Delegation to treaty bodies in EU agreements: constitutional constraints and proposals for strengthening the European Parliament

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EU Free Trade Agreements joint organs – Comprehensive powers beyond executive implementation – Democratic legitimacy concerns – Establishment of treaty bodies in CETA as a conferral of public powers – Limits to delegation prescribed by EU constitutional law – Mechanisms to strengthen the control of the European Parliament over the treaty bodies' decision-making

Introduction

EU free trade agreements establish common bodies that are entrusted with certain tasks and that therefore have specific decision-making powers. The free trade agreements include them so as to facilitate their own amendment and implementation. One well-known treaty organ is the Association Council instituted by the EU Association Agreement with Turkey, whose decisions provide the legal bases for the labour market access of Turkish nationals in the EU. These decisions have binding effect,[1] and are based on an explicit mandate included in the Additional Protocol of 1970[2] which is

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[1] ECJ 10 September 1996, *Taflan-Met and Others* ECLI:EU:C:1996:315, paras. 18-21.

[2] Art. 36 ff Additional Protocol, annexed to the Agreement establishing the Association between the European Economic Community and Turkey, OJ 1977 L 361/59. Art. 36 reads: 'Freedom of movement for workers between Member States of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement of Association between the end of the twelfth and the twenty-second year after the entry into force of that Agreement. The Council of Association shall decide on the rules necessary to that end'. Art. 12 of the Association Agreement, OJ 1977 L 361/1, states that 'the Contracting parties agree to be guided by Articles 48, 49 and 50 of the [ECT] for the purpose of progressively securing freedom of movement for workers between them'.

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quite specific with regard both to its objective and the extent of the Council's competences. The more recent free trade agreements concluded by the EU provide for similar treaty bodies, increasingly with more extensive competences. One can observe a trend of EU free trade agreements making use of such bodies more and more frequently, reflecting the international move towards delegation of authority to international actors.[3] A trade committee has been set up by the free trade agreements with Korea;[4] its binding decisions relate to customs duties[5] but also to treaty amendments and authoritative interpretations.[6] The next, and so far highest, level has been reached in the free trade agreement with Canada (CETA) which provides for a joint CETA committee and a range of specialised committees (Articles 26.1 and 26.2). CETA entrusts these bodies, in particular the joint committee, with many functions. As will be shown below, the bodies are authorised to make binding decisions on very diverse, even rather fundamental, issues of varying significance.

The extent and proliferation of these competences is a threat to democracy, as they have the capacity of allowing decisions to be made and hence public powers exercised that had formerly been subject to the decision-making procedures of national or EU Parliaments (e.g. procedural rules or common standards). The committees do so without parliamentary control even though they sometimes exercise political discretion. The binding force of their decisions is, by and large, not subject to the completion of the usual domestic constitutional procedures relevant for entering into international obligations. The provisions in CETA, for example, are highly imprecise. According to Article 26.3.2, decisions by the CETA joint committee are binding on parties subject to the 'completion of any necessary internal requirements'. Article 30.2.2 CETA explicitly provides that a decision taken by the CETA joint committee to amend protocols and annexes may be approved by the parties in accordance with their 'respective internal requirements and procedures necessary for the entry into force of the amendments'.[7] The latter formulation could be read to imply a ratification requirement as it speaks of 'entry into force'; parliaments could have a say. Alternatively, the simplified procedure of Article 218(9) TFEU might apply meaning that there would be no ratification requirement, no parliamentary participation implied.[8] Thus, generally speaking,

[3] C. Bradley and J. Kelly, 'The concept of international delegation', 71(1) *Law and Contemporary Problems* (2008) p. 1.

[4] Art. 15.4 EU Korea Free Trade Agreement, OJ 2011 L 127, 6.

[5] Art. 2.5.4 EU Korea Free Trade Agreement.

[6] Art. 15.5.2 EU Korea Free Trade Agreement regarding Annexes, Protocols and Notes; Art. 15.1.4 d) on binding interpretations.

[7] Similarly, Art. 5.14.2(d) CETA with regard to the joint management committee decision to amend the annexes to Chapter 5.

[8] *See* German Federal Constitutional Court 13 October 2016, Case 2 BvR 1368/16, *Huber* v *German Federal Government* para. 64, available at <www.bverfg.de/e/rs20161013_2bvr136816.html>, visited 8 July 2018.

parliaments do not need to be involved for decisions taken by treaty bodies to become binding on parties, as they are neither represented in the bodies nor participate in their internal procedures.[9] This raises the question of whether public powers can legally and legitimately be transferred to the committees.

The present contribution first gives an overview of the diversity of the free trade agreements treaty bodies' competences and the legal relevance of their acts – not only under international law - taking CETA as a specific example since the position of the committees is the most elaborate there. It will be shown that these committees do autonomously exercise public power – apart from the few instances in which subsequent ratification or adoption of their decisions by the parties is explicitly provided for. Next, the democratic concerns alluded to above will be addressed. In this respect, one must analyse the competence of the EU to transfer powers to treaty bodies and explore the constitutional limits resulting from requirements of democratic legitimacy and institutional balance. Finally, recommendations will be presented on how to increase parliamentary control over rule-making treaty bodies and, accordingly, expand the European Parliament's role in this respect.

Binding competences of CETA committees: exercise of public powers

Different kinds of power

CETA sets up an extensive institutional architecture consisting of a CETA joint committee (Article 26.1) and a number of specialised committees (Article 26.2.1) which submit proposals to the CETA joint committee or take binding decisions themselves.

As already mentioned, the decision-making powers of these committees comprise diverse types of authority. In the typology of international delegation developed by Bradley and Kelly,[10] the committees are in the first place competent to exercise legislative powers as they may amend CETA[11] or issue general rules.[12]

[9] *See also* A. Alemanno, 'The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences', 18(3) *Journal of International Economic Law* (2015) p. 625 at p. 635 ff.

[10] Bradley and Kelly, *supra* n. 3, p. 10-17.

[11] The CETA joint committee may decide on the extension of the concept of intellectual property (Art. 8.1), or on the meaning of fair and equitable treatment of investors (Art. 8.10.3). It may amend or supplement CETA provisions with respect to the Harmonized System (Art. 2.13.1(b)), and consider amendments to Chapter 4 of the CETA (Art. 4.7.1(f) read in conjunction with Art. 26.1.5(c)) or make amendments to Chapter 23 (Art. 23.11.5).

[12] Under Art. 8.28.3 read in conjunction with Art. 8.28.7 CETA, the CETA joint committee sets out administrative and organisational aspects of the functioning of the Appellate Tribunal, including

An amendment in this sense may also reflect the CETA joint committee's power to change the institutional architecture of CETA, as it is competent to dissolve special committees or to establish new special committees which may alter or take over the powers of the special committees already provided in CETA (Article 26.1.5(a), (g) and (h) CETA); it may also establish ad hoc working groups according to Article 4.7.2. Second, the committees are mandated to adopt regulatory decisions, as they may create technical-administrative rules for implementing CETA,[13] or interpret CETA obligations with binding force (Articles 8.31.3, 8.44.3(a), 26.1.5(e) CETA). The CETA committees can decide on the applicability of exceptions[14] and determine and establish mechanisms for the simplified negotiation of mutual recognition agreements.[15] The modification of annexes to CETA is one of the types of regulatory authority.[16] Some of the regulatory powers may have particularly far-reaching significance, such as deciding on the details for the mutual exchange of product warnings[17] which may include rules on the protection of personal data and the protection of confidential business data. The latter competence may enable the relevant committee to set common standards for implementation measures, which implies the exercise of (quasi) legislative authority. Third, the committees have adjudicative functions.[18]

procedural issues. By virtue of Arts. 8.44.2 and 8.44.3(b), the Committee on Services and Investment establishes a code of conduct for the tribunal members that may address issues of disclosure, confidentiality, impartiality and independence, and procedural and transparency rules. The parties' role as such is to complete their respective internal requirements and procedures.

[13] For example, the joint CETA committee may change the number of investment tribunal members (Art. 8.27.3), settle their salary (Art. 8.27.15), decide the list of arbitrators (Art. 29.8), or remove a member from the tribunal (Art. 8.30.4). Art. 10.5.2(b) grants the competence to exchange and adopt common criteria and interpretations for the implementation of Chapter 10 on temporary entry and residence for business purposes to the contact points of both sides, i.e. the Canadian Immigration Director and the EU Director General for Trade.

[14] *See* the competences of the financial services committee in Annex 13-B CETA.

[15] Art. 11.3 CETA on mutual recognition of professional qualifications. Those agreements are negotiated in a specific procedure provided in Art. 11.3.3–11.3.6 CETA and finally adopted by decision of the MRA Committee, whose binding force is conditional upon subsequent notification to the MRA Committee by each Party of the fulfilment of its respective internal requirements. The negotiations are conducted by each Party.

[16] Under Art. 20.22.1, read in conjunction with Article 26.1.5(c), the CETA joint committee may, by amending Annex 20-A, add or remove protected geographical indications of origin. The joint management committee shall amend the Annexes to Chapter 5 (Art. 5.14.2(d)) (explicitly subject to approval by the parties in accordance with their procedures necessary for the entry into force of the amendment). *See also* Art. 20.22.1 in combination with Art. 26.1.5(c) CETA. For this classification *see* Bradley and Kelly, *supra* n. 3, p. 10.

[17] The Committee on Trade in Goods endorses the implementation measures, Art. 21.7.5 CETA.

[18] Under Art. 6.14.4, in conjunction with Art. 2.8.4 CETA, the joint Customs Cooperation Committee can resolve customs issues raised by a Party.

There are further competences of the committees that cannot be easily classified, as they cover fundamental aspects such as the replacement of the investment dispute system by a multilateral mechanism and the related transitional arrangements (Article 8.29 CETA).

Overall, this overview illustrates that the powers go beyond the mere executive implementation of obligations already enshrined in the agreement; they include decision-making on fundamental issues and even rule-making by generating norms and treaty amendments. Bearing this diversity in mind is important because the legitimacy requirements, in particular the degree of precision of the mandate and the parliamentary involvement required, differ according to the type and significance of the committees' powers. We will return to this.

Decision-making of committees and their binding force

The CETA joint committee, as well as the specialised committees, must decide unanimously (Article 13.18.2, Article 26.3.3). The committees consist of representatives of Canada and the EU, usually the Commissioner responsible for trade (Article 26.1.1 CETA). The presence of representatives of the EU Member States is provided for only in some specialised committees.[19] Consequently, the committees are not actors independent from the parties' will. They are, however, autonomous; they do not comprise all parties and their decisions are binding on the parties.

