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DIRECT EFFECT OF THE EUROPEAN UNION'S MIXED AGREEMENTS AND THE RIGHTS OF INDIVIDUALS

1. CHARACTERISTICS OF THE EU INTERNATIONAL AGREEMENTS

1.1. GENERAL REMARKS

International agreements concluded by the European Union (EU) form an integral part of EU law. This is not a controversial statement as it is the view of the Court of Justice of the European Union (CJEU), which it clearly formulated in the *Haegeman* case. There, the Court stated that “[t]he provisions of the Agreement, from the coming into force thereof, form an internal part of Community law”¹. This opinion was confirmed in the *Kupferberg* case in which the Court stated that the Member States are bound, in the same manner as the institutions of the Community (Union nowadays), by the international agreements that the latter are empowered to conclude. The Court further stated that

in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement [...] form an integral part of the Community legal system².

This status of international agreements within the system of sources of European Union law means that EU secondary legislation should, in principle, be consistent with the Union's international commitments. Such a statement is confirmed by the provisions of Article 216(2) of the Treaty on the Functioning of the European Union (TFEU) according to which agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. One should bear in mind that these provisions differ clearly from the preceding provisions

¹ Judgment of 30 April 1974, *R. & V. Haegeman v Belgium* 181/73, EU:C:1974:41, paragraph 5.

² Judgment of 26 October 1982, *Hauptzollamt Mainz v C.A. Kupferberg & Cie.* 104/81, EU:C:1982:362, paragraph 13.

of Articles 34 and 38 of the Treaty on European Union (TEU), which constituted premises for the EU entering into international agreements in the former second and third pillars. Those provisions made no clear reference to States that they would be bound by the EU's international agreements.

On the one hand, international agreements concluded by the EU are governed by international law and it is according to international law that their validity, legally binding character or interpretation are assessed. On the other hand, however, such agreements constitute an integral part of the EU legal order and according to which they are enforced. Thus, in the same way as the legal acts of EU institutions are subject to review, so too are international agreements subject to the judicial control exercised, both *ex ante* and *ex post*, by the CJEU. Both Member States and EU institutions "may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with Treaties" or if affected by a concluded agreement, bring an action for annulment of the Council's concluding decision³.

1.2. DIRECT EFFECT OF THE EU INTERNATIONAL AGREEMENTS

The provisions of Article 216(2) TFEU refer also to the direct applicability of EU international agreements. Therefore, there is no specific need to transpose them into Union law or to the Member States' domestic law. Where the issue of the direct applicability of such agreements is clear, their direct effect raises some uncertainty. In this context, one should bear in mind the well-known statement on the direct effect of community law formulated by the Court in the *Van Gend en Loos* case⁴.

On the question of whether individuals may invoke the provisions of such agreements before both domestic and EU courts, the CJEU answered in the affirmative. In the *Bresciani* case the Court stated that the association agreements might be used in national courts to challenge national law⁵. Subsequently in the *Kupferberg* case⁶ the Court confirmed the same opinion with reference to bilateral trade agreements and in the *Zoulika Krid* case⁷ with reference to cooperation agreements.

However, in certain cases the Court has found that not all EU international agreements in all circumstances produce direct effect. For example, in the *Kup-*

³ See: Articles 218(11) and 263 TFEU. More on judicial control of EU international agreements, see: M. Cremona, "Who Can Make Treaties? The European Union", [in:] D.B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford, pp. 105–107.

⁴ Judgment of 5 February 1963, *Van Gend en Loos* 26/62, EU:C:1963:1. According to the extensive case law of the CJEU a provision of EU law in order to be directly effective must satisfy three criteria: (1) it must be clear and precise; (2) it must be unconditional, which means that there is no need for the adoption of further implementing measures at either national or EU level, and; (3) it must be capable of creating rights for individuals.

⁵ Judgment of 5 February 1976, *Bresciani* 87/75, EU:C:1976:18, paragraph 26.

