Common Commercial Policy in the European Constitutional Area: EU External Trade Competence and the Lisbon Decision of the German Federal Constitutional Court

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Following the Lisbon Treaty coming into force, the further development of an EU Common Commercial Policy is determined—regardless of its further political and regulatory progression—by the increase in powers which the EU has been attributed in the context of commercial policy through the amendment of Art. 207 of the TFEU. But this extension of powers is also related to the repercussions of the EU commercial policy for the Member States. First, the extension of the traditionally exclusive EU competence (now explicitly stated in Art. 3 para. 1 lit. e TFEU) in the field of Common Commercial Policy in a comprehensive manner on trade in services, on commercial aspects of intellectual property and on foreign direct investment (cf. Art. 207, para. 1 TFEU)[1] leads to the question of the role Member States can still assume in the WTO as it seems all the subject matters of WTO law are now covered solely and exclusively by EU competence. Furthermore, the possibility of a further extension of EU competence in the Common Commercial Policy depends on the constitutional limits of the integration process in the Member States, not least in Germany. The German Bundesverfassungsgericht (Federal Constitutional Court) in its Lisbon judgement set these limits in a manner which was quite criticized as the Federal Constitutional Court named specific policy areas for which a further supra-nationalisation could not take place, or only with

[1] EU competence in the area of foreign direct investments was newly added by the Lisbon Treaty, after corresponding attempts of the Commission to expand EU competence failed in Nice. In the Treaty of Nice EU competence had already been extended to trade in services and the commercial aspects of intellectual property (Art. 133(5) TEU), however it had not existed as an exclusive EU competence insofar, cf. ECJ, Opinion 1/08 – GATS, ECR [2009] I-11129, paras. 144 et seq.; Hahn, in: Calliess/Ruffert (eds.), *EUV/EGV*, (3rd ed.) 2007, Art. 133 EGV, paras. 72, 130.

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significant sensitivity for remaining domestic competences,[2] and which have been termed "Integration proof reserved areas".[3] Without having the slightest criteria for this in the Constitution, the Federal Constitutional Court deduced them ostensibly from the principle of democracy and subsidiarity,[4] and thus as if providing instruction of the tasks of the state.[5] The Court opined: "Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on ... criminal law..., on the disposition of the monopoly on the use of force ..., fundamental fiscal decisions ... decisions on the shaping of living conditions in a social state ... decisions of particular cultural importance" (The German Federal Constitutional Court lists here "family law, the school and education system and the dealing with religious communities").[6] One of the reserved areas was subsequently stressed particularly by the Federal Constitutional Court's order on the rescue package, i.e. national autonomy over budgetary matters,[7] which in our context here is irrelevant as the obligations flowing from WTO law have no fundamental budgetary significance.

Second, the subsequent question is the issue of constitutional restraints to further supra-nationalisation of the Common Commercial Policy resulting from this perception of the Federal Constitutional Court as this Court steers the reality of German constitutional law.

On these two issues in the interplay of supra-national and national competences in the context of the Common Commercial Policy a stance should be taken pointedly in the following:

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[2] Terhechte, Souveränität, Dynamik und Integration – making up the rules as we go along? Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts, Europäische Zeitschrift für Wirtschaftsrecht 20 (2009) 20, p. 724 (731) speaks of "areas of decelerated integration".

[3] By Ruffert, An den Grenzen des Integrationsverfassungsrechts: Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon, Deutsches Verwaltungsblatt 124 (2009) 19, p. 1197 (1202): "integrationsfeste Vorbehaltsbereiche". For more detail on these areas see, pp. 1202 et seq.

[4] See the Lisbon decision of the Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, para. 251: "The principle of democracy as well as the principle of subsidiarity, which is also structurally required by Article 23.1 first sentence of the Basic Law, therefore require factually to restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner, particularly in central political areas of the space of personal development and the shaping of living conditions by social policy. In these areas, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required". (This and all other quotes from the Federal Constitutional Courts are taken from the official English translation of the decisions, available at the Court's website: www.bverfg.de).

[5] S. Calliess, *Die neue EU nach dem Vertrag von Lissabon*, 2010, p. 258; Terhechte, Souveränität, Dynamik und Integration – making up the rules as we go along? Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts, Europäische Zeitschrift für Wirtschaftsrecht 20 (2009) 20, p. 724 (730).

[6] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 252 et seq.

[7] Federal Constitutional Court, 2 BvR 987/10, *Euro Rescue Package*, NJW 64 (2011) 40, 2946 (paras. 124 et seq. and esp. paras. 133 et seq. The limit to the conferral of powers is reached when the autonomy of the national budget is no longer guaranteed resulting in the liability for other Member States' debts, even in the form of the communitisation of national debt.

The Future Role of the EU Member States in the WTO in View of the Exclusivity of EU Competence

The comprehensive exclusive EU competence in the Common Commercial Policy has led to the consideration that the Member States could not participate in ratification of the (possible) outcomes of the current Doha Round negotiations (in the form of a mixed agreement) due to lack of national competences being affected; the changes to the WTO agreements which to date have been discussed or are expected to fall completely within the exclusive competences of the EU in accordance with Art. 207 TFEU.[8] In addition, there are considerations whether or not the EU Member States must leave the WTO for EU legislative reasons as this could be required with reference to the analogous application of Article 307 read in conjunction with Article 10 ECT, which is now Article 351 read in conjunction with Article 4 TFEU.[9]

However, in this issue an initial differentiation must be made between the legal situation under WTO law and that under EU law.

