

THE LISBON TREATY AND CHANGES IN THE LEGAL RULES ON THE COMMON COMMERCIAL POLICY LISABONSKÁ SMLOUVA A ZMĚNY V PRÁVNÍM RÁMCI SPOLEČNÉ OBCHODNÍ POLITIKY

Martin JANKŮ *

I. Introduction

The Lisbon (Reform) Treaty of 2007 (LT) brought important changes concerning the decision-making in the European Union (EU). These include also the Common Commercial Policy (CCP) and the decision-making processes related to it. Compared to previous regulation, it defines explicitly the types of the EU competences (exclusive, shared, supporting, coordinating or complementary). From the perspective of the CCP, the changes concern mainly its ranging among the

competences of EU external policies, the scope of exclusive competence and strengthening the role of the European Parliament and the involvement of national parliaments.

The changes of the legal rules for CCP deserve special attention for at least two reasons: first, external trade policy is still the most important field of the EU external relations in practical terms⁽¹⁾. The EU is one of the key players of the multilat-

POPOULOS. A. 2010. The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy. In EFA Rev, vol. 15, no. 153.

Abstract (EN)

The EU Lisbon Treaty 2007 (LT) brings some changes for the common commercial policy (CCP) and the decision-making processes related to it. CCP is newly included in the one area with all the external activities of the EU, with foreign and security policy, international environmental policy, development aid and economic, financial and technical cooperation with third countries. The fundamental areas of the CCP have been expanded to include foreign direct investment, services and trade-related aspects of intellectual property rights. The scope of exclusive competence for external negotiation of agreements has been confirmed. The changes affect the role of the European Parliament and also the functioning of the European Council, the Council, and competences of the High Representative for Foreign Affairs and Security Policy and the European External Action Service. Together with these changes, there will be also changes in procedures within the European Union. A number of aspects of the decision-making process are not yet entirely clarified, and only the practice of the participation of the EU Member States and the European Parliament in the formation of the common commercial policy will bring more meaningful conclusions. The changes brought by the LT will affect not only the extent of the influence of EU Member States on the common commercial policy, but they can also affect the role of the EU in the context of international trade, particularly in the area of negotiating commitments and rules of multilateral and bilateral trade and investment agreements.

Abstrakt (SK)

Lisabonská smlouva přináší některé změny pro společnou obchodní politiku (CCP) a rozhodovací procesy s ní spojené. CCP je nově zařazena do jedné oblasti se všemi vnějšími činnostmi EU, tedy se zahraniční a bezpečnostní politikou, mezinárodní environmentální politikou, rozvojovou pomocí a ekonomickou, finanční a technickou spoluprací se třetími zeměmi. Základní oblasti CCP byly rozšířeny o přímé zahraniční investice, o služby a obchodní aspekty práv k duševnímu vlastnictví. Byly potvrzeny externí výlučné kompetence EU ke sjednávání dohod v oblastech CCP i interní výlučné kompetence ohledně jejich implementace. Změny se týkají také role Evropského parlamentu. Dotčeny jsou i fungování Evropské rady, Rady, činnost Vysokého představitele pro zahraniční věci a bezpečnostní politiku a Evropská služba pro vnější činnost. S těmito změnami dojde i ke změně procedur uvnitř Evropské unie. Řada aspektů rozhodovacího procesu není prozatím zcela vyjasněna a teprve praxe účasti členských států EU a Evropského parlamentu na formování společné obchodní politiky přinese jednoznačnější závěry.

Změny zakotvené v Lisabonské smlouvě ovlivní nejen rozsah vlivu členských států EU na společnou obchodní politiku, ale mohou ovlivnit také postavení EU v rámci mezinárodního obchodu, především v oblasti sjednávání závazků a pravidel v mnohostranných i bilaterálních obchodních a investičních dohodách.

Keywords (EN)

EU Common Commercial Policy, Lisbon Treaty, foreign direct investments, external and internal exclusive EU competences

Kľúčové slová (SK)

Společná obchodní politika EU, Lisabonská smlouva, zahraniční přímé investice, externí a interní výlučné kompetence EU

* University of Finance and Administration

eral trading system and increasingly pursues bilateral and regional trade agreements with strategic partners throughout the world⁽²⁾. Second, the debates about the scope, nature and instruments of the common commercial policy, as well as the changes introduced already by the Treaty reforms of Amsterdam and Nice suggest that this policy field is characterised by a set of fundamental legal and political disputes⁽³⁾. They concern the distribution of competences between the Union and its Member States, the powers and functions of the EU's institutions and the values and policy goals underlying the formation of the common commercial policy.⁽⁴⁾

II. Material and Methods

The goal of the presented paper is to draw attention to some key rules and principles of the CCP. After the specification the scope and aims of this policy will be analysed by the changes of external trade policy focusing on principles and objectives, competences and institutions. It begins by analysing the CCP in the framework of the Treaties and then moves to a discussion on the impact of both substantive and procedural reforms of the CCP introduced by the Treaty of Lisbon. Within the analysis data of secondary nature were used. We used the method of functional analysis, as well as the method of legal formalistic comparison.

