Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade

By Dorota Leczykiewicz[*]

A. Introduction

The European Union (EU) acts in the area of international trade through the community's commercial policy regulated by the European Community (EC) Treaty. The position of the Union in external trade relations is dependant on the unique legal character of this entity. By developing a legal order which is supreme to the law of its Member States, and creating a complex system of institutions and modes of decision-making, the Community has ceased to be a mere representative of the countries it comprises. The increasing transfer of competences from the Member States onto the community allowed it to aim at the realization of common objectives as opposed to merely collective ones. As a result, tensions between the EC and dissatisfied Member States occur and the delineation of competences may turn out to be crucial when interests of an individual Member State are involved. Therefore, the paper which considers the situation of the "new" European Union in the area of international trade, in light of the Treaty Establishing a Constitution for Europe (Constitutional Treaty), should necessarily investigate how the position of the EU will be strengthened *vis-à-vis* its Member States.

In the first part the paper will investigate the scope of the Common Commercial Policy (CCP) - a sphere of the Union's exclusive competence – as envisaged by the Constitutional Treaty. It will be submitted that expanding the scope of CCP has been and still is the most effective method of broadening the EU competences. Next, the focus of the paper will move to the Union's institutions involved in the realization of the commercial policy. An analysis determining to what extent individual Member States with separate interests and agendas may defend and promote their positions through those institutions follows. The role of the Commission, the Council, and the European Parliament in this field will be investigated; as well as further issues concerning the distribution of powers through adoption of a particular procedure and mode of voting within the Council.

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Finally, the question of how the CCP has been included in general mechanisms governing the functioning of the new Union will be dealt with. Consequently, the problem of uniformity of this policy will be raised as a factor, which may also contribute to the position of the Union when looked from the perspective of its trade partners.

B. The Scope of the Common Commercial Policy

Commercial Policy has been identified by the European Court of Justice (ECJ) as one the spheres in which the Community's competence is exclusive. The Opinion 1/75 in the *Low Cost Standard* case denied Member States the power to enter into international agreements or to legislate matters related to commercial policy, even if the Community has not yet acted.[1] Article I-13 of the Constitutional Treaty seems to codify this case law by explicitly stating that Common Commercial Policy belongs to one of the Union's exclusive competences. An exclusive competence is also defined by the Constitutional Treaty in Article I-12. Article I-12 instructs that if an area is so characterized, the Member States are able to legislate only if empowered by the Union or by implementation of Union acts.

Although it appears as a mere summary of current state of affairs, the substantive scope of the empowerment may be easily changed by incorporating a new issue within the scope of the CCP, which means that this issue is automatically covered by the Union exclusively and Member States will no longer have the possibility to act on this matter. This part of the paper will deal with the delineation of the scope of the Union's commercial policy taking into account explicit changes in the wording of provisions, as compared to those present in the EC Treaty, and existing case law on the boundaries of this policy.

The vast number of ECJ opinions on this matter are the result of procedure established in Article 300 (6) EC Treaty which enables the Court to rule on the compatibility of an envisaged agreement with the Treaty, and on matters of competence, if the institutions or the Member States feel that the case may be disputable. In practice, however, the procedure has often been used for opposite reasons, particularly by the Commission; namely, to disapprove Member States' competence asserting exclusive Community competence through broad interpretation of the CCP. The Commission was able to convince the Court that interpretation of Article 133 EC Treaty, which would restrict the common commercial policy to measures intended to have an effect on the traditional aspects

[1] Case 1/75, Low Cost Standard, 1975 E.C.R. 1355; Case 41/76, Suzanne Criel, nee Donckerwolcke and Henru Schou v. Procureur de la Republique, 1976 E.C.R. 1921.

of external trade, was improper on the ground that the CCP would become nugatory over time.[2] The Court also classified further measures as falling within the scope of the CCP by treating them as important elements of the commercial policy as such, and referring to the unity of the common market and to the uniformity of the policy in question.[3] The same effect was achieved by the Court with regard to measures concerning trade in services, by identifying the similarity to cross-frontier supplies of services not involving any movement of persons to trade in goods.[4]

