

3

*Cross-pillar Mixity: Combining  
Competences in the Conclusion of EU  
International Agreements*

RAMSES A WESSEL

I. INTRODUCTION: THE CONCLUSION OF EU INTERNATIONAL  
AGREEMENTS

THE 1997 AMSTERDAM TREATY introduced an explicit legal basis for the European Union to conclude agreements with third States and other international organisations. Although a number of agreements were already concluded by ‘the Council of the European Union’ in 1999 in relation to the association of Iceland and Norway with the Schengen *acquis*,<sup>1</sup> the formal legal basis in Article 24 TEU was first used for the conclusion of the Agreement between the European Union and the Federal Republic of Yugoslavia on the activities of the European Union Monitoring Mission (EUMM) in 2001.<sup>2</sup> By

<sup>1</sup> See Agreement concluded by the Council of the European Union and 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 ([2000] OJ L/15/123); Agreement in the form of Exchanges of Letters between the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning committees which assist the European Commission in the exercise of its executive powers ([1999] OJ L/176/53); and Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter’s association with the implementation, application and development of the Schengen *acquis* ([1999] OJ L/176/36).

<sup>2</sup> Agreement between the European Union and the Federal Republic of Yugoslavia on the activities of the European Union Monitoring Mission (EUMM) in the Federal Republic of Yugoslavia ([2001] OJ L/125/2). The reference to Art 24 can be found in Council Decision (2001/352/CFSP) of 9 April 2001 concerning the conclusion of the Agreement between the European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in the FRY [2001] OJ L/125/1.

### *Cross-pillar Mixity*

concluding over 100 agreements, the Union has made full use of this competence.<sup>3</sup> 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—PJCCM), the European Union has entered the international stage as a legal actor with obligations and responsibilities. This turned the provision into the general legal basis for the Union's treaty making whenever agreements could not be based on the Community Treaty.<sup>4</sup>

The purpose of this contribution is to look at the phenomenon of 'mixity' in two different ways. We shall both analyse the different forms of agreements concluded by the European Union with a legal basis in two distinct pillars of the Union as they existed before the Lisbon Treaty ('horizontal mixity') and look at the relationship Member States may have with these agreements ('vertical mixity'). The fact that to date Member States themselves have not become parties to the EU agreements does not mean that they are fully immune to the agreements concluded by the Union ('implied mixity'). Section II will address these different forms of mixity. This will be followed by a short analysis of the legal restraints these agreements may have on the external policies of the Member States and the jurisdiction of the European Court of Justice in relation to EU mixed agreements (section III). The investigation of the pre-Lisbon legal regime allows for a better understanding of the current rules. Section IV will analyse this current situation since the entry into force of the Lisbon Treaty, and some final conclusions will be drawn in section V. All analyses will be restricted to agreements to which the European Union has or can become a party. Community/Member States mixed agreements are extensively dealt with in other parts of this book.

<sup>3</sup> 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. All agreements can be found in the international agreements database of the Commission (<http://ec.europa.eu/world/agreements/>).

<sup>4</sup> The debate on whether these agreements are concluded by the Council on behalf of the Union or on behalf of the Member States seems not only to be superseded by practice but also accepted by most experts in EU external relations law. See, for recent contributions, R Gosalbo Bono 'Some Reflections on the CFSP Legal Order' (2006) 43 *CMLRev* 354–56; D Thym, 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 863; 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, 2000) 181; RA 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) 145–80; and RA Wessel and G Fernandez Arribas, 'EU Agreements with Third Countries: Constitutional Reservations by Member States' in S Blockmans (ed), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague, TMC Asser Press, 2008) 291–308.

*Ramses A Wessel*

## II. FORMS OF MIXITY IN THE UNION

### A. Was there a need for mixity in the non-Community parts of the EU?

Most agreements to which the EU is a party are based on Article 24 of the former TEU, which read:

1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency.
2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.
3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2).
4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).
5. 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.
6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.

Similar to the Community treaty-making competences, no provision could be found in the EU Treaty to allow explicitly for either cross-pillar or EU/Member State combinations in the conclusion of EU agreements.<sup>5</sup> Article 24 merely referred to ‘the Council’, and even before Lisbon ‘the European Union’ became a party to the agreements. In relation to mixed agreements in the European Community, it is generally held that a need for mixity flows either from the limited scope of the Community’s competences, or from the non-exclusive

<sup>5</sup> Nevertheless, Art 102 of the Euratom Treaty does foresee the possibility of ‘Agreements or contracts concluded with a third State, an international organisation or a national of a third State to which, in addition to the Community, one or more Member States are parties’. See also Ruling of the Court of 14 November 1978, Ruling 1/78, *Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty* [1978] ECR 2151.

