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EU Trade and Investment Policymaking After the Lisbon Treaty

The ratification of the Treaty of Lisbon[1] will have a number of potentially important implications for decision-making in EU[2] external trade and investment policy. This article summarises the main changes and discusses some key implementing measures that will shape the medium to long-term impact of the treaty changes.

There will be three main changes with the Treaty of Lisbon (ToL): an extension and clarification of EU competence, a greater role for the European Parliament (EP) and the inclusion of external trade and investment policy, along with foreign and security, environment and development policies and humanitarian assistance in the now unified European External Action.

The Main Treaty Changes

Extension and Clarification of EU Competence

For many years there has been a debate over the scope of EC exclusive competence in the field of trade. At issue has been whether all trade in services and trade related aspects of intellectual property rights (TRIPs) on which the EU negotiates in multilateral and preferential agreements should come under exclusive EC competence. In the Maastricht, Amsterdam and Nice Intergovernmental Conferences (IGCs) there were only minor changes made to the treaties, so that services and TRIPs remained mixed competence, in other words part EC and part member state competence. The draft Constitutional Convention favoured a simplification and extension of what is now to be called EU competence and this was carried over into the Treaty of Lisbon. Art 207 TFEU therefore brings services, TRIPs *and* foreign direct investment (FDI) into exclusive EU competence.

Exclusive competence means that the legal basis for the adoption of agreements will in future be a qualified majority vote (QMV) in the General Affairs and External Relations Council (GAERC) not unanimity for some services and TRIPs as in the past. It also means that the consent of the European Parliament by a simple majority of Members of the European Parliament (MEPs) will in effect replace ratification by national parliaments for these policy areas.[3] In practice the changes will not be dramatic. The Commission has negotiated for the EU on all services and TRIPs since the 1980s and consensus has been the practice for decisions on major trade agreements for many years regardless of what is required on paper. On ratification, member state parliaments will only be asked to ratify small sections of agreements, with the bulk being ratified by the EP, but member state ratification has been largely a rubberstamping exercise for years. Essentially for political reasons the ToL (Art 207(4)) also provides for the use of unanimity in decision-making when it comes to the so-called sensitive sectors of audio-visual, health, education and social services. The wording suggests that this does not mean an automatic veto right for member states, but an opportunity to use unanimity where trade agreements "risk prejudicing the Union's linguistic and cultural diversity" or "seriously disturbing the national organisation of [health, education and social] services and prejudicing the responsibility of Member States to deliver them". As EU policy currently precludes making any commitments in the GATS in these sensitive sectors the degree of ambiguity over the use of unanimity is unlikely to be tested in any multilateral negotiation.

By far the most important extension of EU competence is the inclusion of foreign direct investment (FDI) in exclusive EU competence (Art 207(1) TFEU). To date investment has been an area of mixed competence. The EC has negotiated agreements covering investment in services, such as in mode 3 (establishment) of the GATS agreement, and some

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1 All references to the ToL articles are to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) Official Journal, C 115, 9 May 2008, 2008/C 115/01.

2 The ToL integrates the previous three pillars of the European Union, so that the correct legal term is no longer European Community but European Union common commercial policy.

3 The ToL will remove mixed competence for almost all trade agreements. The only remaining areas of mixed competence will be those relating to non-trade-related intellectual property rights and issues linked to transport policy.

other aspects of investment liberalisation such as the GATT Trade Related Investment Measures (TRIMs) agreement that prohibits certain investment performance requirements, but member states have negotiated bilateral investment treaties (BITs) to protect fund repatriation and against unfair or uncompensated expropriation. The retention of member state competence for FDI has meant that unlike the USA the EU has not included comprehensive investment provisions covering liberalisation and investment protection in any preferential trade agreements. This significant extension of EU competence raises some important questions concerning the implementation of the treaty changes (see discussion below).