III. Results and Discussion

Common Commercial Policy as Included in the Treaties

Principles, and the implementation of the CCP are laid down both in the Treaty on European Union and the Treaty on the Functioning of the EU⁽⁵⁾. CCP is the policy included into the package of all external activities of the EU, i.e. with 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 the European Union (Part Five: the Union's External Actions, Title 1 – General Provisions on the Union's External Action).

The inclusion of CCP under external actions raises the question whether the foreign, security and other external policies can (and may be used in order to achieve the trade policy objectives). Although the external actions of the

EU are set in no hierarchy in any way, we can presume – in connection with the current practice – that the objectives concerning the foreign and security policy will be, as a rule, superior to the commercial and the external trade policy will be used to promote foreign policy and other EU goals rather than vice versa.

General provisions on the external action are concerned with the principles developed in the course of establishment, development and enlargement of the EU. They highlight developing relations and partnerships with third countries, international regional or global organizations and engaging in the activities of the United Nations. According to the general provisions, the EU shall define and implement common policies and actions, and work towards the reaching of a high degree of cooperation in all fields of international relations. The Trade policy is directly connected with the aim “to encourage the integration of all countries in the world economy, including through the progressive abolition of restrictions in international trade”, indirectly also the objective “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 the eradication of poverty”. CCP is also influenced by the principle of consistency between the different areas of external action and between these areas and the other policies.

Due to the inclusion of the CCP under the external action of the EU is the Foreign Affairs Council (FAC), that creates the external action of the Union in accordance with the strategic guidelines defined by the European Council and ensure the consistency of Union action⁽⁶⁾. The Council shall, jointly with the European Parliament's legislative and budgetary functions, carry out policy-making and coordinating functions (Title III TEU). Although Council deliberations F AC leads the High Representative, in cases where the Council dealt with issues related to the CCP, it leads the presiding MS.

Competences and Decision Making in CCP

The LT confirms that all key aspects of external trade fall into to the exclusive powers of the EU, through that, uniform principles of the CCP are guaranteed. Among the essential common areas belong the changes in tariff rates, conclusion of tariff and trade agreements relating to trade in goods and services, trade-related aspects of intellectual property, foreign direct investment, unification of liberalization meas-

⁽²⁾ BUNGENBERG, M. 2010. 'Is the EU Going Global? The EU Common Commercial Policy in Perspective'. In *European Yearbook of International Economic Law*, vol. 12, p.126.

⁽³⁾ EECKHOUT, P. 2012. *EU external relations Law*. Oxford University Press, Oxford-New York. ISBN 978-0-19-960663-4.

⁽⁴⁾ KNEZEWICZ, M. 2012. 'The Reform of the Common Commercial Policy'. In: Eeckhout, P. 2012. *European Union Law*. Oxford University Press, Oxford. ISBN: 978-0-19-960663-4, p. 2-2.

⁽⁵⁾ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007)

⁽⁶⁾ WOOLCOCK, S. 2008. *The potential impact of the Lisbon Treaty on European Union External Trade Policy*. In *European Policy Analysis*, Issue 8, Swedish Institute for European Policy Studies.

⁽⁷⁾ For example, during the negotiations about the Free Trade Association (FTA) with India, the EU conditioned trade preferences by the clause on human rights and non-proliferation of nuclear weapons.

⁽⁸⁾ The first FAC meeting following the entry into force of the Lisbon Treaty, dealing exclusively with trade issues, took place on 10. September 2010 and the Ministers approved the continuation of the negotiations on a free trade agreement with Malaysia and the negotiations on the protection of geographical indications in China

ures, export policy as well as trade protection measures such as anti-dumping and anti-subsidy customs (Art. 207(1) TFEU). The European Parliament and the Council adopt in the ordinary legislative procedure regulations defining the legal framework for implementing of the CCP (Art. 207(2) TFEU).

The above paragraphs confirm thus the exclusive EU external competences for negotiation of agreements in these areas; at the same time, they confirm the exclusive internal competences concerning the implementation of agreements concluded, as well as of potential autonomous measures in the CCP⁽⁹⁾. Areas where the Treaties do not allow for the harmonization of the MS national laws constitute exemption from the internal exclusive competence. The performance of the internal competences within the scope of CCP also does not affect the delimitation of competences between the EU and the Member States (Art. 207(7) TFEU).

