The European Community – more than fifty years after its first steps – has become a global actor. While the law of international organizations shapes and influences the European Community, the European Community’s peculiarities also shape and influence international law. Concerning European Community external relations, a tendency to sign mixed agreements rather than “pure” Community agreements can be observed.¹

Mixed agreements are a special form of international agreements, existing almost since the beginning of European integration.² An agreement can be regarded as mixed if – besides third states and/or international organizations – the European Community and one or more of the member states are parties to an international agreement.³ In cases where the agreement is the founding document of an international organization (IO), both the EC and its Member States become parties to the IO. Examples are the United Nations Convention on the Law of the Sea, most association agreements concluded with European neighbor states and, of course, the WTO agreements. Mixed agreements are a phenomenon resulting from the special status of the EC and more specifically from the principles allocating the competencies between the EC and the member states.

1. Topic of the contribution

Out of the multitude of questions and problems concerning “mixity” – that is, the nature of international agreements as mixed agreements – this contribution to the conference will focus on the internal and external reasons for mixed agreements and empirical data in this regard. Often

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³ Stefan Huber, ‘Gemischte Abkommen in den Außenbeziehungen der Europäischen Gemeinschaften und innerhalb eines Bundesstaats’, 61 ZÖR (2006), 109-149 at 110. Agreements can further be regarded as mixed if EC and member states share competence in relation to it, yet only states can be party – this topic is not within the scope of the present discussion. For further information see Dominic McGoldrick, International Relations Law of the European Union (1997), 78.
described as one of the most distinctive features of the external relations and practice of the Community but at the same time one of the most difficult ones, mixed agreements can provide significant insight into the characteristics of the European Community’s external relations. They show how the EC forms and influences the field of international affairs so as to accommodate EC peculiarities.

2. Outline of this contribution

First, an introduction to the importance of mixed agreements in the external practice of the EC shall be given. The reasons for the existence of mixed agreements shall be explained and the different types of competencies as well as their consequences concerning the mixity of agreements will be presented. Then the advantages and disadvantages of mixed agreements will be taken into consideration.

As a second step, empirical data will be collected and presented so as to provide reliable data on the occurrence and nature of mixed agreements in the EC’s external relations.

The last step will present a comparative view concerning agreements in the field of the European Union. The insights gained through the investigation of EC mixed agreements shall be applied to agreements in the field of the European Union. The question of the legal personality of the EU shall be discussed in brief and the question of whether the EU can conclude and has concluded mixed agreements shall be examined. Finally, implications of the findings for the EU shall be outlined.

3. Reasons for the existence of mixed agreements – different types of competencies and their consequences concerning the mixity of agreements

Considering the “legislative aspects” of mixed agreements, one has to take a look at the reasons for their existence. These can be differentiated into internal and external reasons, which shall be looked at consecutively in the following.

Unlike in federal states, the EC was not empowered by a general clause on the attribution of competence; rather, it operates under the principle of conferral by the Member States when transferring competencies. The EC cannot, yet again unlike a federal state, determine the nature and area of its external competencies by itself. According to the principle of conferral, the EC needs a general competence in primary law or rules explicitly authorizing it in certain fields in order to legislate on the relevant subject matter; it also needs the competence either to act in the form of an

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4 See generally Christiaan W. A. Timmermans/Edmond L. M. Völker, Division of powers between the European Communities and their Member States in the field of external relations (1981) and Rafael Leal-Arcas, ‘The European Community and Mixed Agreements’, 6 EFAR (2001), 483-513 at 510.
5 The “administrative aspects” are part of another ongoing project by the author.
agreement or to choose the form. Further, the European Court of Justice has recognized implicit competencies which “flow from other provisions of the Treaty and measures adopted thereof”. This is called the Implied Powers Doctrine – competencies also arise if the EC has internal legislative power. One can therefore distinguish between explicit and implicit Community competencies. Further, the European Court of Justice has recognized the need for mixity in some constellations.