⁶ *Hauptzollamt Mainz* case, op. cit., paragraph 13.

⁷ Judgment of 5 April 1995, *Zoulika Krid* C-103/94, EU:C:1995:97, paragraph 41.

ferberg and *Van Parys*⁸ cases the Court found that one of the premises of the limitation of the direct effect of an agreement is the fact that a third country may limit the direct effect of the same agreement. In different cases the Court stated that the provisions of an international agreement may exclude such direct effect. A pertinent example of this is the *Intertanko* case, in which the Court held

it must be found that UNCLOS [United Nations Convention on the Law of the Sea] does not establish rules intended to apply directly or immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State. It follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention⁹.

While the topic of the direct effect of the EU international agreements raises some justified discussions and doubts, the most important questions refer to the direct effect of the EU mixed agreements. Some of the key questions in this matter will be developed in the subsequent parts of this article.

2. THE EU MIXED AGREEMENTS

2.1. THE NATURE OF THE EU MIXED AGREEMENTS

It is a common perception that the most complex issues pertaining to the enforcement and interpretation of the EU's agreements are related to mixed agreements. Mixed agreements, a special category of the EU's agreements, have existed since the beginning of the process of European integration within the European Communities¹⁰. In the practice of the European Communities, these agreements were described as "part of the daily life of the European Communities external relations"¹¹. The earliest category of such agreements in EC practice were association agreements¹². In total, these mixed agreements made up approximately 10% of all agreements concluded by the Communities¹³. Today, mixed agreements are a permanent element of the European Union's external relations. Indeed, they are

⁸ Judgment of 1 March 2005, *Van Parys* C-377/02, EU:C:2005:121, paragraph 39.

⁹ Judgment of 3 June 2008, *Intertanko* C-308/06, EU:C:2008:312, paragraphs 64–65.

¹⁰ For the history of mixed agreements, see: D. O'Keeffe, H.G. Schermers, "Introduction", [in:] D.O'Keeffe, H.G. Schermers (eds.), *Mixed Agreements*, Deveter 1983, p. ix.

¹¹ R. Leal-Arcas, "The European Community and Mixed Agreements", *European Foreign Affaire Review* 6, 2001, p. 485.

¹² The first such agreement: Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara, 12 September 1963, see: OJ L217, 29/12/1964, p. 3687.

¹³ J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* Kluwer Law International, The Hague 2001, p. 249 *et seq.*

often described as a “very common European Union phenomenon”¹⁴. There are 1139 agreements in the current official European Union database of international agreements, 259 of which are multilateral agreements¹⁵, and the remaining 880 are bilateral¹⁶. Of the 1139 agreements, approximately 200 are of a mixed nature¹⁷.

The nature of mixed agreements is that they are concluded between the European Union and all or some of its Member States and third party States. Mixed agreements whose parties are the EU and all Member States are referred to as complete international agreements, whereas mixed agreements whose parties are the EU and certain Member States are referred to as incomplete international agreements¹⁸.

2.2. THE EU MIXED AGREEMENTS IN THE CONTEXT OF DIVISION OF COMPETENCES BETWEEN THE UNION AND ITS MEMBER STATES

The primary substantive reason for concluding mixed agreements is the division of competences between the Union and its Member States in matters concerning external relations. As a consequence of this division, part of such an agreement falls under the EU’s exclusive competence, while other provisions fall under the Member States’ reserved competence that may be shared with the Union¹⁹. Even though mixed agreements are part of EU primary law they may be described as having a dual nature as, in fact, they are in between international law and European Union law. As agreements, they constitute a source of international law and the rules and principles of the law of treaties are applicable to them²⁰. As mixed agreements they occupy an important place in the system of sources of EU law. Thus, it is in EU law that one should seek the essence and sources of the mixity of agreements. “Mixity”, as a defining feature setting these agreements apart from all other EU agreements, follows primarily from the so-called competence deficit of the Union in its external relations. This deficit, in turn, is a result of the particular division of competences between the Union and its Member States. The EU as an international organization does not have the competence to enter into international obligations in all fields as the limits of its competences are governed

¹⁴ P. Craig, G. de Burca, *EU Law. Text, Cases and Materials*, Oxford 2011, p. 334.

