

MIXED AGREEMENTS AND THE TREATY OF LISBON

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Abstract in original language

A vegyes szerződések az Európai Unió jogának sajátos területét képezik. Nemcsak a hagyományos értelemben vett olyan nemzetközi megállapodások tartoznak ide, amelyeket az EU és a tagállamok kötnek harmadik felekkel. E vertikális megállapodásokon kívül az Unió sajátosságainak megfelelően a Lisszaboni Szerződés hatálybalépése előtt is jelen voltak az ún. horizontális szerződések, amelyekben az Európai Unió és az Európai Közösség is részes félként szerepelt. A tanulmány célja, hogy a Reformszerződés előtt is létező kategóriák segítségével bemutassa e megállapodások szerepét a módosított Alapszerződések által nyújtott keretek között. E jelenség elemzése egyúttal lehetőséget nyújt annak szemléltetésére is, hogy az egységes jogi személyiséggel felruházott Európai Unió hogyan bővül és mélyül a gazdasági és politikai hatáskörök egységes jogi keretbe foglalása által.

Key words in original language

Európai Unió; nemzetközi szerződések; vegyes szerződések; pillérrendszer; Lisszaboni Szerződés; hatáskörök.

Abstract

Mixed agreements form a special field of the European Union law. Not only the mixed agreements in the genuine sense belong to there, which are concluded by the EU and its Member States with third parties. In addition to these vertical agreements, by the characteristics of the Union, the so-called horizontal agreements were also present in the pre-Lisbon era, in which the European Union and the European Community appeared as parties. The aim of this contribution is, to present the role of these agreements with the help of such categories, which existed even before the Reform Treaty, in the framework of the amended Founding Treaties. The analysis of this phenomenon gives the possibility in the same time, to demonstrate how the European Union, conferred with a single legal personality, will be wider and deeper through the transfer both the economic and political competences into a single legal framework.

Key words

European Union; international agreements; mixed agreements; pillar system; Treaty of Lisbon; competences.

INTRODUCTION

Treaty-making competencies were one of the most complex issues in the field of the European Union's external relations since the Maastricht Treaty had founded this new and novel entity. The phenomenon of mixity, as tool of the Community, had existed also before it, but in the framework of the so-called pillar system it received a new kind of importance. A structural change has been resulted by the Treaty of Lisbon as well, introducing a single legal personality for the Union. To make more understandable the recent role of it, it is necessary to analyze the situation of the pre-Lisbon era. Thus firstly I will shortly describe the problems of delimitation the EU competencies from the Community issues before having shown the original types of mixed agreements involving the EU. Thereafter, I will examine the post-Lisbon era. The impact of the single legal personality on the treaty-making powers raises a question about the role of these agreements in the new legal order. The new structure of competences gives place to these agreements, but in other way.

I. THE PRE-LISBON ERA

1. THE LEGAL BACKGROUND OF THE MIXITY

Firstly a short examination has to be made on the role of the European Union as an international actor connected to its treaty-making capacity. The conclusion of international agreements usually shall be based on the legal personality of that entity. In the case of the EU, the situation was quite different.

The Founding Treaties of Paris (1951) and of Rome (1957) granted legal personality to all of the international organizations established there. The three Communities, the European Steel and Coal Community, the European Atomic Energy Community and the European Economic Community, could conclude agreements in their transferred competencies through the international legal personality of them.

In contrast to the treaties above, the Maastricht Treaty from 1992 did not give explicitly the personality to the European Union. According to it a question could arise whether an organization, being equivalent and similar to this, has the possibility to conclude agreements or not, thus the existing competences were also problematic at the first sight.

In general, the lack of legal personality does not exclude the figure of a legal entity in the case of an organization. The International Court of Justice, the main judicial body of the United Nations, concerning the raised issues being attributed to the United Nations, declared that 'the rights and duties of an entity such the Organization must depend on its purposes and functions as specified or implied in its constituent documents and developed in practice',

and 'the Court has come to the conclusion that the Organization is an international person'.¹

The implied powers doctrine was led down also by the Court of Justice in the AETR case but in other sense. It was built on the legal personality of the Community widening the internal competencies to external treaty-making powers.

