

RIGHTS AND ROLE OF THE EUROPEAN PARLIAMENT IN COMMON COMMERCIAL POLICY

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Executive summary

The EU is an influential global trade power whose competence to conclude international trade agreements with third countries is regulated in detail by the EU Treaties, taking into consideration that member states remain sovereign in certain policy areas. In his State of the Union speech of September 2017, Commission President Jean-Claude Juncker has set out an ambitious agenda for advancing trade deals with third countries in 2018.

Over the past decades, the role of the European Parliament in international trade agreements has continuously increased. The controversial debates surrounding trade agreements like ACTA, TTIP, and CETA have shown that it is important to involve the European Parliament (and national parliaments) early in the process. The European Parliament and, most likely, also the EU's national parliaments will also have to approve any possible agreement with the United Kingdom about its future (trade) relationship with the EU after Brexit.

This Policy Paper highlights the foundational legal provisions and rules in the EU Treaties for concluding international trade agreements between the EU and third countries. After a brief overview of the legal basis for trade agreements – as EU-only or mixed agreements – and their decision-making process the focus of the analysis is on the participation rights of the European Parliament. Then, the Policy Paper presents the political veto power role of the European Parliament in Common Commercial Policy: The cases of the EU-South Korea Trade agreement and the SWIFT agreement have shown the possible impact of its participation. At the same time, the democratic (input) legitimacy is becoming more and more relevant for the public acceptance of trade agreements.

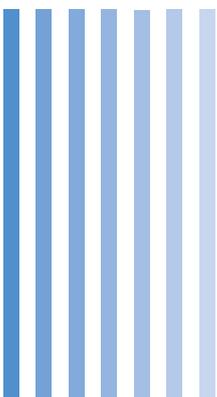


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INTRODUCTION

The Common Commercial Policy (CCP) is a powerful tool of the EU's external action as the EU is one of the biggest trade powers in the world.¹ But trade negotiations can often be contentious political issues: In the past years, the debate about the Transatlantic Trade and Investment Partnership (TTIP), which is currently put on ice, was especially heated and the lack of democratic legitimacy and transparency of trade negotiations was criticised time and again. In this situation, the European Parliament (EP) can play an important role as a counterweight and corrective. The parliament's power in external trade policy is, however, relatively new. In the past, many European policy makers believed that "external trade policy is best conducted without any parliamentary input or interference."² However, the EP managed to keep its idea of a more democratic EU alive and obtained additional powers in the Lisbon Treaty.³

In order to assess the rights and the role of the EP in the EU's CCP, the first part of this Policy Paper examines the Lisbon Treaty rules that apply to international trade agreements taking into consideration the recent CJEU Opinion on the EU's Free Trade Agreement with Singapore. The second part analyses the growing participatory rights of the EP, distinguishing information rights, the right to give an opinion and the right to give (or withhold) consent. The third part of this Policy Paper looks at the political role of the EP in the cases of the EU-South Korea Free Trade Agreement, the EU-US Agreement on the transfer of financial messaging data for the purpose of combating terrorism (SWIFT Agreement) and in the upcoming negotiations with the United Kingdom concerning its future (trade) relationship with the EU. Lastly, it examines the broader role of the EP (and national parliaments) in CCP in the coming years.

1. THE EU'S COMMON COMMERCIAL POLICY

The competences of the EU in CCP which was an exclusive competence of the EC have been constantly extended. The main trigger for the first step of extension was the ECJ's Opinion 1/94⁴ on the WTO agreement. Reacting to the member states' desire of participation in this agreement by ratification, the ECJ ended with this opinion the before practised extensive interpretation of the rules relating to the CCP competences of the EC. Subsequent treaty amendments extended the scope of application of CCP competence.⁵ The capacity of the EU to weight in international, regional or bilateral negotiations lies on and depends the single market which provides an important leverage to the negotiators. The external action of the EU must be guided by the principles, the objectives and the general provisions on the EU's external action.⁶

The legal basis for international trade agreements is as follows: CCP competence is based on Art. 207 TFEU and the competence to conclude association agreements, e.g. free trade associations, is recognised in Art. 217 TFEU; in case of mixed agreements, ratification by member

1. Meunier and Nicolaidis, 2005, 3.

2. Krajewski, 42 Common Market Law Review (2005) 91, 97.

3. Leinen, 2010, 98.

4. Opinion 1/94 of the Court of Justice, 15 November 1994, ECR I-5267, ECLI:EU:C:1994:384.

5. E.g. Art. 133 (5) subpara. 1 TEC-Nice concerning trade in services and the commercial aspects of intellectual property; Art. 207 (1) TFEU-Lisbon concerning foreign direct investment. CCP is mainly realised by international trade agreements, but since the Lisbon Treaty it also includes certain internal measures. CCP is part of the EU's external action (part five of the TFEU).

6. Art. 21 ff. TEU.

states is necessary (1.1). Concluding international trade agreements is subject to the procedure of Art. 218 TFEU and Art. 207 TFEU (1.2). These international trade agreements are implemented by the ordinary legislative procedure according to Art. 207 (2) TFEU.

1.1 Legal provisions for international trade agreements

EU **external action** is principally regulated in Art. 205-222 TFEU.⁷ While Art. 207 TFEU governs the CCP, the EU can conclude association agreements under Art. 217 TFEU which can also concern trade policy measures (namely free trade associations like the agreement on a European Economic Area (EEA)). In contrast to general trade agreements under Art. 207 TFEU, association agreements under Art. 217 TFEU create specific rights, obligations and even institutions.

