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THE PHENOMENON OF MIXED AGREEMENTS – BETWEEN PUBLIC INTERNATIONAL AND EUROPEAN UNION LAW

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Today after many years of concentration on various areas of research my current ambition is to come back to the beginnings i.e. analyze some special legal aspects of EU external relations. This paper, that intends to be a small tribute to the memory of Professor Karol Wolfke, is concerned on the Union's international agreements of the most important category. They seem to be even more interesting as they turn out to be an unusual source from the standpoint of public international law.

I. GENERAL UNDERSTANDING AND SCOPE

Mixity seems to be a phenomenon on the edge between EU and international law and its multifaceted nature has become a very popular notion that needs to accept a variety of approaches and is therefore deserving of the careful attention of many scholars.[1] Being definitely worthy of more careful consideration, at the same time it is not an easy object to analyze as useful points of reference are lacking. What's more, various aspects of mixed agreements considered even as having essential meaning within the framework of EU law analysis and belonging to quite popular topics may not seem to be particularly key from an international law stand point – to take direct effectiveness with its impressive case law as an example. In most of papers dedicated to mixity special attention is paid to the typology or typologies of mixed agreements, which for the Union legal order is doubtlessly essential but in terms of international relations only their particular matters might turn out to be worth considering.

There is no doubt, however, that long ago they turned out to be a very useful and indispensable mode of shaping the external relations of the European Communities with the outside world to such an extent that it

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[1] D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (1983); MJFM Dolmans, *Problems of Mixed Agreements* (1985); A Rosas, 'Mixed Union – Mixed Agreements' in M Koskenniemi (ed), *International Law Aspects of European Union* (1998) 125.

would even be difficult to imagine efficient fulfilment of their international role without them. Taking only this into account, it may come as a surprise that the sole term "mixed agreements" was not provided by the original text of the EEC Treaty when the first one – the Association Agreement was concluded with Greece in 1961.[2] After subsequent attempts to regulate them in Community primary law, again under the Lisbon Treaty, any explicit reference to them vanishes. This lack of express wording definitely does not help to make and provide any definition and specify their scope and actually such a label has been used to cover versatile kinds of legal acts binding especially the European Community internationally.[3]

Probably the most special type, not fitting into the model this paper is concerned with, would be the so called cross-pillar mixity that used to be popular long before the Lisbon Treaty touching upon as any mixity challenge as being of limited competences. [4] It, however, referred more to relations between the EU or the EC and particular institutions as well as to disputes regarding the legal basis of both Treaties. So scopes of such agreements could cover two distinct pillars expanding for example from the Community's activities towards Common Foreign and Security Policy or even more distant past second and third pillar combinations like on the processing and transfer of passenger record data by air carriers. Even though Members States did not necessarily appear there as signatories, some used to suggest so called implied mixity i.e. indirectly binding or even express inclusion into set of provisions those that referred to them.[5] But there is no doubt that the role of these agreements was never considered to be more than limited and the lack of formal participation of Member States meant no special multilevel or triangular relations mixity is so much interesting for. After the Lisbon Treaty entered into force and cross-pillar relations became history they are rather outdated.

Definitely the most interesting are still classical bilateral agreements as in their case the special nature of relations between the participants and the complexity of the fulfilment of duties are particularly noticeable. According to the widely accepted understanding they are signed and concluded by a third state on one hand and EC/EU along with all the Member States on the other creating one "Union's" Party. That is why such an agreement may maintain its bilateral nature despite so many participants who are expected to ratify it in order for it to enter into force. Even if their limited competences do not allow them to regulate matters covered by it as a whole, which may suggest a kind of division into particular parts, it is still one and the same legal act. That this allows all of them to express their willingness

[2] Agreement establishing an association between the EEC and Greece, [1963] OJ C 26/1.

[3] See more about understanding of mixity J J Feenstra, 'A Survey of the Mixed Agreements and their Participation Clauses' in D O'Keeffe and HG Schermers (n 1); J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (1983) 252-77.

[4] See RA Wessel, 'Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements' in C Hillion and P Koutrakos (eds) *Mixed Agreements Revisited. The EU and its Member States in the World* (2010) 30.

[5] C Hillion and RA Wessel, 'Restraining External Competences of EU Member States under CFSP' in M Cremona and B de White (eds) *EU Foreign Relations Law: Constitutional Fundamentals* (2008) 79.

to be bound towards the third party by common rights and obligations based on the principle of additional reinforced unanimity makes research into them so interesting.[6]

Mixity not only defines the way in which the Union and Member States organize their relations with the outside world but, requiring such a special collective effort, it also shapes mutual relations within the Union in this area, making mixed agreements such a special, and sometimes confusing, source of law. Besides this special bilateralism makes even mixed procedure more and more challenging with consequent enlargements. Refusal of ratification by one out of 28 EU members results in the impossibility of the agreement entering into force affecting the Union as a whole and all the rest of States that have already done it. Parties may then accept in advance provisional application of certain provisions in the form of the exchange of letters or more often conclude the so called interim agreement incorporating matters unproblematic in terms of EU competences – mainly on trade and trade related matters. This can be executed right away thanks to smooth EU procedure and without waiting for Member States ratifications.