The binding force of decisions can be inferred from several circumstances. First, CETA distinguishes between decisions and recommendations (*see* e.g. Articles 26.1.4(e), 26.1.5(f) and 26.3.2). Second, any decision adopted by a committee will cease to be effective if the provisional application of CETA is terminated (Article 30.7.3(d)) – such a rule would be futile if the decision was a mere recommendation. Third, both Article 26.3.2 on the CETA joint committee and Article 26.2.4 on the specialised committees explicitly address the general binding effect of their decisions, as shown more explicitly below. Thus, in the vast majority of cases a decision of the CETA joint committee or of any of the specialised committees is binding on the EU and its Member States without further adoption or even

[19] Art. 5.14.1: regulatory and trade representatives that bear responsibility for sanitary and phytosanitary measures; Art. 6.14.2: representatives of customs, commercial or other competent authorities; Art. 13.18.1: representatives of financial services authorities; Art. 19.19.1 makes a general reference to representatives of the contracting parties; Art. 21.6.3: the Forum for Regulatory Cooperation is jointly chaired by senior representatives of Canada and the Commission, while the other members can be 'relevant officials of each Party' which might include national representatives of the EU Member States.

ratification. This is envisaged in other EU treaties as well; it is not a peculiarity of CETA.[20] An analysis of the co-operation rules in EU agreements shows that 'decision' is by far the most frequently used term to designate binding legal instruments; this corresponds to general practice under public international law.[21]

Article 26.3.2, the general rule on the binding force of decisions of the CETA joint committee (*see* Article 26.1.4(e)), establishes the binding effect of its decisions and the obligation of the parties to implement them. However, in parenthesis, it contains the reservation of 'the completion of any necessary internal requirements and procedures'. This formulation does not impose a ratification requirement on the parties and CETA does not define the internal procedures, which are governed by the internal law of the parties. The parties themselves must determine which procedures are relevant according to their national (in particular constitutional) rules on how international obligations become binding upon them.

For the EU, the internal procedures for entering into international commitments are spelled out in Article 218 TFEU. There is a normal procedure by which the Council decides, acting on a Commission proposal, on the conclusion of international treaties with involvement or even consent of the European Parliament according to Article 218(6). Article 218 TFEU also establishes specific, simplified procedures for agreeing to international rules in its paragraphs 7 and 9. Article 218(9) TFEU provides, inter alia, that the Council, again acting on a Commission proposal, adopts the position to be taken by the EU in a treaty body. In the case of simplified amendments to be adopted by a committee, Article 218(7) TFEU establishes an even more simplified procedure[22] whereby an amendment is agreed to by a negotiator (usually the Commission) which has been authorised to do so by the Council. Both rules constitute a derogation from the EU's regular procedures. That the simplified procedure of Article 218(7) applies to the adoption of the CETA joint committee decision under Article 20.22 CETA to amend Annex 20-A, was a matter explicitly decided upon by the Council.[23] Therefore, when Article 26.3.2 refers to internal requirements and procedures, this could either relate to the internal EU preparation of the decision of the CETA joint committee by means of a Council position adopted under Article 218(9), or to mandating the Commission,

[20] *See* for example Art. 15.4 EU Korea Free Trade Agreement. Prior acceptance by the parties is stipulated only with regard to decisions that amend the Agreement (Art. 15.5.2).

[21] N. Appel, *Das internationale Kooperationsrecht der EU* (Springer 2016) p. 211 ff.

[22] Art. 218(7) is a further simplification of para. (9), *see* Opinion of A.G. Sharpston in ECJ 16 July 2015, Case C-73/14, *Council* v *Commission* ECLI:EU:C:2015:490, para. 67; Opinion of A.G. Szpunar in ECJ 24 April 2017, Case C-600/14, *Germany* v *Council* ECLI:EU:C:2017:296, para. 57.

[23] *See* Art. 2 of the Council Decision 2017/38 on the provisional application of CETA, OJ 2017 L 11/1080.

which is then allowed to express consent on behalf of the EU, as envisaged in Article 218(7) TFEU.

Accordingly, and generally speaking, decisions taken by the CETA joint committee immediately become binding on the parties under international law once adopted by it. The exercise of its decision-making powers is accompanied by the Council deciding the EU's position in preparation of the adoption of the committee decision. The committee decision is not subject to subsequent approval by other EU or Member State institutions. Ratification is generally not a requirement for making committee decisions binding on the parties. The decisions become binding on parties merely by virtue of their adoption by the CETA joint committee. This understanding of Article 26.3.2 is further confirmed by the fact that, with regard to certain committee decisions, CETA expressly establishes the requirement of approval by the parties (*see* Articles 2.4.4, 5.14.2(d), 11.3.6), which would be superfluous if Article 26.3.2 CETA had already contained such a requirement.

One could contest this interpretation of Article 26.3.2 CETA, however. The parenthesis could be understood to require subsequent acceptance by the parties. Thus, both the German and English texts make the binding effect of the decision subject to the completion of internal requirements, seemingly as if these procedures were to be carried out *after* the committee's decision. Read thusly, the decision would not be binding on the parties until additional consent had been granted under their internal procedures; the mere adoption of a decision by the committee would not be sufficient for its binding force on the parties. In that case, Article 218(9) TFEU would not apply since it only regulates the adoption of the EU's position *prior* to decision-making by a committee. If one were to understand Article 26.3.2 CETA in this way, any detrimental effects of committee decision-making on national sovereignty or EU competences would be avoided, as the committee's decisions would become binding on the parties only by virtue of their explicit consent afterwards. There are, however, two objections to such an interpretation. First, the parenthesis' reference relates to the completion of 'any necessary' internal requirements and procedures. If the limiting clause establishes a requirement for parties to give their subsequent consent, why limit this to certain, i.e. necessary, cases? It is submitted here that the limiting clause merely states the obvious: it is the internal law of the parties that determines which domestic procedures apply. Hence, for the EU, the simplified procedures of either Article 218(7) or Article 218(9) TFEU apply. The second objection against understanding the parenthesis as a requirement for subsequent approval by the parties relates to the fact that CETA, in only a very few rules, explicitly refers to the approval of the parties (*see* above).

In sum, the general rule on the binding force of decisions taken by the CETA joint committee in Article 26.3.2 CETA provides for autonomous binding force

on the parties. It cannot be understood as a reference to their ordinary treaty-making procedures. The simplified procedures of Article 218(7) or Article 218(9) TFEU apply. This finding is in conformity with EU practice in other agreements.

As regards the numerous specialised committees, the autonomous binding force of their decisions is regulated by Article 26.2.4 CETA, according to which the special committees take decisions when CETA so provides. In contrast to the CETA joint committee, the binding force of the decisions of the specialised committees is not explicitly stated. But this is not a bar to their binding force. The lack of an explicit statement on binding force is not a peculiarity of the CETA – there are other EU agreements that fail to explicitly clarify the binding nature of the decisions of their treaty bodies.[24] The binding effect on parties can be deduced from the context, as is also the case with other EU agreements: CETA distinguishes decisions from recommendations, the latter being a non-binding form of action.[25] Article 26.2.4 does not impose a requirement for ratification or subsequent acceptance by the parties for the binding force of the decisions to come into effect. On the contrary, some of the CETA provisions that envisage decision-making powers for the specialised committees explicitly establish a specific requirement to that effect.[26] In those articles, parties' consent by recourse to domestic procedures is expressly required (which, again, are not specified in any detail). These special arrangements confirm that the general rule of Article 26.2.4 CETA is that the decisions of specialised committees have binding force on the parties without further ado; it does not demand any subsequent acceptance or ratification by the parties. As in the case of the CETA joint committee, the decisions of the specialised committees are, in principle, binding upon the parties.

In conclusion, the autonomous binding force of the decisions by the CETA committees can be inferred from Articles 26.1 and 26.3 CETA, as regards the joint committee, and from Article 26.2, in particular Article 26.2.4 CETA, as regards the specialised committees. Apart from a few exceptions, their binding force does not generally depend on subsequent domestic approval or even ratification procedures. The treaty bodies' decisions become binding on the parties upon their adoption (unless a different date of entry into force has been foreseen).

Conferral of public powers on committees

Along with independent binding decision-making competences, public powers have been transferred to the committees by the EU and its member states with the

[24] Appel, *supra* n. 21, p. 212.
[25] For recommendations *see* Art. 8.10.3, Art. 8.44.3(a), (d) and (e), Art. 23.11.5 CETA.
[26] *See* Art. 5.14.2(d) CETA; Art. 11.3.6 CETA.

provisional entry into force of CETA.[27] One could contend, however, that since decisions must be adopted unanimously (*see* above), their content is effectively shaped by the Council decision under Article 218(9) TFEU. Consequently, one might opine that it is the Council that exercises public powers and not the committees, and that decision-making by treaty bodies is nothing more than a simplified way for the Council to enter into international agreements,[28] and therefore not a genuine transfer of public power by virtue of an EU mandate delegating it to the treaty bodies.[29]

There are, however, several factors that contradict such an understanding of the committees' decision-making as a delegation to the Council. First, the deliberate inclusion in EU primary law of rules for decision-making in committees; the possibility of majority voting in international institutions; the binding effect of decisions simply by virtue of their adoption by treaty bodies; the fact that the Council can allow the EU representative in a committee a degree of discretion, which results in a bit of leeway for decision-making within the committee;[30] and finally, the wording of Article 218(9) TFEU, according to which the bodies themselves are responsible for the adoption of acts having legal effects (and not for the acceptance of EU treaty proposals), all argue in favour of seeing the adoption of legal acts as an exercise of the public power conferred upon the treaty bodies. This, in Dashwood's terms, is 'an additional way of making E[U] law'.[31] Second, a Council decision under Article 218(9) TFEU would remain a futile exercise if there were no subsequent committee decision; the Council decision is merely a preparatory action, and is addressed exclusively to the EU representatives.[32] Third, it is the committees' decisions that, in the view of the European Court of Justice,

[27] The provisional application of CETA as from 21 September 2017 does not comprise those Committee competences which are enshrined in CETA Chapter 8, *see* Art. 1 Council Decision 2017/38, 2017 OJ L 11/1080 and the notice concerning the provisional application of the CETA, 2017 OJ L 238/9. Hence, the present analysis applies to them once they enter into force.

[28] The evolutionary history would militate in favour of this, *see* the exploration of the ECJ case law in Appel, *supra* n. 21, p. 328.

[29] In favour of the latter *see* A. von Bogdandy et al., 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis', 23 *YBEL* (2004) p. 91 at p. 130; *see also* Alemanno, *supra* n. 9, p. 636.

