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THE USE OF SHARED COMPETENCES IN THE EUROPEAN UNION'S EXTERNAL RELATIONS THROUGH MIXED AGREEMENTS

Summary

Throughout its treaty making powers, the EU tends to emphasize its international personality and identity. However, when it comes to the international relations, the Member States still have legitimate interests. Therefore, when the shared competences are applied through the mixed agreements, there are implications on both the Union legal order and to the international responsibility of the Union and the Member States. The mixed agreements dominate within the EU treaty practice. They reflect the legal and political reality, since the EU is not a single actor on the international scene. In terms of division of competence between Union and Member States, the mixed agreements raise many questions which will be briefly assessed in the paper.

Key Words: *European Union; External Relations; Shared Competences; Mixed Agreements; Doctrine of Parallelism.*

I. INTRODUCTION

The EU external relations cannot be completely understood without assessing the legal framework for its actions. The EU's formal participation in relations with third states and international organisations depends on its legal competences. According to Wessel, the legal framework at a minimum level creates political possibilities and sets the boundaries for any action by the EU.[1]

After the entry into force of the Lisbon Treaty, the European Union entered into a new phase as an international actor. Now it is only the European Union that acts on the international stage. And since December 2009, it replaced the European Community in all international organisations. Furthermore, the Lisbon Treaty increased the number of references to the role of the European Union in the world, as well as to the Union's relationship with the United Nations.

In this context, it is very important to emphasize, as the ECJ clarified, that the Union has "only those powers which have been conferred upon it" and they must be respected "in both the internal and the international action".[2] Therefore, it must be taken into account that the Union's external action is limited by the competences which it may exercise in accordance with the objectives set by the Treaties.

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[1] Ramses A. Wessel, 'The Legal Framework for the Participation of the European Union in International Institutions', in K.E. Jørgensen, S. Oberthür and J. Shahin, eds, *Assessing the EU's Performance in International Institutions*, Special issue Journal of European Integration, 2011, p.2.

[2] ECJ, Opinion 2/94 (*Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*), [1996] ECR I-1759, at I-1787, paras 23 and 24.

II. THE EU EXTERNAL RELATIONS COMPETENCES

External relations are of vital importance to the Union and to its future development. The representation and relations of the Union with international organisations and third states depend mainly on the division of powers between the Union and its Member States in the field of external relations. However, in the past, the complexity and dispute over the scope of the Community's external powers seems to have arisen from several factors. There was absence of a general scheme on external relations both in the EC Treaty and the TEU. Furthermore, certain unwillingness existed among the Member States and the Council to allow the Community to fully exercise its treaty-making powers.[3] Lacking Treaty provisions, the Court has formulated guidelines which were very important for the Community's external actions in the past and for the Union's actions in the future.

The existing external competences of the Union include both powers to take autonomous decisions and powers to enter into international arrangements whether by concluding agreements or by participating in the decision making process of the international organisations. In those cases when the power to conclude a treaty in particular area is included within the Treaties, it belongs to the category of the *explicit competences* of the Union. Furthermore, in cases when the power needs to be implied from a treaty provision which does not contain a specific clause or from the secondary law, it is classified in the category of *implied competences*. Furthermore, the distinction between *exclusive Union competences*[4] and *shared external competences*[5] is made.

The paper will focus mainly on the latter distinction in order to assess the implications of the use of shared competences in the external relations through the mixed agreements.

III. EXCLUSIVE AND SHARED COMPETENCES BEFORE THE TREATY OF LISBON

Before the Treaty of Lisbon was enacted, there was no general statement within the Treaties that would categorize the competences of the Community as exclusive or shared with the Member States. However, according to Article 5(2) EC, the European law was making a distinction between *exclusive* and *non-exclusive competences*. Exclusive competences refer to the cases when Member States have no longer the power to enter into international commitments. Within the non-exclusive competences distinction was made between concurrent and parallel (also termed *cumulative concurrent* or *shared*) powers. In those cases, both the Member States and the Community had powers regarding certain subject matters covered by the international agreements or acts of international organisations.

The concept of exclusive competences was introduced by the ECJ. The mere existence of a norm that provided for the exclusive competence prohibited the Member States from acting in that area. When such a competence was found in the Treaties, and as long as that competence remained a part of the Treaties, the Member States were basically prohibited from enacting any legislation in that field. Therefore, one consequence when the Community was granted exclusive competence was that the principle of subsidiarity as defined in Article 5(2) EC would not be applicable. In cases when the Community had exclusive competences, the weighing of the alternative of the Community's acting against the Member States acting

[3] On this issue see: Rachel Frid, *The relations between the EC and international organizations: legal theory and practice*, Kluwer Law International, The Hague, 1995, pp. 58-61.