Of the utmost importance concerning the mixity of agreements is the nature of the competencies. Three basic cases can be distinguished: 1) exclusive Community competence, 2) exclusive Member States competence and 3) cases in which neither the EC nor the Member States have exclusive competence for all subject matters of the international agreement. In the first case, the mere existence of the Community competence prohibits the Member States from acting in this field; thus no mixed agreement is needed. In terms of the second case, the Member States competencies prohibit the EC from acting – again no mixed agreement. Mixed agreements however emerge where an agreement covers subjects in exclusive Community competence and others in exclusive member state competence. The third type of cases also includes situations in which the EC and the Member States “share” competence, including those cases where only part of the subject matters fall within “shared” competence. There are several different variations of this case of non-exclusive competencies: a) concurrent, b) parallel and c) non-regulatory competencies. In the case of concurrent competencies (a), national actions are permitted as long as and to the extent that the Union has not made use of its competence – but if the Union has taken action, it may do so exhaustively and Member States are prevented

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12 Rafael Leal-Arcas, ‘The European Community and Mixed Agreements’, EFAR (2001), 483-513 at 491 f. who refers to coexistent competencies and mixed agreements ‘in the weak sense’ for this configuration in contrast to mixed agreements ‘in the strong sense’ which result from concurrent competencies. This case is called an obligatory mixed agreement in contrast to facultative mixed agreements, where Community competence is non-exclusive by Andreas Metz, Die Außenbeziehungen der Europäischen Union nach dem Vertrag über eine Verfassung für Europa – Eine Untersuchung aus kompetenzrechtlicher Sicht – mit Erläuterungen zu den Außenkompetenzen nach dem Vertrag von Nizza (2007), 145.
13 Sven Sattler, Gemischte Abkommen und gemischte Mitgliedschaften der EG und ihrer Mitgliedstaaten – Unter besonderer Berücksichtigung der WTO (2007), 50 f.
from adopting additional rules.\textsuperscript{15} Therefore, exclusive and concurrent competencies differ as long as the EU has not exhaustively exercised its power.\textsuperscript{16} Concerning international agreements this does not lead to mixity if no all-encompassing action has yet been taken as member states remain competent\textsuperscript{17} and thus remain competent to conclude international agreements as well. If all-encompassing action has been taken, the Community is competent. Mixity is therefore not required in these cases.\textsuperscript{18}

Regarding parallel competencies (b) (also called shared or cumulative-concurrent competencies), the competencies can be exercised alongside each other, meaning that the action of one side does not preclude the other side from taking action as well.\textsuperscript{19} This means that agreements might be of a mixed character as Community participation has no preclusive effect on member state participation.\textsuperscript{20}

The last category of non-regulatory (or complementary) competencies (c) means that the Member States have retained the primary legislative competence.\textsuperscript{21} Agreements in this field could be mixed agreements as well.\textsuperscript{22}

A two-step approach is therefore needed in order to assess the external competence of the EC: 1) does an external competence exist at all (explicit or implied)? 2) If so, of what nature is the competence (exclusive/non-exclusive)?\textsuperscript{23} In many circumstances, mixed agreements are an option –


\textsuperscript{17}See Sven Sattler, \textit{Gemischte Abkommen und gemischte Mitgliedschaften der EG und ihrer Mitgliedstaaten – Unter besonderer Berücksichtigung der WTO} (2007), 52.

\textsuperscript{18}Mixity in these cases thus results mostly from the fact that several different topics are part of the agreement and different competencies therefore involved.


\textsuperscript{20}In the formal sense – when considering a substantial definition based on the non-exclusivity of Community power – these agreements fall outside the parameters. Further, an indirect effect on member state participation can occur. See Rafael Leal-Arcas, ‘The European Community and Mixed Agreements’, EFAR (2001), 483-513 at 488 f. The EC and the member states can further choose to act separately – yet if they choose to act together, the international agreement must be a mixed one; see Sven Sattler, \textit{Gemischte Abkommen und gemischte Mitgliedschaften der EG und ihrer Mitgliedstaaten – Unter besonderer Berücksichtigung der WTO} (2007), 52 f.


they are not always obligatory but sometimes facultative.24 This typology is presented as a tool to structure debate on mixed agreements – it is not intended to be able to allocate each mixed agreement to a single category as some agreements might belong to different categories at the same time.25

In many cases, mixity will result from the fact that different topics form part of the agreement and that different types of competencies are relevant for the different topics. The case that mixity results from the nature of an involved competence (and from this nature alone) seems less frequent and can be construed particularly in cases of parallel or non-regulatory competencies.

