

The Common Commercial Policy as a Legal Instrument of Confirmation of the European Union International Identity

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Abstract

The key component of European Union external action is undoubtedly its Common Commercial Policy. Under EU primary law, the exercise of this policy falls within the exclusive competence of the EU. In order to assure its implementation, the competent EU institutions negotiate and conclude international agreements with third countries and adopt secondary law acts, mainly in the form of Regulations with the aim of liberalizing and expanding international trade as well as promoting-protecting the commercial interests of member states' businesses in the international markets. The aim of the study is to examine the question of the delimitation of the scope of the Common Commercial Policy as well as the operation of the EU institutional system regarding its the formation and implementation after previously analyzing the objectives served by the exercise of this common policy in the field of international economic relations.

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1. Introduction

A key component of the European Union (EU) external action is the Common Commercial Policy (CCP) covering all economic relations with third countries. The Lisbon Treaty has extended the scope of this common policy, which falls under the exclusive competence of the EU. A comprehensive study of the CCP includes, as far as possible, an examination of its objectives and orientation, a definition of its scope and a brief analysis of its implementation measures.

The Article 207 of the Treaty on the Functioning of the EU (TFEU) constitutes the fundamental provision for the exercise of the CCP in the sense that on the one hand it defines the areas falling within its scope and for which the EU is recognized as having exclusive competence and on the other hand it establishes special procedural rules for the negotiation and conclusion of international agreements covering the above sectors.

The more expansive the interpretation of the concept of the CCP, the wider its scope, i.e. more and more trade-related sectors fall under it, with the end result of increasing the number of sectors that fall under the exclusive competence of the EU. The exercise of the CCP belongs to the external competences of the EU and in fact constitutes a purely external competence. Through it, the EU confirms its international identity by playing an important role in the management of international economic relations.

2. The notion of EU exclusive competence in the field of external economic relations - The legal impact

In the field of foreign trade, the EU implements a common policy, namely the Common Commercial Policy (CCP), which is defined as the set of measures taken to regulate economic relations with third countries (Pescatore, 1969). The CCP was the necessary but also logical consequence of the establishment and operation of the Internal Market (Common Market) and especially of the Customs Union with which a common external tariff is introduced (Papayiannis, 2016).

A new reality regarding the CCP was formed by the Treaty of Lisbon, which amended the EC Treaty, clarifying the framework of the specific policy and, above all, expanding the field covered by it in order to include the field of foreign direct investments (Bungenberg, 2010).

The provisions on the CCP are contained in Articles 206 and 207 of Title II of Part Five of the Treaty on the Functioning of the EU (Gryllos, 2012). Of course, the CCP, because it is now included in Part Five of the Treaty on the Functioning of the European Union entitled "External Action of the Union", is also covered by the general provisions that (in general) govern the external action of the EU (Pliakos, 2018).

It is underlined that, by virtue of article 3 par. 1 e) of the TFEU, the EU has exclusive competence in the area of the CCP, i.e. the EU is solely competent for its exercise. Therefore, from the combination of articles 3 par. 1 e) and 2 par. 1 of the TFEU, it follows that for all matters falling within the scope of the CCP, only the EU has the

power to legislate and adopt legally binding acts. The decisions and the measures to implement it are taken only by the EU institutions. So when we say that a trade related issue falls within the scope of the CCP, we mean that the EU has exclusive competence for the specific issue.

3. The essential purpose of the Common Commercial Policy: the development of world trade and FDI through the progressive abolition of national restrictions

One of the objectives pursued by the EU is to contribute to the liberalization of international trade (Dimopoulos, 2010). Both EU Treaties (TEU and TFEU) refer to this objective, specifying that its implementation on the part of the EU will be pursued through the exercise of a common commercial policy. This policy is therefore established as a means of promoting the above objective.

First of all, according to the Preamble of the Treaty, the determination of the member states *“to contribute, by exercising a common commercial policy, to the progressive abolition of restrictions on international trade”* is declared.