Increased Role for the European Parliament

The ToL enhances the formal position of the EP in EU external trade and investment policy in three main ways. First, it grants the EP joint powers with the Council to adopt trade legislation. Before the ToL the Council had wide powers to adopt regulations governing trade with the EP included only through the non-binding consultation procedure. Art 207 (2) states that the "EP and Council acting by means of regulations in accordance with the ordinary legislative procedure (OLP) shall adopt the measures defining the framework for implementing the common commercial policy" (i.e. external trade). The OLP is the new term for co-decision making. The International Trade Committee (INTA) and the EP in general will now share powers with the Council to adopt EU legislation on trade instruments such as anti-dumping, safeguards and the Trade Barriers Regulation (TBR) as well as autonomous trade measures such as the EU's Generalised System of Preferences (GSP) scheme. These new powers cover what might be termed the overall legislative framework, not detailed modifications for which there are provisions in Art 218(9) for the delegation of powers to the Commission, or the application of trade instruments, such as anti-dumping (see discussion below).

Second, the role of the INTA Committee/EP in the process of negotiation is enhanced. Article 207 (3) ToL requires the Commission to *report* regularly to the special committee of the European Parliament (INTA) on the progress of negotiations as it does to the Trade Policy Committee (ex Article 133 Committee consisting of senior member state trade officials).[4] The wording of the treaty does not give INTA the same status as the Trade Policy Committee, which will *assist* the Commission in negotiations. These provisions largely codify existing practice in the sense that the Commission has already been providing the INTA with written briefs on negotiations on a par with those provided to the Article 133 Committee. It remains to be seen, however, how the role of the EP and INTA will grow. Having the same information does not mean that the INTA will be able to engage in negotiations in the same detail as the Trade Policy Committee, which has more expertise, institutional memory and meets every week rather than once a month as in the case of the INTA, but there is the potential for INTA to play a much more important role than it has in the past.

A key issue determining the future influence of the EP is whether it will have any say in EU negotiating objectives. Prior to the ToL these were determined exclusively by the Council with the EP only able to pass resolutions that were not binding on the Council or the Commission. This severely limited the credibility of EP control over trade policy. The EP had power to grant its assent to most trade – and all association – agreements but only after all the member states in the Council and all the EU's negotiating partners had agreed to the deal. In these circumstances a negative vote by the EP was simply not a credible option. The ToL does not grant the EP powers to authorise the Commission to engage in trade negotiations; these are retained by the Council (Arts 207 (3) ToL and 218 (2) ToL (ex Article 300 TEC)). So there is no US Congress-like power for the EP to authorise and thus set the objectives of trade negotiations. But the EP is seeking to get some say in setting the EU's objectives as part of the negotiations on a new framework agreement between the EP and the Commission (see below).

The third change with the ToL is the enhanced role of the EP in ratifying trade agreements. Article 218 (6) (a) (i) to (v) sets out the conditions that have to be met to require the consent[5] of the EP, by a simple majority of MEPs, before the Council can adopt a decision, by QMV, concluding a trade agreement. These are similar to the conditions requiring EP assent before the ToL and include association agreements, agreements establishing a specific institutional framework, and agreements with budgetary implications. The ToL adds the further condition for consent when the OLP applies to the policy area concerned, which by virtue of Art 207(2) (see above) is the case for external trade and investment. Again the ToL is to some degree codifying existing practice here in that the EP has been asked to grant its assent to major trade agreements, but the ToL makes clear that the consent of the EP will now be required for all trade agreements.

4 The INTA Committee was only established during the 2004-9 Parliament; before this trade was covered by a broader committee whose responsibilities included industry, energy and research. INTA was established with the prospect of a greater role for the EP in trade in mind, but as a new committee with hitherto limited powers it has remained a rather junior committee, which has hampered its effectiveness up to now.

