

International Agreements of the European Union. Division of Competences between a Supranational Organization and its Member States^{1 2}

Los Acuerdos Internacionales de la Unión Europea. División de competencias entre una organización supranacional y sus Estados miembros

Michael Schlemmer

schlemmer.michael@gmx.at

University of Vienna

Abstract: Globalization and its subsequent changes in global trade have led to an increase in importance of International Agreements and to the necessity of European Union Member States to appear united. In this context, the possibility of the conclusion of International Agreements by the European Union as a supranational organization instead of each individual Member State is the subject of this paper. The European Union's competence, the general conclusion process, legal effects as well as the Common Commercial Policy as a topic of highest relevance in connection with International Agreements are elaborated in detail. This is achieved through a comprehensive research and evaluation of international literature along with case law and opinions of the European Court of Justice. Moreover, the discussion of controversial questions aims to clarify practice-related issues.

Keywords: European Union – International Agreements – Competence – Common Commercial Policy

Resumen: La globalización y sus siguientes cambios en el comercio global han llevado a un aumento en la importancia de los Acuerdos Internacionales y la necesidad de que los Estados Miembros de la Unión Europea estén unidos. En este contexto, la posibilidad de que la Unión Europea celebre acuerdos internacionales como organización supranacional en lugar de cada Estado Miembro individual es el tema de este artículo. La competencia de la Unión Europea, el proceso de conclusión general, los efectos legales y la Política Comercial Común como un tema de máxima relevancia en relación con los acuerdos internacionales se desarrollan en detalle. Esto

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se logra a través de una investigación y evaluación exhaustiva de la literatura internacional junto con la jurisprudencia y las opiniones del Tribunal de Justicia Europeo. Además, la discusión de preguntas controversiales tiene como objetivo aclarar cuestiones relacionadas con la práctica.

Palabras Clave: Unión Europea – acuerdos internacionales –competencia –Política Comercial Común

1. Introduction

Bi- or multilateral contracts between individual and sovereign states appear to be simple in terms of each party's authority to conclude the agreement on behalf of the respective state: it depends on the domestic division of competences while each party acts with a sole voice. It is a matter of common knowledge that sovereign states are able to create international organizations (IOs), which are distinct legal entities and possible parties to international agreements (IAs). The European Union, however, is more than a regular IO and considered as a supranational organization due to the extensive devolution of legal competences by its MS. At the same time, the MS remain sovereign states with the possibility of concluding own agreements. This situation raises the question of the correlation of a MS's competence with the EU's. To what extent is the EU as a supranational organization entitled to achieve an IA with legal effects for all MS? What are the general modalities in terms of judicial review, modifications and termination but also regarding democratic legitimation?

It seems logical that the answer to the questions raised depends on the conferral of a legal personality as a basic prerequisite for the conclusion of IA. However, transferring competences must imply the concurrent exclusion of the conferring MS in the respective area and consistently certain procedures, which ensure the democratic legitimation of IAs. As a consequence of the EU's unique structure, an indispensable influence must remain with the individual states. Moreover, the competences and corresponding conclusion processes need to vary according to the relevant subject areas.

On December 12, 2007 the leaders of the 27 EU-Member States at that time signed a new treaty amendment called the Treaty of Lisbon (ToL).³ The treaty came as a response to the failed ratification of the 2004 Constitution for Europe⁴ due to negative referenda in France and the Netherlands in 2005. This agreement would have entirely overruled the existing treaties. The ToL amended the Treaty

³ Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, C 306/01, 17.12.2007.

⁴ Treaty establishing a Constitution for Europe, C 310/1, 16.12.2004.

Establishing the European Community (EC-Treaty) as well as the Treaty on European Union (TEU)⁵ and therefore – unlike the proposed constitution – is not a single contract, which comprises their content (Sieberson, 2008: 446).

Art. 1 of the revised TEU⁶ states that the “*Union shall replace and succeed the European Community*”, in addition Art. 47 TEU declares that the “*Union shall have legal personality*”. The legal personality is the foundation of the Union’s competence to enter into contractual obligations with third countries and other subjects of international law.⁷ Art. 216 (1)⁸ expressly entitles the Union to conclude IAs covering areas of the rights and duties transferred by the Treaties. Basis for this Article is the case law of the European Court of Justice (ECJ) concerning the tacit competence for the conclusion of agreements as no general rule existed in this context (Müller-Ibold, 2010: para. 9). Starting point was the judgment *ERTA*⁹, which stated that the Community’s competence for the conclusion of IAs not only arises out of express assignments but also from other Treaty provisions and legal acts adopted in this context.¹⁰

2. The European Union’s External Competence

A fundamental principle of the Union’s external activity is the principle of conferral, which signifies that “*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties*”. As a consequence, any competences not transferred to the Union remain with the MS¹¹ and any legal act by the Union requires an explicit or an interpretatively comprehensible legal foundation within the Treaties (Opperman, 2005: para. 62).

Furthermore, a distinction must be clarified between the legal foundation of integrated- and intergovernmental external competences, as certain areas like the Economic and Employment Policy are coordinated by the Union but implemented by the MS themselves (Nawparwar, 2009: 20). The principle of conferral, however, applies to both areas of external activities (Opperman, 2005: para 1 et seq.). Due to the length restrictions only the integrated external competences can be elaborated in this paper.

⁵ Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, C 325/1, 24.12.2002.

⁶ Consolidated Version of the Treaty on European Union, C 326/13, 06.10.2012.