II. REASONS FOR MIXITY

As already suggested the main conventional reason for the participation of Member States and choosing such a complicated form of international relations is obviously connected to the challenge of powers. First of all mixity is seen as the best way to avoid permanent competences disputes within the Union – both Member States with the Union and even among themselves. What's more, frequently one cannot even find a clear demarcation line between the respective spheres of their competences that may be left undefined when an agreement is concluded and then this is rightly considered as advantageous. Nonetheless it seems to be more complicated than a certain situation of a particular agreement's scope that crosses the line beyond the treaty-making competence of the Union which is not capable to conclude it effectively. In such a case Member States are necessarily supposed to complement it, assuming the rest of commitments in a quite predictable way. But if it is only a question of power one may then ask why not to divide such a scope definitely onto two parallel parts with even parallel application and responsibility as being, practically, more convenient. However this kind of approach would generally undermine this obvious expectation to treat a particular mixed agreement as a single act with complex interrelated provisions creating multilevel triangular rights and obligations. What should also matter, anyway, is that even if the Union's competence occurs to cover the whole scope of an agreement it shall not be tantamount to the exclusion of the corresponding competence of the Member States.

Generally, in the case of the European Union, such a strict and simple division is rather not corresponding to a special nature of its legal order and

[6] Cf. definition M Maresceau, 'A Typology of Mixed Bilateral Agreements' in C Hillion and P Koutrakos (n 4) 12.

therefore here mixity must also be special. It cannot be comprehended without taking also into account increasing political and economic interdependence within the Union's Party that must be reflected in external treaty-making. In many cases nobody might be interested in separate actions as appearing to be inefficient or even practically impossible - even when, due to the evolution of EU competences areas that are currently covered by collective action, in future they will be allowed to become part of regular Union's agreement without formal obligation of the Member States' participation. Therefore, qualifying competences as the main ground to choose mixity, one should be aware that the circumstances of its application are much more complex especially in terms of balancing competitive interests. On the one hand the European Union intends to become a global player and on the other Member States keep struggling for maintaining their international role even in areas overtaken by supranational expansion and influence over the Union itself not allowing the organization to abuse especially its non-exclusive competences.

Actually it should not be taken as a surprise that mixity may be unavoidable even in cases where any question of limited competences does not arise in reality.[7] As practice shows it proves quite easy for Member States to impose the mixed procedure only by the demand to add particular provisions of dubious necessity such as regarding political dialogue. As it is typically reserved for them and requires their involvement without any exceptions, it has turned to be a convenient way to guarantee their participation even if such provisions do not bring any practical meaning for mutual relations. Certainly wide interpretation of the Union's implied powers could definitely help to avoid mixity in those situations, but only if it would follow purely legal reasoning without all the calculations of the above mentioned nature that actually dominate. However, the Court of Justice did not seem to accept that unconditionally in every situation, ruling e.g. in the judgement in Portugal v. Council, that the participation of the Union's Members in the conclusion of an agreement was not necessary even if it covered matters laying outside EU competencies[8]. Although that particular case regarded agreement with India concerning mainly development cooperation with only some inclusions of non-Community areas at that time like e.g. culture or tourism, and it would be definitely not possible to achieve so easily, if at all, in the sphere of purely political nature where States are extremely sensitive to losing influence. More generally the Court found that, in order to accept them to be excluded, the above areas have to play only an ancillary role within the whole agreement's scheme compared to what might be called its essential unalterable object. At least then the mere inclusion of provisions of the first category shall not automatically guarantee Member States' participation – of course as long as it is possible to identify their function properly.

[7] As to considerations regarding the unavoidability of mixity see C Timmermans, 'Opening Remarks – Evolution of Mixity since the Leiden 1982 Conference' in C Hillion and P Koutrakos (n 4) 15-16.

[8] Case C-268/94 *Portuguese Republic v Council of the European Union* ECLI:EU:C:1996:461.