Compared to the previous legislation, the exclusive competence were materially extended to cover foreign direct investments, commercial aspects of intellectual property rights and the concluding of trade agreements on services, which previously belonged to the exclusive and/or shared competences. These rules (article 131 TEC) also have not provided for the gradual removal of restrictions to foreign direct investments and reduction of "other barriers" as one of the goals of the Customs Union. Therefore, some authors argue in the context of article 206 of the TFEU that the exclusive competence covers through the implementation of the Customs Union also the non-tariff barriers to trade, which may include environmental or consumer protection standards as well⁽¹⁰⁾. It is obviously possible to shift to the EU exclusive competence a number of questions that belonged to the autonomous decision-making competence of MS. However, one may assume that – as the MS have yet to agree on a number of aspects of the CCP, the definition of "other barriers" – is not on the table at present, as this could create complications among the MS and create complications in the smooth creation of CCP procedures. The provisions, however, constitutes part of the CCP, and it is possible to see it as a "Trojan horse" that may be employed, if suitable, for the extension of the EU exclusive competences.

Areas of the exclusive competence are subject to qualified majority voting of the EU Council in the ordinary legislative procedure. In practice, however, the Member States and the European Commission seek to reach consensus in all questions concerned. Nevertheless, there are exceptions to the rule of qualified majority voting, established by special provisions of the (Art. 207(2) TFEU). It is the area of negotiation and conclusion of agreements in the field of trade in cultural

and audio-visual services, as well as trade in social, education and health services, where these agreements threat to disturb the national organization of such services and the responsibility of Member States to deliver them. In these politically sensitive areas, unanimous Council decision is required. Unanimity is also required for conclusion of agreements on trade in services, commercial aspects of intellectual property rights and foreign direct investment.

The changes also include, in addition to the confirmation of the exclusive external and internal competences of the EU, and in addition to the substantive enlargement, the shift from exclusive decision-making of the Council on the CCP to shared decision-making by European Parliament (EP) and the Council, including the consent of the EP as a condition for adoption of trade agreements negotiated by the EU. Also the framework of the implementation of the CCP the position of the EP was strengthened.

Foreign Direct Investments (FDI)

The most significant extension relates to the exclusive powers concerning the foreign direct investments (FDI). Under the rules previous to LT, the bilateral investment agreements, in particular on the protection of investment, were negotiated at the level of MS. This has led to the situation that these agreements, including in particular the rules for repatriation of investments and profits and measures against unfair and/or non-compensated expropriation or nationalization, have varied from state to state.⁽¹¹⁾

However, the investment elements are presented also in agreements concluded at the EU level as so called mixed agreement. Significant example of a mixed agreement containing investment rules is the 1998 Energy Charter, which, in addition to the EU Member States, committed other European countries, Japan, Belarus, Russia and the states of the former Soviet Union. This agreement contains the whole range of investment standards and guarantees against non-compensated expropriation, the non-discriminatory treatment under the MFN clause and the national treatment principle were, however, limited to already existing investments.

As mixed agreements were also closed, in particular trade agreements, which include, in addition to trade provisions, investment chapters or investment measures. Examples can be found in both preferential trade agreements and association agreements or agreements on partnership and cooperation, as well as in agreements newly negotiated or agreed. Specific commitments as the one on the market access in financial services were concluded e.g. between the EU and Mexico (by decision of the Joint Committee⁽¹²⁾ with application of a positive list of commitments⁽¹³⁾). Similarly, a positive

⁽⁹⁾ For example, anti-dumping measures, the regulation of market entry conditions, conditions for the Generalized System of Preferences, etc. However, on some of authors quoted below, however, the dependence on the interpretation of the relevant areas of the LS some investment measures, such as limitations for foreign investors, or investment incentives could be added.

⁽¹⁰⁾ VIALE, F. 2010. External trade policy and the Lisbon Treaty: An enforcement of liberalisation of European commercial policy. [online]. [retrieved 15. 2. 2017]. Available at: www.s2bnetwork.org/download/LisbonTreaty&Trade

⁽¹¹⁾ Problematic are also investment treaties between the EU MS that were negotiated in the 1990s between the original States of the EU and the new MS since 2004. As a result of the EU exclusive competences they should be subject to cancellation.

⁽¹²⁾ 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 12th March, 2001, p. 7.