[30] *See* e.g. Art. 2(2) Council Decision 11436/12; T. Giegerich, 'Article 218 AEUV', in M. Pechstein et al. (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017) marginal note 175.

[31] A. Dashwood, 'External Relations Provisions of the Amsterdam Treaty', 35 *CML Rev* (1998) p. 1019 at p. 1026.

[32] This may explain why not all Council decisions under Art. 218(9) are published in the Official Journal, *see* Art. 297(2) TFEU.

may influence the content of EU legislation[33] and which form an integral part of the EU legal system.[34] Hence, Article 218(9) and also Article 218(7) constitute special regimes for the adoption of secondary law within international organisations or treaty bodies.[35] In the Court of Justice's words: Article 218(9) provides by way of derogation from the ordinary procedure, 'a simplified procedure for deciding on the positions to be adopted on behalf of the European Union … within a decision-making body [that adopts] acts applying or implementing that agreement'.[36]

Some might also contend that committee decisions are not the result of a transfer of power, as they are not directly effective within the EU or within any national legal order: they still need to be implemented by domestic authorities or legislators. This objection arises from the premise that an exercise of public function must be relevant not only for the parties to a treaty, but also within their domestic legal orders. Otherwise, a committee decision would be strictly an act under international law, binding on the parties on the international plane, relevant for and in inter-governmental relations, but not directly so for domestic actors. According to such a view, a transfer of powers would necessarily require that the resulting legal acts were directly relevant at the domestic level, within the domestic legal order of the parties, i.e. the EU and its Member States. Indeed, the CETA, contrary toother EU agreements, is not directly applicable pursuant to Article 30.6.1 CETA.[37] Consequently, the decisions of CETA committees do not have direct effect beyond their international binding force.

The lack of direct effect, however, does not mean that there has been no transfer of powers. I make two arguments for this. First, the whole body of EU law is the result of a conferral of competences by the Member States to the EU. The EU Treaties perceive the exercise of EU competences as a result of conferred powers: *see* Article 4(1), Article 5(1), (2) TEU and Article 2(1), (2), Article 4(1) TFEU.

[33] *See* ECJ 24 October 2014, Case C-399/12, *Germany* v *Council* ECLI:EU:C:2014:2258, para. 63. For practical examples *see* J. Czuczai, 'The Autonomy of the EU Legal Order and the Law-making Activities of International Organizations: Some Examples Regarding the Council's most Recent Practice', 31(1) *Yearbook of European Law* (2012) p. 452.

[34] *See* ECJ 14 November 1989, Case 30/88, *Hellenic Republic* v *Commission of the European Communities* ECLI:EU:C:1989:422, para. 13. N. Lavranos, *Legal Interaction between Decisions of International Organisations and European Law* (Europa 2004) p. 35 ff, 53, 93.

[35] Appel, *supra* n. 21, p. 324 ff; Opinion of A.G. Szpunar, *supra* n. 22, para. 58, 162. International delegation does not require transfer of powers to a body that is independent from the parties and has its own will, *cf* Lavranos, *supra* n. 34, p. 79 ff; Bradley and Kelly, *supra* n. 3, p. 6 ff.

[36] ECJ 6 October 2015, Case C-73/14, *Council* v *Commission* ECLI:EU:C:2015:663, para. 65.

[37] *See also* Art. 17.15 EU Singapore Free Trade Agreement. An explicit treaty rule on (the exclusion of) direct effect is binding on the ECJ, *see* ECJ 13 January 2015, Case C-401/12 P, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* ECLI:EU:C:2015:4, para. 53.

Hence, what matters is the exercise of competences in a binding legal form, and not the direct effect of the legal acts adopted. Even though some EU competences were, and still are, limited to the adoption of directives in the sense of Article 288 TFEU (which are generally not directly effective), the relevant competences[38] nevertheless are the result of a conferral of powers.

Second, even though the direct effect of CETA is excluded,[39] Article 216(2) TFEU still applies. Accordingly, EU institutions and the Member States are bound by international agreements entered into by the EU, and by their bodies' decisions (even though the wording of Article 216(2) only pertains to agreements). It is a constant in the case law of the European Court of Justice (although, admittedly, not based on Article 216(2) or its predecessors) that those decisions form an integral part of EU law, since they are directly connected and the latter give effect to the former.[40] Binding force under EU law means that the EU and the Member State institutions are not only obliged to implement the committees' decisions under international law and by virtue of an international legal obligation, but also under EU law. The legal effect that Article 216(2) TFEU imparts on CETA would be disregarded by the above-mentioned view. Article 216(2) TFEU does not apply exclusively to directly effective international treaties.[41] Even though the exclusion of CETA's direct effect clearly restrains its force within the EU and Member States' legal orders, this does not mean – and due to Article 216(2) TFEU cannot mean – that CETA and its committees' decisions do not have any legal effect at all within the EU and national legal orders.[42] The EU organs cannot deviate from Article 216(2) TFEU, nor are they able to exclude its

[38] *See* e.g. Arts. 23(2), 52(2), 53(1), 59(1), 82(2) TFEU.

[39] The exclusion of direct effect in my opinion does not relate to the investment court systemm as its decisions must be enforced by domestic courts without any further implementation measure, *see* Art. 8.41.2 CETA. This issue, however, is not relevant for the time being as provisional application of CETA does not comprise the ISDS mechanism.

[40] *Hellenic Republic* v *Commission of the European Communities*, *supra* n. 34, para. 13; ECJ 20 September 1990, Case C-192/89, *Sevince* v *Staatssecretaris van Justitie* ECLI:EU:C:1990:322, para. 9. Not least in the case of an EU free trade agreement, they enjoy the same legal status as the agreements. *See* R.A. Wessel and S. Blockmans, *The Legal Status and Influence of Decisions of International Organizations and other Bodies in the EU*, Brugge Research Paper 1/2014, p. 20. The ECJ refers to Art. 216(2) only with regard to the agreements themselves, *see* ECJ 16 July 2015, Case C-612/13 P, *ClientEarth* v *Commission* ECLI:EU:C:2015:486, para. 33.

[41] In the cases cited above, direct effect of the treaty bodies' decisions was not an issue. The character of such a decision as an integral part of EU law does not require its direct effect, nor even its legal binding force; for the latter *see* ECJ 21 January 1993, Case C-188/91, *Deutsche Shell AG* v *Hauptzollamt Hamburg-Harburg* ECLI:EU:C:1993:24, para 17-18; M. Mendez, *The Legal Effects of EU Agreements* (Oxford University Press 2013) p. 113 ff. *See also Taflan-Met*, *supra* n. 1, para. 18 ff, where the Court distinguished between the binding force of a treaty-body decision for the Member States and the issue of its direct effect.

[42] *See again Deutsche Shell AG*, *supra* n. 41, paras. 17-18.

legal effect in international agreements as Article 216(2) is primary EU law. One legal effect implied by this has already been mentioned: the implementation obligation is not only an international legal obligation but is also an obligation under EU law; the decisions and their legal effect become 'unionised'.[43] The EU and national institutions must pay respect to the CETA and its committees' decisions. They must implement them;[44] they must consider them when adopting secondary law.

Consequently, committee decisions are relevant facts for public institutions in the EU. They are legal facts that cannot be ignored under EU law even though they are not directly effective. EU and national institutions have a primary legal obligation to implement and respect them.

In consequence, the establishment of the competences of the committees is the result of exercising public authority and competence of the EU (and the Member States) to enter into international treaties. Likewise, the use of these competences, i.e. of decision-making powers that CETA grants to the committees, constitutes an exercise of public power, as the decisions adopted are legally binding on EU and national institutions, even though only to a limited extent when compared to directly effective EU agreements. Issuing binding and internally relevant decisions is an exercise of public power.

Conferral of power by the EU to international institutions – legal base and no limits? The role of Article 218(9) TFEU

As we are able to observe a transfer of public power to the committees effectuated by entering into CETA, the question arises as to whether the EU is competent to transfer the sovereign rights it was granted by the member states to new institutions of public international law. If not, the EU may have acted ultra vires since it remains subject to the principle of conferral that governs EU competences and the limitations on them (Article 5(1) TEU). This is an unavoidable conclusion – at least insofar as the committees enjoy powers that go beyond the mere execution of the agreement's provisions.[45] As shown, the decision-making powers of CETA committees go beyond purely technical issues and comprise legislative and regulatory functions.

[43] *Cf* Lavranos, *supra* n. 34, p. 60; Appel, *supra* n. 21, p. 384 ff.

[44] This is in line with the maximalist enforcement paradigm of the ECJ as regards EU Agreements, *see* Mendez, *supra* n. 41, p. 157. The binding force for the member states of a treaty-body decision established by a mixed agreement does not depend on the adoption of implementing measures, *see Taflan-Met*, *supra* n. 1, para. 19-22.

[45] Recently, ECJ 25 October 2017, Case C-687/15, *European Commission* v *Council* ECLI:EU:C:2017:803, para. 48-49 confirmed the constitutional significance of respecting the principle of allocation of powers also with regard to international action of the EU.

The explicit competence of the EU to establish decision-making treaty bodies in free trade agreements is rather sparsely indicated, although it is implied by Article 218(9) and provided for by Article 218(7) TFEU.

EU primary law does not explicitly envisage the EU transferring decision-making powers to treaty bodies by means of international agreements. However, Article 217 gives some indication in that regard; the EU is entitled to establish common actions and special procedures in association agreements. This implies that common treaty bodies can exercise decision-making powers. Their competences, however, are not specified in any detail.

Beyond that, there are only indirect statements in procedural rules: Article 218 (6)*lit.*(a)(iii) TFEU provides that the European Parliament must consent to agreements that establish institutional cooperation procedures, which inherently confirms the permissibility of decision-making treaty bodies.

The same applies to the procedural rule laid down in Article 218(9) TFEU, according to which the Council defines the EU position to be adopted in bodies set up per agreement. This rule was only introduced into primary EU law upon conclusion of the Treaty of Amsterdam[46] (then Article 300(2), subparagraph 2 ECT); it was intended to replace the less practicable legal situation that, in line with the jurisprudence of the ECJ, in the absence of specific procedural rules, any decision in an international forum in which the (then) EC participated had to be seen as the conclusion of an international agreement by the EC.[47] The new rule (now Article 218(9) TFEU) should allow for a simplification of the procedure.[48] This also explains the introduction of the rule within the context of a procedural provision. Article 218(9) not only impliedly confirms the competence of the EU to establish treaty bodies, but explicitly provides for their competences to a certain degree: the treaty bodies can 'adopt acts having legal effects'.