[4] Cases when Member States have no longer the power to enter into international commitments.

[5] Both the Member States and the Union have powers regarding certain subject matters covered by the international agreements or acts of international organizations.

alone could not be done.[6]

Nevertheless, the Treaties themselves did not provide any competence of the Community to be exclusive except by implication. The only exemption was the competences in the Monetary Policy field.[7] According to the ECJ case law, the Common Commercial Policy under Article 133 EC was recognized as being an exclusive competence.[8] Furthermore, the ECJ recognized EC exclusive competence with respect to the issues of protection of maritime resources and the conservation of marine biological resources under the common fisheries policy.[9] In other fields in which the Member States enjoyed concurrent powers, the boundaries of the competences were often very difficult to draw. Even in the Common Commercial Policy field an exclusive competence only existed in the core areas.[10]

Furthermore, the Community had exclusive competences regarding the internal organisation of its institutional system. Some of those competences were explicitly foreseen, and some were based on an implicit competence. Under Article 283 EC, those competences included the right to promulgate staff regulations and conditions of employment or the rules on judicial procedure in the European courts, which are exclusively governed by the Court of First Instance's and ECJ's rules of procedure.

The ECJ qualified the Community competences by making distinction between the "exclusive" and "parallel" competences. According to the Court, the parallel competences included all non-exclusive competences. However, the legal theory made distinction between the concurrent, shared and non-regulatory competences that will be explained below.[11]

Unlike in the case of the exclusive competences, the concurrent competences permit autonomous national legislation. The independent national action was allowed to be taken only in those cases when the Community had not made use of its competences. If the Community had taken action, a concurrent competence allowed it to regulate the field in its entirety. When the Community had exercised its regulatory power, secondary law was preventing the Member States from adopting different rules. That prohibition was attributed to the primacy of Community law. This effect is also called pre-emption.[12] Back in the 1970s and 1980s, both internal and external Community competence was either exclusive or concurrent and it was considered that the unilateral action by individual Member States would undermine the unity of the market and the uniform application of Community law.[13]

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[6] On this issue see: A. von Bogdandy, J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 Common Market Law Review, Kluwer Law International, pp. 239-241.

[7] Article 106 EC.

[8] *Opinion 1/75* [1975] ECR 1355; Case 41/76 *Donckerwolkce* [1976] ECR 1921; *Opinion1/94* [1994] ECR I-5267.

[9] Case 804/79 *Commission* v.*UK* [1981] ECR 1045; Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279.

[10] In those policy areas, the Member States may no longer take autonomous action. If they act at all, it must be with the authorization, and under the control, of the institutions. The rationale of this pre-emptive form of exclusivity lies in the nature of the authorized activities. They are activities which, the Court has indicated, could not be effectively carried on, if competence were shared with the Member States.

[11] For the categorization of the competences see: A. von Bogdandy, J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 Common Market Law Review, Kluwer Law International, pp. 239-241; R.H. van Ooik, 'The European Court of Justice and the Division of Competence in the European Union', in D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law*, ELP, 2007, p. 11-40; Marise Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', in A.Dashwood and M.Marsceau (eds.), *Law and Practice of EU External Relations: Salient features of a changing landscape*, Cambridge university press, 2008, p. 34-69.

[12] The development of the classic form of pre-emption theory emerged in the period from 1970 to the late 1980s.

[13] On this issue see: Marise Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in P.Craig and G. de Burca (eds.), *The Evolution of EU Law*, Oxford University Press, 1999, pp. 137-177.

However, it depended on the legal instrument the Community enacted in order to determine whether the Member States would have enacted legislation. On the one hand, the Directives require the Member State to adopt national laws to implement it, while the Regulation prevented the adoption of national legislation.

Furthermore, the permissive norms under which the competences of the Community and Member States were exercised alongside one another were categorized as parallel or shared competences. In cases of shared competences, the Member States were not prohibited from acting autonomously in the same field. The main assumption connected with the enactment of parallel legislation of the EC and the Member States, was that throughout the measures enacted at each level they would have to strengthen one another. The relevant Treaty articles before the Treaty of Lisbon was enacted generally were using the description of "complementing" the Member State activities[14] or "contributing" to the achievement of common objectives[15]. After the Single European Act was enacted many of the new powers were in the area of shared competences. The following areas can be listed as examples: Industrial Policy[16], Economic and Social Cohesion[17], Research and Technological Development[18], Development Cooperation[19]. The Common Foreign and Security Policy under the EU Treaty can also be listed in this type of competence. The law on State aids[20] played a special role in the area of shared powers. As a cross-sectoral competence, it could have been exercised only by the Community. However, the Member States retained a shared competence.