⁷ ECJ, 31.03.1971, C-22/70, Commission/Council (*ERTA*), [1971] ECR 263, para.13/14.

⁸ For reasons of simplicity, Articles without naming a law refer to the Consolidated Version of the Treaty on the Functioning of the European Union, C 326/47, 6.10.2012 (TFEU).

⁹ ECJ, 31.03.1971, C-22/70, Commission/Council (*ERTA*), [1971] ECR 263.

¹⁰ ECJ, 31.03.1971, C-22/70, *Commission/Council (ERTA)*, [1971] ECR 263, para. 20/22.

¹¹ Art. 5 (2) TEU.

2.1. Competence Types

Regarding internal competences of the Union the following categories can be distinguished:

2.1.1. *Exclusive Competence*

Areas under exclusive Union competence are subject to the exclusive legislation and adoption of legally binding acts by the Union; hence MS require authorization to do so if they are not implementing Union acts.¹² Art. 3 (1) enumerates those areas, which include the Customs Union, monetary policy for MS whose currency is the Euro and the Common Commercial Policy. It is important to mention that the list is regarded as non-exhaustive (Nettesheim, 2011: para. 7). Exclusive competence is also designated for IAs under the conditions listed in Art. 3 (2), which are elaborated in section II.C. below.

2.1.2. *Shared Competence*

In areas of shared competence, both the Union and MS have the power to legislate and adopt legally binding acts (Art. 2 (2)). However, the competence of the MS depends on the actions of the Union as it is only intended in case the Union does not exercise or decides to cease the exertion of its competence. According to Art. 4 (1), the Union shares all competences conferred by the Treaties, which are neither subject to an exclusive competence nor supportive actions as described below. Principal areas of shared competences are inter alia consumer protection and transport (Art. 4 (2)).

2.1.3. *Competence to carry out Supporting Action*

A wide range of areas is being affected by measures supporting, coordinating or supplementing actions of the MS, such as human health, industry, culture or tourism.¹³ Unlike activities of the Union concerning the shared competence, none of these measures result in a repression of competences of the MS according to Art. 2 (5).

2.2. Conferral of Competences

Art. 216 (1) provides four alternatives regarding the Union's competence to conclude IAs: (i) if explicitly provided by the Treaties; if the conclusion of the agreement is either (ii) necessary to fulfil one of the objectives referred to in the Treaties, (iii) or intended in a legally binding Union act, (iv) or likely to affect common rules or alter their scope.

¹² Art. 2 (1) TFEU.

¹³ Art. 6 TFEU.

2.2.1. *Explicit Competences*

The first of the aforementioned alternatives describes explicit competences for the conclusion of an IA by the Union. Authorizations can be found in various Articles; examples are Environmental Policy (Art. 191), Common Commercial Policy (Art. 207), Development Cooperation (Art. 209) as well as Association Agreements (Art. 217) (Rehulka, 2011: para. 27). It is crucial to understand that the provisions effect on the existence of external competences, while the competence types described in section II.C. regard their exclusivity (Martenczuk, 2007: 183).

2.2.2. *Implicit Competences*

Alternatives (ii) – (iv) represent implicit competences developed by the ECJ and are substantiated by numerous decisions (Metz, 2007: 111).

An important foundation of implicit competences is the *implied-powers*-doctrine which restricts the principle of conferral. Further reaching implicit competences are deduced in case of measures that are essential for the “*effective and complete exercise*” of an explicit competence (Schweitzer 2010: para. 336a). As this doctrine describes an interpretation of explicit competences, new competences are not created (Nicolaysen, 1966: 131).

In its *New Lugano Convention*-Opinion¹⁴ the ECJ provides an overview of the main principles, especially of its *ERTA*-Decision and *Laying-up fund*-Opinion.¹⁵ The Community’s competence for the conclusion of IAs “*may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted within the framework of those provisions by the Community institutions*”, and “*whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect*”.¹⁶ Furthermore, when “*internal competence may be effectively exercised only at the same time as external competence*”, the Union’s competence is exclusive.¹⁷ Regarding competence types, the ECJ clarified that implicit competences can either be exclusive or shared.¹⁸

The second alternative concerning the necessity to fulfil one of the objectives referred to in the Treaties covers the ECJ’s *Laying-up fund*-Opinion concerning the creation of external competence (Mögele, 2012: para. 30). Unlike this opinion, Art. 216 does not link the Union’s external competence to a corresponding internal competence, a fact that is questionable as regards the principle of conferral (Mögele, 2012: para. 31). With respect to the interpretation of this alternative, different opinions exist

¹⁴ ECJ, 7.2.2006, Opinion 1/03, *New Lugano Convention*, [2006] ECR I-1145.

¹⁵ ECJ, 26.4.1977, Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, [1977] ECR 741.

¹⁶ ECJ, 7.2.2006, Opinion 1/03, *New Lugano Convention*, [2006] ECR I-1145, para. 114.

¹⁷ ECJ, 7.2.2006, Opinion 1/03, *New Lugano Convention*, [2006] ECR I-1145, para. 115.

¹⁸ ECJ, 7.2.2006, Opinion 1/03, *New Lugano Convention*, [2006] ECR I-1145, para. 115.

in legal literature: Some prefer a restrictive interpretation based on the principle of conferral and require a correlation between the external- and internal competence concerning the conclusion of IAs (Heuck, 2013: 201).

A different point of view is to apply a broad interpretation which is reasoned with the argument that Art. 216 regulates the Union's general competence to conclude agreements as opposed to its exclusivity (Frenz, 2011: para. 5166).