The subject-matter of this contribution is not the Community's mixed agreements, but the outline of its categories would make more understandable the mixity also in the field of EU. The application of it was based on the lack of EC's competencies to conclude certain agreements. The following lines contain that by which kinds of powers was it necessary to use mixity:

- Exclusive competencies are one of the most sensitive issues in the case of an international organization. Exclusiveness means that the Member States cannot act in these kind of matters, just the common entity.
- Concurrent competencies: national actions are permitted as long as and to the extent that the Community has not made use of its competence, but if it has taken action exhaustively, the Member States are prevented from adopting additional rules. Hence, in this case it is not necessary to use mixed agreements.
- Parallel competencies means that both actors can exercise its powers, the action of one side does not preclude the other side from taking action.
- Supporting, coordinating or complementary (or non-regulatory) competencies: the Member States can legislate primary.²

In the last two cases of competencies, also called 'shared competencies', it was possible to conclude mixed agreements. The European Community as a supranational actor possessed this fullness of powers. But the situation on the Union level was quite different.

The transferred competencies to the Union in the narrow sense had a peculiar nature. The Treaty of the European Union regulated the Common Foreign and Security Policy (CFSP) and the Police and Judicial Co-

1 See, *International Court of Justice; Reports of Judgments, Advisory Opinions and Orders; Reparation for Injuries Suffered in the Service of the United Nations; Advisory Opinion of April 11th, 1949*. pp. 179-180. <http://www.icj-cij.org/docket/files/4/1835.pdf> (7. 6. 2010)

2 See, Betz, N.: *Mixed Agreements – EC and EU*. The European Union in International Affairs Conference – GARNET 2008. pp. 3-4. http://www.ies.be/files/repo/conference2008/EUinIA_V_4_Betz-revised.pdf (10. 6. 2010)

operation in Criminal Matters (PJCCM) under the Title V and VI. These policies included such objectives like 'to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles with the United Nations Charter' or 'to strengthen the security of the Union in all ways'. The subject-matters in the latter case were for example 'preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offenses against children'.

The second and third pillar shall be qualified as being intergovernmental regarding their respective characters. This feature did not exclude the existence of all those competencies subscribed before. Pursuant to the theory of Wessel the treaty-making power on the side of Member States as well as in the case of the Union points to shared or more exactly to parallel competencies in the issues of CFSP and PJCCM.³

2. THE GENUINE TYPES OF MIXITY

According to Schermers' and O'Keefe's doctrinal opinions, „A mixed agreements is any treaty to which an international organization, some or all of its Member States and one or more third State are parties and for the execution of which neither the organization nor its Member States have full competence”.⁴

The original type of mixed agreements, in accordance with this definition, existed even before the establishment of the European Union in 1992. The European Community as an actor of international law needed the contribution of its Member States as parties in certain cases.

The subject-matter of a legal act could not always be classified according to its place in the pillar system (see below). The complexity of the external relations of the European Union needed the appearance of both the EU and EC in some cases. Therefore, involving the Community, the following types of mixity could be drafted:

- Vertical mixity. The EU and its Member States appears in these agreements. The situation was different also between the intergovernmental pillars. While in Common Foreign and Security issues the Member States did not appear as parties, in the agreements concerning third pillar matters often every actors were present. Reasons for the former could be the intergovernmental structure of it. Because of

³ See, Wessel, R. A.: The EU as a party to international agreements: shared competences, mixed responsibilities, in: Dashwood, A. et al: *Law and Practice of the EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 157.

⁴ See, O'Keefe, D. et al: *Mixed Agreements*, Deventer: Kluwer, 1983, pp. 25-26.

this exclusivity,⁵ suggestions have revealed that these treaties have been concluded on behalf of the Member States.⁶ In latter case the provisions of such justice affairs agreements needed their direct enforcement through the domestic laws.

- Horizontal mixity. Both the EU and the EC had become parties of these treaties. The cross-pillar mixity as a specific feature of the international relations of the European Union occurs in cases where the agreement has concerned issues from the Community pillar (so mostly economic subjects) and also from the other two pillars (foreign policy or justice affairs). The typical example for that was the association agreement with Switzerland to adopt the Schengen acquis.
- Vertical and horizontal mixity. The appearance of both Union and Community issues and the Member States as well shows the complexity of the Union's international relations and its peculiar nature. Besides the Community and Union matters such agreements contain subjects where the Member States have retained their competencies. The Partnership and Cooperation Agreements with the Newly Independent States included all this aforementioned characteristics.⁷

3. PROBLEMS OF MIXITY

One of the most important problems, concerning mixity, was that there were no provisions within the legal system established by the TEU and the TEC. But because of the comprehensive delimitation of competencies between the Community and the Member States drafted above, the legal basis of the given agreements was unequivocal. Mixed agreements involving the Union have shown a more difficult situation.