The member states are unwilling to leave the field of international relations exclusively to Community competence. Only rarely do the Member States fail to find reasons for the mixity of an international agreement – an agreement will be concluded in the mixed form whenever the smallest reason for doing so can be found.26

Yet in other constellations, there are external factors for the mixity of agreements: In (rather rare) occasions, third states prefer mixity for example because they expect a higher guarantee of fulfillment.27 Further, the package-deal character of international negotiations and international agreements (especially on a multilateral basis/in international organizations) leads to political and procedural arrangements that develop during the negotiation process and often cross the competence borders between the EC and the member states.28

4. Advantages and disadvantages of mixed agreements

A thorough examination of the advantages and disadvantages of mixed agreements would go beyond the scope of this contribution. A small variety only can be presented.

Mixed agreements ensure a balance between the interest of the Member States in genuine participation in international agreements and the EC’s efforts toward autonomy.29 Further, conflicts

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24 Rafael Leal-Arcas, ‘The European Community and Mixed Agreements’, EFAR (2001), 483-513 at 495 presents parallel and concurrent competencies as facultative constellations and coexistent competencies as obligatory constellations concerning mixity.
29 Joni Heliskoski, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States (2001), 27.
of competencies are said not to arise because the respective competencies abut without gap.\textsuperscript{30} For third states an advantage is the certainty of concluding the agreement with the legal personality that is able to fulfill the agreement concerning the internal allocation of competencies.\textsuperscript{31}

One disadvantage is that the allocation of competencies between the EC and the Member States concerning the subject matter of the agreement as well as the nature of the competence will have to be considered.\textsuperscript{32} Yet, these can even evolve over time, requiring a different type of agreement.\textsuperscript{33} Further, the adoption of mixed agreements can become protracted – negotiation process and ratification by all member states can take a long time and make this form of agreement unattractive for third states.\textsuperscript{34}

On the other hand, mixity can avoid long debates about the legal basis of agreements and the precise delineation of competencies.\textsuperscript{35}

Further, the international bargaining power of the European Community and the member states in “mixed negotiations” must not be underestimated.\textsuperscript{36} The EC’s bargaining power in mixed agreements has been thoroughly examined and assessed by Mark Rhinard and Michael Keading. They come to the result that “the prevailing view that mixed competence issues weaken the EC’s international standing may be overstated”.\textsuperscript{37}

Similarly, the difficulty of internal formation of objectives between Community and member states can be solved – often using internal implementing agreements.\textsuperscript{38}

As one can see, mixity has disadvantages just as well as advantages – what prevails is highly disputed. To my mind, the advantages prevail.

\begin{itemize}
\item \textsuperscript{30} Dauses, ‘Die Beteiligung der Europäischen Gemeinschaften an multilateralen Völkerrechtsübereinkommen’, EuR (1979), 138-170 at 149.
\item \textsuperscript{31} Dauses, ‘Die Beteiligung der Europäischen Gemeinschaften an multilateralen Völkerrechtsübereinkommen’, EuR (1979), 138-170 at 149.
\item \textsuperscript{32} Rafael Leal-Arcas, ‘The European Community and Mixed Agreements’, EFAR (2001), 483-513 at 487.
\item \textsuperscript{35} Panos Koutrakos, \textit{EU in International Relations Law} (2006), 152.
\item \textsuperscript{38} Silja Vöneky, ‘Art. 310 EGV’, in Eberhard Grabitz/Meinhard Hilf (eds) \textit{Das Recht der Europäischen Union}, Volume III (31st supplemental set, October 2006), ref. 1-137, at 42.
\end{itemize}
B. The concept of mixed agreements – an empirical analysis

The concept of mixity was not part of the Treaty of Rome but first appeared in the Treaty establishing the European Atomic Energy Community (Article 102)\(^{39}\) and was then deemed suitable for the EC as well (see now Article 133 paragraph 4 sentence 2 TEC\(^{40}\)). Further, Article 6 paragraph 2 of the Act concerning the conditions of accession of the 10 new Member States (2003) contains a provision referring to mixed agreements.\(^{41}\)