*Cross-pillar Mixity*

nature of existing competences.<sup>6</sup> In that respect certain views on the legal nature of the European Union may even render the concept of mixity in relation to the former EU absurd. After all, it is still not accepted by everyone that even before Lisbon there was a distinction between the Union and its Member States. In the eyes of those observers the Union was to be equated with the Member States, and any forms of (vertical) mixity would be absurd. I have dealt with these views and the counter-arguments extensively elsewhere,<sup>7</sup> and would like to point out here that also in relation to the notion of mixity, a conceptual differentiation between the Union and its Member States is needed to explain why EU agreements were, and still are, not ratified by the Member States and why cross-pillar EU/EC agreements are not the same as classic EC/Member States mixed agreements.<sup>8</sup>

The complex relationship between the EU, the EC and the Member States as it existed before Lisbon was addressed by Advocate-General Mengozzi in his *ECOWAS* Opinion.<sup>9</sup> The case was about the question whether a decision on financial assistance to the Economic Community of West African States was correctly based on the Common Foreign and Security Policy (CFSP; second pillar), or whether it should have been based on the competences of the Community in the area of development cooperation. As development cooperation, in turn, is a parallel power, the question was relevant when there was (or should be) a collective action by the Member States, or when the Union acted (or should act) on the basis of the CFSP. The controversy on this issue was reflected in the discussion between the Commission and the United Kingdom. The Commission argued that the relation between the Community and the Union could not be equated with the relation between the Community and the Member States. In this model, termed ‘triangular’ by the Advocate-General (para 85), the Union possesses and exercises its own competences, which are not merely equivalent to the collective exercise of the competences retained by the Member States. The United Kingdom, on the other hand, defended a ‘dualist’ model, in which the boundary between the competences of the Community and those of the European Union was treated the same as the boundary separating the Community and its Member States. In other words (and quoting the Advocate-General):

according to that approach, an action of the European Union under Title V of the EU Treaty pursuing one of the objectives laid down in Article 11(1) TEU, including the preservation of peace and the strengthening of international security, would never

<sup>6</sup> See J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague, Kluwer Law International, 2001) at 25.

<sup>7</sup> See eg Wessel, above n 4.

<sup>8</sup> See Wessel and Fernandez Arribas, above n 4.

<sup>9</sup> Opinion of A-G Mengozzi in Case C-91/05, *Commission v Council* (‘*ECOWAS*’ or ‘*Small Arms and Light Weapons*’), judgment of 20 May 2008, nyr. See C Hillion and RA Wessel, ‘Competence Distribution in EU External Relations after *ECOWAS*: Clarification or Continued Fuzziness?’ (2009) 46 *CMLRev* 551.

*Ramses A Wessel*

encroach on the competences of the Community in the area of development cooperation, even if that action had a similar content to the action of the Community, because, like its Member States, the Union would be exercising concurrent competences with those of the Community, thus rendering recourse to Article 47 EU pointless. (para 86)

Advocate-General Mengozzi did not need many words to correct the United Kingdom, and argued that action by the Union on the basis of the second pillar was something other than collective action by the Member States. He referred to earlier case law for support.<sup>10</sup> At that time Article 47 provided that nothing in the EU Treaty should affect the EC Treaties and acts and was invented only to prevent an infringement of the *acquis communautaire* by Union law, not to deny Member States their (individual or collective) existing external competences. In that sense the function of Article 47 (current Article 40 TEU) indeed differed from that of Article 10 EC (current Article 4, para 3 TEU), which does seem to limit the freedom of Member States by stressing the principle of loyalty. In the eyes of the Court, Article 47 had, and probably still has, an internal (horizontal) Union function, and the question of a possible violation of this provision does not depend on the nature of the competences of the Community (paras 61–62). In contrast to the division of external competences between the EC and its Member States, the boundary between the pillars does not move to the extent that the Community made more use of its external competences. Although the Court in its final judgment did not deal with this question in a similar extensive fashion, it implicitly used the ‘triangular’ model as the basis for the division of competences between the Community, the Union and the Member States (see also below).

