

Os ACL da UE e a soberania dividida: Mudanças transformadoras na autoridade comercial

EU FTAs and divided sovereignty: Transformative shifts in trade authority

Maria Helena Guimarães

Abstract—A política comercial da UE evoluiu no âmbito do seu mandato através do que pode ser formulado como "creeping competence" (Pollack 1994, 2000). Desde o Tratado de Roma até ao Tratado de Lisboa, a UE consolidou a sua soberania sobre o comércio, expandindo as suas competências. Contudo, o âmbito alargado dos ACL da UE levou as entidades subnacionais a exigir soberania partilhada sobre as questões comerciais para proteger o statu quo das suas competências reguladoras. Por sua vez, a decisão do Tribunal de Justiça de 2017 de que o Acordo UE-Singapura só poderia ser concluído com o consentimento da UE e dos seus Estados-Membros levou a Comissão a propor a cisão dos acordos comerciais em acordos da competência exclusiva da UE, e acordos "mistos", que requerem uma soberania dividida com os estados membros. Tanto o envolvimento de entidades subnacionais na política comercial como o impacto da decisão do Tribunal conduziram a mudanças transformadoras no locus de decisão da política comercial - de competências centralizadas para uma soberania partilhada com entidades nacionais e subnacionais. As dificuldades daí resultantes na ratificação de acordos comerciais da UE levaram a soluções de "stop-gap" que levantam questões sobre onde é aplicável o padrão de "creeping competence". Estes desafios políticos e jurídicos realçam as consequências não intencionais da "creeping competence", e que desencadeadas pela dinâmica da própria política comercial. Assim, no domínio do comércio, esta noção tem de captar os desafios legais, os esforços para recuperar a centralização, bem como a reação das entidades subnacionais destinadas a proteger a sua soberania regulatória.

Palavras-Chave — "Creeping competence", soberania dividida, política comercial da UE, envolvimento subnacional, "failing forward"

Abstract—EU trade policy has evolved on the scope of its remit through what can be framed as "creeping competence" (Pollack 1994, 2000). Since the Treaty of Rome to the Lisbon Treaty the EU has consolidated its sovereignty over trade by broadening its competences. However, the enlarged scope of EU FTAs has pushed subnational units to demand shared sovereignty over trade issues to protect the status quo on their regulatory competences. In turn, the 2017 Court of Justice ruling that the EU-Singapore Agreement could only be concluded with the consent of the EU and its Member States has led the Commission to propose the splitting of trade deals into EU-only and "mixed" agreements. While the EU holds to its exclusive competences in the former, mixed agreements require divided sovereignty with the member states. Both the engagement of subnational entities in trade policy and the impact of the Court decision represent transformative shifts in the locus of trade policymaking from centralized competences to divided sovereignty with national and subnational entities. The ensuing difficulties in ratifying EU trade agreements have prompted stop-gap solutions that raise questions as to where the pattern of "creeping competence" is applicable. These political and legal challenges highlight that "creeping competence" may have unintended consequences unleashed by the dynamics of the policy itself. In trade policy the notion of "creeping competence" has to capture the legal challenges, the efforts to claw back centralization, as well as the pushback by subnational entities to protect their regulatory sovereignty.

Keywords — Creeping competence, divided sovereignty, EU trade policy, subnational engagement, failing forward.

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Introduction

IN the last two decades there has been an increase in the number of EU FTAs (Free Trade Agreements), with a progressive widening and expansion of the trade agenda, addressing issues that go beyond the conventional scope of trade policy focused on reducing tariffs and quantitative restrictions. These deeper FTAs include provisions on environmental protection, labour rights, health issues or public procurement, and have been raising issues of competence over trade policy, and changing the nature of the politics of trade. This article analyzes how EU trade policy has evolved since its inclusion in the Treaty of Rome as a common EU policy, to the Treaty of Lisbon, which expanded EU competences over trade issues in a progressive pattern of "competence creep" (Pollack 1994, 2002), to the present transformative shifts towards divided sovereignty between the EU and its member states. I argue that the centralization of EU trade policy has been challenged by the very expanding scope and depth of the EU trade agreements. EU FTAs (Free Trade Agreements) increasingly include new issue-areas that often impinge upon national and subnational competences, and they have pushed subnational entities to demand shared sovereignty over trade policy-making. As a consequence, the negotiation and conclusion of recent EU trade deals, such as with Canada and Mercosur, have become more difficult and contentious. The effort to improve the efficiency of trade negotiations by consolidating investment and intellectual property under EU competence in the Treaty of Lisbon, had significant consequences, namely the difficulties to ratify trade agreements not only by national but also by subnational parliaments (Freudlsperger 2021). Therefore, the broader and deeper trade agenda brought to the fore the challenges to the expansion of EU competence beyond core trade issues, as further centralization of trade-related policies in the Treaty of Lisbon led to the increasing contestation of FTAs (Broschek 2021, Egan and Guimarães 2022, Bollen, de Ville, and Gheyle 2020).

