

Impacts of the Lisbon Treaty on the EU Trade Policy

Identification of Possible New Problems related to the EU Competences, to the EU Membership in International Organizations and to the Role of the European Parliament

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Abstract

Lisbon treaty that is in force since the 1 December 2009 is a basis for changes in the EU procedures. The text considers changes in the Common Commercial Policy from the perspectives of some practical impacts on the involvement of EU member states into the policy making process and of the EU position within international organizations and agreements.

The CCP is newly a part of the EU external policies, to which belong common foreign and security policy, international environmental policy, development cooperation and economic, financial and technical cooperation with third countries. The basic areas of the CCP have been extended by foreign direct investment, services and trade related aspects of intellectual property rights. EU external exclusive competences for negotiations and conclusions of agreements have been confirmed as well as internal exclusive competences within their implementation. Changes concern also the role of the European Parliament and functioning of the European Council, Council, activities of the High Representative for Foreign Affairs and Security Policy and European External Action Service. Along with the above changes the procedures within the EU are expected. Many of aspects of the decision process are not yet clarified and only the practice of participation of the Member States and European Parliament on drafting the Common Commercial Policy could bring clear conclusions.

Introduction

The Lisbon Treaty that entered in force the 1 December 2009 amended the previous EU and EC treaties, without replacing them (Treaty on European Union and Treaty on the Functioning of the European Union). It provides the Union with an amended legal framework and new tools: it has established the European Union (EU) as a subject with **legal personality** and brought changes into the **decision making processes** of the EU, including the changes for the Common Commercial Policy. The Common Commercial Policy (CCP), sometimes called [Common] Trade Policy, together with other common policies is a keystone of the functioning of the European integration since the establishment of the European Communities (EC) in 1957 by the Treaty of Rome. The core of the EC trade policy has been always the common customs tariff that reflects the most important feature of the free movement of goods - the customs union. Also decisions of some other areas of trade have been

conferred to the EC. These areas were related mostly to the trade in merchandise, including the agricultural trade flows (where the Agricultural Common Policy is applicable). Areas of trade as services, trade aspects of intellectual property rights, government procurements or some investment issues belonged to the mixed competencies between European Communities at one side and member states at the other side. Changes of the Lisbon Treaty lie in the explicit adjustment of the EU competences, namely the exclusive and mixed ones. The competences were conferred to the EU by all EU members through the signature of the Lisbon Treaty (principle of conferral) that constitutes also limits for the same EU competences - the use of them is governed by the principles of subsidiarity and proportionality.

From the CCP perspectives, changes concern namely the inclusion of trade in the common external action of the EU, scope of external competencies, the role of European Parliament and role of national government and national parliaments. These changes could influence not only the internal EU decision making process, but also position of the EU and its member states within international trade, negotiations on trade agreements and international organizations. Very many aspects of the decision making procedures are not yet clear – it is and will be through the practice of the EU participation at various international forums and within internal EU discussions and meetings when the clarification happens.

Common Commercial Policy in the TEU and in the TFEU

Principals, rules and procedures of the Common Commercial Policy (CCP) are set down in the **Treaty on European Union (TEU)**¹ and in the **Treaty on the Functioning of the European Union (TFEU)**². CCP is newly put together with all other external actions of the EU, it means with the foreign and security policy, international environmental policy, development cooperation, economic, financial and technical cooperation with third countries and humanitarian aid. It belongs to the EU action at the international scene and is submitted to the provisions, principles and goals of the Treaty on European Union (Part Five: the Union's External Actions, Title 1 – General Provisions on the Union's External Action).

Inclusion of the CCP under the **external actions** rose questions about using the foreign and security policy for achieving the trade policy goals (Woolcock, 2008). Even if external actions are not submitted one to another, taken into account the current practice it is possible to conclude that the goals of the foreign and security policy will be superior to those of trade and that even the mutual supportiveness will occur only rarely. The external trade policy will be more likely used for enforcement of the EU foreign policy objectives than otherwise³.

General provisions on the external action constitute principles which have inspired the EU 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. According to the general provisions, the EU defines and pursues common policies and activities in all the range of international relations by listing the goals that shall be achieved. In respect to the CCP, the goal is characterized as „encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on

¹ Treaty on EU: it is the Maastricht Treaty that has been amended by the Amsterdam Treaty and Nice Treaty, lastly by the Lisbon Treaty. The complete edition is accessible from the Notice No. 2010/C 83/01 of the Official Journal of the EU C83, Volume 53, from 30 March 2010

² Treaty on the Functioning of the European Union: before Treaty on the Establishment of the European Communities. It is the Treaty of Rome, amended by following agreements, lastly by the Lisbon Treaty. The complete edition is accessible from the Notice No. 2010/C 83/01 of the Official Journal of the EU C83, Volume 53, from 30 March 2010

³ For example, during the negotiations about the FTA with India, the EU conditioned trade preferences by the clause on human rights and non-proliferation of nuclear weapons.

international trade“, indirectly also goals „to promote an international system based on stronger multilateral cooperation and good global governance“ and „foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty“⁴. CCP is also influenced by the principle of cohesion among areas of external action and among these areas and other policies.

