(National) Constitutional Law Limitations on the Advancement of the EU's Common Commercial Policy

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CCP and National Constitutional Law: Two Worlds with Nothing in Common?

The relationship between the Common Commercial Policy (CCP) of the European Union (Art. 207 et seqq. TFEU) and German—or any national—constitutional law has rarely been addressed in the past.[1] This could be the result of a perception that where the more 'technical' trade law and 'political' constitutional law were considered in tandem, what resulted was a collision of two worlds which *prima facie* shared little in common. Considered differently, the relationship between national and European constitutional law is also at play here, in so far as one can consider primary EU law as a form of constitutional law.[2] Despite that the division of competences in the 'European constitutional courts compound' (*Verfassungsgerichtsverbund*) has not been definitively established, this relationship has been explored to the greatest extent in multiple judgments of the German Federal

[1] Certainly examination of the economic constitution of the German Basic Law has focused primarily on the importance of the European Legal Framework, see for example Papier, Grundgesetz und Wirtschaftsverfassung, in: Benda/Maihofer/Vogel (eds.), *Handbuch des Verfassungsrechts*, 1995, 2. ed., § 14 para. 30; see also Badura, *Wirtschaftsverfassung und Wirtschaftsverwaltung*, 2008, 3. ed., p. 60.

[2] See von Bogdandy, Founding Principles of EU Law: A Theoretical and Doctrinal Sketch, European Law Journal 16 (2010) 2, p. 95; von Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2009, 2. ed.; Lenaerts/van Nuffel, *Constitutional Law of the European Union*, 2005; Terhechte, Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der Europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?, Europarecht (EuR) 43 (2008) 2, p. 143.

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M. Bungenberg and C. Herrmann (eds.), *Common Commercial Policy after Lisbon*, European Yearbook of International Economic Law,
DOI 10.1007/978-3-642-34255-4_2,

Constitutional Court (FCC), the *Bundesverfassungsgericht*, and the Court of Justice of the European Union (ECJ).[3] Moreover the national constitutional aspects of the CCP did not normally feature significantly in the foundational judgments of the ECJ and the FCC. In this respect the Maastricht Judgment of the FFC had no impact on the CCP.[4]

This stance changed dramatically with the so-called Lisbon Judgment of the FCC.[5] This judgment discussed extensively the constitutional law limitations on a further conferral of competences in the field of the CCP and considered the constitutional concretion of provisions relating to the CCP which had been changed with the Treaty of Lisbon. The conclusions reached by the court on this occasion have been heavily criticised by some commentators.[6] In particular, the way in which the FFC has approached the new interpretation of Art. 207 TFEU opposes the traditional interpretation basis of Union Law and comprehensively ignores the procedure based on the division of labour amongst the judiciary in the European Constitutional Order. According to Art. 19 TFEU it is still explicitly the task of the ECJ to make final binding declarations on matters of Union law. As regards the CCP, which embodies an exclusive competence of the EU, Courts of final instance in EU Member States cannot be empowered to create their own binding interpretations.

The following remarks attempt to clarify the constitutionally based limitations of deeper European Integration which have been created by the FFC with respect to the CCP. The jurisprudence of the FCC will first be restated so that it can be critically evaluated. An attempt should also be made to consider the reasoning behind the explicit engagement of the FCC with the CCP of the EU.

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[3] Voßkuhle, Der europäische Verfassungsgerichtsverbund, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 29 (2010) 1, p. 1; see also Terhechte, *Konstitutionalisierung und Normativität der europäischen Grundrechte*, 2011, p. 77.

[4] Federal Constitutional Court, 2 BvR 2134/92; 2 BvR 2159/92, BVerfGE 89, 155 (*Maastricht*).

[5] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*).