III. THE INTERNATIONAL ROLE OF MIXED AGREEMENTS

The special combination of legal and political aspects described above is sometimes called dialectics of the integration process and mixity seems to be the only way to reconcile all of them.[9] Tens of mixed agreements that have been concluded and applied successfully for decades are the best confirmation of how attractive and efficient instrument of international relations of the Union and its Member States it has become, facilitating assuming of a role of a global player in many areas far beyond just trade matters. Among them there were the most important ones with third states as well as agreements being a legal basis of the organization's participation in essential multilateral treaties and organizations like United Nation Conventions on the Law of the Sea, the Kyoto Protocol, ILO, WTO, FAO or even the Open Skies Agreements.[10]

What should be particularly emphasized here are agreements concluded with potential Member States that could serve as legal instruments of pre-accession preparations - designed directly or even indirectly to lead in the future to coming to full accession.[11] Introducing special and complex relations between the Community and Member States with third States they actually commenced mixed bilateral procedures at the beginning of 60ties. For the first time, it was the already mentioned Greek association, actually finalized with EEC membership several years later, unlike in case of the following agreement with Turkey from 1964, still in force[12]. But that second agreement, which has lasted for so long with well-functioning own organs and has been annexed seriously through decades, must have occurred to be much more interesting from the legal and academic point of view. It refers particularly to the developed case law thanks to the Court of Justice having had a chance to take this act as a some kind of a model of mixity and consider carefully different aspects of mixed agreements in general and nature of Community relations.

A bit similar to the Greek pattern of integration has been used since the beginning of the 90ties in relations with countries of Central and Eastern Europe starting with Poland, Hungary and Czechoslovakia, latter expanding even into the Balkans. That does not necessarily mean that agreements of the 60ties could be compared with those latter ones from the time after the collapse of communism. But also, the Polish agreement seems to be extremely modest in comparison with one of the latest association agreements with Ukraine that counts thousands of pages and hundreds of provisions that deliver far more advanced legal topics to consider. However at least some of Court of Justice's judgements regarding rights of Polish citizens of the pre-accession period steaming from this act or more generally its legal effects are to be listed among the most significant for the

[9] Timmermans (n 8) 3.
[10] J Klabbers, *An Introduction to International Institutional Law* (2002) 294.
[11] See more in A Ott and K Inglis (eds) *Handbook on European Enlargement* (2002).
[12] Agreement establishing an association between the EEC and Turkey, [1963] OJ C 113/2.

development of EU law in this area.[13] What's interesting however, initially even this category of so called Europe Agreements from the 90ties, was rather seen as an alternative to full membership trying to establish advanced durable relations with European non-member partners for quite a long period and the later change of attitude resulted from new political decisions.[14]

There is no doubt then that what distinguished them from e.g. trade agreements was, again, a real political dimension which justified application of mixity also in case of relations with two other neighbouring groups of states that are to be considered very important for the global role of the EC/EU – post-Soviet countries, Russia itself included as well as Southern Mediterranean states. Therefore in the case of more distant EU partners like South Africa or South Korea actual choice of the same procedure for trade and development cooperation does not seem to be equally convincing and what prevailed was a strong pressure from Member States.

An interesting example would also be relations with Switzerland, which did not accept membership of the European Economic Area. What the Swiss government decided to do afterwards was to negotiate a whole set of various separate agreements being interconnected by a "termination clause" providing simultaneous entrance into force and the termination. Most of these sectoral agreements were just bilateral without mixity, except e.g. one regulating the free movement of persons that required ratification by all the Member States. It actually conditioned application of all the others but could be understandable due to the sensitivity of this area especially after the EU enlargement from 2004 when direct participation of States seemed to protect the national interests of Switzerland better. So what may determine or justify the demand for all Member States to ratify is not necessarily connected with the geographical location of a partner but just a special nature of a particular sector and that was also the case of agreements on combating financial fraud or regulating the so called "Open Skies".[15]

IV. DIVISION AND COMPOSITION OF POWERS IN APPLICATION

One of the most fascinating aspects of mixed agreements concerns the challenge of how to make use of these combined competences and assure such a complex participation of Member States and the Union in order to apply one common agreement.

1. The necessity of mixity "management"

Such a special kind of the division of powers that affects both internal affairs and also the external appearance of the European Union on the international scene inclined some academics to evaluate mixity by reference

[13] Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616; Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer* ECLI:EU:C:2002:57.

[14] K Inglis, 'The Europe Agreements Compared in the Light of Their Pre-accession Orientation' (2000) 37 CMLRev 1173-1210.

[15] Maresceau (n 6) 24-27.

to so called Federal Principle.[16] That is not necessarily tantamount to the presumption of the Union as a federation but seems to respect the output of the traditional case law of the ECJ regarding its special nature as an extraordinary supranational organization with autonomous legal order. What might be particularly interesting in terms of the legal construction of mixity would be a distinct mode of relations with and among Member States which supranationality is based on, with special emphasis put on the idea of unity within diversity and for some that seems to be a suitable environment for invoking the European tradition of the open federal state.[17]

Certainly real federation is recognized as one subject of international law whose members are only allowed to conclude limited international treaties which is not the case here. But on the other hand the developments of the Community's treaty-making power, and especially the doctrine of implied powers and parallelism, do not allow to level current relations between the organization and Member States to the typical model of international organization, nor see both of them as any other party to any international treaty. The extent and the way their competences were limited or they have even been deprived of their traditional role and international standing is rather distant from the classical model - both as a consequence of the application of explicit Treaty provisions as well as developments of the case-law symbolized by famous ERTA ruling[18], Opinion 1/76[19] and Opinion 1/94[20]. Therefore searching for some adequate conceptualization even of the above kind should not be surprising even if the "federal" element is to be considered rather symbolic in this context.