Art. 207 TFEU empowers the EU to conclude international trade agreements. This **competence of CCP** covers “changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies”.⁸ Thus, every measure concerning trade with third countries or international organisations as well as every measure intended to influence trade flows and trade volumes falls under the competence of the EU.⁹ Art. 207 TFEU is also the legal basis for the EU’s participation in the WTO.

As CCP is an **exclusive EU competence**¹⁰, member states are not allowed to conclude trade agreements on their own.¹¹ The provisions of international trade agreements are implemented by legislative acts of the EU¹² in accordance with ordinary legislative procedure¹³ and executed by the member states in accordance with the general division of competences between the EU and the member states.¹⁴

Agreements which contain measures of Art. 207 TFEU as well as measures which are not covered by this empowerment (and therefore belong to the competences of member states) are concluded as so-called **“mixed agreements”** between the third country or international organisation on one side and the EU and all its member states on the other side. Small provisions in an international trade agreement can cause it to be “mixed”.¹⁵

The scope of application of mixed agreements has considerably diminished due to the extension of Art. 207 TFEU (ex-Art. 133 TEC) in the Lisbon Treaty. If an agreement is completely under the EU competences of Art. 207 TFEU, it is “EU-only”.¹⁶ Prominent examples of provisions which still require a mixed agreement are: portfolio investments and obligations which

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⁷ Apart from these articles, rules concerning CFSP and CSDP can be found in Art. 21 ff. TEU and concerning the neighbourhood policy in Art. 8 TEU. Embargoes in the area of trade policy can be established under Art. 215 TFEU.

⁸ Art. 207 (1) 1 TFEU.

⁹ Haratsch, Koenig and Pechstein, n. 1276; this competence is limited by the prohibitions on harmonization within the treaties, Art. 207 (6) TFEU, see on this interpretation of this legal norm Weiß in: Grabitz, Hilf and Nettesheim (eds.), Art. 207 TFEU, n. 76 ff.

¹⁰ Art. 3 (1) lit. e TFEU.

¹¹ Member states are not allowed to adopt legally binding acts in trade policy either. They may only do so themselves, if they are empowered by the Union or when they implement Union acts (see Art. 2 (1) TFEU). Some stated under the Nice Treaty that single national measures within the scope of the Union’s competence were possible, which is to be opposed, see Weiß in: Grabitz, Hilf and Nettesheim (eds.), Art. 207 TFEU, n. 74 f.

¹² Art. 207 (2) TFEU.

¹³ Concerning matters of market entry pursuant to Art. 207 (2) TFEU, matters of the internal market must be implemented following the division of competences within the different policies.

¹⁴ See section 2.3 on the EP’s rights within these procedures.

¹⁵ See Box 1 on the recent Opinion 2/15 of the CJEU on the question which provisions make the agreement “mixed”.

¹⁶ Weiß in: Grabitz, Hilf and Nettesheim (eds.), Art. 207 TFEU, n. 74, 91 ff.

affect the prohibitions of harmonisation in the Treaties¹⁷. The CJEU's Opinion 2/15 on free trade agreement between the EU and Singapore brought more clarity on this issue (see Box 1).

BOX 1 – The Impact of Opinion 2/15 of the CJEU¹⁸ in mixed agreements

The CJEU expanded the scope of mixed agreements with its Opinion 2/15. The **free trade agreement between the EU and Singapore** (concluded in October 2014 and one of the first agreements of a “*new generation*”¹⁹) has raised the question whether the EU can conclude this agreement on its own or whether it must be concluded as a mixed agreement and ratified by *each member state*. This had to be answered by the CJEU in its May 2017 opinion pursuant to Art. 218 (11) TFEU.

The Court found that the Union lacks exclusive competence to conclude the agreement without member state participation in two respects:

- First, **non-direct foreign investments** are not covered by exclusive EU competence of Art. 3 (1) lit. 3 or (2) TFEU (n. 225 ff.) but can be regarded as “necessary in order to achieve [...] one of the objectives referred to in the Treaties”, within the meaning of Art. 216 (1) TFEU and thus fall into shared competence relating to the internal market of Art. 4 (2) lit. a TFEU (n. 239-243).
- Second, the regime governing **dispute settlement between investors and states** cannot be regarded as an institutional provision which couples the main commitments in an ancillary manner; since this regime removes disputes from the jurisdiction of the courts of the member states, it is not of a purely ancillary nature and thus not covered as an annex to the EU competence of concluding international agreements (n. 285 ff.).

All of the other provisions of the agreement (relating to market access, investment protection, intellectual property protection, competition, sustainable development and services in the field of transport) have been declared as covered by exclusive EU competence of Art. 3 (1) lit. e or (2) TFEU.

As a result, not only the Singapore-agreement, but all agreements concerning non-direct foreign investment and investor-state dispute settlement mechanisms must be concluded as mixed agreements and thus require the ratification *by all member states* according to national procedures.

Source: Own elaboration.