Other provisions of the Treaty on EU are applicable directly to the CCP too: functioning of the European Council (strategic interests and goals of the EU), functioning of the Council (legislative and budget competences), activities of the High representative for the foreign and security policy and functioning of the European External Action Service.

The CCP belongs to the **Foreign Affairs Council** (FAC) that establishes external action according to the strategic goals set down by the European Council and ensures coherence of the EU actions⁵. The FAC is headed by the High representative, but for the CCP issues, the FAC is chaired by the country of EU presidency. This is not a subject of any provision in the Treaty on the Functioning of the EU, but a result of intensive negotiations between member states and the European Commission. Derived from this fact, it seems to be admissible for member states to bring inputs into the explanation of the procedures of the Treaty and establish a new practice other than it has been foreseen or not resolved in detail by the Treaty.

Procedures of the CCP are submitted to the Treaty on the Functioning of the EU, while competences are set down in Part First (*Principles*), Title 1 (*Categories and Areas of Union Competences*), Article 3, paragraph 1e), norm of competences are established by the Part Five (*External Action of the Union*), Title II (*Common Commercial Policy*), Articles 206 and 207. How to negotiate and conclude the international agreements is provided in the Article 218 of the same Part Five, Title V.

In the complete edition of the Treaty on the Functioning of the European Union the individual Articles has been renumbered: the CCP provisions in the previous agreements has numbers 110 – 116 (Treaty of Rome), 133 (Amsterdam Treaty), 131 – 134 (Nice Agreement). International agreements provisions had been contained in the Article 300.

2. Competences

Lisbon treaty confirms that all key aspects of the external trade are conferred to the **exclusive competences of the EU**. Through them, the common principles of the CCP are ensured. The main common areas are customs tariffs, customs and trade agreements related to the trade in goods and services, trade aspects of the intellectual property rights, 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 subsidies⁶. 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.⁷ In the mentioned two articles, the **external exclusive competences** of the EU respective to the international trade agreements in the mentioned areas has been confirmed by the same as **the internal exclusive competences** for the implementation of those agreements and eventual autonomous measures in trade policy. The exceptions from the internal exclusive competencies are areas, in which the Treaties exclude harmonization of the national legislation of member states. Unanimous action of the Council is required also for agreements that include provisions for which unanimity is required for the adoption of internal rules⁸.

⁴ Lisbon Treaty, Notice No. 2010/C 83/01 of the Official Journal of the EU C83, Volume 53, from 30 March 2010

⁵ Ibid

⁶ Article 207, Treaty on the Functioning of the EU, paragraph 1

⁷ Ibid, paragraph 2

⁸ Ibid, paragraph 4 and 6

In comparing with the previous treaties, the exclusive EU competencies has been extended for the areas of **foreign direct investment, services and commercial aspects of intellectual property rights** that belonged before the 1 December 2009 under mixed competences. Moreover, new goals of the custom union has been added⁹: progressive abolition of restrictions [on international trade] and on foreign direct investment, and the lowering of customs and other barriers¹⁰ It is why some authors (Viale, 2007) and the author of this text conceive that exclusive competences apply through the execution of the customs union also to non-tariff trade barriers, for example environmental standards, consumer protection, labour standards, etc. By this provision, very many areas have been shifted from autonomous national decision under the CCP. It is probable, however, that these impacts will not be underlined until other priorities are resolved, as a great disagreement of the member states could be expected.

Exclusive competences – from the decision perspective - are submitted to the **principle of qualified majority**¹¹. In practice of the CCP, member states and the Commission seek a consensus. Exceptions from the principle of the qualified majority are agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity and 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 them¹². The **unanimity** is required for the mentioned sensitive areas, and also for some types of the agreements on services, intellectual property rights and FDI¹³

The policy making processes and negotiations of agreements within the CCP are now subjects to the **shared decision of the Council and the European Parliament**, while in the previous legislation only the Council decided. The consent of the European Parliament is required also for the adoption of all trade agreements negotiated by the EU (ratification in the areas of services, intellectual property and investment is shifted from national parliaments to the European level, as a consequence of the exclusive and not mixed competences under the Lisbon Treaty).

2.1 Competences in the Field of Investment

The most important extension of the **exclusive competences applies for the foreign direct investment (FDI)**. Until the 1 December 2009, bilateral investment agreements, namely on the investment protection were negotiated and approved at the member states level. As a result of it, these agreements that includes rules for repatriation of the investment and benefits and measures against uncompensated expropriation or nationalization, are state to state different.¹⁴

Investment aspects are included also in agreements that have been signed at the EU level as **mixed agreements**. The most important example is the **Energy Charter** from 1998, which bind also other European countries, Japan, Belorussia, Russian Federation and Commonwealth of Independent States.

