La tentation de la Commission européenne d'accélérer la ratification de l'accord commercial UE-Mercosur : une attaque contre la démocratie

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La Commission européenne a indiqué qu'elle explorait différentes options pour déterminer sur quelle "base juridique" allait-elle s'appuyer au sujet du mode de ratification de l'accord d'association UE-Mercosur. Il est fort probable qu'elle envisage sérieusement une astuce procédurale visant à contourner l'opposition d'un certain nombre d'États membres de l'UE et de leurs parlements : le " *splitting*". Conçu comme un accord d'association, l'accord UE-Mercosur ne peut théoriquement être adopté que si tous les États membres de l'UE l'approuvent à l'unanimité. En d'autres termes, chaque État membre dispose actuellement d'un droit de veto. En outre, les parlements nationaux et/ou régionaux de l'UE ont également le droit d'approuver ou de rejeter l'accord au cours du processus de ratification se déroulant dans chaque pays.

Toutefois, ce “splitting” conduirait à séparer le pilier commercial de l'accord UE-Mercosur du reste du contenu de l'accord d'association, c'est-à-dire la partie relative au dialogue politique et à la coopération. Il entraînerait une modification de la procédure de vote pour le pilier commercial, qui pourrait être adopté, contrairement à ce qui était initialement prévu, par une majorité qualifiée de membres du Conseil, sans nécessiter le consentement de tous les États membres de l'UE. Sans nécessiter non plus la ratification nationale de l'accord par les parlements des États membres. La Commission pourrait prendre une autre voie ayant un impact similaire mais une forme juridique différente consistant à accélérer la ratification du pilier commercial de l'accord UE-Mercosur sous la forme d'un accord de libre-échange dit "intérimaire". L'accord UE-Chili en est un exemple récent.

Afin d'étudier la légalité et les ramifications possibles de telles actions, nos organisations ont commandé une analyse juridique au professeur Markus Krajewski et à Julian Werner de l'université Friedrich-Alexander d'Erlangen-Nuremberg.

L'analyse juridique confirme que :

- La scission de l'accord d'association UE-Mercosur en un accord commercial relevant exclusivement de la compétence de l'UE constituerait une déviation fondamentale par rapport au mandat de négociation initial donné par le Conseil à la Commission, puisque le Conseil lui-même a assumé que l'accord dans son intégralité devrait être ratifié à la fois par l'UE et par les États membres (c'est-à-dire par l'intermédiaire de leurs parlements).
- La scission entraînerait une modification des conditions de vote au sein du Conseil : l'adoption du pilier commercial UE-Mercosur de façon séparée ne nécessiterait qu'une majorité qualifiée, au lieu d'un vote à l'unanimité qui serait nécessaire si la partie commerciale de l'accord restait partie prenante de l'accord d'association plus large. Cela constituerait un écart ce que le Conseil prévoyait pour l'accord UE-Mercosur, selon lequel les mesures commerciales devraient s'inscrire dans un accord politique plus large.
- La scission porterait atteinte aux droits des différents membres du Conseil, qui ont initialement consenti à l'ouverture des négociations entre l'UE et le Mercosur en considérant que le Conseil adopterait à l'unanimité tout accord résultant de ces négociations.
- Par conséquent, en proposant de scinder l'accord UE-Mercosur en un accord de libre-échange et un accord d'association distinct, la Commission enfreindrait le mandat que lui a confié le Conseil. Cette situation ne pourrait être corrigée que si le Conseil acceptait de réviser le mandat de négociation.
- Toutefois, si le Conseil refuse de suivre l'approche de la Commission et n'accepte pas de modifier le mandat existant pour permettre une scission, aucune modification du mandat ne peut être envisagée et, par conséquent, une scission pourrait être considérée comme une violation du droit de l'UE.

L'analyse considère en outre que, pour tenter de contourner les ramifications juridiques, la Commission européenne pourrait rechercher de nouvelles approches qui pourraient, en fonction de leur contenu, ce que la partie commerciale de l'accord, relevant de la compétence de l'UE, fasse l'objet d'une procédure accélérée :

- Premièrement, elle pourrait essayer de rendre le mandat initial comme inefficace et le remplacer par deux nouveaux mandats, l'un pour le pilier commercial et l'autre pour la partie politique de l'accord d'association.
- Deuxièmement, elle pourrait demander un nouveau mandat pour un accord de libre-échange intérimaire qui entrerait en vigueur immédiatement après son adoption par le Conseil et le Parlement.