[6] See Herrmann, Die Gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, in: Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts*, *Europarecht (EuR) Special Issue 1/2010*, p. 193; Raith, The Common Commercial Policy and the Lisbon Judgement of the German Constitutional Court of 30 June 2009, Zeitschrift für Europäische Studien (ZEuS) 12 (2009) 4, p. 613; Terhechte, Art. 351 TFEU, the Principle of Loyalty and the Future Role of Member States' Bilateral Investment Protection, in: Bungenberg/Griebel/Hindelang (eds.), *International Investment Law and EU Law, 2 European Yearbook of International Economic Law, Special Issue 1*, 2011, p. 79 (93); Nettesheim, Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG, Neue Juristische Wochenschrift (NJW) 62 (2009) 39, p. 2867 (2867).

The Lisbon Judgment and the External Trade Policy of the European Union

A Single Constitutional Limitation to Deeper Integration?

The Lisbon Judgment of the FCC voices an encyclopaedic extent of opposition to the Lisbon Reform Treaty.[7] If one is to consider the sheer length of the judgment and the basic arguments contained therein alone, it is clear that the court intended to give a directed judgment, one which amounted to a general overview of the process of European Integration in light of the German Basic Law. That the FCC was completely opposed to a number of policy fields under Union Law can certainly be cited as a reason behind this judgment. From the beginning, the boundaries which were drawn in the judgment should have indicated a certain permanence or durability. One should not however make the mistake of considering the submissions of the Court as being solely about the CCP. To a much greater extent the comments are connected with further areas in which 'Member States extend the scope of competences and the political possibilities of action of the European association of integration'.[8] In practical terms, what the FCC envisages by this are the fields of Judicial Co-operation in criminal and civil matters, external relations, the Common Defence and Security Policy and ultimately, social policy. The jurisdiction of the EU in these fields, according to the FCC, 'can, and must, be exercised by the institutions of the European Union in such a way that at Member State level, tasks of sufficient weight in extent as well as substance remain which are the legal and practical conditions of a living democracy'.[9] Additionally the court is of the view that as long as the so mentioned competences are expressed in such a manner, amendments or changes will not contain any element of state involvement or causality.[10] This summary of the FCC of the material and legal amendments

[7] For additional analysis see e.g. Grimm, Defending Sovereign Statehood Against Transforming the Union Into a State, European Constitutional Law Review 5 (2009) 3, p. 353; Halberstam/Möllers, The German Constitutional Court says "Ja zu Deuschland!", German Law Journal 10 (2009) 8, p. 1241; Thym, In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgement of the German Constitutional Court, Common Market Law Review 46 (2009) 6, p. 1795; Ziller, The German Constitutional Court's Friendliness towards European Law – On the Judgement of Bundesverfassungsgericht over the Ratification on the Treaty of Lisbon, European Public Law Journal 16 (2010) 1, p. 53; see also Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts*, *Europarecht (EuR) Special Issue 1/2010*.

[8] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 406.

[9] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 406.

[10] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 406.

made by the Lisbon Treaty is certainly bold and poses fundamental questions and considerations applying to Criminal Law, the Defence Policy and the future themes of European Law—the 'autonomous' social policies of the Member States. It is however incomprehensible why external trade policy of all areas should be mentioned in this context. Although the findings of the FCC should be quite acceptable to trade law experts, they nevertheless act as confirmation that through their actions they are operating like a surgeon on the 'open heart' of democratic society. Nevertheless the train of argument of the FCC is not coherent: what is particularly interesting is that the FCC has furnished areas dealing with vastly different subject matter with a single constitutionally based caveat, in spite of the fact that the Union in each of these fields is assigned different competences. It is clear that the FCC was less concerned with showcasing the CCP as the outer limit of integration, rather than with exercising a complete overview of the Lisbon Treaty and of the amendments and changes which were introduced in its wake. Ultimately it must be asked whether this mixture of a variety of different subject fields can be considered to be progressive.