⁹ Compare: Article 131, Treaty on the establishment of the European Communities, complete edition, Journal Official of the EU, C 321 from 29 December 2006

¹⁰ Article 206, Treaty on the Functioning of the EU

¹¹ Qualified majority: until 31 October 2014 – 255 votes expressing agreement of the majority of members, taking into account that each member has a certain number of votes (for example: Czech Republic – 12, France, Germany, Italy, Great Britain – 29, Malta – 3). The qualified majority shall represent at least 62 % of EU citizens.

After the 1 November 2014: at least 55 % of members of the Council, at least 15 members, representing at least 65 % of EU citizens. The blocking minority: 4 members of the Council. Further details: see the Treaty on the Functioning of the EU and Protocols to it.

¹² Article 207, paragraph 4

¹³ 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“ (Article 207, paragraph 4). Unanimity is required also for any measure to restrict the free movement of capital.

¹⁴ Problems create also investment agreements between original EU members (15) and actual new members that have been signed in 90ties. As a consequence of the Lisbon Treaty, these agreements should be abolished.

This agreement contains many investment standards and guarantees against uncompensated expropriation, but the non-discriminatory treatment according to the Most Favoured Clause and national treatment principle is limited only to the existed investment.

As mixed agreements should have been concluded also agreements, that have beside others also investment provisions or chapters, but for other parts were under the exclusive competences of the EU, namely **trade agreements**. Examples are to be found in preferential agreements, in association agreements or in the Partnership agreements on cooperation, as well as in newly negotiated agreements. Some commitments as for the market access in financial services have been signed also between EU and Mexico (through the decision of the Joint Committee)¹⁵ by applying the bottom-up approach.¹⁶ The positive list of commitments is a part of the association agreement between the EU and Chile. Investment rules are part of the Partnership agreement of cooperation with Russian Federation that opens market access for investment through the right to establish branch offices for economic activities, but does not specify conditions for investment and leaves them for national legislation of member states. It provides the Most Favoured Clause treatment, what only ensures the same conditions for the European subjects as for their competitors from other countries.

Based on the experiences from negotiations of agreements with investment parts that were problematical due to the mixed competencies, in 2006 the **Minimum platform on investment** has been established and is used in negotiation of the investment parts within free trade agreements¹⁷. This pattern could continue to be used for investment agreements under the exclusive competences of the EU. According to the platform, the commitments for the investment market access should be set down as a positive list; in concrete as a function of the interests of partners and results of negotiations. The model is, however, aimed namely on **liberalization** and does not create comprehensive international investment legislation (Vis-Dunbar, 2007) – it contains only very weak protection of investment, without a protection against expropriation, for example. The platform has been used at Economic Partnership agreements with the ACP countries (Dimopoulos, 2008). It is a part of the free trade agreement EU – South Korea signed in October 2009 and also a part of the negotiations about the Trade and Investment Enhancement Agreement, TIEA, with Canada.

Negotiations on investment at the EU level are going on **in the World Trade Organization**. Although the WTO agreements do not cover investment market access agreement, some important investment commitments could be accepted in the framework of the **General Agreement of Trade in Services** (GATS). The commitments concern namely rules, conditions and limitation to the presence of juridical persons providing services in the given sectors. These commitments are concluded by the EU and are binding to all member states, but individual member states had until now a possibility – due to the mixed competencies – to insert in the schedule of commitments their own protectionism or liberalization of services¹⁸. This approach will not be more consistent with the Lisbon Treaty.

Another WTO agreement that is related to investment is the **Trade Related Investment Measures Agreement** (TRIMS). Goal of this agreement is, however, only to bind members not to implement any investment measure that could be an obstacle for trade. In the annex to the TRIMS are listed „prohibited“ measures, for example a limit of national inputs for the final product from the FDI.

¹⁵ Decision No. 2/2001 of the EU-Mexico Joint Council, of 27 February 2001, implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership Political Coordination and Cooperation Agreement 2001/153/EC, OJ L 070 z 12. March, 2001, s.7

¹⁶ Bottom-up approach, or a positive list or opt-in: commitments are not taken in other sectors or mode of supply than specifically provided. This approach is used by negotiating commitments in services within the WTO.

¹⁷ Note for the attention of the 133 Committee 381/06, 31.7.2006, Minimum platform on investment for EU FTAs – Provisions on establishment in template for a Title on "Establishment, trade in services and e-commerce", http://www.iisd.org/pdf/2006/itn_ecom.pdf

¹⁸ For example, in the horizontal commitments of France, Spain, Italy and Portugal limited presence of juridical persons – services providers at their markets (see the schedule of commitments of the EC, <http://tsdb.wto.org/simplesearch.aspx>). In the revised offer the EU from 2005, in the sector of pipeline transport services, EU closed its market for foreign providers, but Lithuania and Hungary offered liberalization of their markets in this field (Reinisch, 2010).

Investment related could be also rules on intellectual property rights that are established as the minimum standard of protection and enforcement of the intellectual property rights (**Trade Related Intellectual Property Rights Agreement**, TRIPS). Due to the features of the TRIMS and TRIPS agreements that do not allow to the EU member states sign different commitments and the same rules are binding for all of them, the extension of the EU competences on FDI should not be a problem within the mentioned framework.

