



Trade Policymaking in the European Union: Institutional Framework

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Summary

Trade policy in the EU is made in the context of legal provisions provided by the 1957 Treaty of Rome. As part of this treaty, an institutional framework for the making of trade policy—common commercial policy—was established. Despite relatively few changes in the treaty base of the EU’s common commercial policy, its institutional framework has evolved over time as the scope of what constitutes trade policy has been a subject of continuing controversy. The roles and functions of key institutions—the European Commission, the Council of Ministers, subordinate bodies of the Council, the European Parliament, and the European Court of Justice—are described in this report. The actual process of how the EU makes trade policy is of growing interest to the United States as the EU continues to play a larger and more assertive role in the world economy. This report will be updated as events warrant.

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Background

The EU is a treaty-based institutional framework that defines and manages economic and political cooperation among its twenty-seven members. Impetus for the formation of the EU came in the aftermath of the devastation of World War II with the signing of several treaties by six countries—Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.¹ By agreeing to integrate their economies in matters of coal and steel production, trade, and nuclear energy, Europe’s leaders hoped to achieve a closer union among the people’s of Europe and avoid another war on the continent.

As a result of the 1957 Treaty of Rome, the European Economic Community (EEC) came into force in January 1958. The EEC was designed to merge separate national markets into a single common market that provides free movement of goods, people, capital, and services across borders. To provide for the free movement of goods, the EEC recognized that it required a common external trade policy to prevent one member state from importing foreign goods at cheaper prices due to lower tariffs and then re-exporting the items to another member state with higher tariffs.²

Formal Trade Policymaking Framework

Article 113 EEC provides the legal framework for trade policymaking. Embedded in this provision are two transfers of authority for the making of trade policy: (1) from the member states and their parliaments to the assembly of European states, acting collectively through the Council of Ministers; and (2) from the Council of Ministers to the European Commission.³ The first transfer of authority is often referred to as “Community competence” or “supranational competence;” the second level of delegation involves the practical transfer of competence from the Council of Ministers to the European Commission.

Article 113 states as follows:

- the common commercial policy shall be based upon uniform principles, particularly in regard to tariff rates, the conclusion of tariff and other agreements, the achievement of uniformity in measures of liberalization, export policy, and measures to protect such as those to be taken in the event of dumping or subsidies;
- the Commission shall submit proposals to the Council for implementing the common commercial policy;
- where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open negotiations;

¹ For background on the EU, see CRS Report RS21372, *The European Union: Questions and Answers*, by (name redacted).

² The European Community is the legal entity that has competence to act in the field of international economic relations for the European Union. The press and many scholars, however, tend to use the two terms interchangeably.

³ Meunier, Sophie and Kalypso Nicolaidis, “Who Speaks for Europe? The Delegation of Trade Authority in the EU,” *Journal of Common Market Studies*, September 1999, Vol. 37, No. 3, p. 480.

- the Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue for it; and
- in exercising the powers conferred upon it by this Article, the Council shall act by qualified majority.

Although Article 113 provides the Community with an exclusive external competence over commercial policy, the scope of what constitutes commercial policy has been a subject of major and continuing controversy. This issue was raised most pointedly in April 1994, when the Final Act embodying the Uruguay Round Agreements was signed in Marrakesh. At the meeting, some Member States, despite the strong objections of the Commission, insisted on signing the Final Act as well. The Commission held that the Final Act and its Annexes fell within the exclusive competence or jurisdiction of the European Community and requested a ruling or opinion from the European Court of Justice (ECJ) on whether the Community was competent to conclude the Uruguay Round.⁴ The Council, eight Member States, and the European Parliament took the position that the competence to conclude the Uruguay Round Agreements was shared between the Community and the Member States.

This disagreement was not about whether to conclude or approve the Uruguay Round Agreements, but about who had the power to approve them. More specifically, the dispute centered on the competence to conclude the agreements in the Uruguay Round related to trade in services (the General Agreement on Trade in Services) and intellectual property rights protection (Agreement on Trade-Related Aspects of Intellectual Property Rights).⁵

In a November 1994 opinion (1/94), the ECJ concluded that the Community had sole competence to conclude international agreements on trade in goods, but that the Commission and Member States had to share competence in dealing with the new issues of services trade and intellectual property protection. By ruling that these were areas of mixed competence, thereby subject to the principle of unanimity, the ECJ arguably reduced the leverage of the Commission vis-a-vis member states during internal bargaining on the EU position.⁶

EU Trade Policymaking in Practice

The second transfer or delegation of authority from the Council of Ministers (representing the interests of the Member States) to the European Commission (representing the interests of the community or EU as a whole) is complex in practice. Although the Commission negotiates on behalf of the Member States, it retains much power to shape the negotiating mandate, the actual negotiations, and the ratification or approval of any trade agreement.