The first mixed agreements were concluded in the early sixties of the last century, in association agreements with Greece and Turkey.\(^{42}\) Today, mixed agreements are said to play an important role in the external practice of the EC – for example as stated by Rafael Leal-Arcas: “[W]ithin European Community treaty-making, there is a tendency to sign mixed agreements rather than agreements of European Community exclusive competence in areas dealing with the External Relations of the EU. This shows their importance for the European Community and for its position in the world”.\(^{43}\) Mixity has become part of the daily life of the EC’s external relations.\(^{44}\)

The mixity of an agreement is not of solely academic interest – many important questions concerning for example the negotiation process,\(^{45}\) conclusion, ratification and participation\(^{46}\) position in the internal legal order,\(^{47}\) interpretation,\(^{48}\) legal protection\(^{49}\) or amendments\(^{50}\) arise. Or,

\(^{39}\) The wording reads as follows: “Agreements or contracts concluded with a third State, an international organization or a national of 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 Member States concerned that those agreements or contracts have become applicable in accordance which the provisions of their respective national laws”.

\(^{40}\) Art. 133 paragraph 6 subparagraph 2 TEC (Nice) reads: “In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.”


\(^{42}\) The wording of paragraph 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded is: “The new Member States undertake to accede, under the conditions laid down in this Act, to the agreements or conventions concluded or provisionally applied by the present Member States and the Community, acting jointly, and to the agreements concluded by those States which are related to those agreements or conventions”.

\(^{43}\) See for example the Agreement establishing an association between the European Economic Community and Greece of 06 July 1961, published in OJ 26, 18.2.1963, 294–342.


\(^{47}\) Panos Koutrakos, EU in International Relations Law (2006), 165-175.


\(^{49}\) See as an example of a more recent decision, TUM v Secretary of State for home department, Case C-16/05, published in 45 CML Rev (2008), 18-52. Concerning interpretation by the European Court of Justice see Silja Vöneky,
as Dominic McGoldrick states: “Mixed agreements are of enormous legal significance for the international relations of the EC”.52

1. Empirical data on the number of mixed agreements in the EC’s external relations

While literature is underlining the importance of mixed agreements in the EC’s external relations and pointing to their becoming the standard form of international agreements,53 the exact number of mixed agreements remains unknown.54 Yet a profound knowledge of the number of mixed agreements can be of importance when assessing their significance. Therefore, some empirical numbers and figures will be presented.

Regarding the overall figure of international agreements, research in the database for international agreements revealed 1106 listed entries for the EC and 69 for the European Atomic Energy Community.55

After the first mixed agreement from 1961, this form of international agreements has experienced something close to a triumphal procession. From 1961 to 2000, more than 150 mixed agreements were concluded56 and since then, several more have come into being.57

So far, no connection between international agreements and the proportion of mixed agreements has been made. Therefore, figures relating to the composition of Union law will be presented,


54 See Joni Heliskoski, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States (2001) 252-277 for a list of agreements concluded between 1961 and 2000.

55 See http://www.consilium.europa.eu/cms3_fo/showPage.asp?lang=de&id=252&mode=g&name= (last access March 18, 2008). The figure for the EC is comprised of 897 agreements of the EC and 209 of the EEC. For the European Parliament a figure of 11 and for the European Coal and Steel Community 59 international agreements are listed.

56 Joni Heliskoski, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States (2001) 252-277 lists 154 mixed agreements concluded between 1961 and 2000. This list is mainly based on the Official Journal – for a description of the sources: ibid. page 250, footnote 3. The list does not include amendments or agreements relating to the accession of new parties to the agreement or consequent to the accession of the Member States to the EU which have – in spite of this – been taken into consideration for the empirical analysis conducted for this contribution and lead to bigger numbers.

illustrating the part thereof that international agreements form. In a second step, the proportion of mixed agreements within the group of international agreements will be examined.

A first empirical analysis of community legislation was conducted with material dating from 1997 examining and developing the legal regimes of the existing instruments of Union law. For this purpose an empirical study considering different types of legal acts published in the Official Journal of the European Union, irrespective of their degree of abstractness or generality, was carried out.