It thus makes sense to look at both horizontal and vertical mixity in relation to the non-Community parts of the European Union. This will allow us to understand the concept of mixity under the post-Lisbon treaties.

## **B. Cross-pillar second/third pillar combinations**

Before the Treaty of Lisbon, the obvious way to approach this type of cross-pillar agreement was to look for agreements that are based both on Article 24 TEU and on Article 38 TEU. While Article 24 could be found in Title V of the EU Treaty (on CFSP), Article 38 was part of Title VI (PJCCM) and served as a bridge to allow the Union to use its treaty-making competence in the area of the third pillar as well:

Agreements referred to in Article 24 may cover matters falling under this title.

The legal basis primarily plays a role in the adoption of the decision by which the Council approves the international agreement. It is not referred to in the agreements themselves.

<sup>10</sup> See in particular Case C-170/96 *Commission v Council* [1998] ECR I-2763, and Case C-176/03 *Commission v Council* (*‘Environmental Criminal Law’*) [2005] ECR I-7879.

*Cross-pillar Mixity*

The following agreements have been concluded on the basis of both Article 24 and Article 38:

- Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service ([2008] OJ L/213/49)
- Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement) ([2007] OJ L/204/18)
- Agreement between the European Union and the Swiss Confederation on security procedures for the exchange of classified information ([2008] OJ L/181/58)
- Agreement between the European Union and the Government of the United States of America on the security of classified information (OJ [2007] L/115/30)
- Agreement between the European Union and the Republic of Croatia on security procedures for the exchange of classified information ([2006] OJ L/116/74)
- Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security ([2006] OJ L/298/29)
- 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 – Declarations ([2006] OJ L/292/2)
- Agreement between the Republic of Iceland and the European Union on security procedures for the exchange of classified information ([2006] OJ L/184/35)
- Agreement between the European Union and Ukraine on security procedures for the exchange of classified information ([2005] OJ L/172/84)
- Agreement between the European Union and the Republic of Bulgaria on security procedures for the exchange of classified information ([2005] OJ L/118/53)
- Agreement between the European Union and Romania on security procedures for the exchange of classified information ([2005] OJ L/118/48)
- Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information ([2005] OJ L/94/39)
- Agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information ([2004] OJ L/324/16)
- Agreement between the European Union and the Republic of Iceland and

*Ramses A Wessel*

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 ([2004] OJ L/26/3)

- Agreement on mutual legal assistance between the European Union and the United States of America ([2003] OJ L/181/34)
- Agreement on extradition between the European Union and the United States of America ([2003] OJ L/181/27)

Taking into account their subject matter, many of these agreements in fact concern third pillar measures only. One could argue that in these cases a reference to Article 38 TEU would have sufficed, since a reference to Article 24 is already included in that provision. In these cases the mere reference to a dual legal basis would be too formal an argument to decide on their character as cross-pillar agreements.

On the other hand, some agreements do indeed touch upon both CFSP and PJCCM issues alike. This would at least hold true for the agreements on security procedures for the exchange of classified information. The classified information addressed in these agreements is not specified as being related to either CFSP or PJCCM material, and may relate both to information in the framework of the European Security and Defence Policy (ESDP) and the participation of these States in ESDP operations, as well as to information in the area of police cooperation. This would make them truly cross-pillar. At the same time, the Agreement between the EU and the International Criminal Court (ICC) reveals that recourse to a third pillar base was not always necessary—even in a case where the subject matter seems to be related more to police and justice cooperation than to foreign and security policy.<sup>11</sup> Leaving out a reference to Article 38 may be problematic from the point of view of judicial protection, given that third pillar instruments could be subject to judicial review, including arguably international agreements concluded on the basis of Article 38 TEU.<sup>12</sup>

Indeed, the division of competences over the pillars was something that was not dealt with by the Council in a consistent and fully understandable fashion. The Agreement with Bosnia and Herzegovina on security procedures for the exchange of classified information, and the Agreement with Iceland and Norway on mutual assistance in criminal matters are not published under the OJ heading ‘Acts adopted under Title V of the Treaty of the European Union’ but as general

<sup>11</sup> Council Decision 2006/313/CFSP of 10 April 2008, concerning the conclusion of the Agreement between the ICC and the EU, is based on Art 24 EU only ([2006] OJ L/115/49). This is also the only agreement which gives a definition of the European Union by referring to the institutions and relevant EU actors (the Council, the Secretary General/High Representative, the General Secretariat and the Commission of the European Communities [*sic*]). It explicitly states that “EU” shall not mean the Member States in their own right’.