However, if we consider that all policies covered by the World Trade Organization (WTO) are trade policies, it has been made clear in the EC Treaty and in the Court's case law that the Member States retain certain powers, in particular powers regarding services and intellectual property. Those issues covered by the WTO agreement have been recognized to constitute a sphere of shared competence, where so-called mixed agreements must be concluded. Additionally, the fact that those issues were covered by other specific chapters of the Treaty suggests they did not fall within the scope of the CCP, and as a result they were not in the EC's exclusive competence.[5]

The Amsterdam Treaty allowed the Council, acting unanimously on a proposal from the Commission and after consulting the Parliament, to extend the application of provisions on Common Commercial Policy to services and intellectual property. Therefore, it seems that it allowed the institutions of the Community to expend its field of exclusive competence so as to cover new aspects. New paragraph 5 after the Treaty of Nice has a narrower scope than the Amsterdam paragraph as it refers to *trade* in services and to the *commercial aspects* of intellectual property rights. It operates a dichotomy between the negotiation and conclusion of international agreements and the adoption of internal Community rules and it presupposes that

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[2] Case 1/78, Natural Rubber, 1979 E.C.R. 2871. Stating that the CCP covered general economic policy measures, like the international agreement on natural rubber.

[3] Case 1/75, Low Cost Standard, 1975 E.C.R. 1355, 1362. The Court ruled that the CCP covered systems of aid for exports and credits for financing local costs linked to export operations.

[4] Case 1/94, WTO, 1994 E.C.R I-5267.

[5] Case 1/94, WTO, 1994 E.C.R. I-5267, para. 47. Consumption abroad, commercial presence and the presence of natural persons as modes of supply of services covered by GATT Agreement were not recognized to fall under the scope of the CCP. The Court pointed out that regarding the movement of natural persons, it was clear from Article 3 EC Treaty, which distinguished between a common commercial policy and measures concerning the entry and movement of persons, that the treatment of nationals of non-member countries on crossing the external frontiers of Member States could not be regarded as falling within the common commercial policy.

there may be internal competence of the Community in those fields.[6] Unanimity is a prescribed mode of voting where the agreement includes provisions for which unanimity is required for the adoption of internal rules or where the agreement relates to a field in which the Community has not yet adopted internal rules. In other words, it precludes the Community from concluding an agreement on the basis of a Council qualified majority decision, which decision promulgates rules in fields in which there were no Community harmonization measures. The conclusion of such an agreement would achieve harmonization within the Community and thus would enable the institutions to escape the internal constraints in relation to procedures and voting, which normally appear in the case of harmonization.[7]

The changes introduced by the Constitutional Treaty relate to both form and substance. Intellectual property and trade services were moved from a separate paragraph[8] to the first paragraph of Article III-315 of the Constitutional Treaty, which is the equivalent of the EC Treaty Article 133. It should also be noted, that the Constitutional Treaty abolishes the possibility that the Council extend the external competence of the Union to non-commercial aspects of intellectual property rights, which are currently contained in Article 133(7) EC Treaty. If the wording of paragraph 7 in Article 133 was indeed to allow the Community's capacity with regard to changes of Treaty on Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, it could be argued that the abolition of this provision in the Constitutional Treaty could mean that the EU's competence according to Article III-315 should never embrace those changes.

According to Markus Krajewski, such a reading of this provision of the Constitutional Treaty is too narrow. He refers to the intention of the Convention to broaden and simplify competences relating to external trade matters and argues that the term "commercial aspects of intellectual property rights" in Article III-315 should therefore be read as a reference to all trade-related aspects of intellectual property rights within the world trading system.[9]

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[6] According to Article I-13(2) of the Constitutional Treaty, the exclusive competence would also include the conclusion of an international agreement "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope." This provision is an attempt to codify the case law of the ECJ on implied external powers, in particular in the *ERTA* judgment and Cases 1/76, Inland Waterways and 1/94, WTO.