Already article art. 216 (2) TFEU provides a special solution regarding any EU international agreements, non-mixed ones included since they are supposed to be binding on Member States. It does not seem to correspond to the wording of the Vienna Convention on the Law of Treaties for International Organizations, where despite initial preparatory attempts, the final text excludes any Members' association with obligations of the organization that would secure performance of its agreements. Even if the above article is intended to have rather internal implications for the EU legal order, and third states are not given an opportunity to start any dispute under international law against its Member State for their non-fulfilment, it still seems to be un-typical situation. What matters for example is the competence of the European Commission to bring such a matter before the CJEU or the possible direct effectiveness of such an agreement's provisions guaranteeing their almost automatic enforcement by the national administrative authorities and courts, even if this second option might be limited.

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[16] R Schutze, 'Federalism and Foreign Affairs: Mixity as (Inter)national Phenomenon' in C Hillion and P Koutrakos (n 4).

[17] See R Schutze, *From Dual to Cooperative Federalism: The Changing Structure of European* Law (2009) ch 1.

[18] Case 22-70 *Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1971:32.

[19] Opinion 1/76 ECLI:EU:C:1977:63.

[20] Opinion 1/94, ECLI:EU:C:1994:384.

In case of mixed agreements some federal connotations might not be so groundless in terms of their function of coordination of external relations in a special way. It turns out to be necessary, particularly when for the same agreement the European Union is to be solely entitled to act externally in some areas in a way not reminiscent of regular international organizations but at the same time neither the organization nor Member States enjoy full power in all of them. The only, but very challenging, solution would be to "unite" their competences in an advanced combination reducing any divisions of treaty-making powers between them solely to internal affairs, without exploiting shared competences separately. This is the very conceptual framework of academic proposals to understand mixity as the hallmark of the European Union's foreign federalism and to search for comparisons to national constitutional experiences of states such as Germany or the United States.[21] It should be mentioned, however, that not everybody follows this path and some scholars put emphasis, rather, on undermining or degrading the special role of the Union in international relations as representative of the collective interests even in the above situations, although for most commentators it is still a necessary evil.[22]

There is no doubt, however, that above mentioned challenge requires a distinctive approach that is sometimes described as management of mixity, which is usually also connected to interinstitutional bargaining, but definitely the problem of relations between the Union and the Member States is the leading one. There have been long disputes over the years about how to set the centre of gravity and how to manage the exercise of shared competences. It was definitely the case law of ECJ to specify the necessity of some kind of unity in international representation – both during negotiations and conclusion as well fulfilment of the commitments entered into.[23] The Court tried to introduce some kind of discipline into mixity, leaving no doubt that respect for this might be judicially sanctioned, and putting an emphasis on particularly close association between the institutions of and the Member States in the whole process as a guarantee of proper application of the agreement within the Union and among them.[24] In the famous Commission v. Council case (C-25/94) the Court has collected all his historical findings:

> It must be remembered that where it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from

[21] Schutze (n 17) 80-81.

[22] See A Barav, 'General Discussion' in C Timmermans and ELM Volker (eds), *Division of Powers between the European Communities and their Member States in the Field of External Relations* (1981); and CD Ehlermann, 'Mixed Agreements: A List of Problems' in D O'Keeffe and HG Schermers (n 1).

[23] It is well represented especially by Opinion 1/78 ECLI:EU:C:1979:224, paras 34-36; see also Opinion 1/94 above n 19; and Opinion 2/00 ECLI:EU:C:2001:664.

[24] C Timmermans, 'Organising joint participation of EC and Member States' in A. Dashwood and C Hillon (eds.) *The General Law of EC External Relations* (2000) 239-241.

> the requirement of unity in the international representation of the Community (Ruling 1/78 [1978] ECR 2151, paragraphs 34 to 36, Opinion 2/91 [1993] ECR 1-1061, paragraph 36, and Opinion 1/94 [1994] ECR I-5267, paragraph 108). The Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard (Opinion 2/91, paragraph 38).[25]

It should be also clear in this contest why it is so essential according to the Court that, especially, mixed agreements in their entirety must form an integral part of EU legal order and shall be considered as a source of EU law regardless of the sphere of competence. Well established case-law leaves no doubt as to that – for example regarding one of WTO Agreements i.e. TRIPS[26] or the Aarhus Convention[27]. At the current stage of the development of the integration process there is no ground to maintain that this does not extend to provisions belonging to the sphere where Member States entered into commitments exercising their own powers. Such a qualification may not, however, determine automatically the mode of implementation where drawing the dividing line between spheres of competences matters much more.