In the majority of the vertical mixed agreements the Member States do not appear as parties, so that kind of agreements formally are not mixed ones. But these treaties granted essential rights and duties for the Member States. The agreements with the United States of America on extradition and mutual legal assistance show the peculiar nature of them. As it is illustrated in Article 3 (2) (a):

'The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such a Member State and the United States of America, the

5 See, Wessel, R. A.: *op. cit.* p. 157.

6 See, Betz, N.: *op. cit.* p. 13.

7 See, Wessel, R. A.: Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements, in: Hillion, C. et al: *Mixed Agreements in the EU Law Revisited*, Oxford: Hart Publishing, 2010, pp. 38-44.

application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the United States of America'.⁸

Hence, this provision states the main obligation, which has binding force on the Member States, and the Union has just ensure that. In addition the European Union as a party is not enough for the fulfillment of the agreement, the United States needs also written instruments from the Member States.

In the special kind of mixity the Court of Justice had to deal with other problems. The objective of horizontal (or cross-pillar) mixed agreements could belong either to first pillar or to second/third pillar issues following to different interpretations. Examples from the jurisdiction of the Court show its practical importance.

In the judgment of the ECOWAS case from 2008 the Court pointed out the boundary between the first and second pillar. The subject-matter of it was the legal basis of an EU support to the Economic Community of West African States (ECOWAS) in the fight against the proliferation of small arms and light weapons.

The Council adopted firstly a Joint Action in 2002 in the framework of the CFSP,⁹ thereafter, also on the basis of the EU Treaty, a Decision in 2004 to enforce that.¹⁰ During the preparation of the Decision, the Commission argued, that it fall rather under the development cooperation policy of the Community, so a first pillar issue.

Firstly the Court pointed out that development cooperation policy concerns not only to economic and social development, but also the development and consolidation of democracy and the rule of law. In its opinion a measure which could be adopted under the EC Treaty cannot have the EU Treaty as a legal basis.

The Court referred to the Article 47 TEU, it stated:

'Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel

⁸ Agreement on extradition between the European Union and the United States of America, OJ L 181, 09.07. 2003, p. 28. and Wessel, R. A.: *op. cit.* p. 42.

⁹ Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons, OJ L 191, 19. 7. 2002, p. 1.

¹⁰ Council Decision 2004/833/CFSP of 2 December 2004 implementing Jopint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium aon Small Arms and Light Weapons, OJ L 359, 4. 12. 2004, p. 65.

Community and Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them'.

The conclusion of the Court was built on a hierarchical relationship between the first and second pillar based on the afore-mentioned provision. 'Taking account of its aim and content, the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and other within the CFSP'. For that reason it cannot be adopted on the basis of the EU Treaty if it also falls within a competence conferred by the EC Treaty.¹¹

II. THE POST-LISBON ERA

1. SINGLE LEGAL PERSONALITY OF THE UNION

After the failure of the Constitutional Treaty by the French and Dutch referendums in 2005 the Member States decided to elaborate a new treaty, which preserves the most of the achievements of the former, without involving concepts, which refers to a state. The new treaty should not replace the Treaty on European Union and the Treaty establishing the European Community, but has the intention to amend them.

The Treaty of Lisbon, signed in December 2007, renamed the formers to Treaty on European Union (TEU) and Treaty on Functioning of the European Union (TFEU). After a long implementation procedure it entered into force on 1 December 2009.

One of the most important structural changes of the Lisbon Treaty is the replacing of the European Community by the European Union. The Article 1 TEU states, that 'The Union shall replace and succeed the European Community'. But it is not just a replacement.

The introduction of a single legal personality resulted a more unified legal framework. The separation between the competences of the EU and the EC has formally disappeared, a single structure has come into existence. Instead of the former system both Treaties are ruling one entity. The revised TEU

11 Judgment of the Court in case C 91/05, *Commission v. Council*, 20 May 2008, para. 108-109. <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&juredj=juredj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=c-91/05&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher> (12. 6. 2010)

do not supplement the TFEU, however, according to the article quoted above: 'Those two treaties shall have the same legal value'.

