

Mixed agreements

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Mixity

Outline:

What are mixed agreements

Why care about mixity & why do we have mixity?

Mixity in comparative perspective – the EU as a federal system

3 types of mixity

3 types of limits?

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

[EU+MS] + third country

Mixity

These agreements may be multi- or bilateral

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

If bilateral, EU will complete the ratification on European side once all MS have ratified: eg June 2022 ratification of the 2016 EU-NZ PA

If multilateral, EU and MS act more as separate parties, eg Paris Agreement

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

Agreement between



Or



Mixity

Sometimes, mixity is legally unavoidable, sometimes it is legally avoidable (see further on)

But mixity is not purely a legal question: MS have an interest in not allowing the EU to take on its role to the fullest extent possible

This interest is double – not just about control!

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How Hungary is keeping Brussels' post-Cotonou agreement in limbo

By *Vince Chadwick* // 14 March 2022

Trade & Policy | Democracy, Human Rights & Governance | Institutional Development | OACPS | EU | Hungary

Mixity

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

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 phenomon' 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 Inghelaere, 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.

Mixity

Practice of mixity = wild west

Academics have tried to rationalize and structure but there is no 'official' typology

Obligatory mixity – Traditional MS position

Facultative mixity – Rosas

Functional mixity – Govaere

Obligatory and facultative mixity take an internal perspective, starting from the EU's own division of competences

Functional mixity takes an external perspective, looking at the requirements flowing from international law

Mixity

Obligatory mixity

Mixity is legally unavoidable if an international agreement covers issues that come both under EU exclusive competence and national exclusive competence

Facultative mixity

Mixity is merely an optional course of action if an international agreement is completely covered by EU competences, at least some of which come under shared competence

Mixity

Obligatory mixity

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

Facultative mixity

E.g. EU-NZ Partnership agreement

Mixity

Agreement covers	Parties	Type
EU excl. competence	EU	Obligatory EU only
EU excl. competence + MS excl. competence	EU + MS	Obligatory 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	Obligatory MS only

Mixity



Obligatory EU-only



Facultative EU-only



Facultative mixed



Obligatory mixed

**EU-UK Trade and
Cooperation
Agreement**

**EU – China
Comprehensive
Agreement on
Investment**

**Istanbul
Convention**

**EU-Ukraine
Association
Agreement**

Mixity

So far the perspective has been internal, issue of mixity would be entirely determined by the internal issue of how competences are divided in the EU between the EU and its MS and the issue who decides whether the EU can exercise its (shared) competences

Which actors ultimately determine these two issues?

Division of competences

Exercise by EU of its shared competences

Mixity

Since mixity is inherently linked to the EU's external relations and public international law, doesn't international law also have something to say on mixity?

More recent suggestion of *functional* mixity by Govaere

Functional mixity results from the incomplete and imperfect (internal) conferral of competences

Incomplete: EU has no full competences

Imperfect: division of competences in EU is an internal affair, international law does not necessarily take into account that EU MS as sovereign states granted part of their treaty making power/power of representation to an IO

Mixity

As a result, the international context and PIL may at times require mixed action, even if this is not required under the EU's internal division of competences and even if there would be political willingness to have the EU act alone

Judicial confirmation of these three types of mixity?

! Court never expresses itself in these 'academic' terms

Mixity

Obligatory mixity?

“[Since ISDS] removes disputes from the jurisdiction of the courts of the Member States, [it] cannot be of a purely ancillary nature [...] and cannot, therefore, be established without the Member States’ consent.” para. 292 [Opinion 2/15](#)

Mixity

Facultative mixity?

“[T]he Court must, first, reject the arguments of the Federal Republic of Germany and the French Republic that, in areas where the European Union and its Member States have shared competence, an external Union competence cannot exist outside the situations laid down in Article 3(2) TFEU.” para. 61 [C-600/14](#)

Mixity

Functional mixity?

“[The EU’s submission to the IMO] could not in any event be presented to the IMO in the name of the European Union without an infringement of the rules governing the work of that organisation. The Council was therefore fully entitled to consider that the submission at issue was required to be presented by the Member States in their own names, acting jointly in the interest of the European Union.” para. 71 [C-161/20](#)

Mixity

Functional mixity?

Another example in the currently pending case C-24/20

EU exclusive competence at issue (like IMO)

REIO clause of the Geneva Act prescribes that the EU can join (<> IMO) but that EU's votes depend on the number of its MS that are also party to the Geneva Act

If no MS are allowed to join, EU will have 0 voting rights

= Functional reason to allow MS to join, despite EU exclusive competence being at issue?

Mixity

If those are the three main types of mixity – which limits to mixity can you think of?

Suppose you work for the Commission, which arguments could you think of to limit the scope of obligatory, facultative and functional mixity – broadening the scope of EU-only action?

Mixity

Obligatory mixity

Essentially results from: MS exclusive competence

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

Criminal enforcement of infringements substantive rules (in so far not covered by Article 83(2) TFEU

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

National judicial system (cf. opinion 2/15)

Mixity

Facultative mixity

Essentially results from: Council's political discretion on the exercise of EU shared competence

'Solution':

1. Broaden EU excl competence at expense of EU shared competence
2. 'Limit' discretion

Mixity

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. Limit discretion

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

Different AG's take 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

Functional mixity

Essentially results from: PIL being premised on state actors being the rule rather than IO

‘Solution’? Article 351 TFEU + Article 4(3) TEU?

Questions?