In order to imagine how challenging mixity management might turn out to appear, what should be taken into consideration is the relationship between Member States and the Union under such an agreement where the particular matter falls within the non-exclusive competence of the Union and consequently in part within that of Member States and the practical division of responsibilities is difficult to achieve, or even imagine. But the reality of mixity is far more complicated mirroring the complex nature of the Union, especially that its objectives are supposed to be pursued not only thorough the conferring upon the Union of certain competences or through actions taken by institutions. There are also respective obligations imposed upon the Member States for sake of these objectives, which may not imply any correlative powers for the Union. Moreover, even those parts of mixed agreements that are within the sphere of their competences might not be allowed to be applied completely independently as if it was autonomous regulation. Therefore generally, it is rather expected that legal authority will be exercised jointly by both kinds of participants and, especially, Member States having even their own competence should share them with the Union taking advantage.[28]

Paradoxically, the above findings resulting from special supranational nature of the EU legal order do have certain impact on the so called

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[25] Case C-25/94 *Commission of the European Communities v Council of the European Union* ECLI:EU:C:1996:114, para 48.

[26] Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos Ld[a] v Merck & Co. Inc. and Merck Sharp & Dohme Ld[a]* ECLI:EU:C:2007:496, paras 31, 33.

[27] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky ECLI:EU:C:2011:125.*

[28] J Heliskoski, 'Adoption of Positions under Mixed Agreements' in C Hillion and P Koutrakos (n 4); and Rosas, (n 1) 131-32; and A Apella, 'Constitutional Aspects of Opinion 1/94 of the ECJ Concerning the WTO Agreement' (1996) 45 ICLQ 440 at 460.

international law approach and the international standing of the complex Union Party of the mixed agreements, even if it might seem to be a coincidental link.[29] Consequently international commitments of all its participants do not have to be a function of the division of competences. Even if for some agreements, declaration of competences determining the extent of their international responsibility could be submitted, such a dividing line could occur quite independent of the determination of responsibilities in terms of real internal division of powers within the Union. But generally, even if such a clearance of allocation of respective obligations seemed to be very convenient for a third party anyway, it was not offered at all in most of cases. From the standpoint of international relations, it is in exchange strongly emphasized that for outside world the Union and the Member States are seen as unique contracting parties that bear joint and several responsibilities for the entire mixed agreements' execution.

Then, on the one hand these external settlements cannot certainly have any pre-emptive effect affecting the internal division of competencies. But on the other hand, conclusion of a mixed agreement implies that commitments towards third states derived from it must be independent from intra-Union relations and this responsibility is of the single contracting party and for whole act as EU and Member States are seen as generally engaged as an indivisible group. It is supposed to be based on a mutual mandate, well-founded in these special rules of supranational legal order, to be analyzed in next part of this paper. Justification for that is the objective to establish international respective international status of unified system with unified modus operandi on the world scene, in order to be affirmed as unitary global actor and that may also help to understand why the jurisdiction of the Court of Justice in case of mixed agreements, described below is so much expanded.[30]

2. The duty of loyal cooperation

Taking into account both how difficult is to manage such complicated multilevel relations of participants that are supposed to act as one Party and guarantee the uniform application of a mixed agreement as well as the Member States' obligation to exercise their competences consistently with Union law, it should not be surprising that what is needed to handle that must be more advanced than the principle of *pact servanda sunt*. In order to provide the necessary level of unity along with comprehension and realization of common interests, the system of the European Union offers the principle of loyal cooperation provided in art. 4, 3 TEU.[31] Probably mixity could not become such a phenomenon and the above described challenges could not be faced efficiently having agreements functioning properly without such an indispensable rule, introducing special ties and obligations among Member States and towards the Union. That is generally

[29] E Neframi, 'Mixed Agreements as a Source of European Union Law' in E Cannizzaro, P Palchetti and RS Wessel (eds), *International Law as Law of European Union* (2012) 340-344.

[30] E Neframi (n 29) 340-344.

[31] See more regarding principle of loyal cooperation and its role as more advanced framework than just reciprocity D Kornobis-Romanowska in this volume.

one of the foundations of the whole EU having great political and legal meaning but analyzed context proves the best example of its more international impact - not limited only to the internal existence of the Union.[32]

One of the main reasons of its effectiveness is that duty steaming from this principle entails legal and enforceable obligations. As confirmed by the case-law of ECJ represented for example by the Dior judgment, judicial and political authorities of the member States and the Union are legally bound by this to cooperate closely in an enforceable way.[33] It was also evoked in the ruling in the Commission v. Council regarding the Community's participation in the FAO, which resulted in being a very interesting case touching upon one of the important aspects of mixity – who is to be granted voting rights in an international organization[34] The Court decided in favour of the Commission's position that it was the Community competence of Community. In other rulings it also left no doubt that the essence and scope of above duty could not depend on whether the Union competence would be exclusive or there might exist any right of the Member States to enter into obligations towards third states.[35] What should be further commented bellow is that it is commonly used as a justification for Court's competences to provide unified interpretation of the agreement even in a case of the provision lying outside the scope of EU law.