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On the other hand, the 2017 Court of Justice of the EU (CJEU) ruling that some issues included in the new generation FTAs (non-direct foreign investment and investor-state dispute settlement regime) are not of exclusive competence of the EU (Court Opinion 2/15 on the EU-Singapore Agreement), has also challenged the centralization in the EU of further trade-related issues. Following the CJEU ruling, and having to face the claims of further involvement of subnational entities in trade policy decision-making and the increasing difficulty in the ratification of trade agreements, the Commission decided to split trade deals into EU-exclusive and mixed-competences agreements. Thus, the continual expansion of competences over trade-related issues has led the EU to address the shortcomings of the existing institutional arrangements, and to adjust to the new political and legal challenges.

Drawing on Pollack's notion of "creeping competence" (1994, 2000), I argue that while in the Treaty of Rome the EU took responsibility for trade policy, and the Treaty of Lisbon further expanded the scope of the EU trade powers to new areas, the centralization of trade policy is presently experiencing a backlash. The Commission's previous "creeping competence" is now challenged by the consequences of a more ambitious EU trade agenda, which has pushed demands for shared sovereignty in the negotiation and signing of EU FTAs, particularly by subnational authorities. The increasing engagement of subnational entities in trade policy and the CJEU decision on shared powers in specific trade-related issues, represent transformative shifts in the in the pattern of EU "creeping competence" in trade policy. Thus, "creeping competence" needs to account for the attendant political risks of the pushback by subnational entities to protect the status quo on their regulatory competences, and to the legal constraints to the Commission's efforts to claw back to its original authority on trade policy. These changes in the locus of trade policy-making raise questions as to where the pattern of "creeping competence" is applicable and where it is not, as well as to the use of stop-gap solutions to address the challenges of sovereignty claims by national and subnational entities. The recent developments regarding the EU-Mercosur

agreement illustrate the political efforts to adapt to the new trade agenda and to avoid stalling the ratification of EU FTAs and the pace of EU treaty-making. This highlights that "creeping competence" may have unintended consequences due to the dynamics unleashed by trade policy itself.

In assessing the evolution of trade authority with the "creeping competence" concept, I sustain that the latest evolution of EU trade policy fits the "failing forward" argument of European integration (Freudlspeger 2021, Jones, Keleman and Meunier 2021). The adjustments the EU is seeking by splitting trade agreements, and the recent stop-gap measures to try to move trade policy forward, are rooted in the difficulties to ratify broad-agenda FTAs, and in the Court ruling on EU-exclusive competences.

The paper addresses the following questions: As subnational entities increasingly demand a "voice" in FTAs negotiations and the ratification of trade agreements is ever more difficult, how is subnational mobilization impacting centralized sovereignty over EU trade agreements? How does the Court ruling on the EU-Singapore FTA impact the Commission's creeping competence on trade? The paper is divided into 3 sections. The first section shows how the increasing scope and depth of EU trade agreements is challenging the EU competences over trade agreements. Section 2 addresses the evolution of competences over FTAs, from centralization to retrenchment, and stop-gap measures to address political challenges and legal constraints. The third section uses Pollock's notion of "creeping competence" in the realm of trade policy to argue that the increasingly diversified scope and depth of EU trade agreements is leading to transformative shifts in trade authority, from consolidated undivided EU competences to divided sovereignty with member states over specific trade-related issues.

1 The EU expanding trade agenda and subnational competences

The EU has currently 41 trade agreements with 72 countries. Out of these deals, 31 are FTAs or have an FTA component (Conconi et al., 2021)

