Chapter 16
EU AGREEMENTS WITH THIRD COUNTRIES: CONSTITUTIONAL RESERVATIONS BY MEMBER STATES

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1. Introduction

The introduction of Article 24 by the 1997 Amsterdam Treaty in the Treaty on European Union was meant to provide an explicit legal basis for the Union to conclude agreements with third states and other international organisations. It is well known that the Union has made full use of this competence and has concluded more than ninety agreements.[1] By using the Article 24 TEU competence (in conjunction with Article 38 TEU in the case of agreements in the area of police and judicial cooperation in criminal matters – PJCC) the European Union has entered the international stage as a legal actor with obligations and responsibilities that can be viewed in distinction from those of its Member States. This turns the provision into the general legal basis for the Union's treaty making, which may even be used to conclude cross-Pillar (Second and Third) agreements.[2] In practice, the treaty-making competence has proven to facilitate the EU's role in international crisis management as most agreements relate to the European Security and Defence Policy (ESDP).[3] In fact, one could argue that the 'subsequent practice' of the EU's treaty

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[1] Indeed, these 'agreements' can be considered treaties in the sense of Art. 2(1)(a) of the 1969 and 1986 Vienna Conventions on the Law of Treaties as they fulfil all generally accepted criteria. See, in general, A. Aust, *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press 2007); and J. Klabbers, *The Concept of Treaty in International Law* (The Hague, Kluwer Law International 1996). Following some of Klabbers' criteria one could probably conclude that the same holds true for the other international instruments used by the Union: 3 Memoranda of Understanding, 3 Joint Declarations, 1 Joint Statement, 1 Joint Position, and 1 Strategic Partnership.

[2] See the 2006 Agreement between the European Union and the United States of America on the processing and transfer of passenger name records (PNR) data, which is based on Decision 2006/729/CFSP/JHA of the Council of 16 October 2006, *OJ* 2006 L 298. This refers to both Arts. 24 and 38 TEU. See, in general, E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford, Oxford University Press 2002).

[3] See R. Wessel, 'The EU As a Party to International Agreements: Shared Competences? Mixed Responsibilities?', in A. Dashwood and M. Maresceau, eds., *The Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge, Cambridge University Press 2008).

S. Blockmans, ed., The European Union and Crisis Management

making is largely based on the creation of ESDP and the launching of around twenty crisis management missions since 2003.

The debate on whether the agreements are concluded by the Council on behalf of the Union or on behalf of the Member States seems to be superseded by practice.[4] And even before that, it was clear that 'it would hardly be persuasive to contend that such treaties are in reality treaties concluded by individual Member Stares.'[5] Indeed, the entire decision-making process as well as the conclusion of the agreements does not involve a separate role for the Member States. Apart from the references to the European Union in both the texts and the preamble of the agreements and the fact that adoption and ratification take place 'on behalf of the Union', this is confirmed by the central role of the Union's institutions and bodies (including the Presidency, the Council's working parties and the Council Secretariat) and by the final publication in the L series of the Official Journal (decisions on *inter se* agreements of the Member States are published in the C series).[6] As one author observed, 'fairly strange operations would be needed to demonstrate that a treaty concluded under such circumstances has instead created legal bonds between the third party concerned and each one of the Member States of the European Union.'[7]

It has already been argued elsewhere that the European Union itself is primarily responsible for the implementation of the agreements.[8] The Member States may

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[4] See, however, some early agreements which refer to 'the Council of the European Union' as the contracting party, including the 1999 Agreement with the Republic of Iceland and the Kingdom of Norway on the establishment of rights and obligations between Ireland and the United Kingdom of Great Britain and Northern Ireland, on the one hand, and the Republic of Iceland and the Kingdom of Norway, on the other, in areas of the Schengen acquis which apply to these States, *OJ* 2000 L 15/2; and the 1999 Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis, *OJ* 1999 L 176/ 35. Indeed, even recently, some Member States have (still) held to the view that the Council concludes agreements on their behalf, rather than on behalf of the Union. See S. Marquardt, 'La capacité de l'Union européenne de conclure des accords internationaux dans le domaine de la coopération policière et judiciaire en matière pénal', in G. De Kerchove and A. Weyembergh, eds., *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne* (Brussels, Editions de l'Université de Bruxelles 2003), at 185. See the same contribution for arguments underlining the view that the Council can only conclude these agreements on behalf of the EU. See also S. Marquardt, 'The Conclusion of International Agreements Under Article 24 of the Treaty on European Union', in V. Kronenberger, ed., *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, T.M.C. Asser Press 2001) 333-350; D. Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague, T.M.C. Asser Press 2004), at 74. See also, more extensively, R. Wessel, 'The International Legal Status of the European Union', 2 *EFA Rev.* (1997) 109-129; see also R. Wessel, 'Revisiting the International Legal Status of the EU', 5 *EFA Rev.* (2000) 507-537.

[5] C. Tomuschat, 'The International Responsibility of the European Union', in E. Cannizzaro, ed., *The European Union As an Actor in International Relations* (The Hague, Kluwer Law International 2002), at 181. See also P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, Oxford University Press 2004), at 159; P. Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing 2006), at 406-9; R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', 43 *CML Rev. (*2006), at 354-356.

[6] See, more extensively, D. Thym, 'Die völkerrechtlichen Verträge der Europäischen Union', 66 *ZaöRV* (2006) 863-925.

[7] See Tomuschat, *supra* n. 5, at 181-2.

[8] See Wessel, *supra* n. 3.

have allowed the Union to become a party to the agreements, but this does not mean that they themselves have entered into a legal relationship with the third states or international organisations. On the other hand, both Article 10 TEC and Article 11(2) TEU seem to call for a loyal attitude of the Member States with regard to agreements adopted (or planned) by the Union. After all, the (international) legal status of agreements concluded by the Union could be deprived of any effect if they would allow Member States to conclude agreements which would depart from established Union law.