WTO Law

The EU Member States are and remain, in any case, formal members of the WTO and thus participate in the ratification processes of changes to the WTO Agreements in accordance with Article X of the Agreement Establishing the WTO. They do not lose membership status on account of a total transition of competence to a supranational organisation; this is not changed by Art. XII of the Agreement Establishing the WTO which requires as a condition of membership that a State or separate customs territory possesses full autonomy in the conduct of its external commercial relations and of the other matters covered by WTO law. For, on the one hand, the EU Member States are original members of the WTO according to Art. XI of the Agreement Establishing the WTO with the result that Article XI is not applicable; on the other hand, the discontinuation of membership requirements does not result in loss of membership. A loss of membership in an international organisation under international law only happens in the event of the dissolution of a State. Thus, EU

[8] Haratsch/Koenig/Pechstein, *Europarecht*, (7th ed.) 2010, para. 1277.

[9] Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 161 (172); Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, Europarecht Supplement 1/2009, 2009, p. 195 (206); see also Berrisch, *Der völkerrechtliche Status der EWG im GATT*, 1992, pp. 99 et seq. The Federal Constitutional Court (2 BvE 2/08 et al., BVerfGE 123, 267, para. 380) interprets Art. 351 TFEU to the effect that at first earlier Treaties of the EU Member States remain in force. This is very correct but Art. 351(2) TFEU envisages an obligation on the part of the Member States in the event of a collision with EU legislation to dissolve the latter which actually could happen by a national exit from the WTO.

Member States maintain their WTO membership which—and this rightly has been pointed out—is on this account more than just a formal membership, because it is the EU Member States that pay membership contributions to the WTO budget, and not the EU.

EU Law

As regards the situation under EU law, the need for a mixed agreement to conclude the Doha Round and other changes to treaties may cease with the expansion of the EU exclusive competences in the area of external trade. Such a situation already arose in 2007 when only the European Community ratified the agreed amendments to the TRIPS Agreement of December 2005 on access to essential medication (Protocol amending the TRIPS Agreement)[10]: When depositing the instruments of acceptance the Presidency of the Council of the EU had confirmed the binding nature of the legislation also on Member States pursuant to Article 300 para. 7 ECT (now Article 216 para. 2 TFEU).[11] In terms of competence this resulted from the exclusive competence of the EU extended to TRIPS by the Treaty of Nice.[12] However, for future amendments or factual amendments to the WTO agreements by dynamic interpretation of WTO law by the WTO dispute settlement institutions the situation may become more complex as it cannot be excluded that the WTO may one day cover issues which go beyond the exclusive competence of the EU because, for example, the WTO disciplines could also comprise portfolio investments which may not be covered necessarily and in every context by the new Article 207 para. 1 TFEU[13]; in part the definition of direct investment is narrowed to such an extent in Art. 207 para. 1 TFEU that it covers

[10] WT/L/641. See Herrmann/Weiß/Ohler, *Welthandelsrecht*, (2nd ed.) 2007, para. 967.

[11] The document can be found at http://www.wto.org/english/tratop_e/trips_e/popup_amendment_ec_e.htm.

[12] On the significance of Art. 133(5) TEC cf. Osteneck, in: Schwarze (ed.), *EU-Kommentar*, (2nd ed.) 2009, Art. 133 para. 11.

[13] See also Hahn, in: Calliess/Ruffert (eds.), *EUV/AEUV*, (4th ed.) 2011, Art. 207 para. 62. For the notion of investment in the sense of Art. 207(1) TFEU see Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, para. 379, which uses the acquirement of control as the relevant criterion, and refers to Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum transnationalen Wirtschaftsrechts (2009) 83, p. 16, (also Tietje, Außenwirtschaftliche Dimensionen der europäischen Wirtschaftsverfassung, in: Fastenrath/Nowak (eds.), *Der Lissaboner Reformvertrag*, 2009, p. 237 (249)) who states that according to OECD principles the term direct investment subsumes an equity interest exceeding 10%. This can open up a tension in the interpretation of the term investment to the rules on movement of capital which usually are more broadly interpreted because they not only imply gaining control but also refer to effective participation in management, cf. ECJ, Case C-326/07, *Commission vs. Italy*, ECR [2009] I-2291, para. 35.

only specific trade-related aspects of investment agreements.[14] In such cases, the competence of the Member States becomes relevant again for the activities of the EU in the WTO under EU law. Against this backdrop it seems absolutely improper to intend to compel EU Member States to leave the WTO, and then having to renew their accession at a later date. Also for the conclusion of the Doha Round the extension of EU competence does not necessarily mean that in regard to EU law a ratification of amendments to the WTO agreements also by the EU Member States would be prohibited. For in assessing this question it must be taken into consideration that in international law, on account of a lack of clear distribution of competences between EU Member States and the EU,[15] the EU Member States on account of them being signatories to the Treaty bear full liability for adhering to WTO obligations and newly emerging obligations resulting from the Doha Round. In the same way, in WTO dispute settlement practice the recurring total liability of the EU for compliance with WTO law and for measures of the EU Member States which damage the WTO is stressed.[16] The internal delimitation of competences between the EU and its Member States is of no interest insofar. Additionally, the fact remains that the Member States, and not the EU, are parties to international agreements in the context of which principles and standards are drafted which are relevant for WTO law. In order to uphold these standards and principles also towards the EU the panels refer to the respective membership of at least the EU Member States.[17]

For these reasons construing under EU law an obligation for EU Member States to exit the WTO does not seem convincing, all the more so as the EU competences (irrespective of the problems of interpreting the term investment in Article 207 para. 1 TFEU) do not cover all fields already currently covered by the WTO, for example, national security policy (this remains the competence of the Member

[14] So Krajewski, External Trade and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (114–115); equally Osteneck, in: Schwarze (ed.), *EU-Kommentar*, (2nd ed.) 2009, Art. 133 para. 42; contrary to Terhechte, Art. 351 AEUV, das Loyalitätsgebot und die Zukunft mitgliedstaatlicher Investitionsschutzverträge nach Lissabon, Europarecht 45 (2010) 4, p. 517 (521).