Striking these trade agreements is getting ever more challenging for the EU, as they no longer are merely about decreasing or eliminating tariffs, and enlarging or abolishing quotas to ease access to foreign markets. These first-generation trade agreements gave way to second-generation deals that furthered economic integration by tackling non-tariff barriers, and by including trade-related issues such as intellectual property, labor and environmental standards that are closely inter-related with trade. By addressing these behind-the-border measures and restrictive governmental policies, trade agreements became increasingly politicized. Not only civil society and NGOs campaigned in opposition to specific trade deals (De Ville and Siles-Brügge 2016, Buonanno 2017, Eliasson and García-Duran 2017), as indeed national and subnational governments became more vigilant on the impact of FTAs on their economic interests and public policy competences on social rights, consumer protection, or public procurement (Tatham, 2018, Kersschot, Kerremans, and De Bièvre 2020, Egan and Guimarães, 2022). While first- and second-generation trade deals aimed at increasing market access for physical goods, the third generation deals now encompass trade in services and digital trade, as well as add new dimensions to trade-related issues on human rights (slave labor, for example) or on environmental performance (Leblond and Viju-Miljusevic 2019). Therefore, trade agreements are increasingly "living agreements" (Meunier and Morin 2015) that respond to technological changes and advancements (artificial intelligence), to new society concerns (data protection), and to the transformations in the global economy and in trade patterns, particularly those relating to the restructuring of global supply chains in a post pandemic world. These are all factors that propel the expansion of the international trade agenda into ever more multidimensional trade agreements (Guimarães 1995).

With their deeper and ever-larger scope provisions, trade agreements increasingly call the attention of subnational authorities, as they address trade-related issues that intrude on their constitutional and regulatory competences. Consequently, subnational entities progressively "establish themselves as stakeholders in trade politics"

(Broschek 2021, 2), and subnational parliaments emerge as "sounding boards for public contestation" (Freudlsperger 2020, 45), and gain "actor-ness" in EU politics of trade. This was paramount in the Wallonia Parliament *ex post* veto of Comprehensive Economic Trade Agreement with the EU (CETA) in 2016. The Wallonia saga, with the regional parliament refusal to ratify agreement, put on hold its signature until a clarification instrument regarding compliance with socio-economic issues, environmental regulations, and the safeguard of public interest in the dispute resolution mechanism was included in its annexes. The influence of Belgium's sub-federal parliament on the EU ability to conclude CETA epitomizes the rise in regional attention and participation in EU trade policy, as subnational governments seek to preserve their autonomous policies, competences and prerogatives against the supranational encroachment brought up by the expanding agenda of EU trade agreements (De Bièvre and Poletti 2020; Van Loon 2020; De Ville and Siles-Brügge 2016; Young 2019). One can then expect that regional actors make "political statements" on their subnational constitutional rights, and that they mobilize for shared sovereignty on trade policy issues, contesting EU exclusive powers. These constraints and incursions on policy realms to which subnational authorities are sensitive (public procurement, social policies), trigger the involvement of sub-central entities in the politics of trade, raising calls for shared sovereignty with the EU, which is problematic not only for the central governments but in particular for the EU.¹ As deeper trade agreements increasingly expose subnational jurisdictions to international trade rules, and subnational authorities, in turn, hold competences of relevance to EU trade policy-making (Freudlsperger 2020, 1-2), the centralization of trade policy is called into question (D'Erman, 2020). The demands for devolution become more audible as subnational entities mobilize to partic-

ipate in the negotiation of trade agreements, and require their consent in the signing of the trade deals. Trade agreements have also distributional effects across subnational territories, with some economic sectors in specific regions being more negatively affected by EU trade liberalization. As such, the most impacted regions will demand shared decision-making powers in an attempt to protect their interests. These distributive issues across regional units contribute to the politicization of EU trade policy, and add to the governance challenges in EU treaty-making.

Subnational ratification challenges arise in federal systems, where subnational parliaments have legislative powers. Despite that these challenges are bigger where regions have veto powers on trade policy, such as in Belgium, in Germany states also have ratification powers within the second-chamber (the Bundesrat), where the federal government and the Länder traditionally seek consensus, sometimes after the federal level makes concessions to the states' demands. German states increasingly take part in trade debates, which include parliamentary motions against EU trade deals, namely regarding investor-state dispute settlement provisions. In other EU states, such as in Spain, there is mounting attention to the impact of EU deals on regional economic interests, namely in the agricultural sector. In Ireland and France, regional economic agents have voiced their concerns and pressured the national government not to ratify the Mercosur agreement, due to its impact, respectively, on the import-competing beef sector and on the protection of geographical indications. In sum, there is growing subnational engagement regarding the consequences of EU trade deals on regional competences and autonomy, but also their effects on regional economic and sectoral interests.