Indeed, agreements concluded by the EU may also bind the Member States indirectly.[9] Apart from the fact that, in general, the agreements concluded by the Union seem to be restraints on Member State competences to conclude new agreements covering the same issues, some ESDP agreements explicitly refer to the Member States.[10] More clear examples can be found in some Third Pillar agreements pursuant to which Member States have obligations as well.[11] A particular complex situation is created by Article 24, para. 5, which provides that

> 'No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.'

So far, this provision has not received much attention in academic literature. However, once invoked, its potential impact on the legal status of EU agreements – and hence on the Union's possibility to engage in international crisis management – may be substantial. Obvious questions include: are EU agreements binding on those states that did not put forward their constitutional requirements?; what are the legal effects of the provision's application?; and, how long can provisional application last? In the following sections we aim to shed more light on the potential ramifications of Article 24(5) TEU. Section 2 will analyse the content of this provision; section 3 will discuss the positions taken by Member States in relation to Article 24(5); section 4 will investigate to what extent EU agreements have been affected by the use of Article 24(5); and section 5 will look at the legal consequences of the provisional application of EU agreements.

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[9] See, more extensively, C. Hillion and R. Wessel, 'Restraining External Competences of EU Member States under CFSP', in M. Cremona and B. de Witte, eds., *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford, Hart Publishing 2008) (forthcoming).

[10] This is however exceptional. Examples can be found in the agreement between the EU and NATO on the Security of Information (*OJ* 2003 L 80/36) and in some framework participation agreements pursuant to which Member States have to make a declaration 'waiving certain types of claims against the participating third States concerned.' See A. Sari, 'The Conclusion of International Agreements by the European Union in the Context of the ESDP', 57 *ICLQ* (2008) 53-86, at 81.

[11] See in particular the two 2003 agreements with the United States on mutual legal assistance and on extradition. Both agreements have been published in *OJ* 2003 L 181. On the negotiations on and content of the agreements, see G. Stessens, 'The EU-US Agreements on Extradition and on Mutual Legal Assistance: How to Bridge Different Approaches', in De Kerchove and Weyembergh, eds., *supra* n. 4, 261-273. Stessens points to the fact that certain results in these agreements would have been unattainable for individual states in bilateral agreements with the US.

2. The content of Article 24(5) TEU

Paragraph 5 can be considered as the most controversial provision of Article 24 TEU. The most obvious interpretation would be that a Member State can exclude the binding effect of an agreement once its representative in the Council states that it is required to observe domestic constitutional procedures, in which case the provision allows a provisional application of the agreement by the other members of the Council. Over time, however, paragraph 5 has been subject to many different interpretations. It has been used both as proof of the Union's treaty-making capacity and as a reason to deny it. Hence, the reference to the internal procedures of the Member States in this provision, as well as the fact that the Member States have been enabled to use the procedures to exclude the binding effect of the agreements has been considered evidence of the conclusion of the agreement by the Member States, since the final decision remains in their hands.[12] On the other hand, an *a contrario* interpretation of the provision would produce a different result: if Member States themselves became a party, any reference to domestic constitutional requirements would be superfluous.[13] Article 24(5) TEU would make sense only if the Member States were not parties to the agreement, since if they could be parties they would have the chance to decide for themselves whether or not to sign and subsequently ratify the agreement.

Another question that arises in relation to the application of Article 24(5) is at what moment a declaration has to be made: before or after the conclusion of the agreement? An obvious interpretation of the provision would be that it seems more adequate to make the declaration *prior* to the conclusion of the agreement, in particular if the decision of the Council has to be adopted by unanimity. Otherwise the state would have to vote against the adoption of the agreement as domestic constraints would not allow its conclusion or application.[14] But, failing a unanimity requirement, would it be possible to first conclude the agreement and subsequently invoke Article 24(5)?

Taken literally, the provision in paragraph 5 merely influences the application of the agreement by the EU Member States, but does not seem to affect the conclusion of the agreement by the EU as such; it would thus be possible – at least theoretically – for a Member State to make a declaration after the conclusion of the agreement.[15]

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[12] See M. Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', in P. Craig and G. De Burca, eds., *The Evolution of EU Law* (Oxford, Oxford University Press 1999), at 168; J.-C. Gautron, 'L'Union européenne et le concept d'organisation internationale', in R. Vitoria, ed., *L'Union européenne et les organisations internationales* (Brussels, Bruylant 1997) 14-35; P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments* (Oxford, Hart Publishing 2001), at 32.

[13] See A. Tizzano, 'La personalità internazionale dell'Unione Europea', 2-3 *Il Diritto dell'Unione Europea* (1998), at 393.

[14] See P. Mariani, *Le relazioni internazionali dell'Unione europea: aspetti giuridici della politica estera, di sicurezza e difesa comune* (Milan, Giufreè 2005), at 98; see Marquardt (2001), *supra* n. 4, at 344.

[15] As Marquardt states 'the fact that Member States may have internal constitutional requirements (…) does not affect the nature of the agreement and the procedure for its conclusion on the part of the Union.' See Marquardt (2001), *supra* n. 4, at 344.