1.2 Decision-making procedures for international trade agreements

To conclude an international agreement on free trade between the EU and third countries or an international organisation, the rules concerning **international agreements**²⁰ are applicable with small amendments codified in Art. 207 TFEU.²¹ These special rules relating to trade agreements foresee a special **committee** appointed by the Council to assist the Commission in its task to conduct the negotiations.²²

This special committee is composed of member state representatives. Art. 207 (3) subpara. 2 and 3 TFEU codifies that the Commission is to be appointed as negotiator by the Council²³ and shall report regularly to the special committee and to the EP, which makes this **a strictly coordinated process**. The procedure for the conclusion of trade agreements can be divided into five stages²⁴:

- First, the Council adopts a decision on opening the negotiations²⁵ based on a recommendation from the Commission;

¹⁷ E.g. education (Art. 166 (4) TFEU), culture (Art. 167 (5) TFEU) and healthcare (Art. 168 (5) TFEU).

¹⁸ Opinion 2/15 of 16 May 2017, ECLI: EU:C:2017:376.

¹⁹ This generally means that an agreement is comprehensive with regards to trade liberalisation in a number of fields, including the elimination of tariff and non-tariff barriers, further liberalisation in services, investment, competition and the enforcement of intellectual property rights.

²⁰ Art. 218 TFEU.

²¹ See Art. 207 (3) subpara. 1 TFEU.

²² Art. 207 (3) subpara. 2 TFEU.

²³ Art. 218 (3) TFEU.

²⁴ Chalmers et al., 633.

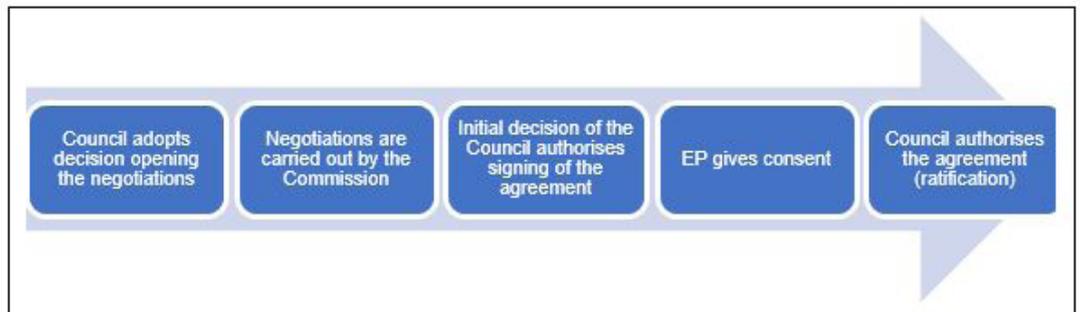
²⁵ Rules concerning the mode of decision can be found in Art. 207 (4) TFEU. The Council generally acts by qualified majority for the negotiation and conclusion of trade agreements (subpara. 1). Certain issues which require unanimity are described in subpara 2 and 3, thus ensuring the synchronism with intern decision modes, see Weiß in: Grabitz/Hilf/Nettesheim, Art. 207 TFEU n. 101.



THE PROCEDURE FOR THE CONCLUSION OF TRADE AGREEMENTS CAN BE DIVIDED INTO FIVE STAGES.

- Second, the negotiations are carried out by the Commission in coordination with the Trade Policy Committee (in accordance with the negotiating directives by the Council);
- Third, the Council takes an initial decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force;
- Fourth, the EP gives its consent;
- Fifth, the Council authorises the agreement (ratification).

FIGURE 1 ■ The conclusion of international trade agreements in the EU (simplified)



Source: Own elaboration.

In case of mixed agreements, all **member states must ratify** the agreement according to their own constitutional requirements in addition to the Union’s procedures. This means, for most member states, that national parliaments must decide on the domestic implementation of the provisions in question and on the authorisation of the ratification.

2. PARTICIPATION RIGHTS OF THE EUROPEAN PARLIAMENT

On the basis of this overall legal framework for CCP, it is important to note that the EP gained soft influence and hard powers with every treaty change in a long-term process of increasing transparency and reducing the democratic deficit. Under the EU’s two-channel structure of political representation, constituted by national governments in the Council and by the EP, an increase of participation rights for one institution, however, does not come at the expense of another institution. The EP could expand its influence (2.1) and now has a variety of participation rights at its disposal (2.2 and 2.3).

2.1 A gradual expansion of EP influence

Until the Lisbon Treaty came into effect, the CCP was in the hand of the executives: the European Commission and the Council were the only formal actors and not much constrained in their policy choices. The Commission had the right of initiative, proposing a mandate to be approved by the Council. The EP had no legislative competence in this field²⁶, but has been able to gradually extend its powers²⁷, as proponents of the “new parliamentarism”²⁸ have stressed.²⁹

26. Vanhoonacker, The institutional Framework, in: Hill and Smith (eds), 2005, 75-100.

27. Hix and Høyland, 2013.

28. Schmidt, 2016, 18-23.

29. Hix and Høyland, 2013; Héritier et al., 2015.



THE EP GAINED SOFT INFLUENCE AND HARD POWERS WITH EVERY TREATY CHANGE.

Even though the EP did not have a constitutional role, it managed to be increasingly involved through informal channels. In 1964 the Dutch Foreign Minister Joseph Luns initiated what came to be known as the “Luns-Westerterp procedure”. It was initially an informal arrangement between the EP and the Council of Ministers to keep the EP informed about negotiations on association agreements. In 1973, this procedure was extended to international trade agreements by Tjerk Westerterp, another Dutch foreign minister. Since these arrangements remained informal, the degree of information varied depending on the political climate surrounding the respective negotiations. This changed in 1986 with the Single European Act (which gave the EP the right to veto over association agreements and accession treaties), but it still had no formal role with regard to international trade agreements.