The study was conducted as an analysis of the ‘Directory of Community legislation in force’, a publication of the Office for Official Publications in Luxembourg, listing references to all legal acts of European Union law in force at a certain date. This includes all acts published in the Official Journal L series and some of those published in the C series with legal relevance. This source was selected because it is the only public source reliably listing all legal acts of the EC/EU in force at a given point in time. A random sample of 500 acts was drawn from the Directory to be representative of the total of 9797 legal acts.

The results concerning international agreements were quite noteworthy: 9.2 per cent of what the Directory considers to be legislation in force consists of international agreements. Besides the rather monist approach hereby demonstrated, this figure may be rather unexpected. Nearly 1/10 of the law in force consists of international agreements. Yet, if one adds those acts of international cooperation bodies, the figure is even bigger – but this will not be our topic today. When extrapolated, the 46 acts in the sample represent about 900 international agreements.

A second – still unpublished – empirical analysis with data from 2004 allows us to check the evidence from the first project. In 2004, the enormous increase in legal acts in force catches one’s eye – 12,255 legal acts in force in 2004, which stand for an increase of about 25 per cent in little

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60 Since 01.01.2005 the Directory is only published in an electronic form: http://europa.eu.int/eur-lex/lex/de/report/index.htm (last access February 13, 2008); http://europa.eu.int/eur-lex/lex/de/legis/legis_archives.htm (last access February 13, 2008) shows the archive, the chapters can be printed as pdf-documents. The Directory has been published on a biannual basis since 1980 and beginning from December 2006 it is now being published on a monthly basis.


63 Forthcoming 2008.
more than six years. Forty-four international agreements formed part of the sample from 2004, representing 8.8 per cent of the legal acts in force at that point in time. The 44 acts in the sample at that point in time represented about 1080 international agreements. To sum up, the proportion of international agreements seems to have grown at roughly the same rate as the legal acts in force in their entirety.

When examining this figure more closely, the question arises, what part of these international agreements is of a mixed character. Therefore data on the percentage of mixed agreements in the European Community’s law in force will now be presented.

A closer look thus reveals that out of the 9.2 per cent of international agreements of the 9797 acts in force in 1997, 13 per cent can be traced back to mixed agreements. This number stands for about 118 mixed agreements in force at that point in time.

With respect to the data stemming from 2004, there are 4 mixed agreements among the 44 international agreements – this makes 9 per cent. When extrapolated, this figure represents about 98 mixed agreements in force at that point in time. Further, 4 agreements feature very interesting characteristics: they are (additional) protocols to mixed agreements yet are concluded in a non-mixed style. It may be concluded that the subject of this additional protocol was deemed to be in exclusive Community competence and thus concluded by the EC and the third party (in each case prospective member state) without the participation of the member states. This backs up the argument put forward above that mixity in many cases can be traced back to the interplay between different categories of competencies and not to the nature of one single competency as such.

Another interesting aspect was discovered in the course of the study: two agreements were at first sight of an astonishing character. Besides the European Union, Denmark is a party – and the Local Government of Greenland or the Home Government of the Faroe Islands. The background of this constellation are Greenland and the Faroe Islands, which are not part of the EC but are a “distinct community within the Kingdom of Denmark” and “a self-governing nation within the Danish

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64 Again, the biggest part is formed by bilateral agreements (55 per cent), followed by multilateral agreements (16 per cent) and internal agreements (5 per cent) and others (2 per cent).
65 This is true for three of the four agreements – the fourth is an amendment of two other agreements, one of which is a mixed one.
67 See the Greenland Treaty at http://eur-lex.europa.eu/de/treaties/index.htm#other (last access April 16, 2008).
68 See Section 1 (1) of the Home Rule Act at http://www.nanoq.gl/English/The_Home_Rule/The_Home_Rule_Act.aspx (last access April 16, 2008) and Section 13 concerning foreign relations.
These international agreements are not of a mixed character as only the EC and a member state are parties to the agreement but no third states or international organizations are a party.