The EU would remain responsible for the implementation of the agreement in spite of the fact that one or some of its Member States are not bound by it. However, complying with the agreement may be difficult when one or more Member States are under no legal obligation to respect it. While this solution could thus be accepted from a legal point of view, it could lead to a breach of the agreement by the EU, in particular when the ECJ lacks the competence to force Member States to comply with the agreement.[16] In order to avoid a breach of the agreement by the Union as a result of the use of Article 24(5) and subsequent non-application of the agreement by a Member State, one solution could be to include in the agreement the possibility of its provisional application. However, this option does not solve the problem of non-application of the agreement by the Member State(s) making the declaration, since the agreement has to be applied provisionally by the EU as a whole. These theoretical legal problems are no doubt the main reason that in practice the EU has interpreted Article 24(5) in the most obvious sense and, where it is invoked, puts off the conclusion of international agreements until Member States indicate that they have fulfilled the necessary constitutional requirements. Provisional application has not yet been used as regards any of the ESDP agreements. This solution was however adopted by the EU in its agreement with the United States on the processing and transfer of passenger name record (PNR) data by air carriers of the United States Department of Homeland Security.[17] The Council Decision adopting this agreement only contains the authorisation to *sign* the agreement, not to *conclude* it. The Decision also confirms the provisional application pending the entry into force of the agreement, for which a new Council Decision is needed, authorising the conclusion of the agreement and notifying the completion of national procedures. This mechanism presents a two-step procedure 'comparable to the signature and ratification steps.'[18] It should be underlined that this comparison with the ratification procedure of states does not mean that the national procedures are part of the conclusion procedure of the EU. It also excludes the possibility of invoking Article 46 of the Vienna Convention on the Law of Treaties with a view to questioning the validity of the agreement in case the procedure mentioned in Article 24(5) has not been completed.[19]

Another question related to the declaration made by Member States is whether invoking domestic constitutional procedures allows non-application of EU agreements in view of other obligations and principles in the EU Treaty. Although Article 24(5) TEU leaves possible conflicts unaddressed, the general principle of good faith in conjunction with Article 11(2) TEU, which states that the Member States support the activities of the Union 'in a spirit of loyalty and mutual solidarity' and

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[16] See G. Hafner, 'The Amsterdam Treaty and the Treaty Making Power of the European Union', in G. Hafner, ed., *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of his 80th Birthday* (The Hague, Kluwer Law International 1998), at 275.

[17] *OJ* 2006 L 298/27.

[18] See Hafner, *supra* n. 16, at 275.

[19] Ibid., at 274. See also T. Georgopoulos, 'What Kind of Treaty-making Power for the EU? Constitutional Problems Related to the Conclusion of the EU-USA Agreements on Extradition and Mutual Legal Assistance', 30 *EL Rev.* (2005), at 197.

'refrain from any action which is contrary to the interest of the Union or likely to impair its effectiveness (…)', could provide a basis for establishing an obligation for Member States to at least carry out those constitutional procedures as quickly as possible.[20]

Finally, once the domestic constitutional procedures have been completed, a positive result will allow the state to pass an affirmative vote in the Council regarding the conclusion of the agreement. But what if a constitutional procedure reveals that it is impossible for a government to be bound by the agreement? There seem to be different ways out of this legal dilemma. First of all, in case of a unanimity requirement, a 'no' vote by any Member State(s) obviously prevents the final conclusion of the agreement. To avoid this result, some authors have considered the possibility of abstention on the basis of Article 23(1) together with a formal declaration.[21] The agreement could thus be concluded but would not be binding on that (those) particular Member State(s). It has however also been argued that the unanimity requirement in Article 24(2) TEU should be seen as a *lex specialis* 'which overrides the general rule under Article 23(1).'[22] This view is supported by the fact that no cross-references are made in Articles 23 and 24 allowing abstentions in the conclusion of international agreements. The entire legal regime seems to aim at the conclusion of an agreement by the Union, which must be binding on all Member States as soon as possible, albeit on the basis of Union law rather than international treaty law. For cases where one or more Member States bring up domestic constitutional problems, Article 24(5) only provides for provisional application as an option. As provisional application is not intended to last indefinitely, one may assume that in practice either a reference is made, in a special declaration, to the specific position of one or more Member States, or that negotiations with the third party are re-opened.

3. The position of Member States in relation to Article 24(5) TEU

It goes beyond the scope of this contribution to study the parliamentary procedures related to these agreements in all 27 Member States. However, based on some discussions with members of the legal services of the EU institutions and certain ministries of foreign affairs, it seems that, despite the clear difference as to how Member States interpret Article 24(5), most Member States generally do not consider EU agreements relevant to be subjected to their regular parliamentary procedure.[23] As

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[20] See Mariani, *supra* n. 14, at 98; A. Mignolli, 'Sul Treaty-Making Power nel secondo e nel trezo pilastro dell'Unione Europea', 4 *Rivista di Diritto Internazionale* (2001), at 983-984. See on the application of Art. 11(2) TEU as well as Art. 10 TEC, Hillion and Wessel, *supra* n. 9.

[21] See Marquardt (2001), *supra* n. 4, at 345; Mariani, *supra* n. 14, at 98; and Mignolli, *supra* n. 20, at 984.

[22] See Hafner, *supra* n. 16, at 279.