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Only the Lisbon Treaty made almost all trade and international agreements subject to the Consent Procedure and gave veto power to the EP.³⁰ Obviously “[g]ranting more power to the EP [...] might have reduced the likelihood of adopting trade deals.”³¹ The EP was indeed quick to exert influence under the Consent Procedure: In February 2010, the EP used its new powers and rejected the initial version of the so-called SWIFT agreement (the agreement between the EU and the US on the transfer of financial messaging data for the purpose of combating terrorism)³². This showed that the EP was ready to use its veto power against an international agreement.

2.2 The EP’s current participation rights

The new participation rights of the EP in the Lisbon Treaty in the field of EU external action range from no participation³³ to veto power. As there are no further special rules concerning the involvement of the EP in the procedures of concluding trade agreements, the general rules for international agreements codified in Art. 218 (6) TFEU apply. In general, three forms of parliamentary involvement can be identified within the procedure: information rights, the right to give an opinion and the veto right (consent). Finally, the implementation of CCP via ordinary legislation can be seen as indirect participation.

2.2.1 Information rights

At all stages of the procedure, the EP is to be “immediately and fully informed”.³⁴ This right is important to conduct democratic control concerning e.g. the legal basis of an agreement and applies as early as the authorisation of the opening of negotiations has taken place. The legal framework for the EP’s information rights in the case of EU negotiations on free trade agreements and other international accords with non-EU states is the inter-institutional framework agreement of 2010.³⁵ This right puts the EP on equal footing with the Council. It receives amendments to the previously adopted negotiating mandate, drafts of the negotiating texts, and the final versions of negotiated provisions of the agreement.

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THREE FORMS OF
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PROCEDURE.

³⁰. See the analyses on how the European Parliament managed to increase its power in the course of the failed Constitutional Treaty and the following Lisbon Treaty by Rosén, JEPP 24 (2017) 1450.

³¹. Meunier and Nicolaidis, 13 Journal of European Public Policy (2006) 906, 909

³². See in detail section 3.2.

³³. One big exception within the procedures of concluding international agreements is applicable to matters of CFSP. The EP has no right of active participation during the procedure in this policy field. This is the consequence of CFSP remaining an intergovernmental policy field which is not subject to the supranational rules of EU law and thus outside the sphere of involvement of the EP.

³⁴. Art. 218 (10) TFEU.

³⁵. Framework Agreement on relations between the European Parliament and the European Commission, 2010 (Annex III). In its Recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, the EP advocates increasing its role in the elaboration of the negotiating mandate: “following CJEU Opinion 2/15 on the EU-Singapore FTA, Parliament should see its role strengthened at every stage of the EU-FTA negotiations from the adoption of the mandate to the final conclusion of the agreement” (para. 20).

2.2.2 Right to give an opinion

Pursuant to Art. 218 (6) lit. b TFEU the EP is to be heard in all the other cases that are not named in lit a. The possibility of giving an opinion was the normal case in Nice Treaty and now serves as an “omnibus clause” to safeguard the Parliaments participation within the procedure of conclusion of international agreements. The Council can determine a delay for the EP’s opinion, which is prescribed by the level of urgency. If the EP does not give its opinion within this delay, the Council can decide.

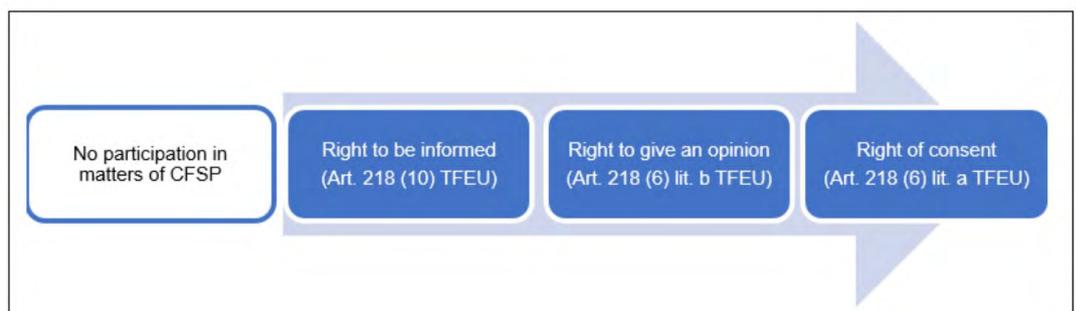
2.2.3 Consent

In all cases listed by Art. 218 (6) lit. a TFEU, the EP can exercise its greatest influence by its right to give or deny consent to the conclusion of an agreement prior to the Council’s authorisation. The requirement of consent is applicable to all “agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the EP is required” pursuant to Art. 218 (6) lit. a TFEU in “accordance with the ordinary legislative procedure” pursuant to Art. 207 (2) TFEU. In cases of urgency, the EP and the Council can agree on a deadline for giving consent, in accordance with the principle of mutual sincere cooperation of Art. 13 (2) phrase 2 TEU.

Opinion 2/15 CJEU does not affect the EP’s participation.³⁶ But the extension of participation of national parliaments could make it harder to find satisfactory solutions for all parties in a complex agglomeration of interests. Trade Commissioner De Gucht already asked in 2010: “Do we really need 27 additional national ratifications when the EP can now exercise parliamentary scrutiny over these agreements?”³⁷ His implicit argument is that national parliamentary ratification is not necessary as the EP is involved. Opponents of this view argue that the EU rests upon two sources of democratic representation and legitimacy, which are anchored in Art. 10 TEU, by way of a two-channel structure. Citizens are represented in their national parliaments, which exercise control over their governments in the Council of the European Union and the European Council, and citizens are also represented directly in the European Parliament.