¹⁵ 35 of these agreements have not yet entered into force.

¹⁶ 138 of these agreements have not yet entered into force.

¹⁷ EU Treaties Office Database, www.ec.europa.eu.

¹⁸ An example of the latter is the UNCLOS, concluded between the EU and all its Member States, text of the UNCLOS see: UNTS, vol. 1844, p. 397.

¹⁹ E. Neframi, “Mixed Agreements as a Source of European Union Law”, [in:] E. Cannizzaro, P. Palchetti, R.A. Wessel (eds.), *International Law as Law of the European Union*, Leiden 2012, p. 325.

²⁰ For more details, see e.g.: A. Bleckmann, “The Mixed Agreements of the European Economic Community in Public International Law”, [in:] D. O’Keeffe, H. G. Schermers (eds.), *op. cit.*, p. 155 *et seq.*

by the principle of conferral. It can be argued therefore that the primary source of mixed agreements is the nature of the division of competences between the EU and its Member States or, in other words, a material criterion. An important condition for concluding mixed agreements can also be found in the provisions of Article 4(3) of the TEU formulating the principle of sincere co-operation in the relations between the EU and its Member States. These joint actions, where the EU and its Member States “assist each other”, undoubtedly enable the achievement of the EU’s objectives set out in the Treaties.

The conclusion of mixed agreements in the external relations of the EU may also be justified on other grounds. These are of a political nature. That is, a third country may have certain reasons to wish for Member States to be parties to an agreement along with the Union. Equally, the Member States may for the same reasons wish to be parties to an agreement together with the EU. There are pragmatic reasons too. That is, joint participation in international agreements may help manage potential conflicts of interests in the relations between the EU and its Member States. Through participation in these agreements, Member States ensure their involvement in joint actions *in foro externo*, to the extent that they have not transferred their competences to the EU. It is often emphasized in the literature that mixed agreements will remain an integral and important part of the “legal landscape” so long as both the European Union and its Member States retain their treaty-making powers in international relations²¹.

It is worth mentioning that the term “mixed agreement” is not present in any of the EU Treaties. Some reference can be found in the Treaty of Nice. The Treaty added to Article 133 of the TEC paragraph 6, which allowed the EC together with its Member States to conclude agreements relating to trade in cultural and audiovisual services, educational services and social and human health services²². It is generally agreed that the term “mixed agreements” was coined by Professor P. Pescatore who used the terms *accords mixtes*, *accords mi-gouvernementaux*, and *accords mi-communautaires* in a lecture on the external relations of the European Community delivered in 1961 at the Hague Academy of International Law²³. Nowadays, the term “mixed agreements” is commonly used in the doctrine²⁴.

²¹ P. Craig, G. de Burca, op. cit., p. 334.

²² These provisions did not use the term “mixed agreement”. They were not included in current Article 207 of the TFEU which did not use the term “mixed agreement” either.

²³ P. Pescatore, Les relations extérieures des Communautés européennes, *Recueil des Cours de l'Académie de droit international de La Haye* 103, vol. II, 1961, p. 104.

²⁴ Examples of relevant works: P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, Oxford 2004, pp. 236–274; P. Koutrakos, “Interpretation of Mixed Agreements”, [in:] C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and Its Members States in the World*, Oxford 2010, pp. 116–137; A. Rosas, “Mixed Union-Mixed Agreements”, [in:] M. Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague 1998, pp. 125–148.

It also appears in the case law of the CJEU, especially in the context of mixed competences. This is understandable as mixed competences are the main source of the mixity of agreements²⁵.