As the multiple trade-related dimensions of trade liberalisation impact sub-central regulatory authority, subnational economic interests, and social policy preferences, the multilevel governance issues become key elements of EU trade politics. EU trade treaty-making, which takes place at different levels of governance, is increasingly about competence distribution and sovereignty partition between the subnational and the supranational level - and not only across the supra-

1. A recent survey of European citizens' views towards trade policy shows their apprehension regarding these policy incursions. Many believe that the bilateral trade agreements signed with Canada, Japan and Mexico will limit the autonomy of national governments to pass their own laws, namely those relating to environmental and health standards - two main priorities of trade policy for Europeans - and also their policy autonomy to protect workers and education policies (Eurobatometer 2019).

national/national divide - and thus authority over trade is becoming more fluid (Egan and Guimarães 2022). This brings challenges to the multilevel politics of trade and to the effective cross-cutting governance of trade policy (Garben 2019).

In this context, the comprehensive and multi-dimensional trade agenda of the EU is generating an increasing difficulty to conclude trade agreements. Ratification problems in member states delay the entry into force of trade agreements as national and subnational entities seek to safeguard their sovereign rights and socio-economic preferences. These are not new issues in the EU trade policy process, as ratification conflicts began in the 1980s, but they are now exacerbated by the effects of the multidimensional trade agenda across levels of governance. Indeed, the time needed for ratification of trade agreements has been lengthening, and is presently of about three years since the agreement signature (Freudlsperger 2021), highlighting the increasing sovereignty-salience of various provisions of the deep trade agreements.

2 EU FTAs: from delegated competence to divided sovereignty

2.1 From Rome to Lisbon

Trade policy is one of the EU's core Treaty-delegated competences, as established by Art. 3 (1) TFEU. With the Treaty of Lisbon (2007), the Commission has extended its exclusive competences by bringing more dimensions of trade policy under Article 207 TFEU, namely foreign direct investment and the commercial aspects of intellectual property rights. In doing so, the EU enlarged the scope of its exclusive competences on trade, and reinforced internal cohesion to speak with "one voice" in global trade negotiations, (Conceição-Heldt and Meunier 2017). This centralization in the scope of competences would streamline trade negotiations by improving their efficiency and effectiveness in face of the diversity of member states' interests and preferences, and the constraints of constitutionally divided powers

(Garcia 2020). The Treaty kept Commission policy entrepreneurship on trade "at the wheel" of EU treaty-making, but it would have to consult the Council and inform the European Parliament. The member states determine the Commission's negotiating mandates (the negotiating directives) and oversee the Commission's negotiation of the trade agreements. The role of the European Parliament was bolstered as it has to give its consent to trade agreements before the Council can adopt a decision by qualified majority to conclude a trade deal, by authorizing its signature. Therefore, while trying to improve inter-institutional coordination, and providing for more effective and legitimate institutional scrutiny (Bollen, de Ville, and Gheyle 2020), the Lisbon Treaty also transferred competences to the supranational level to cover new areas of trade, enlarging the scope of the Commission's competences.

The expansion of European trade policy competences with the Lisbon Treaty has led to significant pushback from national parliaments, as well as from subnational parliaments and regional governments. In face of the expansion of the EU trade agenda and its impact on their constitutional rights, the "creeping competence" of the Lisbon Treaty over trade policy has ultimately generated demands for increased participation in trade negotiations, and the advocacy of subnational direct involvement in the EU trade decision-making process.

2.2 The Court ruling on the EU-Singapore FTA

In the aftermath of the Treaty of Lisbon, the Commission assumed that trade agreements that did not include political cooperation issues could be considered of "EU-exclusive" competence, while the Council had a different view on the exclusive competence of the EU to conclude trade agreements (Conconi et al., 2021). Thus, the Commission requested the Court of Justice to decide on its competence to conclude the EU-Singapore Agreement (EUSFTA). In doing so, it demanded a clarification from the Court on the division of competences regarding EU trade agreements, and hence on the scope of the Common Commercial

Policy. The request of the Commission was made at a time when contestation in member states to CETA and TTIP was on the rise, including in subnational parliaments (Egan and Guimarães 2022). In this context, CETA was officially denominated a "mixed agreement" by the Council, under pressure from some member states, particularly the German government. This opened a window of opportunity for subnational influence and engagement to demand a say in the negotiation of the agreement.²

In its Opinion 2/15 (delivered in May 2017), regarding the division of competences between the EU and its member states, the CJEU ruled that provisions on portfolio investment and the regime on dispute settlement between investors and states were not of EU-only competence, but rather of shared competence between the Commission and the EU member states, thus requiring national ratification. In response to the Commission request to the CJEU (in the context of the EU's FTA with Singapore) the Court ruled that EU competence is still "incomplete", as some trade issues require both EU and member states consent (Freudlsperger 2021), and as such, the EU has not complete authority over trade. And while the competence issues in the EU tend to be solved with Treaty revisions, the Court ruling is having a significant effect in the present dynamics of EU trade policy, as it set limits to competence creep (Garben 2017, 210).