<sup>12</sup> See C Hillion and RA 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) 79.

*Cross-pillar Mixity*

acts of the Council alongside Community measures. The reason may be that somehow these decisions have no CFSP or JHA number but an EC number (2004/731/EC and 2004/79/EC respectively). Nevertheless, Articles 24 and 38 are the only articles mentioned as the legal basis for these acts, and there is nothing which would legitimise the deviation from the general rule to publish them with a CFSP or a JHA number. In fact, one may wonder what happened to the sensitivity on the side of certain Member States in relation to these issues now that they suddenly allowed for acts with a Community number to be adopted on the basis of the non-Community pillars.

A similar situation may be found in relation to the decision concerning the conclusion of the Agreement with the United States on the security of classified information.<sup>13</sup> This decision is presented under the heading 'Acts adopted under Title V of the EU Treaty' (hence CFSP), but it has a third pillar number (2007/274/JHA). Again, the Council did not seem particularly interested in a strict separation of the distinct competences when adopting decisions concerning the conclusion of EU agreements. A case in point is also formed by its decision concerning the conclusion of the Agreement with the European Space Agency, which was published as an 'Act adopted under the EC Treaty/Euratom Treaty', was numbered 2008/667/JHA (hence hinting at a third pillar measure), but which was merely based on Article 24 (implying that it is a CFSP measure only).<sup>14</sup> This is all the more striking since it was possible for the Council to use a combined CFSP/JHA numbering. The Decision concerning the conclusion of the Agreement with Former Yugoslav Republic of Macedonia is numbered 2005/296/CFSP, JHA.<sup>15</sup> The text of this Decision, however, is the same as the text of the other Decisions concerning agreements on exactly the same topic with other States. Similarly, the Decision on the signing of the 2007 PNR Agreement with the United States was numbered 2007/551/CFSP/JHA (note the forward slash instead of the comma). In this case, however, one may wonder why the reference to CFSP was included, as the subject matter seems to be fully covered by the third pillar.<sup>16</sup>

The Council has obviously been struggling with the correct use of Decision numbers in decisions concerning the conclusion of cross-pillar agreements, something which may reflect the more general struggle of the EU bodies to choose between the pillars in substantive terms too.

<sup>13</sup> Council Decision 2007/274/JHA of 23 April 2007, [2007] OJ L/115/29.

<sup>14</sup> Council Decision 2008/667/JHA of 7 April 2008, [2008] OJ L/219/58.

<sup>15</sup> Council Decision 2005/296/CFSP, JHA of 24 January 2005, [2005] OJ L/94/38.

<sup>16</sup> As implicitly suggested by the ECJ in Joined Cases C-317/04 and C-318/04 *European Parliament v Council* [2006] ECR I-4721, and confirmed by the subsequent conclusion of the agreement on the basis of Title VI TEU.



*Ramses A Wessel*

### C. Cross-pillar EU/EC combinations

Cross-pillar measures to create a coherent external policy were already explicitly promoted by the European Council at Feira in 2000 when, in relation to third pillar policy, it said that it

should be incorporated into the Union's external policy on the basis of a 'cross-pillar' approach and 'cross-pillar' measures. Once the objectives have been defined, they should be implemented by making joint use of the Community provisions, those available under the CFSP and those on cooperation laid down in Title VI of the TEU.<sup>17</sup>

This, however, was easier said than done. Where second/third pillar combinations—when limited to true cross-pillar agreements—are already scarce, this is even more the case in relation to EU/EC combinations. The classic example is formed by the Agreement between the European Union, the European Community and the Swiss Confederation, concerning the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*.<sup>18</sup>

Because this agreement concerned both Community and other Union issues, and a combination of an EC and an EU legal basis was not considered to be possible, the Council adopted two Decisions, one 'on behalf of the European Union' (with a reference to Articles 24 and 38 EU) and one 'on behalf of the European Community' (with a reference to Articles 62, point 3, 63, 66 and 95 in conjunction with Article 200(2) EC).<sup>19</sup> The entry into force of this agreement took some time. Not only did Switzerland need a transition period of two years to be able to comply with its constitutional procedure (in this case a referendum),<sup>20</sup> but also, after Switzerland had notified the ratification of the agreement on 23 March 2006, it was still being only provisionally applied due to the fact that the EU had not yet ratified it. The reason seemed to be the application of Article 24(5) by Member States in view of the obligations imposed directly upon them and the agreement's delicate subject matter.<sup>21</sup> In this case the Council decided on a procedure in two stages, allowing Member States to follow domestic parliamentary procedures before actually concluding the agreement. Indeed, the 2004

<sup>17</sup> See 'A Strategy for the External Dimension of JHA', doc 14366/3/05, REV 3, at para 6. Cf also M Cremona, 'EU External Action in the JHA Domain: A Legal Perspective' (2008) *EUI Working Papers LAW* 2008/24, at 14.