Succinct research concerning the number of international agreements published in the Official Journal between 2004 and 2007 has backed up the results: mixed agreements form a portion of about 12 per cent.\(^69\)

A conservative estimation might point to a slightly growing number of mixed agreements in the external relations of the European Union, yet this conclusion would need further research based on a bigger sample to provide satisfying evidence.

### 2. Empirical data on the nature of mixed agreements as bilateral or multilateral

As for the nature of agreements, a first empirical study indicates that far more than half of the international agreements are bilateral ones. The results even point to a proportion of more than two-thirds. A multilateral character show nearly one-forth of the international agreements, a further 5 per cent consist of internal agreements.\(^71\)

Further, the data suggests that there has been a slight increase in multilateral agreements (and a decrease in bilateral ones) in the international agreements in force.\(^72\)

The trend to mixity seems to be stronger in case of multilateral agreements: while about 3 per cent of bilateral agreements are of a mixed nature, the proportion of mixed agreements in multilateral agreements amounts to 30 per cent.\(^73\) This could imply that of the mixed agreements in force more agreements are of a multilateral than of a bilateral character. To test these results, further research should be undertaken.

### 3. Summary

To sum up: international agreements continue to be of importance in the external affairs of the European Union: In the past 10 years, the number of international agreements has been steadily growing, while at the same time maintaining its share of the legal acts in force. This can be observed, even though an increase in new forms has led to a higher differentiation, making it more

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\(^69\) See Section 1 of the Act on the Home Government of the Faroes at http://www.tinganes.fo/Default.aspx?ID=201 (last access April 16, 2008) and Section 5 concerning foreign relations.

\(^70\) When looking at International Agreements of secondary character only, the portion of mixed agreements consists of about 21 per cent. Concerning agreements in all CELEX-number classification groups, the result is about 12 per cent of mixed agreements. This group cannot be used as a comparison group without caution as their main unit is different.

\(^71\) A comparison with the data from 1997 supports these results.

\(^72\) The data of the first research stems from 1997 and the data of the second research stems from 2004.

\(^73\) When considering the four agreements that can be traced back to mixed agreements as mentioned above, the proportion is still lower than the one found for multilateral agreements and consists of about 16 per cent. A check with the data from 1997 has backed up these results.
difficult to maintain the share.\textsuperscript{74}

Mixed agreements form a considerable part thereof, constituting about one-tenth of the international agreements (also roughly maintaining their share), and should be closely examined. Yet, this result does not support the predominant perception in literature that most international agreements are now concluded as mixed agreements. A considerable share of the international agreements in force was concluded in this way, yet by far not a majority. Further research conducted on the main unit of recently concluded international agreements and the proportion of mixed agreements thereof would provide more insight into this question.

Mixity seems to occur in bilateral as well as multilateral agreements, with a much higher percentage in the field of multilateral agreements. This could result from the fact that the above mentioned package-deal character of international negotiations and international agreements is particularly prominent in multilateral constellations and thus mixity occurs more frequently in these cases. In these constellations, more different topics and thus different categories of competencies will be concerned – thus furthermore supporting the hypothesis that mixity results more frequently from this reason than from the nature of one single competence alone.

C. A comparative view of agreements in the field of the EU

The insights gained through the investigation of EC mixed agreements shall now be tested on agreements in the field of the European Union in order to assess whether the concept could be applicable.

1. Question of the legal personality of the EU

Concerning the international legal capacity of the European Communities no doubts prevail due to Article 281 TEC. Concerning the EU, there is no equivalent norm in primary law explicitly stating the status as a legal entity.\textsuperscript{75} Consequently, dispute has arisen.

Using Article 24 TEU as a starting point, one can say that especially the modification of the norm in the Treaty of Nice supports the argument for legal personality:\textsuperscript{76} The original wording (“the other members of the Council may agree that the agreement shall apply provisionally to them”)\textsuperscript{77} was

\textsuperscript{74} A new form of legal act is for example the ECB-guideline (in German: \textit{EZB-Leitlinie}).