L'analyse juridique précise que les États membres individuels (ainsi que les institutions de l'UE) pourraient demander à la Cour de justice des Communautés européennes (CJCE) si ces deux options, à savoir la "scission" ou l'accord "intérimaire", que la Commission pourrait poursuivre seraient compatibles avec les traités de l'UE. Le principe de "coopération sincère", consacré par l'art. 13 (2) TFUE, empêcherait la Commission de proposer la conclusion d'un accord "fractionné" ou "intérimaire" avant une décision de la CJCE. De même, le Conseil et le Parlement devraient s'abstenir d'adopter un tel accord "fractionné" ou "intérimaire" sans l'avis favorable de la Cour.

Conclusions et exigences

Cette analyse confirme qu'en proposant la conclusion d'un accord de libre-échange “splitté” ou “intérimaire”, la Commission européenne effectuerait une manœuvre ayant des répercussions négatives importantes sur le processus démocratique. Selon nous, une telle manœuvre vise à favoriser une entrée en vigueur rapide de l'accord commercial entre l'UE et le Mercosur, en dépit des inquiétudes largement exprimées concernant ses impacts environnementaux et sociaux négatifs. Elle aurait pour seul effet de faire taire le débat public et de mettre à l'écart l'opposition de certains gouvernements de l'UE et des parlements nationaux et/ou régionaux : les parlements d'Autriche, des Pays-Bas, de Wallonie et de la région de Bruxelles, ainsi que le gouvernement français, ont déjà exprimé leur opinion négative sur l'accord commercial UE-Mercosur.

Cependant, les États membres de l'UE peuvent agir pour bloquer les tentatives de la Commission visant à violer les garanties qui protègent le processus démocratique dans l'approbation des accords de libre-échange de l'UE. Nous demandons donc instamment aux États membres du Conseil de l'UE de :

- Rejeter fermement toute tentative de la Commission de scinder la partie commerciale du reste de l'accord d'association UE-Mercosur, ainsi que toute tentative visant à forcer l'approbation de cet accord en tant qu'accord de libre-échange "intérimaire" ;
- Si la Commission présente une proposition d'adoption d'un accord de libre-échange "scindé" ou "intérimaire", demander immédiatement l'avis de la Cour de justice européenne sur la base de l'article 218 (11) du TFUE quant à la compatibilité de ces accords "scindés" ou "intérimaires" avec les traités de l'UE.

Ci-dessous : l'analyse juridique menée par le professeur Markus Krajewski et Julian Werner de l'université Friedrich-Alexander d'Erlangen-Nuremberg.

Prof. Dr. Markus Krajewski / Julian Werner
Friedrich-Alexander-Universität Erlangen-Nürnberg

Legal Comment on Issues in Connection with the Mandate of the EU Commission for Negotiating the EU-Mercosur Association Agreement

Commissioned by Greenpeace

1. *Would splitting the EU-Mercosur association agreement – i.e. separating it into a trade agreement and a general policy agreement – be in line with the negotiation mandate issued by the Council to the EU Commission? Were the EU Commission to split the EU-Mercosur agreement, would that require modifying the negotiation mandate?*

Pursuant to Article 207 Sec. 3 Subsection 2 of the Treaty on the Functioning of the European Union (TFEU) the Council authorizes the European Commission to open treaty negotiations with other countries in the area of common trade policy. Article 207 Sec. 3 Subsection 3 of the TFEU provides further that the Commission will conduct such negotiations "within the framework of such directives as the Council may issue to it". In general trade policy debates these directives are frequently referred to as Commission "mandates". The Council's negotiation directives thus represent the basis and framework of the negotiations to be conducted by the Commission. However, within that framework the Commission enjoys wide ranging political autonomy to negotiate specific treaty contents. The Commission may not, however, transgress the key boundary markers defining that framework. Thus, in particular, the Commission cannot negotiate with other states or subjects of international law than those mentioned in the mandate or propose a completely different content. The Commission is also bound to observe specific instructions from the Council to refrain from dealing with certain matters.