[23] The general reluctance on the part of Member States to invoke national constitutional requirements in relation to the conclusion of EU agreements is confirmed by G. De Kerchove and S. Marquardt,

ratification by Member State governments is not required for agreements concluded by the Union, one could argue that their constitutional requirements simply do not apply. At least in the Netherlands the agreements are not considered to be in need of parliamentary approval since the Kingdom of the Netherlands is not a party. For the same reason, the agreements are not published in the *Traktatenblad*, the national official journal of treaties concluded by the Kingdom. An exception was made for the agreements concluded with the United States in the area of PJCC matters, because these could be considered to complement or even amend existing bilateral treaties with the United States. However, in this particular case the position of the Netherlands was not exceptional: all Member States – with the exception of Austria, Estonia, France and Greece – made a constitutional reservation. The same situation occurred as regards the conclusion of the agreements with Iceland and Norway on the application of certain provisions of the Convention of 29 May on mutual assistance in criminal matters and on a surrender procedure,[24] whereas in relation to the agreement with Switzerland on the implementation, application and development of the Schengen acquis eight Member States invoked Article 24(5).[25] This clearly differentiates Third Pillar agreements from those concluded under the Common Foreign and Security Policy (CFSP), regarding which, despite the relation with military matters of the crisis management agreements, the states have never made use of Article 24(5) because of the voluntary nature of the contribution to the operations concerned. Nevertheless, this practice does not prevent the use of this provision in such agreements. Not only in Third Pillar cases does the question become relevant as to why the Union and its Member States have not opted for the same construction that has proven its value under Community law: the 'mixed agreement'. One could argue that ESDP agreements, too, concern sensitive issues in which national parliaments would want to have a say. On the other hand, as mixed agreements would need to be ratified by all Member States, this would certainly come into conflict with the urgency of ESDP cases.

In general, Member States have used the expression 'the requirements of its own constitutional procedure' in Article 24(5) in different ways. How and why states make a statement based on this provision depends on their national rules and on their interpretation of the provision. A restricted use of it is supported by Greece, France and Portugal, which generally consider that an Article 24(5) declaration should (only) be made if the provisions of the agreements are incompatible with the national Constitutions. Specifically in France, the *Conseil d'Etat* stated that if an

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'Les accords internationaux conclus par l'Union Européenne', 50 *Annuaire Français de Droit International* (2004), at 813: '(…) dans la pratique suivie jusqu'à présent aucun État membre n'a invoqué le respect de ses règles constitutionnelles lors de la conclusion par le Conseil d'accords dans le domaine de la PESC.'

[24] *OJ* 2004 L 26 and *OJ* 2006 L 292.

[25] *OJ* 2004 L 370. See De Kerchove and Marquardt, *supra* n. 23, at 813 and 823. In these cases the Council decided on a procedure in two stages, allowing Member States to follow domestic parliamentary procedures; see Conclusions of the Council of 6 June 2003, Doc. 10409/03 of 18 June 2003. See also J. Monar, 'The EU As an International Actor in the Domain of Justice and Home Affairs', 9 *EFA Rev.* (2004) 395-415; and Georgopoulos, *supra* n. 19, at 193.

agreement concluded under Article 24 were incompatible with the rights and freedoms granted by the Constitution, the executive power could invoke Article 24(5) TEU.[26] These countries also consider that it is not necessary to use national ratification procedures in order to be able to apply agreements concluded by the Union under Article 24 TEU. Nevertheless, they may inform national parliaments about these agreements in some specific situations. The French government, for instance, informs parliament of agreements affecting parliamentary competences on the basis of the procedure included in Article 88-4 of the Constitution.[27] Although parliament requests the French government to follow its opinion, it is not considered to have binding effect.[28] Likewise, in Portugal, parliament's opinion is non-binding and is required in matters that fall under its legislative competence in accordance with Article 161(n) of the Constitution and with Law 43/2006.[29] The Spanish case is similar to those described above since Spain has so far used Article 24(5) where the subject of the agreement has affected the national constitutional order.[30] In this sense, *El Consejo de Estado* stated that the agreements on extradition and mutual legal assistance with the United States affected rights included in the Spanish Constitution.[31] This required the application of Article 94(1) of the Spanish Constitution, which contains the national procedure for concluding an agreement. However, in this case Spain did not make use of Article 24(5), as it had done in relation to the PNR agreement and the agreement with Iceland and Norway on mutual legal assistance in criminal matters.

A different opinion is shared by those states which expand the use of Article 24(5) to situations that are not exclusively related to constitutional rules. Italy is one of the most characteristic examples in this respect, as it will also invoke Article 24(5) if the agreement does not comply with domestic legislation, if it conflicts with previous agreements signed by Italy or if it requires new domestic legislation. Likewise, Estonia will make a statement according to Article 24(5) if the agreement requires amending domestic legislation or drafting new legislation, or falls within the competence of parliament.

The German situation is special as this Member State applies national rules on the conclusion of international agreements to agreements concluded by the EU,

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[26] Avis nº 368.976, 7 May 2003 <http://www.conseil-etat.fr/avisag/368976.pdf>.

[27] Art. 88-4: 'The Government shall lay before the National Assembly and the Senate, drafts of or proposals for Acts of the European Union containing provisions which are of a statutory nature as soon as they have been transmitted to the Council of the European Union. It may also lay before them other drafts of or proposals for Acts or any instrument issuing from a European Institution. In the manner laid down by the rules of procedure of each assembly, resolutions may be passed, even if Parliament is not in session, on the drafts, proposals or instruments referred in the preceding paragraph.'

[28] See De Kerchove and Marquardt, *supra* n. 23, at 823.

[29] 'The Assembly of the republic shall be responsible for: n) Pronouncing, as laid down by law, on such matters awaiting decision by European Union bodies as concern the sphere of its exclusive legislative responsibility.'

[30] Information received in private conversations with a member of the legal service of the Spanish Ministry for Foreign Affairs.

[31] Dictamen del Consejo de Estado Ref. 609/2004 and Ref. 610/2004.

despite the fact that Germany is not a party to those agreements. Thus, according to Article 59 of the Basic Law,[32] the German parliament has to consent to the application of those agreements and in order to comply with this procedure Germany may have to invoke Article 24(5) TEU. In contrast to this position, Austria considers that it is not a party to the EU agreements and, hence, that there is no need to apply the national parliamentary procedure. The situation in the United Kingdom is even different, as in this country there is no formal requirement to apply an EU agreement, but in relevant cases the legislation necessary for implementation must be ready before the Council Decision on the conclusion of the agreement is adopted.