⁽¹³⁾ Positive list or the „bottom-up“ approach means that the commitments do not concern other services than those explicitly listed.

list of commitments to open investment markets is included in the association agreement between the EU and Chile. Investment rules, even if rather limited, are included also in the agreement on partnership and cooperation with the Russian Federation, which opens the access to the market for investment through the right to establish branch offices to carry out economic activities, but in no way specifies the conditions for investment leaving it to national legislations. It provides only for treatment according to MFN clause, which means that the European companies in the Russian market should not find themselves in a disadvantaged position in relation to the foreign competitors and *vice versa*.

Based on experiences from the negotiation on the agreements with investment components which, for reasons of mixed competence in this area, have been complicated, the Minimum platform on investment was adopted in 2006. The latter is used in negotiation of the investment parts in free trade agreements⁽¹⁴⁾. The agreements concluded since 2006 are already based on this pattern, in which the commitments to open the market for investments are defined positively, depending, in particular, on the interests of partners and the results of the negotiations. This model, however, is primarily aimed at the liberalisation and does not create a broad international investment law⁽¹⁵⁾. It contains only very weak investment protection, for example, no protection against expropriation is incorporated. The platform was used in negotiating economic partnership agreements with groups of the ACP countries with a focus on rules for the liberalisation of capital movements, including protective measures, the conditions for the establishment of foreign investments before and after settling in the country⁽¹⁶⁾. It is also contained in the free 2009 Trade Agreement with South Korea and later on the basis for negotiations on Trade and Investment Enhancement Agreement (TIEA) with Canada.

At the EU level, also other multilateral negotiations on investments, in particular on the market access for investment measures within the World Trade Organization, in response to some agreement, took place and/or are in progress. Although the WTO agreements do not include the multilateral agreement on access to the investments market, significant investment obligations can be accepted in the framework of the General Agreement on Trade in Services (GATS). These are especially the rules, conditions and limitations for the presence of legal persons providing services in specific sec-

tors. These obligations are concluded for the entire EU and binding for all MS, but individual States could until now – because of the shared competences in this area – insert limitations or liberalization of obligations to the list of obligations in accordance with their economic interests⁽¹⁷⁾. This approach is no more viable due to the LT's extension of the EU exclusive competence for foreign direct investment and at the same time to the trade in services (see below).

Another WTO agreement, which relates to investments, is the Agreement on Trade-Related Aspects of Investment Measures (TRIMS). The aim of this agreement is, however, only commitment of members to ensure that their investment measures, particularly recently established ones, do not become a barrier to trade. In the annex to the Agreement are then enumerated examples of "prohibited" measures, which include, e.g. the requirement of certain proportion of domestic content in the final product.

Investments may be affected also by the rules related to the intellectual property rights, which are established as the minimum standards for the protection and enforcement of these rights (TRIPS). Due to the nature of the TRIMS and TRIPS agreements, which do not allow members of the European Union to conclude different obligations and the same rules are then binding all members, the extension of the exclusive competences in CCP on the foreign direct investment cannot hinder the implementation of these agreements.

The shifting of competences regarding FDI, in the context of the current practice, raises a number of questions. It is not clear whether the inclusion of foreign direct investment to the exclusive competence can be understood both in terms of liberalization of investment (i.e. market access) or of its protection. If it should concern only the liberalization of the FDI in the exclusive competences, then the further practice would be probably much easier than if the exclusive competencies would include also protection of investment (expropriation and the regime of property rights). Only few bilateral investment agreements of MS namely include provisions on the access to the market⁽¹⁸⁾. Thus, it would be a relatively viable possibility either to negotiate these parts further, in the sense of their cancellation (and the replacement by agreement on the EU level), or subject them to the EU rules by another legislative act. The starting point for the EU rules could become the abovementioned Minimum Platform on Investments. Protection of FDI would thereafter be the task of individual States and could remain to be ruled by the existing (or to be concluded) bilateral agreements.

ed. This approach is relevant for negotiating the commitments on trade in services within the WTO.

⁽¹⁴⁾ Note for the Committee of the Ministers 381/06, 31. 7. 2006, Minimum platform on investment for EU FIAs – Provisions on establishment in terms of a Title on "Establishment, trade in services and e-commerce", available on http://www.iisd.org/2006/itn_ecom.pdf

⁽¹⁵⁾ VITTORE, R. D. 2009. EU Member States reject the call to terminate intra-EU bilateral investment treaties. International Institute for Sustainable Development. [online]. [retrieved 20. 2. 2017]. Available at: <https://www.iisd.org/itn/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties/>

⁽¹⁶⁾ DIMOPOULOS, A. 2010. The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy. In EFA Rev, vol. 15, no. 153.