From the perspective of the Member States, the shared competences had many advantages. Besides the fact that the European legislation was enacted in certain field, the national authorities were still able to continue their political activity. On the other hand, they were acceptable for the EC as well, since the shared competences were agreeable for the process of integration. The concept of minimum standards represented an acceptable compromise between necessary legal equality and regulatory competition. However, in cases of shared competence, there were many disadvantages in terms of conflicts of law.

Finally, the norms that enabled the Community to undertake contributing measures, but not harmonization, were under the scope of the non-regulatory competences. Those norms provided for a mechanism that gave the Member States and private parties an incentive to take positive action. There were several ways through which positive action was taken. Those were through targeted subsidies, pilot projects and symbolic action.[21] Acting within this competence, the EC enacted decisions that were not addressed to particular persons. These legal instruments were not supposed to create duties neither for the Member States nor for the citizens.

The autonomous policies of the Member States were coordinated by a number of mechanisms contained within the Treaties. Furthermore, there were many mechanisms for facilitating cooperation between the Member States' authorities. Coordinated employment strategy[22] and Surveillance of economic policy[23] were the examples of this kind of competence. The European Council was involved in the exercise of the coordinating

[14] Art. 164 EC.
[15] Art.157 EC.
[16] Ibid.
[17] Art.158 EC.
[18] Art.163 EC.
[19] Art.177 EC.
[20] Art.87 EC.
[21] See for example: Employment (Art.129 EC), Education (Art.149(4) EC), Culture (Art.151(5) EC) and Health (Art.152(4) EC).
[22] Article 125 EC.
[23] Article 99 EC.

competences in both abovementioned cases. However, in most cases, the power to coordinate the Member States' authorities on horizontal level lied within the Commission.

Moreover, there were a number of competences that could be added to the non-regulatory competences and were mainly recommendation competences. The Commission had extensive competence to make recommendations and deliver opinions.[24] On the other hand, the Council did not enjoy a general competence to make recommendations.[25]

These non-regulatory competences of the Community were taken very serious. With the limited non-regulatory competences that were given to the EC, the Community's institutions were enabled to undertake activities in sectors where the Member States were not prepared to see further integration.

IV. EXCLUSIVE AND SHARED COMPETENCES AFTER THE TREATY OF LISBON

As previously mentioned, before the Treaty of Lisbon was enacted, there was no general statement categorizing competences as exclusive and shared and the characteristics of exclusive Community competence had been developed by the European Court of Justice. Recent case law has emphasized a rationale for exclusivity based on the need "to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law".[26]

The Treaty of Lisbon attempts to codify the existing rules within the case law. The text of the Treaty is making a summary of what was perceived by the drafters to be the current state of the law.[27] However, the treatment of the CFSP is still specific.

Above all, the Treaty of Lisbon for the first time establishes different categories of competence. It makes distinction between exclusive, shared and complementary or supporting competences.[28] Certain competences are allocated to the exclusive and to the complementary categories. The others are declared to be shared. The list of complementary competences that cover the actions to support, coordinate or supplement the actions of the Member States does not include any specifically external relations fields of activity. However, the importance of the external dimensions of health, culture, tourism and education should not be underestimated.[29] Exclusive competences include the customs union and the CCP, as well as the issues connected with the conservation of marine biological resources and competition policy, which have an actual or potential external dimension.[30] This case of constitutional exclusivity, where the Member States are as such precluded from acting, is different from pre-emption which applies in the case of shared competence. Article 2(2) TFEU makes useful distinction, which is not always brought out clearly in the case law:

> "The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

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[24] Art. 211 EC.

[25] However, there were certain provisions within the TEC that granted the Council to adopt recommendation. One example is Article 151(5)(2) EC, which enabled the Council unanimously to adopt recommendations.

[26] ECJ, Opinion 1/03, para. 128.

[27] Marise Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', in A.Dashwood and M.Marsceau (eds.), *Law and Practice of EU External Relations: Salient features of a changing landscape*, Cambridge university press, 2008, p. 60.

[28] Article 2 TFEU.

[29] Article 6 TFEU.

[30] Article 3 TFEU.