This wide variety of interpretations of Article 24(5) produces legal uncertainty, not only for the Union and its Member States, but also for third parties involved. The possibility of 'provisional application' offered by paragraph 5 may be seen as a way out, but as with the conclusion of agreements, each state has different (constitutional) rules on provisional application (see *infra*, section 5). With regard to the use of Article 24(5), the limited interpretation supported by France and Greece seems the best way to both comply with the loyalty obligation in Article 11(2) and to prevent a situation in which a combination of the unanimity requirement and the possibility to invoke national constitutional requirements effectively blocks the treaty-making competence of the Union.

4. Agreements affected by Article 24(5) TEU

Despite the fact that information on this issue is hard to find, it seems that so far the European Union has signed eight agreements regarding which states have invoked Article 24(5). The provision was invoked in relation to the agreements with the United States on extradition and mutual legal assistance,[33] as well as with respect to the agreements with Iceland and Norway on mutual legal assistance in criminal matters[34] and to the agreement with Switzerland on the implementation, application and development of the Schengen acquis.[35] Indeed, the procedure has so far not been used in regard to CFSP or ESDP agreements. Nevertheless, it is of a general nature and could be applied to all Union agreements. Although there are no references in other agreements, the use of Article 24(5) can been inferred from the content and the status of some agreements as well as from the procedure used. This

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[32] 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.'

[33] *OJ* 2003 L 181; see also Council Conclusions, 13 June 2003, Press release Nr. 10409/03. Council Decision concerning the signature of an Agreement between EU-USA on mutual legal assistance and extradition; and Council Conclusions, 26 October 2006, Press release Nr. 10959/2/06 (REV 2). Status of ratification of EU-USA Agreements of 25 June 2003 on extradition and of bilateral instruments. See further De Kerchove and Marquardt, *supra* n. 23, at 823.

[34] *OJ* 2004 L 26.

[35] *OJ* 2004 L 370.

leads us to conclude that Members States also applied Article 24(5) in the case of the agreement with Iceland and Norway on the surrender procedure[36] and both PNR agreements with the United States.[37]

The most significant characteristic of the above-mentioned agreements is that the Council only authorised the *signing* and not the *conclusion* of the agreements. This is the two-step procedure referred to above which requires two separate decisions of the Council, the first one to authorise the signature and the second one to authorise the final conclusion. Obviously, the first signature is not a 'signature' as meant in Article 12 of the Vienna Convention on the Law of Treaties (consent to be bound by signature) but rather as meant in Article 14(c) of that Convention (consent to be bound by signature subject to ratification).[38] The main reason for this procedure is the use of Article 24(5) by Member States. After all, due to the fact that the decision to conclude the agreements is subject to unanimity,[39] the need to check for domestic constitutional conformity would force governments to vote against the adoption of the Council Decision. In these cases the separation of signature and conclusion allows finalisation of the text with the third party, without the need for immediate conclusion and with the possibility of provisional application.

Furthermore, the subject of these agreements is police and judicial cooperation in criminal matters (Title VI of the TEU) and since these are the only agreements signed in this area it can be concluded that Article 24(5) has been invoked only in relation to Third Pillar agreements. However, perhaps it is not so much the subject matter as the fact that these agreements contain special and specific duties for Member States that trigger national constitutional requirements. This is particularly clear in the provisions on the application of the agreement in relation to (already existing or new) bilateral extradition or mutual legal assistance treaties with the US. These provisions lay down the rules of application of the treaty and divide competences between the Union and its Member States. In fact, these two agreements with the US provide for a marginal role for the Union as such: most rights and obligations rest with the 'State', which may either be a EU Member State or the US. An example can be found in Article 10 of the extradition agreements:

> 'If the requested State receives requests from the requesting State and from any other State or States for the extradition of the same person, either for the same offence or different offences, the executive authority of the requested State shall determine to which State, if any, it will surrender the person.'

Similar references to State obligations can be found in the Treaty on mutual legal assistance, e.g., in its Article 4:

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[36] *OJ* 2006 L 292.

[37] *OJ* 2006 L 298; and *OJ* 2007 L 204.

[38] See R. Lefeber, 'The Provisional Application of Treaties', in J. Klabbers and R. Lefeber, eds., *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag* (The Hague, Martinus Nijhoff Publishers 1998) 81-95, at 84.

[39] Art. 24(3) states that 'The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.'

> 'Upon request of the requesting State, the requested State shall, in accordance with the terms of this Article, promptly ascertain if the banks located in its territory possess information on whether an identified natural or legal person suspected of or charged with a criminal offence is the holder of a bank account or accounts. The requested State shall promptly communicate the results of its enquiries to the requesting State.'

Formally, however, even in these cases the Member States are not bound by the agreements vis-à-vis the United States; they only have obligations to uphold the Treaty provisions in relation to the EU. This is confirmed by the fact that the US thought it necessary to ask for written instruments in which the Member States stated that they considered themselves bound by the agreements.[40] This may very well be the reason for the somewhat peculiar provision in joint Article 3(2)(a) of the agreements, pursuant to which the European Union 'shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application (…) of its bilateral mutual legal assistance treaty in force with the United States of America.' As these seem to be clearly 'shared' or 'parallel' competences, a mixed agreement should have been the obvious solution. The new agreement could thus have replaced the original bilateral treaties, rather than making them part of a new complex system.[41]

Similar to the above-mentioned agreements, the agreement between the EU and Iceland and Norway on legal assistance contains obligations for Member States, which are clearly stated in Article 6(4): '(…) the entry into force of this Agreement creates rights and obligations between Iceland and Norway and between Iceland, Norway and those member states in respect of which the EU Mutual Assistance Protocol has entered into force.' In addition, the key role of Member States in the fulfilment of the agreement is reflected in Article 4, which only regulates possible disputes – regarding the interpretation and application of the agreement – between Iceland or Norway and Member States of the EU, without making any reference to disputes between the contracting parties to the agreement, Iceland, Norway and the EU.