[7] Arts. 94, 95 and 308 of Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC Treaty].

[8] Art. 133(5) EC Treaty.

[9] Markus Krajewski, *External Trade Law and The Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, 42 COMMON MARKET LAW REVIEW 91, 111 (2005).

The Constitutional Treaty also contains a provision parallel to Article 133(5) EC Treaty.[10] Accordingly, the Council is required to adopt measures, regarding trade in services and the commercial aspects of intellectual property, unanimously where the agreement in those fields includes provisions requiring unanimity for adopting internal rules. However, Article III-315(4) does not require unanimity where agreements include provisions relating to a field in which the Community has not yet acted. This means that trade in services and commercial aspects of intellectual property have become a genuine part of the Union's exclusive competence whether the EU will decide to exercise its internal competences in that respect or not.

Paragraph 1 of Article III-315, apart from including trade in services and the commercial aspects of intellectual property, adds a completely new field to the scope of the CCP; namely, foreign direct investment. Foreign direct investment by service providers, which is covered by the General Agreement on Tariffs and Trade (GATT) has already been within Community competence since the Treaty of Nice. The scope of the Community's competence has been extended in the Constitutional Treaty so as to include foreign direct investment by all companies, including those manufacturing goods. Such an extension of the scope of the common commercial policy was already discussed in the context of revisions of the Amsterdam and Nice treaties, but was not agreed upon. The extension of the competence to foreign direct investment would be seen in the context of the WTO and other international organizations (such as the Organization for Economic Cooperation and Development or OECD) in attempts to negotiate multilateral rules on investment.[11] Traditionally, however, there has been a clear distinction between international trade agreements and international investment agreements, the latter concern protection on investment in a particular country.

In practical terms, trade agreements are often regional or multilateral agreements, whereas investment agreements are often bilateral agreements.[12] Incorporating investment in the scope of the CCP, and thus assuming an exclusive competence for the Union, would mean that Member States would lose the competence to negotiate, conclude, and implement these agreements. Additionally, the Union would be responsible for the negotiation of new, or the re-negotiation of old, investment agreements. It seems, however, that one should interpret the term

[10] Art. III-315(4) of the Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C310) [hereinafter CT].

[11] Krajewski, *supra* note 9.

[12] MITSUO MATSUSHITA, *ET AL.*, THE WORLD TRADE ORGANIZATION – LAW, PRACTICE AND POLICY 522 (2004).

"foreign direct investment" used in Article III-315 in the light of Article III-314 of the Constitutional Treaty; Article III-314 states that the Union aims to contribute to the progressive abolition of *restrictions* on international trade and on foreign direct investment. This would suggest that foreign direct investment is only part of the common commercial policy as far as restrictions on foreign direct investment are concerned, but not where investment protection against expropriation is concerned. Investment protection against expropriation is traditionally an element of investment agreements.

What stems from the points raised above is that Article III-315 of the Constitutional Treaty clearly broadens the scope of the Union's exclusive competence by expanding the scope of issues covered by the CCP through upfront reference in paragraph 1 of the provision. It now applies to trade in goods *and services* and *commercial aspects of intellectual property* as well as to *direct foreign investment*. As a result, comments may be heard that "[t]here can be no doubt that all current WTO matters would come within the scope of the common commercial policy if the Constitutional Treaty entered into force."[13]

C. Limitations on the Common Commercial Policy

Currently, the Community's competence to conclude agreements is to the greatest extent limited by Article 133(6), which states that an agreement may not be concluded if it includes provisions which would go beyond the Community's internal powers; particularly by leading to harmonization of the laws or regulations of the members states in an area for which this Treaty rules out such harmonization. This is another safeguard against circumvention of provisions regulating or restricting harmonization of the laws of the Member States. Article III-315(6), which is the equivalent of Article 133(6) (of the EC Treaty) also limits the competences of the Union in external trade policy according to the internal distribution of powers between the Union and Member States. Consequently, the "new" Union would not have the exclusive competence to negotiate, conclude, or implement an international agreement covering aspects which the Union does not have the power to legislate internally.