What's interesting – the pre-Lisbon version of this principle as expressed in the previous Treaties (art. 5 and later 10 of TEC) was mainly concerned with the Member States' duties towards common interest. For mixed agreements this is definitely its key function, taking into account how important is to maintain their subordination, especially that these acts are commonly seen as protecting national external competences or more generally stronger influence on relations with the outside world. Since the very beginning though the duty of loyal cooperation has required Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. As some kind of a counterbalance to that common approach, it provided special justification for their diligence for the Union's and their own obligations steaming from the agreement, especially towards the organization itself. As two cases against Luxemburg[36] and Germany[37] show

[32] See more K Mortelmans, 'The Principle of loyalty to the Community (Article 5) and the obligations of the Community Institutions' (1998) 5 Maastricht Journal of European and Comparative Law 67; and Timmermans (n 25) 239 at 241; and J Temple Lang, 'Article 5 of the EEC Treaty: the emergence of constitutional Principles in the case-law of the Court of Justice' (1987) 10 Fordham International Law Journal 503.

[33] Joined cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* ECLI:EU:C:2000:688.

[34] Case C-25/94 (n 25).

[35] See case 804/79 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:1981:93.

[36] Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxemburg* ECLI:EU:C:2005:341.

[37] Case C-433/03 *Commission of the European Communities v Federal Republic of Germany* ECLI:EU:C:2005:462.

it is even more advanced prohibition of any action that would compromise the achievement of the common tasks. Member States may be under the duty to closely cooperate with EU institutions, if not even to abstain from own negotiations and conclusion of international agreement, even if they are still competent in the area to be regulated, while the Commission has been mandated by the Council to negotiate with the same state the Community agreement regarding the same subject.

However the current wording of the principle provided in art. 4 (3) TUE is more expanded and universal. It confirms long standing case law of the ECJ emphasizing that not only Member States but also Community institutions have a special duty of close cooperation in fulfiling the commitments undertaken by them under joint competence when they concluded a mixed agreement. So, at present, loyal cooperation implies imposing certain burdens also on the Union, as the first sentence of this article provides that both the organization and Member States are supposed, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. Therefore even if Union acts in areas of its exclusive competences covered by the mixed agreements, its institutions are compelled by the duty to cooperate with Member States respecting the spirit of loyalty although it seems to be more limited here than in case of Member States rather – to the "best endeavour" than enforceable obligation.

As a consequence, nowadays the duty of loyal cooperation seems to have a much more mutual nature. So as IMO case shows "none the less, any breach by the Commission of Article 10 EC cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, in breach of that State's obligations (…). Indeed, a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of Community law".[38] But as best described in Opinion 2/91 it operates in all the aspects of negotiations and fulfilment of the agreement obliging both MS and Union institutions to take all the measures necessary so as best to ensure such operation.[39]

Despite the above considerations, implications of this duty do not go so far to impose simple and unconditional unification of approaches among all above participants of Union's Party and even if commitments are supposed to be treated as joint, it is rather more balanced plurality within the more advanced unity inherent in the mixity. Even if that may not seem to guarantee its ultimate efficiency is more natural to the EU political and legal order confirming its unique character. So the emphasis is put, rather, on constraining coordination or even looser cooperation providing enough degree of coherence and consistency of the external activities and international representation - without merging, however, all voices into one although making them "speak the same language".[40] Therefore it does not even necessarily mean that Member States and institutions must always act

[38] Case C-45/07 *Commission of the European Communities v Hellenic Republic* ECLI:EU:C:2009:81, paras 25-26.
[39] Opinion 2/91 ECLI:EU:C:1993:106.
[40] C. Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"' in C Hillion and P Koutrakos (n 4) 92.

jointly on the basis of a co-ordinated position when implementing agreement - or they cannot act at all, as that would be too close to the unity in international representation. So outside the scope of exclusive competence of the Union, the duty of cooperation rather concentrates on the special obligation of the conduct of Member States to use their best efforts to reach a common standing with the Union and ensure it. It should not be even fully excluded that when it turns to be not possible, they may even defend their own interests in more balanced way i.e. no obligation of result where competences of the Union and Member States meet. At the same time also the Union itself is mutually supposed to take into account and to give full effectiveness to their shared competences.[41]