The most commonly quoted definition of a mixed agreement is that given by H.G. Schermers, according to whom “[a] mixed agreement is any treaty to which an international organization, some or all of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence”²⁶.

By slightly modifying this definition and adding an express reference to the division of competences between the Union and Member States, we can conclude that, in the context of EU law, a mixed agreement is an agreement whose parties are the EU and all or some of its Member States on the one hand, and a third party or parties on the other, and which is concluded in accordance with the treaties’ division of competences between the Union and its Member States, so that neither the organization nor Member States have exclusive competence over the entire subject matter of the agreement. Given that the most characteristic feature of mixed agreements is the mixity of competences in external relations, it is from this perspective that their analysis in the context of EU law, and particularly the case law of the CJEU, should be carried out.

Certainly, if the EU and its Member States jointly conclude an international agreement it is the result of an obvious need whereby due to a certain division of competences some parts of the agreement fall under the exclusive competence of the Union, while the remaining parts lie within the reserved competences of Member States, which may also be shared with the EU. In these terms mixity is the result of the EU not having exclusive external competence in all or some of the areas concerned by the provisions of a given agreement. Additionally, the literature mentions the so-called “false” mixed agreements. This is the case when an international agreement is concluded as a mixed agreement even though the European Union has exclusive competence in all areas governed by this agreement. The term “false” indicates that the participation of Member States as parties to this agreement has no legal basis²⁷.

²⁵ The first explicit reference to the concept of mixed agreements appears in the *Demirel* case: Judgment of 30 September 1987, *Demirel* C-12/86, EU:C:1987:400, paragraphs 8–9; for subsequent cases, see, i.e.: Opinion 2/91 ILO: Opinion of 19 March 1993, Opinion ILO 2/91, EU:C:1993:106; and Opinion 1/94 WTO: Opinion of 15 November 1994, Opinion WTO 1/94, EU:C:1994:384.

²⁶ H.G. Schermers, “A Typology of Mixed Agreements”, [in:] D.O’Keeffe, H.G. Schermers (eds.), op. cit., pp. 25–26.

²⁷ M. Moldner, “European Community and Union, Mixed Agreements”, [in:] R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. III, Oxford University Press, Oxford 2013, p. 857; and N.A. Neuwahl, “Shared Powers or Combined Incompetence? More on Mixity”, *Common Market Law Review* 33, 1996, no. 4, pp. 667 *et seq.*

2.3. DIRECT EFFECT OF THE EU MIXED AGREEMENTS

This phenomenon leads to certain consequences at the EU law level. That is questions arise as to the status of these agreements as sources of EU law. Pursuant to Article 216(2) of the TFEU, international agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. Are mixed agreements an equal source of EU law? In other words, does the entire mixed agreement constitute a source of EU law or only insofar as its provisions fall under the competence of the EU? Another element to be established is the nature of the EU's competence in question, i.e. whether the competence is exclusive or non-exclusive. The answer to this question has certain value as acknowledging mixed agreements as a source of EU law implies not only an interpretative jurisdiction of the CJEU, but also the possibility of enforcing such agreements by Member States. Assuming that only parts of a mixed agreement constitute a source of EU law raises another question; namely, whether the remaining parts should be considered sources of international law, thus leading to certain consequences for the internal legal order of the States parties, in this case member States of the EU. These questions, as well as the answers to them, are far from simple, especially since the status of mixed agreements is not explicitly defined in the Treaties. Accordingly, the answers should be based on the case law that includes various references to the above-mentioned division of competences between the EU and its Member States in matters relating to external relations. The authors attempting to answer these questions unanimously refer to the parameter of competences²⁸.