The negotiation directives, however, are a legal mechanism that governs exclusively the internal relationship between the Council and the Commission. The directives have no

external effect. Only the Council can assert a claim that the directives have been disregarded. It follows from this that the Council can implicitly restrict or expand the mandate, e.g. by declaring that it agrees with a particular Commission action.

On 17 September 1999 the Council adopted negotiation directives for a treaty with Mercosur, thereby issuing the European Commission its negotiating mandate. Consistent with the normal practice until the end of the 2010s this Council resolution and hence the wording of the mandate was not published.[1] The French language version of the mandate, however, was unofficially disclosed and published on the bilaterals.org website.[2]

That text set forth the general principles and essential contents of a free-trade treaty with Mercosur. An analysis of the wording is the first step toward clarifying the question whether the mandate covered a "splitting" of the treaty. In the third section of Title I – "nature et portée de l'accord" (*nature and scope of the treaty*) – the mandate states as a goal: a mutual agreement on political and economic issues.[3] The fourth section also provides that there be a "unique" or "singular" treaty.[4] Thus, the wording of the mandate provides that economic and political issues are to be jointly negotiated and implemented with legal enforceability. It follows from the wording of the mandate that a split into a trade treaty and a general treaty does not fall within its scope.

It is arguable that the division of a treaty into two different treaties would represent such a deviation from the negotiation directives that would be possible only by modifying the mandate. One could claim to the contrary that, when issuing its mandate, the Council was primarily concerned with the treaty partners and the core content of the treaty and only incidentally on the number of treaties. On the other hand, the fact that international treaties of the EU are integral components of EU law and thus independent legal acts, supports the view that a mandate modification is necessary. Where the Council's declaration of intent is directed toward one and not several legal acts, the number of legal acts is not within the Commission's discretion. The Commission also may not unilaterally split a treaty. Rather, it requires the

[1]The negotiating mandates were not published regularly until the beginning of 2017. There is, however, no legal obligation to publish.
[2]https://www.bilaterals.org/IMG/pdf/ue-mercosur-mandat-sep-1999.pdf
[3]In the original: „Les parties développeront l'accord-cadre existant afin de le transformer en un accord d'association politique et économique entre les parties […]"m Fn. 3 ("*The parties will develop the existing master treaty to transform it into a political and economic treaty between the parties".*)
[4]"L'accord sera équilibré, global et constituera un engagement unique…", Fn. 3. ("The treaty will be balanced, global and will constitute a single convenant…")

affirmative consent of its negotiating partners who must go along with negotiating two treaties with the Commission and not just one.

Above all, separating one treaty into two independent treaties would be impermissible without a mandate modification if the division of a treaty would have legal consequences for the EU legal system. If the split affects the interests of EU bodies, the voting modalities for the adoption in the Council or the relationship of the EU to its Member States, the split of one treaty into two would be so material that it would be impermissible without a mandate modification.

Above all a mandate modification is necessary where the treaty envisioned by the Council is a mixed treaty, i.e. it contains subject matter falling within the respective competencies of both the EU and its Member States. In such case, the Council's negotiation directives mandate the Commission to conduct treaty negotiations not just in the name of EU. Rather, the representatives of the EU Member States act as one to issue the mandate to the Commission to negotiate on their behalf as well; in other words, on behalf of the Member States. This avoids having the Commission conduct treaty negotiations on matters over which the EU lacks competency. Without such a "double mandate", i.e. a mandate from the Council in the name of the EU and a mandate from the representatives of the Member States unified within the Council, the Commission's mixed treaty negotiations would be *ultra vires*.

When issuing the mandate to negotiate a mixed treaty, the Council and the representatives of the Member States within the Council assumed that the treaty in its entirety would have to be ratified both by the EU as well as the Member States. Even if this was a case of legal political decision-making, it nevertheless is decisive for purposes of interpreting the negotiation directives. A split of a mixed treaty into one part which falls within the exclusive competence of the EU and another part that remains a mixed treaty would therefore be a fundamental deviation from the original negotiating mandate.

