Constitutional Complaint against the EU-Singapore Free Trade Agreement (EUSFTA)

Background – May 2019

1. Why are we challenging an EU free trade agreement before the German Federal Constitutional Court?

People who question the legality of free trade agreements are quickly suspected of being opponents of globalisation. These critics also risk being accused of harbouring anti-European sentiments and underestimating the welfare gains associated with international trade. However, in most cases – as in this one – such accusations are unwarranted. The sole objective of the present constitutional complaint is to address the serious threats to European democracy posed by trade agreements.

The free trade agreement between the EU and the Republic of Singapore is a so-called "comprehensive" or "new generation" trade deal, like the CETA agreement between the EU and Canada. These agreements not only cover the removal of customs duties ("at the border"), but also entail the liberalisation and harmonisation of rules within the countries of the contracting parties ("beyond the border").

These rules can be technical in nature (e.g. safety standards for cars and double approval procedures for technical equipment) or can also affect regulations on environmental, health and consumer protection. The latter group includes rules for the approval of hazardous chemicals, the maximum permissible levels of pesticides in fruit and vegetables, the quality of public services of general interest (e.g. health-care systems) and the safeguarding of workers' rights (collective bargaining and the establishment of works councils).

The complainants filing this constitutional complaint are of the opinion that the new generation of comprehensive free trade agreements is changing the power structures within the EU without sufficient democratic legitimacy. By establishing a new level of political power, these free trade agreements are threatening the democratic nature of the EU and its Member States. The signatories therefore assume that these agreements are in violation of the Basic Law (GG) of the Federal Republic of Germany and have accordingly filed a constitutional complaint against the EUSFTA with the German Federal Constitutional Court.

To be clear, the constitutional complaint is not directed against Europe or the European Union. It is also not directed against international trade. The fundamental implication of the ongoing process of European integration is that Member States will be required to transfer more of their national sovereignty to EU institutions. This process is intentional and can be both sensible and beneficial. However, the benefits of Europeanisation/European integration are associated with a loss of democratic substance on the side of the

Member States that does not correspond with a democratic gain at EU level. The weakening of democracy through comprehensive trade agreements is taking place behind closed doors.

In this sense, the constitutional complaint is not specifically a German project and is not an end in itself. It seeks to support the conclusion of comprehensive trade agreements that strengthen (instead of weaken) democracy at European and national level, and strives to *promote* efforts to continue building a democratic "House of Europe".

2. The EUSFTA as an EU-only agreement

On 13 February 2019 the European Parliament gave its consent to the conclusion of the EU-Singapore agreement. The final approval by the European Council and the exchange of the instruments of ratification will occur in the near future.

Although the CETA agreement with Canada was treated as a "mixed agreement", which requires ratification by the parliaments of the EU Member States, the EUSFTA is representative of the EU's new strategy of splitting its free trade agreements into two parts: one agreement that provides for market liberalisation and regulation in a comprehensive manner and a second that deals with investment protection. The liberalisation and regulation agreement is being concluded as an "EU only" agreement without the participation of Member States; solely the investment protection agreement (IPA) is still considered "mixed" because investment protection also affects the jurisdiction of the national courts. The EU-only agreements are voted on exclusively by the Council of the EU and the European Parliament; the parliaments of the Member States have no say. The Council can decide by qualified majority vote whether a trade agreement will be concluded as "EU-only" or "mixed".

The classification of traditional trade policy agreements as EU-only might seem appropriate in light of the fact that the EU is responsible for foreign trade and must have a single trade policy that determines what happens at its external borders in order to protect the integrity of the single market. However, this assumption becomes more tenuous when we consider the extent to which new-generation free trade agreements regulate policies and standards "beyond the border", thereby impinging on the competences of the Member States (via trade policy). Special legitimacy issues arise when this rule-making is largely delegated to treaty bodies instead of being carried out by the EU institutions that are accountable to the Member States. As a result, bodies in which the Member States are not represented suddenly have the power to make rules that are binding on the Member States, e.g. in the areas of environmental, consumer or health protection. As a result, the institutions of the new free trade policies impinge strongly on domestic policies. This raises the question as to whether a decision taken by the EU institutions alone (Council and Parliament) provides sufficient democratic legitimacy for the conclusion of comprehensive trade agreements.