The shift of competences in FDI provokes a range of questions. It is not clear at all, and it is under a severe discussion of the EU member states and Commission, if the exclusive competences on investment could be explained as the investment **liberalization (market access) as well as its protection**. If it covers only FDI liberalization, the further practice will be simpler than if it covers also the investment protection (expropriation and regime for property rights). Namely, only a few bilateral investment agreements provides for the market access (Reinish, 2010) and it would be relatively easy to renegotiate abolishment of these parts and amends them by the agreement on the EU level or to submit their by further legislative norm to the communitarian rules. As a basis for the communitarian rules could be established the mentioned Minimum platform on investment. The protection of FDI would be consequently a subject in the competences of member states and the existing bilateral agreements could remain in force.

If the exclusive competences are related also to the protection of the investment, than since the 1 December 2009, all the bilateral agreements have not been in compliance with the European legislation (Woolcock, 2010). In this area, a compulsory comment that set down a juridical certainty is necessary. A suggestion in this direction is based on a „grandfathering clause“ for the existing bilateral investment agreements.

Perspectives that would unify investment agreements practice at the EU level reflect exclusive liberalization competences and national protection competences are lying in a smooth transition to the EU bilateral investment agreements with third countries that would replace existing bilateral agreements of member states¹⁹, extend them by the market access rules, but they would be adopted as mixed agreements.

In any outcome of the explanation of the exclusive competences on investment, it is clear that it will be necessary to process at the EU level principles and rules of a „model investment agreement“ that will be a basis for the investment agreements between the EU and third countries. These principles will comprise payment and capital protection, rules for investor’s behaviour and rules for respecting international commitments of the target country²⁰. It is most probable that these rules could be applied for positively listed areas of investment, not for all of them. The model agreement should not provide for worse treatment that is the best in any bilateral agreement of any member state²¹.

Moreover, the internal negotiations about investment agreements could be complicated by the fact that member states consider their bilateral investment agreements as a competitiveness tool that supports the FDI income and outcome.

Investment agreements will be, as other legislation of the CCP, approved by the European Parliament. Also for this reason, to find a common position could be a long process with many flexible transitional solutions. As a catalyst, from the other side, it could serve the interest of third countries to sign with the EU only one investment agreement that would amend the range of different existing agreements.

2.2 Competences on services and intellectual property rights

¹⁹ Investment Promotion and Protection Agreements (IPPAs)

²⁰ Respect for labour standards of International Labour Organization or international environmental agreements, for example.

²¹ Problem here could be bilateral investment agreements that new EU countries closed with the USA before their accession to the EU: These agreements, which commitments are very wide, unilaterally disadvantageous and were adopted under certain pressure from the USA, are now for the interests of the EU restrictive.

Trade in services and trade related aspects of the intellectual property rights (IPRs) were before the 1 December 2009 submitted to a specific regime – they were not explicitly quoted among the common principles and exclusive competences of the CCP, but the same rules applied for agreements on them. The difference was in a requirement of unanimity in adopting certain agreements on these areas. The agreements were, beside it, always mixed as they belonged to the mixed competences of the EU and member states.

It was possible to extend rules of the CCP for negotiation and adoption of agreements on intellectual property generally, it means also for non trade aspects of the IPRs. It created an ambiguous environment as for the competences and disputes on them, what undermined the EU position within negotiations at the WTO, for example (negotiations on a protection of biodiversity, on agriculture, etc).

The shift of competences on services and IPRs to the EU exclusive competences might have eliminated many controversial competency aspects, what should be proved by the compulsory explanation of the Lisbon Treaty. The Lisbon Treaty at the same time confirmed that the agreements on services and IPRs are not more mixed agreements²²

It is to be noted that the transportation and non-trade aspects of IPRs are not included into the exclusive competences. If any of new agreements will contain any of these elements, the agreements should be sign as the mixed ones.

As a result of exclusive competences on services and intellectual property rights, the adoption of a decision in these areas is a subject of qualified majority and not more unanimity as until the 1 December 2009. Moreover, the external competences were completed by the internal ones.

From the perspective of the external competences and practice of negotiations on services and some trade related aspects of intellectual property rights, important changes are not foreseen. These areas as parts of trade agreements have been for almost two decades negotiated by the European Commission for the whole EU. The practical consequence of the shift of competences is only that the member state, which would not agree with the results of negotiations achieved by the EC, could not more appeal the unanimity.