<sup>18</sup> [2004] OJ L/370/78.

<sup>19</sup> Council Decision 2004/849/EC of 25 October 2004, [2004] OJ L/368/26 and Council Decision 2004/860/EC of 25 October 2004, [2004] OJ L/370/78.

<sup>20</sup> See <<http://www.europarl.europa.eu/oeil/resume.jsp?id=5200972&eventId=887204&backToCaller=NO&language=en>>.

<sup>21</sup> See, eg, 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.' See also G de Kerchove and S Marquardt, 'Les accords internationaux conclus par l'Union Européenne' (2004) 50 *Annuaire Français de Droit International* 813. See more extensively on the function and use of Art 24(5), Wessel and Fernandez Arribas, above n 4.

*Cross-pillar Mixity*

Decisions concerned the *signing* of the agreement, whereas an EC and an EU Decision of January 2008 allowed for its *conclusion*<sup>22</sup> and its subsequent entry into force on 1 March 2008.<sup>23</sup> This mechanism presents a two-step procedure ‘comparable to the signature and ratification steps’,<sup>24</sup> and has also been used in relation to the Agreement with the United States on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security.<sup>25</sup>

A similar situation occurred in relation to the agreement on the accession of Liechtenstein to the above-mentioned EU–EC–Switzerland Agreement.<sup>26</sup> Again, two separate Decisions were taken by the Council, one on behalf of the European Union and one on behalf of the European Community.<sup>27</sup> Again, the Protocol could only be signed ‘Subject to its conclusion at a later date’ (preamble point 2). At the same time the protocol reveals the capacity of the EU/EC combination to conclude not only bilateral but also multilateral international agreements.

In the light of the *ECOWAS* judgment of the European Court of Justice (section II.A. above), the division of competences between the EC and the EU (CFSP and PJCCM) deserved renewed attention. On the basis of this judgment it could be concluded that EU/EC cross-pillar agreements were to become even more scarce.<sup>28</sup> The Court seemed to limit the possibilities for combined Community/CFSP decisions. The Community was to adopt a measure not only when that measure is, in terms of aim and content, mainly related to an area of Community competence, but also if the measure was both about EC and CFSP matters, without one being incidental to the other. Only when a measure was intended to implement mainly Union objectives, and failing a Community competence, could the Union act (compare paras 71 and 72 of the judgment)—irrespective of a possible relationship with Community objectives. This comes close to a similar situation in the third pillar, where—irrespective of the main purpose of Article 47 TEU—the Court has decided that situations could be

<sup>22</sup> Council Decisions 2008/146/EC, [2008] OJ L/53/1 and 2008/149/JHA, [2008] OJ L/53/50. See also 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’ (2004) 9 *European Foreign Affairs Review* 395; and T Georgopoulos, ‘What Kind of Treaty-making Power for the EU?’ (2005) 30 *ELRev* 193.

<sup>23</sup> See the special announcement in [2008] OJ L/53/18.

<sup>24</sup> 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.

<sup>25</sup> [2006] OJ L/298/27.

<sup>26</sup> Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland; see the Treaties Office Database (<http://ec.europa.eu/world/agreements>).

<sup>27</sup> Council Decisions 2008/262/EC, [2008] OJ L/83/5 and 2008/261/EC, [2008] OJ L/83/3, respectively.

<sup>28</sup> See also Hillion and Wessel, above n 12.