The aforementioned change has affected also the issues of the European Union in the narrow sense, but not in the same way. The PJCCM has been 'communitarized'. The competencies and thus the decision-making procedure in this field has become similarly to the former Community issues. The place of its provision in the Treaties is also different now, the TFEU contains them under the Title V Area of Freedom, Security and Justice.

The issues of the CFSP have remained quite different, the Title V shows its peculiar nature including two couples of provisions. The first part of it is the Chapter 'General provision on the Union's external action', therefore on one hand a unification in the Union's external relations can be detected. This Chapter enumerates the aims of Union, among them are to:

- safeguard its values, fundamental interests, security, independence and integrity;
- consolidate and support democracy, the rule of law, human rights and the principles of international law;
- encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- etc.¹²

On the other hand, there is a specialization of former second pillar issues in the Chapter 'Specific provisions on the common foreign and security policy' under the same Title. It contains some procedural rules, which show the absence of supranational structure in this field. According to 24 (1) TEU revised:

'The common foreign and security policy is subject of specific rules and procedures. It shall be defined and implemented by the European Council and the Council act in unanimously, except where the Treaties provide otherwise'.

The actors, above all the European Council, and the acts, could be adopted in these issues, are different from the others. A conclusion could be drawn that this Policy, including the Common Security and Defense Policy, has remained intergovernmental. To understand the affect of it on the treaty-

making power of the Union it is necessary to examine the competences in the new Treaties.

2. EXTERNAL TREATY-MAKING COMPETENCIES

Since the Constitutional Treaty has been drafted, the better difference of competences has belonged to the aims of the treaty-reform process. Hence, the Treaty of Lisbon has introduced more certain competences, being enumerated above, into the revised Treaties. The Title I TFEU contains not only the objectives, which fall under exclusive, shared and supporting, coordinating and supplementing competences, but also explains the meaning of them.

The lack of CFSP issues from this list reveals the question whether the competences exist in the analyzed field. There is no explicit provision relating to this issue, but Article 4 (1) TFEU can lead to a solution. For proving this statement, compare with the following citation:

'The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6'.

The following list contains just the 'principal areas' of shared competences, thus this exemplificative list does not exclude the existence of powers in the field of Common Foreign and Security Policy objectives. Against the shared competencies argue the Declaration 13 and 14, that the CFSP will not affect the responsibilities of the Member States for the formulation and conduct of their foreign policy.¹³

Regarding to the categories of the aforementioned shared competencies, so the concurrent and parallel competences, these Declarations exclude the possibility of concurrent competences, as such measures would preclude the Member States to act in these cases. Those parallel competences could exist there, which not only do not preclude the Member States' act in this field, but also they would not affect the subjects which are ruled by national provisions.

The legal basis for the treaty-making power of the Union with one or more third countries or international organizations could be found in the Article 216 TFEU. According to this method, conclusion of an agreement is possible in the following cases:

- where the Treaties so provide

13 Cremona, M.: Defining competence in EU external relations: lessons from the Treaty reform process, in: Dashwood, A. et al: *Law and Practice of the EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 65.

- or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties,
- or is provided for in a legally binding Union act
- or is likely to affect common rules or alter their scope.

As a *lex specialis* to the *lex generalis*, the Article 37 TEU revised states among the special rules on the CFSP, that:

'The Union may conclude agreements with one or more States or international organizations in areas covered by this Chapter'.

On the one hand, the first provision makes much wider the the treaty-making power of the Union, as it was in the case of the Community. It reflects to such principles, like the implied powers doctrine, which were declared in the judgments of the Court of Justice.

On the other hand, in the field of the CFSP Article 37 TEU revised narrows the possibilities to conclude agreements. According to the grammatical interpretation of both Articles 'areas covered by this Chapter' may only refer to the first case, namely 'the Treaties so provide'.

But the Chapter 2 'Specific provisions on the common foreign and security policy' referred by the Article 37 does not contain such list like the Title I TFEU ruling the exclusive, shared and supporting, coordinating and supplementing competences. it includes mostly procedural provisions connecting that field. Article 24 (1) under this Chapter states only, that 'The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy [...]'.¹⁴

The phrase 'all areas' could be interpreted widely, in addition to the former Article refers to Chapter before, according to it:

'The Union's action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1'.¹⁴

The aforementioned Chapter 'General provision on the Union's external action' contains objectives such as 'preserving peace, prevent conflicts and strengthen international security', that is all the aims of the Union's international relations.