The agreement between Iceland and Norway and the EU on the surrender procedure contains a similar provision on dispute settlement in Article 36, and the obligations of the Member States can be inferred from Article 1(2), which stipulates that:

> 'The Contracting Parties undertake, in accordance with the provisions of this Agreement, to ensure that the extradition system between, on the one hand, the Member States and, on the other hand, the Kingdom of Norway and the Republic of Iceland shall be based on a mechanism of surrender pursuant to an arrest warrant in accordance with the terms of this Agreement.'

This article thus contains an obligation for the EU to ensure the application of the extradition system by Member States, and an indirect obligation on Member States,

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[40] See Marquardt (2003), *supra* n. 4, at 193; and Monar, *supra* n. 25, 395-415.

[41] See also Thym, *supra* n. 6, at 28; Marquardt (2003), *supra* n. 4, at 193; and Georgopoulos, *supra* n. 19, at 207.

since the fulfilment of the obligation by the EU entails the obligation for Member States to apply the extradition system established by the agreement.

Both PNR agreements differ from the other agreements in that they set out obligations for the EU (and mainly air carriers) and not for Member States. Nevertheless, the content of the obligations may give Member States a reason to invoke Article 24(5), since these obligations potentially affect fundamental rights and especially the right to the protection of personal data – rights that are usually protected by national constitutions through the right to personal privacy.[42]

Finally, the agreement between the EC, the EU and Switzerland seems to be an example of a different reason for provisional application, seeing that a transition period of two years has been established in order for Switzerland to comply with its constitutional procedure, in this case a referendum.[43] Although Switzerland notified the ratification of the agreement on 23 March 2006, it is still only being provisionally applied due to the fact that the *EU* has not yet ratified it. The reason seems to be the application of Article 24(5) by Member States as a result of the obligations imposed directly upon them and the agreement's delicate subject matter.[44] Indeed, it could be argued that Third Pillar agreements may have a more explicit impact on the legal orders of the Member States in the sense that they may affect the lives of EU citizens. On the other hand, if that were the criterion, one might ask oneself whether not all EU agreements related to the establishment of military missions should be subject to parliamentary scrutiny.

The military agreements are closely related to constitutional matters (armed forces) and most will affect the status of the members of the mission and consequently the status of EU citizens in the countries where the mission is deployed, which seems to justify parliamentary scrutiny. Nevertheless, as mentioned earlier, the difference with the other agreements in which Article 24(5) has been used is the voluntary character of the contribution. The Member States are under no obligation to contribute to the mission – they only have a commitment[45] – which seems to

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[42] See Georgopoulos, *supra* n. 19, at 202. Examples include Art. 10 of the Dutch Constitution: 1. Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament. 2. Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data. 3. Rules concerning the rights of persons to be informed of data recorded concerning them and of the use that is made thereof, and to have such data corrected shall be laid down by Act of Parliament; Art. 18 of the Spanish Constitution: 1. The right to honour, to personal and family privacy and to the own image is guaranteed. 4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights; and Art. 19 of the Slovak Constitution: 2. Everyone has the right to protection against unwarranted interference in his private and family life. 3. Everyone has the right to protection against the unwarranted collection, publication, or other illicit use of his personal data.

[43] See <http://www.europarl.europa.eu/oeil/resume.jsp?id=5200972&eventId=887204&backToCaller=NO&language=en>.

[44] See for instance Art. 17(2): 'Implementation of the provisions referred to in paragraph 1 shall create rights and obligations between Switzerland, of the one part, and, depending on the case, the European Union, the European Community and the Member States, in so far as they are bound by these provisions, of the other part.'

[45] Military Capabilities Commitment Declaration, adopted at the Capabilities Commitment Conference on 20 November 2000.

enable the EU to conclude an ESDP agreement, allowing the Member States to decide later, after the parliamentary scrutiny, whether or not to contribute troops to the mission.

This is not to say that Article 24(5) could not be relevant in the case of ESDP agreements. The very fact that much is left open may affect domestic constitutional principles. Since 2004, the Council somewhat streamlined the decision-making process under Article 24 in relation to the participation of third countries in ESDP missions. Since then, it has become a habit to conclude generic 'framework participation agreements' which allow third states to participate in future EU crisis management missions. The same happened with another large category of agreements: the Status-of-Forces Agreements (SOFAs) and Status-of-Mission Agreements (SOMAs).[46] This system allows the Presidency to negotiate with third parties without the need to seek a fresh mandate from the Council in each specific case.[47] The use of model agreements may make it more difficult for Member States and their parliaments to follow the decision-making process and to look for potential effects on their national constitutional rules and principles. This is even more so in the case of the informal agreements that are frequently concluded, either as an implementation of formally concluded agreements or as independent agreements (mostly in the form of an exchange of letters) between the High Representative for the CFSP and the representative of a third state or another international organisation. There are reasons to conclude that (at least some of) these supplementary and administrative arrangements constitute international agreements binding the European Union.[48] It can moreover not be excluded that these agreements (which may not only deal with communications, medical services or host nation support, but also with the settlement of claims) have an effect which would normally have triggered Member States to invoke Article 24(5).