This meant that deals with similar provisions needed to be ratified by member states' national parliaments and in some EU federal states by subnational parliaments as well, according to their national constitutional provisions (Woolcock 2010; Eschenbach 2015).³ In Belgium, sub-federal parliaments may even use their individual veto over federal foreign policy, as happened with the CETA (Bursens and De Brièvre, 2021). The Commission then decided to split the EUSFTA in two

distinct agreements - an "exclusive-competence" FTA, and a separate "mixed agreement" to address investment liberalization issues not covered by EU-exclusive competence (namely investment protection). Eventually, the EU signed two EU-Singapore agreements in October 2018 - a free trade agreement, and an investor protection agreement (AIP) of shared competence that still needs to be ratified by 16 EU member states.

Following the CJEU ruling, the Commission recommended to split future agreements. "EU-only" agreements would include all trade provisions except portfolio investment and investor-state dispute settlement, so that they would not require member state approval. Mixed agreements that are subject to approval and ratification by both the EU and its member states, and include provisions of shared competence with member states. In this new trade policy scenario, the EU-Vietnam Agreement (signed by the Council in 2020) was also split into a trade agreement and an AIP, and the negotiations with New Zealand and Australia followed the same strategy.⁴ The full range of trade policy issues is no longer of the exclusive competence of the EU, as it has to share powers in select trade policy issues. By splitting the trade agreements, the Commission tried to take hold of (part) of its former exclusive powers on trade policy-making, a centralized competence that it enjoyed since the Treaty of Rome and was expanded with the Treaty of Lisbon.

However, in May 2018, the Council adopted a new approach on negotiating and concluding EU trade agreements, resulting mainly from the Court of Justice ruling, but also wary of the increasing engagement of new players in trade policy-making - not only civil society and NGOs, but also subnational entities. While the Commission tried to hold on to its authority and entrepreneurship on trade policy by splitting the agreements, the Council is reluctant to concede authority to the Commission, and insists it must establish what is covered in the EU-only deals. As such, in 2018 it decided that according to their content, the agreements with Mercosur, Mexico, and Chile should

2. The Namur Declaration (2016) and the Trade Together Declaration (2017) reflect, at the academic level, the dilemma on the division of authority over EU trade policy, with the signatories of the former Declaration defending shared competences with the national and subnational levels, while the Trading Together document argued for "EU-only" competences.

3. National parliaments of all member states but Malta, and all regional parliaments in Belgium, must ratify "mixed" trade agreements.

4. At the time of writing, the negotiation of the FTAs with New Zealand, Chile and Mexico are concluded but the agreements have not yet been signed.

be "mixed", to abide by the 2017 CJEU ruling and to contain national and subnational contestation.

Despite the fact that the Court ruling can be interpreted as distinguishing between core-trade liberalization issues and trade-related provisions as a criterion to assign EU-only competence, and EU and member states "mixed competence", a "grey area" on the distribution of competences remains (Conconi et al., 2021), preventing the establishment of a clear pattern in the division of authority over trade. As mentioned above, the living nature of trade agreements suggests that future deals may have an even larger scope, incorporating new trade-related issues (such as in the area of culture), and encompassing new dimensions of human rights and labour standards, or new aspects of investment flows. This more encompassing agenda will further the dilemmas and debate over exclusive versus shared sovereignty.

2.3 Stop-gap solutions

Despite that in the EU-Mercosur Agreement member states, led by France, pushed for a mixed agreement to share trade sovereignty with the EU⁵, the deal is being strongly contested by national and regional parliaments due to deforestation and environmental concerns, as well as trade protection issues. In a stance that is reminiscent of the 2016 rejection of CETA, Wallonia's Parliament already unanimously adopted a resolution rejecting the EU-Mercosur agreement (The Brussels Times, 2020). In face of the apparent ratification difficulties, as the Agreement's "mixture" may lengthen the ratification process in national and subnational parliaments, the EU Commission is now proposing to redesign and split the agreement, as it has been on hold since 2019. This suggests that the Commission is taking the opportunity to claw back its competence on the core trade issues of the Agreement, and to re-take into its hands its EU-exclusive competences. In the agreement with Mexico, the Commission is also proposing a split solution, to avoid national and subnational parliaments' shared sovereignty in core trade parts of the deal. These discussions

5. France also wanted the EU Mexico agreement to be mixed (Politico, 2022b).

mirror a "tug of war" between the Commission and the member states on their sovereignty over the EU trade policy agenda, as it progressively expands beyond trade.