[15] The Lisbon Treaty made no far-reaching changes to this as the competence provisions of Art. 2 et seq. TFEU incorporate the well-known, even though not explicitly stated rules under the Nice EU/EC law. Art. 2 et seq. TFEU largely do not more than reflect the traditional ECJ case law on the categories and scope of EU competences, cf. Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, (3rd ed.) 2010, p. 104, 107–108.

[16] Cf. the case studies mentioned by Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 161 (165 et seq.).

[17] Cf. Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 161 (167).

States alone, Article 4 para. 3, sentence 3 TEU), balance of payment issues of non-Eurozone members and budget law (relevant for Articles XXI, XII GATT and members' contributions).[18]

In Particular: Harmonisation in Services Trade and the Meaning of Article 207 Para. 6 TFEU

Not every facet of trade in services falls under exclusive EU competence. Even though cultural services, services in the social, education and health sectors are under the exclusive competence of the EU (see their explicit naming in Art. 207 para. 4 TFEU) yet in accordance with Art. 207 para. 6 TFEU this competence has its limits where, as a result of WTO provisions, obligations for harmonisation in these areas may arise. For in relation to culture, health protection, education or vocational training, according to Article 2 para. 5 in conjunction with Article 6 TFEU, the EU may only support and coordinate but not harmonise (Art. 2 para. 5, subpar. 2 TFEU; see also the prohibition against EU harmonization provided for in Article 166 para. 4 TFEU regarding education and vocational training, Article 167 para. 5 regarding culture and Art. 168 para. 5 regarding health services). The GATS envisages in Article VI:4, however, the setting of uniform criteria in the form of disciplines necessary for ensuring the quality of services and the objectivity and transparency of criteria for the supply of services; in other words, this provision prescribes the adoption of (minimum) harmonisations.[19] Thus the WTO possesses an albeit currently almost unused competence to adopt disciplines leading to certain standardisations of domestic provisions in the service sector whereby the area of application has not been conclusively clarified.[20] In regard to Article 207 para. 6 TFEU the external competence of the EU should not suffice to adopt such harmonisations within the WTO, but require further supplementing by the Member States.[21] Insofar, Article 207 para. 6 TFEU is similar to the former Article 133 para.

[18] This is also noted by Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 161 (172).

[19] Cf. Hummer, in: Vedder/Heintschell von Heinegg (eds.), *Europäischer Verfassungsvertrag*, 2007, Art. III-315, para. 36–37; Pitschas, Der Handel mit Dienstleistungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 99 (105–107).

[20] It has not yet been clarified whether disciplines pursuant to Art. VI(4) GATS only include sectors for which specific commitments were made or whether they are relevant to all services.

[21] Cf. Fischer, *Der Vertrag von Lissabon*, 2008, p. 334 who regards Art. 207(6) as limitation clause to the exclusive EU competence; similar Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag*, 2007, Art. III-315, para. 32–33, who once speaks of a limit to exclusive competence, but then of a limitation to the exercise of competence. In favour of a need for a mixed agreement also Pitschas, Der Handel mit Dienstleistungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 99 (106–107).

6 subpar. 2 ECT, which explicitly envisaged a joint responsibility and thus a mixed agreement of the EU and its Member States in certain areas (trade in cultural services, in educational services, or in social and human health services) which were very broadly interpreted.[22] The exclusion of these areas from the exclusive competence of the EU through Art. 133 para. 6 subpar. 2 ECT went much further in actual application than Art. 207 para. 6, as Art. 133 ECT excluded these areas completely while Art. 207 para. 6 only does this in relation to harmonisation obligations. Functionally, through Art. 207 para. 6 TFEU however a limitation on the exclusive competence of the EU has been enshrined in the TFEU with the result that trade agreements entered into by the EU, which could lead to harmonisation obligations for the Member States in areas where harmonisation is prohibited to the EU, cannot be based on the exclusive EU competence.

In any case the meaning of Art. 207 para. 6 TFEU is controversial. Usually this norm is not regarded as a limitation of the exclusive external competence of the EU in the Common Commercial Policy but is regarded as emphasising the Member States' internal implementation competence which still should remain their unchanged responsibility.[23] Such reading fails to recognise that Art. 207 para. 6 is not limited only to the *internal* allocation of competences. It is of course correct that Art. 207 has no significance for the allocation of implementation competences between the EU and the Member States; the issue of implementing EU law is governed as always by other EU provisions. However, the question stands as to the remaining significance of Art. 207 para. 6, should the contrary view be correct. For this norm would only maintain something which is in itself self-evident because no one ever claimed that if the EU had a competence to conclude an international agreement then it should also have the internal implementation competence; such a conclusion has never been drawn and would collide with the principle of conferred powers.[24] If Art. 207 para. 6 TFEU should ensure that exclusively *national* harmonisation competences should not be displaced through the Common Commercial Policy treaty competences of the EU, this can only mean that the EU cannot

[22] Cf. ECJ, Opinion 1/08 – *GATS*, ECR [2009] I-11129, paras. 138–139; Advocate General Kokott, Opinion in ECJ, Case C-13/07, paras. 167–168.

[23] Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (115–116); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum transnationalen Wirtschaftsrecht (2009) 83, pp. 12–13 (also Tietje, Außenwirtschaftsrechtliche Dimensionen der europäischen Wirtschaftsverfassung, in: Fastenrath/Nowak (eds.), *Der Lissabonner Reformvertrag*, 2009, p. 237 (244-245); Müller-Ibold, in: Lenz/Borchardt (eds), *EU-Verträge*, (5th ed.) 2010, Vor Art. 206-207, para. 21.