\textsuperscript{77} Article 24 TEU (Maastricht): “When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted
changed to “the other members of the Council may agree that the agreement shall nevertheless apply provisionally”78 by the Treaty of Nice. This supports the view that the agreement applies for the Union and not for the member states. Further, “shall be binding on the institutions of the Union” is reminiscent of Article 300 paragraph 7 TEC and hints at the possibility that the Union as such is being bound.79

Besides a norm that explicitly states or confers legal personality, the very same could arise on an inherent or potential basis.80 As Dominic McGoldrick stated in 1997: “if the Union sought to make, or be a party to, international agreements ... and was accepted by other international actors, then it would have been recognized as being capable of possessing international personality”.81

A decade later, The European Union has emerged as an influential global actor, which is for example of great importance in negotiation processes in the GATT and WTO.82 But, even more importantly, the Union has become party to several international agreements – research in the database for international agreements revealed the figure of 103(!) international agreements with the European Union as a party.83

The question arises, whether this database correctly lists the EU as a party. Some suggest, that these treaties have been concluded “on behalf of the member states”.84 Daniel Thym has conducted an
in-depth analysis of the European Union’s international agreements, concluding after a thorough examination of the process that the EU has on all stages acted as an independent party.\textsuperscript{85} This approach is based on the EU’s practice of concluding agreements rather than on an abstract interpretation. The processes described seem very similar to those the “General outline for a draft revision of the Treaties”\textsuperscript{86} suggested: endowing the EU with legal personality and setting out a procedure for the Presidency to negotiate agreements on behalf of the Union, subject to unanimous authorization and negotiating directives issued by the Council (resulting agreements would be concluded unanimously).\textsuperscript{87} Apart from the fact that in practice, the Council\textsuperscript{88} authorizes the Presidency to open negotiations and concludes such agreements, a process is set forward in Article 24 TEU which is followed in practice and even surpasses the claimed unanimity, in terms of how significant the EU’s role is: qualified majority suffices in certain circumstances.\textsuperscript{89} This comparison therefore leads to the view that the premises of EU legal personality put forward in the “General outline for a draft revision of the Treaties” are being applied in practice.

Furthermore, the treaties are published in the Official Journal L series and not in the C series, where decisions on inter se agreements of the member states are published.\textsuperscript{90} Using a different starting point, another opinion supports legal personality arguing for the inherent status of the EU as an international legal entity.\textsuperscript{91}

In recapitulation: the signs of legal capacity have intensified in the course of time – especially with Article 24 TEU.\textsuperscript{92} Whether the threshold to legal personality has been crossed remains controversial.\textsuperscript{93} Following the line of argument presented above, the thesis that the European Union


\textsuperscript{87} See the exact wording above n. 66.

\textsuperscript{88} A noteworthy point: the Council – and not the Representatives of the Member States of the European Union meeting within the Council (or both) – acts. This has also been put forward by the Working group III “legal personality” of the European Convention, Working document 01, WG III – WD 01, Brussels, 13 June 2002 in a note on effects on making Union legal personality explicit and on the merger of Union and Community legal personalities on page 4.


\textsuperscript{91} For elaboration see Ramses A. Wessel, ‘Revisiting the International Legal Status of the EU’, EFAR (2000), 507-537 at 507.


has legal personality will be supported in this contribution.

2. European Union – mixed agreements?

From the viewpoint of legal personality of the European Union, the question arises whether mixed agreements could and have been concluded.

In the sense illustrated above, this would require external competencies of the EU. Article 24 TEU has already been examined above – concerning the field of the Common Foreign and Security Policy (CFSP) the European Union has far-reaching yet “non-exclusive” competence. The cross-reference in Article 24 TEU indicates that this provision can be seen as a general rule concerning the EU’s competence in treaty-making and applies likewise in terms of Police and Judicial Co-operation in Criminal Matters (PJC).

Concerning the reasons for mixity, it can be stated that the same starting position of non-exclusive competencies or an unclear allocation of competencies to conclude international agreements is true for the EU. There seem to be no compelling reasons why mixity should not be possible, if one assumes that the EU has legal personality. Mixed agreements consequently seem to be a viable solution for the EU as well.