*Ramses A Wessel*

envisaged in which the Community encroaches upon competences of the *Union* in other pillars. In the *PNR* case, the Court held that the EU–US Agreement on Passenger Name Records should not have been based on the Community Treaty (Article 96 EC, internal market) but on the Union Treaty.<sup>29</sup> Hence, in determining the ‘centre of gravity’ of a Community instrument, the Court was no longer restricted to the legal bases offered by the Community Treaty itself, but – even before Lisbon – it was compelled to use the overall Union legal order as the interpretative framework.<sup>30</sup>

Before the entry into force of the Lisbon Treaty (but perhaps even now—see below), the wish of the Court to hold on to a clear separation between different external measures ran the risk of creating a negative side-effect. After all, after *ECOWAS* the Council may have been tempted to refrain from referring to Community measures or initiatives when adopting other Union instruments, in order to make clear that it was dealing with non-Community measures. However, in the case of EU/EC cross-pillar agreements, a combination of Community and other Union issues formed the very essence of the legal basis of agreement. Ironically, one might have imagined a turn to classic mixed agreements once an agreement was not primarily intended to implement non-Community objectives.<sup>31</sup>

#### D. EU/Member State combinations

To date we have not seen any ‘vertical mixity’ in the sense of agreements concluded by both the EU and the Member States. Indeed—and perhaps ironically—the agreements are concluded by the Union on an *exclusive* basis. For proponents of the ‘EU equals MS thesis’ as far as CFSP is concerned, this will not come as a surprise. It should, however, be kept in mind that most Member States generally did not consider the pre-Lisbon EU agreements appropriate to be subjected to their regular parliamentary procedure.<sup>32</sup> As ratification by Member State governments was not required for pre-Lisbon agreements concluded by the Union, one could indeed argue that their constitutional requirements simply did not apply. Many of the agreements do, however, concern sensitive issues (related

<sup>29</sup> Joined Cases C-317/0 and C-318/04 *European Parliament v Council* [2006] ECR I-4721.

<sup>30</sup> In this respect, see also Case C-301/06 *Ireland v Council and European Parliament* (judgment of 10 February 2009, nyr), in which Ireland unsuccessfully argued that the Data Retention Directive (2006/24/EC) should not have been based on Art 95 EC but on Art 34 TEU. See also R H van Ooik, ‘Cross-pillar Litigation Before the ECJ: Demarcation of Community and Union Competences’ (2008) 4 *European Constitutional Law Review* 399.

<sup>31</sup> See also Hillion and Wessel, above n 12.

<sup>32</sup> 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 de Kerchove and Marquardt, cited above n 21, 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.’

*Cross-pillar Mixity*

either to justice and home affairs, or to military actions), and agreements concluded by the EU may very well bind the Member States indirectly, resulting in what could be termed ‘implied mixity’. 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,<sup>33</sup> some agreements explicitly refer to the Member States. Apart from a few cases in the area of ESDP,<sup>34</sup> clearer examples can be found in some third pillar agreements pursuant to which Member States have obligations as well (see below).<sup>35</sup>

In some of these cases the subject matter of the EU agreements was thought to affect citizens’ rights and formed a reason for Member States to invoke Article 24(5) TEU, allowing for a provisional application of the agreements pending domestic constitutional procedures in certain Member States.<sup>36</sup> The provision was invoked in relation to the agreements with the United States on extradition and mutual legal assistance,<sup>37</sup> as well as with respect to the agreements with Iceland and Norway on mutual legal assistance in criminal matters<sup>38</sup> and to the agreement with Switzerland on the implementation, application and development of the Schengen *acquis*.<sup>39</sup> The procedure has not been used in regard to CFSP or ESDP agreements. Nevertheless, it was 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) may be inferred from the content and the status of some agreements, as well as from the procedure used. This leads us to conclude that Member States also applied Article 24(5) in the case of the agreement with Iceland and Norway on the surrender procedure,<sup>40</sup> and in both PNR agreements with the United States.<sup>41</sup>

<sup>33</sup> Hillion and Wessel, above n 12.

<sup>34</sup> See the agreement between the EU and NATO on the Security of Information ([2003] OJ 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 also A Sari, ‘The Conclusion of International Agreements by the European Union in the Context of the ESDP’ (2008) 57 *ICLQ* 53 at 81.

<sup>35</sup> See in particular the two 2003 agreements with the United States on extradition and on mutual legal assistance. Both agreements have been published in [2003] OJ L/181/27 and L/181/34 respectively. 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 G de Kerchove and A Weyembergh (eds), *Sécurité et justice: enjeu de la politique extérieure de l’Union européenne* (Bruxelles, Editions de l’Université de Bruxelles, 2003) 263. Stessens points to the fact that certain results in these agreements would have been unattainable for individual States in bilateral agreements with the US.

<sup>36</sup> See Wessel and Fernandez Arribas, above n 4.