[24] Contra Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (116–117), who opines that without Art. 207(6) TFEU the EU would have gained comprehensive implementation competence with conclusion of an international trade agreement. There seems, however, to be no legal basis for such bold allocation of competence to the EU; Krajewski does not offer one. The case law of the ECJ deals with the emergence of external EU competences as a result of exercise of internal EU competences, but not the other way round.

justify harmonisation obligations through trade agreements by means of Art. 207 TFEU. Instead it may do so only together with the Member States by means of a mixed agreement.[25] Otherwise the harmonisation prohibitions stated earlier would be meaningless and could easily be circumvented.[26] The interpretation of Art. 207 para. 6 TFEU put forward here, to the contrary, results in respect for the remaining national competences as the Member States' competences are still required for conclusion of the GATS in as much as it requires a joint agreement in spite of the extension of the EU competence in Art. 207 para. 1 TFEU. Here Art. 207 para. 6 draws a border for EU competence just as the ECJ in his Opinion 1/94 on the WTO Agreement refuted an interpretation of Art. 113 ECT (now Art. 207 TFEU) which would have permitted the European Community to conclude agreements in the area of intellectual property. In doing so the ECJ pointed out that this would thus undermine the differing procedural provisions regarding the internal EU competences for these areas (the ECJ referred to Art. 100, 100a and 235 ECT, now Art. 114 f. 352 TFEU).[27] The same rationale must reign all the more so for the risk of curbing internal harmonisation prohibitions against the backdrop of the contents of Art. 207 para. 6 TFEU.

Against the view stated here concerning Art. 207 para. 6 TFEU apparently *four objections* can be raised: Firstly, it is said that there is nothing unusual in the fact that the competence for concluding an agreement and competence for its implementation are separated. Secondly, the wording allegedly indicates otherwise as it only limits the *exercise* of competence. Thirdly, the drafting history is said to prove that Art. 207 para. 6 TFEU does not intend to limit the exclusive EU competence, thus it does not build a basis for advocating EU Member State's competence to be involved in contractual agreements. And finally, the view presented here is blamed for cancelling the competence extension desired by the Convention. The latter objection is a *petitio principii*, for the debate exactly is about the degree of this extension.

Concerning the first objection: The fundamental statement that in EU legislation external and internal competences can be separated doubtless is correct. However, the situation described here is not comparable with the rather frequent situation that the EU enters into obligations in international law for which it has no responsibility for internal implementation; in regard to the above-named harmonisation areas the EU does not only lack the competence, but harmonisation attempts originating in EU legislation are explicitly excluded.[28] The existence of Art. 207 para. 6 proves

[25] Cf. also Hahn, in: Calliess/Ruffert (eds.), *EUV/AEUV*, (4th ed.) 2011, Article 207, para. 121.

[26] Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (118) describes the substantial legal and factual pressure on the Member States in case the EU takes on obligations under international law.

[27] ECJ, Opinion 1/94, ECR [1994] I-5267, paras. 59–60.

[28] This is ignored by Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (117).

that this exclusion should not be invalidated through EU agreements in the context of the Common Commercial Policy.

Concerning the second objection: The interpretation presented here whereby Art. 207 para. 6 limits the exclusive EU competence, cannot be deduced so simply from the wording indeed. The wording of Art. 207 para. 6 is ambivalent, however, and does not exclude the interpretation presented here. The wording does not explicitly limit the EU competences according to Art. 207 para. 1 but refers to the "exercise" of competences and not to the competences themselves. On the other hand, it prohibits, unequivocally, an impact on the allocation of competences between the EU and the Member States and forbids that the exercise of EU competences leads to an EU harmonisation in excluded areas. The latter appears to be decisive in nature: The exercise of EU competence should not lead to a EU harmonisation excluded by the TFEU; this would be precisely the case if the EU alone had the remit to enter into harmonisation obligations under international law in such policy fields. As a result the Members States would be obliged to implement these, and this would render the prohibition against EU harmonisation in the areas listed in the TFEU worthless. Under the Nice Treaty Art. 133 para. 6 subpar. 1 ECT was a more precisely formulated, albeit a norm no easier to interpret, which made clear that the Council could not conclude agreements with consequences for harmonisations of national legal and administrative provisions excluded in the ECT. Thus the exclusive EU competence was limited,[29] according to the Finnish proposal on which the new formulation of Art. 133 ECT introduced by the Nice Treaty was largely based.[30] That Article 207 para. 6 TFEU is less stringently formulated in comparison to Article 133 para. 6 ECT does not mean that the interpretation advocated here would be inadmissible.

Concerning the third objection: A glance at the Convention documents confirms that the current Art. 207 para. 6 TFEU was incorporated very early in an almost verbatim provision[31] and that thus the recommendation of the responsible Convention working group was to be taken into account (to the effect that the decision on trade agreements should require a qualified majority in the Council without prejudice to current restrictions on harmonisation) and that the EU competence for the Common Commercial Policy should in no way modify the delimitation of competences between the EU and the Member States.[32] However, the Presidium postponed the decision on the explicit continuation of the exceptions to the

[29] Cf. Hahn, in: Calliess/Ruffert (eds.), *EUV/EGV*, (3rd ed.) 2007, Art. 133, paras. 110–112.

[30] Cf. Fischer, *Der Vertrag von Nizza*, 2001, pp. 116–117.

[31] In the convention draft this finally became Article III-217(5) ("The exercise of the competences conferred by this Article in the field of commercial policy shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of Member States in so far as the Constitution excludes such harmonisation".) After the intergovernmental conference of 2004 the only change in the English version of the text was the omission of the word "internal" in the then Art. III-315(6) of the Draft Constitutional Treaty, see OJ [2004] C 310/1.