By virtue of the Article 3 par. 5 of the TFEU, the EU, in the field of international relations, *“contributes to peace, security, sustainable development of the planet, solidarity and mutual respect between peoples, free and fair trade”*.

The Article 21 par. 2 e) of the TEU provides for the competence of the EU to define and implement common policies and actions (...) in all areas of international relations, with the aim of *“promoting the integration of all countries into the world economy, between others and through the progressive abolition of restrictions on international trade”*.

It should be noted the close relationship that exists between the CCP and the customs union, which entails not only the removal of tariff barriers to trade between EU member states (the internal dimension of the customs union), but also the definition of a common policy towards goods originating from third countries (external operation of the customs union). This second function of the customs union is implemented through the common external tariff. Therefore, the customs union contributes, together with the CCP, to the regulation of external trade, i.e. trade with third countries. This link is evidenced by the fact that Article 206 of the TFEU defines the objectives and orientation of the CCP with reference to the customs union.

According to this provision, the EU, by creating a customs union, contributes for the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international transactions and direct foreign investments, as well as the reduction of customs of barriers and other barriers.

The provisions in question, which are not sufficiently clear and precise in order to produce a direct effect in the legal order of the Member States, take into account the fact that the Union, as a contracting party (together with its Member States), to the multilateral trade agreements of the World Trade Organization, has adopted and accepted the principles of the multilateral system of the WTO and in particular the

General Agreement on Tariffs and Trade 1994 (Lickova, 2005), Article XXIV of which imposes on customs unions the obligation to contribute to the development of trade.

However, it is worth noting that even the aforementioned provisions do not refer to a complete liberalization of the EU's commercial transactions with third countries. Its institutions undertake to shape the CCP in such a way that it has a positive, favorable impact on the development of international trade in goods and services and foreign direct investment. However, it is necessary to clarify that from the wording of Article 206 of the TFEU, it is concluded that the commitment of the EU does not concern the adoption of rules and the formulation of terms and conditions that will lead to the complete, absolute liberalization of international trade and investments (Bourrinet, 2005).

In other words, the pursuit of the removal within the Union of barriers to trade does not apply in the field of external trade for reasons related to the need to protect the EU market and European entities exercising economic activity. The Article 206 of the TFEU makes it clear that the contribution to the development of international trade must be made in accordance with the common interest.

4. The expansion of the scope of the CCP under the Lisbon Treaty – Towards a comprehensive policy

It is a fact that defining the scope of CCP has always been a difficult undertaking. The central question repeatedly raised within the EU concerned which areas of trade activities are covered by this policy. In these specific sectors, the principles and procedures provided for by the Articles of the TFEU related to the CCEP would be applied, which would also entail their subjection to the exclusive EU competence. Different, conflicting positions were advocated even among the EU institutions, mainly between the Commission and the Council. The Court, with its jurisprudence, favored an expansive interpretation of the CCP in the direction of expanding its scope. The successive amendments of the Treaty establishing the EC (Treaty of Amsterdam and Treaty of Nice) did not contribute to the clear delimitation of the scope of the EU external trade policy (Neframi, 1998, 2001).

With the reforming Treaty of Lisbon (Krajewski, 2012) it was sought to make the framework for the formulation and implementation of the CCP clearer. The Article 207 of the TFEU defines the scope of the CEP as well as the procedure for the adoption of autonomous measures, the negotiation and conclusion of international agreements in the areas falling within this scope.

Pursuant to the provision of article 207 par. 1 of the TFEU, the common commercial policy, the formulation of which is based on uniform principles, covers in particular the following issues:

- a) Changes in tariff rates.
- b) The conclusion of tariff and commercial agreements regarding exchanges of goods and services, and the commercial aspects of intellectual property.
- c) Foreign direct investment.

- d) Achievement of uniformity in measures of liberalization.
- e) Export policy and trade defense measures, including measures taken in cases of dumping and subsidies.