Apart from invoking explicit limitations prescribed by the Treaties relating to harmonization of national legal systems of the Member States, attempts were made to narrow the scope of the CCP by including aspects of external trade policy within general foreign policy, which is still the second EU "intergovernmental" pillar.

[13] PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 55 (2004).

Thus, to the extent that the Member States continue to have powers in the area of Common Foreign and Security Policy (CFSP), the principle of exclusivity of the EC competence does not come into play.

The juxtaposition of commercial and foreign policy may be clearly seen when we consider that the preferred instruments of international relations, used in exercising political and economic pressure on countries and regimes, which can be decreed by the UN Security Council, are trade restrictions and embargoes. It is difficult to see them as non-trade measures, given their marked effects on trade, but there are doubts as to whether they should be really treated as such. If we regard trade restrictions used for political purposes as regular trade measures, the authority to adopt trade sanctions would then appear to come within the EC's exclusive powers. Therefore, the Member States are likely to argue that what relates to foreign and security policy should be excluded from the scope of the CCP, and that national governments are still left with substantial freedom in adopting measures in that respect.

This argument was used by the German government in defending the legality under Community law of legislation, which applied to the control of export of so-called dual-use goods.[14] The German legislation enabled the authorities to curtail contracts and activities in the sphere of foreign trade in order "to guarantee Germany's security, prevent a disturbance of peaceful coexistence", or "prevent the external relations of Germany from being seriously disrupted". In order to decide on the distribution of competences, as between the Community and the Member States, to adopt such measures, the Court stated that the question was whether the common commercial policy solely concerned measures which pursued commercial objectives. However, the ECJ came to the conclusion that measures, whose effect was to prevent or restrict the export of certain products, could not be treated as falling outside the scope of the common commercial policy simply because they had foreign policy and security objectives[15] on the grounds that Member States should not be able to restrict the scope of the CCP by freely deciding, in the light of its own foreign policy or security requirements, whether a measure was covered by

[14] Case C-70/94, Werner v. Germany, 1995 E.C.R. I-3189; Case C-83/94, Leifer and Others, 1995 E.C.R. I-3231.

[15] *See,* Case C-62/88, Greece v. Council, 1990 E.C.R. I-1527 (Chernobyl I Case) and Case C-281/01, Commission v. Council, 2002 E.C.R. I-12049 where the Court adopted the approach that trade measures are trade measures whatever the objective pursued, when a Member State tried to limit the Community's exclusive competence by arguing that the measure fell within environmental protection rather, which is an area of shared competence (Article 174 EC Treaty and also I-14 of the Constitution). The situation is even clearer when an instrument had direct and immediate impact on trade and only possible positive environmental effect.

current Article 133. Nevertheless, the Court accepted that the German legislation conformed to EC legislation on export, which enables Member States to adopt restrictions on public security grounds.

In *Centro-Com*,[16] the Court accepted that the Member States had indeed retained their competence in the field of foreign and security policy, but the powers retained by the Member States had to be exercised in a manner consistent with Community law. It was within the province of the Member States to adopt measures of foreign and security policy in the exercise of their national competence. Those measures nevertheless had to respect the provisions adopted by the Community in the field of the common commercial policy provided by the current Article 133, which may result from political measures adopted within the second pillar.[17]

When the Constitutional Treaty is in force, Common Foreign and Security Policy will be further incorporated within what the workings of the new Union. According to Article I-16, the Union will have competence in all areas and questions relating to the Union's security and the Council will adopt European decisions which define actions and positions to be taken by the Union in order to implement the guidelines of the European Council. Tensions between the CCP and CFSP may arise not on the question of who has the competence, but also on the mode of voting. The CCP, in most cases, requires only qualified majority; while the CFSP requires unanimity.[18] Bringing the issue within the scope of the latter policy would insure more effective protection of individual interests of the Member States.