⁴ The ECJ is the EU's version of a Supreme Court with the responsibility to decide what is legal and what is not under the founding Treaties. Cases may be brought to the ECJ by the Commission, the European Parliament, member governments, nationals of member governments, for foreign entities.

⁵ Van den Bossche, Peter L. H., "The European Community and the Uruguay Round Agreements," In *Implementing the Uruguay Round*, by John H. Jackson and Alan O. Sykes, Clarendon Press, 1997, p. 29.

⁶ Woolcock, Stephen, "European Trade Policy," In Wallace, Helen and William Wallace, *Policy-Making in the European Union*, Oxford University Press, 2000, pp. 274-375.

The Negotiating Mandate

The European Commission is the EU's version of a central executive body, vested with power to propose legislation and common policies. The Commission also acts as the guardian of EU treaties to ensure that EU legislation is implemented by all members.

For the trade issue, the Commission has broad authorities and responsibilities. Most importantly, the Commission develops proposals for the initiation and content of international trade negotiations and negotiates on behalf of the EU. In drawing up trade proposals, the Commission seeks to balance different national and sectoral interests. Depending on the negotiation and the mandate provided by the Council, the Commission has considerable flexibility in deciding on negotiating tactics. The Commission also has much autonomy for administering the EU's trade remedy procedures (anti-dumping, countervailing duty and safeguard procedures) against foreign non-members.

The Commission is headed by around a dozen commissioners who are nominated by the Member States and then selected by consensus for a five-year term. Each commissioner is charged with acting in support of EU needs and goals, independent of instructions from national governments. Most commissioners have held high office in their home countries previous to coming to Brussels. Each commissioner has an assigned portfolio and can draw on the Commission's administrative staff of 21,000 civil servants (often referred to as *Eurocrats*) for support. In addition, they are assisted by a small cabinet or team of aides. As a body they meet once a week to adopt proposals and finalize Commission policy. When necessary, decisions of the Commission are made by majority vote.

The group of Commission officials directly responsible for trade policy matters is located in the Trade Directorate (DG Trade). These officials develop initial trade proposals in consultation with a special 133 Committee. This committee, composed of senior civil servants from the Member States' national ministries, can be viewed as the representative of the Council of Ministers in watching over the Commission in its work on trade issues.⁷

Though its role is purely consultative, the 133 Committee plays a key role in helping member states influence trade policy. According to one scholar, "the Commission almost always follows the advice of the 133 Committee, because its members reflect the wishes of the ministers who ultimately can refuse to conclude the agreement negotiated by the Commission."⁸ Once the 133 Committee has agreed with or amended the Commission's proposal, it is transmitted to the Council of Ministers, which has the power to establish the objectives and parameters (known as the "negotiating mandate") for a trade negotiation. The negotiating mandate comprises directives and objectives that are not legally binding on the Commission. For some negotiations, the

⁷ The 133 Committee meets at both the full committee or senior level and at the level of deputies. Charged with overall responsibility for trade policy, the full members (often referred to as *Titulaires*) meet on a monthly basis. Full members tend to be senior civil servants drawn from national ministries of trade, foreign affairs, or finance. Usually close to the ministers they serve, they tend to have a good sense of what actions are politically acceptable within their member states. The deputies group, which meets weekly, are drawn from the member states' permanent representations based in Brussels. This group focuses more on technical than political issues.

⁸ Meunier, Sophie, *Trading Voices: The European Union In International Commercial Negotiations*, Princeton University Press, 2005, p. 35.

mandate takes the form of one or several directives, but for others it may take the form of only highly generalized and vague objectives.⁹

Technically, the Council agrees on a negotiating mandate for traditional trade issues (exclusive of services and intellectual property) based on a qualified majority voting procedure whereby voting weights are based approximately on the size of Member State populations.¹⁰ Yet, as a practical matter, the Council most often attempts to find a general consensus without resorting to a formal vote.¹¹

The Negotiations

Once the Commission has a “negotiating mandate” from the Council, in principle it has considerable leeway to determine its own negotiating strategy. In practice, however, its flexibility and autonomy could be affected in cases where some Member States are intensely interested in the outcome or in cases where the negotiating mandate is quite strict.