<sup>37</sup> [2003] OJ L/181/27 and L/181/34; see also Council Conclusions, 13 June 2003, Press release No 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 No 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, above n 21, at 823.

<sup>38</sup> [2004] OJ L/26/3.

<sup>39</sup> [2004] OJ L/370/78.

<sup>40</sup> [2006] OJ L/292/2.

<sup>41</sup> [2006] OJ L/298/29; and [2007] OJ L/204/18.

*Ramses A Wessel*

The fact that these agreements contain special and specific duties for Member States may have triggered the ‘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 may 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. See, for example, Article 4:

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.<sup>42</sup> This may very well be the reason for the somewhat peculiar provision in 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.

Obviously the fact that Member States would be bound by the agreements as a matter of *Union* law did not fully reassure the third State in question. In this situation of clear ‘shared’ or ‘parallel’ competences, a mixed agreement could 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

<sup>42</sup> 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 pénale’ in de Kerchove and Weyembergh, above n 35, 179 at 193; and Monar above n 22, 395.

*Cross-pillar Mixity*

system.<sup>43</sup> In this case this would not have had an impact on the speed of the ratification process. The ‘written instruments’ had to be signed by the Member States, but the Union had an obligation to ‘ensure’ this. It took many Member States more than five years to conclude these instruments, and because of the sensitive subject matter some national governments were also obliged to use national parliamentary approval procedures for the conclusion of the EU–US agreements themselves. In the end, 56 ratifications proved to be necessary on both sides of the Atlantic to be able to conclude two (in fact bilateral) agreements.<sup>44</sup>

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

Lastly, even without an explicit reference to obligations of Member States, the subject matter of EU agreements may lead to ‘implied mixity’. Thus, the PNR agreements set out obligations for the EU (and mainly for air carriers) and not for Member States. Nevertheless, the content of the obligations potentially affects

<sup>43</sup> See also Thym above n 4 at 28; Marquardt above n 42 at 193; and Georgopoulos above n 22 at 207.

<sup>44</sup> See Cremona, above n 17, at 24.

*Ramses A Wessel*

fundamental rights—especially the right to the protection of personal data—rights that are usually protected by national constitutions through the right to personal privacy.<sup>45</sup>

#### E. EU/EC/Member State combinations

Cross-pillar dimensions with Member State involvement are not entirely alien in agreements concluded on the basis of pre-Lisbon EU law. A key example of an early combination of EC, CFSP and PJCCM, and Member States issues can be found in the Partnership and Cooperation Agreements (PCAs) concluded with the Newly Independent States (NISs) at the end of the 1990s following the disintegration of the Soviet Union. Although these agreements were signed as mixed agreements by the Community and the Member States, the latter were ‘acting in the framework of the European Union.’ As observed by Hillion:

From the outset the PCAs have been characterised by a ‘cross-pillar’ dimension and as such epitomised the emergence of external activities *of the Union*, resulting from interaction between the EC, the Member States and the EU acting on the basis of Title V and VI. In hindsight, it may be suggested that the PCAs are not only mixed agreements in the classical sense [ . . . ], they also anticipate another form of mixity, namely *cross-pillar mixity*, inasmuch as they relate to the different suborders of the Union.<sup>46</sup>

Indeed, considering the non-exclusive nature of most external competences, one could have expected the frequent conclusion of agreements with third States or organisations to which the Union, the Community and the Member States would be a party. Member State involvement could then result from competences they have retained under either the EU Treaty or the EC Treaty. Similarly, the need for an EU/EC combination could emerge out of the fact that the agreement would cover both Community and non-Community Union issues (compare the agreement with Switzerland). Nevertheless, we have not been able to witness such a ‘mixed-mixed agreement’. This is not to say that the option was entirely theoretical. The Council and Commission have actually considered the possibility of mixed-mixed agreements, since the negotiations on the Stabilisation and Association Agreements with Macedonia and Croatia in 2000 and the Euro-Med Association Agreement with Algeria in 2002.<sup>47</sup> The debate returned during the negotiations for the 2006 Framework Agreement on Partnership and Cooperation with Thailand, Indonesia, Singapore, The Philippines, Malaysia and Negara

<sup>45</sup> See Georgopoulos, above n 22, at 202.

<sup>46</sup> C Hillion, *The Evolving System of EU External Relations as Evidenced in the EU Partnerships with Russia and Ukraine* (PhD thesis, Leiden, 2005) 58; see also C. Hillion, *The European Union and its Eastern European Neighbours: A Laboratory for the Organisation of EU External Relations* (Oxford, Hart Publishing, 2010).