For these matters, the TFEU confers exclusive competence on the EU. The aforementioned provision is the legal basis for adopting measures and concluding agreements with third countries to regulate trade and international investment. The Treaty of Lisbon explicitly included foreign direct investment within the scope of the CCP (Kujper, 2010), with the result that this policy now covers trade in goods, supply of services, commercial aspects of intellectual property and foreign direct investment.

In Opinion 2/15 on the Free Trade Agreement with Singapore, the Court clearly delineated the areas covered by the CCP and in which the EU exclusive competence is therefore recognized, by virtue of Article 207 par. 1 in conjunction with Article 3 par. 1 e) of TFEU (Cremona, 2018). The CJEU consolidated jurisprudence which has established a fundamental, central criterion in the light of which the substantive content and object of the economic provisions of a global agreement must be examined is confirmed. This is the criterion of the special connection of these provisions with international trade.

According to this criterion, when an agreement contains provisions that have direct and immediate effects on trade with an international dimension (with a third country) both in goods and services and are intended to promote, facilitate or regulate trade, these provisions fall within the scope of the CCP as defined by the article 207 par. 1 of TFEU and therefore fall under the exclusive competence of the EU.

The application of the rule resulting from the aforementioned criterion covers the provisions on the liberalization of market access, the provision of non-discriminatory treatment, the adoption of trade defense measures, technical barriers to trade and Sanitary and Phytosanitary (SPS) measures, public procurement, protection of competition, protection of intellectual property rights, sustainable development.

Regarding the services sector, when an agreement contains provisions aimed at promoting the liberalization of the international provision of services, the mutual opening of the contracting parties' markets to their service providers and generally the promotion and regulation of transactions in this sector, the EU is solely responsible for undertaking commitments in the framework of the implementation of the CCP.

With regard to the provisions related to the investments of EU nationals or companies in the territory of a third country and vice versa, it is clear that the EU alone is competent to undertake the commitments in the field of foreign direct investments based on article 3 par. 1 e) in conjunction with article 207 par. 1 of the TFEU.

On the contrary, the approval of the provisions related to non-direct investments does not fall under the exclusive competence of the EU, neither on the basis of article 3 par. 1 e) of the TFEU in conjunction with article 207 par. 1 of the TFEU,

nor on the basis of article 3 par. 2 of the TFEU. These provisions must be approved by both the EU and its member states.

It follows from the above that the undertaking of the commitments arising from the provisions of investment related chapters of the global economic agreements or of the provisions of the stand-alone investment agreements, falls under the concurrent competence of the EU and the Member States to the extent that the same provisions regulate both direct and non-direct investments made between the EU and the third countries (Hainbach, 2018).

Following Opinion 2/15, the Commission proposed, in April 2018, the conclusion of two separate agreements with Singapore:

- a) A free trade agreement, which covers areas of exclusive competence of the EU and therefore only needs the approval of the Council and the European Parliament before it can enter into force;
- b) An investment protection agreement (IPA) which, given that it covers areas of shared competence, should be ratified by all Member States before it can enter into force. The time period for the implementation of this agreement is therefore much longer.

It is foreseen that this practice will be applied in the future also in the case of agreements with other countries.

5. The EU institutional system of implementation of the CCP

The Common Commercial Policy, pursuant to Article 207 of the TFEU, is exercised and implemented through the adoption of Regulations by the competent Union bodies and the conclusion by the EU of international agreements.

The Article 207 par. 2 TFEU gives the European Parliament and the Council the power to adopt Regulations establishing measures to define the framework for the implementation of the common commercial policy, including foreign direct investment policy (Ortino and Eeckhout, 2012 / Brown and Alcover-Llubia, 2012). The Decisions on adoption of said Regulations are taken through the application of the usual legislative procedure.