Trade related aspects of intellectual property rights are included not only in multilateral and bilateral trade agreements, but also in agreements of the World Intellectual Property Organization (WIPO) – the actions of EU member states towards these agreements has been only coordinated. By application of the exclusive competences, a certain doubts could occur on the question who leads the negotiations on which part of WIPO agreements. It is evident that the Commission will pursue the level of the EU, what will be related to the „enhancement“ of the EU status in WIPO. Until now, the European Communities were a permanent observer, in some bodies a „special member without a right of voting“, and became a member only to the WIPO agreements where the membership of a non-state subject were conceded²³. Now, with the legal subjectivity and the extension of the EU competences, the EU will accede to all existing WIPO agreements and will become member to the new agreements. These agreements will be, probably, binding for all EU member states, even if they are not members to them. In these cases, the internal competences would apply through implementation of a regulation. These procedures are not yet clear. The first WIPO agreements to which the EU acceded after the 1 December 2009 were WIPO Copyright Treaty and to the WIPO Performances and Phonograms

²² Article 207, in contrast with the Article 133, does not mention mixed competences at all.

²³ EC has acceded to the Protocol of the Madrid Treaty on international trademarks registration, to the Haag agreement on international industrial design registration, to the UPOV, to the WIPO Copyright Treaty and to the WIPO Performances and Phonograms Treaty.

Treaty²⁴. Together with the EU, all EU member states that had not been members to these agreements acceded as well.²⁵

The external competences on IPRs will apply also to the negotiations on the Ant counterfeiting Trade Agreement, ACTA. On this controversial agreement, only qualified majority will have the decisive power, and the only „safety fuse“ against non-required commitments will be the European Parliament. The space for any refusal by the member states has significantly diminished.

Problems could arise also in negotiations on trade in **cultural, audiovisual, health, educational or social services** within the multilateral GATS/WTO agreement or within bilateral agreements when any EU member state does not agree with the Commission's achievements and appeals the unanimity of the Council for the decision, as the commitments of these services could be declared as prejudicing the Union's cultural and linguistic diversity or as disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.²⁶ For the time being, the member states agreed on no GATS commitments that risk disturbing health, educational or social services.

Problems could occur also by exercising the internal exclusive competences as these are applicable not only to autonomous measures, but also to the implementation of agreements. Even if the unanimity of the Council is required for some provisions within services, IPRs or investment agreements, Viale (2007) argues that the competences should not be limited by the rules for voting and that the Article 207 in paragraph 2²⁷ in connection to the paragraph 1²⁸ conferred exclusive internal competences limited only by the paragraph 6 of the same Article²⁹.

2.3. Adoption of international agreements and membership in international organizations

For the negotiations and conclusions of international agreements, the TFEU provides for general rules in the Article 218, without prejudice to the specific provisions of the Article 207. Generally, the initiation of negotiations about international agreement is decided by the Council, on the recommendation of the Commission, or on the recommendation of the High representative for foreign affairs and security policy (treaties on common foreign and security policies. The Council provides also guidelines for negotiations and conclude them. In general, the TFEU does not specifically prescribe who is or could be entitled by the Council to lead negotiations, within the CCP it is always the Commission.

Specific procedure for the negotiation on the CCP agreements is the obligation of the Commission to consult a specific committee established by the Council, while in other areas the specific committee is only a possibility, not an obligatory step. The Council could provide the negotiator (Commission) with guidelines for negotiations.

²⁴ Ratification note has been forwarded to the Director General of WIPO the 14 December 2009.

²⁵ Germany, Great Britain, Austria, Estonia, Dane mark, France, Finland, Greece, Italy, Malta, Nederland,, Luxembourg, Ireland, Portugal, Sweden, Spain.

²⁶ Article 207, paragraph 4

²⁷ „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.“ (Article. 207, paragraph 2).

²⁸ „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.“ (Article. 207, paragraph 1)

²⁹ „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.“ (Article 207, paragraph 6)

The Commission inform on a regular basis the specific committee and the European Parliament; and the Commission together with the Council are responsible for compliance of the negotiated agreements with the internal EU policies and legislation.

Comparing the procedure for negotiations and conclusion of international agreements in the CCP with the preceded legislation (former Article 300), no significant changes have place. The specific committee that assists Commission at CCP negotiations and implementation is the Trade Policy Committee (TPC)³⁰ (before the Committee 133) and working groups³¹. The TPC meets in Brussels at expert level usually once a week (Fridays) and at titular's level once a month. As for the Commission, the respective directorate will remain the General Directorate for Trade, even if other agreements will be negotiated by the European External Action Service.

On agreements, the Council decides by qualified majority with exceptions where unanimity is required.³² As mentioned, within the CCP the agreements where the unanimity is required, are some type of FDI, services and IPRs agreements. Changes are further related to the new role of European Parliament (see part 3 of this text).

The TFEU entitles the EU for cooperation with international organizations (Article 220), namely with the UN and its agencies, European Council, OSCE and OECD. The EU is represented by the High representative and the Commission.

The EU is represented in third countries and at international organizations by the EU diplomatic mission – delegations of the European External Action Service. These delegations will cooperate with national missions and embassies of member states.

In relation to the CCP, the most important is the membership of the EU in the World Trade Organization, where the EU is represented by “one voice”, even if all EU member states are also members to this organization. The EC membership to the WTO is overtaken by the EU.