As emphasized above, in terms of one given mixed agreement it appears obvious that provisions falling under the exclusive competence of the EU may be considered provisions of an EU agreement, with all the consequences that this entails. However, the question remains as to the status of those provisions of the agreements that fall under non-exclusive competences, i.e. the different categories of shared competences. Article 3 of the TEU obviously enumerates the fields of co-operation that lie within the Union's exclusive competence. This article indicates that only in a few areas are competences exclusively in the hands of the EU²⁹. Moreover, any detailed decisions regarding the use of these competences should be based on case law. In considering the CJEU's key judgment in the *ERTA* case, we may assert that, according to the *ERTA* principle, whether a given provision falls within the competence of the Union depends on the adoption of appropriate common rules when exercising internal competences and on whether the Member States' action would affect those common rules³⁰. This view was clarified in several subsequent

²⁸ E. Neframi, op. cit., p. 329.

²⁹ B. Van Vooren, R.A. Wessel, *EU External Relations Law. Text, Cases and Materials*, Cambridge 2014, p. 55.

³⁰ The Court expressed its view as follows: "[i]n particular, each time the Community, with a view of implementing a common policy envisaged by the Treaty, adopts provisions laying down

decisions, e.g. the *Open Skies* judgment³¹ and Opinion 1/03³², in which the Court advanced the thesis that the exclusivity of the EU's competences depends on the application of internal rules in a manner that is consistent and effective. Based on these decisions, E. Neframi concludes that the Member States are unable to exercise their external competences not only when international commitments form part of common rules, but also if such commitments may affect internal measures³³.

The situation where an entire international agreement falls within the exclusive competence of the Union is clear-cut. Such an agreement will be concluded by the EU only and will not be a mixed agreement. If, however, some provisions of this agreement fall outside the EU's competences it will require joint action meaning that the agreement will have to be concluded jointly by the Union and its Member States. Those provisions of a mixed agreement that remain within the EU's exclusive competence enjoy the same status within the EU's legal order as the provisions of any agreements concluded by this organization. This part of the agreement is binding on both the Union's institutions and Member States, which are therefore obliged to implement it, just like they would be in the case of any other unilateral act of the EU institutions or any agreement concluded by the Union.

As regards the legal status of those provisions of a mixed agreement that do not fall within the EU's exclusive competences, it should be noted that a shared competence that existed before the conclusion of a mixed agreement remains fundamentally unchanged after this agreement has been concluded. From the perspective of EU law the conclusion of a mixed agreement does not have a pre-emptive effect³⁴. The legal status of the provisions of a mixed agreement that do fall under shared competences is not clear. In EU case law, the situation is sometimes assessed from the perspective of what the direct effect of these provisions is expected to be. According to this view, adopted by the Court particularly in the context of the direct effects of the TRIPS Agreements, accepting or rejecting the direct effect of the provisions falling outside the EU's competences is a matter for a national court³⁵.

common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries, which affect those rules"; see: Judgment of 31 March 1971, ERTA 22/70, EU:C:1971:32.

³¹ Judgment of 5 November 2002, *Commission v Denmark* C-467/98, EU:C:2002:625; Judgment of 5 November 2002, *Commission v Sweden* C-468/98, EU:C:2002:626; Judgment of 5 November 2002, *Commission v Finland* C-469/98, EU:C:2002:627; Judgment of 5 November 2002, *Commission v Belgium* C-471/98, EU:C:2002:628; Judgment of 5 November 2002, *Commission v Luxembourg* C-472/98, EU:C:2002:629; Judgment of 5 November 2002, *Commission v Austria* C-475/98, EU:C:2002:630; Judgment of 5 November 2002, *Commission v Germany* C-476/98, EU:C:2002:631; Judgment of 5 November 2002, *Commission v Netherlands* C-523/04, EU:C:2002:632.

³² Opinion of 7 February 2006, Opinion 1/03 Lugano Convention, ECR I-1145.

³³ E. Neframi, op. cit., p. 330.

³⁴ J. Weiler, "The External Legal Relations of non-Unitary Actors: Mixity and Federal Principle", [in:] D.O'Keeffe, H.G. Schermers (eds.), op. cit., p. 39.

³⁵ E. Neframi, op. cit., p. 332.