As has been mentioned, the CCP incorporates a field of Union *exclusive competence*.[11] According to Art. 2 para. 1 TFEU, this entails that the Union alone may act legislatively and execute legal acts in such a field. Member States may only act in these fields in so far as they have been authorised to do so by the Union or in order to adopt Union acts into their national laws.[12] Therefore, Member States have consciously reduced their role in these policy fields to a minimal level, which could be primarily associated with the affected areas. Alongside the CCP, each of the following areas form part of the exclusive competences of the Union—subject to certain limitations—the customs union, competition policy, monetary policy and the conservation of marine biological resources under the common fisheries policy.[13] Excluding the last field of action mentioned, it is clear that it is areas which are politically and economically sensitive which fall within the exclusive competences of the Union. Conversely the grounds of competence for the other fields about which the FCC speaks are completely different: in social policy and in the area of Freedom, Security and Justice the Union is only afforded a shared competence (Art. 4 para. 2 lit. b and lit. j TFEU); moreover the Common Defence Policy forms part of the intergovernmental regime of Union law.[14] Faced with this range of different competence grounds, it is surprising that the FCC formulated a singular constitutionally-based proviso or caveat. For example, there is

[11] For more on the exclusive competence of the Union in the field of the Common Commercial Policy ECJ, Case 41/76, *Donckerwolcke/Procureur*, [1976] ECR, 1921, paras. 31, 37; see also Osteneck, Art. 207 AEUV, in: Schwarze (ed.), *EU-Kommentar,* 2012, 3. ed., para. 26; Nettesheim, Art. 3 AEUV, in: Grabitz/Hilf/Nettesheim (eds.), *Das Recht der EU*, loose-leaf, para. 19.

[12] For deeper analysis see Nettesheim, Kompetenzen, in: von Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2009, 2. ed., p. 389 (424 et seq.).

[13] See Nettesheim, Art. 3 AEUV, in: Grabitz/Hilf/Nettesheim (eds.), *Das Recht der EU*, para. 9 et seq.

[14] See Terhechte, Art. 24 EUV, in: Schwarze (ed.), *EU-Kommentar*, 2012, 3. ed., para. 2.

undoubtedly less of a risk that the competences of the Member States will be depleted in the domain of defence than in the area of the CCP. Looked at from a different perspective, the fields of judicial co-operation or defence (politically, at least) take centre stage more than measures in the realm of the CCP.

However, the Member States play an altogether different role than in other fields. It is obvious that because of their heterogeneity, the mixing by the FCC of different policy areas in its judgment is highly problematic. Particularly in the field of the CCP, it can be especially difficult to allow for activities by Member States, which are properly significant in *both their extent and substance*.[15] The demands of the FCC can nowadays no longer be adhered to. What is perhaps a sensible approach for the areas of defence—or social policy provides in the best case scenario only stopping potential for the CCP and goes beyond the actual practice of this field. In so far as the FCC perceived that the CCP needed to be confronted, different sectors should have warranted different approaches.

Common Commercial Policy and (National) Constitutional Law: Three Aspects

In practical terms the judgment deals with three aspects of the post-Lisbon CCP:

1. Firstly, analysis of the practical and legal extension of Union competences as part of the CCP into the arenas of 'foreign direct investment', 'trade in services' and 'trade related aspects of Intellectual Property Rights' is to the forefront.
2. Attached to this is a consideration of the consequences of an expansion of competences, with respect to the role of the Member States in the WTO.
3. Finally, the FCC confronts in detail the broadening of Art. 207 TFEU to incorporate 'foreign direct investment'.

The submissions emerge from the reasoning of the FCC which has been applied in general to policy arenas which have emerged from the Lisbon Treaty. In other words: within the extension of competences and the practical consequences arising there from, the FCC seeks an interpretive approach, which facilitates an interpretation of competences which adheres to the Basic Law or 'enhances national sovereignty'.

Practical-Legal Facets of the CCP

A starting point for the analysis of the FCC is to develop a concept of the newly structured Art. 207 TFEU.[16] FCC summarises the amendments which have been

[15] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 406.