Moreover, also after the Constitutional Treaty is effective, Member States will be able to use derogations from measures of commercial policy taken by the Union as allowed in the German case cited above. If one treats the CCP as an external equivalent to internal provisions regulating trade between Member States, it may be argued that exceptions mentioned in Article 134 of the EC Treaty and in EC regulations reflect Article 30 EC Treaty derogations from the prohibition on restrictions on import and export within the common market.[19] In the area covered by the exclusive competence of the Community and in future of the Union, they will give the Member States at least some possibility to take necessary protective measures and to conduct an "individualized" trade policy.

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[16] Case C-124/92, The Queen, ex parte Centro-Com v. HM Treasury and Bank of England, 1997 E.C.R. I-81.

[17] Art. 301 EC Treaty.

[18] Art. III-300(1) CT.

[19] Art. 134 EC Treaty, removed from the draft Constitution, situations such as those arising in it would now be dealt with under the Import Regulation.

D. Institutions of the EU and the Common Commercial Policy

According to the Article III-315 of the Constitutional Treaty, three institutions will be involved in the CCP: the Commission, the Council and the European Parliament. The most significant change relates to the evolution of the involvement of the Parliament in that field. As far as internal rules are concerned, the Constitutional Treaty in paragraph 2 of Article III-315, states that measures defining the framework for implementing the CCP should take the form of European laws. Thus, Article III-315(2) refers us to the chapter of the Constitutional Treaty where legal acts of the Union are set out. European law is the equivalent of the current Regulation, which means that the Union will continue to adopt internal measures which are generally and directly applicable. Article I-34 specifies the procedure by which European law should be adopted. This will take place under ordinary legislative procedure, which is a new name for the so-called co-decision procedure. As a result, the most "communitarian" procedure thus far has been extended to the CCP and, at least where implementing measures are in question, the Council will need the Parliament's approval.

Paragraph 3 of Article III-315 deals with external action of the Union. Under Art. III, the Commission is only required to report regularly to the EP on the progress of negotiations – an obligation which has not been assigned to the Commission in the current EC Treaty. In practice, even today the Parliament is involved by being informed and consulted. Its consent may be required when the agreement is not limited to trade or because the agreement comes within one of the categories requiring Parliamentary assent (Article 300(3) EC Treaty and Article III-325(6) of the Constitution). Such a situation occurred in the conclusion of the WTO agreement, where the EP's approval was necessary because the agreement established a specific institutional framework. Nevertheless, unless such a situation occurs, Parliament will still lack "hard" instruments to influence the negotiations. It seems that the drafters of the Constitutional Treaty regarded this as sufficient to make the Commission accountable for their actions in the CCP under the general system of checks and balances in the Union's institutional framework.

The Commission retains its capacity as the institution recommending commencement of negotiations to the Council and effectively conducting those negotiations under the surveillance of a special committee appointed by the Council and within the framework of directives issued by the Council (Article 133(3) EC Treaty and Article III-315 of the Constitution). It is clear, however, that the Council and the Commission may have different interests. This is well exemplified by the *Natural Rubber* case, which involved an international agreement drafted in the framework of 1976 UNCTAD "Integrated Programme for Commodities," designed to improve conditions for trade in certain commodities

which were of particular interest for the developing countries. The Commission proposed to the Council that it be given a mandate to conduct negotiations, it considered that the draft agreement came within the scope of current Article 133 EC. The Council had rejected the view and had decided that the negotiations were to be conducted by a Community delegation and by delegations from Member States, which were to act on the basis of a common standpoint. The Commission went to the Court of Justice and requested an Opinion on the scope of the Community's competence.[20]

Additionally, in the *Energy Star Agreement* case,[21] the Commission challenged the Council's conclusion of the agreement on the basis of Article 175(1) (environmental protection), which is an area of EC shared competence, in conjunction with Article 300. Of course, the Commission was not interested in concluding a mixed agreement because it would still need to take into account the position of individual Member States and it argued that the agreement in question should have been concluded on the basis on Article 133 – exclusively by the Community. The Court agreed with the position of the Commission. It is thus clear that the Commission, in order to be able to act independently from Member States, will argue the necessity, as the case-law shows with much support from the ECJ, of founding the negotiation and conclusion of agreements entirely on the basis of provisions relating to the CCP.