Representatives of Member States play no formal role in actual trade negotiating sessions but, depending on the meeting, could sit in as observers. If a member state makes clear its opposition to the direction a negotiation is moving, the Commission’s trade negotiators must decide to move forward anyway and risk Council rejection of any trade agreement negotiated that strays too far from the negotiating mandate or to go back on concessions made to the negotiating partner, arguing that the EU’s hands are tied.¹²

Ratification and Implementation

Most major trade agreements, such as the Uruguay Round Agreement, must be ratified by both the Council and Member States. EU ratification occurs when the Council adopts a short (usually one-page) decision that is followed by hundreds of pages of annexes. Member States ratify the agreement according to their own internal procedures, such as a vote in parliament.

In the case of the Uruguay Round Agreements, the Final Act was signed on April 15, 1994, by representatives of the Council and Commission on behalf of the European Community, on the one hand, and by representatives of the Member States on behalf of their respective governments. By signing the Final Act, the Community and the Member States agreed to submit the agreements to their competent authorities for approval and final conclusion. This included approval by the European Parliament.¹³

⁹ In the case of the Uruguay Round negotiations, the Council did not issue negotiating directives of a formal or specific nature for most aspects of the negotiations. The one exception was agriculture, an area where the Council’s negotiating directives did play an important role.

¹⁰ The Council is composed of ministers from each member government. The ministers represent the interests of their member states. Different ministers participate in the Council depending on the subject matter under discussion. From the mid-1980s, discussions on trade policy have often been on the agenda of the Council of Foreign Ministers although trade ministers have occupied the national chairs for discussion of numerous trade matters.

¹¹ Meunier, *Trading Voices*, p. 36.

¹² Meunier, *Trading Voices*, p. 38.

¹³ The 768 member European Parliament (EP) historically has played a limited and mostly indirect role in trade policy. Although the EP cannot enact laws like most parliaments, it can veto legislation in areas such as social policy, agriculture, and the EU’s internal market. But the EP does not have veto power over trade legislation. However, by (continued...)

After a long delay (the Council failed to submit the request for approval by the Parliament until October 1994), the European Parliament gave its assent by a vote of 327-65 on December 14, 1994. Eight days later, the Council formally adopted Decision 94/800/EC, accepting on behalf of the European Community the agreements reached in the Uruguay Round. In addition, the Council adopted implementing legislation. Some of the changes in Community law included in the implementing legislation “were in fact not explicitly required by commitments undertaken by the Community in the Uruguay Round Agreements, but were additions and amendments on which some Member States had insisted in return for approval of the agreements.”¹⁴ Although much of the legislation could have been adopted by qualified majority, the Council adopted the implementing legislation on the basis of the unanimity principle.

U.S. Interests

As the EU plays a larger and more assertive role in the world economy, its trade and investment policies increasingly have the potential to help or hinder U.S. economic interests. For this reason, it is important for policymakers and private sector interests to understand how and why EU trade policies are crafted in order to represent and defend U.S. interests to the greatest extent possible.

From the perspective of institutional arrangements, the making of EU trade policy can appear relatively straightforward. The Commission has the power to propose new initiatives and the Council has the power to approve. In making its decision, the Council relies heavily on the advice of the 133 Committee.

While the roles and functions of the relevant decision-making institutions are spelled out, the relative influence of the key actors—the Commission, the Council, and the 133 Committee—on any specific issue is not easy to discern. Nor is it clear how each of these institutions reach agreement and why they may differ.

Unlike in the making of U.S. trade policy, the EU lacks formal and public mechanisms for taking advice and recommendations from the private sector. Most of EU trade policymaking is done informally and behind closed doors. A number of U.S. trade officials, including former U.S. Trade Representative Charlene Barshefsky, have criticized this process. In her view, some of the stress in the U.S.-EU trade relationship derives from an EU decision-making system that is slow, opaque, and lacks clear lines of authority between the Commission and member states.¹⁵ Given that the EU process is unlikely to change as result of external criticism, U.S. policymakers face the challenge of trying to better understand how the process works and can be influenced.

(...continued)

holding hearings and issuing reports, the EP can influence the atmosphere for consideration of trade issues.

¹⁴ Some of the amendments strengthened the EU’s commercial defense instruments such as countervailing duty and antidumping procedures. See Van den Bossche, p. 84.

¹⁵ Barshefsky, Charlene, “USTR Barshefsky on Transatlantic Economic Relationship,” January 17, 2001. Found on the worldwide web at <http://www.useu.be/ISSUES/bars0017.html>.

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