The conduct of negotiations with third countries or International Organizations regarding the conclusion an international agreement and the conclusion thereof are carried out in accordance with the general rules provided for in Article 218 of TFEU, subject to the special provisions of Article 207 (Kleimann and Kubek, 2018). The Commission is empowered to make recommendations to the Council, which authorizes it to initiate the necessary negotiations. It is up to these two institutions to ensure that the agreements under negotiation are consistent with EU policies and internal rules. The Commission conducts the negotiations (a) in consultation with a special committee appointed by the Council to assist it in this task and (b) within the framework of the instructions that the Council may direct to it. The Commission submits to this special committee as well as to the European Parliament a regular report on the progress of the negotiations.

For the negotiation and conclusion of the above agreements, the Council decides by a qualified majority.

Excluded from this rule the agreements in the areas of trade in services and commercial aspects of intellectual property as well as in that of foreign direct investment, as long as these agreements contain provisions that require unanimity for the establishment of internal rules. In these specific cases unanimity is required for the Council to take a decision. The requirement for an unanimous decision in the Council enables Member States to indirectly play a decisive role in shaping the common rules in the above-mentioned areas of the CCP.

Also, decisions on negotiation and conclusion of agreements are taken, in accordance with article 207 par. 4 al. 3 of TFEU, by the Council unanimously:

- a) In the field of trade in cultural and audiovisual services, where there is a risk that such agreements may affect the cultural and linguistic diversity of the Union.
- b) In the field of trade in social, educational and health services, where there is a risk that such agreements would seriously disrupt the organization of these services at national level and affect the responsibilities of the Member States regarding their provision.

It is necessary to underline that the EU does not have the freedom to exercise trade policy in a vacuum, without commitments and control. On the contrary, when adopting the implementing measures, it is obliged to take into account the legal framework of the World Trade Organization (WTO) and to ensure that the measures in question are compatible with the multilateral rules of the WTO agreements. Besides, the EU commercial policy, like the policies of the other WTO members, is subject to its control.

In order to implement the CCP, in accordance with the above-mentioned procedure, the competent EU institutions adopt measures that establish rules regulating both imports and exports.

The measures that make up the import regime are mainly included in:

- a) The EU Regulation on the implementation of a system of generalized tariff preferences, under which the EU unilaterally grants market access either entirely duty-free or at a reduced tariff rate, for products imported from developing countries
- b) The EU Regulation providing for the common regime for imports of products originating in third countries.
- c) The EU Regulation on the common regime of imports from certain third countries.
- d) The EU Regulation on the regime regarding the trade of certain textile products.
- e) The Regulation on defense against dumped imports from non-EU countries.
- f) The Regulation on defense against subsidized imports from non-EU countries.

Regarding exports from the EU to third countries, the Regulation on common export regime applies.

In the field of international investments, reference must be made to the following legal acts:

- a) The Regulation 1219/2012 of the European Parliament and of the Council of 12-12-2012 concerning the establishment of transitional arrangements in the context of bilateral investment agreements between member states and third countries.
- b) The Regulation 912/2014 which provides basic principles regarding the allocation of financial responsibility between the EU and its Member States in relation to investor-state dispute settlement tribunals established under international agreements to which the EU is a party or to which the EU and its Member States are contracting parties and determine who, the EU or the said States, as the respondent, is responsible for managing the proceedings conducted under the dispute settlement system provided for by the respective agreement.
- c) The Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 which establishes a new framework for the control of foreign direct investments in the EU for reasons of security or public order.

6. Conclusion

The main pillar of the external action of EU is the foreign trade policy established by the primary EU Law as a Common Commercial Policy (CCP) which is formed on the basis of uniform principles. The EU is expressly granted the exclusive competence for the exercise (formulation and implementation) of this policy which includes all the measures, rules and decisions adopted and taken by the competent EU institutions and whose object is the regulation of trade relations with third countries. The EU determines the trade policy of the member states and negotiates agreements on their behalf. Speaking with one voice, the EU has more weight in international trade negotiations than its member states would have on an individual basis.

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