As can be seen from the quote above, the preemption depends on Union action. Even though the exercise of shared competence may pre-empt the action of the Member States, the right to exercise their competence may also be returned to the Member States. The Treaty, further, includes in the category of exclusive competence, the following:

> "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope."[31]

According to Cremona, the Treaty unfortunately muddies the distinction by including, in the category of exclusive competence following the list of a priori exclusive competences, an attempted synthesis of the case law of the ECJ on exclusive implied external competence, which is based essentially on the existence of Union rules, which is pre-emption.[32] The two separate questions of the existence of implied external competence and the exclusivity of that competence are additionally confused. It seems that the provision is unnecessary, since the pre-emptive exclusivity that is described is already implicit in the principle of loyal cooperation found both in Article 4(3) TEU revised and in the definition of shared competence in Article 2(2) TFEU.[33]

With regard to the division of competences between Union and Member States in the area of the CFSP, the Lisbon Treaty clarifies the position of the CFSP with its allocation within the TEU revised. The Title V of the TEU revised deals with the CFSP and sets it apart from other fields of external competence. The CFSP competence is separated from the three general categories of competence provided within the Treaty - exclusive, shared and supporting or complementary provided in Article 2 TFEU. And there is no indication as to what form of competence this might be. Moreover, according to Article 24(1) TEU revised, the CFSP "is subject to specific rules and procedures", including the role of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy. Furthermore, the Treaty excludes the legislative acts in this area, together with the jurisdiction of the ECJ.[34]

V. IMPLICATIONS OF THE USE OF SHARED COMPETENCES THROUGH MIXED AGREEMENTS

In the past, lacking an explicit Treaty provision, the procedure of Article 300 TEC was applied by analogy for the conclusion of international agreements by the Community. After the Lisbon Treaty was enacted, Article 216 (1) TFEU provides that international agreements can be concluded "with one or more third countries or international organisations". Article 217 TFEU provides that association agreements can be concluded with both states and international organisations. And finally, Article 218 and Article 219 (3) TFEU present the

[31] Article 3(2) TFEU.

[32] Marise Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', in A.Dashwood and M.Marsceau (eds.), *Law and Practice of EU External Relations: Salient features of a changing landscape*, Cambridge university press, 2008, p. 60.

[33] On the issue of pre-emptive exclusivity see in: A. Dashwood, 'The Relationship between the Member States and the European Union/European Community', 41 CMLRev. (2004), pp. 372–3.

[34] It has to be noted that this is done with important exceptions. Those exceptions refer to the Court jurisdiction to monitor compliance with Article 40 TEU revised and to review the legality of certain decisions as provided in Article 275 (2) TFEU.

procedures how these international agreements will be concluded. Furthermore, since there are numerous cases when the Member States have maintained their own competences, mixed agreements are the appropriate instrument for the EU and its Member States to engage in international organisations in which both participate fully and in relations with third states when their competences are shared.

There are three types of international agreements connected to the EU and its Member States - the international agreements concluded under the competence exclusively within the Union; competence shared between the Union and the Member States; and competence exclusively with the Member States. When the Union is the only one competent for the matters under the agreement, then the Union alone should become party of that agreement. However, there are certain cases where even the substance of the agreement is of exclusive Union competence, but the Member States' participation might also be necessary. Besides the fact that in these cases, the Member States do not participate on the table of negotiations alongside the European Union, the agreement may require the participation of Member States so that the Union can exercise its competencies and participate effectively.[35]

The mixed agreements are one of the most distinctive features of the external relations law of the Union. One agreement can be defined as a mixed agreement if the European Union and one or more Member States are parties to that agreement.[36] According to McGoldrick, mixed agreements refer to those agreements where the Member States are parties, but they share competence with the Union in relation to the subject of that agreement. Finally, one agreement can be mixed, because of requirements relating to its financing or relating to its provisions on voting.[37] The agreements where the European Union and the Member States indisputably share competence are the most precise description of mixed agreements.

The international commodity agreements and association agreements are concluded as mixed agreements. In cases when the agreement can be divided into two parts, one of which falls under the exclusive competence of the EU, and the other under the competence of the Member States, they need to be concluded as mixed agreements. One of the typical examples of obligatory mixity is the Law of the Sea Convention. According to the Convention, the EU can become a party only if one or more of the Member States have become parties.[38]

On the other hand, when one international agreement involves exclusive as well as non-exclusive EU competences, concluding of mixed agreement is facultative. The agreements that fall within the area of the development policy can be concluded either only by the Union or together with the Member States. In those cases when the Union has non-exclusive external powers, the Member States may act on those issues as long as and to the extent the Union has not done so.[39]

The Commission and sometimes the Member States prefer pure Union agreements. This comes as a result of the need to speed up the process and to avoid different complications. Furthermore, the third parties are as well favorable of the pure Union agreements. This mainly results from the same considerations as previously noted. Furthermore, third parties

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[35] Marcus Klamert and Niklas Maydell, **'**Lost in Exclusivity: Implied Non–exclusive External Competences in Community Law' (2008) 13th European Foreign Affairs Review, Kluwer Law International, pp. 510-513.