[32] See CONV 685/03, p. 55, para. 7 (at the end).

exclusive competence of the EU as contained in Art. 133 para. 6 subpar. 2 ECT.[33] In addition, the first version of this paragraph contained an important clarification which, however, was not maintained in the final text of Art. III-217 para. 5: the draft of the Presidium (CONV 685/03) reads "The exercise of the competences conferred by this Article in the field of commercial policy shall not affect the delimitation of *internal* competences between the Union and the Member States" (Italics from the author). This clarification that the extension of EU competences would not impinge upon the *internal* division of competences only is later missing. Working Group VII had considered in their discussions, to which the Presidium refers, the issue of the voting quorum in the Council (qualified majority or unanimity)[34] and issues concerning EU competence.[35] The subsequent proposals for amendment in the Convention in relation to para. 5 of Art. III-217 (the precursor of Art. 207 para. 6 TFEU in the Convention draft) focused on changing this to the wording of Art. 133 para. 6 ECT,[36] which, however, was not fully implemented. The same happened to the proposal to add as a new paragraph 6 a provision which explicitly states a competence of the Member States to conclude agreements as in Art. 133 para. 5 last sentence ECT. From this drafting history it is deduced that amendment proposals to limit the exclusive EC competence did not prevail.[37] An extensive discussion ensued in the Convention on the formulation of Art. III-217 para. 4 (requirement for unanimity) and para. 5. Proposals digressing from the Presidium draft wanted either no single exception to the qualified majority decision or even more strongly to revert to Article 133 para. 6 ECT and provide that agreements in the areas of trade in cultural and audiovisual services, educational or social and human health services should come under the joint responsibility of the Community and its Member States.[38] The Presidium, however, retained its initial formulations and promised a more explicit and comprehensible formulation of the policy areas subject to the requirement for unanimity.[39] The course of the discussions shows that the discussion focused primarily on the scope of the voting quora in the

[33] CONV 685/03, p. 55, para. 8.

[34] The majority of the working group advocated qualified majority, but regardless of harmonisation limitations: The Presidium did not take this up and referred to a simplified continuation of Art. 133(5) TEU in the precursor rule of Art. 207(4) TFEU requiring unanimity in certain areas, CONV 685/03, p. 53, para. 1.

[35] CONV 459/02, pp. 7, 18.

[36] Cf. CONV 707/03, pp. 7, 108.

[37] Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum transnationalen Wirtschaftsrecht (2009) 83, pp. 12–13 (also Tietje, Außenwirtschaftsrechtliche Dimensionen der europäischen Wirtschaftsverfassung, in: Fastenrath/Nowak (eds), *Der Lissabonner Reformvertrag*, 2009, p. 237 (244–245).

[38] CONV 727/03, pp. 53–54.

[39] CONV 727/03, pp. 53–54. The final convention draft, CONV 850/03, p. 166, Art. III-217 para. 4, included trade in cultural and audiovisual services as further cases for unanimity.

Council.[40] The fact that a closer alignment of Art. III-217 para. 5 to Art. 133 para. 6 TEU did not occur, shows only that there were no corresponding formulations in this direction. Nevertheless, however there was a definite change to the formulation and reference to internal competences was deleted. The consequences resulting from the harmonisation prohibition of Art. III-217 para. 5 for the scope of exclusive EU competence never was an explicit issue in the Convention. As a result it is evident that the genesis of this norm does not concede a clear significance in either direction. In the light of these facts it is by no means compulsory that Art. 207 para. 6 TFEU cannot be interpreted as a limitation to the exclusive EU competence. Indeed the change to the text, which dispenses with the little word "internal", rather is evidence of the interpretation presented here.

Concerning the fourth objection: As the areas in the TFEU which are subject to a harmonisation prohibition for the EU are strictly delimited, the interpretation made here will not significantly undermine the extension of competences in favour of the EU. The present interpretation of Article 207 para. 6 TFEU changes nothing regarding the fact that the EU may conclude trade agreements also in areas for which it has no competence for internal implementation. The exceptions to the EU treaty making competences comprise only those areas for which EU harmonisation is (expressly) excluded (thus the wording of Art. 207 para. 6 TFEU).

The interpretation presented here of Art. 207 para. 6 TFEU is strengthened, in addition to the wording which clearly proscribes that the EU Common Commercial Policy competence should not lead to a harmonisation which the Treaty excludes, also by the motivation for introducing a norm which should ensure that the delimitation of competence should not be at the cost of the Member States. Only if one interprets Article 207 para. 6 TFEU as a limitation to the exclusive EU competence the wording and purpose of Art. 207 para. 6 TFEU retain significance while the contrary view of Art. 207 para. 6 TFEU robs it of any effective significance and regards it as an "unnecessary clarification".[41]

On the Possibility of the Member States to Exit the WTO

However, it is a completely different question if the EU Member States on their own instigation can leave the WTO on account of the comprehensive exclusive EU competence. In terms of power politics and negotiation tactics it is not expedient because of the loss of direct influence and the resulting reduced voting weight for the EU in the WTO (even though formal voting where the number of votes is of importance has to date scarcely, if ever, taken place). Hence, for this reason there

[40] The setting of unanimity in the Council and the issue of exclusive or shared EU competence are two different matters, see also ECJ, Opinion 1/08 – *GATS*, ECR [2009] I-11129, para. 142.