The Treaty of Nice had already broadened the EU's capacity to set up such decision-making bodies by extending it to all types of EU agreement; in Article 300(2) subparagraph 2 ECT-Amsterdam there was a reference to agreements 'under Article 310' (Association Agreements) that has been removed by the Treaty of Nice.[49]

[46] For the genesis of Art. 218(9) TFEU *see* the Opinion of A.G. Cruz Villalon in ECJ 24 October 2014, Case C-399/12, *Germany* v *Council* ECLI:EU:C:2014:289, para. 39 ff; A. Dashwood, 'EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements', in M. Cremona and C. Kilpatrick (eds.), *EU Legal Acts* (Oxford University Press 2018) p. 189 at p. 228 ff.

[47] *See* ECJ, Opinion 1/78 ECLI:EU:C:1979:224, para. 51; *see also* Opinion of A.G. Cruz Villalon in *Germany* v *Council*, *supra* n. 46, para. 44-45. With regard to some treaty bodies in EU Agreements, specific arrangements or procedures had been concluded between Council and Commission or provided in the concluding act, *see* Dashwood, *supra* n. 31, p. 1025.

[48] Opinion of A.G. Cruz Villalon in *Germany* v *Council*, *supra* n. 46, para. 80.

[49] Opinion of A.G. Cruz Villalon in *Germany* v *Council*, *supra* n. 46, paras. 51, 80.

The European Court of Justice has, for a long time, assumed an implied competence of the EU to establish international institutions and to provide them with 'appropriate powers of decision'.[50] The capacity to establish decision-making bodies is inherently part of the substantive competences of the EU to conclude international agreements (*see* current Article 216(1) TFEU).[51] The abovementioned procedural rules confirm this assumption. Thus, the EU has the power to provide for such bodies as part of its international treaty-making competence as enshrined in the TFEU.

Recourse to the EU;s substantive treaty-making powers for the legitimation of treaty bodies does not, however, clarify the type of their public powers. As already noted, the European Court of Justice describes the role of the treaty bodies mentioned in Article 218(9) TFEU as 'decision-making bodies set up by international agreements [that adopt] acts applying or implementing that agreement',[52] without, however, providing any further guidance. Neither Article 218(9) TFEU nor the other rules referred to above give any further indication as to the nature and scope of public powers to be conferred on treaty bodies. Article 218 (9) TFEU merely implies that the competence exists with respect to acts 'having legal effect'. This concept includes binding legal acts, but also comprises – according to a recent decision of the European Court of Justice[53] – mere recommendations which influence the content of EU legislation, for example through references. This is a broad, rather vague concept, which does not refer to any particular form or type of action.[54]

That a wide range of public powers can be transferred to treaty bodies can also be concluded from the development of the terminology used in Article 218(9). The textual change brought about by the Treaty of Lisbon supports a breadth of transferable sovereignty functions. Whereas before Lisbon the terminology was 'legally effective decisions' (*see* Article 300(2) sub-section 2 ECT), Article 218(9) TFEU now reads 'acts having legal effects'. This change in terminology wrought by the Treaty of Lisbon can also be observed in other language versions.[55] The terminological change draws on the Constitutional Treaty (Article III-325) and

[50] ECJ 26 April 1977, Opinion 1/76 ECLI:EU:C:1977:63, para. 5

[51] *See* recently ECJ 16 May 2017, Opinion 2/15 ECLI:EU:C:2017:376, para. 276; ECJ 18 December 2014, Case C-81/13, *UK v Council of the EU* ECLI:EU:C:2014:2449, para. 61; ECJ 5 December 2017, Case C-600/14, *Germany v Council* ECLI:EU:C:2017:935, para. 60.

[52] *Council* v *Commission*, *supra* n. 36, para. 65.

[53] *Germany* v *Council*, *supra* n. 33, para. 56 ff, 63 ff.

[54] In contrast, Opinion of A.G. Cruz Villalon in *Germany* v *Council*, *supra* n. 46, paras. 89-99 opined that Art. 218(9) applied only to acts which have binding force under international law.

[55] In the French version one can observe the change from 'des décisions ayant des effets juridiques' in Art. 300(2) subpara. 2 ECT to 'des actes ayant des effets juridiques' in Art. 218(9) TFEU, in the German version from 'rechtswirksame Beschlüsse' to 'rechtswirksame Akte'.

the Convention draft (Article III-227(10)) and has been incorporated into the Reform Treaty. In the Convention draft, the change in terminology came about only during the textual adjustment phase following the June 2003 European Council meeting in Thessaloniki, probably to bring it in line with the terminology for the various forms of EU legal acts which, with the Treaty of Lisbon, had been newly regulated and adapted to reflect common practice. Therefore, one could conclude that the new terminology was not intended to extend the powers of the treaty bodies beyond those acts previously designated by the term 'decision'.[56] Nevertheless, the objective change in terminology indicates that the acts adopted by treaty bodies could cover all forms of legal action. Under the Treaty of Lisbon, the EU primary law term 'decision' denotes an action which is either a single-case decision addressed to certain addressees or a general rule-making act addressed to an undefined multitude of addressees ('rule making decision'[57]): *see* Article 288(4) TFEU.[58]

Binding acts can indeed be adopted by different branches of government. Binding acts can be individual decisions, decisions addressed to an unlimited group of addressees, legislative and generally applicable executive rule-making, but are also understood to include non-legally-binding acts that can nevertheless have legal effects. Further justification for a broad conception of the term 'acts having legal effects' is provided by the fact that today's EU law, like earlier EC law, has a wide range of legal forms of action which can be the result of the exercise of powers in the field of foreign affairs, legislative powers, subordinate legislation, or even purely administrative regulation or executive single case decision-making.[59] While the plethora of forms of Union acts cannot without further ado be transferred to the level of international law,[60] international legal practice too has very diverse forms of, and terminology for, international acts. The concept of 'acts having legal effects' in Article 218(9) TFEU refers to the acts of treaty bodies adopted at the international level. Frequently, these are concrete decisions adopted to implement the international mandates envisaged by the agreements, but they can also comprise abstract rule-making. The available forms of action and their concomitant legal effects are thus determined by international treaty, and in the absence of explicit rules therein, by general international law. Treaty bodies can

[56] *See* Opinion of A.G. Cruz Villalon in *Germany* v *Council*, *supra* n. 46, para. 52 who opines that the changes in Art. 218(9) did not imply 'fundamental changes of substance'.

[57] K. Bradley, 'Legislating in the EU', in C. Barnard and S. Peers (eds.), *European Union Law* (Oxford University Press 2014) p. 97 at p. 101.

[58] *See* D. Chalmers et al., *European Union Law*, 3rd edn (Cambridge University Press 2014) p. 112.

[59] A. von Bogdandy et al., 'Handlungsformen im Unionsrecht', 62 *Heidelberg Journal of International Law* (2002) p. 77 at p. 147 ff.

[60] *See also* von Bogdandy et al., *supra* n. 29, p. 129.

adopt different forms of action, just as agreements under international law can contain different types of rule. They can coordinate the behaviour of parties or set rules that aim to influence internal legislation, as delegation to treaty bodies can pertain to both legislative and regulatory mandates, as is the case in CETA (*see* above). The indeterminate formulation used in Article 218(9) internally reflects this; it is incapable of limiting the type of authority conferrable to treaty bodies in any meaningful way.

In conclusion, one can state that neither the relevant substantive competence provisions in the EU treaties nor the procedural rule in Article 218(9) TFEU indicate in specific, let alone precise, terms which kind of public authority may be delegated to treaty bodies. The legal foundations for conferring powers to treaty bodies are highly inaccurate in this respect. International practice and the vague wording of Article 218(9) hint at a broad conception of powers conferrable to treaty bodies. Consequently, one must conclude that the public powers conferrable by the EU to treaty bodies may be very extensive and comprehensive.

The conferral of power and democratic legitimacy

The European Parliament's limited role in the conferral and exercise of power by the committees, and resulting legitimacy concerns

Up to this point, I have shown that Article 218(7) and (9) TFEU provide for simplified procedures for entering into international commitments based on mandates in EU agreements that confer public powers on treaty bodies. Under Article 218(9), these powers can be very extensive as their substance is only broadly described there (apart from the constraint concerning the institutional framework), but also under Article 218(7) even though it only applies to modifications to agreements. The legal significance of the treaty-body decisions is considerable, as they are binding under both international and EU law as soon as they are adopted by the treaty bodies; as shown above, only a very few CETA committee decisions require subsequent adoption or ratification by the parties in order to become binding upon them. As these powers – under CETA in particular – pertain to legislative and regulatory functions, one may wonder what the role of the European Parliament is in their conferral as committee's decisions could interfere with its functions, especially if these decisions have an impact on political choices or if their implementation requires changes to EU legislative acts.

As already mentioned, Article 218(9) TFEU provides that a decision on the EU position in the decision-making of a committee is adopted by the Council acting on a proposal by the Commission; similarly, only the Council acts under Article 218(7) TFEU. In both instances, the European Parliament is not involved in the decision-making of the Council. Neither does a right of the European Parliament

to approve a Council decision under Article 218(9) result from the substantive legal bases for Council decisions: as shown above, the EU's external competences as established in Articles 207 and 217 TFEU form the substantive legal basis also for Council decisions under Article 218(9) TFEU, but their procedural consequences for entering into agreements for the involvement of the European Parliament (*see* Article 218(6)) do not apply to the decision-making of Article 218(9), as the latter rule is a *lex specialis* as such.[61]

The European Parliament is merely informed of the positions under Article 218(10) TFEU; the information 'at all stages of the procedure' includes information on the positions taken by the Council in preparation of a decision taken by a treaty body. Likewise, the European Parliament is informed in the event the Council makes use of Article 218(7) TFEU with regard to agreements that require the European Parliament's consent.[62] In the past, the immediate disclosure of a Council position to the European Parliament was explicitly provided for by Article 300(2) ECT Amsterdam/Nice.[63] The provision of information to the European Parliament on such Council positions was not altered by the Lisbon Treaty even though it is no longer expressly mentioned. The Lisbon Treaty's general information rule in Article 218(10) TFEU aims at increasing the information given to the European Parliament, and not at withholding information about Council positions on decision-making in treaty bodies from the European Parliament. Article 109 of the Rules of Procedure of the European Parliament gives it the ability to hold debates and issue recommendations (including requests to the Council) once the Commission has proposed a position to be adopted on the EU's behalf in a treaty body. There are, however, no 'comply or explain mechanisms' in place regarding these recommendations, nor does the European Parliament have any say in the adoption of a Council decision taken under Article 218(9).