14 Article 23 TEU revised

The drafting of the Article quoted above does not declare such clear competences which could lead to a potentially wider basis to act in international matters. For the narrower powers speaks the Article 4 (1) TEU revised, that 'competences not conferred upon the Union in the Treaties remain the Member States'.

3. MIXED AGREEMENTS IN THE NEW FRAMEWORK

Reflecting the review on the new system of the Union's treaty-making power, the role of mixed agreement will be analyzed with the help of categories mentioned above. Similar to the Treaties of the pre-Lisbon era, the TEU and TFEU do not contain any provisions on mixed agreements.

The single legal personality conferred to the Union gives a unified legal basis to both the former Community and Union issues. But as being an international organization, the legal personality does not grant the fullness of competences as the states have them in their external relations. It remains also in the future the question of transferred competences and the scope of them.

The situation is much clearer in the former Community subjects, because Article 2-6 TFEU provide the different types of competences. Vertical mixed agreements, namely with the Member States could be necessary in some cases of shared competences (internal market, social policy, consumer protection etc.) or of supporting, coordinating and supplementing powers (for example industry, culture, tourism etc.).

The external competences of the Union in CFSP remains obscure. The participation of the Member States was clear in the field of the former PJCCM, in the new legal framework it has become subject of the shared competences. The lack of explicit competences in the field of CFSP issues can lead back to the theory of conclusion on behalf of Member States.

It is interesting to raise a question, whether the Article 4 (1) TEU revised strengthens or weakens the concept of 'collective decision'. Repeatedly:

'In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States'.

In the case of the TFEU matters, the former Community issues, this provision is a clear separation of the Union's and the Member States' powers. It could also be a basis for a well-bounded competence structure concerning the CFSP, if competences would have formulated in the latter case as well. But regarding the 'competences' on the side of the Union this stipulation emphasizes the 'collective decision' concept, and thus the intergovernmental structure of CFSP.

The Member States did not held it necessary to take part in agreements, which were concluded by the Union in pre-Lisbon era with no explicit

competences transferred to this entity, the exclusivity of the European Union may remain under similar circumstances. Therefore, the Member States do not need to take part in such agreements, because such agreements can be adopted basically unanimously,¹⁵ as a result of the so-called intergovernmentalism.

Horizontal mixed agreements still remain also in the post-Lisbon era but in another way. The two well-classified groups of competences need different decision-making procedure and acts in the supranational as well as in the CFSP issues. The delimitation of these two fields has been changed by the Lisbon Treaty. Instead of the lack of competences in other provisions and the hierarchical relationship between the pillars in the former EU Treaty (Article 47, see above), Article 40 TEU revised creates two independent-like legal framework:

'The implementation of the foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter'.

Given equal weight to the two competences,¹⁶ interestingly it refers to two autonomous systems with own powers. This provision could be the legal basis for delimitation between them as well as for the application of mixed agreements in the case of overlaps in the future.

CONCLUSION

The single legal personality of the European Union, instead of the separation of actors in the EU external relations, has resulted a much unified legal framework for the integration. The better division of competences on the one side makes clearer the scope of the treaty-making power of the Union mostly in the former Community issues. But the absence of the wording of CFSP competences will be the reason for obscurity in the future.

The legal personality, and therefore the establishment of a new kind of Union, does not preclude the need for mixed agreements. Without a regulation uncertainty will remain in this field. Critics have been arisen that delimitation of competences had been easier between the two actors in the

15 Article 31 TEU revised

16 Cremona, M.: *op. cit.* p. 45.

pre-Lisbon era. Undoubtedly the separation of them made it easier to decide about the legal base at the first sight, but the possibility of the competences' fuzziness is now much lower through the clear classification of it in the supranational matters. The delimitation of the CFSP issues will be simpler with the repeal of the hierarchical relationship between the two different sort of competences.

To sum up, mixed agreements will have their place also in the new framework of Union law with other meaning but with a renewed importance. The transformation of the PJCCM into the 'first pillar' is a sign for the closer cooperation of the Member States as well as for a deeper integration. The later practice of the Member States will show, how they can act together in their international relations with or without the European Union.

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