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OPINION 2/15 CJEU
DOES NOT AFFECT THE
EP’S PARTICIPATION.

FIGURE 2 ■ Forms of EP’s participation in concluding international trade agreements



Source: Own elaboration.

³⁶. The conclusion as a mixed agreement instead of an EU-only agreement does not alter the role of the European Parliament which must still give its consent according to Art. 218 (6) TFEU.

³⁷. De Gucht Karel, “The implications of the Lisbon Treaty for EU Trade policy”, S&D seminar on EU Trade Policy. Oporto, 8 October 2010.

2.2.4 The implementation of CCP via ordinary legislation

In order to implement the EU's CCP, regulations can be adopted by the EP and the Council in accordance with the **ordinary legislative procedure**³⁸. This puts the EP on an equal footing with the Council. Regulations are explicitly foreseen in Art. 207 (2) TFEU and there are no other forms of legal acts permitted in order to implement CCP. They set a "framework" for essential aspects to implement CCP.³⁹ Individual measures are defined by the Commission following European administrative rules; member states implement EU law. The EP participates in these procedures by its rights under Art. 290 (2) and 291 (3) TFEU.

3. PARLIAMENTARY INVOLVEMENT IN PRACTICE

The EP has managed to play an eminently political role in international trade agreements, most importantly in the cases of SWIFT and ACTA⁴⁰, but the EU-South Korea Free Trade Agreement, CETA and TTIP are other examples.⁴¹ To give an overview of the political role that the EP has played in CCP, this section examines the struggles around the EU-South Korea Free Trade Agreement and the SWIFT Agreement (3.1). This section also looks into the upcoming role of the EP in the negotiations with the United Kingdom concerning its future relationship with the EU (3.2). Finally, it tries to give an idea of the future parliamentary involvement in CCP (3.3).

3.1 The EU-South Korea Free Trade Agreement and the SWIFT Agreement

In the aftermath of the entry-into-force of the Lisbon Treaty, the intense discussions and inter-institutional struggles surrounding the EU-South Korea Free Trade Agreement and the SWIFT Agreement have laid the ground for the EP's influence in the following years. Internally, these struggles have led to **the awakening of an institution** that had no power to grant or withhold consent until then. In the early days of the post-Lisbon Consent Procedure, the vote on the initial version of the SWIFT in 2010 was not taken by roll-call. The vote on the EU-South Korea Free Trade Agreement in 2011, however, was taken by roll-call and divisions within the S&D group became visible when French Socialists broke away from their group and rejected the agreement. Over the years, the cohesion of the political groups on these issues has increased.

The agreement with South Korea was one of the first international trade agreements of a "new generation" and the **SWIFT agreement** was the first international agreement after the entry-into-force of the Lisbon Treaty that was subject to the Consent Procedure. It constitutes a symbolic case for the newly-empowered EP and has been **a strong reference point for the EP as well as for its willingness to use veto power**. Without its role in the SWIFT Agreement, the EP would not have been able to exercise influence later, e.g. in the context of the negotiations on the Free Trade Agreements with South Korea, Canada (CETA) and the United States (TTIP).

In addition to the cases of the EU South Korea's Free Trade Agreement and the SWIFT Agreement that are examined in great depth, Box 2 briefly summarises the case of ACTA – an agreement that the EP rejected and effectively buried.

³⁸ Art. 207 (2) TFEU.

³⁹ See Weiß in: Grabitz, Hilf and Nettesheim (eds.), Art. 207 TFEU, n. 112 f.

⁴⁰ Anti-Counterfeiting Trade Agreement, a multinational agreement on intellectual property rights enforcement. See Box 2.

⁴¹ See e.g. Meissner, 21 EFA Rev. (2016) 269; Crespy and Parks, 39 Journal of European Integration (2017) 453; Van den Putte, De Ville and Orbie, CEPS Special Report No. 89; Jančić, 40 West European Politics 40 (2017) 202.

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INTERINSTITUTIONAL STRUGGLES HAVE LAID THE GROUND FOR THE EP'S INFLUENCE.

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WITHOUT ITS ROLE IN THE SWIFT AGREEMENT, THE EP WOULD NOT HAVE BEEN ABLE TO EXERCISE INFLUENCE LATER.

3.1.1 EU-South Korea Free Trade Agreement

Eight rounds of negotiations between the EU and South Korea took place between 2007 and 2009, after the Council had adopted the mandate for negotiations.⁴² As early as December 2007, the EP pointed to “significant problems” in a report on economic and trade negotiations with South Korea.⁴³ During the negotiations, European carmakers requested the suspension of the talks with South Korea because of fears about an increased competition if tariffs were abolished⁴⁴, and several countries, “including Germany, France, Spain and Italy [...] opposed [the] agreement.”⁴⁵

In mid-September 2010, Italy – apparently being under pressure from its largest carmaker FIAT – threatened to veto the agreement itself, unless there was a regional safeguard clause and a one-year deferment.⁴⁶ After only a week of negotiations, however, Italy lifted its veto on the signing in exchange for a six-month delay in the application of the agreement.⁴⁷ The EP wanted EU-wide **safeguard clauses** “[to] work properly.”⁴⁸ It decided to postpone the final vote on the safeguard clause regulation to allow time for an agreement with the Council. In particular, the EP demanded an easy-to-apply and effective safeguard clause, and to make the agreement more attractive for European industry.⁴⁹