Similarly, splitting a treaty would lead to the alteration of the modality of voting within the Council on concluding the treaty. If the mandate included subject matter that required the unanimous consenting adoption of the Council in accordance with Art. 218 Sec. 8 Subsec. 2 of the TFEU or Art. 207 Sec. 4 Subsec. 2 of the TFEU and thus, according to the "Pastis"

principle,[5] requiring the unanimous vote of the Council for its adoption, a split of the treaty into one part whose adoption, in accordance with Art. 207 Sec. 4 Subsec. 1 of the TFEU, required only a qualified majority and one part that was subject to the unanimity requirement would likewise constitute a deviation from the trade policy envisioned by the Council. In such a case, although the rights of the Member States taken as a whole would not be infringed, it would infringe the rights of individual Council members who originally consented to issue the mandate with the expectation that the Council resolution of adoption would be unanimous. In this regard, too, a split of the treaty would be a breach of the mandate curable only by – possibly impliedly – revising the mandate.

Given all the above, if the negotiating directives of the Council expressly refer to "one" treaty and the Commission were then to split a treaty into a "EU only" part covering only EU competencies and a "mixed" part, or in other words one part subject to the requirement of unanimity and one part requiring a mere qualified majority, such split would violate the Council's specifications.

The Council, or the Council and the representatives of the Member States within the Council, can however informally alter the mandate at any time to permit a split. For reasons of transparency and legal clarity it would be preferable that such alteration be explicit. An implicit alteration of the mandate is, however, possible. If, for example, the trade policy committee of the Council were to expressly welcome or applaud the Commission's methodology, it might well be regarded as an implicit alteration of the mandate. If, on the other hand, the Council declines to go along with the Commission's approach and does not express itself willing to it, no implied alteration can be assumed since such implicit modification is predicated on decision making by the Council that vis-à-vis the Commission also extends to the outside.

2. Would a modification of the negotiation mandate to allow a splitting have to be done by unanimity or would a qualified majority suffice?

A split agreement does not have to be an actual split, but could simply take over the results of the previous negotiations. Insofar as the Commission does not explicitly state what it is doing in concrete terms, then a split would probably be interpreted as follows. The previous

[5]Listed by Advocate General Kokott in her final pleadings concerning legal matter C-13/07, margin note 121; EuGH citing the WTO-Decision

mandate is likely to become effectively ineffective. Both the purely trade policy agreement and the "remaining" general policy agreement are not covered by the original mandate, see above. There would then have to be two new mandates, one for the trade part that falls under EU competence ("EU only") and one for the general policy agreement.

The "new" purely trade policy agreement is concluded in accordance with Art. 207 TFEU and requires a qualified majority for the adoption in accordance with Art. 207 Sec. 4 Subsec. 1 TFEU, although depending on the contents, unanimity might be required anyways.[6] The general policy agreement in turn requires a mandate under Art. 218 Sec. 3 TFEU and is adopted unanimously as an association agreement under Art. 216 Sec. 6 letter A of the TFEU.

3. If the EU Commission were to split the EU-Mercosur treaty without the prior unanimous consent of the Council, what legal remedies are available to Member States who oppose such action?

Art. 218 Sec. 11 of the TFEU provides an expert legal opinion procedure for disputed issues involving international agreements. The legal opinion procedure is intended to ensure that the Union does not enter into any international legal obligations contrary to Union law.[7] "Every question is permissible that can call into doubt the substantive or formal compatibility of the treaty with the [EG = today EU/AEU] treaty".[8] Likewise the ECJ has deemed it a permissible question to clarify upon what ground a treaty can be legally sustained.[9]

In the circumstances described above there would conceivably be two legal questions to resolve. First, whether the post-split or interim treaty falls within the exclusive jurisdiction of the EU; second, whether the procedural standard of Art. 207 Sec. 4 of the TFEU which is conditioned on unanimity was followed. The ECJ regularly deals with the issue of jurisdiction in the context of international agreements.[10]

[6]See under question 4.
[7]EuGH, legal opinion 1/13, margin note 47 ff.
[8]EuGH, legal opinion 1/08, margin note 108.
[9]Ebd., margin note 41, 173.
[10]EuGH, legal opinion 1/94, Slg. 1994, I-5267, margin note 9 (WTO); s. also legal opinion 1/75, Slg. 1975, 1355, 1363 (Local Costs); legal opinion 1/76, Slg. 1977, 741 (Decommissioning Funds); legal opinion 1/78, Slg. 1979, 2871 (International Natural Rubber Treaty); legal opinion 2/92, Slg. 1995, I-521 (OECD); legal opinion 2/00, Slg. 2001, I-9713 (Cartagena Protocol), legal opinion 2/15, ABl. 2015 Nr. C-363/18 (EU-Singapore).