[16] For more, see Bungenberg, Going Global? The EU Common Commercial Policy after Lisbon, in: Herrmann/Terhechte (eds.), *1 European Yearbook of International Economic Law*, 2010, p. 123.

made and even when a strong statement of the Court's WTO opinion[17] is made, this statement is only intended to refer to the division of competences as they existed prior to the Treaty of Nice coming into force.[18] By choosing this starting point for its analysis, it is obvious that the FCC is anxious to show that the ECJ has formulated limits to Union competences and that the concept of an 'all-encompassing' CCP should bear on further submissions. The FCC does however recognise that henceforth with the Lisbon Treaty in force 'the Union acquires the sole power of disposition over international trade agreements'.[19]

Nevertheless the FCC regards such treaties as being capable of enormous consequences, which may result in 'an essential reorganisation of the internal order of the Member States'.[20] In its final analysis, there is a dual perspective in the remarks made by the FCC about the CCP: on the one hand, an overbearing influence of international trade law in the national constitutional sphere should be controlled and hindered, whereas on the other hand, the FCC is concerned with maintaining scope for the Member States, which is ultimately connected with the preservation of the competences held by the FCC.

The Future Role of EU Member States in the WTO

A desire to maintain an outward looking focus is also reflected in the FFC's ideas on the (future) role of the Member States in the WTO.[21] According to the FCC, as a result of the comprehensive competences afforded to the EU in the field of CCP, the Member States risk that their Membership of the WTO will be reduced to mere formal status.[22] The remarks of the FCC state that this affects in particular Member States' voting rights within the WTO, their standing in the Dispute Settlement Understanding as well as their participation in future negotiation rounds for the development of the WTO Regime.[23]

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[17] ECJ, Opinion 1/94, [1994] ECR I, 5267; see also Hilf, The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?, European Journal of International Law 6 (1995) 1, p. 245; further evaluation of this opinion can also be found in Hilpold, *Die EU im GATT/WTO-System*, 2009, 2. ed., p. 193 (esp. p. 206 et seq.).

[18] See also Raith, The Common Commercial Policy and the Lisbon Judgement of the German Constitutional Court of 30 June 2009, Zeitschrift für Europäische Studien (ZeuS) 12 (2009) 4, p. 613 (614 et seq.); see in relation to the changes which the Treaty of Nice introduced in the field of the CCP Herrmann, Common Commercial Policy after Nice: Sisyphus would have done a better job, Common Market Law Review 39 (2002) 1, p. 7.

[19] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 418.

[20] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 418.

[21] See also Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 161.

[22] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 418.

[23] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 418 et seq.

Which limits have been drawn by the FCC? Initially it considers the (formal) membership of the Federal Republic of Germany as being unaffected by the Lisbon Treaty. In this sense the EU cannot under any circumstances force Member States to withdraw from the WTO. The Member States, in so far as the above statement is true, will continue to have the opportunity to take part in future WTO negotiation rounds. With respect to this, the Federal Government is obliged to inform both the German Bundestag and the German Bundesrat of any developments which happen on the WTO arena.

In any case there is a limitation already in place for the FCC, in so far as a gradual reduction of Member State legal personality in external relations matters would enable the European Union to act 'more and more clearly in analogy to a state'.[24] These remarks by the FCC refer not only to the CCP, but also to external matters in a general sense, which also includes other fields of EU external relations (in particular the CFSP). This is moreover plausible in the context of the unified orientation as regards foreign relations which accompanied the Lisbon Treaty.[25] It can be deduced therefrom that the limits which German constitutional law has created for the field of Union competences refer to the situation which will arise from the use of such competences, i.e. whereby the Union will communicate in unified manner in external matters. Clear criteria cannot be derived from this. However it is obvious that the FCC is concerned with preserving on a lasting basis the 'double membership' of the Member States and the Union within the WTO and indeed it considers this 'cooperatively mixed' membership as a model for other international organisations and collectives of states.[26]

Foreign Direct Investment Post Lisbon

There was a detailed evaluation of the new competence in the field of foreign direct investments in the FCC's Lisbon judgment.[27] The FCC finds boundaries resulting

[24] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 420.

[25] Art. 205 TFEU contains a cross reference of Art. 21 and 22 TEU, which provide the basis for the CFSP, and which are also of relevance to the CCP for more see Khan, Art. 205 AEUV, in: Geiger/Khan/Kotzur (eds.), *EUV/AEUV Commentary*, 2010, 5. ed., para. 3; Terhechte, Art. 205 AEUV, in: Schwarze (ed.), *EU-Kommentar*, 2012, 3. ed., para. 2 and 7.