As progress on getting EU trade agreements into force has been stalled⁶, the option for separate deals with a "fast track" model of approval for core trade issues is gaining traction among member states (Politico 2022a). This is a move that deviates from the 2018 Council stated preference for mixed agreements, as key member states like Germany are now aligning with the Commission intention of drafting separate negotiating directives for EU-exclusive competences and for mixed investment agreements.⁷ More importantly, these latest developments illustrate how the continual expansion in the scope of the Commission trade competences has led the EU to confront the shortcomings of its institutional arrangements, by adjusting to the new challenges through stop-gap measures, to address the evolving legal and political challenges of EU treaty-making. As Jones, Keleman and Meunier (2021, 1528) argue, as the nature of EU FTAs broadens, the issues of institutional competence on trade policy remain. The new plan of the Commission to create an additional protocol to the EU-Mercosur agreement containing supplementary environmental (non-binding) commitments, to satisfy national and subnational entities' concerns, are the latest example of those stop-gap measures trying to overcome the stalling free trade deal (Euractive 2022).

One may argue that the expansion of trade agreements provisions beyond purely-trade issues highlights that sovereignty over trade agreements is actually different between the beginning and the end of the trade policy process. The Commission has delegated and centralized competence

6. The EU-Vietnam Agreement still needs to be ratified by 17 member states. CETA awaits ratification by 12 member states. Just recently the Irish Parliament did not ratify CETA as it considered that the agreement was unconstitutional on the grounds that the provisions on investor tribunals breached the judicial sovereignty of the state (The Irish Times, Nov. 2022).

7. The Council conclusions on the negotiation and conclusion of EU trade agreements state that it is for the Council to decide case by case whether to open negotiations on the basis of separate agreements, and that association agreements, depending on their content, should be mixed. They add that when separate agreements are necessary, investment agreements should be negotiated in parallel with FTAs.

to negotiate trade agreements, and the member states have the competence to approve and ratify them. Put in other words, the Commission has the capacity and the entrepreneurial ability to initiate new trade agreements, but the authority to decide lies with the member states. This is a challenge for EU trade policy-making and for the timely entry into force of trade agreements. As the German chancellor O. Scholz recently acknowledged, "it is a somewhat complicated idea that the EU has the competence for FTAs, and then all the parliaments of member states - sometimes regional governments - have to agree in order for a FTA to come into force" (Politico 2022a)⁸.

In traditional trade agreements, with provisions that did not encroach on national and subnational competences, this divided authority did not entail legal or political risks at the subnational level, nor did it cause inter-institutional clashes (D'Erman 2020).⁹ They are the "lowest level" of preferential trade agreements and do not raise issues of sovereignty, nor multilevel governance challenges (Bongardt and Torres, 2017). The enlarged scope of second and third generation trade deals, with provisions that intrude on national and subnational competences, brings to the fore how these two types of competence over FTAs hamper the signature of trade deals and stall EU treaty-making, leading to stop-gap solutions often on a case by case basis.

3 The end of EU "competence creep" over trade agreements?

Pollack's notion of EU "creeping competence" (1994, 2000) is particularly useful to interpret these two key changes in the multilevel politics of politics of FTAs. In his work Pollack argues that since the Treaty of Rome (1957) until the Maastricht Treaty (1992) the EU has substantially expanded its activities and the range of issue-areas over which it has competences. Then, he points out that this creeping centralization has

slowed with in the Maastricht era: while the EU retained active regulatory competences over an increasing range of issue-areas, its competences over budgetary policies retrenched. Looking at EU policy-making in the area of trade, namely the EU's treaty-making competences, the evolution of EU competences over trade can be compare with Pollack's findings.

In the realm of commercial negotiations the locus of trade policy decisions transitioned from the national to EC level with the Treaty of Rome, and the Treaty of Lisbon expanded the EU authority to new trade policy issues, reinforcing its grip over other aspects of international trade, namely services, the commercial aspects if intellectual property and foreign direct investment. Therefore, the Treaty of Rome is a milestone in the delegation of trade competences to the EU, and the EU "creeping competence" over trade policy continued after Maastricht, with the Lisbon Treaty of 2007 actually expanding the scope of EU authority.