5 In the ToL the term "consent" is used, where previously the EP gave its assent.

Inclusion of Trade under the Common Heading of External Action by the EU

The ToL dispenses with the formal division between the three pillars of the European Union and, at least on paper, creates a unified set of objectives and decision-making procedures for all EU external policies. Article 205 (ToL) (Part Five, External Action) brings EU trade and investment policy into this unified European external action, so that trade policy is henceforth to be conducted within the "context of the framework of principles and objectives of the EU's external action" (Article 207(1)). These include general aims such as support for democracy, rule of law and human rights as well as the slightly more specific aims of sustainable economic, social and environmental development, the integration of all countries into the world economy (including through the progressive abolition of restrictions on international trade), the progressive improvement of the environment and sustainable management of global resources and good global governance (Chapter 1 of Title V of the Treaty on European Union). To date EU external trade policy has, of course, served broad foreign policy or strategic objectives, such as through the negotiation of Association Agreements with the EU's near neighbours in order to promote economic and thus political stability within the wider European security area. The EU has also made use of trade agreements to strengthen relations with specific countries or regions. But trade has been used less in the pursuit of specific short-term foreign policy objectives. The question is whether the ToL will mean trade becomes more of an instrument of EU foreign policy. The inclusion of trade and investment with other policies also raises issues concerning the coherence of EU policies; for example, will there be more pressure for trade to serve development or environmental policy objectives?[6]

Some Immediate Issues Concerning Implementation

The core of EU policymaking has been the relationship between the Commission and member states in the Council and Art 133 Committee. This has become well established over the past half century with all parties involved sharing expectations and common understandings of how decisions are made and negotiations conducted. These well established practices and norms are not likely to change overnight and it must be expected that they will change only progressively. However, there are a number of important issues concerning implementation that will have a bearing on the impact of the treaty changes. These concern the treatment of investment, who controls the Commission's application of commercial instruments (i.e. anti-dumping), the EP's ability to shape EU negotiating aims and where in the EU institutions the institutional memory and trade expertise will reside.

Investment: Grandfathering Existing BITs and Developing an EU policy

Art 207 TFEU simply includes FDI in EU exclusive competence. In trade and investment agreements one can make a distinction between liberalisation, such as binding commitments to pre-establishment national treatment, and investment protection, such as for funds transfers or in the case of expropriation. If exclusive competence covers investment protection and liberalisation, then most existing member state BITs have been illegal under EU law since the entry into force of the ToL on 1 December 2009. Although some may argue that only investment liberalisation is covered, a more realistic interpretation is that both liberalisation and protection are covered. Given the danger of litigation challenging the legality of member state BITs, EU legislation, using the Ordinary Legislative Procedure, is likely to be necessary to "grandfather" existing member state BITs.

In the medium term the EU will also need to develop an EU model investment agreement to be applied in any future EU BITs or investment chapters in free trade agreements.[7] The EU has been developing a common platform on investment for some time and has concluded a number of FTAs with investment chapters. But a comprehensive EU will require more and in particular a balance between investment protection to match the existing member state BITs and enough scope for an EU right to regulate in policies such as the environment. This will not be an easy balance to find, especially given the history of opposition to some aspects of investment rules in the EU.[8] A common EU policy on investment is therefore likely to take some time, but if the EU wishes to shape international investment rules it will want to include comprehensive rules in some of the agreements currently being negotiated, such as the EU-Canada FTA negotiations and perhaps even the EU-ASEAN or India negotiations.

6 The issue of coherence has featured in literature on EU foreign policy and some policy fields such as development and, increasingly, the environment. Coherence has been less prominent in the discussion of EU external trade policy. This is probably because there is less difficulty achieving vertical coherence (between the member state and EU levels) given the exclusive EC competence for much of trade. The question of horizontal coherence between trade and other policies, (e.g. development, climate change) is, however, becoming more important.

7 Member state BITs have generally been based on model agreements. The USA has also used a model BIT, dating from 1982, as the basis for its BITs and for the investment chapters in bilateral FTAs.

8 A report by a French MEP Catherine Lalumière contributed to the collapse of the Multilateral Investment Agreement (MAI) in 1998 on the grounds that investment protection provisions combined with investor-state dispute settlement encroached too far into national sovereignty (right to regulate) but did not go far enough in obligations on investors (i.e. on environment and labour standards).

