

# Mixed Agreements

# Mixed Agreements - mixity

## Outline:

What are mixed agreements

Why care about mixity?

Is the EU unique in its mixed action?

Types of mixity

Why do we have mixity – non legal reasons

Can a limit be put on mixity?

If you have questions or remarks, please  
raise them / voice them!

# Mixity

Mixed agreements – accords mixtes – gemischte Abkommen

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

If bilateral, EU and MS are 'parties on the one side'

# Mixity

Why do we care about mixity?

Mixity comes with series of practical and legal challenges/problems

Just think about the differences in

Negotiation

Signature

Provisional application

Conclusion

Implementation/responsibility

Denunciation

For an agreement between

USA & EU

VS

USA & EU+AT, BE, BG, HR, CY, CZ, DK, EE, FI, FR, DE,  
GR, HU, IE, IT, LV, LT, LU, MT, NL, PL, PT, RO, SK, SI,  
ES, SE

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By *Vince Chadwick* // 27 March 2023

Economic Development

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# EU lawmakers demand bloc ratifies Istanbul Convention

By Julia Eastham | EURACTIV.com 📅 Feb 16, 2023



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Members of the European Parliament voted on Wednesday (15 February) to push EU countries to ratify the Council of Europe's (CoE) Istanbul Convention in line with a European Court of Justice 2021 ruling.

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## SECTORAL POLICIES / ENERGY

# European Commission proposes partial suspension of Energy Charter Treaty between EU and Russian and Belarusian investors

*Brussels, 28/03/2024 (Agence Europe)*

On Wednesday 27 March, the European Commission published a proposal for the partial suspension of the application of the Energy Charter Treaty (ECT) between the Union, on the one hand, and *Euratom*, on the other, and any legal entity owned or controlled by citizens or nationals of Russia or Belarus, and any investment, within the meaning of the Treaty, which is an investment by an investor from one of these two countries.

## In U-turn, Brussels recommends EU-wide exit from controversial Energy Charter Treaty

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*The Energy Charter Treaty has been widely criticised for providing legal protection to fossil fuel projects.* - Copyright Bernd Wuestneck/AP

By [Jorge Liboreiro](#) • Updated: 07/02/2023

## Mixity

Sometimes, mixity is unavoidable (see further)

Often, mixity is not required but still opted for (see further)

In the latter case the challenges/problems caused by mixity are especially accute – if mixity is not required why does EU not simply avoid it?

## 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

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'Keefe 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.

## Mixity

One of the few exceptions is Belgium where the Constitution (Article 167) recognizes that the regions and communities may independently (from the federal state) conclude international agreements

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.

Similar but not identical approach in DE - *Lindauer Abkommen*

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,

## Mixity

Abstraction made of Belgium, EU is atypical federacy since its limited (internal) competence translates into its external competence

The EU *only* has conferred competences (Article 5 TEU)

Moving from internal to external action does not change this, a competence conferred by the Treaties will always be required to be shown

# Mixity

## Recap:

EU has limited competences

For some agreements competences belong to EU *and* MS

This creates scope for mixity

Where mixity is *possible* it is sometimes but not always *required*



## Mixity

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

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

Pursuant to Article 216(2) TFEU this agreement would also be binding on the MS

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 the EU Council, may also choose to exercise the competence to conclude the agreement themselves instead of through the EU

This is facultative mixity

## Mixity

If the agreement covers issues coming under both EU exclusive and EU shared competences, the EU at least has to be involved and could conclude the agreement on its own but a possibility for the MS to be involved also remains

This is also facultative mixity

## Mixity

Agreement covers	Parties	Type
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 – China  
Comprehensive  
Agreement on  
Investment

Istanbul Convention

EU-Ukraine  
Association  
Agreement

# Mixity

So far the legal framework in a nutshell

What is the political and institutional reality?

Often argued that most agreements concluded by the EU are mixed agreements or that mixity 'is on the rise'

Quantitatively a minority of agreements is mixed

Qualitative the most important agreements are mixed

## Mixity

Are the existing mixed agreements the result of compulsory mixity or is there also facultative mixity?