In a case of the above described arrangements the impact of the principle of loyal cooperation seems to be rather predictable in terms of the special nature of the EU system even if it may appear to be far reaching from the stand point of typical international relations. But what might be particularly interesting is the application of mixed agreements in areas pertaining to reserved, exclusive competences of Member States, as at first glance it may seem that they are to be generally free to act within such a scope.[42] To accept it, however, without any conditions, would mean to allow that other, more "union" provisions of the same act could be negatively affected or, even more, the general Union interest would be in jeopardy. As naturally all that provisions are interrelated it is quite obvious that often a breach of a particular one under an agreement may undermine the performance, of many others if not all, of its rights and obligations, especially when the inclusion of a clear statement regarding the division of scopes into two parts is missing. Then again even if according to Treaties, spheres of competences may look to be distinct, with the guarantee of exclusivity included, in none of the cases may they be exercised autonomously or separately without taking into account their interconnections.[43]

Consequently, also joint international liability for the fulfilment of whole set of rights and obligations steaming from the agreement is rather commonly accepted, especially that it seems to be more secure from the stand point of the third party. Such a responsibility must enhance the common understating of the Union and Member States that agreement must be complied with in full – as long as the third party is not able to sanction one of them in particular.[44] From the Union's stand point it confirms the above mentioned task to avoid any deficient fulfilment of its obligations that would have negative impact upon Member States. But as far as Member States are concerned it seems to have more profound meaning that was specified by the Court of Justice in the famous case of Kupferberg. There it

[41] C. Hillion (n 40) 103-104.
[42] I McLeod, I D Henry and S Hyett, *The external relations of the European Communities* (1996) 149.
[43] A Barav, 'The division of external relations power between the European Economic Community and the Member States in the case law of the Court of Justice' in C Timmermans and ELM Volker (n 23) 29, 90.
[44] R Hooldgard, *External Relations Law of the European Community – Legal Reasoning and Legal Discourses* (2008) 163.

was found that in ensuring respect for the commitments arising from an agreement concluded by the Community institutions they fulfil their obligation not only towards the non-member country concerned but also, and above all, towards the organization, which has assumed responsibility for its due performance.[45]

Although the above case concerned a purely Community agreement, the Court did refer to it later ruling on mixed ones as for example with Turkey.[46] Therefore being jointly liable for ensuring full compliance with the obligations steaming from the whole agreement Member States have no choice but sincerely cooperate with each other and first of all with the Union, always respecting the principle of loyal cooperation, no matter of the divisions of powers between them. Along with the general obligation to facilitate the achievements of the Union's tasks and to refrain from taking actions that would compromise its effectiveness, it determines more detailed measures, such as in the case of foreign policy, which would have to respect common commercial policy framework.[47]

3. Jurisdiction of the Court of Justice of European Union

The above findings seem to have a serious impact on the expansion of the Court of Justice's jurisdiction over mixed agreements. Already the principle of loyal cooperation has made it rather hard to question this process by Member States especially that, as mentioned previously, the practice worked out by the Council resulted in decisions on conclusion with not necessarily explicit limitation of Community participation. The importance of that can be understood in terms of the mentioned presumptions that these acts shall form an integral part of EU law and consequently be submitted to the rules of uniform interpretation and application over their whole subject matters. The Court has turned out then to be seen as a guardian of such uniformity, which is not to be achieved if any restriction of its jurisdiction would be accepted – limited particularly to those parts of mixed agreements that could be included into exclusive Community/Union competence.

There is no doubt that these kinds of restrictions would have very negative repercussions taking into account how serious an impact Court's judgments have had for the proper functioning of acts so complex as mixed agreements. What should be mentioned at first is certainly the preliminary rulings procedure – fully indispensable for their proper application as well as actually very popular among national parties in domestic courts to settle various disputes including non-EU subjects and rights and obligations steaming from international law. But enforcement proceedings being initiated in response to a Member State's failure to fulfil obligations stemming from a mixed agreement seem to be even more relevant for the proper understanding of the duty of loyal cooperation. Unfortunately case-law has mainly concentrated, so far, on areas within Community

[45] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* ECLI:EU:C:1982:362, para 13.
[46] Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400, paras 9-11.
[47] P Koutrakos, *Trade, foreign policy and defence in EU Constitutional law* (2001) 138-39.

competences and therefore general findings concerning all the scope covered by mixity are to be more presumed.[48]

It is good to recall the way Court already handled this problem in the famous preliminary ruling in the Demirel case[49] – one of the most known as far as mixed agreements and especially the one with Turkey is concerned. On the one hand it was not definitely confirmed as a general principle that the Court should have had jurisdiction over provisions regulating commitments entered into in the exercise of Member States' own competencies. But, on the other, it was admitted for this particular act in its entirety on the ground that the association agreement created special links with a non-member state, which was supposed to empower the Community to guarantee commitments in all fields covered. The Court did not have any problem to declare that Member States were in breach of Community law by failing to comply with provisions falling outside the Community exclusive competence.[50]

In the famous Hermes case classified as a milestone for this line of case-law Court's jurisdiction was confirmed regarding the provision of one of the WTO agreements – TRIPS that was to be applied both to situations falling within the scope of national and Community law – again for sake of uniform interpretation.[51] This particular agreement was also the subject of the already mentioned Dior case whose impact, however, got weakened due to its procedural nature – the enforcement of trade marks by means of measures to be applied both to Community and national one. But the Court referred there to the obligation of close cooperation in fulfilling the commitments stemming from the whole agreement and the need of uniform interpretation. These kinds of findings seemed to allow reading of these rulings as acceptance of full Court's competences to be used in the same way in every situation falling within its regulation.

