

Mixed agreements: undermining EU autonomous action?

Mixed Agreements - mixity

Outline:

Some concepts – mixity and autonomy

Why care about mixity?

A brief comparative perspective

Types of mixity – the power of law I

Why do we have mixity – the law of power

Can a limit be put on mixity? – the power of law II?

Feel free to engage during the lecture!

Mixity

Agreements concluded by the EU and all, or some, Member States with another entity (state or international organization) under international law

These agreements may be multi- or bilateral

These agreements will be binding on both the EU and its MS as a matter of international law

Mixed agreement <> EU only agreement, EU only agreements are still binding on all EU MS as a result of Article 216(2) TFEU

Mixity

Difference

EU only agreement



Mixed agreement



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Mixity

What is the difference between an EU only agreement and a mixed agreement when it comes to:

- | | |
|---------------------------------|--|
| • Negotiation | Who gives instructions to negotiator & who sits at the table? |
| • Signature | Who signs and who decides who/when (is) to sign? |
| • Provisional application | What is the effect of not all EU parties provisionally applying? |
| • Conclusion | What if some MS do not ratify? |
| • Implementation/responsibility | Who should a 3d country hold responsible? |
| • Suspension | Who/how to decide(s) whether to suspend? |
| • Denunciation | Who must/how to agree to denounce a mixed agreement? |

Mixity

On all these questions, the answers in case we are dealing with an EU-only agreement are relatively straightforward and can be found in Article 218 TFEU

But when we turn to a mixed agreement, these questions turn into complex questions of EU and national constitutional law and international law

The involvement of MS further seems to limit the EU's autonomy, understood as its capacity to act independently

Mixity

Where does mixity come from? – What is the reason for mixity?

In the EU legal order, competences are ‘shared’ between the EU and national level – since not *all* powers re external relations have been *fully* transferred from MS to EU, MS can still play a role in external relations

Isn't this the same for other federal systems?

Mixity

In other federal systems, the internal 'federal division of competences' is typically ignored in international relations and the federal level acts with plenary powers

See Weiler, Joseph, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle', in D. O'Keeffe and H. Schermers (eds.), *Mixed agreements* Deventer, Kluwer, 1983, pp. 35-83.

See Schütze, Robert, 'Federalism and Foreign Affairs: mixity as an (inter)national phenomenon' in *Foreign Affairs and the EU Constitution – Selected Essays*, Cambridge, CUP, 2014, pp. 175-208.

Exceptions are countries like Belgium, Germany

See Ingelaere, Frank, 'De internationale betrekkingen' in: B Seutin & G van Haegendoren, De transversale bevoegdheden in het federale België, Brugge, Die Keure, 2017, pp. 151-190.

See Le Hardy de Beaulieu, Louis, 'Fédéralisme et relations internationales en Belgique. La réforme de 1993-1994', Revue générale de droit international public, 1994, pp. 823-844.

See Michèle Knodt, 'Auswärtiges Handeln der Deutschen Länder' in: W-D Eberwein & K Kaiser, Deutschlands neue Außenpolitik, Band IV, Oldenbourg Wissenschaftsverlag, 1998, pp. 153-166.

When the federal level wants to sign and conclude treaties touching on the exclusive competences of the regions/Länder, the regions must agree/ the Länder must give permission

Mixity

The EU takes this 'federal' logic even further however, since mixed agreements do not merely depend on the agreement of the MS, the MS become *formal* parties to the agreement

<>

Belgian regions and German Länder are not formal parties to the agreements; their agreement is organized 'internally'

Mixity

When we say that competences are 'shared' between EU and MS this may mean two things:

1. Both have competence over the same issue (shared in the sense of Article 4 TFEU)
2. Both share separate competences that need to be combined to cover all aspects treated in an agreement (shared in the sense of joint)

The two meanings of 'shared' show how mixity is sometimes *possible* but not always *required*

Mixity

The power of law I

Thus, if there is part of an international agreement for which no competence has been conferred on the EU while for another part the EU is exclusively competent, the agreement can only be concluded if MS and the EU act together (jointly)

E.g. UNCLOS: stock conservation (EU) – territorial demarcation, warships, etc (MS)

This is known as ‘compulsory mixity’

I.e. a mixed agreement is *legally* required

What happens if an international agreement comes under EU shared competence? E.g. energy, transport, etc?