The exclusion of the European Parliament from involvement in Council decision-making in preparation of a treaty-body decision is rooted in tradition. The simplified procedures developed in certain instances before the introduction of Article 218(9) TFEU/300 ECT by the Amsterdam Treaty, intentionally left out any role for the European Parliament, as this was held to be impracticable due to the frequency with which such positions might be required.[64] In the same vein, the formulation of Article 300(2) ECT, the predecessor of Article 218(9) TFEU, was drafted in such a way as to derogate from the role the European Parliament

[61] *See* mutatis mutandis *UK* v *Council of the EU*, *supra* n. 51, para. 66.

[62] *See* Annex III, para. 9 of the Framework Agreement between Commission and European Parliament, 2010 OJ 304/47.

[63] *See* B. Martenczuk, 'Decisions of Bodies Established by International Agreements and the Community Legal Order' in V. Kronenberger (ed.), *The EU and the International Legal Order* (Asser Press 2001) p. 141 at p. 150 ff.

[64] Dashwood, *supra* n. 46, p. 189 at p. 230.

had in concluding international agreements (apart from the exception with regard to changes to the institutional framework).[65]

Hence, it is the Council alone that – based on a Commission proposal – determines the EU's position and therefore shapes the content of treaty body decisions for the EU. As treaty body decisions become binding once adopted, the Council decision-making under Article 218(9) that determines the EU position to be presented by the EU representative in the committee is the last stage at which the substance of a CETA committee decision with binding effect for the EU legal order can be influenced (or its adoption even avoided) on behalf of the EU. The European Parliament has no say in this respect. Decisions of the committees may, however, create new rules by way of their legislative and regulatory function whose adoption would have been a competence of the EU legislature, i.e. a joint competence of the Council and the European Parliament. In the same way, if a committee decision requires the adoption of implementing rules by the EU legislature, the European Parliament might, without prior involvement, be bound by the substance of the committee decision. Hence, the conferral of powers to treaty bodies could circumvent essential procedural rules established in EU primary law.[66]

Such concerns are not assuaged by the participation of the European Parliament in the decision-making of the committees themselves. CETA does not grant any role to parliaments in the decision-making processes of its committees. The EU is represented, as has already been shown, by the Commission. Nor does CETA provide any other accountability mechanism with regard to committee decision-making.[67] The internal rule-making procedures of the EU do not provide the European Parliament with any status (e.g. as observer) in CETA committees.[68]

The legitimacy of committee decisions might ultimately be rooted in the European Parliament's consent to CETA. The European Parliament is involved in the delegation of powers to treaty bodies as these powers are determined by the enabling EU agreement. By consenting to the empowering treaties (as required under

[65] Dashwood, *supra* n. 46, p. 231; P. Eeckhout, *EU External Relations Law*, 2nd edn (Oxford University Press 2011) p. 208.

[66] This concern was already raised with regard to Association Council decisions by N. Neuwahl, 'The European Parliament and Association Council Decisions: The example of Decisions 1/95 of the EC/Turkey Association Council', 33 *CMLRev* (1996) p. 51 at p. 56.

[67] Chapter 27 on Transparency contains stipulations only with regard to domestic implementation. The legitimacy concerns caused by the restraining effects treaties have for public participation lack participatory standards established in EU law, and may even deplete these standards in their implementation, *see* J. Mendes, 'EU law and global regulatory regimes: Hollowing out procedural standards', 10(4) *International Journal of Constitutional Law* (2012) p. 988.

[68] Para. 26 of the Framework Agreement, *supra* n. 62, provides for a possible observer status for Members of the European Parliament at meetings of decision-making bodies set up by multilateral agreements only, not with regard to bilateral ones.

Lisbon rules to a considerably greater extent than previously),[69] the European Parliament also agrees to the treaty-body decision-making mandates provided therein. From a formal perspective, the public powers of the committees would appear to be legitimate as they have been the subject of parliamentary decision.

Nevertheless, considerable concern remains as to the legitimacy of the treaty bodies' exercise of powers pertaining to legislative or regulatory functions or that have fundamental political importance or significance for individuals, as the European Parliament's general consent to a treaty might not convey sufficient legitimacy to such mandates. From a substantive perspective, the more precisely treaty-body mandates are defined by the treaty (i.e. the more detailed the content of their decisions is prescribed in substantive terms in the treaties), the more legitimate general European Parliament consent to the treaty makes them. A substantive assignment of legitimacy in this way can only work if the content of a decision is pre-specified by substantive prescriptions of the European Parliament or with its approval. The density of the substantive prescriptions for treaty-body decisions is therefore decisive for the level of legitimacy conveyed by the European Parliament. If and insofar as these prescriptions are imprecise because the treaty assigns wide discretion to its bodies, the European Parliament's consent merely conveys formal – but not substantive – legitimacy. The legitimacy concerns are all the more founded given the CETA committees' regulatory and even legislative functions. In this sense, the decisions do not merely spell out specifications already laid out in the CETA text. The different categories of public power mandated to the CETA committees prompt the need for differentiation when examining the requirements of their legitimacy.

Legitimacy requirements must take the significance and relevance of a decision into account. The more profound the consequences of a decision, the more important the tasks and powers assigned to the decision-making body, and the more leeway it enjoys, the greater the legitimacy demands. This means that general consent to an open-termed mandate is not sufficient for vesting legitimacy in the exercise of rule-making powers by a committee. Conversely, legitimacy requirements are negligible if the exercise of power does not lead to externally binding decisions nor affects the rights of individuals. The absence of supervisory and control structures to oversee international institutions may in turn increase legitimacy demands. The link between the extent of the powers transferred and the level of legitimacy requirements has been stated by the German Constitutional Court: 'The constitutional requirements placed by the principle of democracy on the organisational structure and the decision-making procedures … depend on the extent to which sovereign responsibilities are transferred … and the degree of political independence in the exercise of the … powers transferred. … [T]he level

[69] *See* Art. 218 VI(ii), (iii) TFEU.

of democratic legitimation [must be] commensurate with the extent and importance of supranational power'.[70] This is transferable to the present context of democratic requirements for the conferral of powers by the EU, all the more since the European Court of Justice, in conceiving the principle of democracy in the EU, draws from the traditions of national democracies.[71] The fundamental insight to be gleaned here is that a lack of precision in the definition of extensive, significant powers conferred on treaty bodies makes it even less likely that the European Parliament's consent to the treaties can grant the powers sufficient democratic legitimacy. The mandates must be specifically set out and clearly described in the empowering treaty provision, as a requirement of democratic legitimacy.[72]

Thus, there may be constitutional constraints or safeguards (such as control rights, or a requirement of specificity of mandates) for the transfer of extensive powers to treaty bodies such as to the CETA committees). Before these are explored in the next section, a few potential objections need to be addressed.

Sufficient legitimacy by the Council?

One argument against the above legitimacy concerns that arise due to a lack of European Parliament participation could be the fact that the sole competence of the Council under Article 218(7) and (9) is in perfect alignment with EU democracy requirements; the European Parliament is not the sole law-maker in the EU and the Council performs executive functions, in particular in the area of external relations which is not the role of a parliament.

Under EU law, according to Article 10(2) TEU the democratic legitimation of EU legal acts rests on two pillars, namely the Member State representatives in the Council who are accountable to their constituency and the legitimacy ensured by the European Parliament, the latter being the genuine supranational pillar. In these ways, EU primary law emphasises that the exercise of public authority must be traceable to the will of the people (referred to as national citizens and EU citizens; there is no European demos) and not only to the domestic governments represented in the Council. Even though Article 10(2) in this way expresses that the dual structure of legitimacy[73] is one of the more distinctive elements of the EU multilevel system, one cannot directly draw conclusions from this principle on the

[70] German Federal Constitutional Court 30 June 2009 (Lisbon Treaty), Case 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208, para. 262.

[71] K. Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice', 62 *ICLQ* (2013) p. 271 at p. 280.

[72] Appel, *supra* n. 21, p. 303.

[73] A von Bogdandy, 'Founding Principles', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 2nd edn (Hart 2009) p. 11 at p. 49.

correct allocation of accountability mechanisms between the two pillars. In the present context of transferring powers to committees, one could, however, state that since decisions on the EU position in treaty bodies are adopted by the Council acting alone and the European Parliament does not have a say, democratic legitimacy predominantly rests upon the Member State pillar.

The genuine supranational pillar conveys legitimacy to treaty-body decisions only to the extent that the empowerment of a treaty body in an agreement has been subject to European Parliament assent. As shown, this supranational pillar conveys only very limited legitimacy, the sufficiency of which appears to be highly doubtful with regard to the conferral of legislative and regulatory powers to CETA committees. Legislative and regulatory powers and their delegation are, within the EU, shared between the Council and the European Parliament. The concrete shape of the dual legitimacy of the exercise of public powers in the EU depends on the concrete allocation of powers between Council and European Parliament in a given policy field. Therefore, when assessing whether decision-making on the exercise of powers conferred to a treaty body by the Council alone conforms to EU standards of legitimacy, it is essential to explore the issue-specific internal, domestic, allocation of power between European Parliament and Council instead of trying to draw abstract conclusions from the principle of dual legitimacy. On a theoretical level, one could postulate that the legitimacy bestowed on a legal act is greater if the European Parliament contributes to it. The European Parliament is indeed the forum for pluralistic deliberation of political issues in which diverse aspects of common interest to the EU can be fed into the rule-making procedure. The European Parliament's political composition engenders transnational discourse. In contrast, the Council predominantly represents domestic governments and hence a majoritarian political approach.[74] This theoretical account of higher legitimacy of the European Parliament's contribution is reflected by the development of EU primary law in which the EU's legitimacy has been increased by incrementally expanding the European Parliament's rights at the expense of the Council.

Irrespective of such a theoretical account, under EU law as it presently stands one has to analyse the allocation of powers between Council and European Parliament in order to find an answer to the above question. The general allocation

[74] For such conception of the dual democratic legitimacy of the EU *see* J. von Achenbach, *Demokratische Gesetzgebung in der EU* (Springer 2014) p. 300 ff, 452 ff; J. von Achenbach, 'The European Parliament as a Forum of National Interest? A Transnationalist Critique of Jurgen Habermas' Reconstruction of Degressive Proportionality', 55(2) *Journal of Common Market Studies* (2017) p. 193; R. Sangi, *Die auswärtige Gewalt des Europäischen Parlaments* (Springer 2018) p. 63 ff. *See also* ECtHR 29 October 1997, Case No. 24833/94, *Matthews* v *United Kingdom*, para. 52: the European Parliament 'must be seen as that part of the European Community structure which best reflects concerns as to "effective political democracy"'.

of functions between Council and European Parliament is determined by the typology provided by Articles 14 and 16 TEU and, with regard to external relations, by Article 218 TFEU. Accordingly, the Council and the European Parliament jointly exercise the basic parliamentary functions of legislation and budgeting. In addition, the European Parliament constitutes a control and advisory body, while the Council defines and coordinates policy. In the area of external treaty relations, while the Council is the treaty-making body, the European Parliament exercises a supervisory function as a result of its right to information; it has far-reaching political functions as well in relation to certain agreements whose conclusion by the Council require its consent (*see* Article 218(6) TFEU). The European Parliament makes effective use of the consent requirement and its information rights and contributes to policy formation in informal ways, all of which allows it to co-determine the substance of any treaty under negotiation.[75] Article 218(6) hence establishes 'symmetry' between the European Parliament's involvement in legislation and treaty-making 'in order to guarantee that the Parliament and the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties'.[76] Thus, in trade policy the European Parliament exercises a considerable political function, almost equivalent to the Council's, again resulting in joint competence.