[41] Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, Europäische Zeitschrift für Wirtschaftsrecht 21 (2010) 6, p. 207 (210).

have been really no relevant considerations to this end in any EU Member State. Concerning deliberations about an exit of EU Member States from the WTO as a consequence of the far-reaching EU competences, the Federal Constitutional Court in its Lisbon decision has attempted to determine a constitutional limit and even to justify a constitutional prohibition against exiting the WTO. The Court did so by refering to the competence limitations of the EU (convincingly insofar) and further by refering to the democratic necessity for the Member States' participation in the WTO negotiation processes. The latter argument fails as under the Nice Treaty Member States were already mediated through the EU Commission in the WTO institutions: In practice, it is only the EU Commission which represents the EU and its Member States in the WTO bodies.[42] The marginalisation of Member States' influence in the WTO feared by the German Federal Constitutional Court as a consequence of the competence extension through the Lisbon Treaty and the accompanying loss of participation "in the discourse on fundamental socio-political and economic policy issues"[43] would have already existed prior to the changes introduced by the Lisbon Treaty if the assumption had been correct. The fear of marginalisation of the Member States as a consequence of the enlarged EU competences ignores, however, that also in future the Commission must come to agreement in close collaboration with the Member States through the Special Committee pursuant to Art 207 para. 3 TFEU (it already pre-existed in accordance with Article 133 para. 3 ECT). As a result the exit of EU Member States from the WTO would also raise problems under EU law (here reference is made again to the areas listed earlier for which the Member States remain responsible): An obligation to exit does not exist in EU law, nor does a national constitutional prohibition against leaving the WTO. The converse argumentation of the Federal Constitutional Court can indeed only be termed breath-taking.[44] In any case it seems politically undesirable.

Result

It should be kept in mind that also the new EU law contains no obligation on the part of EU Member States to exit the WTO; there hardly is any legal basis for such obligation. The extension of exclusive EU competence in the area of Common Commercial Policy by the Lisbon Treaty does not completely remove the basis for the EU Member States' further participation in the WTO. On closer inspection,

[42] Raith, The Common Commercial Policy and the Lisbon Judgement of the German Constitutional Court of 30 June 2009, Zeitschrift für europarechtliche Studien 12 (2009) 4, p. 613 (615, 617, 618 et seq.).

[43] Cf. Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 374–375.

[44] Nettesheim, Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG, Neue Juristische Wochenschrift 62 (2009) 39, p. 2867 (2868).

their participation in the WTO remains necessary even if single amendments to the WTO Agreements seen in themselves may be completely covered by EU competences. The Common Commercial Policy will continue—as is currently the case—to be driven by the Commission in close agreement with the Member States; the pivotal 133 Committee is maintained as a Special Committee under Article 207 para. 3 TFEU. Thus, the new Article 207 TFEU can be understood even in such a way that it (to a large extent) only reflects what has in any case been the WTO reality since Nice at the latest[45]: i.e. that the Commission represents the EU and the Member States. The Lisbon Treaty only added the primary law basis, as we have seen in other areas of EU law as well.

Limitations to Further Supra-Nationalisation of the External Economic Policy?

The Federal Constitutional Court did not include legislation on external trade in the list of reserved areas in which further supranationalisation can only occur if due regard is taken to the remaining domestic competences (cf. the above quote of the Lisbon decision). This could lead to the view that no limits have been set for a further extension of EU competences in this policy field either through further amendments to the EU Treaties or through an extensive interpretation of Article 207 TFEU by the ECJ. Thus the ECJ could be tempted to continue interpreting the area of investment protection beyond the frame which the Federal Constitutional Court set and, for example, to include portfolio investment in EU competence under Art. 207 para. 1 TFEU, or to take a different stance than that of the Federal Constitutional Court on the fate of the bilateral investment protection agreements already concluded by the EU Member States. The Federal Constitutional Court did not regard the continued legal existence of these national agreements as jeopardised but ruled that the EU Council would have to approve their retention on account of the "legal concept that a legally existing factual situation in the Member States will in principle not be adversely affected by a later step of integration".[46]

An additional area of conflict could arise if the ECJ, as a consequence of the far-reaching transition of exclusive competence to the EU, would question the membership role of EU States in the WTO as this would contradict the Federal Constitutional Court's emphasis on the significance of WTO membership for EU Member States.[47]

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[45] Cf. Raith, The Common Commercial Policy and the Lisbon Judgement of the German Constitutional Court of 30 June 2009, Zeitschrift für europarechtliche Studien 12 (2009) 4, p. 613 (617).

[46] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, para. 380. This is rightfully criticized by Terhechte, Art. 351 AEUV, das Loyalitätsgebot und die Zukunft mitgliedstaatlicher Investitionsschutzverträge nach Lissabon, Europarecht 45 (2010) 4, p. 517 (530–531).

[47] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 375–376.

Even though external trade is not part of the reserved areas, the Federal Constitutional Court has also determined that for external trade law the exercise of the new EU competence must be carried out in such a way that at the Member State level both in scope and in substance tasks of sufficient importance must exist in order to ensure that the prerequisites for a living democracy at the national level remain and that "the Federal Republic of Germany retains substantial national scope of action for central areas of statutory regulation and areas of life".[48] It is interesting that—apart from the above-mentioned reserved areas of sovereign Statehood—it is only the area of external trade which became subject to closer analysis by the Court regarding the question whether the changes by the Treaty of Lisbon still provides enough national scope meeting the requirements stated by the Court.[49] Regarding the statements of the Federal Constitutional Court about the new EU competence in the area of investment agreements and the future fate of the national Bilateral Investment Treaties,[50] *Matthias Ruffert* has ascertained that finally it remains unclear what the consequences would be of an even further extension of EU competences, beyond what the Federal Constitutional Court did for Art. 207 TFEU, in particular for the interpretation of the notion of investment. It was left open, in particular, if the violation of statehood and sovereignty negated by the Federal Constitutional Court in its Lisbon decision at some point (and from when?) must be viewed in a different light.[51]

Further Supra-Nationalisation in the Context of the Current Transferred Competences: About Dynamic Interpretation of Competences by the ECJ as an Action Ultra Vires in the Light of the Honeywell Order and the Rescue Package Judgement of the Federal Constitutional Court

As far as the possibility of an extension of EU competence through a broad interpretation and dynamic legal development resulting from judicial development of the law by the ECJ is concerned, the Federal Constitutional Court acknowledges—as last confirmed in the so-called *Honeywell* Order[52]—that the

[48] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 351, 370 et seq.