5. Consequences of the provisional application of EU agreements

Article 24(5) enables the members of the Council who have not stated that they have to comply with the requirements of their own constitutional procedure, to agree that the agreement should nevertheless apply provisionally. Whereas the original (Amsterdam) version of this provision stated that in that case the 'agreement shall nevertheless apply provisionally *to them*' [emphasis added], the Nice Treaty deleted the words 'to them', which seems to underline that the agreement should indeed be applied (on a provisional basis) by the Union. The fact that some Member States may not be able to fulfil obligations they may have because of domestic constitutional problems, is a matter of EU law and not of international treaty law.

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[46] See on SOFAs and SOMAs, A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice', 19 *EJIL* (2008) 67-100.

[47] See, more extensively, Sari, *supra* n. 10, at 61.

[48] Ibid., at 66.

In what sense does provisional application differ from regular, definite application? The 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations deals with provisional application as follows:[49]

> '*Article 25*
> *Provisional application*
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
> (*a*) the treaty itself so provides; or
> (*b*) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.
> 2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.'

It is clear that all parties to the agreement will have to agree to the provisional application.[50] In practice, provisional application is only used if the entry into force of a treaty is subject to the constitutional approval and ratification by at least one of the negotiating states.[51] In the case of EU agreements it is not so much the ratification procedure of one of the parties but rather those of the Member States that may be a reason to opt for provisional application. Article 25 of the Vienna Convention seems to allow different reasons, as long as the parties have in some way agreed to provisional application. This means that indeed already during the negotiations the matter should be brought up and, ideally, be incorporated into the agreement.

With regard to EU agreements, references to their provisional application may be found in the Council Decision by which they were adopted. This system was used when the two PNR agreements were concluded. Article 3 of both Council Decisions relating to the signing of these agreements states that the 'Agreement shall be applied on a provisional basis as of the date of its signature, pending its entry into force.'[52] In these cases it is clear that the provisional application was part of the negotiation process as both agreements state in Article 7 that

> 'This Agreement shall enter into force on the first day of the month after the date on which the Parties have exchanged notifications indicating that they have completed

[49] This provision is similar to Art. 25 of the 1969 Vienna Convention on the Law of Treaties between States, with the distinction that reference is made to international organisations in the 1986 Convention.

[50] See Aust, *supra* n. 1, at 172.

[51] See Lefeber, *supra* n. 38, at 81. On provisional application in general see also M. Rogoff and B. Gauditz, 'The Provisional Application of International Agreements', 39 *Maine Law Review* (1987) 29-81; D. Vignes, 'Une notion ambiguë: la mise en application provisoire de traités', 18 *Annuaire Français de Droit International* (1972) 181- 199.

[52] *OJ* 2006 L 298/27 and *OJ* 2007 L 204/16

their internal procedures for this purpose. *This Agreement shall apply provisionally as of the date of signature*.'[53]

There are also other EU agreements that have been applied provisionally, but without the use of Article 24(5). In those cases the reason may be found in the need for the third party to comply with its internal procedure. Examples include the agreements with Bulgaria, Macedonia and Indonesia.[54] In yet other cases agreements are signed 'subject to their conclusion', but they are not being applied provisionally.[55] It is not clear whether Article 24(5) has also been invoked in some of these cases.

There may be good reasons for provisional application. In general, constitutional and ratification procedures may be quite time-consuming, which in case of, e.g., an international crisis may frustrate decisive action.[56] At the same time, the term 'provisional' implies that the legal situation is not meant to last indefinitely. It is assumed that once parties express their consent to be bound, the provisional application ends for them. A state may also decide that it will never become a party, in which case Article 25(2) of the Vienna Convention makes it possible to end the provisional application for that state. At the same time, it can be derived from the same provision that in the absence of ratification by one or more parties, provisional application may continue to play a role.

An interesting question as regards EU agreements is to what extent the legal situation under provisional application differs from a situation where a treaty would have been concluded. There is considerable consensus in literature that even a provisionally applied agreement is a binding legal instrument and would as such be enforceable.[57] Reference is often made to the commentary of the International Law Commission regarding its work on the Vienna Convention: 'there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis.'[58] Thus, the provisional character of an EU agreement does not affect its

[53] Emphasis added.

[54] Art. 16 of the Agreement between the European Union and the Republic of Bulgaria establishing a framework for the participation of the Republic of Bulgaria in the EU crisis management operations, *OJ* 2005 L 46/50; Art. X of the Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the activities of the European Union Monitoring Mission (EUMM) in the Former Yugoslav Republic of Macedonia, *OJ* 2001 L 241/2; Agreement in the form of an exchange of letters between the European Union and the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel, *OJ* 2005 L 288/60.

[55] Agreement on extradition between the European Union and the United States of America, *OJ* 2003 L 181/27 of 19 July 2003; Agreement on mutual legal assistance between the European Union and the United States of America, *OJ* 2003 L 181/34; Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto, *OJ* 2004 L 26; Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ* 2006 L 292/1.

[56] See Lefeber, *supra* n. 38, at 82.

[57] See Lefeber, *supra* n. 38, at 90-91.

[58] 'Report of the International Law Commission on the Work of Its Eighteenth Session', II *YILC* (1966), at 210.

status as a treaty at the international level. That is not to say that the legal effects at the national level are equally similar. Here, the general principle seems to serve as a starting point: as regards the legal effects of a provisionally applied agreement in the domestic legal order, states remain free to make a distinction with treaties to which they have (already) become a party as long as this does not prevent them from fulfilling their international obligations.