The interpretation of the third alternative (competency intended for in a legally binding Union act) is also disputed. The ambiguity concerns the question whether it is sufficient that the EU has already adopted rules in the interior or if those acts have to explicitly provide the Union's external competence (Heuck, 2013: 202).

The last possibility of Art. 216 (1) is based on the ECJ'S *ERTA*-Decision and its criteria for the creation of implicit competences for the conclusion of agreements (Wouters, Coppens and Meester, 2008: 174 et seq.). A negative impact by international commitments concluded by MS occurs when they “*fall within the scope of the common rules or, in any event, within an area which is already largely covered by such rules*”.¹⁹ The required degree of harmonization due to the affected Community law is vague as the ECJ has requested a “*large extent*”²⁰ but also a “*complete harmonisation*”.²¹ Furthermore, a negative impact occurs if the IA desired by MS “*is incompatible with the unity of the common market and the uniform application of Community law*”.²²

2.3. Exclusive External Competence

In similarity to the Union's implicit competences, Art. 3 (2) lists various situations in which exclusive competence concerning the conclusion of IAs is also conferred to the Union: (i) when it is provided for in a legislative act of the Union, (ii) necessary to enable the Union to exercise its internal competence, or (iii) in so far as its conclusion may affect common rules or alter their scope.

Important for the understanding of this provision is the fact that the stated prerequisites for implicit competences for the conclusion of IAs are exclusive while the competence itself derives from Art. 216. Art. 3 (2) codifies the case-law concerning the Union's competence in external power as a form of the *implied-powers*-doctrine as described above (Mögele, 2012: para. 11 et seq.).

¹⁹ ECJ, 14.7.2005, C-433/03, *Commission/Germany*, [2005], ECR I-6985, para. 45.

²⁰ ECJ, 19.3.1993, Opinion 2/91, *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work*, [1993], ECR I-1064, para. 25.

²¹ ECJ, 7.2.2006, Opinion 1/03, *New Lugano Convention*, [2006] ECR I-1145, para. 122.

²² ECJ, 7.2.2006, Opinion 1/03, *New Lugano Convention*, [2006] ECR I-1145, para. 122.

The first significant information gained by this provision is that the Union also enjoys exclusive external competence in those areas with exclusive internal competence (“*shall also have exclusive competence...*”). In addition, under the conditions of (i) – (iii), an exclusive competence is also possible in areas with shared competences (Heuck, 2013: 203).

Alternative (i) refers to reservations of competences included in legislative acts of the Union, which automatically result in an exclusive competence without the necessity of an explicit mention of the exclusiveness in the legislative act (regulations, directives and decisions) (Eilmansberger and Jaeger, 2012: para. 26). This possibility has already been acknowledged by the ECJ in 1994.²³

A necessity to enable the Union to exercise its internal competence (ii) occurs when the conclusion of an IA is “*necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules*”.²⁴ Regarding the interpretation of the necessity, a restrictive approach is preferred in legal literature to ensure that MS only have no competence in case the IA is actually required (Lenaerts and Van Nuffel, 2011: para. 7 et seq.; Eilmansberger and Jaeger, : para. 27; Nettesheim, : para. 23).

The last alternative applies when an IA might affect or alter Community rules – the similarity to Art. 216 (1) last alternative is obvious and therefore reference is made to the explanations above. Regarding the interaction between the last alternative of Art. 3 (2) with Art. 216 (1) last alternative, literature suggests to apply a very tight interpretation to the latter in order to avoid an undermining of the shared competences (as this combination results in the Union’s exclusive competence) (Cremona 2008: 62).

2.4. Legal Effects of a Transgression of Competence

A vivid example of a transgression of competence is the ECJ Case C-475/98²⁵, which dealt with the conclusion of a bilateral aviation agreement between the USA and Austria. Regulation No. 2409/92²⁶ comprised the applicable criteria and procedure for the establishment of fares and rates on air services within the Community and according to its Art. 1 (3) “*only Community air carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products*”.²⁷ The ECJ determined that the Community has acquired exclusive competence to enter into IAs with non-MS concerning Art. 1 (3) of this Regulation²⁸ and that Austria therefore infringed this exclusive external competence by concluding an IA in this area.²⁹

²³ ECJ, 15.11.1994, Opinion 1/94, *GATS/TRIPS*, [1994] ECR I-5267, para. 95.

²⁴ ECJ, 7.2.2006, Opinion 1/03, *New Lugano Convention*, [2006] ECR I-1145, para. 115.

²⁵ ECJ, 5.11.2002, C-475/98, *Commission/Austria*, [2002], ECR I-9797.

²⁶ Regulation (EC), 23.7.1992, No 2409/92, *on fares and rates for air services*, 1992 OJ L 240.

²⁷ ECJ, 5.11.2002, C-475/98, *Commission/Austria*, [2002], ECR I-9797, para. 10.

²⁸ ECJ, 5.11.2002, C-475/98, *Commission/Austria*, [2002], ECR I-9797, para. 113.

²⁹ ECJ, 5.11.2002, C-475/98, *Commission/Austria*, [2002], ECR I-9797, para. 115.

It is apparent that the ECJ's statements refer to today's Art. 216 (1) last alternative and Art. 3 (2) last alternative as Austria's action affected common rules by acting in an area already covered by Regulation 2409/92 – although the agreement's content did not conflict with Community law.³⁰

Finally, an IA cannot be subject to an annulment by the ECJ and thus the determination of a transgression of competence has no immediate impact on its validity. However, Art. 260 (1) states the Union's and MS's obligation to remove a violation by adopting necessary measures (Rehulka, 2011: para. 44).