Consequently, postulating – based on a literal reading of Article 218(9) – that the Council might be solely competent under EU law to decide on the exercise of broad legislative or regulatory mandates by treaty bodies such as CETA committees would not appear to be in keeping with this joint allocation of powers to Council and European Parliament in legislation, delegation and treaty-making.

A recent decision from the European Court of Justice seems to contradict this conclusion. Germany had complained that the Council could not adopt decisions under Article 218(9) TFEU if this resulted in a circumvention of the ordinary legislative procedure and thus, a violation of the rights of the European Parliament. In response, the Court merely stated that the wording of Article 218(9) did not limit EU action 'to situations where it has previously adopted rules in accordance with the ordinary legislative procedure'.[77] While this statement was correct, it failed to address the concerns behind Germany's claim. In this case, the Court did not need to delve any deeper into the issue, as the mandates of the OTIF Revision committee at stake

[75] *See* R. Schütze, *Foreign Affairs and the EU Constitution* (Cambridge University Press 2014) p. 385 ff; A. Ott, 'The European Parliament's Role in EU Treaty-Making', 23(6) *Maastricht Journal of European and Comparative Law* (2016) p. 1009; K. Meissner, 'Democratizing EU External Relations: The European Parliament's Informal Role in SWIFT, ACTA and TTIP', 21(2) *European Foreign Affair Review* (2016) p. 269.

[76] ECJ 24 June 2014, Case C-658/11, *Parliament* v *Council* ECLI:EU:C:2014:2025, para. 56.

[77] *Germany* v *Council*, *supra* n. 51, para. 71.

did not encompass legislative functions, but only the competence to propose (rather than decide upon) modifications of the Convention concerning international carriage by rail that still required, for their entry into force, approval by the General Assembly and then by the parties individually.

Towards an EU doctrine on delegation to treaty bodies: limitations flowing from democracy and institutional balance

Searching for EU standards on delegation in external relations

The above legitimacy concerns can be confirmed by exploring the constitutional principles for conferring powers to international decision-making bodies. Democracy and institutional balance in the EU place restrictions on delegation to treaty bodies similar to those on internal delegation. The principle of democracy in the EU comprises protecting the European Parliament's prerogatives,[78] which implies a prohibition against transferring fundamental issues to other branches of government apart from the legislative, and a prohibition against unspecified delegation. Furthermore, the delegation of rule-making to executive institutions requires democratic control. These restrictions on (internal) delegation under EU law amount to an EU (non-)delegation doctrine.[79] While emanating from Articles 290 and 291 TFEU, they are reflected in the *Meroni* case law and also apply to external relations, as Article 218(9) TFEU indicates.

The internal assignment of powers between the executive and legislative branches of the EU reflects the principle of limitation on the delegation of public powers to the executive under EU law. The limitations to and conditions for the delegation of rule-making to the executive ensure democratic legitimacy and control. Article 290 (1) TFEU imposes a rather strict limitation on delegation by the legislature which must reserve for itself the provision of the 'essential elements' of a policy; this cannot be delegated. 'Essential elements' is of course not a straightforward concept, but it has been developed in the case law of the European Court of Justice and there has been a principle of legislative reservation since before Lisbon. Essential elements are reserved to the EU legislature because of their political nature; they comprise political or strategic decisions on the fundamental orientation of Union policy. Such decisions require immediate democratic legitimation as they imply wide discretion,

[78] Lenaerts, *supra* n. 71, p. 293 ff.

[79] For non-delegation in other jurisdictions *see* R. Schütze, '"Delegated" legislation in the (new) European Union: a Constitutional Analysis', 74(5) *MLR* (2011) p. 661 at p. 663 ff; for Germany *see* Art 80 Basic Law. R. Schütze, 'Constitutional Limits to Delegated Powers', in A. Antoniadis et al. (eds.), *The EU and Global Emergencies* (Hart 2011) p. 49 at p. 50, was the first to use the phrase 'delegation doctrine' in EU constitutional law, yet focusing on the internal side, specifically EU agencies.

in particular the need for political choices that weigh potentially conflicting policy aims and interests.[80] Not entirely negligible interferences with fundamental rights amount to essential elements of a policy as well.[81] As regards non-essential elements (i.e. specification of regulatory details and technical aspects of legislation), the EU legislature is competent to unburden itself of their regulation by delegating rule-making to the executive (i.e. the Commission). This is, however, subject to two requirements. First, the legislature must define the objectives, content, scope and duration of the delegated rules: Article 290(1) subparagraph 2 TFEU; undefined delegation is prohibited.[82] Even prior to Lisbon and Article 290 TFEU, the European Court of Justice demanded that the scope of powers and the criteria for their exercise be set out in the legislative act with a certain degree of specificity; they needed to be determined and circumscribed quite precisely.[83] Second, delegation must be accompanied by control mechanisms, i.e. Parliament's right to revoke the delegation or to reserve a veto so that it can review the exercise of the delegated powers and of any discretion transferred: Article 290(2) TFEU. Such mechanisms act as a counterbalance to derogation from the principle of separation of powers inherent to the delegation of public powers and thus ensure observance of the requirements of democratic legitimacy.[84]

The conferral of implementing powers to the Commission must be provided for by an enabling act as well. Implementing acts are subject to scrutiny by the Member States according to legislative rules adopted by the Council and the European Parliament in Regulation 182/2011 in accordance with Article 291(2), (3) TFEU. In this way, the EU legislature is also involved in the allocation of implementing powers.[85]

[80] ECJ 5 September 2012, Case C-355/10, *Parliament* v *Council* ECLI:EU:C:2012:516, paras. 64-67, 76, 78; ECJ 27 October 1992, Case C-240/90, *Germany* v *Council* ECLI:EU:C:1992:408, para. 37.

[81] *Parliament* v *Council*, *supra* n. 80, para, 77; ECJ 10 September 2015, Case C-363/14, *Parliament* v *Council* ECLI:EU:C:2015:579, para. 53. *See also* M. den Heijer and E. Tauschinsky, 'Where Human Rights Meet Administrative Law: Essential Elements and Limits to Delegation', 10 *EuConst* (2013) p. 513 at p. 527, 533; D. Curtin and T. Manucharyan, 'Legal Acts and Hierarchy of Norms in EU Law', in A. Arnull and D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) p. 103 at p. 112.

[82] In R. Schütze, 'Constitutional Limits to Delegated Powers', in A. Antoniadis et al. (eds.), *The EU and Global Emergencies* (Hart 2011) p. 49 at p. 54 terms: specificity principle.

[83] *See* ECJ 6 December 2005, Case C-66/04, *United Kingdom* v *Parliament and Council* ECLI:EU:C:2005:743, para. 48 f.

[84] Opinion of A.G. Mengozzi in ECJ 16 July 2015, Case C-88/14, *Commission* v *Parliament and Council* ECLI:EU:C:2015:304, para. 45.

[85] *See* W. Voermans, J. Hartmann and M. Keading, 'The Quest for Legitimacy in EU Secondary Legislation', 2(1) *Theory and Practice of Legislation* (2014) p. 5 at p. 9: 'democratic update' of the implementing system.

These provisions prove that the European Parliament cannot with further ado deprive itself of its rule-making powers. Delegation of rule-making is subject to procedural and substantive safeguards which amount to a parliamentary reservation. Article 290 TFEU implies a constitutional requirement to adopt a specific legislative act, with controlling powers for the delegator.

Admittedly, such safeguards for the European Parliament's legislative and control competences are not explicitly provided for by EU primary law with regard to conferring decision-making powers to treaty bodies. A comparative constitutionalist justification for this might refer to the peculiarity of external relations as a traditional domain of the executive. The position of the executive in this policy area is historically fundamentally stronger than that of parliaments.[86] Consequently, safeguards for democratic legitimacy are commonly held not to be required to the same extent as in the case of domestic internal decision-making, regulation or legislation. Lower standards with regard to legitimacy requirements are therefore thought to be acceptable, at least as far as decision-making involving technical aspects, regulation of details and administrative functions is concerned. The traditional predominance of the executive in foreign affairs, however, can no longer be justifiably claimed after the strengthening of the position of the European Parliament in external relations by Lisbon, specifically in the area of trade policy. As shown in the previous section, the European Parliament now also has a strong political role in the negotiation and conclusion of trade agreements, making it almost the equal of the Council in this respect.

The *Meroni* case law confirms the existence of inherent limitations to the delegation of powers that are a feature of the institutional balance within the EU and hence to democratic requirements, even though *Meroni* itself does not explicitly refer to democratic legitimacy. Institutional balance is an EU-specific form of the separation of powers brought about by the limited distribution of responsibilities to the EU institution concerned, resulting in a specific assignment of public functions under EU primary law (*see* Article 13(2) TEU). This implies a reciprocal obligation for each of the EU institutions to respect the competences of the other and the boundaries of its own competences,[87] and comprises demands for the democratic legitimation of the exercise of public power.[88] In *Meroni*, the European Court of Justice spelled out the limitations on the delegation of authority based on the principle of institutional balance (initially 'balance of power') with regard to the transfer of decision-making powers to institutions

[86] This position is based on J. Locke, *Two Treatises of Government. Second Treatise*, Chapter XII, para. 146 ff.

[87] *See* recently in the context of external relations *European Commission* v *Council*, *supra* n. 45, para. 40.