In the post-Lisbon era, the 2017 CJEU ruling on the EUSFTA on EU competences, which established shared competence between the Commission and the EU member states in specific issues, represents a transformative shift in the EU "creeping competence", as it cuts back EU exclusive trade competences. The ruling came at a time when subnational entities were already demanding a say in trade negotiations, and making the case for divided sovereignty with national authorities. They demanded participation in trade negotiations, and were also calling for national and subnational parliamentary ratification, given their concerns that the new provisions of trade agreements would increasingly constrain their constitutional powers. The increasingly comprehensive nature of trade agreements, with provisions on trade-related areas impinging upon national and subnational regulatory competences (environment, public health, public procurement), are the backdrop for the Court decision and the demands of subnational authorities, both pointing to a retrenchment in the EU trade centralized powers. The consequences of the CJEU ruling, coupled with the increased subnational engagement of subnational authorities in trade policy emerge as two key factors underlying the change in the "creeping competence" of the EU

8. Olaf Scholz speech at the 13th German Mechanical Engineering Summit in Berlin, on state-business relations, in 11 Oct 2022. (Available at <https://www.youtube.com/watch?v=eGnEBe9-bNE>).

9. Most past EU FTAs were mixed-competence agreements.

over FTAs. Legally, the 2017 CJEU decision - the most recent legal landmark on the division of sovereignty over trade - shifts the "locus" of trade policy-making, as part of the deep trade agenda becomes subject to divided competences. Politically that shift is supported by subnational mobilization demanding shared competences.

Building on Pollack's (2000, 522) levels of autonomy progress across issue-areas, Table 1 pinpoints the evolution in authority between the EU and member states over trade policy since Rome to the Treaty of Lisbon, and the latest shift in trade sovereignty produced by the 2017 CJEU decision. While prior to the establishment of the EU integration project all trade policy decisions were taken in the national sphere (level of authority 1), the Treaty of Rome gave the Commission exclusive privilege on trade policy (level 4). This formal power of the EU, however, was only gradually transferred to the Commission - policy decisions on commercial negotiations were still taken both at national and European Community level (2) in 1968, and mostly at EC level (3) in 1970. According to the author, the Single Market Act (SMA) of 1992 brings increased powers to the EU. Given the implied exclusive external competences of the Commission, that gives it powers to conclude international agreements that include provisions that are already internally binding, the Single Market programme for deeper regulatory convergence indirectly contributed to the Commission's creeping trade authority (level 4). The Lisbon Treaty marks a defining institutional change in the Commission's external trade competences as it formally widens those competences to new issue-areas (level 5, the largest scope ever of trade authority under the Commission's remit). The CJEU Singapore verdict, in turn, represents a cutback in the Commission's trade authority (level 3), whereby most trade competences remain at the EU-level, but there is partial "decentralization" to national and subnational entities of the existing Commission authority to manage EU trade policy (cf. Pollack 2000).

The legal constraints but also the political backlash against trade centralization since the 2010's, though not threatening a complete retrenchment in the scope of centralized trade authority, is shifting the "locus" of trade policy by

relocating sovereignty over specific trade-related issues to the intersection between the Commission and the member states' authority scale

Table 1: Levels of authority in trade policy¹⁰

Before 1957	1957	1968	1970	1992	2007	2017
	Treaty of Rome			Single Market Programme	Treaty of Lisbon	CJEU ruling on EU-Singapore FTA
1	4	2	3	4	5	3

Key:

- 1 = all competences at national level
- 2 = competences at both national and EU level
- 3 = most competences at EU level (EU-exclusive FTAs and mixed agreements on select issues)
- 4 = all competences at EU level
- 5 = extended competences to EU level due larger scope of FTAs

NB: Adapted from Pollack (2000) and updated by the author.

Furthermore, while in Pollack's (2000) findings the EU has retained its competences and is an active regulator in a wide range of regulatory issue-areas after Maastricht (Pollack 2000), in the realm of agreements on trade such creeping regulatory authority faces the resistance of subnational units. Taking the case of some public services such as health or transport, in which subnational units preserve their competences, the EU regulatory powers are subject to the political and economic backlash by subnational entities. The expansion of trade-related regulatory provisions in the second and third generation agreements seems to have slowed the pace of the regulatory activeness of the EU in trade-related issues, as national and subnational entities question, and often contest, the regulatory approximation aims of these agreements, namely on social policies in which they have constitutionally granted competences.