Implementation of Commercial Instruments: Revision of Anti-dumping Legislation

Under the ToL the EP will share powers with the Council on trade legislation, but Article 291 (2) grants the Commission implementing powers for legally binding acts. In the most sensitive area of anti-dumping the Commission is currently responsible for determining the dumping margin, injury as well as the so-called Community interest, and can impose preliminary anti-dumping duties. But the Council (in the shape of the Anti-dumping Committee) votes on the adoption of definitive dumping duties by a majority of member states voting. Anti-dumping is thus one of the very few areas where voting rather than consensus is used on trade issues. Such implementation by a member state vote appears to run counter to the spirit, if not the letter, of the ToL that seeks to establish a standard approach to implementation. This is an area of contention between the Council and the European Parliament. Article 219 (3) states that the EP and Council shall lay down how the member states control the Commission when it exercises its implementing powers, so the question is whether the member states will give up some power and whether the EP gains some say in how the anti-dumping and other commercial instruments are implemented. This issue must be addressed at the latest when the existing anti-dumping regulation comes up for revision. The EP is therefore pressing for a timetable for revised legislation because it wishes to exercise its joint powers. The Council can be expected to be in less of a hurry.

An EP Say in Negotiating Objectives: the Revised Inter-institutional Framework Agreement

It was argued above that a key question in how the role of the EP/INTA develops is whether the EP will have any say in shaping negotiating objectives. In its opinion on the EP's role and responsibilities implementing the ToL, the EP's International Trade Committee (INTA) argued for a means of establishing preconditions for the granting of the EP's consent through a revision of the Framework Agreement between the Parliament and the Commission.[9] Article 19 of the 2004 Framework Agreement provided for the Commission to inform the EP (principally the INTA) during all stages of negotiation including the preparation and negotiation of agreements. The framework agreement set out the aim of ensuring that the EP could make its views known in good time. In return the EP undertook to ensure confidentiality of information so as not to advertise the EU's negotiating positions to its negotiating partners. When a new framework agreement is negotiated, the EP is therefore likely to press for equivalent if not stronger wording that will allow it to have some influence on negotiating objectives. If it succeeds in this the INTA will have something to work on as it seeks to develop a stronger say in EU trade and investment policies.

9 European Parliament 2008/2063(INI), 27 May 2008.

Trade as Part of the EU's External Action

In terms of treaty provisions Article 218 (ToL), which provides the procedure to be followed for negotiating all international agreements, states that the Council will nominate either the Commission or the High Representative for Foreign and Security Policy (HRFSP) as negotiators. Where the agreement relates exclusively or principally to common foreign and security policy this would clearly be the HRFSP, but what about trade? Article 218 (1) is without prejudice to the specific provisions laid down in Article 207 (ex Art 133 TEC), which deals with external trade and states that the Commission will negotiate. Consequently, one must expect that the Commission will continue to be the EU's negotiator on the substance of trade.

Just what role the HRFSP will play in shaping the balance between trade and other objectives will depend on how the relationship develops between the HRFSP, the European External Action Service (EEAS), the Commission and the Council. One indicator of how things might develop is where the Commission staff working on trade will sit. A decision appears to have been taken that they will stay in DG Trade and not move to the EEAS. The institutional memory and technical expertise that is central to trade policy will therefore reside in DG Trade

Conclusion

The ToL brings a number of changes in the field of EU external trade policymaking. More exclusive EU competence can be expected to strengthen the EU presence in trade as will the extension to include FDI. Some of the changes constitute a codification of what has become practice, such as closer consultation with the EP. One must await the implementation of the treaty to see the real effects, and this article has pointed to some key decisions that will shape the outcome. In general the expectation must be that change will be progressive because of the well established nature of decision-making procedures based on the close cooperation between the Commission and member states in the Trade Policy Committee that have evolved over half a century. The role of the EP, however, seems destined to increase, which means that all actors will now have to take it more seriously. The HRFSP and the Council will continue to make key political decisions, such as when to authorise the Commission to negotiate, where (multilateral or bilateral) and with whom, but with the institutional memory and expertise on trade remaining where it is one must expect DG Trade to shape the content of trade policy.