Under Article 24(5) TEU the value of provisional application could therefore be found in the fact that it allows the Union to sign and apply an agreement with a third state or international organisation, even in a situation where one or more Member States have stated that they have to comply with the requirements of their own constitutional procedure. In that case, Article 24(5) provides that the agreement shall not be binding on that state. The question remains, however, whether that state would otherwise be bound by an agreement to which it is not a party. Elsewhere, it is contended that there may be reasons to apply the so-called *Haegeman* doctrine to EU agreements and to regard them as forming 'an integral part of Union law'.[59] This view is supported by the reference in Article 24(6) TEU that the agreements bind the institutions. This would then lead to the conclusion that when Member States are bound by an agreement concluded by the EU, they are so as a matter of EU law. In that respect, it would even be necessary to take principles of EU and EC law into account, including the loyalty obligation in Article 10 TEC (as well as the related case-law of the ECJ).[60] The bottom line is that any recourse to the possibility of provisional application would only be relevant within the EU legal order and not at the international level. In that sense, one could argue that there is no reason for the EU not to conclude an agreement, nor for the members of the Council to vote against conclusion on the basis of domestic constitutional requirements. Any differentiation between Member States could be dealt with 'internally'. This even holds true for Third Pillar agreements which provide for special and specific obligations for the Member States. As long as they are not individual parties to the agreements, their responsibility is indirect and related to the responsibility of the Union, which indeed will have to prevent becoming blocked by constitutional problems of Member States in the fulfilment of its international obligations.

6. Conclusion

International agreements are an important tool used by the European Union in international crisis management; most agreements are used to implement the European Security and Defence Policy. The inclusion of paragraph 5 in Article 24 TEU can primarily be explained from a political perspective. Some Member States clearly acknowledge the need to regulate the treaty-making competence of the Union,

[59] See Hillion and Wessel, *supra* n. 9. The doctrine was established by the ECJ in relation to international agreements concluded by the European Community: Cases 181/73 *Haegeman* [1974] *ECR* 449 and 104/81 *Kupferberg* [1982] *ECR* 3641. See in the same vein Thym, *supra* n. 6, at 38.

[60] See Hillion and Wessel, *supra* n. 9.

whereas others have been keen not to lose their own (sovereign, constitutional) powers in that area.[61] This would also explain why Article 24(5) has so far only been invoked in situations where Member States' competences were clearly affected. From a legal point of view, however, the option to invoke domestic constitutional requirements to prevent the European Union from exercising its international role is far from clear. The possibility which the Council has to decide on provisional application of the agreement certainly offers a way out of the dilemma, but the question remains why the Union should not be allowed to conclude international agreements and to deal with the possible implementation of these agreements by its Member States at an internal level. Moreover, the international legal effects of provisional application do not seem to differ substantially from the ordinary conclusion of agreements.

This is not to say that it is completely incomprehensible that Member States raise constitutional reservations. First of all, in the agreements concerned they have been given a special and separate role. Perhaps it would be more appropriate for the Union to negotiate and sign international agreements in which it only decides on its own obligations and to arrange the implementation of these obligations by the Member States in a separate Council Decision. On the other hand, in some cases it may be wise for the Union to make sure that its international commitments are supported by the Member States in order to prevent them from effectively blocking its international actions.[62] This is connected to the second reason why Member States may feel the need to stress domestic constitutional procedures: the lack of any parliamentary scrutiny at EU level as regards the agreements. Neither Article 24 nor Article 38 TEU provide for a role of the European Parliament in the conclusion of international agreements. Of course, on the basis of Article 21 TEU, the European Parliament is to be consulted on the main aspects and the basic choices of the Common Foreign and Security Policy, just like Article 39 TEU provides that the Council shall consult the European Parliament before adopting any measures in the area of police and judicial cooperation in criminal matters; however, this can hardly been regarded as parliamentary scrutiny.[63] Hence, whenever Member States feel that from a perspective of legitimacy parliamentary involvement is desired or perhaps even necessary, they have no choice but to opt for the domestic level. Thirdly, the agreements in relation to which Article 24(5) has been invoked somehow concern (fundamental) rights of individuals. In some Member States this even implies a constitutional necessity to follow the domestic procedures. At least as long as the protection of fundamental rights is not guaranteed through a clear status of the agreements in the Union's legal order and a role for the ECJ with regard to the legal protection of EU citizens, constitutional 'reservations' may offer a way out.

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[61] This also explains the adoption of Declaration No. 4 at the Amsterdam IGC: 'The Provisions of Article J.14 and K.10 [now Articles 24 and 38] of the Treaty on European Union and any agreements resulting from them shall not imply any transfer of competence from the Member States to the European Union.'

[62] See Thym, *supra* n. 6, at 45-46.

[63] See W. Wagner, *The Democratic Deficit in the EU's Security and Defense Policy – Why Bother?*, RECON Online Working Paper, 2007/10, September 2007.

In legal terms at least, most of these problems could be solved by following the example of the European Community: where competences are not exclusively in the hands of either the European Union or the Member States, a 'mixed agreement' may assure that both parties are allowed to use their prerogatives. Of course, from a more practical point of view, this could result in lengthy ratification procedures at the national level, which, particularly as regards CFSP and ESDP, may conflict with the objectives of the agreements. In that respect, the 2007 Lisbon Treaty does seem to streamline the procedure, not only by deleting Article 24(5) but also by putting an end to the division between EU and EC agreements, irrespective of the fact that the continued separation of CFSP from other policy areas does not completely end the ambiguity of the new type of agreements.[64]

[64] CFSP is the only policy area that will be part of the Treaty on European Union; all other policy areas (including the former Third Pillar) will find a place in the Treaty on the Functioning of the European Union. Art. 37 of the new Treaty on European Union will allow the Union to conclude agreements with one or more states or international organisations in the area of the Common Foreign and Security Policy and the Common Security and Defence Policy. In fact, this provision replaces the current Art. 24 TEU in its entirety. Art. 216(2) of the Treaty on the Functioning of the European Union will provide that 'agreements concluded by the Union are binding upon the Institutions of the Union and on its Member States.'

Part V
Learning by doing