⁽¹⁷⁾ For example, in the horizontal commitments relating to investment, France, Spain, Portugal and Italy to limit the presence of the legal persons providing the service on their markets (see the list of EC commitments available at <http://tsdb.wto.org/simplesearch.aspx>). In the revised offer of EU commitments in services of the year 2005, in the sector of transport services, pipeline transport, specifically in the EC its market for foreign providers has concluded, however, with the exception of Lithuania and Hungary, which have offered liberalisation of their markets (Reinisch, 2010).

⁽¹⁸⁾ REINISCH, A. 2009. Protection of or Protection Against Foreign Direct Investment? In: Herrmann, C., Terhechte, J. 2009. European Yearbook of International Economic Law. Springer Verlag, Berlin Heidelberg. ISBN 987-3540-78882-9.

If the exclusive competences relate also to the investment protection, then theoretically all bilateral investment agreement of MS would be from 1. December 2009 contrary to the EU legislation⁽¹⁹⁾. It is obviously not the case but nevertheless, to confirm a binding conclusion in this respect is highly desirable in order to reach legal certainty. It may occur e.g. in the form of the so-called “grandfather” clause, which would apply to already existing bilateral investment agreements.

As a promising option that could unify the practice of investment agreements at EU level and reflect both the EU’s exclusive competence as to the liberalization and national competences in the protection of investments, may be considered a gradual transition to the conclusion of EU bilateral investment treaties with third countries (so called Investment Promotion and Protection Agreements, IPPA), that would replace the existing bilateral agreements of the MS, extent them by the rules for market access and, at the same time, conclude them as mixed agreement.

Whether the exclusive competence for FDI shall include the liberalization or protection of investments, we may presume that specific policies and principles of “model investment agreement” will necessarily be drawn up at the EU level as the basis for the investment agreement between the EU and third countries. These policies will likely cover the protection of payments and movement of capital and the rules for the “behaviour” of investors and respecting of international conventions of the State of destination. With respect to the interests of the partners the said rules obviously should be applied at all fields of investment, but only at those that are positively specified in the individual cases. Moreover, the model agreement should not provide, from the perspective of the protection of investments, for weaker or stricter treatment than the optimal treatment so far agreed in any bilateral agreement of any Member State, which may lead to a number of problems or compensations⁽²⁰⁾.

Finding of a commonly acceptable position in the area of policies and rules for FDI at the EU level will be probably complicated due to the fact that MS hold the bilateral investment agreements as a competitive instrument that supports both the FDI inflow to the country and the expansion of domestic investors to the third State.

The EP shall, similarly to the decision concerning CCP, approve also the EU investment agreement. Not only for this reason can finding of a common position in this area become a long-term process including a number of provisional flexible solutions. To speed up this process, however, may influence the interests of third countries in the negotiation of a single investment agreement with the EU that would re-

place a number of existing bilateral agreements. This “pressure” will depend on the circumstance whether a specific third country has or does not have investment agreements closed with individual MS. When it may depend on whether it considers as preferable to conclude single agreement on the level of the EU or existing agreements with MS.

Trade with Services and Intellectual Property Rights

Trade in services and the commercial aspects of intellectual property rights are subject to a special regime as they were not part of the original scope of CCP. However, the negotiation and conclusion of trade agreements were regulated by the same rules as applied to trade agreements. The decision-making process of the EU Council nevertheless was ruled differently. Should they contain provisions for which unanimity for the adoption of internal rules was required, or should they be among horizontal agreement or agreements in central areas – visual services, educational, social and health care, where an unanimous decision was required. The latter agreements had to be negotiated as mixed agreements as they belonged to shared competences of the EU and MS.

When meeting the condition of unanimity of the EU Council and a decision of the EP, the CCP rules on negotiation and conclusion of agreements could be extended to agreements on intellectual property rights in general, including those on the non-commercial aspects. In practice, however, these rules have brought some uncertainties regarding the delimitation of competences. The disputes concerning delimitation of competences in the area of services have even been submitted to the European Court of Justice. A vague interpretation of the competences acted as a brake on the international negotiations and weakened the promotion of the EU interests. For example, when conducting negotiations on the protection of biodiversity in the WTO under the TRIPS Agreement, the European Union could not support the requirements of developing countries due to the opposition of Germany against the conditions of patentability of biological materials, even when for other MS these requirements did not represent a problem. Accommodating the developing countries in this area was important for the EU in terms of providing support for these countries for the broader interests of the EU in other areas of trade negotiations, however, German experts on patent law blocked this intention⁽²¹⁾.

Moving the trade agreements on services and the commercial aspects of intellectual property rights under the exclusive competence of the EU has brought obviously the exclusion of a number of questionable competence elements of the trade agreements, which should confirm the binding interpretation of the TFEU. The LT also confirmed that the conclusion of agreements within the CCP, including those concerning services and the commercial aspects of intellectual property rights shall fall within the exclusive EU competence and, therefore, the category of mixed contracts for the CCP should not be applied.