E. Qualified Majority or Unanimity?

In a situation where the scope of the CCP is interpreted broadly by the ECJ, the Council may appear as the last bastion of Member States, through which they can defend their individual interests. In order to analyze to what extent this will be possible and how difficult it will be for the Commission to push decisions in the wording drafted by this institution, it is crucial to consider the systems of voting in the field of common commercial policy.[22]

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[20] Case 1/78, Natural Rubber, 1979 E.C.R. 2871.

[21] Case C-281/01, Commission v. Council, 2002 E.C.R. I-12049.

[22] The system of voting may primarily depend on the legal basis. It is obvious that the Commission will look for the legal basis allowing qualified majority as opposed to unanimity. In the case on the correct legal basis for the adoption of generalized tariff preferences (GSP) (Case 45/86, Commission v. Council, 1987 E.C.R. 1493) the Commission advanced an argument that Article 133 requiring qualified majority should be used and the Council was of the opinion that GSP regulations were in fact based on Article 133 EC Treaty and Article 308 EC Treaty, the latter requiring unanimity. The Court noted that the contested regulations not only had commercial-policy aims, but also major-development policy aims. In the context of the organization of the powers of the Community, the choice of legal basis for a measure could not depend simply on an institution's conviction as to the objective pursued, but had to be based on objective factors which were amenable to judicial review (paras. 10-11). Moreover, it concluded that

Similar to Article 133 of the EC Treaty, the Constitutional Treaty envisages that the Council, in exercising its powers in the CCP, will act by qualified majority.[23] As has been mentioned earlier, Article III-315(4) treats agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, differently. It requires unanimity where such agreements include provisions for which unanimity is required for the adoption on internal rules. This exception is comparably narrower than the derogation envisaged by paragraph 5 of Article 133 EC Treaty. Article III-315(4) of the Constitutional Treaty institutes another exception concerning trade in cultural and audiovisual services, educational services, and social and human health services. In Article 133(6) subparagraph 2 of the EC Treaty such agreements had a mixed character. The sectoral carve-out is thus retained by the requirement of unanimity of the Council's decision.

However, qualified majority remains the default option and when a Member State would like to call for a unanimous vote; it would have to show that unanimity is required for the adoption of internal rules relating to issues in the agreement in the fields of trade in services and the commercial aspects of intellectual property as well foreign direct investment. A Member State may specifically invoke either subparagraph 3(a) or 3(b) of Article III- 315(4) and must explain why and how the agreement in question would pose a risk to the Union's cultural and linguistic diversity or to the provision of health, social, education services. This means that if this is not shown or if the other Council members do not share this view, the decision will be taken by qualified majority voting and only a judgment by the ECJ would provide ultimate clarity.

F. Homogeneity and Uniformity of the Common Commercial Policy

The constitutional uniformity of the "new" Union depends on whether all policies will be governed by the same mechanism of functioning. The incorporation of the CCP into the general system of the EU, at the highest level, will be determined by setting uniform objectives to be pursued by the Union's institutions. Article III-315(1) states that the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action, which broadly include the principles which have inspired the creation of the Union, its development and enlargement, and other universal values. This means that, at least

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Article 133 EC Treaty is the proper legal basis and, therefore, there is no need to justify the Community's competence on the basis of Article 308 EC Treaty if it is only used where no other Treaty provision conferred the competence (paras. 14-21).

[23] Art. III-315(4) CT.

in theory, it should not only cover trade liberalization and development of economic activities. We will be able to observe whether and how the nature of the CCP will be changed by the fact that the Union's action in this field will need to include such values as democracy, human rights, equality and solidarity. One may assume that Commercial Policy and Development should approximate even further.

