Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon
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The Treaty of Lisbon will grant the European Union (EU) an exclusive competence for Foreign Direct Investments (FDI) as part of the Common Commercial Policy (CCP). The article outlines the historic background of the competence beginning with the EEC Commission's proposal for a regulation instituting a guarantee system for investments in third countries in 1972. The Commission hereby referred to the CCP as a legal basis. Attention is drawn to the revisiting of the topic in the context of GATT/WTO negotiations. The reasoning of the ECJ in its Opinion 1/94 clarified that FDI did not fall within the scope of the CCP. This resulted in continuous efforts of the European Community to extend the scope of the CCP. The different suggested approaches, drafts and proposals that were discussed during several Conferences of Representatives of the Governments of the Member States and sessions of the European Convent are entirely examined.

The article focuses on the scope of the new exclusive competence of the EU. The term “Foreign Direct Investment” is defined by using recent ECJ decisions on the fundamental freedom of establishment, European secondary law and the definition of the OECD and the IMF. Especially a concept paper of the Working Group on the Relationship between Trade and Investment is regarded as important for the definition. It is concluded that a transaction will regularly qualify as FDI, when an investor owns 10 per cent or more of the shares or voting rights in a company. If an investor holds less than 10 per cent of the shares, the investment should be assessed by using a holistic approach that determines six criteria: representation in the Board of Directors; participation in policy-making processes; inter-company transactions; interchange of managerial personnel; provision of technical information and provision of long-term loans at lower than existing market rates. Portfolio investments and investment protection against expropriation will not be part of the CCP and remain in the competence of the Member States, although they are commonly part of Bilateral Investment Treaties (BITs). The exercise of the new competence shall not affect the internal distribution of powers between the EU and its Member States. It is considered that according to this the external competence of the EU to conclude international agreements extends beyond the internal competence to implement these agreements. For these reasons future EU BITs are expected to be concluded as mixed agreements.

The existing BITs of the Member States will generally remain in force alongside the respective EU BITs. But the Member States are pursuant to Article 307 EC and Article 351 TFEU analog respectively obliged to take appropriate steps to eliminate incompatibilities with Community law, especially regarding conflicts with respective EU BITs as part of the EU law. Member State BITs will have to be amended or terminated in this case. The EU will have to respect the post-termination protection that is commonly contained in BITs of the Member States, in order that Member States can comply with their obligations under the BITs entered into with third countries. Member States will not be allowed to conclude BITs that cover FDI under the Lisbon Treaty. Member States are even obliged to refrain from concluding such BITs at least from the date of ratification of the Lisbon Treaty according to the Kramer judgement of the ECJ.

The article discusses whether Article 75(1) TFEU offers the possibility for the EU to take action against Intra-EU BITs. Consequences for Investment Guarantees are also
covered. The author concludes that the competence for FDI leads to issues that are unsolved to date, especially with regard to the EU’s lack of membership in the ICSID.