It is necessary to add that the transport and the non-commercial aspects of intellectual property rights shall still re-

(19) WOOLCOCK, S. 2010. Treaty of Lisbon and the European Union as a factor in international trade. ECIPE Working Paper, No. 10. [retrieved 20. 2. 2017]. Available at: www.ecipe.org/publications/working-papers

(20) The bilateral aspect can become bilateral investment treaties of some of the new MS, including the Czech Republic have concluded agreements with the USA before the EU accession negotiations started. These treaties, whose commitments are relatively very large, disadvantageous, and adopted unilaterally under certain pressure from the USA, are now observed as limiting from the point of view of the EU interests as a whole.

(21) DASHWOOD, A. – MARESCEAU, M. 2010. Law And Practice of EU External Relations. Cambridge University Press. ISBN 978-0-521-18255-3.

main outside the exclusive EU competences. If any of the new trade agreements contain these elements, it is likely that the EU will ratify and apply instantly those parts that belong to the exclusive competence, while the MS shall implement the marginal elements, which fall under the shared competencies, only after the ratification.

Due to the shifting into the EU exclusive competences the agreement on trade in services and intellectual property rights have become areas that are adopted by the qualified majority, while under the previous rules unanimity was required. Moreover, the internal competences have newly completed the exclusive external ones of the EU.

In terms of external competences and the negotiation practice on trade in services – and in some cases also on trade-related aspects of intellectual property rights – no significant changes will occur as these parts of the trade agreements have been negotiated already for many years by the EU Commission on behalf of the EU as a whole. The practical impact of the transfer of competences, however, may be the fact that MS, which would not agree with the content and the results of the Commission negotiations can no longer rely on the requirement of unanimity and the “veto” of a MS is weakened (for a single State it is out of the question; only the so-called blocking minority is applicable). MS can rely on the necessity of unanimous decision only in the case that the implementation of such agreements requires unanimity for the adoption of national rules (Art. 207(4) TFEU).

However, the trade-related aspects of intellectual property rights are, in terms of international agreements, regulated in treaties of the World Intellectual Property Organization (WIPO). In these cases, the actions of the EU Member States in the WIPO have so far been only coordinated at the EU level. The application of the exclusive competence may result in uncertainty as to the leadership in the course of the negotiations between EU and MS in the field of trade and extra-trade parts of the WIPO treaties. Nonetheless, however, that the EU Commission tries to move the moving of all negotiation on new agreements to the EU level is linked to the efforts to “promote” the status of the EU in WIPO and treaties concluded under the auspices thereof. Before the LT, the EU occupied in WIPO the position of a permanent observer, in some organs a full member without the voting rights”. With the acquisition of legal personality and the enlargement of the competences within the CCP, the EU is able to accede to all existing WIPO treaties and become member of new WIPO-Administered Treaties. These treaties shall then be binding on the EU Member States, even if they are not the Contracting Parties. Because of the internal EU competences the negotiation of the treaties takes place in the form of the adoption of regulation. The first WIPO – Administered Treaties with the EU as Contracting Party, were the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (so-called “Internet” Treaties). This Act entered into force on 14th March 2010 for the whole EU⁽²²⁾. Due to the fact that it was not clear how the legal effects of the treaties with the EU would concern the MS, which were not their Contracting Parties, it was decided that these states will

ratify the treaties simultaneously with the EU.

The EU exclusive competences in the area of intellectual property rights had also impact on negotiations of Anti-counterfeiting Trade Agreement (ACTA). Due to competence changes within the CCP, it will be possible to decide on the agreement in accordance with the interests of only a qualified majority of MS. The EU Treaty Amendment took the function of safeguards against adoption of undesired obligations for both the negotiation and adoption of the agreement, and also when adopting regulations implemented by the agreement⁽²³⁾. The space for any refusal by the member states has, however, significantly diminished in comparison to the rules prior to 1st December 2009.

Problems could also arise in negotiations of the EU Commission in trade in health, education or social services in the context of a multilateral GATS/WTO agreement or with other international agreements, in the case any of the MS should disagree with the Commission’s position. The question is, how should a situation be addressed, if a MS fears a threat to its national policy in these areas. It refers to the request of a unanimous decision of the Council. For the time being, the MS tentatively agreed that in the current round of WTO negotiations no GATS obligations, which would endanger the health, education or social services, shall be adopted.

