

W. Weiß, Constitutional Complaint against the EU Singapore Free Trade Agreement (EUSFTA), 16 May 2019

Introduction

The present constitutional complaint is directed against the EU free trade agreement with Singapore (EUSFTA), which was concluded as an EU-only agreement, meaning that it was negotiated, signed and will be concluded by the EU alone. The EUSFTA, which is about to enter into force soon, is a new-generation trade agreement containing comprehensive rules that go far beyond tariff reduction and market-access issues, also affecting “behind-the-border” issues of national (internal) legislation. Nevertheless, the EUSFTA is being concluded as an EU-only agreement, whereas, until recently, comprehensive trade agreements were concluded as mixed agreements.

The constitutional complaint challenges the participation of the German government in the negotiation and conclusion of this treaty in the Council of the EU and the absence of a reaction from the German Bundestag to it. The complainants are of the opinion that this agreement is not compatible with the constitutional identity of the Federal Republic of Germany for two reasons.

Firstly, the EUSFTA, like other comprehensive trade agreements, establishes a system of committees that is authorised to autonomously exercise public powers without parliamentary control over their usage. These committees are entrusted with rule-making competences and empowered to amend the free trade agreement. Any such conferral of far-reaching powers from the EU to institutions under international law requires democratic control. However, this democratic control does not exist. The ability of the German Bundestag to exercise control over European integration is further weakened by the establishment of such an additional level of exercising political power. However, this constitutional complaint is not generally directed

against every institutionalisation of international cooperation and the EU's involvement in them. It is certainly acceptable for public powers to be transferred to institutions under international law to a limited extent and with legal safeguards. However, in the free trade agreement with Singapore, these restrictions are not being respected, as significant decision-making authority, namely the power to make rules and amend the agreement, is being delegated with no parliamentary control mechanisms. The result is the creation of a new level of exercising sovereignty that lacks sufficient democratic legitimacy.

Secondly, the EUSFTA is being concluded as an EU-only agreement, not a mixed agreement. As a result, the Member States are not party to the agreement. The conclusion of the agreement by the EU alone constitutes an overstepping of European Union competences, hence an *ultra vires* act. The EU is using the recent CJEU opinion 2/15 to justify its exclusive treaty-making competence; however, this opinion has permanently shifted the division of competences between the EU and its Member States as laid down in EU primary law. In its interpretation of the external competences of the EU, the CJEU adopted an understanding of the relevant rules that, without the approval of the German legislature, constituted a significant transgression of the previous integration programme explicitly laid down in primary law through the Treaty of Lisbon. This decision has led to an expansion of the exclusive external competences of the EU on a scale which – similar to federal state entities – grants the EU comprehensive external powers that go beyond the internal legislative powers. This also changes the international legal position of the Member States; as a result, they have lost a great deal of independence, similar to the constituent states of a federal state. The constitutional complaint challenges this silent constitutional change in the scope of external EU competences, particularly with regard to exclusive competences, without democratic control or accountability. By ruling that the Council of the EU is allowed to decide independently about the conclusion of an agreement as a mixed or EU-only agreement, the CJEU has also given the Council the authority to take a final decision as to an exclusive exercise of

powers by the EU at the expense of the Member States. This decision represents a weakening of the Bundestag's ability to exert influence. In this sense, the above-described usage of EU competences and the associated choice by the executive branch in the Council in favour of entering into an EU only treaty have a negative effect on the balance of powers between the Federal Government and the Bundestag.

This complaint is not a veiled criticism of globalisation or trade agreements in general. However, with respect to constitutional law, the new generation of comprehensive EU trade agreements and the associated exercise of political power at a new level raises considerable concerns in light of Article 23 and Article 38 of the German Basic Law (GG) with respect to the EU's exercise of public powers, particularly as exclusive powers.