Answering this question requires a detailed examination of each single mixed agreement

*Reality* is that MS typically do not like to 'disappear' from the international stage and will therefore insist on mixity (for the important agreements)

Not so much in order to retain control: mixity is even used for association agreements which have to be concluded with unanimity according to Article 218(8) TFEU – cf. Hungary's original veto against ACP agreement



## Mixity

For facultative mixity, MS in the EU Council will decide that the EU will not exercise its competence and that it leaves the legal space to MS

In accordance with Article 2(2) TFEU then, since the EU has not yet made use of its competences, the MS may exercise theirs

Facultative mixity may be turned into compulsory mixity

An agreement that could be concluded as an EU only agreement may be turned in a 'compulsory mixed' agreement by adding a provision to the agreement that comes under MS exclusive competence

This is what the so called 'pastis metaphor' refers to

## Mixity

Pre-lisbon, the example of 'political dialogue' clauses was widely used

An EC agreement contained a provision on political dialogue would have to be concluded by the EC and the MS, since the EC had no competence whatsoever on political dialogue

Similarly: clauses on WMD

## 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

Instances of facultative mixity are not affected by the EU's increased competences (which are by default shared) unless these are exclusive (EU) competences

Interim conclusion: mixity not so much affected by the Lisbon Treaty

Member States may and do still insist on being involved in the agreements which the EU could actually conclude on its own

# Mixity

Recap:

1. Mixity is characteristic feature of EU external relations
2. Mixity results from lack of a general (exclusive) EU competence for external relations
3. Obligatory mixity where a matter comes under national excl and EU excl competences > can be forced by adding drop of pastis
4. Facultative mixity the moment shared competences are involved
5. Since Lisbon Treaty did not create new EU exclusive competences, no immediate limit of mixity

# Mixity

What has the Court ruled in relation to mixity, following entry into force of Lisbon Treaty?

## 1. Expansive reading of Article 3(2) TFEU

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.

Generous application of ERTA doctrine = more issues coming under EU exclusive competence = more obligatory EU only agreements

# Mixity

## 2. What about facultative 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)

<> Longstanding claim of a number of MS who argued that EU only has exclusive external competences (hence if no exclusive EU competence, mixity is obligatory and facultative mixity never exists)

## Mixity

Does it follow from *COTIF I* that the Council has an unfettered choice in choosing whether EU will exercise its shared competences (and therefore whether legal space is left to MS to act jointly with MS)?

*COTIF I* was read by many as confirming the Council's unfettered political discretion in this, the Court confirmed this in Opinion 1/19 of the Istanbul Convention (para. 252)

Especially the Commission is frustrated with the Council's automatic equation between shared competence & mixity



## Mixity

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 and not formally involve the MS?

## Mixity

In Opinion 1/94 Commission tried to convince the Court to rule in favour of EU only by referring to the practical problems resulting from mixity

- > Court ruled that practical problems do not affect the competence question
- > Court ruled that there is a duty of close cooperation between EU & MS to ensure unity in the EU's representation to deal with these practical problems
- > Duty of close cooperation is the Court's solution to deal with mixity, cannot be relied upon to do away with mixity

## Mixity

Since 1/94 Commission has not yet tried to bring this issue before the Court yet

The only route the Commission has taken is to argue that an agreement is completely covered by EU exclusive competence (ruling out mixity in that way)

Illustrating this: *AMP Antarctique*

Commission complained that Council equates shared competence with mixity but did not develop a plea on this

Only two pleas were based on Article 3(1) TFEU and 3(2) TFEU

## Mixity

Other option:

Splitting of a mixed agreement in those parts coming under EU exclusive competence and those coming under shared/MS competence

Way forward for Mercosur?

## Mixity

Different AG's have taken different positions on the question whether there are legal limits to the Council's choice

AG Hogan in Avis 1/19 follows the position that this is purely a political choice (non reviewable by Courts) (similar reasoning may be found in [Council Legal Opinion on EU-UK TCA](#))

AG Wahl in Avis 3/15: apply absorption doctrine vertically <> AG Kokott in AMP Antartique

AG Kokott in AMP Antartique: if Council does not explicitly set out that it is not fully exercising shared competences, should be assumed that the Council fully exercises shared competences and therefor pre-empts MS

See [Chamon, Merijn, 'Constitutional Limits to the Political Choice for Mixity', in: E. Neframi & M. Gatti \(eds\), Constitutional Issues of EU External Relations, Baden-Baden, Nomos, 2018. \(OA\)](#)

# Mixity

Court has not picked up on any of these suggestions

However, in Opinion 1/19, the Court not only ruled that the Council has a political discretion as to whether EU competences will be exercised

It also confirmed that the Council can conclude a mixed agreement on behalf of the EU even when not all MS have completed their national ratification processes

This results in 'incomplete mixity'

!Only works when the legal basis in the EU Treaties foresees QMV

Has been used in June 2023 by Council to conclude Istanbul Convention on behalf of EU

## Mixity

Mixity is here to stay or a childhood disease of the EU legal order?

Field of tension between law and diplomacy

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

Mixity

Questions?