Since EU has shared competence, it can conclude the agreement without the MS

Mixity

However, Article 2(2) TFEU provides in relation to shared competence that the MS may exercise their competence to the extent that the EU has not exercised its competence

Thus, if an agreement falls under shared competence, the MS *in Council* may also choose not to exercise the competence through the EU and instead leave the legal space to conclude the agreement to the MS

Here we see the 'facultative' nature of mixity

Mixity

Agreement covers	Parties	Agreement
EU excl. competence	EU	Compulsory EU only
EU excl. competence + MS excl. competence	EU + MS	Compulsory mixity
EU excl. competence + shared competence	EU or EU + MS	Facultative EU only Facultative mixity
Shared competence	EU or MS or EU + MS	Facultative EU only Facultative MS only Facultative mixity
Shared competence + MS excl. competence	MS or EU + MS	Facultative MS only Facultative mixity
MS excl. competence	MS	Compulsory MS only

Mixity

1. Mandatory EU-only
2. Facultative EU-only
3. Facultative mixed
4. Mandatory mixed

EU-UK Trade and
Cooperation
Agreement

EU – Mercosur
interim trade
agreement

Istanbul Convention

EU-Mercosur
Partnership
agreement

Mixity



Mixity

The law of power

Quantitatively a minority of agreements is mixed, qualitatively the most important agreements are mixed

MS 'use' every potential which the law allows for their involvement to be formally involved in the process, in addition to their involvement through the Council, where they find this to be opportune

I.e. CETA is mixed; return agreements are EU only; UK-TCA is EU only

Mixity

The power of law II – limits on mixity?

Can the law somehow govern or even limit the political power dynamics where MS favour mixity where they think this is beneficial for them?

Three important Lisbon developments :

- Court interprets EU exclusive competences generously
- Merger of EU and EC legal personality
- Court clarifies dynamics of shared competences

Mixity

Court interprets EU exclusive competences generously

The broader the scope of EU exclusive competences, the less scope there is for MS involvement

Post-Lisbon, the Court interprets the rules on supervening exclusivity more generously

See Chamon, Merijn, Implied Exclusive Powers in the Post-Lisbon Jurisprudence of the Court of Justice: The Continued Development of the ERTA Doctrine, (2018) 55 *Common Market Law Review* 4, pp. 1101-1142.

Mixity

This will be further tested in Opinion 1/24

Pre-Lisbon (Open Skies cases), Court ruled that air transport agreements did not fully come within EU exclusive competence – result = MS can be involved

Commission now argues that internal EU legislation has developed so much that that conclusion needs to be reconsidered and that EU has complete exclusive competence over entire Air Transport agreement with Oman

AG Capeta does not agree with the Commission!

Mixity

Merger of EC and EU by Lisbon

Relevant in light of the pastis metaphor:

Pre-Lisbon, MS managed to turn compulsory EC only agreements into compulsory mixed agreements by adding provisions to the agreement that did not come within the EC's competences

For instance, clauses on 'political dialogue' and 'WMD': an EC agreement containing such clauses would have to be concluded by the EC and the MS, since the EC had no competence whatsoever on these issues

Mixity

With the expansion of EU competences in successive Treaties (and the fusion of the EC and EU by Lisbon) instances of compulsory mixity because of exclusive national competences are becoming harder and harder to find

Examples may be:

Territorial demarcation (see also *Slovenia v. Croatia*)

Right to strike (cf. Article 153(5) TFEU))

Mixity

Court clarifies dynamics of shared competences

For a long time, MS claimed (and still today suggest) that EU only agreements are only possible when the entire agreement comes under EU exclusive competence

The moment one aspect of the agreement came under shared competence, those MS argued that the agreement became *compulsory mixed*

Mixity

In COTIF I, Court for the first time clearly confirmed that if a matter comes under EU shared competence, the Council can decide that the EU exercises this on its own (without MS)

After COTIF I, Court in Opinion 1/19 added however that “both the decision whether or not to act on [a Commission] proposal to conclude an international agreement, and, if so, to what extent, and the choice of the appropriate time to adopt such a decision fall within the Council’s political discretion.”

This suggests that there are no legal requirements *forcing* the Council to use a shared EU competence where it is available

Mixity

This is why the Commission up until today brings arguments to the Court whereby

It claims that the Council mistakenly thinks a shared competence is at issue, whereas in reality an EU exclusive competence is at issue

Instead of

Accepting that a shared competence is at issue, but developing arguments explaining why the Council in certain cases has no *unfettered* discretion in deciding not to exercise such a shared competence

Mixity

Some questions:

1. Are there cases in which mixed action reinforces the autonomy of EU action?
2. Suppose you work for the Commission, which arguments could you think of that would restrict the Council's discretion, i.e. 'forcing' it to exercise EU competences precluding the formal involvement of the MS?
3. Suppose you work for a department of foreign affairs of an EU MS and your minister really wants an agreement coming under EU exclusive competence to be concluded as a mixed agreement, how would you advise?

Mixity

Is mixity here to stay or a childhood disease of the EU legal order?

Field of tension between law and diplomacy, sometimes with negative repercussions for the EU's own autonomy

MS insist on their international personhood – will typically exploit the limits of the law to the fullest to achieve this

Mixity

Questions?