3. Conclusion Process of International Agreements

The ToL had a great impact on the EU's external relations, which were characterised by dualism due to the pillar structure and regulated in Art. 300 EC and Art. 24 TEU. The first pillar was the “*European Community*” (covering topics such as the Economic and Monetary Union and education) while the second pillar comprised the “*Common Foreign and Security Policy*” and “*Cooperation in the Field of Justice and Home Affairs*” was covered by the third.³¹

IAs covering topics of the first pillar were subjects to the proceedings regulated in Art. 300 EC. The commencement of negotiation along with signing and conclusion were authorized by the Council while the Commission proposed these steps and represented the EC. Besides issues concerning trade policy the EP had to be consulted and the agreements were subject to possible examinations by the ECJ on demand of the MS and the institutions involved in this process regarding the compatibility with the Treaties (Gatti and Manzini, 2012: 1705). Deviating from that, agreements covering topics of the second and third pillar were confronted with a different process:

According to the former Art. 24 TEU, not only the MS but also the Commission held the initiative right to start negotiations, while the Council was entitled to authorize its start, signing and conclusion. Unlike the proceedings concerning topics of the first pillar, the second and third pillars were characterised as intergovernmental affairs. The Council Presidency represented the EU in the negotiations with the support of the Commission, the EP just like the ECJ could not participate (Gatti and Manzini, 2012: 1705).³²

³⁰ ECJ, 5.11.2002, C-475/98, *Commission/Austria*, [2002], ECR I-9797, para. 116.

³¹ “The Maastricht and Amsterdam Treaties”, Fact Sheets on the European Union, European Parliament, http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf, accessed 26.04.2018.

³² “The Maastricht and Amsterdam Treaties”, 1705.

As a consequence of Art. 1 and 47 TEU, the ToL merged the Union and the EC into one particular unit and therefore abolished the pillar structure with its diverse rules concerning external relations (Kaddous, 2009: 173). The respective articles in the TEU and EC about the proceedings were replaced and unified by Art. 207, 218 and 219 (Gatti and Manzini, 2012: 1705).

3.1. General Rules of Procedure

According to Art. 218 (1) “*agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance*” with this article, which thereby constitutes general rules, as the topics regulated in Art. 207 are specifically excluded. Its scope of application broadly covers all types of bi- and multilateral agreements (except for trade-, monetary and exchange-rate matters with third countries) (Tomuschat, 2003: para. 18). The procedure is divided into the subsequent steps:

3.1.1. Negotiations

The precondition for any negotiation is the authorization of the Council according to Art. 218 (2). This authorization is based on recommendations by the Commission unless the “*agreement envisaged relates exclusively or principally to the common foreign and security policy*” (in this case the High Representative of the Union for Foreign Affairs and Security Policy recommends the negotiation³³), allowing both of them to act as negotiators (Rehulka, 2011: para. 6). Furthermore, the Council has the right to issue directives to the respective negotiator and to create a special committee, which has to be consulted by the respective delegate (Art. 218 (4)).

It should be noted that unlike the US-Congress, the European Parliament (EP) does not hold the power to authorize negotiations and therefore cannot influence any ambitions of the relative negotiation (Woolcock, 2010: 23).

3.1.2. Signing

This step has to be considered in the light of public international law. A binding acceptance of an international legal obligation is not always the result of an agreement’s signing (Müller-Ibold, 2010: para. 4).

In this context one-step- and multiphase procedures have to be distinguished. Agreements of minor importance can be subject to the one-step procedure and are binding after the signature or the exchange of the contractual documents (Art. 12 and 13 of the VCLT³⁴). Significant treaties on the

³³ See Art. 203 (3) TFEU.

³⁴ Vienna Convention on the Law of the Treaties, United Nations, Treaty Series, 23.5.1969, UNTS vol. 1155, p. 331.

other hand are faced with an extended approval procedure. They require the consent of certain institutions and the process of ratification or accession (Von Arnault, 2014: para. 196 et seq.).

In the course of a multiphase procedure an agreement by the Union is therefore just considered a planned agreement as long as its conclusion is missing.³⁵ In the case of a one-step procedure the Council has to agree on the conclusion of the respective resolution prior to the signing (Eeckhout, 2004: 176).

Art. 218 (8) states the general rule that the Council's resolution requires a qualified majority. Qualified majority is characterised as a double majority system. Art. 238 (3) demands 55 % of the MS to vote in favour and simultaneously represent at least 65 % of the total EU population (in case the Council does not act on a proposal of the Commission or the High Representative).

There are exceptions to this general rule as for example association agreements (AA) and certain agreements with states which are candidates for accession require unanimity.³⁶

3.1.3. Conclusion

The conclusion of an agreement (Art. 218 (6)) is faced with the same requirements as its signing – in general, a qualified majority and in certain cases unanimity as described above. It represents the IA's entry into force under international law after the exchange or deposit of the instruments of ratification, unless a contractual obligation through the signing is stipulated (Bleckmann, 2001: para. 296).