Finally, Parliament and Council reached a first reading agreement after trilogue negotiations between September and December 2010. The EP “wanted an agreement but not at any price and the conditions of the safeguard clause to protect EU industries were essential.”⁵⁰ On 17 February 2011, the EP approved the agreement and the regulation on the safeguard clause.⁵¹ Within the S&D group, French MEPs and many Italian MEPs did not follow the line of their political group. The Council adopted the regulation on 11 April 2011⁵², and the agreement provisionally entered into force on 1 July 2011.⁵³

The case of the Free Trade Agreement with South Korea shows that the EP is a powerful actor whose concerns must be taken into account. It has an **increasing capacity to weight in the negotiating process** and can highlight specific worries related to the impact of such an agreement. Whether the influence of sectorial interests could constitute a stumbling block for trade negotiations remains an open question.

⁴² Brown, in: Terhechte, 297-308.

⁴³ Agence Europe, “Support - not without specific European Parliament requirements - for a bilateral trade agreement”, 15 December 2007.

⁴⁴ Euractiv.com, “EU trade pact with South Korea faces criticism.” 15 October 2009.

⁴⁵ Agence Europe, “Still no consensus between Twenty-Seven on FTA.”, 10 March 2009.

⁴⁶ Agence Europe, “Threat of Italian veto to FTA with South Korea”, 9 September 2010.

⁴⁷ Agence Europe, “Italy lifts veto and Council approves signing of free trade agreement with South Korea”, 17 September 2010.

⁴⁸ Agence Europe, “EP wants better balance in EU-South Korea free trade deal”, 12 February 2010.

⁴⁹ European Parliament, “EU-South Korea free trade accord: MEPs agree on the safeguard clause”, Press Release, 24 January 2011. The safeguard clause allows to suspend further reductions in customs duties or increase them to previous levels, if lower rates lead to an excessive increase in imports from South Korea, causing or threatening to cause “serious injury” to EU producers.

⁵⁰ Agence Europe, “Towards ratification of free trade agreement”, 27 January 2011.

⁵¹ With 465 votes to 128 (19 abstentions) and with 495 votes to 16 (75 abstentions). Source: VoteWatch Europe.

⁵² Regulation (EU) No 511/2011 of the European Parliament and of the Council of 11 May 2011 implementing the bilateral safeguard clause of the Free Trade Agreement between the European Union and its member states and the Republic of Korea, OJ L 145, 31 May 2011, 19.

⁵³ Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its member states, of the one part, and the Republic of Korea, of the other part (2011/265/EU), OJ L 127, 14 May 2011, 1.

3.1.2 The EU-US Agreement on the transfer of financial messaging data for the purpose of combating terrorism (SWIFT Agreement)

SWIFT was the first international agreement that was subject to the EP's consent after the Lisbon Treaty came into effect. The Society for Worldwide Interbank Financial Telecommunication (SWIFT) handles about 80% of all international financial transactions. After SWIFT had decided to move its servers to Europe, US authorities had to negotiate access for their Terrorist Finance Tracking Programme (TFTP) that would be legal under European data protection laws.⁵⁴ On the EU side, the Council adopted the negotiation mandate in July 2009. The negotiations between the EU and the US were successful and on 30 November 2009, one day before the Lisbon Treaty came into effect, the Council agreed by unanimity (Austria, Germany, and Hungary abstained).⁵⁵ Several delegations made public statements in the Council minutes, e.g.: "Germany cannot agree [...]. Germany sees a pressing need for further improvements."⁵⁶ At the time, the legal basis was still Article 24 (2) TEU in the version of the Nice Treaty and the Council had to act unanimously.



THE EP REJECTED
THE INITIAL SWIFT
AGREEMENT.

On the basis of a negative recommendation from the Civil Liberties, Justice and Home Affairs Committee, however, **the EP rejected the SWIFT agreement** on 11 February 2010.⁵⁷ This marked a "spectacular use of the Parliament's expanded consent power."⁵⁸ The vote itself was not taken by roll-call, thus only press statements and reports can give an idea of the voting behaviour: S&D, ALDE, Greens-EFA and GUE-NGL rejected the agreement, while EPP and ECR were in favour, but at the time Agence Europe reported that "several members of the EPP and S&D groups are not toeing their party line [...], Spanish S&D members are in favour [...], whilst their German colleagues of the EPP group are opposed."⁵⁹

After a consensus on new negotiations with the US in April 2010, the Council took care that the EP was immediately and fully informed at all stages of the procedure, as prescribed by Art. 218 (10) TFEU. The EP reacted "cautiously positive"⁶⁰ to these developments, but called for more data protection guarantees. When the negotiations had been completed, S&D and ALDE joined the EPP in supporting the deal. The Council adopted the agreement⁶¹ unanimously on 28 June 2010⁶²; only France abstained because of a parliamentary scrutiny reserve. On 8 July 2010, MEPs gave their consent.⁶³ The roll-call vote reveals that a broad coalition of EPP, S&D, ALDE, and ECR voted in favour of the new version of the SWIFT agreement, while Greens/EFA and GUE/NGL were against.⁶⁴ The agreement entered into force on 1 August 2010.

⁵⁴ Dretzka and Mildner, AICGS (2010).

⁵⁵ EurActiv.com, "Council overrules Parliament on banking data deal", 1 December 2009.