Well, in general case-law is far from clear-cut as the Court did tried to confirm its broad jurisdiction over mixed agreements without, however, express acknowledgement whether it is to cover their total scope no matter whose competences are on the agenda. The best example here would be one more case regarding TRIPS - Merc Genericos[52] where the referring national court was asking about another provision which tended to be included rather into ones beyond the reach of above jurisdiction as no Community measures were adopted within the scope covered by this. As a starting point the ruling recalled obvious Treaty provisions confirming that international agreements were an integral part of the Community legal order along with statements of lack of any clear division of competences between the Community and Member States. Basing on that, the Court could declare generally that, within the TRIPS framework, it did had jurisdiction to give preliminary ruling concerning its interpretation, concentrating though subsequently on

[48] P. Koutrakos, 'Interpretation of Mixed Agreements' in C Hillion and P Koutrakos (n 4) 116.
[49] Case 12/86 (n 44).
[50] Neframi (n 29) 326-328.
[51] Case C-53/96 *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV* ECLI:EU:C:1998:292, para 17.
[52] Case C-431/05 (n 26).

defining the obligations belonging to scope where the Community had thereby assumed them - in order to interpret provisions belonging to this category.[53]

It does not seem, however, acceptable to find that jurisdiction of the Court shall be limited only to matters in relation to which the Union has already adopted harmonizing measures. A more general reason is that it would generally undermine any opportunity to enter into agreements in a particular area, if the specific matters covered by it has not been yet the subject of rules at Union level or had been only partially, while such a competence was confirmed anyway e.g. in MOX plant case.[54] In another case the Court confirmed the breach of obligations stemming from Community law, by France, when implementation of the mixed agreement was failed despite it concerning matters not covered by Community legislation.[55] On the other hand certainly existence of such legislation is very helpful in leaving no doubts as to Union's competences along with the Court's one to interpret. What's more as far as the Court's jurisdiction is concerned it turned out that it was enough to find even potential impact of a particular agreement provision on existing supranational legislation to accept it. The development of the case-law has expanded it onto any situation where such jurisdiction seems to serve the interest of the Union, which is to be quite a capacious and flexible expression, justifying some kind of spill-over effect of Court interference into areas considered to be governed by national competences.[56]

Even if the above seems quite helpful, it should not be forgotten, however, that following this reasoning means to accept that instead of the general jurisdiction of the Court over mixed agreements there is always some kind of a condition or a connecting factor necessary for it to be proved. Certainly it is not beyond imagination to assert that the above "interest" already covers uniform application of EU law and consequently proper implementation of whole mixed agreements within this order – actually quite close to the spirit of the principle of loyal cooperation offering a more universal solution. But it would be much better to follow the less ambiguous and very pro-Union reasoning of the Advocate General Colomer, in the previously mentioned Merc Genericos case, who strongly and expressly opted for unlimited jurisdiction of the Court, justifying it just by the need for uniform interpretation of the whole agreement. It was even emphasized that effects of such interpretation binding on everybody, even in fields beyond Union activity, would help Member States better comply with this principle. At the same time, however, no doubt was left that it should not have been seen as tantamount to any equivalent transfer of competences to the Community.[57]

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[53] Case C-431/05 (n 26) paras 31,33.

[54] Case C-459/03 *Commission of the European Communities v Ireland* ECLI:EU:C:2006:345, paras 94-95.

[55] Case C-239/03 *Commission of the European Communities v French Republic* ECLI:EU:C:2004:598.

[56] See also examples commenced by Timmermans (n 8) 5-6.

[57] Case 431/05 Opinion of Advocate General Ruiz-Jarabo Colomer ECLI:EU:C:2007:48, paras 55-59.

CONCLUDING REMARKS

Therefore, what should be mentioned at the end of this paper is that even if jurisdiction of the Court is to be subject to any discussion relevant to the division of competence and especially that it is entitled to give preliminary rulings concerning the interpretation of the whole agreement its mixed character shall be respected as far as implementation is concerned. Still then one of key purposes of its activity would be the determination which provisions fall under Member States' and respectively the Union's competences. National authorities are definitely accountable in this area but in cases of provisions belonging to their sphere of competences shall maintain a wider margin of autonomy. As proves the case originating from Slovakia regarding Aarhus Convention the best example of this is would be lack of capability to judge on direct effect.[58]

The above in no way undermines the special nature of acts analyzed in this paper that are to be essential sources of EU law as far as external relations are concerned and at the same time rather untypical international agreements.

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[58] Case C-240/09 (n 27).

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