A brief search for mixed agreements including the European Union in the database for international agreements delivers no positive results. And the thorough investigation by Daniel Thym affirms this outcome when revealing the central position the EU (through its institutions and organs) assumes in all stages of the process. Consequently, none of the international agreements concluded by the Union so far is of mixed character. Not only are the member states not mentioned as parties, most of them have further not ratified the agreements concluded by the EU. Consequently, member states appear to assume that the agreements are not mixed ones.

The resulting zero per cent mixity is striking. The EU exclusively concluding the international

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100 Ramses A. Wessel, ‘The EU as a party to international agreements: shared competences mixed responsibilities’, in Alan Dashwood/Marc Marescau (eds) Law and Practice of EU External Relations: Salient Features of a Changing Landscape (2008 – forthcoming). This is backed up by the process of coming into force of the agreements – see ibid.
agreements is described as “perhaps ironical” by Ramses Wessel who inquires why the EU and the member states have not opted for the construction that has proven its value under EC law – mixed agreements.\textsuperscript{101} Stefan Huber has put forward the proposition to interpret these agreements as mixed ones from an inside perspective.\textsuperscript{102}

The controversy on the legal personality of the Union consequently leads to a circumvention of national parliaments through the avoidance of ratification procedures.\textsuperscript{103} Constitutional processes and rules do not apply.\textsuperscript{104}

\textbf{3. Implications}

As Allan Rosas states: “The European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organization, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements … offers a telling illustration of the complex nature of the EU and the Communities as an international actor”.\textsuperscript{105}

The European Union acts with legal personality on the international plane. The dispute concerning the legal personality of the European Union however leads to alarming consequences: national parliaments, and with them democratic connection, are circumvented. When turning to the responsibilities, no direct relationship between the member states and the other party or parties to the agreement emerges.\textsuperscript{106} However the indirect responsibility poses problems of legitimacy when no national parliament has been involved.\textsuperscript{107}

In this sense, the concept of mixed agreements that is designed to protect the member states’ interests\textsuperscript{108} and to ensure participation, certainty and autonomy,\textsuperscript{109} could be the adequate solution

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for different problems in the field of the EU in international affairs.

D. Conclusion

To sum up, mixed agreements are a complicated and disputed topic. They are a way of balancing the EC and its Member States. In the words of Joseph Weiler: “mixed agreements may be regarded … as a faithful image of the federal/international character of the EC… Mixed agreements … bring and tie together the main actors of European integration – Community and Member States. In my view, mixed agreements though not resulting in a further exclusive building of the centre may – by virtue of their capacity to eliminate tensions and by constituting a growing network whereby the Community and Member States gain in international strength simultaneously and become among themselves even further inextricably linked – be regarded as a contribution to the strengthening of the overall framework of European integration.” In consequence, one can see the way the EC has since its creation influenced and changed the field of international law – for example by establishing the form of mixed agreements.

The empirical data has provided a basis for the discussion of the topic – the proportion of international agreements is about 1/10 and thus forms an important part of the law in force. Mixed agreements form a considerable part thereof, yet by far not reaching 50 per cent of the international agreements. The form of mixity seems to occur particularly in multilateral agreements.

The EU’s standing in the field of international affairs ought not to be underestimated – more efforts have to be made to manage this emerging field. In this sense, mixed agreements are a lesson that can be learned from EC external relations for the field of the EU. Mixed agreements can and should also be utilized for the field of the European Union in order to help to solve the problems of disputed legal personality and their consequences. Even cross-pillar agreements could be concluded as mixed agreements, yet such a development has so far not been observable.

109 Joni Heliskoski, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States (2001), 10 ff.
112 It would further be interesting to test the concept of völkerrechtliche Einheit developed by Vera Rodenhoff against this possibility of EU mixed agreements – Vera Rodenhoff, Die EG und ihre Mitgliedstaaten als völkerrechtliche Einheit bei umweltvölkerrechtlichen Übereinkommen (2008 – forthcoming).
114 However, in 2006 a Cooperation Agreement with Thailand was concluded in mixed form that had previously been the topic of debate concerning a new structure. See Ramses A. Wessel, ‘The EU as a party to international agreements: shared competences mixed responsibilities’, in Alan Dashwood/Marc Marescau (eds) Law and Practice of EU External Relations: Salient Features of a Changing Landscape (2008 – forthcoming).