[88] *See* P. Craig, 'Institutions, Power, and Institutional Balance', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd edn (Oxford University Press 2011) p. 41 ff.

outside EU primary law which restrain the freedom of EU organs to delegate discretionary powers.[89] The guiding principles of *Meroni* are still pertinent when assessing the powers of EU institutions as the European Court of Justice applied them to delegation of the power to amend legislative acts[90] (which now follows from Article 290 TFEU) and recently with regard to the delegation of regulatory powers to agencies.[91]

The first stipulation of *Meroni* requires that a transfer of power be limited to 'clearly defined executive powers',[92] the exercise of which must be carried out under strict observance of objective criteria determined by the delegating authority, without granting a wide margin of discretion.[93] Use of the powers has to be supervised by the delegating authority (*cf* the parallels with control mechanisms in Article 290(2)). The delegated powers must therefore be exercised within a precise, detailed regulatory framework of delegation. Second, delegation must not 'bring about an actual transfer of responsibility', which would be the case if the delegatee enjoyed such a degree of latitude that it actually exercised a political function that EU primary law had allocated to an EU institution. Hence, a transfer of power must not conflict with the division of powers provided for by the TEU/TFEU.

One might object that the *Meroni* principles have not, strictly speaking, been formulated with regard to treaty bodies. Indeed, there are considerable differences that speak against their transferability in the present context. Treaty bodies are not administrative institutions within the internal market, and they are furthermore foreseen in primary EU law (i.e. Article 218(9)). Nevertheless, these principles also appear to be relevant for the delegation to treaty bodies.[94] If the delegation of power within the EU is subject to constraints, these constraints would appear to be even more necessary when conferring powers to institutions created under international law that owe no democratic accountability to any EU institution.

[89] ECJ 13 June 1958, Case 9/56, *Meroni* v *Haute autorité* ECLI:EU:C:1958:7.

[90] ECJ 12 July 2005, Joined Cases C-154/04 and 155/04, *Alliance for Natural Health and Others* ECLI:EU:C:2005:449, para. 90.

[91] ECJ 22 January 2014, Case C-270/12, *United Kingdom* v *Parliament and Council* ECLI:EU:C:2014:18, para. 41 ff; P. Craig, *EU Administrative Law* (Oxford University Press 2012) p. 155.

[92] *Meroni* v *Haute autorité* , *supra* n. 89, [1958] ECR 133 at 152; *Alliance for Natural Health and Others*, *supra* n. 90, para. 90.

[93] Discretionary powers are critical as soon as they imply a wide margin of discretion, *see Meroni* v *Haute autorité*, supra n. 89, [1958] ECR 133 at 154; *United Kingdom* v *Parliament and Council*, *supra* n. 91, para. 50. For this understanding *see also* Schütze, '"Delegated" legislation in the (new) European Union: a Constitutional Analysis', *supra* n. 79, p. 661 at p. 674, fn 89. For a criticism of a distinguishability between wide and simple discretion *see* J. Saurer, 'Supranational Governance and Networked Accountability Structures: Member State Oversight of EU Agencies', in S. Rose-Ackerman et al. (eds.), *Comparative Administrative Law*, 2nd edn (2017) p. 619 at p. 627 ff.

[94] Accord von Bogdandy et al., *supra* n. 29, p. 130.

Articles 290 and 291 TFEU provide for the delegation of powers solely or mainly to the Commission, i.e. an EU institution that is ultimately accountable to the European Parliament, a circumstance that contributes to the democratic legitimacy of delegation under these rules.[95] The fact that the binding decisions of treaty bodies are not directly applicable, meaning that they require implementation by the European Parliament or national parliaments, is no compensation for the loss of democratic accountability; parliaments may be forced to implement them without any substantial leeway.

Consequently, the *Meroni* requirements apply to the present constellation and run parallel to the stipulations provided in Article 290. The first *Meroni* stipulation equates to the Article 290(1) requirement of precision in the description of the delegated authority. It requires the delegating EU organ to set out in precise terms which powers are being conferred to a treaty body. The second *Meroni* stipulation requires respect for the allocation of responsibilities under EU primary law. This translates in the present context – i.e. making use of the simplified procedure under Article 218(9) to enter into international obligations – into respect for the functions of the European Parliament, which is reflected by the establishment of control mechanisms by Article 290(2). Use of the simplified procedure must neither undermine treaty-making or legislative functions nor interfere with the control competences of the European Parliament with regard to executive rule-making. There would be considerable tension with the functional assignments of power between Council and European Parliament identified above if the approximate equilibrium of power between them in internal legislation and external trade-treaty-making were undermined by extensive use of the simplified procedure under Article 218(9). This suggests that the powers of the treaty bodies should be limited to decisions of an administrative or executive nature that serve to concretise the terms of an agreement. This would conform to the European Court of Justice's description of the functions of the treaty bodies already cited above: 'applying or implementing that agreement'.

If the treaty bodies, however, were able to adopt rules of general application that obligated the European Parliament (or the Commission by virtue of a mandate under Article 290) to amend secondary EU legislation accordingly – without the European Parliament having had the opportunity to pre-programme and control their content – the treaty bodies would then in effect be exercising regulatory or even legislative functions; the division of functions between the Council and the European Parliament would then be infringed upon. Therefore, the lack of involvement of the European Parliament in the Council decision-making on EU positions to be adopted in treaty bodies, and the lack of European

[95] Opinion of A.G. Jääskinen in ECJ 22 January 2014, Case C-270/12, *United Kingdom* v *Parliament and Council* ECLI:EU:C:2013:562, para. 85.

Parliament control over the treaty bodies and the Council, militates in favour of limiting the scope of powers conferrable in this way to those that suit the type of public power attributed to the Council and that do not undermine the European Parliament's functions.

The fundamental principle of legislative reservation – according to which important, essential elements of policy remain exclusively with the legislature – also applies to external relations, as is confirmed by Article 218(9) TFEU. Article 218(9) expressly provides that its simplified decision-making procedure on decisions of treaty bodies does not apply to the acts of treaty bodies that 'supplement or amend the institutional framework of the agreement'. Application of the simplified procedure is ruled out for institutional changes to an agreement, which are instead subject to the ordinary treaty making procedure.[96] In the case of trade agreements or agreements establishing cooperation procedures, the ordinary treaty making procedure requires the consent of the European Parliament pursuant to Article 218(6) TFEU. Consequently, the exception in effect places limitations on which powers are conferrable on treaty bodies. Treaty bodies are not permitted to amend the institutional structure by way of establishing new treaty institutions or by changing the competences of the envisaged institutions.[97]

Requiring that the ordinary treaty-making procedure be used for the adoption of institutional change safeguards the prerogatives of the European Parliament and the institutional balance in the EU.[98] This exception appears to be motivated by an intent to exempt 'particularly important decisions'[99] from the scope of simplified procedures; these should apply only to 'minor and quite technical amendments'.[100] Hence, the exception in Article 218(9) excludes fundamental[101] changes from simplified procedures and thus reflects the exclusion of important, essential decisions from delegation to executive institutions, as under Article 290 TFEU, also with regard to external relations. Consequently, 'particularly important decisions' cannot be the subject of a mandate to treaty bodies. Since the exception serves to safeguard the competences of the European Parliament, it should be conceived broadly rather than narrowly so that the determination of amendments to the institutional framework of an agreement can be informed by the meaning of 'essential elements' expressed in Article 290 TFEU. Accordingly, rule-making on fundamental issues must not be conferred to treaty bodies at all as

[96] *See* Opinion of A.G. Cruz Villalon in *Germany* v *Council*, *supra* n. 46, para. 75.

[97] *See* K. Schmalenbach, 'Art. 218' in C. Calliess and M. Ruffert (eds.), *EUV/AEUV*, 5th edn (CH Beck 2016) para. 31.

[98] Opinion of A.G. Cruz Villalon in *Germany* v *Council*, *supra* n. 46, para. 80 ff.

[99] Opinion of A.G. Cruz Villalon in *Germany* v *Council*, *supra* n. 46, para. 75.

[100] Opinion of A.G. Szpunar, *supra* n. 22, para. 58, fn. 30

[101] *See* P.J. Kuijper et al., *The Law of EU External Relations*, 2nd edn (Oxford University Press 2015) p. 182.

this is part of the joint treaty-making or legislative function reserved for the European Parliament and the Council.

Identifying an EU (non-)delegation doctrine and consequences for CETA

The above deliberations demonstrate that democracy and institutional balance concerns are the underlying cause for the explicit limitations to delegation enshrined in Articles 290 and 291 TFEU, the *Meroni* principles and Article 218 (9) TFEU. The limitations apply both to internal and external decision-making, i.e. decision-making at the international level by virtue of authority delegated by the EU to international bodies; these rules and principles, taken together in an overall assessment, lay the foundation for a general delegation doctrine in EU law. As the limitations to delegation are founded on constitutional principles of institutional balance and democracy, they are implicitly present in any conferral of power by the EU. This is not limited to external trade relations, as the parallelism of the European Parliament's legislative and treaty-making powers and the symmetry of the Council's and the European Parliament's competences apply to all treaties that establish a 'specific institutional framework' (Article 218(6)(iii)). Democracy and institutional balance requirements result in consistent, common limitations to any delegation of powers: non-delegation of the essential,[102] and apart from that, specificity of conferred powers, both of which advise against granting wide discretion to the delegatee. Accordingly, deciding on essential issues is not transferable to treaty bodies. Conferred powers, or even mere executive decision-making, must be circumscribed and determined precisely in the enabling act, i.e. the agreement. The scope of the powers and the criteria for exercising them must be set out in the enabling treaty provision with a certain degree of specificity. In addition, rule-making of general scope or decision-making powers that allow wide discretion cannot be conferred to treaty bodies without assurances for the competencies of the European Parliament such as control mechanisms that can ensure the legitimacy of the substantive content of the treaty-body decisions. In short, one can identify three principles of delegation that also prevail in external relations: the essential is not delegable but must be provided for by the treaty; mandates for autonomous, binding decision-making by treaty bodies must be specific; any exercise of power beyond simple implementation measures must be subject to control by the European Parliament.

Applying these principles to the mandates extended to CETA committees yields the insight that the rule of Article 218(9) TFEU should not raise concerns if it is applied to the conferral of precisely delineated implementation powers to

[102] Schütze, *supra* n. 75, p. 396: 'absolute limitation [following] from the constitutional frame'.

CETA committees – without broad discretion and limited to a mere concretisation function.

Decisions of fundamental importance, however, cannot be the subject of conferrals of power under the procedure of Article 218(9) if the decision-making criteria have not been clearly set out in CETA and hence had not been specifically consented to by the European Parliament. Therefore, the competence of the CETA joint committee under Article 8.29 CETA to transfer investment protection to a multilateral investment court is not legitimate since CETA sets requirements for neither ethical standards nor for safeguards for the independence and impartiality of the members of the Court and the applicable procedures of that Court. The decision as such was fully granted to the committee without any parliamentary control and without determining its conditions.