Problems and contradictions may apparently arise when performing internal exclusive competences. The latter should indeed concern not only the implementation of autonomous measures, but also the implementation of the treaties. Even if the treaties on services, trade-related aspects of intellectual property and foreign direct investment require the unanimity of EU Council decision-making for certain provisions, some experts conclude that the competences cannot be without prejudice to the rules on voting, and that Art. 207 assigns in section 2 – in context with section 1 the exclusive internal competences limited only by section 6 of the same article that provides: “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”⁽²⁴⁾.

International Treaties and Membership of International Organisations

For the negotiation of international treaties with third countries or international organisations, the general procedures of the EU are laid down in article 218 TFEU subject to any specific procedures enshrined in article 207. In general, on

⁽²³⁾ Subordination of the ACTA to the CCP policy is documented by the EP resolution of 10 March 2004. March 2010 on transparency and the State of negotiations on the ACTA agreement (in the first sentence referred to “the European Parliament, – having regard to articles 207 and 218 of the Treaty on the functioning of the European Union”).

⁽²⁴⁾ VIALE, F. 2010. External trade policy and the Lisbon Treaty: An enforcement of liberalisation of European commercial policy. [online]. [retrieved 15. 2. 2017]. Available at: www.s2bnetwork.org/download/LisbonTreaty&Trade.

⁽²²⁾ See http://europa.eu/rapid/press-release_IP-09-1916_en.htm?locale=en

the opening of negotiations on international treaties the Council shall decide on a recommendation by the Commission or, in the case of treaties relating the common foreign and security policy of the EU – on the recommendation of the High Representative for Foreign and Security Policy. The Council also adopts the guidelines for the negotiation, authorises signing of treaties and concludes them. While the TFEU does not provide for contracts outside the CCP specifically, to whom the Council entrusts the negotiation of a treaty, as regards treaties within the CCP scope, it is always the EU Commission.

A specific procedure for the treaties within the CCP scope brings also the obligation of the Commission to consult a Special Committee designated by the Council, which assists to the Commission in the negotiations (for other treaties, a Special Committee for consultation is only an option decided upon by the EU Council). The Council may provide for the negotiator, i.e. the Commission as regards treaties within the CCP, guidelines for the negotiations.

The Commission provides regularly reports on the state of the negotiations of treaties within the CCP to the Special Committee and to the EP. For the compatibility of the negotiated treaties with the internal policies and EU legislation, the Council and the Commission are jointly responsible.

When we compare the procedures for the negotiation of international treaties within the scope of CCP with the previous rules in former Art. 300 TEC we will find no significant changes. The Special Committee, assisting to the Commission in the negotiations concerning the implementation of the CCP and CCP at all, is the Trade Policy Committee⁽²⁵⁾ (previously the Committee 133) and the working group. In the meetings of the Committee, all MS take part on a working (usually once a week in Brussels) at the level of the official state representatives the Committee meets once a month in the EU Council's headquarters, in the state holding EU presidency and/or in connection with the WTO negotiations in Geneva. Working groups also regularly. On the part of the Commission the competent Directorate for CCP remains the General Directorate for Trade, even though the European External Action Service negotiates other treaties.

For the negotiation and conclusion of international treaties, the Council decides by a qualified majority, with some exceptions requiring unanimity. As mentioned above (chap. 2) within the scope of CCP exceptions exist in context with the adoption of internal rules and concern some treaties on trade in services, trade related aspects of intellectual property rights and foreign direct investment. Changes have also been done in the procedure of concluding of trade treaties in relation to the EP.

TFEU retains also the EU's mandate to establish coop-

eration with international organisations, explicitly with the United Nations, the Council of Europe, OSCE and OECD. The mandate is exercised by the High Representative for Foreign Affairs and security policy and the Commission.

For the representation of the EU in third countries and at international organisations, delegations of the EU are established as delegations of the European External Action Service under the guidance of the High Representative for Foreign Affairs and Security Policy. In relation to the CCP, the key representation at the WTO, where previously both individual MS and the EC had been represented. Beside the transition to membership there are no changes in relation to the WTO. Negotiations will continue to be lead on the basis of uniform positions designed and coordinated between the Commission and the MS, in the framework of the Committee on Trade Policy in Brussels or on the coordinating meetings in Geneva. As regards key positions, the Council makes decisions. However, new in this procedure since the LT is the role of the EP, which is able to enter into negotiations and shall be regularly informed about its outcomes.

CCP is also connected with membership and activities in other international organizations, such as the OECD or UNCTAD, recently also with membership in organizations providing services (International Telecommunication Union, Postal Union and the World Health Organization) and intellectual property rights (WIPO). In these organizations, as a result of the changes by the LT, all negotiations and actions, regarding trade in any aspect, should be undertaken uniformly by the EU Commission upon the decision-making identical with other elements of the CCP.