[49] Ruffert points to this in his contribution: An den Grenzen des Integrationsverfassungsrechts: Das Urteil des BVerfG zum Vertrag von Lissabon, Deutsches Verwaltungsblatt 124 (2009) 19, p. 1197 (1204).

[50] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 377 et seq.

[51] Cf. Ruffert, An den Grenzen des Integrationsverfassungsrechts: Das Urteil des BVerfG zum Vertrag von Lissabon, Deutsches Verwaltungsblatt 124 (2009) 19, p. 1197 (1204).

[52] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 62. See also Federal Constitutional Court, 2 BvR 687/85, BVerfGE 75, 223 (242 f); Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 351–352.

"Court of Justice is . . . not precluded from refining the law by means of methodically bound case-law. The Federal Constitutional Court always explicitly recognised this power . . . It is in particular not opposed by the principle of conferral and the structure of the association of sovereign states (*Staatenverbund*) constituted by the Union. Rather, the further development of the law – carried out within the boundaries imposed on it – can particularly also contribute in the supranational association to a delimitation of competences which does justice to the fundamental responsibility of the Member States with regard to the Treaties as against the regulatory powers of the Union legislature".

Hence, broad boundaries should be set to a dynamic competence interpretation. According to the latest statements of the Federal Constitutional Court these boundaries would be transgressed if "[f]urther development of the law . . . changes clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties), or creates new provisions without sufficient connection to legislative statements. This is above all not permissible where case-law makes fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power and influence".[53] The Member States' "constitutional law responsibility for integration" would be seriously undermined if independent expansions of competence were carried out by the ECJ to "cover areas which are counted among the constitutional identity of the Member States or depend particularly on the process of democratic discourse in the Member States".[54] On the other hand, the Federal Constitutional Court allows the ECJ methodic scope and also fallibility:

The "Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the 'uniqueness' of the Treaties and goals that are inherent to them (see ECJ Opinion 1/91 *EEA Treaty* [1991] ECR I-6079 para. 51)" are to be respected. "Secondly, the Court of Justice has a right to tolerance of error. It is hence not a matter for the Federal Constitutional Court in questions of the interpretation of Union law which with a methodical interpretation of the statute can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own. Interpretations of the bases of the Treaties are also to be tolerated which, without a considerable shift in the structure of competences, constitute a restriction to individual cases and either do not permit impacts on fundamental rights to arise which constitute a burden or do not oppose domestic compensation for such burdens".[55] These deliberations of the Court may be regarded as a softening of the Lisbon Judgement of the Federal Constitutional Court; at least Justice Landau, in delivering a dissenting opinion expressed this because "[t]he

[53] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 64.

[54] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 65, with reference to Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 357–358.

[55] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 66.

Senate majority goes beyond the requirement of a manifest – that is unambiguous and evident – transgression of competences and departs from the consensus on which the Lisbon judgment was based by requiring a 'sufficiently qualified' violation of competences which is not only manifest, but which also leads to a structurally significant shift in the structure of competences between Member States and a supranational organisation. Hence, the Senate majority goes beyond the goal of a structure of *ultra vires* review which is open towards European law. It ignores the major prerequisite of binding democratic legitimation on exercising sovereign power that is emphasised in the Lisbon judgment which is breached on any transgression of competences; if the exercise of sovereign power is permitted without sufficient democratic legitimation, this contradicts the core statement of the Senate's judgment of 30 June 2009".[56]

In the application of these principles the Federal Constitutional Court saw no grounds to intervene against the postulated general legal principle of the prohibition of discrimination on grounds of age as postulated by the ECJ in the *Mangold* Judgement[57]: "It is irrelevant whether the outcome found in the *Mangold* ruling can still be gained by recognised legal interpretation methods and whether any existing shortcomings would be evident. At any rate, it does not constitute a transgression of the sovereign powers assigned to the European Union by an Approving Act (*Zustimmungsgesetz*), thus violating the principle of conferral in a manifest and structurally effective manner".[58]

Hence, the Federal Constitutionl Court has lowered the standards for its review for ultra vires acts also with regard to ECJ judgements to a control of manifest transgressions of competences implying a structurally significant shift in the competence structure. This would seem to suggest that, as a result of being anchored in competence norms of the EU Treaties, a dynamic, broad interpretation of the term investment in Article 207 TFEU and different assessment of the future of the national BITs by the ECJ would not be acts ultra vires, in spite of the limitations set by the Federal Constitutional Court to the competence effects of inadmissible development of the law which do not allow to expand "existing competences ... with the weight of a new establishment".[59] With regard to its structural effects an interpretation must be seen much more critically under which the exclusive EU competences no longer would leave scope for the participation of EU Member States in the WTO. Taking a realistic view of this and in view of the political significance of an exit of the EU Member States from the WTO it is not to be expected that the ECJ will adopt such a legal interpretation.

[56] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, Dissenting opinion of Judge Landau, para. 102.

[57] ECJ, Case C-144/04, *Mangold*, ECR [2005] I-9981.

[58] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286 para. 68.

[59] Regarding the latter Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 78.