3.2. Participation of the European Parliament

The EP directly represents EU citizens at Union level since 1979 (Kreppel, 2002: 71). According to Art. 14 (3) TEU its members are elected for a term of five years by direct universal suffrage. As already mentioned above, the EP has no right to authorize negotiations as participation rights are only intended for internal Union approval procedures (Schmalenbach, 2011: para. 14). The participation can be divided into the following groups:

Basis for the most extensive participation right is Art. 218 (6) (a), which requires the consent of the EP for the cases listed in (i) – (v), such as AAs. Agreements relating “*exclusively to the common foreign and security policy*” are expressly precluded. This list also contains very broadly defined situations like “*agreements with important budgetary implications for the Union*”. The financial impact is calculated as the comparison of the expenses induced by the respective agreement with the total amount of the funds

³⁵ ECJ, 15.11.1994, Opinion 1/94, *GATS/TRIPS*, [1994] ECR I-5267, para. 12.

³⁶ Art. 218 subparagraph 2 TFEU.

intended to finance the Union's external actions.³⁷ For this purpose the nature of the agreement and details of its implementation (e.g. a period of several years) have to be considered (Koutrakos, 2006: 146).

The last provision in this list (*v*) displays a vast effect as it includes agreements covering fields of the ordinary- and special legislative procedure (in the event of a special procedure only if the consent of the EP is required). The ordinary legislative procedure is defined as “*the joint adoption by the EP and the Council of a regulation, directive or decision on proposal from the Commission*” (Art. 289). A wide range of areas is covered by this procedure such as Freedom, Security and Justice as well as European Administration (Mayoral, 2011: 2). The vast majority of IAs are subject to approval by the EP as the ordinary legislative procedure – as a result of the ToL – covers a significant part of the relevant topics (Martenczuk, 2007: 197). The special legislative procedure is characterized by the adoption of a legislative act by the EP with the participation of the Council or vice versa (Art. 289 (2)). In this context, a unanimous vote of the Council as well as the consent of the EP, and therefore in case of an international agreement the approval of the EP, are required concerning e.g. anti-discrimination measures (Art. 19 (1)) (Frenz, 2011: para. 1912). In legal literature, this participation right is justified with the necessity of avoiding a possible circumvention of the joint decision-making power of the EP by the conclusion of an IA (Tomuschat, 2003: para. 43).

Agreements not depending on the EP's approval are subject to consultation of this institution, which occurs within the Council's decision-making process (Art. 218 (6) (b)). However, the EP cannot prevent the conclusion of the respective agreement as the Council is not tied to its expressed opinion (Heliskoski, 2001: 87). This implies that the Council is left to cope with the statement (Schmalenbach, 2011: para. 14). Moreover, the Council can set a time-limit for the issue of the opinion depending on the urgency of the matter – in case of a failure to comply with the deadline the Council is authorized to pass the resolution.³⁸

Last but not least, Art. 218 (10) requires the EP to be immediately and thoroughly informed at all stages of the agreement conclusion procedure. In legal literature the required point of time is defined as prior, but no later than the beginning of negotiations (Sangi, 2017: 114).

³⁷ ECJ, 8.7.1999, C-189/97, *Parlament/Council*, [1999], ECR I-4741, para. 31.

³⁸ Art. 218 (6) (b) last sentence TFEU.

3.3. Judicial Review

3.3.1. Request for opinion

Art. 218 (11) enables the EP, Commission, Council and also the MS to obtain the opinion of the Court of Justice regarding the question whether an intended agreement is compatible with the Treaties. Furthermore, the request for the opinion may relate to the question if the EU or any of its institutions “has the power to enter into that agreement”.³⁹ Such requests also comprise uncertainties over the allocation of agreements to the exclusive competence of the Community or to the sphere of shared competence of the Community and the MS.⁴⁰

As the question of competence should be clarified before entering into negotiations, the respective agreement does not need to be substantively determined; only its subjects and main features have to be evident in order to be subject to an opinion.⁴¹ However, upon entering the final binding effect – according to international law – a request for an opinion is no longer admissible.⁴²

In the case of a negative response the respective agreement cannot take effect unless it or the Treaties are adjusted.⁴³ A subsequent action according to other provisions is not precluded by a positive Opinion.⁴⁴

3.3.2. Preliminary ruling procedure

Agreements with third countries are acts of the Community’s institution and therefore the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning the validity and interpretation of those acts according to Art. 267 (b).⁴⁵ The interpretation of an IA has to take into consideration its origin under international law⁴⁶ and therefore is dynamic in accordance with the principles under international law which also apply in Union law (Rehulka, 2011: para. 34).

³⁹ Rules of Procedure of the Court of Justice, 29.9.2012, L 265/1, Art.196 (2).

⁴⁰ ECJ, 30.11.2009, Opinion 1/08, *GATS*, [2009] ECR-11129, para.109; 06.12.2001, Opinion 2/00, *Cartagena Protocol*, [2001] ECR I-9713, para. 19.

⁴¹ ECJ 4.10.1979, Opinion 1/78, *International Agreement on Natural Rubber*, [1979] ECR 2871, para. 35.

⁴² ECJ, 30.11.2009, Opinion 1/08, *GATS*, [2009] ECR-11129, para. 107.

⁴³ Art. 218 (11) TFEU.

⁴⁴ ECJ, 10.03.1998, C-122/95, *Germany/Council*, [1998] ECR I-973, para. 42.

⁴⁵ ECJ, 30.04.1974, C-181/73, *Haegeman*, [1974] ECR 449, para. 2/6.

⁴⁶ ECJ, 26.10.1982, C-104/81, *Hauptzollamt Mainz/Kupferberg & Cie.*, [1982] ECR 3641, para. 17.