3. The constitutional complaint

3.1. Admissibility of the constitutional complaint

The German Federal Constitutional Court (BVerfG) monitors the process of European integration and ensures that the shifts in competences and transfers of national sovereignty to the EU are not in violation of the basic principles of the German constitution, the "Basic Law" (Grundgesetz). This duty, which the BVerfG refers to as the protection of constitutional identity, focuses on two main areas. The first is the democratic legitimacy of decisions at both European and national level. The second is the question of whether a transfer of national sovereignty is in accordance with the agreed division of competences between the EU and its Member States or whether there has been a breach of competences on the part of the EU.

Any German citizen who feels that his or her fundamental rights have been violated may lodge a complaint with the Federal Constitutional Court. These fundamental rights include the right to participate in democratic decision-making processes, i.e. the right to vote (Article 38 I German Basic Law – GG). Owing to the fact that comprehensive free trade agreements encroach upon the rights of the German Parliament, both directly and indirectly, the citizens' right to participate in the political process through the election of representatives is also being restricted. The complainants see this restriction as a violation of their fundamental rights and are lodging their constitutional complaint on this basis.

In the complainants' view, Germany's participation in the signing and conclusion of the EUSFTA through the Council of the European Union constitutes a violation of their rights under Article 38 I of Germany's Basic Law (GG). Accordingly, the constitutional complaint is directed against the vote cast by the German government minister on the Council of the EU in favour of the signature and conclusion of the EUSFTA.

3.2. Subject matter of the constitutional complaint

a) Violation of "constitutional identity"

The constitutional complaint asserts that the conclusion of the EUSFTA represents a violation of the constitutional identity of the Federal Republic of Germany. In the complaint, the claim of a violation of constitutional identity is substantiated through an examination of the issue from various perspectives, taking into consideration numerous aspects, only a few of which can be addressed in this Background Paper.[1]

Two lines of argumentation are used for justifying the claim of a violation of constitutional identity. Firstly, the complaint argues that an unlawful transfer of competence from the Member States to the EU has taken place through the conclusion of the agreement with its comprehensive set of provisions, which also include clauses on sustainable development and shipping. This transfer of competence weakens the democratic participation of the German Parliament in the process of European integration. In addition, the transfer of competence has occurred without the approval of the German Parliament. The fact that the German representative on the Council of the European Union

[1] See W. Weiß, Legal Document on the Constitutional Complaint dated 16 May 2019

will be involved in the conclusion of the agreement does not remedy this shortcoming, because, through this vote, a representative of the executive branch of government is deciding on the rights of the German Parliament.

Secondly, the country's constitutional identity has been violated in that the decisions of the treaty bodies established by the agreement lack democratic control by the legislative branch. These treaty bodies not only make their decisions on the basis of a simplified procedure that requires no approval by the European Parliament, but also have no representatives from the parliaments of the Member States. The decisions of the treaty bodies are taken by unanimity based on a position adopted by the Council by qualified majority.

b) Treaty bodies

This is why the system of treaty bodies or committees, like those established by the EUSFTA and other trade agreements, is a central issue of this constitutional complaint. Some of these bodies have far-reaching decision-making powers. Examples from the Singapore agreement include the Trade Committee, which has the right to make labelling rules for food products, and the SPS Committee, which can set sanitary and phytosanitary standards, such as requirements for pest and disease control in the import and export of products of animal origin. Furthermore, the committees can make changes in the liberalisation of services, including changes that affect public services.

The committees are even authorised to amend the text and structure of the international treaty between the EU and Singapore. In addition, the Trade Committee has a kind of carte blanche, allowing it to make amendments to the institutional structure of the agreement: it can establish and allocate responsibilities to any number of committees. The decisions made by these committees are binding under international law.

Through this system of treaty bodies, a new level of political power is being created that fundamentally changes the structure within the EU, strengthening the EU's executive arm in its external competence and weakening the democratic participation of the European Parliament and national parliaments.

4. The general weakening of democratic structures through comprehensive trade agreements

The threshold of unconstitutionality is high: in its examination of this constitutional complaint, the Court will apply strict scrutiny and require compelling reasons for concluding that the agreement violates a key provision of the Basic Law. Even if the Court does not find the regulations addressed by the constitutional complaint to be unconstitutional, the democracy-related criticism and the demands that are being made on the basis of this criticism will still apply.