⁵⁶ Council of the European Union, ANNEX, Statements for the Council Minutes, Statement by the Federal Republic of Germany, p. 25.

⁵⁷ With 378 votes to 196 (31 abstentions). Source: VoteWatch Europe. European Parliament legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program.

⁵⁸ Corbett et al., 254.

⁵⁹ Agence Europe, "Parliament's vote on Swift agreement likely to be close", 6 February 2010.

⁶⁰ Agence Europe, "Parliament wants more guarantees on future Swift negotiations", 8 April 2010.

⁶¹ Council Decision of 28 June 2010 on the signing, on behalf of the Union, of the Agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ L 195, 27 July 2010, p.1.

⁶² Busse, „EU-Staaten billigen SWIFT-Abkommen.“ Frankfurter Allgemeine Zeitung, 28 June 2010.

⁶³ With 484 to 109 votes (12 abstentions). Source: VoteWatch Europe.

⁶⁴ VoteWatch.eu, "Agreement between the EU and the USA on the processing and transfer of financial messaging data from the EU to the USA for purposes of the Terrorist Finance Tracking Program - Draft legislative resolution."

BOX 2 ■ Background information on ACTA

The objective of the Anti-Counterfeiting Trade Agreement (ACTA) was to protect intellectual property against classical counterfeiting (clothing, pharmaceuticals) as well as digital counterfeiting (illegal downloads) on the basis of harmonized international norms. Contracting parties were Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, the United States and the European Union. ACTA was negotiated outside the World Trade Organization (traditionally the forum for these sorts of agreements) between 2007 and 2010. In early 2012, tens of thousands of people gathered in numerous European cities to protest against ACTA. Several Member States reacted by halting their national ratification procedures and the European Commission asked the Court of Justice to issue an opinion. The European Parliament took the views of the citizens and anti-ACTA movement into account and vetoed the agreement.

Source: Own elaboration, based on Kreiling 2012.

3.2 The upcoming “Brexit role” of the European Parliament

The EP will also have to give consent to the international agreements between the EU and the United Kingdom to be included in the context of the Brexit negotiations. These negotiations follow different strands⁶⁵ and have so far only covered **withdrawal** under Article 50 TEU, but after the European Council of December 2017 declared that sufficient progress has been made, they will expand: The withdrawal agreement and the future relationship between the EU and the United Kingdom are to a certain extent connected with regard to content and political terms.

As envisaged in Article 50 TEU, the withdrawal negotiations should therefore already **take “account of the framework for its future relationship”**. If the respective negotiators have already developed a common idea on the future relationship during the withdrawal negotiations, the forthcoming framework for this relationship could already be specified in this agreement: The European Council of December 2017 announced that the transition and the framework for the future relationship should be clarified in a political declaration in October 2018 which would have to be duly referred to in the withdrawal agreement. It would to some extent anticipate the results of the negotiations about the future relationship. The European Council is expected to adopt guidelines for the negotiation of the transition and the framework for the future relationship in March 2018. The EP participates in these negotiations through its comprehensive information rights and the final right to grant (or withhold) consent.⁶⁶

Currently, the most likely model for the future relationship⁶⁷ seems to be a free trade agreement like the one between the EU and Canada (CETA), possibly with a broader scope (this has commonly been called “Canada plus”). In addition to this EP’s necessary consent to the withdrawal agreement and the new partnership agreement, **national or even regional parliaments are veto players** when it comes to the future relationship. After its decision to treat CETA as a mixed agreement, the Commission may take a similar view on a free trade agreement between the EU and the UK. EU chief negotiator Michel Barnier stressed in his address to Members of national parliaments from all EU member states in May 2017 that “[w]hatever legal form which will frame this new partnership in all its dimensions, it will in any case be a so-called ‘mixed’ agreement, which each of your Parliaments will have to ratify, in accordance with your constitutional rules. With the EP, you will have the last word.”⁶⁸

Thus, contrary to the case of the withdrawal agreement, not only Westminster and the EP will have veto power over an agreement about the future relationship between the UK and the EU-27, but other parliaments – national or even regional – matter, too, when it comes to

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THE EP PARTICIPATES THROUGH ITS COMPREHENSIVE INFORMATION RIGHTS AND THE FINAL RIGHT TO GRANT (OR WITHHOLD) CONSENT.

“
NATIONAL AND EVEN REGIONAL PARLIAMENTS MIGHT ALSO HAVE THEIR SAY ON THE FUTURE RELATIONSHIP.

65. Kreiling, Becker and Wolfstädter, 2017, 3.
66. See section 2.2.
67. Kreiling, Becker and Wolfstädter, 2017, 11-14.
68. European Commission, Discours de Michel Barnier, 30 May 2017.

the future relationship. Michel Barnier sees a necessity for national parliaments to follow the negotiations closely: "It is necessary that your parliaments follow closely the entire negotiating process, far beyond your legal responsibility in the final ratification."⁶⁹ While the veto player role of national parliaments is not entirely clear yet, members of national parliaments voting on mixed agreements "should enjoy the same high level of access to information as MEPs."⁷⁰ It is, however, mainly the task of national governments to ensure that national parliaments receive **adequate and timely information** for their watchdog role during the negotiations.