[26] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 420; for more detail on the problems posed by 'parallel Membership' see Herrmann, Rechtsprobleme der parallelen Mitgliedschaft von Völkerrechtssubjekten in Internationalen Organisationen – Eine Untersuchung am Beispiel der Mitgliedschaft der EG in der WTO, in: Bauschke et al. (eds.), *Pluralität des Rechts – Regulierung im Spannungsfeld der Rechtsebenen*, 2003, p. 139.

[27] See Eilmansberger, Bilateral Investment Treaties and EU Law, Common Market Law Review 46 (2009) 2, p. 383; Bungenberg, Going Global? The EU Common Commercial Policy after Lisbon, in: Herrmann/Terhechte (eds.), *1 European Yearbook of International European Law*, 2010, p. 123 (135 et seq.); Tietje, Außenwirtschaftliche Dimensionen der europäischen Wirtschaftsverfassung, in: Fastenrath/Nowak (eds.), *Der Lissabonner Reformvertrag – Änderungsimpulse in einzelnen Rechts- und Politikbereichen*, 2009, p. 237; Griebel, Überlegungen zur

from the interpretation of the term 'foreign direct investment', and develops its own proposal for interpreting this term. The remarks of the FCC can be interpreted in a broad fashion. The court assumes that the new competences held by the EU in this domain will primarily effect 'only encompasses investment which serves to obtain a controlling interest in an enterprise [. . .]'. This observation suggests that, exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements'.[28] This proposed interpretation by the FCC has been criticised on numerous occasions.[29] In the context of its subject matter, the FCC has been criticised for leaving open the question as to why it considers such a limited interpretation to be constitutionally required. The motivation for this is however clear when the practical significance of Investment Protection Treaties and the means by which German capital is invested abroad are considered. The Federal Republic of Germany should retain a certain influence in this field; the EU should not be put in a position to appoint itself as the sole actor in this policy arena. Only a judgment of the ECJ can make a final determination on the term 'foreign direct investment', with respect to what is outlined in Art. 19 TEU.

The Future Role of Member States' Bilateral Investment Treaties (BITs)

The judgment also posed the important question as to what the effects of the shifting of competences in relation to currently existing Bilateral Investment Agreements of Member States might be.[30] The FCC assumes in its judgment that the Union must authorise Member State BITs which are already in force; however, the practical consequences of this remain undefined.[31] The foundation of this 'duty to authorise' lies apparently in a practice of the Member States and the justification for this is

Wahrnehmung der neuen EU-Kompetenz für ausländische Direktinvestitionen nach Inkrafttreten des Vertrags von Lissabon, Recht der Internationalen Wirtschaft (RIW) 55 (2009) 7, p. 469; Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon, Europarecht (EuR) Special Issue 1/2009*, p. 195 (202 et seq.); Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2008, 2. ed., p. 126 (127 et seq.); Müller-Ibold, Handelsaspekte geistigen Eigentums sowie Investitionen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 117 (126 et seq.).

[28] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 421.

[29] Pars pro toto Herrmann, Die gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, in: Hatje/Terhechte (eds.), *Europarecht (EuR), Special Issue 1/2010*, p. 193 (204).

[30] For deeper analysis see Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW 21 (2010) 6, p. 207; Terhechte, Art. 351 TFEU, the Principle of Loyalty and the Future Role of Member States' Bilateral Investment Protection, in: Bungenberg/Griebel/Hindelang (eds.), *International Investment Law and EU Law, 2 European Yearbook of International Economic Law 2011, Special Issue 1*, p. 79.

[31] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 421 et seq.

shaky. Disregarding the weaknesses in its reasoning, the intention of the FCC is indeed unequivocal. If a change in the structure of competences in the area of the CCP has been observed, then the impact of this should be absorbed. The FCC manifestly seeks means to maintain Member States BITs. It is highly doubtful whether a so-constructed 'duty to authorise', which ultimately prejudices an autonomous decision by the Council of the European Union, can constitute a realistic boundary. Such a move is questionable from the perspective of the autonomy of the Union legal order, not least because neither the Commission nor the Union as a whole is bound by the jurisprudence of the FCC.