Therefore, regardless of the outcome of the constitutional complaint, it should be made clear that comprehensive trade agreements like the ones currently being developed by the EU not only sign away democratic control at European and national level by conferring legislative and regulatory powers to treaty bodies without any parliamentary oversight, but also weaken the parliaments – and thereby democracy – in general.

International agreements put constraints on the scope of action of nation states for the purpose of achieving transnational goals. For example, if the EUSFTA is agreed, the legislative freedom of the European Parliament and national parliaments will be restricted because, under European law, all agreements reached in the context of the EUSFTA would have legal effect in the EU. It is true that the shell of formal legislative powers would not be affected by the EUSFTA: the "right to regulate" would be preserved. However, in a substantive sense, the situation is altogether different. The EUSFTA, as an international treaty, would stipulate what can still be implemented by way of EU secondary legislation and national legislation. This means that, if the EU or its Member States were to make any rules or regulations that conflict with the trade agreements, these rules would automatically entail a violation of international law. As a result, European and national legislators would inevitably become cautious, wanting to avoid such violations. This situation may be common for international agreements, but it has serious implications under comprehensive free trade agreements, which cover many aspects of life that impact citizens, consumers, workers and companies. Any efforts to further develop or improve important socio-political regulations, in so far as they concern foreign trade, would require the approval of the respective trading partners. In this sense, the comprehensive free trade agreements fundamentally weaken the parliaments, and thereby the voting rights of EU citizens, to an unprecedented extent. When citizens go to the polls, they will only have limited influence over decisions on the constitution and the laws that affect them.

This curtailment of legislative discretion is particularly obvious in cases where the negotiating partners agree a common, specific standard – e.g. for the labelling of food products that contain genetically modified substances. If one of the contracting parties wanted to continue developing the standard at a later point in time, the desired changes would require the consent of the other partner. This situation becomes especially problematic when dealing with standards that have to be continuously developed and improved in order to meet socio-political needs. A contracting party that decides to change a mutually agreed standard without the consent of the other contracting party would face contractual penalties and/or trade sanctions. This system guarantees the protection of the status quo for socio-political regulations, effectively hampering socio-political progress.

5. Outlook and demands: Free trade, Europe and democracy

The opposition to the free trade agreement with the US (TTIP) – whose negotiations have been abandoned for the time being but may soon be relaunched – and the CETA deal signed with Canada was primarily focused on the lack of transparency of the negotiations. This lack of transparency contributed significantly to the scepticism towards the EU's trade policies.

It is therefore essential that the citizens of the EU be given clear information about not only the content of the negotiations, but also the shifts in the internal European balance of power ("institutional balance") that have resulted from the comprehensive trade agreements. In addition, the transfer of sovereign rights and the decision-making processes of the treaty bodies must be democratically legitimised, and this legitimation should also require the consent of the national parliaments of the Member States.

The conclusion of comprehensive trade agreements without the consent of the national parliaments, along with the establishment of treaty bodies whose decisions lack sufficient democratic legitimacy, can only create more alienation from the EU by Member States, undermining the idea of Europe and impeding European integration. This is why the ultimate aim of this constitutional complaint is to strengthen legitimacy in the conclusion of international trade agreements and ensure that the process of European integration is not weakened but instead supported by the trade agreements.

Demands:

1. The new-generation trade agreements (in the present case, the agreement with Singapore) must be sent to the national parliaments of the Member States for approval by law or in accordance with their constitutional imperatives.
2. The competences and responsibilities that can be transferred to treaty bodies or committees in these new trade agreements must be clearly defined and specified in detail.
3. When the treaty bodies make rules and regulations concerning the elimination of non-tariff barriers, these rules must include a simplified right of termination in order to prevent a regulatory “chill” or “race to the bottom”.
4. The rights of the European Parliament to exercise control over the treaty bodies’ decision-making must be strengthened.
5. The decisions made by the treaty bodies on important issues must also be approved by the European Parliament in order to ensure democratic control.
6. In Germany an accompanying law must determine in which cases the decisions of treaty bodies would also require the involvement or consent of the Bundestag (Federal Parliament).
7. With the ratification of the trade agreement, Germany must enter a reservation under international law that allows the country to refuse compliance with the decisions of the treaty bodies if the provisions of the accompanying law have not been respected.

Berlin, 16 May 2019

The complainants:

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