[36] D. McGoldrick, *International Relations Law of the European Union,* Longman, 1997; A. Rosas, 'The European Union and mixed agreements' in A. Dashwood & C. Hillion (eds), *The General Law of EC External Relations,* Sweet and Maxwell, 2000; Rafael Leal-Arcas, **'**The European Community and Mixed Agreements' (2001) 6th European Foreign Affairs Review, Kluwer Law International.

[37] D.McGoldrick, *International Relations Law of the European Union,* Longman, 1997, p.78.

[38] See Article 3 of the Annex IX to the Law of the Sea Convention (1982), as an example which provides that the EU may become a party only if a majority of the Member States ratify or accede.

[39] On this issue see: Marcus Klamert and Niklas Maydell, **'**Lost in Exclusivity: Implied Non–exclusive External Competences in Community Law' (2008) 13th European Foreign Affairs Review, Kluwer Law International, pp. 493-513.

have concerns of who has the responsibility and the liability when it comes to the mixed agreements.

According to the opinion of Advocate-General Jacobs in Case C-316/91, within the EU legal order, the Union and the Member States are responsible for the implementation of those parts of a mixed agreement which fall within their respective competencies. In his opinion, it is stated:

> "The Lome Convention was concluded as a mixed agreement (i.e. by the Community and its Member States jointly) and has essentially a bilateral character. This is made clear in Article 1 which states that the Convention is concluded between the Community and its Member States of the one part, and the ACP States of the other part. Under a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion."[40]

In general, each party to an international agreement is responsible for performance of its own obligations. The joint liability under an agreement is not usually to be presumed. Nevertheless, the special circumstances of the EU and the Member States may lead to an exception to this rule. The common policies are generally achieved by the EU and the Member States working together.[41] From a third party point of view, it is very difficult to determine where legal powers lie between the EU and the Member States. Therefore, the most convenient conclusion for the third party is that the EU and the Member States assume joint obligations and they are required to assure these joint obligations. The ECJ as well emphasized the "requirement of unity" in the external representation of the Union. When the rights and obligations of the EU and the Member States are inter-linked, than very clearly the problem of the particular responsibilities of the Union and the Member States will arise. If the action and retaliation take place in respect of matters entirely within the competence of the Union or entirely within the competence of the Member States, the problems are less difficult. The issue is more complex if the third party responds to action in an area of Member State competence by retaliation in an area within the competence of the Union.[42]

Finally, when it comes to the mixed agreements, it should be pointed out that they were not foreseen in the Treaty of Rome. The concept of mixed agreements appeared in the Treaty establishing the European Atomic Energy Community.[43]

From the perspective of the Treaty of Lisbon, it is noticeable that there is no mentioning of mixed agreements, either in the provision dealing with the negotiation and conclusion of agreements[44], or in any other provision. The Treaty ignores the fact that a high proportion of the most important external agreements are mixed. According to Cremona, it might also be argued that the Treaties are not there to provide certainty and legal security to third countries. However, the transparency would have been enhanced with some recognition of the phenomenon, especially at the procedural level.[45]

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[40] Case C-316/91, 1994 ECR I-625, para. 69.

[41] Rafael Leal-Arcas, 'The European Community and Mixed Agreements' (2001) 6th European Foreign Affairs Review, Kluwer Law International, p. 498.

[42] Ibid

[43] Article 102 provides: "Agreements or contracts concluded with a third State… to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws".

[44] Article 217 TFEU.

[45] Marise Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', in A.Dashwood and M.Marsceau (eds.), *Law and Practice of EU External Relations: Salient features of a changing landscape*, Cambridge university press, 2008, pp. 62.- 63.

VI. CONCLUSION

Since the external relations are of vital importance to the Union and to its position in the international society, the issues of shared competences in the external relations and the mixed agreements as a product of the shared competences are especially important for both EU and its Member States and the third parties. The representation and relations of the Union with international organisations and third states depend mainly on the division of powers between the Union and its Member States in the field of external relations. In the cases when the legal competences are divided among the Union and its Member States, the actual use of these competences depends on the possibilities that particular agreements and organisations are offering, as well as on the willingness by the Member States to be represented by the EU. Because the mixed agreements which are concluded by the European Union and one or more Member States raise many questions and uncertainties, in certain cases both Union and Member States insist on concluding pure agreements in order to speed up the process and to avoid different complications.

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