Conclusions

How can the relationship between German constitutional law and the future development of European External Trade policy be defined? From the perspective of the FCC the Member States are being essentially kept 'in their place' post the entry into force of the Lisbon Treaty. The criteria which have been developed by the FCC are far from convincing and misrepresent in particular the reality of the day to day co-operation which exists between the EU (the Commission) and Member States in the field of the WTO.

Looking beyond this issue, it is clear from the judgment that the FCC has no desire to await a judgment by the ECJ on a concrete case, which will undoubtedly find in favour of there being a Union competence. The decision of the FCC to define the content of the term 'foreign direct investment' has often been questioned. At any length literature on this subject considers that the ECJ's submissions on the interpretation of this term could have been more broadly worded.[32]

Notwithstanding it is difficult to imagine an actual conflict, given that any hurdles to further development of the European External Trade policy which have been formulated by the FCC have been so general. Most recently the Lisbon Judgment is regarded in a different light in the 'Honeywell' ruling. It is hard to envisage how a ('qualified') legal act which is repugnant to the law and presumes the existence of competence could be possible in the context of an exclusive Union competence.[33]

Ultimately it must be asked what the constitutional benchmark of the FCC actually is. Evidently Art. 23 of the Basic Law only plays a marginal role in this issue. There is good reason to doubt whether Art. 38 of the Basic Law on its own can provide a sound basis for this.[34] Therefore the limits to integration as defined by the FCC had to be extremely abstract.

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[32] Herrmann, Die gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, in: Hatje/Terhechte (eds.), *Europarecht (EuR) Special Issue 1/2010*, p. 193 (204).

[33] Federal Constitutional Court, 2 BvR 2661/06, BVerfGE 126, 286 (*Honeywell*).

[34] Nettesheim, Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG, Neue Juristische Wochenschrift (NJW) 62 (2009) 39, p. 2867 (2867); Terhechte, Dynamik, Souveränität und Integration – playing up the rules as we go along? – Anmerkungen zum Lissabon-Urteil des BVerfG, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 20 (2009) 20, p. 724 (725).

Finally the clear boundaries provided for in the judgment affect the general form of the Union: as long as it does not develop into a federal construct, the Union may continue to develop the External Trade policy. Such a move in the direction of becoming a federal state is neither envisaged in the Lisbon Treaty (quite the opposite is the case) nor is it possible in the constitutional order of the Union.[35] The potential to halt further development which has resulted from these limitations—be they of a primarily political or a primarily legal nature—should not be underestimated, as it concerns not only the CCP, but rather the entire field of EU external relations. Once more the problematic construction of the whole Lisbon judgment can be clearly seen. The concentration of the Union's fields of action as determined under national law is neither coherent nor is it possible under Union law. In the context of the CCP many of the FCC's submissions more closely resemble political statements, which are best avoided. The EU is nevertheless best advised to pay heed to this 'warning shot' and to also sufficiently consider areas of exclusive competence and the co-operation structures for European constitutional matters and administration, as are outlined in the Lisbon Treaty. The sharing of tasks and co-operation in the framework of the EU can no longer solely focus on the determination of unilateral limitations. Far more attention should be paid to the form which a commonly executed integration process would take, which would benefit the citizens of the EU.

[35] For more on this see Terhechte, Europäischer Bundesstaat, supranationale Gemeinschaft oder Vertragsunion souveräner Staaten? – Zum Verhältnis von Staat und Union nach dem Lissabon-Urteil des BVerfG, in: Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration, Europarecht (EuR) Special Issue 1/2010*, p. 135.

http://www.springer.com/978-3-642-34254-7

Common Commercial Policy after Lisbon
Bungenberg, M.; Herrmann, C. (Eds.)
2013, XVI, 244 p., Hardcover
ISBN: 978-3-642-34254-7