IV. Conclusions

It is not yet clear what the extent of the impact of reforms introduced by the Lisbon Treaty will be. Opinions diverge as to whether in practice the changes proposed by the Lisbon Treaty in relation to the EU's external trade treaties will significantly alter the status quo and second, whether the proposed changes are sufficient to make the CCP more efficient and more democratic.

Much will depend on the implementation of the newly introduced arrangements. However, at this stage we can say that the EU's trading partners will have to look more broadly to the EU's trade policy as an integral part of its overall external policy to the trading partner. This may mean that non-trade policy issues will more easily interfere with specific trade agenda issues. Second, the EU's trading partners will have to watch more closely the EP when dealing with the EU on trade issues given the increased roles of the EP on trade policy. A lot will depend on the way, the EP will exercise the new powers granted by the Lisbon Treaty.

The LT has brought a number of changes to the CCP that will be implemented continuously, in particular as regards to the decision-making and implementation procedures. It is clear that some areas of the economy and trade were transferred to the exclusive competence of the EU, both external and internal. The question is whether this transfer concerns only areas explicitly listed in the Treaties, i.e. foreign direct

⁽²⁵⁾ Information on the website of the Swedish Presidency: http://ec.europa.eu/en/meetings_news/2009/12/1s/multilateral_trade_policy_is_governed_by_details.

⁽²⁶⁾ This is a working group for dual-use goods, trade issues working group, a working group on basic raw material (commodity), the Working Group for the generalised system of preferences, a working group on export credits and the working group with a territorial focus. Source: www.mpo.cz

investment, trade in services and the commercial aspects of intellectual property rights, or whether the exclusive competencies influence some related areas as well, such as environmental issues, labour standards, consumer protection, and other areas in which it is possible to identify non-tariff barriers to trade. In this case, this would mean a very broad and deep extension of the EU exclusive competences, which would further limit the sovereignty of the MS.

Changes brought by the LT will have impact 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. It may be of interest to follow these impacts of the CCP in a distant time perspective, where some experiences from the practice will be at the disposal.

References

1. BUNGENBERG, M. 2010. Going Global? The EU Common Commercial Policy After Lisbon'. In *European Yearbook of International Economic Law* 1, vol. 12, p.126.
2. DASHWOOD, A. - MARESCEAU, M. 2010. *Law And Practice of EU External Relations*. Cambridge University Press. ISBN 978-0-521-18255-3.
3. DIMOPOULOS, A. 2010. The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy. In *EFA Rev*, vol. 15, no. 153.
4. EECKHOUT, P. 2012. *EU External relations Law*. Oxford University Press. Oxford-New York. ISBN 978-0-19-960663-4.
5. European Parliament resolution of 10 May 2010 on the transparency and state of play of the ACP negotiations. [online]. [retrieved 20. 2. 2017]. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN>.
6. KRAJEWSKI, M. 2012. The Reform of the Common Commercial Policy. In Biondi, A., Eeckhout, P. 2012. *European Union Law After the Treaty of Lisbon*, Oxford University Press. ISBN: 978-0-199-11112-2.
7. REINISCH, C. 2009. Protection of or Protection Against Foreign Direct Investment. In: Herrmann, C., Terhechte, J. 2009. *European Yearbook of International Economic Law*. Springer Verlag, Berlin-Heidelberg. ISBN 987-3540-78882-9.
8. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 12.2007)
9. VILK, F. 2010. External trade policy and the Lisbon Treaty: An enforcement of liberalisation of European commercial policy. [online]. [retrieved 15. 2. 2017]. Available at: www.s2bnetwork.org/download/LisbonTreaty&Trade
10. WILKIS-DUNBAR, D. 2009. EU Member States reject the call to terminate intra-EU bilateral investment treaties. *International Institute for Sustainable Development*. [online]. [retrieved 20. 2. 2017]. Available at: <https://www.iisd.org/itn/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties/>.
11. WOOLCOCK, S. 2008. The potential impact of the Lisbon Treaty on European Union External Trade Policy. In *European Policy Analysis*, Issue 8, Swedish Institute for European Policy Studies.
12. WOOLCOCK, S. 2010. The Treaty of Lisbon and the European Union as an actor in international trade. *ECIPE Working Paper*, No. 01. [online]. [retrieved 20. 2. 2017]. Available at: www.ecipe.org/publications/ecipe-working-papers

Contact address/ Kontaktná adresa

Doc. JUDr. Martin Janků
University of Finance and Administration,
Estonská 500/3, 10100 Praha 10
e-mail: jankum@mendelu.cz