The need for democratisation
The European Union’s trade and investment policy since the Lisbon Treaty.

Trade policy as an exclusive EU competence

The central aim of the Lisbon Treaty is to strengthen EU Common Commercial Policy (CCP). Competences have then been shifted towards Brussels to the detriment of nation states. Along with trade in commodities, international trade in services and the protection of intellectual property rights are now also exclusive EU competences. This enables the EU to make relatively autonomous decisions on provisions and treaties made with other countries. Trade agreements affecting sensitive areas such as trade in cultural and audiovisual, social, educational or health services no longer require ratification by member states. Only “mixed” trade agreements that affect spheres of competence common to the EU and its members must still be ratified by both Brussels and the member states themselves. This includes treaties which contain trade policy provisions or agreements on political cooperation such as justice and internal security.

While this considerably limits the competences of national parliaments, it also means the European Parliament (EP) gains power. From now on the ratification of trade agreements depends on its approval. Still, the bottom line is that this process of centralisation reduces democracy and that this cannot be offset by a stronger involvement of the European Parliament. This is particularly important as the EP is only able to vote on the final results of negotiations and is not involved in the negotiations themselves.

Furthermore, general awareness and a capacity for discourse among the European public has been lacking until now. Both are needed if European institutions and the decision making process are to be critically monitored. If and when decisions taken at the EU level are put to national debate, this is generally done either in a limited manner or very late in the process. In addition, the individuals responsible in Brussels are much less the focus of public attention than their member state counterparts: does anyone in Germany know the name of the European trade commissioner? At the same time media coverage is generally seen through the narrow viewpoint of a single member state and if a common European perspective is present, it is a rudimentary one at best.

Despite the fact that decisions made by the Council of Ministers are now published and Council meetings are filmed, in practice not all meetings are open to the public. If national parliaments or citizens are granted access to the relevant documents, this often happens months after they were produced. This is not the way to achieve real transparency, democratic controls or involvement in the decision making process.

Strengthening the European Parliament?

The co-decision procedure which grants the EP and the Council of Ministers equal rights within the legislative procedure is referred to in the Lisbon Treaty as the ‘Ordinary Legislative Procedure’ of the Common Commercial Policy. Previously the EP was only consulted by the Council and informed of its decisions. Now the EP is able to actively participate in some areas of the legislative process, such as preventing trade agreements with non-member states or by proposing amendments to certain import and export regulations.

However, the EP’s right to co-decision is limited to procedures which define the framework for the implementation of the Common Commercial Policy such as the Generalized System of Preferences or anti-dumping measures. In practical areas of trade policy (such as specific anti-dumping measures against...
non-member states) the only requirement is that parliament be informed. This at least was made legally binding in the Lisbon Treaty.

The EP then still has no direct right to participate in contractual trade policy. In the beginning of contractual negotiations about a new trade agreement with a non-member state or group of states, the Commission submits a proposal to the Council as the Commission has the exclusive right to initiate trade proposals. On approval by the Council of Ministers, the Council issues a negotiating mandate to the Commission. The actual negotiations are undertaken by the Directorate-General for Trade as part of the Commission. This is done in close consultation with the Trade Policy Committee, (TPC) previously known as the Article 133 Committee. The TPC is appointed by the Council, holds weekly meetings and consists of representatives of member states and members of staff from the Commission.

A new provision in the Lisbon Treaty is that additional approval from Parliament is now required. Accordingly, the EU Commission and Council of Ministers submit the negotiation results to the EP which votes on the proposal. It is approved or rejected by simple majority. Finally the Council of Ministers also vote on the proposal, usually on the basis of a qualified majority.

Parliament only has a real possibility to intervene once negotiations have been completed. It is unlikely that an agreement would fail due to a lack of support in the EP after undergoing several years of intensive negotiations. Whereas the Commission and Council are linked via the TPC and through a multi-level voting process, Parliament stands mainly on the periphery. The only requirement is that it should be informed by the Committee on International Trade (INTA). As the Parliament is not represented in the influential TPC, the Common Commercial Policy’s lack of democratic control will remain a problem in the future.

**Investment policy as an exclusive EU competence**

Besides the regulation of trade in services and intellectual property rights, EU competences now also fully encompass the regulation of investment. Prior to the Lisbon Treaty the EU negotiated regulations on market access for investors with non-member states according to the framework provided by existing trade agreements. The Lisbon Treaty leads to a substantial extension of EU competences in investment protection. Investment protection agreements (Bilateral Investment Treaties or BITs) have until now been bilaterally agreed upon by member states.
BITs grant investors extensive rights without imposing obligations upon them. An example of this is investor-to-state arbitration, which enables private investors to take states before courts of international arbitration. This has important implications and may even endanger state sovereignty. For example, South Africa revised a law promoting equal economic opportunities for black citizens after being sued for expropriation by Italian investors. Elsewhere transnational companies also undermine environmental protection and labour laws in this way. Furthermore, the courts of arbitration (ICSID, UNCITRAL, etc.) are not required to report on their actions and there is no right to public participation. Transparency and a broad public discussion are clearly unwanted. Although investor-to-state arbitration deals with areas in which public interest is at stake, arbitration is undertaken far from public scrutiny. It is of little help that the Lisbon Treaty has shifted investment competences from national governments to the EU. Where democracy is most needed, it is hardest to find.

**Conclusion: no substantial improvements**

According to Brussels and Berlin, giving the EU the exclusive competence for Common Commercial Policy ensures European interests are strongly asserted at the global level. It remains open as to whether the interests they intend to assert are public or economic ones. Either way, the Lisbon Treaty should not be understood as a step towards the democratisation of European trade policy.

In principle, extending the EP’s competences is to be welcomed if this enables Parliament to exert control over the Council and Commission. Similarly, the Lisbon Treaty has led to improvements in information rights and transparency. However, these improvements do not go far enough as in many areas the Parliament merely takes on the role of an (informed) observer. If Parliament refuses to accept these limitations, which in practice mean rubber-stamping a result which has already been accepted by all other parties, it will have to fight for an extension of its competences.

In the foreseeable future the Lisbon Treaty will neither solve the problem of the EU’s lack of democracy nor that of the Common Commercial Policy. Moreover it is likely that commercial policy debate will become less important at the national level, without this leading to a stronger discourse at the pan-European level. The chances for democracy in EU commercial policy have suffered since the ratification of the Lisbon Treaty.

Still, the conformity of the Common Trade Policy to the principles and objectives of EU foreign policy means that for the first time European commercial policy need no longer be orientated primarily around economic liberalisation. Instead it is linked to a catalogue of values, which alongside the creation of an internal market based around free and undistorted competition, also includes environmental protection, social justice, cultural diversity and worldwide poverty reduction. These objectives have yet to be implemented, but if they are to be achieved the EU will no longer be able to sidestep the real democratisation of its commercial and investment policy.

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