The CCP is concerned also by the membership in other international organizations as OECD, UNCTAD³³, newly also by the membership in organizations dealing with services (ITU³⁴, UPU³⁵, WHO³⁶, etc.) and with intellectual property rights (WIPO). In these international organizations all negotiations and statements, concerning trade in any aspect, should be presented jointly by the European Commission and decision making process should be submitted to the general procedures as other parts of the CCP.

3. European Parliament

As a consequence of the Lisbon Treaty, the role of the European Parliament (EP) is enhanced through all the procedures, including the area of the CCP. For expressing the role of the EP in co-decision making, the new term is used: “ordinary legislative procedure”.

EP in the CCP decides together with the Council. It has competences to refuse the negotiated agreement as the Council shall adopt the decision concluding the agreement only after obtaining the EP consent³⁷. It is based on the provision of the Article 218, paragraph 6, that provides for the EP

³⁰ http://www.se2009.eu/en/meetings_news/2009/12/15/meet_the_chair_trade_policy_is_governed_by_details

³¹ Working groups on goods of dual use, on trade questions, on commodities, on General System of Preferences, on export credits and territorial groups.

³² Unanimity is a condition for agreements in fields where the EU unanimous decision is required for internal measures, for association agreements, agreements with candidate countries on economic, finance and technical cooperation and for agreements on accession of the EU to the European Treaty on Human Rights Protection.

³³ UN Conference on Trade and Development

³⁴ International Telecommunication Union

³⁵ Postal Union

³⁶ World Health Organization

³⁷ Consent requires a simple majority of EP members proved by voting.

consent for agreements covering fields to which the ordinary legislative procedure applies, what are also CCP agreements. Limitations in this area apply on agreements that have to be implemented into national legislations. It can be assumed that the EP will enhance its influence also at the stage of launching negotiations about agreements: through a discussion on points of departure, conditions and goals of negotiations would be possible to avoid an eventual disagreement in the phase of approval. This scheme became already a part of the revised version of the inter-institutional framework agreement between Commission and the EP that „provides for the Commission to inform the EP (INTA³⁸) during all stages of negotiations including the preparation and negotiation of agreements“ (Woolcock, 2010, p. 12)

Until the 1 December 2009 the EP had been consulted in many cases, but it did not have decisive competences. Even now, the actual competences of the EP do not apply to the area of the initiation of trade negotiations – to launch trade negotiation is a decision of the Council, based on the proposal from the Commission³⁹. The role of the EP is not also to „double“ or to overtake activities of the special committee that is designed by the Council (Trade Policy Committee, TPC, before the 133 Committee) for consultation of all issues of the CCP. With the TPC that is composed of experts from member states, the Commission consults the preparatory stage of any negotiations or implementation of a trade policy measure and has an obligation to provide information to the Committee about the development of negotiations on a regular basis. On the other hand, the TPC is a platform where concerns of member states are discussed and the Commission receives shall reflect them in the process of negotiations. Obligations of the Commission towards the EP are only “one way” procedure: the EP receives information about negotiations, but does not have a right to intervene or to provide a binding consultancy. The relations between Commission and the EP issuing from the Lisbon Treaty could be, however, a good basis for the EP interventions into the negotiation process, but there is always a question if the EP-INTA would have capacities to reflect negotiations in details and at such an expert level as it is accomplished by the TP Committee.

The trade and investment agreements will be the most probably, due to the enhanced competences of the EU, concluded only or namely at the EU level. As a result, agreements will not be more a subject to ratification within national parliaments. In this regard, the role of national parliaments and national governments is decreased⁴⁰ and member states loose a part of their power to influence their external trade policy. In this relation, some authors discuss doubts on legitimacy of the CCP (Viale, 2007). Even if – according to the official explanation of the Lisbon Treaty – the role of national parliaments should be strengthened through the principles of subsidiarity and proportionality⁴¹, these principles do not apply for areas with exclusive competences, including the CCP.

The EP has a new role by implementing the legislation on the CCP, including normative acts related to the implementation of trade and investment agreements. The majority of agreements’ provisions and other measures limiting the framework of the CCP will be implemented into the EU legislation as regulations. The regulations will be adopted by the EP and Council within the ordinary legislative

³⁸ International Trade Committee (INTA) of the EP is dealing with definition and exercising the CCP and external economic relations of the EU, namely in the field of financial, economical and trade relations with third countries and regional organizations; in the field of harmonization of technical norms under the international legislation; in the field of relations to international organizations and organizations for supporting regional economic and trade integration outside the EU; in the field of relations to the WTO including the parliamentary dimension.

³⁹ Article 207, paragraph 3, and Article 218, paragraph 2

⁴⁰ Governments of member states, before the 1 December 2009, analyzed negotiation achievements and provided national argumentation as a basis for the ratification in national parliaments. Now, national governments do not have any power to influence negotiations by this way – the only chance how to say anything on negotiations will be at the Council meetings, but with regard to the rule of qualified majority, the decision could be taken against some national interests. Moreover, the Council meetings are not used to be preceded by sessions of national governments and by an in-depth discussion on all aspects that could lead to an omission of some important economic, social and other views.