The result of such expert legal analysis will probably not prevent splitting, as the treaties can then be modified according to the outcome of the ECJ opinion. However, although invoking legal remedies would have no suspensive effect, it would be a violation of the principle of "sincere cooperation" under Art. 13 Sec. 2 sentence 2 of the TFEU to conclude the treaty after invoking remedies but before a decision of the ECJ.[11]

If the ECJ should rule that there was a jurisdictional error then this would indirectly produce an international legal impact. Pursuant to Art. 46 Sec. 1 of the Vienna Convention on the Law of Treaties (VCLT) internal jurisdictional errors do not invalidate the conclusion of treaties, insofar as the errors are not obvious. With the ECJ's legal opinion, internal jurisdictional problems would then be so obvious that it must be clearly recognizable by the other parties to the treaty under Art. 46 Sec. 2 VCLT.[12] The conclusion of the treaty would have to be declared invalid on the grounds of obvious internal discrepancies.[13]

Another possible legal remedy (available to a Member State or the European Parliament) to proceed against the Commission would be a nullification action brought under Art. 263 Secs. 1 and 2 of the TFEU. A suit under Art. 263 of the TFEU could also be appropriate if an action under Art. 218 Sec. 11 of the TFEU were no longer permissible because the treaty had already become binding under international law.[14] For such an action the mandate would have to be directly an action with legal effect vis-à-vis third parties. The splitting would have to be in breach of contract or in breach of a material formal requirement. If the splitting did not represent any modification of the mandate then Art. 263 of the TFEU would offer no further help. The mandate would then continue to abide unused. Again, what is critical here is that all parties participating in the action brought under Art. 207, 218 of the TFEU have actual dispositive power to shape the outcome. Thus the Council must give its consent to sign under Art. 207 Sec. 4 of the TFEU – exactly as the Parliament must consent pursuant to Art. 207 Sec. 3, Art. 218 Sec. 6 a) i) of the TFEU.

4. Must an EU-Mercosur "interim trade agreement" (like EU-Chile) be adopted in the Council by unanimity or qualified majority?

[11] *Schmalenbach* in Calliess/Ruffert, TFUV Art. 218 margin note 38.
[12] *Frenz*, Handbuch Europarecht Band 5, margin note 3203.
[13] Ebd.
[14] EuGH, legal opinion 1/08, margin note 107.

An interim treaty is an independent treaty under international law which is subject to the suspensive condition that another treaty becomes fully effective. This is illustrated by the EU-Chile Disclaimer:[15] "The iTA will expire when the Advanced Framework Agreement enters into force." This variant is likely because it requires no modification of the previously negotiated global treaty. The legal effectiveness of both the EU-only split as well as the interim effectiveness can be fully effectuated in the new EU-only treaty. Unlike the treaty's stipulation of the provisional effectiveness of parts of the treaty (compare Art. 30.7 of CETA) there need be no agreement on the complete treaty. Since the interim treaty is a separate treaty, the procedure of Art. 207 Sec. 3, 218 TFEU still needs to be fulfilled, namely requiring a mandate. As shown above under 1, this procedure must not be explicit, but can be extrapolated from the Councils' actions. In any case, the Council has the final say on the adoption of a treaty. Whether this final vote requires unanimity or qualified majority is subject to the contents of that treaty.