Following the Court of Justice ruling, the Commission proposal to split trade agreements into EU-exclusive and "mixed agreements" speaks

10. Pollack's (2000) six level taxonomy considers also the category "only some competencies at EU level". As trade policy does not fit in this score, the levels of authority in trade policy were adapted to a 1-5 taxonomy.

of the Commission's efforts to hold on to its creeping trade competences in core trade liberalization measures, while it had to concede authority on selected trade-related issues. This move was intended to limit the contentiousness of deep trade agreements and avoid national and subnational vetoes to the ratification of all-inclusive trade deals. The stop-gap solutions that are being experimented by the Commission speak of the EU efforts to adjust to the deeper trade agenda, and to move trade liberalization forward, grounded on its dynamism and capacity for adaptability (Garben 2017). The bilateral non-legally binding and merely declaratory text negotiated with Brazil to address member states environmental concerns with the Mercosur Agreement, best illustrate these efforts.

In the same line of Freudlsperger's (2021) "failing forward" argument, the difficulties at the subnational level to accept deeper trade agreements - stemming from the expansion of the EU trade agenda - lead to the necessity of "mixed" agreements. This shows that are gaps in the EU-exclusive trade competence, as the CJEU judicial decision on the EUSFTA laid bare. The problems and (sometimes) the impossibility to ratify trade agreements in national and subnational parliaments may have lasting implications for EU trade policy-making (Jones, Keleman and Meunier, 2022). While the splitting of trade agreements has implied a division of sovereignty between the EU and its member states (in mixed agreements) and, thus, a retrenchment in the EU "creeping competence" over trade, it may also be an opportunity for the EU to move its trade agenda forward. Similarly, ratification issues may create opportunities to negotiate agreements with deeper integration provisions (Freudlsperger 2021). This research confirms the "failing forward" conceptual framework by applying the argument to the latest evolution in the EU "creeping competence" over the trade policy agenda. Indeed, the splitting of trade agreements and the stop-gap measures, which respond to the increasing complexities in the ratification of trade deals, represent the EU legal adjustments and political adaptations to move the EU trade agenda forward.

4 Conclusion

The expansion of the scope and the deepening of EU trade agreements is an important driving force behind the transformative shifts in the locus of competences over trade policy. It brings to light the new nature and challenges of today's multilevel politics of trade, and the complexities of the split-level functioning of modern EU trade policy, where not only the national and supranational levels of government interact, but where the involvement of the subnational tier becomes key to ensure the implementation of ever more deep trade agreements.

While there are economic benefits from the trade liberalization and market-access provisions of FTAs, there are costs for EU trade policy-making of pursuing non-economic objectives (on human rights and forced labour, sustainable development, and in the future, due diligence). While EU market liberalization competences do not raise sovereignty issues, the expansion in the scope of trade agreements to a plethora of trade-related dimensions is raising issues of sovereignty that per se are politically sensitive, as they challenge sub-central competences. This has led subnational entities to demand to be part of the governance structure of EU trade policy, calling into question the EU delegated powers over trade policy.

In turn, both the CJEU decision stipulating that not all trade policy issues are under EU-exclusive competences, and the Commission response suggesting to separate deals in shared competence and EU-exclusive power agreements, have concurred for a backlash in the creeping powers of the EU over trade policy enshrined in the Treaty of Lisbon. The legal, as well as the political challenges to EU trade policy centralization have led to stop-gap and case by case measures, which put to test the pattern of EU trade policy-making that the Treaty of Rome had delegated to the EU and the Treaty of Lisbon had reinforced.

Drawing on Pollack's concept of EU "creeping competence", and bridging that notion with the "failing forward" argument, I conclude that in the realm of trade policy the continual expansion of competences has led the EU to confront the shortcomings of its institutional arrangements and to

adjust to the new challenges. It does so by the splitting of trade agreements and by resorting to stop-gap measures, which facilitate the pursuit of its trade agenda. Therefore, the ongoing shifts in trade authority and its consequences for EU trade policy fit "failing forward" framework of institutional change.

"Creeping competence" in trade has encountered legal constraints in the 2017 CJEU ruling, and involves political risks stemming from subnational entities' pushback to protect their competences, highlighting the unintended consequences unleashed by the dynamics of trade policy itself. In sum, both the ruling by the Court and the pushback of competences from subnational entities are constraining the expansion of EU creeping centralization of the trade agenda "beyond Lisbon", and are calling into question the future of EU-only trade agreements. Furthermore, the legal restraint imposed by the CJEU, and the potential that subnational contestation of the EU trade agenda will remain, will have a lasting impact on the EU's prospects of concluding deeper trade agreements at a time when trade deals are key elements of the EU's geopolitical interests, and trade policy a crucial instrument to increase its global influence.

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