3.3.3. Action for annulment

An action for annulment constitutes the general possibility to claim an infringement of an essential procedural requirement or of the Treaties. It also grants a claim in case of a lack of competence or misuse of powers.⁴⁷

Any acts conducted by Union institutions with binding legal effects are possible subjects to an objective judicial control by the ECJ. Actions can be lodged by MS, the EP, Council, Commission as well as certain other Union institutions and in some cases even by a natural person (Borchardt, 2010: 104). A revocation of a Council decision concerning the conclusion of an IA following an action for annulment has an impact within the Union only and not in connection with third parties (Tomuschat, 2003: para. 95).

3.3.4. Infringement proceedings

Art. 258 allows the Commission to deliver a reasoned opinion to a MS, which is considered to have failed the fulfilment of an obligation according to the Treaties. In the case of an unsuccessful preliminary procedure and non-compliance on behalf of the MS with regards to the Opinion, an action may be filed with the Court of Justice.

A possible litigation issue is the infringement of Union law by a MS in the course of the conclusion of an international treaty: Austria for example violated several Treaty provisions by concluding an aviation treaty with the USA, inter alia by breaching the regulations regarding the Community's external competence (see section II.D.).

3.4. General Provisions

3.4.1. Modifications

A simplified procedure concerning modifications of the respective agreement is possible if the Council authorises the negotiator at the time of the conclusion of the agreement to approve the amendment in the name of the Union. The respective agreement itself has to provide the possibility of modifications through a simplified procedure or via a body set up by the agreement.⁴⁸

⁴⁷ Art. 263 TFEU.

⁴⁸ Art. 218 (7) TFEU.

3.4.2. Termination

With respect to the termination of an agreement and the participation right of the EP there is a dissent in legal literature as Art. 218 TEUF does not regulate the termination proceedings:

Despite of the missing clarification some authors assume that Art. 218 (6) applies analogously to the termination of an agreement due to comparable interests and the termination being the *actus contrarius* to the conclusion (Lorenzmeier, 2011: para. 61 et seq.; Müller-Ibold, 2010: para. 20). Following this opinion, a termination would require the approval of the EP for those agreements demanding its consent concerning the conclusion or the consideration of its opinion (as described in section III.B.). This point of view was met with approval in practice, as the termination of the cooperation agreement between the EEC and Yugoslavia followed these steps.⁴⁹

The prevailing view is being criticized as it is regarded of not meeting the *telos* of Art. 218 (6) because the right of approval for the completion confers the EP the final decision authority for the conclusion – while due to the missing right of initiative of the EP, such final decision authority concerning the termination is missing. Consequently, the analogue application is not seen as a consistent and corresponding *actus contrarius*. Even in the case of a right of initiative binding the Commission, reviewers doubt a final decision authority as the EP's initiative can be overruled by the Council. Following this idea, a final decision authority would only be possible if the EP could revoke its initial approval or reserve a possible revocation (Sangi, 2017: 117).

3.5. Legal Effects of International Agreements in Union Law

Having elaborated the division of competences concerning external activities of the Union as well as the conclusion procedure, the question regarding the legal effects of IAs arises.

First of all, Art. 216 (2) constitutes that IAs concluded by the Union are binding upon its institutions and MS. This regulation is essential as MS are not contracting parties of IAs concluded by the Union and therefore are not obligated under international law (Macleod, Hendry and Hyett 1996: 125 et seq.).

According to the case law of the ECJ, IAs concluded pursuant to Art. 218 become an integral part of the Union's legal order at the moment they enter into force.⁵⁰

⁴⁹ Council Decision 602/91, 25.11.1991, [1991] OJ L 325/23; Approval of the EP 20.11.1991, [1991] OJ C 326/82.

⁵⁰ ECJ, 30.4.1974, C-181/73, *Haegemann*, [1974] ECR 449, para. 2/6; 4.11.1989, C-30/88, *Greece/Commission*, [1989] ECR 3711, para. 12.

Their status within the Union's legal system is remarkable as IAs occupy a rank between primary- and secondary law.⁵¹ The precedence over secondary law is justified by the ECJ with the argument that IAs are binding for the Union's institutions⁵² with the limitation, however, of unconditional and sufficiently specified provisions of international law.⁵³ The primacy of primary law is based on Art. 218 (11) – which is explained in section III.A. of this paper – as the ECJ can verify the compatibility of an IA with the Treaties and therefore the fundamentals of the Union cannot be affected by conventions under international law.⁵⁴

Direct applicability of international instruments in the Union's legal system is another complex matter. The direct applicability is of great importance as it is required in order to allow individuals and MS to refer to specific provisions of Union agreements.⁵⁵ The ECJ therefore clarified that a provision has to contain a “*clear and precise obligation*” and that its implementation or effects do not depend on “*the adoption of any subsequent measures*” to be directly applicable.⁵⁶ In this context, an obligation is “*clear and precise*” when it constitutes a precise obligation and a judicial assertion is possible without any further implementation measures being required.⁵⁷ Finally, the focus has to be set on the content and rationale of the concluded IA.⁵⁸

3.6. Mixed Agreements

The conclusion of mixed agreements deviates from the above mentioned general procedure as the MS act as contracting parties besides the Union (Mohay, 2017: 153). Since Art. 218 does not contain any special rules for agreements concerning areas both with Union and MS competence, the procedure to follow is problematic (Hellmann, 2009: 84). The Union has to apply the procedural steps set out in Art. 218 while MS exercise the particular provision of the domestic legal order concerning the completion of an IA (Tomuschat, 2003: para. 57). Consequently, the danger of failure lies on the Union's part of the agreement if the IA is rejected in one of the MS (Vedder, 2007: 78).