An EU-Mercosur interim trade agreement (iFTA) could be adopted under Art. 207 Sec. 3, 4 Subsec. 1 of the TFEU, which is a qualified majority resolution as a general principle. The provisional nature of the trade policy treaty does not alter the fact that Art. 207 of the TFEU is the governing procedural provision for concluding that treaty. Pursuant to its terms, treaties that have purely trade policy subject matter generally require a qualified majority in the Council, if under Art. 207 Sec.4 Subsec. 3 lit. a) and b) of the TFEU unanimity is not required. In the past, given the lack of clarity of these provisions, treaties were always adopted by unanimous Council resolution regardless of their subject matter and scope. However, depending on the design of the particular treaty, it is possible to deviate from that procedure. Even if the issuance of the mandate and conclusion of the treaty were unanimous, the actual majority requirements for the treaty are decisive.[16]

At present it is unclear just what a splitting of the EU-Mercosur treaty might look like. Nr. 13 of the agreement in principle[17] which governs intellectual property is part of the trade policy pillar of the agreement. If the trade policy treaty should also include this clause then Art. 207 Sec. 4 Subsec. 2 of the TFEU is applicable. Unanimity would then be necessary if it "is required for the adoption of internal rules". Under Art 118 Sec. 2 of the TFEU this applies to

[15]https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en

[16]*Lorenzmeier* in Grabitz/Hilf/Nettesheim, TFEU Commentary, Art. 218 margin note 44b.

[17]The agreement in principle, published by the Commission, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en

provisions governing language arrangements for intellectual property. These are not explicitly identified in the agreement in principle but the EU and Mercosur are in agreement on enforcement rules[18] which, among other things, will include evidentiary rules. Should a rule of evidence relate to a legally valid language then unanimity would also apply to a splitting. Some of the academic literature assumes that a trade policy treaty must always require unanimity since its provisions must be consonant with internal policies and, accordingly, Art 207 Sec. 4 of the TFEU would always require unanimity.[19] Ultimately, however, this is a case-by-case issue which depends on the specific content of the provisions of a trade policy treaty. Depending on the content of the post-split content of the (i)FTA it is both possible - and compatible with EU law – to argue for the Council to resolve the adoption of the iFTA by a qualified majority as well as unanimity.

5. Is it compatible with EU law if, after ratification by the Council and the EP, the interim FTA were to enter fully into force and not just provisionally?

The difficulties in ratifying the CETA treaty by the EU Member States resulted in a new procedure for concluding mixed treaties. As a reaction, part of CETA was declared to be provisionally in force. In the modernisation of the EU-Chile agreement, the deal is to be separated into an interim FTA (iFTA) and a completed treaty.[20] The intention – at least in the view of the parties that want to see the treaty succeed – is that it allows the possibility of directly implementing a portion of the treaty without having to await the outcome of a wearisome ratification process.

The European treaties do not differentiate between a provisional treaty or one that has entered into force completely. Consequently, there is no problem of compatibility with EU law if there is already no difference in legal consequences between the entry into force of a provisional treaty versus final treaty. Assuming a wording like in EU-Chile – "The i[F]TA will expire when the Advanced Framework Agreement enters into force" – makes it already clear upon adopting the resolution that the iFTA is to be valid indefinitely so long as adoption of the global treaty has not yet been resolved and ratified. Thus, this variant of the iFTA does not in

[18]The agreement in principle, p. 13
[19]*Bungenberg* in Frankfurt Commentary on the TFEU, Art. 207 margin note 183, see also with regard to cultural or social services: *Hahn* in Calliess/Ruffert, TFEU, Art. 207 margin note 105ff.
[20]https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en

any way breach any hypothetical principle of good faith were it to be argued that the Commission, having committed to concluding a global treaty, is now purportedly acting contrary to that obligation.

6. What would happen were the interim FTA to be adopted but the global treaty was then rejected in the Council, the European Parliament or by the trading partners? Would that also invalidate the interim FTA or could it continue in effect as an independent instrument?

If one again assumes a splitting as in the case of EU-Chile, then the "failure" of the global treaty will not mean the failure of the interim treaty. Neither Art. 207 nor Art. 218 of the TFEU provide for rejection as a possibility with legal consequence. If a draft of the global treaty remains unsigned, then the negotiation project remains in abeyance and "awaits" a modification that might possibly lead to a conclusion. It thus continues to lack only the resolution of adoption to conclude the treaty.

Thus, insofar as the iFTA exists, until the global treaty enters into effect, it is not an "independent instrument" but rather, continues as an adopted transitional treaty.