Maximum uniformity would also be achieved if all policies were governed by the ordinary legislative procedure. This clearly occurred with regard to internal measures adopted within CCP. As far as the conclusion of international agreements is concerned, the decision of the Council must indeed to be made by qualified majority voting like in the case of ordinary legislative procedure, but the role of the Parliament is rather secondary. The conclusion of international agreement in the area of the CCP could be unified further if the European Parliament participated on the basis of a similar mechanism to the one envisaged for the ordinary legislative procedure.

Consequently, we could ask whether the procedure of taking action to conclude international agreements in commercial policy is at least homogenized with constitutional provisions relating to conclusion of international agreements by the Union in other areas. According to Article III-325(6), the Parliament in such cases is to be consulted unless its approval is required by subparagraph 2(a). It is, however, necessary to remember that the exceptions which require the EP's approval to conclude an international agreement would apply also within the scope of the CCP. Thus, the Constitutional Treaty adopts an intermediate method for the commercial policy, as in the sphere of foreign and security policy, which also belongs to the Union's external action, the involvement of the Parliament is almost entirely excluded.

Homogeneity of the Union's commercial policy as such may be also achieved by various means. The primary method would involve further transfer of competences to the EU. As a result, there will be more uniform internal rules regulating trade between Member States and third states, and the Union will be the sole actor as far as negotiating and concluding agreements are concerned. It has been discussed that the Constitutional Treaty has advanced in this direction. By expanding the scope of the CCP, the Union will probably be able to negotiate and conclude agreements across the entire sphere covered by the WTO agreement. There will be no longer the need for the Member States' participation. Similarly, the trade in cultural and audiovisual services and in social, education and health services will become a field of exclusive competence of the Union. The sectoral carve-out for intellectual property, trade in services, foreign direct investment, as well as for cultural, educational and health services, has nevertheless been preserved by the

requirement of unanimity in the Council. In that respect, homogeneity of measures adopted in order to conclude an international agreement may be endangered by the necessity to balance competing interests of the Member States and to achieve difficult compromises.

G. Conclusion

This paper has considered a number of factors influencing the role of the European Union in the field of international trade. It was first argued that the position of the new Union *vis-à-vis* its Member States will become stronger as a result of expending the material scope of the Common Commercial Policy – the area in which the Community had, and the Union will have, the exclusive competence. Interrelations between the CCP and other policies were also shown in the context of limiting and delineating the sphere covered by the principle of the exclusivity of the Union's competences. The paper also discussed the enhanced role of the European Parliament in the CCP and how it can contribute or obstruct the coherency of the EU external trade policy. It was also noted that the Council retains the greatest powers in concluding international agreements, which should adequately protect the position of the Member States. The balance between the decisions approved by unanimity and those approved by qualified majority has also been investigated in order to identify the capacity of an individual Member State to effectively protect its interests and to influence the commercial policy of the Union. In the context of homogeneity and uniformity of the Union's commercial policy, transformation of the shared competence to conclude agreements relating to trade in cultural, educational and health services into the exclusive competence has been discussed. Consequently, the paper argued that the position of the European Union in the Constitutional Treaty has been strengthened by a broader definition of the Union's commercial policy, an extension of application of the qualified majority voting procedure in the Council, involvement of the European Parliament, and by transforming some of the fields of shared competences into those within the Union's exclusive competences, though requiring the Council's unanimous vote. What may stem from these observations is that Article III-315 of the Constitutional Treaty is capable of influencing the balance between the Union and its Member States by shifting "the burden of proof" to justify the Union's competences to take certain actions by qualified majority from the EU and the Commission onto the Member States and the Council to give evidence that the matter falls outside the scope of the EU exclusiveness or that unanimity in a given case is required. From the perspective of the EU, the Constitutional Treaty certainly smoothes out some of the irregularities of the CCP. However, in a situation where subtle changes may affect a balance achieved with difficulty, uniformity of commercial policy and simplification of its rules and mechanisms should not themselves be the aim.