The EP has strong powers as a **watchdog and a veto player**, but – like national parliaments – it is not a negotiating party.⁷¹ Nevertheless, it named Guy Verhofstadt as its coordinator for Brexit matters. In a resolution with the overwhelming majority of 516 votes (133 votes against, 50 abstentions) the EP also pointed out its priorities and preconditions for its consent to an agreement with UK in April 2017⁷² and has continued to oversee the process. The EP's right to withhold consent to the final agreement offers political leverage for it to influence the agreement in advance. In this context, the European Parliament advocates for the EU citizens' rights and emphasizes that the citizens interests must be put in first place. In this respect, the EP has a crucial role not only for citizens of the Union, but also for those of the post-Brexit UK.

3.3 A politicised trade policy and the future of parliamentary involvement

The cases described above⁷³ illustrate how CCP has become politicised. European citizens have started to take an interest in trade policy and the debate on democratic legitimacy of trade policy could be seen as a (belated) awakening of European citizens. As **trust** in political institutions⁷⁴ and in the promise of globalisation varies, this will become more important in the future.

It is mainly the increase in **regulatory cooperation** that has prompted the interest of the civil society and many worries (cf. TTIP, CETA). In earlier years, when trade agreements mainly concerned tariffs, producers tried to influence the negotiations; the new regulatory components of trade agreements require further consultation, transparency and "pedagogy" about what is going on. The increased influence of national parliaments on trade (or on the ratification of trade agreements) follows from this broadening of the negotiations that includes mixed competences. Obstructing trade agreements, however, would weaken the EU's ability to influence the regulation of globalisation at a time when the EU is increasingly acknowledged as a normative global leader and trade agreements are seen as useful leverage to promote EU norms.⁷⁵

In the EP, there is no formal division between majority and opposition. **Civil society** therefore has a crucial role to play in exerting influence on the parliamentary process. Members of the EP and civil society have a mutual interest to work together⁷⁶ and their role will be decisive for alleviating the doubts of European citizens. It will be important to protect the rights that the EP has gained over the years (its right of consent, its rights to state an opinion and to stay informed). At the same time, the parliament should be wary not to overstretch its influence at the negotiation table. Respecting a proper separation of powers, trade negotiations themselves re-

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THE COMMON
COMMERCIAL
POLICY HAS BECOME
POLITICISED.

⁶⁹. Ibid.

⁷⁰. European Parliament, Draft Opinion of the Committee on International Trade for the Committee on Constitutional Affairs on the implementation of the Treaty provisions concerning national Parliaments (2016/2149(INI)).

⁷¹. Kreilinger, 2016.

⁷². European Parliament, "Bedingungen des Parlaments für die Brexit-Verhandlungen", Press Release, 6 April 2017.

⁷³. See section 3.2.

⁷⁴. Kreilinger, 2018, 7-10.

⁷⁵. Fabry, 2016.

⁷⁶. Crespy and Parks, 39 Journal of European Integration (2017) 453.

main the domain of the executive branch.⁷⁷ The EP's International Trade (INTA) committee had only limited expertise when the Lisbon Treaty entered into force. It was able to develop trade expertise since 2010 as a consequence of the ACTA, TTIP and CETA "sagas". Such expertise inside the EP must be considered an added value for the negotiating process, but the existing potential for its further development should be fully exploited in the coming years.

National parliaments also share responsibility in this mission to regain the trust of European citizens, where big steps in terms of transparency have already been undertaken by the Commission. As more and more agreements are qualified as mixed agreements, **national parliaments** have gained power over CCP, not during the negotiations but by ratifying these trade agreements. It must be stressed that their trade expertise has, however, not developed at the same pace. Even if their influence during the ratification phase is only *ex post*, national parliaments can have a great impact.⁷⁸ This can either be a danger for the EU's capacity of action or a catalyst for greater public interest and engagement of EU citizens in CCP and EU politics more broadly.

CONCLUSION

The recent controversies surrounding the negotiation of international trade agreements such as CETA and TTIP⁷⁹ are expressions of a problem that reaches beyond trade policy. The public has become increasingly wary of the democratic legitimacy of the European Union and the consequences of an ever-deepening globalisation. The Commission, the Council and the EP as well as national parliaments have the task to push for the introduction and implementation of European values in international trade agreements⁸⁰ thus ensuring that CCP is consistent with these values.

In the past couple of years, there has been some movement concerning the increasing involvement of citizens. Both the process that expanded the EP's rights through treaty change and amendments, as well as the evolution of the EP's perceived role in international agreements – which has occasionally been criticised (i.e. by the opponents of CETA) – have contributed to this phenomenon. While CCP falls mainly under EU competences, the jurisdiction of the CJEU and the extension of the scope of trade agreements have given national parliaments the possibility to exert influence by the requirement to ratify mixed agreements according to national constitutional requirements. This new tendency is accompanied by the strong participation rights of the EP following the Lisbon Treaty and has increased democratic legitimacy in this policy field.

This evolution towards greater parliamentary involvement is part of a process of gradual change. Even though the increasing roles of the EP and national parliaments are a challenge for the successful conclusion of international and trade agreements, the different parliamentary arenas and their participation are offering opportunities for making the voice of civil society clearly heard in such negotiations.

⁷⁷ See Brok, *integration* (2010), 3, 209, 220.

⁷⁸ See Jančić, 40 *West European Politics* (2017) 202, 206 f. also with an analysis of their influence during the negotiation and conclusion phase through representatives in the Council.

⁷⁹ See, for the case of Germany: Fabry, 2015.

⁸⁰ See also Brok, 3 *integration* (2010) 209, 222; sceptical are van den Putte, De Ville and Orbie, CEPS Special Report No. 89 who do not see the EP fulfill this role until now.

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