The Court considered this issue in the *Dior* case where it interpreted Article 50(6) of the TRIPS agreement establishing time limits on national interim measures³⁶. In this decision, the Court held that

in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPS or that it should oblige the courts to apply that rule of their own motion³⁷.

A similar view was expressed by the Court in the *Merck* case pertaining to the direct effect of Article 33 of the TRIPS agreement, specifying the period of the protection of patents³⁸. The Court stated that, within the limits of their competences, Member States “at this point in the development of Community law [...] may choose whether or not to give effect to that provision”³⁹. The Court considered the direct effect of certain provisions of mixed agreements not only using the example of the TRIPS agreement, but also the Aarhus Convention⁴⁰. The subject of the Court’s analysis was Article 9(3) of the Convention concerning access to justice. In this decision the Court unambiguously confirmed that national courts determine on the basis of national law “whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion”⁴¹.

The dominant view in the doctrine is that the above-cited decisions suggest that the Court admitted its jurisdiction to interpret the relevant Articles of the TRIPS Agreement and the Aarhus Convention as mixed agreements. It follows that the CJEU has jurisdiction to interpret mixed agreements, especially in order to determine the relative competences of the European Union and Member States as well as the responsibility for the performance of these agreements⁴².

³⁶ For a commentary, see: E. Neframi, “La compétence de la C.J.C.E. pour interpréter l’accord TRIPS selon l’arrêt Parfums Christiane Dior, du 14 décembre 2000”, *Revue du droit de l’Union européenne* 2, 2001, pp. 491 *et seq.*

³⁷ Judgment of 14 December 2000, *Parfums Christian Dior* joined cases C-300/98 and C-392/98, EU:C:2000:68, paragraph 48.

³⁸ For a commentary, see: E. Neframi, “L’insociabilité des accords OMC tributaire du régime juridique des accords mixtes”, *Revue du Marché commun et de l’Union européenne* 2008, pp. 227 *et seq.*

³⁹ Judgment of 11 September 2007; *Merck* C-431/05, EU:C:2007:496, paragraph 47.

⁴⁰ Convention on the Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, United Nations Treaty Series (UNTS) 2161, no. 37770, p. 447.

⁴¹ Judgment of 8 March 2011, *Lesoochranárske zoskupenie* C-240/09, EU:C:2011:125, paragraph 32.

⁴² M. Cremona, “Who Can Make Treaties...”, p. 113.

If interpretative jurisdiction by the Court is possible for that part of an agreement which falls outside the EU's exclusive competences, then the provisions concerned must be deemed an integral part of the EU legal order. The Court itself expressly stated as much, for instance in the *Merck* case, and noted that the TRIPS forms part of the WTO agreement signed by the Community and, therefore, held that "according to settled case law, the provisions of the convention now form an integral part of the Community legal order". Thus, the Court established its jurisdiction "to define its obligations which the Community thereby assumed and, for the purpose, to interpret the provisions of the TRIPS Agreement"⁴³. Based on these decisions certain authors claim that as part of this interpretative jurisdiction the Court may decide on the meaning of those of the provisions of a mixed agreement which fall outside the EU's exclusive competence. It appears therefore justified to advance the thesis that the provisions of a mixed agreement lie within the scope of EU law to the extent that they refer to areas in which the Union has exercised its powers and adopted legislation. Accordingly, Member States are obliged to implement these provisions. The Court's decision in the *Commission v France* case may be quoted to support this thesis. In its ruling the Court held that:

[s]ince the Convention and the Protocols thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments⁴⁴.

As such the CJEU has jurisdiction to interpret such provisions of mixed agreements and to determine their direct effect. The Court, however, may not accept or reject the direct effect of those provisions of a mixed agreement that do not fall under the exclusive competence of the Union and pertain to fields in which the Union has not exercised its powers and adopted legislation. Consequently, according to E. Neframi, mixed agreements "cannot be assimilated to EU agreements"⁴⁵. That is to say that, in the case of the latter agreements, the interpretative jurisdiction of the Court includes determining their direct effect, i.e. their implementation. By contrast, with regard to mixed agreements there is a division of implementation competences according to the extent of pre-emption⁴⁶.

