements which need implementation in internal law may not be too significant in practice. In any case, the requirement of parliamentary consent will also strengthen the European Parliament's influence in the negotiation process of international agreements, which is arguably just as important as the right to accept or reject an agreement.

When assessing the overall level of democratic legitimacy of external trade policy according to the Lisbon Treaty, the increased rights of the European Parliament must be seen in light of other changes. In this context, the Lisbon Treaty will not substantially increase the European Parliament's supervisory role vis-à-vis the Commission.

Furthermore, since the Lisbon Treaty submits all areas of trade policy to the exclusive competence of the Union, Member States' parliaments would no longer be required to ratify trade agreements. This in turn would reduce their influence on those agreements and the level of legitimacy they could confer upon the common commercial policy. In particular because of the reduced influence of national parliaments on the common commercial policy, the Lisbon Treaty would not substantially decrease the deficit of democratic legitimacy of this policy area.

If ratified, the Lisbon Treaty would make the Union's external trade policy more federal, but not necessarily more democratic. The necessity to implement an international agreement of the Union will nevertheless put political pressure on the Member States to adopt the relevant legislation. The formal competence of the Member States to implement an international agreement may in fact not leave the Member States a large margin of discretion.

The Lisbon Treaty would increase the rights of the European Parliament in relation to the conclusion of trade agreements. However, this improvement is partly - if not fully - outweighed by the fact that the national parliaments would lose the right to ratify trade agreements and would therefore lose influence on external trade policy. Furthermore, the Lisbon Treaty does not establish full parliamentary accountability of the Commission. The right to revoke the executive - a constituting element of democratic accountability in parliamentary systems - remains restrained. At least from the perspective of democratic legitimacy, the Lisbon Treaty is problematic.

Coloured from one end to the other by neo-liberalism, from the principles it promotes to the policies it advocates, this treaty is an extension of those of Maastricht and Amsterdam. The European Union will

remain a privileged space for the promotion of neo-liberal policies. The few positive points do not fundamentally challenge the current functioning of the Union, which is marked by a profound democratic deficit with a confusion of powers whereby the Executive of the Union, the Commission, has legislative and judiciary powers and the Council, a legislative organ, is the assembly of national executives.