⁴¹ Principal of subsidiarity: the goal is to avoid implementation of EU level legislation if it could be more effective to achieve the same aim at national or regional levels. Principal of proportionality: forms of measures are considered and only those are settled which do not exceed limits necessary for the achievement of drafted goals.

procedure⁴². As a consequence, the EP can influence, besides trade and investment agreements, also trade barriers as for example antidumping measures, or unilateral preferences offered to the third countries. The question in this regard opens as of the length of the procedure and namely reaction on anticompetitive practices where the extended time could have negative impacts on the EU industry.

At the EP, the Council (FAC) will be represented by the High representative for foreign and security, in individual committees including INTA, by officers of the Commission.

Conclusion

Lisbon Treaty amended many fields of the EU and member states legislation, practice and activities. Namely, a single legal personality for the EU increased its negotiating power that will help the EU to pursue more effectively its interests at international environment and in international organizations, and to be more visible and transparent for third countries.

The changes on the Common Commercial Policy will be implemented continuously in the procedures of decision making and implementation processes. Even if it is obvious that some areas of economy and trade were shifted to the **exclusive external and internal competences** of the EU, it is still discussed if these changes are related only to the fields explicitly listed in the Treaties (FDI, services, IPRs), or if exclusive competences will influence – through the customs union and abolishment of other barriers – other areas like environmental measures, labour standards, consumer protection, etc.

The submission of mentioned areas to the exclusive competences means also that the requirement for unanimity in the decision process has been abolished (with some exception already mentioned above). The **qualified majority** is now sufficient for almost all decision related to the CCP, including implementation of new measures of negotiation and conclusion of trade and investment agreements.

The exclusiveness means also that the mixed competences for negotiation and conclusion of agreements do not more apply for the “new” areas of the CCP, even not for those rare fields where the unanimity is required. It leads to the practical **elimination of parliaments of member states** from the decision making process in the CCP as a whole, as there will be no space for bilateral investment agreements between a member state and a third country and the trade and investment agreements or their parts will not be more submitted for the national parliamentary approval (ratification).

National governments will still have a certain possibility to influence the process of the CCP, namely through participation of their experts in the **Trade Policy Committee** and through the **Council**, but decisions based on qualified majority can lead to decisions that are not in favour of some member states and even against their interest.

The changes in the decision-making process are also reasons, why the **role of the European Parliament is enhanced**. It is not only that the TFEU established new rules for the EP participation in co-decision making (ordinary legislative procedure), but also that the EP is a unique forum where other than only expert views could be reflected and where the interests of member states could be attempted for being pursued. But once more, as the qualified majority applies, it is a question if the EP can really accomplish the role of a “safety pin” for national interests within the CCP.

The enlarged exclusive competences of the EU in the CCP **decreased de facto the role and power of the EU member states in the external trade and investment policy**. The provisions of the TEU and TFEU on the CCP allows also to be explained more broadly and as a consequence, other politics or their parts risk to be submitted to the exclusive competences

As mentioned above, the whole range of procedures within the CCP is not yet resolved, what provides certain space for member states to pursue their opinions and bring them into the explanatory and practice establishing process. This will be acceptable, however, only until the **„Regulation adjusting**

⁴² The CCP is submitted now to the ordinary legislative procedure according to the Article 207, paragraph 2.

decision-making in the field of trade policy in the light of the entry into force of the Treaty of Lisbon” is not adopted. Based on an already fine-tuned roadmap, the initiative is prepared by the Commission for July 2010⁴³.

Changes embedded in the Lisbon Treaty could have impacts on the **position of the EU within international trade**, namely in the field of negotiation on commitments in multilateral and bilateral trade and investment agreements. These impacts should not be, however, of a great importance, as the EU has been already one of the main players in multilateral negotiations and has had a high influence in international organizations and other international foras.

The analysis of impacts of the Lisbon Treaty to the CCP and related “new” problems that could occur opened also “short term” questions on issues that should be resolved in a “transitional” period from former and actual legislation, it means in the near future. Some questions have risen in relation to the ratification of already concluded Free Trade Agreement EU-South Korea, to supposed changes in the manner of the negotiations with other trading partners about free trade agreements, to the accomplishment of the EU membership in international organization and its consequences for the member states membership, to the statements and activities in this organization, etc. Also some aspects related to the establishment of **the European External Action Service** are not yet settled down in all details, for example the rules on EU representation at international forums. The answers will be provided in the near future, through additional legislative norms and through practice in all procedures.