The explicit exclusion by Article 218(9) of institutional changes from the powers conferrable on treaty bodies means that Article 26.1.5(a), (g), (h) CETA – which empowers the CETA joint committee to amend the responsibilities of specialised committees, provide for new responsibilities or establish new specialised committees and bilateral dialogues in order to assist it[103] – cannot be conferred under the simplified procedure. Such changes to CETA must be adopted by the EU by means of the ordinary treaty making procedure, which requires European Parliament approval; application of Article 218(9) TFEU would be an infringement of EU law.

The same applies to certain of the rule-making competences of CETA committees. Article 21.7.5 CETA allows the provision of fundamental issues to a CETA committee by which the committee is empowered to establish the conditions and criteria for the exchange of product warnings, including specification of the information to be exchanged and the modalities of exchange. These rules must respect confidentiality and protect sensitive business and personal data; they could potentially interfere with fundamental rights. CETA, however, sets no standards insofar as, even though with regard to data protection, for example, Article 8(3) EU Charter of Fundamental Rights implies an obligation by which data must be retained within the EU to enable the requisite data protection control.[104] Implementation of a committee decision under Article 21.7.5 CETA might require changes to EU Directive 2001/95 on the Community rapid information system; the European Parliament would be bound in spite of not having participated in the committee decision enactment.

[103] Other agreements also establish that a treaty body may set up further committees and define their tasks, *see* Art. 15.1.4 EU Korea Free Trade Agreement, OJ 2011 L 127, 6; Art. 31.3 EU Norway Agreement, OJ 1973 L 171, 2; Art. 43 EU Interim Treaty with Bosnia and Hercegovina, OJ 2008 L 169, 13; Art. 49 EU Mexico Free Trade Agreement, OJ 2000 L 276, 45.

[104] ECJ 8 April 2014, Case C-293/12, *Digital Rights Ireland and Seitlinger and Others* ECLI:EU:C:2014:238, para. 68.

Autonomous rule-making mandates in Articles 8.28.7 and in Article 8.44.2 and 3 b) CETA also raise concerns with regard to the above principles. Article 8.28.7 allows for the enactment of procedural rules concerning certain administrative and organisational aspects of the functioning of the Appellate Tribunal. Under Article 8.28.7 g), the CETA joint committee is given broad leeway to set out 'any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal'. The content and substance of these rules are not pre-defined; it is up to the committee itself to determine which rules might be necessary. It consequently enjoys a very wide range of discretion. Likewise, the autonomous rule-making authority of the CETA committee on Services and Investments under Articles 8.44.2 and 8.44.3(b) CETA lacks specificity with regard to a code of conduct for Tribunal Members and with regard to dispute settlement and transparency rules. Due to a lack of any precise conditions for the exercise of these decision-making powers by committees combined with a lack of any effective parliamentary control over their usage, their degree of legitimacy would be insufficient to allow a conferral of power by the EU by means of the Article 218(9) TFEU procedure without the European Parliament being given a decisive say in the exercise of these mandates.

Strengthening the democratic legitimacy of treaty bodies

These observations establish the need for democratic safeguards for the benefit of the European Parliament.

Limiting the scope of simplified procedures

One way to safeguard the European Parliament's legislative and control functions within the EU democratic order would be to make all rule-making by treaty bodies subject to the requirement of consent by the European Parliament. Such a consent requirement would automatically ensue if one were to apply the normal treaty making procedure of Article 218 TFEU to such treaty-body decisions instead of the simplified procedures provided by its paragraphs 7 and 9. Consequently, treaty bodies would not have autonomous binding decision-making competences as such. Instead, their decisions would require consent by the European Parliament in order to enter into force – even under international law. This remedy might not comport with the intentions of the parties in setting up treaty bodies and it would complicate procedures. In particular, if the decisions of a treaty body related to a policy for which the Member States still enjoyed a degree of competence, European Parliament consent alone would not suffice; the consent of the national parliaments might be required in addition.

As has been shown, democratic and institutional balance requirements do not demand such a comprehensive bar against all rule-making by treaty bodies. Only the ability to autonomously engage in general, abstract rule-making, hence quasi-legislative rule-making on essential elements of policy including considerable interferences with fundamental rights, is barred from being transferred to treaty bodies. The exercise of such public powers is reserved for parliaments and the simplified procedures must not apply. Beyond this, there are no constitutional demands to limit the scope of simplified procedures as long as other constitutional requirements, i.e. the specificity of the delegation and parliamentary control, have been met. Consequently, for rule-making or single-case decision-making that remains below the essential elements threshold, other ways of effectively safeguarding the European Parliament's effective control powers (beyond information and debate) may suffice.

Additional safeguards to the democratic legitimacy of simplified procedures

The constitutionally grounded requirement of specificity (*see* above) demands that the scope of the transferred powers and the criteria for their exercise by the treaty bodies be determined and circumscribed precisely in the enabling treaty provision. Additionally, control mechanisms are required to enable the European Parliament's effective oversight of the use of rule-making powers or powers granting wide discretion. The control powers of the European Parliament must be strengthened in order to direct the exercise of public powers by the treaty bodies, in particular if decisions by the treaty bodies could interfere with EU legislation. An additional benefit of increased involvement and control by the European Parliament is that such control powers over the treaty bodies' decision-making may prevent too extensive a reading of their powers, or even self-empowerment.

These mechanisms could conceivably function at two levels, the international and the domestic, internal EU levels, alternatively or cumulatively. At the international level, this would translate into involvement by the European Parliament in the autonomous decision-making of treaty bodies. One way of achieving this would be to regard Members of the European Parliament as part of the EU representation in the treaty bodies, or at least to grant them observer status. The current Framework Agreements foresee European Parliament Members as observers at international conferences, as part of the EU delegation.[105] This possibility could be expanded to include observer status for the European Parliament in treaty bodies of EU Free Trade Agreements. In this way, the European Parliament would receive direct information regarding the processes

[105] *See* para. 25 ff Framework Agreement (fn. 62).

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within the treaty bodies, which would contribute to the effectiveness of the European Parliament's control over them.

At the domestic level, such mechanisms would require the involvement of the European Parliament in the preparation of the EU position pursuant to Article 218(9) TFEU. At the very least, this would entail making sure that the European Parliament received complete and timely information at all stages of the procedure (Article 218(10) TFEU) with regard to envisaged treaty-body decisions. One could, for instance, allow the European Parliament to formulate binding recommendations for the Commission in drafting proposals for Council decisions pursuant to Article 218(9),[106] or at least make the Commission subject to an obligation to state its reasons for not taking the recommendations into account.[107] The full provision of information to the European Parliament by the Commission before agreement modifications authorised by the Council under Article 218(7) TFEU[108] can be approved, must be expanded to include Article 281(9) TFEU.

Another, much more promising way of increasing control by the European Parliament with regard to international rule-making in treaty bodies would be to require formal European Parliament involvement in Council decision-making pursuant to Article 218(9) TFEU. If a decision involved rule-making, in particular if it required – for its implementation – any change to EU legislation, the European Parliament would need to be granted a right of consent. The expansion of the European Parliament's rights brought about by the Lisbon Treaty has led to considerable enhancement of its role in legislation, budgeting and treaty-making, but the simplified procedure of Article 218(9) has not been amended to reflect this change.[109] If the European Parliament's consent to the Council decisions were required, this deficit would be corrected. This change would not require an amendment to the EU Treaties; it could be implemented by the Council decision on the conclusion of the EU Free Trade Agreement, in which a framework could be established which prescribes the European Parliament's involvement in the procedures under Article 218(9). Alternatively, a Framework Agreement between the Council and the European Parliament could establish a general requirement for Council decisions under Article 218(9).

[106] Currently, Rule 108(4) Rules of Procedure of the EP, January 2017 <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20170116+0+DOC+PDF+V0//EN&language=EN> and para. 23 of the Framework Agreement only provide for EP recommendations that are required to be taken into account with regard to the negotiation and conclusion of agreements. Rule 109 (2) merely foresees that the EP may issue recommendations which may include requests to the Council.

[107] *See* Annex III, para. 4 of the Framework Agreement.

[108] *See* Annex III, para. 9 of the Framework Agreement.

[109] Accord Alemanno, *supra* n. 9, p. 636 ff.

Keeping legal certainty in mind, the more preferable solution would be to adopt a general regulatory framework for the implementation of the treaty-body decision-making provided in EU Agreements. A legislative regulation could be enacted by virtue of Article 207(2) TFEU that provides the additional safeguards proposed here.[110]

Conclusion

EU Free Trade Agreements establish treaty bodies upon which public powers of an increasingly diverse and significant nature are conferred. The conferral of rule-making functions in particular raises democratic concerns; the treaty bodies are not subject to parliamentary control and the EU position is decided solely by the Council acting under Article 218(9) TFEU. Under CETA, the use of treaty bodies to amend and further develop the agreement in particular and trade relations with Canada in general has reached a new level; it provides for a full array of committees which enjoy autonomous decision-making powers. This paper therefore analyses the question of whether these competences could potentially present a threat to democracy. The decision-making powers of the CETA committees are – in most cases – autonomous and binding on parties under both international and EU law. Hence, the transfer of powers to the committees constitutes a conferral of public powers by the EU to international institutions. Such a conferral of powers is bound by the principle of conferral found in EU law. Under the EU Treaties, the EU is competent to establish legally binding decision-making treaty bodies. There are, however, limitations which the EU must respect when empowering treaty bodies. These derive from democratic legitimacy requirements and the institutional balance between the European Parliament and Council, and result in a non-delegation doctrine with regard to essential elements of policy, a specificity requirement with regard to non-essential decision-making powers and a need for effective control mechanisms for the benefit of the European Parliament in case the delegation of rule-making or decision-making goes beyond simple implementation measures, in particular if implying a wide degree of discretion. The constitutional foundation for these requirements can be found in a comprehensive synopsis of the requirements for delegation in Articles 290, 218 (9) TFEU and the *Meroni* case law. In consequence, limitations on the delegation of internal and external EU rule-making are comparable for the sake of protecting the prerogatives of the European Parliament where it shares treaty-making powers with the Council. Applying these constraints to CETA committee mandates

[110] For a proposal of an EU Trade Act *see* T. Cottier, 'Front Loading Trade Policy-Making in the European Union: Towards a Trade Act', *European Yearbook of International Economic Law* (2017) p. 35. It should contain the rules proposed here.

demonstrates that several of them are a cause of concern. Therefore, additional safeguards that strengthen the European Parliament's control powers have to be implemented. Consequently, the role of the European Parliament in the implementation phase of trade agreements that establish decision-making bodies must be expanded considerably, as has been done regarding the role of the European Parliament in the implementation of EU legislation internally.[111]

[111] *See* P. Craig, *The Lisbon Treaty* (Oxford University Press, 2010) p. 53 ff.

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