The conclusion of a mixed agreement is compulsory if the respective agreement covers areas of exclusive or (already exercised) shared competences of the EU, but also areas of sole competence of MS. It is facultative if it covers shared competences not yet exercised besides exclusive- or already

⁵¹ ECJ, 10.9.1996, C-61/94, *Commission/Germany*, [1996] ECR I-3989, para. 52.

⁵² ECJ, 3.6.2008, C-308/06, *Intertanko inter alia*, [2008] ECR I-4057, para. 42.

⁵³ ECJ, 10.1.2006, C-344/04, *International Air Transport Association inter alia*, [2006] ECR I-403, para. 39.

⁵⁴ ECJ, 14.12.1991, Opinion 1/91, *EEA-I*, [1991] ECR I-6079, para. 71.

⁵⁵ ECJ, 12.9.1990, C-192/89, *Sevince*, [1990] ECR I-3461, para. 26.

⁵⁶ ECJ, 12.4.2005, C-265/03, *Simutenkov*, [2005] ECR I-2579, para. 21.

⁵⁷ ECJ, 12.4.2005, C-265/03, *Simutenkov*, [2005] ECR I-2579, para. 23.

⁵⁸ ECJ, 14.12.2000, Joined cases C-300/98 and C-392/98, *Dior and Others*, [2000] ECR I-11307, para. 42.

exercised shared competences by the Union, as an agreement without the participation of MS is still possible (Gatti and Manzini, 2012: 1711).

The Union and MS are obliged to cooperate closely in the process of negotiation and conclusion of mixed agreements.⁵⁹ To ensure cooperation in the best possible manner, both sides have to adopt all required measures of the conclusion and performance of this IA.⁶⁰ Negotiations are expediently conducted by delegations consisting of Union- and MS representatives with a variety of structures – a delegation of MS- and Council representatives as well as of the chief negotiator (“*Rome-formula*”) being the most common in practice (Frenz, 2011: para. 5199 et seq.).

As a consequence of the participation of the MS as contractual parties including the above described contract conclusion process, the legal effects of the MS’s part of the agreement follow the respective provisions of the domestic legal order (Frenz, 2011: para. 5202). Concerning the judicial examination, the ECJ’s power of examination extends to provisions applicable to situations within the scope of Union- and domestic law due to the Union’s interest in a uniform application.⁶¹ With regard to the comprehensive jurisdiction of the ECJ, no distinction is made between the exclusive- and other types of Union competences (Eeckhout, 2004: 227).

4. Common Commercial Policy

The EU accounts for 20 % of the total volume of global imports and exports and is therefore among the strongest trading powers next to the USA, China and Japan (Nettesheim, 2011: para. 1). The crucial importance of this area is reflected in the legal framework of the Union, which experienced significant changes in 2009 as the ToL modified each particular provision affecting the CCP (Kleimann, 2011: 1).

The CCP is now regulated in Part Five, Title I of the TFEU and has the objective to “*contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers*” (Art. 206).

Art. 207 (1) defines trade with goods and services, commercial aspects of intellectual property as well as foreign direct investment as subjects of the Union’s trade policy, while transport services are expressly excluded (Art. 207 (5)). The Union is clearly assigned with an exclusive competence in the

⁵⁹ ECJ, 19.3.1993, Opinion 2/91, *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work*, [1993], ECR I-1064, para. 39.

⁶⁰ ECJ, 19.3.1993, Opinion 2/91, *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work*, [1993], ECR I-1064, para. 38.

⁶¹ ECJ, 14.12.2000, Joined cases C-300/98 and C-392/98, *Dior and Others*, [2000] ECR I-11307, para. 33 et seq.

area of CCP (Art. 3 (1) (e)). The particular allocation of a treaty to the CCP has to be based on the consideration of its essential contractual subject, not regarding auxiliary provisions.⁶²

Possible trade measures such as the conclusion of trade agreements or measures to protect trade are listed in Art. 207, which is regarded – just like Art. 133 TEC before the changes of the ToL – as a non-exhaustive list.⁶³ These actions include autonomous – which are implemented through the adoption of secondary law – as well as contractual measures. An extensive interpretation of the CCP concerning measures not mentioned in this list has to be applied according to the ECJ.⁶⁴

In general, Art. 207 (2) provides for the application of the ordinary legislative procedure by the EP and the Council regarding the measures for the realization of the CCP – namely autonomous measures. This co-decision power of the EP was introduced by the ToL, which constitutes a major change in the EU's legal system as the EP's participation in the issue of secondary law was not provided for in Art. 133 TEC (Frenz, 2011: para. 5065).

With regards to contractual measures, Art. 207 (3) sets forth the application of the general rules in Art. 218 with various special rules. The Council authorises the Commission to conduct negotiations based on recommendations received by the latter. Contrary to Art. 218, the High Representative of the Union for Foreign Affairs and Security Policy is not mentioned as a negotiator in Art. 207. However, the Commission is obliged to “conduct the negotiations in consultation with a special committee appointed by the Council”⁶⁵ as well as to follow directives issued by the Council (such like concerning the EU-Chile AA). The committee for the negotiation of customs- and trade agreements consists of MS-representatives with an advisory function (Reinisch, 2011: para. 30). Besides that the EP has to be regularly informed about the process of the negotiations.⁶⁶ Thus for the first time, the EP is integrated in the negotiation of commercial policy agreements, although it is criticised that the EP does not have a comparable position to the special committee as only the latter has the power of review concerning the Commission's compliance with the Councils' directives (Frenz, 2011: para. 5075). At least, important approval rights remain with the EP, which compensate this discrepancy.