Bibliography:

- Archick, K. (2008) *The European Union's Reform Process: The Lisbon Treaty*, CRS Report for Congress, Library of Congress, Washington, <http://italy.usembassy.gov/pdf/other/RS21618.pdf>
- Balan, G.D. (2008): *The Common Commercial Policy under the Lisbon Treaty*, Jean Monnet seminar on Advanced Issues of European Law, 6th session, Dubrovnik
- Belfrage E. (2010) : *A Modern Trade Policy for the European Union*, EU Trade Policy Study Group, www.ecipe.org/tpsg/trade-policy-study-group
- Břicháček, T. (2008): *Deset nejtěžších hříčů Lisabonské smlouvy*, <http://www.cepin.cz/cze/clanek.php?ID=821>
- Bungenberg, M. (2009): *Going Global? The EU Common Commercial Policy after Lisbon*, In: Herrmann, C., Terhechte, J.: *European Yearbook of International Economic Law*, Springer Verlag, Berlin Heidelber. ISBN 987-3-540-78882-9
- Bungenberg, M. (2008): *The Common Commercial Policy after Lisbon*, Paper presented at the Hebrew University Jerusalem, http://micro5.msc.huji.ac.il/~iasei/documents/Lisbon_Papers/iasei_bungenberg.doc
- Cabrera Diaz, F.: *EU trade negotiations with India stumble over human rights, proliferation issues*, International Institute for Sustainable Development, 2007, www.iisd.org/investment/itn, http://www.iisd.org/pdf/2007/itn_mar16_2007.pdf
- Cash, B., McConalogue, J., Vasconcelos, M., Laughland, J. (2008): *The Lisbon Report: An analysis of the Lisbon Treaty with specific amendments and briefings for the House of Lords*, European Foundation, www.europeanfoundation.org
- DA CONCEICAO-HELDT, E. (2009): *Delegation of Power and Agency Losses in EU Trade Politics*, EUI RSCAS 2009/18, European University Institute. ISSN 1028-3625

⁴³ http://ec.europa.eu/governance/impact/planned_ia/docs/90_trade_lisbon_omnibus_en.pdf

- Dimopoulos, A. (2008) : *Shifting the emphasis from investment protection to liberalization and development: The EU as a new global actor in the field of foreign investment policy*, <http://www.asil.org/files/ielconferencepapers/dimopoulos.pdf>
- Directorat General – External Policies of the Union (2008): *The Impact of the Lisbon Treaty on ESDP*, briefing paper, European Parliament
- Driga, I., Nitá, D. (2008): Considerations Regarding the Common Commercial Policy of the European Union, University of Petroșani, Romania, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317630
- Duke, S (2008): *The Lisbon Treaty and External Relations*, EIPASCOPE No.1, http://www.eipa.eu/files/repository/eipascope/20080509183907_SCOPE2008-1-3_SimonDuke.pdf
- Eeckhout, E. (2009), *The Lisbon Treaty and External Relations*, Centre of European Law UKAEL Seminar, www.kcl.ac.uk/cel
- INTA:
<http://www.europarl.europa.eu/activities/committees/homeCom.do;jsessionid=9A73E5984CDBD623034183F391A502E7.node2?language=CS&body=INTA>
- Koeb, E. (2009): *The Lisbon Treaty – Implications for ACP-EU Relations*, Trade Negotiations Insights, www.ictsd.net/news/tni a www.acp-eu-trade.org/tni
- Lisabonská smlouva*, konsolidované znění, Úřední věstník Evropské unie, české znění, Oznámení č. 2008/C 115/01, 9. května 2008, ISSN 1725-5163
- McNamara, S. (2009): *The Lisbon Treaty: Implications for Future Relations Between the European Union and the United States*, Testimony before: Committee on Foreign Affairs Subcommittee on Europe, U.S. House of Representatives, <http://www.heritage.org/research/Europe/tst12152009a.cfm>
- Legal texts (*Treaty on EU, Treaty on the European Communities, Treaty on Functioning of the EU*), EUR Lex, Access to European Union law, <http://eur-lex.europa.eu/en/treaties/index.htm>
- REINISCH, A. (2009): *Protection of or Protection Against Foreign Direct Investment?* In: Herrmann, C., Terhechte, J.: *European Yearbook of International Economic Law*, Springer Verlag, Berlin Heidelberg. ISBN 987-3-540-78882-9
- Tanugi, C. L. (2008): *Une stratégie européenne pour la mondialisation*, Rapport en vue de la présidence française du conseil de l'Union Européenne, Euromonde 2015, www.euromonde2015.eu/IMG/pdf/RAPPORT_EUROMONDE_2015.pdf
- European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN>
- Viale, F. (2007): *External trade policy and the Lisbon Treaty: An enforcement of liberalisation of European commercial policy*, ATTAC France
- Vis-Dunbar, D. (2007): *European Govts remain split over extent of investment provisions in EU FTAs*, International Institute for Sustainable Development, [z www.iisd.org/investment/itn](http://www.iisd.org/investment/itn), http://www.iisd.org/pdf/2007/itn_mar16_2007.pdf
- Woolcock, S. (2008): *The potential impact of the Lisbon Treaty on European Union External Trade Policy*, European Policy Analysis, Issue 8, Swedish Institute for European Policy Studies
- Woolcock, S. (2010): *The Treaty of Lisbon and the European Union as an actor in international trade*, ECIPE Working Paper r, No. 01, www.ecipe.org