The recent judgement of the Federal Constitutional Court on the rescue package is proof of retraction of the standard of review for acts ultra vires, at least in its outcome.[60] The Euro rescue package consists of three components, namely the Regulation 407/2010 based on Art. 122 para. 2 TFEU, by means of which the European Financial Stabilisation Mechanism (EFSM) was introduced, The European Financial Stability Facility (EFSF),[61] which is not based on European secondary legislation, but represents an intergovernmental agreement of the Euro States (implemented in Germany through the Euro Stabilisation Mechanism Act—StabMechG), and participation of the IMF.[62] This raises the question of an act ultra vires in regard to VO 407/2010 as it is very questionable if the legal basis of Art. 122 para. 2 TFEU is sufficient, all the more so as it is doubtful if the underlying events are really exceptional occurrences beyond the control of a Member State.[63] The Federal Constitutional Court, however, has not touched upon this problem. Instead it regarded the participation of the Federal Government in intergovernmental decisions and the participatory activities of German organs in agreements under international law also as an unsuitable object of a constitutional complaint as is the case with the intergovernmental and supra-national decisions themselves.[64] Indeed, legal acts of the EU are not acts of the—German—public administration. But in the case of lack of EU competence they could very well be legal acts ultra vires. In the Maastricht Judgement[65] and in the Lisbon Judgement[66] the Federal Constitutional Court explicitly reserved the competence to examine this. A further object for the Federal Constitutional Court's ultra vires review (which the Court, however, did not pursue) could be the purchase of government bonds by the ECB in the context of a programme for the securities market (admittedly the secondary market) which

[60] Federal Constitutional Court, 2 BvR 987/10, *Euro Rescue Package, NJW 64 (2011) 40, 2946*.

[61] It is a special purpose vehicle of the Euro States under Luxembourg law.

[62] For details on the content and essence of the Euro rescue package see Thym, Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle, Europäische Zeitschrift für Wirtschaftsrecht 22 (2011) 5, p. 167 (168); Baumgart, Die Zurückweisung der Verfassungsbeschwerden gegen Maßnahmen zur Griechenlandhilfe und zum Euro-Rettungsschirm, Neue Justiz 65 (2011) 11, p. 450 (450–451).

[63] Sceptical Thym, Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle, Europäische Zeitschrift für Wirtschaftsrecht 22 (2011) 5, p. 167 (169).

[64] Federal Constitutional Court, 2 BvR 987/10, *Euro Rescue Package*, NJW 64 (2011) 40, 2946, paras. 113 et seq.

[65] Federal Constitutional Court, 2 BvR 2134/92; 2 BvR 2159/92, BVerfGE 89, 155, para. 188.

[66] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 353–354.

could contravene Article 123 para. 1 TFEU.[67] Instead of denying the admissibility of the complaint, an ultra vires review in accordance with the *Honeywell* criteria would have been appropriate at the level of substance.[68] The Federal Constitutional Court, however, created a high admissibility hurdle in a way which is methodically questionable.

Further Supra-Nationalisation Through Treaty Changes: Identity Review

A second possibility for extending the EU competence in the area of Common Commercial Policy is through Treaty amendments. Here the above-mentioned reserved areas could be relevant if the EU was granted exclusive competence to conclude far-reaching agreements on educational or human health services which involve harmonization obligations. In the Lisbon Treaty, according to the interpretation presented here, as a consequence of Article 207 para. 6 TFEU the conclusion of agreements for example in the educational services sector a joint agreement is required if the agreement contains obligations causing the need for regulatory harmonization because such trade agreements insofar are not covered by the exclusive EU competence under Article 207 para. 1 TFEU (cf. I., *supra*). Harmonisations in the area of education collide with the commitment of the Federal Constitutional Court in the Lisbon Decision whereby the principle of democracy guarantees democratic self-determination, i.e. the nation State's primary responsibility "to assert oneself in one's own cultural area, especially relevant in decisions made concerning the school and education system, family law, language, certain areas of media regulation, and the status of churches and religious and ideological communities".[69] Obligations in international law to harmonise educational diplomas and educational content in the interest of establishing a global educational market could clearly collide with this. Such harmonisation competences thus cannot, at least not to any large degree, be transferred to the EU as part of its exclusive Common Commercial Policy.

[67] Critical remarks by Ruffert, Die europäische Schuldenkrise vor dem Bundesverfassungsgericht – Anmerkung zum Urteil vom 7. September 2011, Europarecht 46 (2011) 6, p. 842 (847) and Pagenkopf, Schirmt das BVerfG vor Rettungsschirmen?, Neue Zeitschrift für Verwaltungsrecht 30 (2011) 24, p. 1473 (1479). Also Nettesheim, "Euro-Rettung" und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion, Europarecht 46 (2011) 6, p. 765 (769–770) stressed that a constitutional court review is also necessary where there is no national legislation or national implementation measure. Explicitly he names the activities of the EFSM and the role change of the ECB as starting points for ultra vires review.

[68] Accord Ruffert, Die europäische Schuldenkrise vor dem Bundesverfassungsgericht – Anmerkung zum Urteil vom 7. September 2011, Europarecht 46 (2011) 6, p. 842 (846–847).

[69] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, para. 260.

Conclusion

The new EU law hardly offers a legal basis for establishing a legal obligation of an EU Member State to leave the WTO. The extension of EU competences in the Common Commercial Policy does not touch the foundations of the Member States' further participation in the WTO. It even continues, in certain areas, to be indispensable. The Common Commercial Policy will also in future be led by the Commission in close agreement with the Member States present in the Special Committee under Article 207 para. 3 TFEU.

The limits to further supra-nationalisation of commercial policy as exclusive EU competence are above all existent in areas where the EU is bound by internal harmonisation prohibitions which are of cultural significance and thus, in the view of the Federal Constitutional Court in the Lisbon Judgement, are within the remit of the nation State's primary responsibility. The statements of the Federal Constitutional Court in the *Honeywell* judgement prompt the assumption that the interpretative guidelines developed by the Federal Constitutional Court in the Lisbon Judgement regarding Article 207 TFEU should not be regarded as absolute but leaves the ECJ room for manoeuvre as long as there is no structurally significant shift in the structure of competence allocation between the EU and its Member States to the latter's detriment. Such significant shift would occur in the case of an exclusion of EU Member States from WTO membership. Such an interpretation of EU law seems very improbable.