These matters reflect the scale of problems that arise with reference to determining by the CJEU of the direct effect of the EU mixed agreements, in particular in the context of the rights of individuals. Such problems justify the thesis of the complex nature of such agreements which, after all, constitute an important source of EU law.

⁴³ *Merck* case, op. cit., paragraphs 31 and 33.

⁴⁴ Judgment of 7 October 2004, *Commission v France* C-239/03, EU:C:2004:598, paragraph 29.

⁴⁵ E. Neframi, "Mixed Agreements as a Source...", p. 335.

⁴⁶ *Ibid.*

3. CONCLUDING REMARKS

All in all, it can be concluded that differentiating between exclusive and shared competences within the provisions of a mixed agreement matters when it concerns the direct effect and implementation of individual provisions analysed from the perspective of different categories of competences. Those provisions of a mixed agreement that fall under shared competences create an EU obligation of the Member States and require a uniform interpretation by the CJEU, yet their direct effect — or in more general terms, their implementation — depends on whether the Union has exercised its powers and adopted legislation in the field of co-operation concerned⁴⁷.

All these factors make the discussion of the treaty-making powers of the EU far more complex than the discussion of the treaty-making powers of international organizations in general. The reason for this is not only the particularly high level of integration within the Union, but mostly the existence of different categories and subcategories of EU powers in external relations. Mixity raises diverse legal but also practical questions, and only some of these questions have been addressed in this paper. Undoubtedly, there is still and there will be a need for mixity in the external relations of the EU.

BEZPOŚREDNI SKUTEK UMÓW MIESZANYCH UNII EUROPEJSKIEJ W KONTEKŚCIE OCHRONY PRAW PODSTAWOWYCH

Streszczenie

Szczególną kategorią umów międzynarodowych, jakie szeroko występują w praktyce stosunków zewnętrznych Unii Europejskiej, są umowy mieszane. Umowy takie mają niejako podwójną naturę, bo pozostają na styku prawa międzynarodowego i prawa Unii Europejskiej. Jako umowy, są one źródłem prawa międzynarodowego i w stosunku do nich pozostają w mocy reguły prawa traktatów. Jednocześnie, jako umowy mieszane, zajmują one ważne miejsce w systemie źródeł prawa Unii Europejskiej. Specyfika umów mieszanych wynika zwłaszcza z określonego w traktatach, charakterystycznego podziału kompetencji między Unię Europejską i jej państwa członkowskie, zwłaszcza w stosunkach zewnętrznych.

Zagadnienia te stanowią podstawę do zaprezentowania szczegółowej problematyki badawczej, a mianowicie problematyki skutku bezpośredniego umów międzynarodowych mieszanych, zwłaszcza w kontekście ochrony praw podstawowych. Prezentując tę problematykę, autor odwołuje się do odpowiednich postanowień Traktatu z Lizbony, które nie tylko określiły nowy, prawnomiędzynarodowy status Unii Europejskiej, ale które w niektórych dziedzinach współpracy określiły nowy kształt kompetencji Unii, bądź to jako kompetencji wyłącznych, bądź jako kompetencji dzielonych. Na tym tle autor prezentuje problematykę skutku bezpośredniego umów mieszanych, powołując przy tym na reprezentatywne orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej.

⁴⁷ For more on the future of mixed agreements since the entry into force of the Lisbon Treaty, see e.g.: A. Dashwood, "Mixity in the Era of the Treaty of Lisbon", [in:] C. Hillion, P. Koutrakos (eds.), op. cit., pp. 349 *et seq.*; and A. Rosas, "The Future of Mixity", [in:] Hillion Ch., Koutrakos P. (eds.), op. cit., 2010, pp. 367 *et seq.*