Following the general rules regarding the negotiation and conclusion of an agreement, the Council acts by a qualified majority.⁶⁷ In derogation of this, unanimity is required in trade of services, commercial aspects of intellectual property as well as foreign direct investment – given that the adoption of internal rules regarding those areas requires unanimity (Art. 207 (4) subparagraph 2). In practice, a wide scope of application of the unanimity requirement is not anticipated as due to the changes of the ToL only a few areas of internal legislation continue to require a unanimous vote – such as foreign direct

⁶² ECJ 4.10.1979, Opinion 1/78, *International Agreement on Natural Rubber*, [1979] ECR 2871, para. 56.

⁶³ ECJ 4.10.1979, Opinion 1/78, *International Agreement on Natural Rubber*, [1979] ECR 2871, para. 45.

⁶⁴ ECJ, 29.3.1990, C-62/88, *Greece/ Council*, [1990] ECR I-1527, para. 16.

⁶⁵ Art. 207 (3) subparagraph 3 TFEU.

⁶⁶ Art. 207 (3) subparagraph 3 TFEU.

⁶⁷ Art. 207 (4) TFEU.

investment according to Art. 64 (3) (Tietje, 2009: 10). Furthermore, unanimity is required in certain sensitive areas such as trade in social, education and health services, or if a serious disturbance of their respective national organisations is at risk and MS's responsibilities of their delivery is prejudiced.⁶⁸ The purpose of this provision is to keep this sensible area under the control of the MS without affecting the simplified procedure of contract conclusion based on the Union's exclusive competence (Hummer, 2007: para. 6) – unlike the more complex procedure of areas within shared competences. Another exemption is the unanimously act in the trade of cultural and audio-visual services if a negative impact of the Union's cultural and linguistic diversity is at risk.⁶⁹ As in this case, an impairment in the Union as a whole is required (all MS must opine that such a negative effect exists), whereas the before mentioned sensitive service sectors refers to domestic interferences (Hummer, 2007: para. 28 et seq.).

Art. 207 (6) clarifies that the conferral of competences in the CCP must not affect the delimitation of competences between the Union and MS. The significance and scope of this retention is questioned in legal literature as a transgression of competence is anyways prohibited by the principle of conferral⁷⁰ and simultaneously the application of the *implied-powers*-doctrine excludes the possibility of exceeding competences (Tietje, 2009: 11).

5. Conclusion

The fact that IAs cannot only be concluded by the MS but also by the supranational EU itself requires complex provisions to strike a balance between national and Union's interests.

This balancing act starts with the division of competences for the conclusion of IAs as it is the pre-condition for all following steps. The codification of the case-law regarding implicit competences through the ToL clarified most ways of competence-assignment. However, the existence of different points of view regarding the interpretation of certain parts, such as for Art. 216 second alternative, clearly demonstrates a lack of accuracy of the legislator. A restrictive interpretation of the necessity to fulfil one of the objectives referred to in the Treaties is crucial to avoid the Union's competence in areas not intended by the MS. Therefore, a congruency of internal and external competences should still be required to create an external power of the EU. As the ToL did not provide full clarity in this area, the codification of implicit competences cannot be regarded as a success. This has been made

⁶⁸ Art. 207 (4) subparagraph 3 (b) TFEU.

⁶⁹ Art. 207 (4) subparagraph 3 (a) TFEU.

⁷⁰ See section 2.2.

apparent in Art. 3 (2), as the complexity of implicit external competences, which are exclusive under the condition of paragraph (2), definitely do not support the long-demanded transparency of EU law.

In terms of direct-democratic legitimacy of IAs, the ToL improved the situation by stipulating the EP's participation. The reform wasn't sufficiently extensive though, as the EP remains powerless concerning the authorization of negotiations. This constitutes a direct-democratic deficit as negotiations could be led without the prior consent of the EP, which is being faced with a *fait accompli* in case of specific negotiation results. Moreover, Art. 218 (6) (b) cannot be considered as a success as the influence of the EP in the conclusion of agreements, within this Article, is inconsequential because of the missing regulation on dealing with its opinion. In addition, the possibility of a time-limit for the statement provides another opportunity to minimise the EP's participation as a profound discussion and opinion forming might not be possible. This is just a formal step, which is almost equal to the EP's basic information right according to Art. 218 (10). There is no doubt about the usefulness of this comprehensive clause, the question is whether it is extensive enough and not just a safety net. Simply informing the representing body of the people does not comply with the requirements of a democratic process. It is rather the minimum action in a supranational organisation and therefore leaves room for improvements.

Regarding the dissent over the termination of IAs (as described in section III.D.) both points of view have their strengths. The analogous application of Art. 218 (6), which demands the EP's approval or the consideration of its opinion in certain cases, provides a satisfying result which is accepted in practice but lacks in substantive arguments. The minority viewpoint, however, negates the analogous solution due to the missing final decision authority and offers a comprehensive argumentation. Consequently, the minority viewpoint should therefore be preferred as long as there is no clarification by legislature – a task which is in need of immediate attention.

In conclusion, the author emphasizes that the answer to the question of the EU's competence in certain areas depends on various provisions, which are unique in terms of its regulation intensity compared to those of other IOs. On the other hand, it is important to recognise that MS are able to influence IA's even in areas with the EU's exclusive external competence by means of supervision and guidance of authorised Union bodies, which in some cases could diminish the efficiency of the illustrated regulations.

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