<sup>47</sup> See chapter twelve by Frank Hoffmeister in this volume.

*Cross-pillar Mixity*

Brunei Darussalam.<sup>48</sup> In the end, however, the agreement was concluded as a traditional Community/Member State mixed agreement. A similar debate took place on the EU's accession to the ASEAN Treaty of Amity and Cooperation. As the relevant documents (such as Council Doc 15772/06) are not in the public domain, it is difficult to find out why in the end it did not work out, but it may be assumed that sensitivity on the side of certain Member States, the unclear division of Member State and Union competences, and the difficult combination of Union and Community procedures (for instance in relation to the role of the European Parliament) may have led to the more classic mixed agreement, leaving out the Union as a party.<sup>49</sup>

One could argue that for those issues falling under CFSP/ESDP and PJCCM, there was no longer a need for Member States to become a party. In fact, leaving out the Member States may have been seen as a way to speed up the ratification procedures. After all—and as shown, for instance, by the lengthy ratification period of the Cotonou Agreement—entry into force is often delayed because of slow procedures at the domestic level. When many of the clauses on political issues (eg on anti-terrorism, human rights and democracy, weapons of mass destruction, cooperation with the International Criminal Court) could be part of a separate but connected agreement concluded by the European Union, this could limit the need for Member States to become a party to the agreement concluded by the Community.<sup>50</sup> In 2005 this question explicitly emerged during the negotiations with Iran on economic (trade) and political (the fight against terrorism and non-proliferation) issues. Rather than opting for a combined EU/EC agreement, consideration was given to concluding two separate agreements with mutual references in relation to, for instance, enforcement and suspension questions. However, the question of how violations of either agreement should have an impact on the other could not be answered.<sup>51</sup>

After these experiments the EU stuck to classical mixity, albeit with a role for the High Representative in the negotiations whenever agreements included CFSP issues. This may be understandable from a practical procedural point of view, but it does not do justice to the competences the European Union by that time

<sup>48</sup> At least in the literature the option was also mentioned in relation to a possible follow-up to the PCA between the Community and Russia. Two out of the four 'road maps' established by the EU and Russia in May 2005 were dedicated to CFSP and PJCCM. See M Emerson, F Tassinari and M Vahl, 'A New Agreement between the EU and Russia: Why, what and when?' (2006) *CEPS Policy Brief* No 103, 5. Similar suggestions were made in relation to the new EU-Ukraine Enhanced Agreement; see C Hillion, 'Mapping-out the New Contractual Relations between the European Union and its Neighbours: Lessons from the EU-Ukraine 'Enhanced Agreement'' (2007) 12 *European Foreign Affairs Review* 169: 'the new EU-Ukraine Treaty will almost inexorably be an association agreement based upon Article 310 EC, [and] its likely cross-pillar dimension, both in terms of objectives and content, may mean that the Union could become a concluding party to the new agreement, alongside the Community and the Member States' (though this was written before *Ecowas*).

<sup>49</sup> See Thym, above n 4, at 48.

<sup>50</sup> See M Petite, 'Current Legal Issues in the External Relations of the European Union' (2006) *EUI Working Papers*, LAW No 2006/38, 4.

<sup>51</sup> See chapter twelve by Frank Hoffmeister in this volume.



*Ramses A Wessel*

enjoyed in the area of CFSP and PJCCM. While a combination of procedures remained difficult since different legal bases were required, with the agreements with Switzerland and Liechtenstein the Union proved that by using two separate Council Decisions, account could be taken of the characteristics of both the EU and the EC treaty-making procedures.

### III. RESTRAINTS ON MEMBER STATES' EXTERNAL COMPETENCES AND THE JURISDICTION OF THE EUROPEAN COURT OF JUSTICE

Two additional questions emerge in relation to the legal status of concluded cross-pillar agreements. The first one relates to the possible restraints on Member States' external actions imposed by these agreements; the second concerns the jurisdiction of the European Court of Justice (ECJ) with regard to the preliminary procedure, as well as to former Article 300(6) EC (the opinion of the Court on compatibility with the Treaty).

#### A. Cross-pillar agreements: the effects on Member States

In relation to the first question—the possible restraints on Member States' external actions—it has already been argued that even pre-Lisbon agreements concluded by the European Union may be considered as forming 'an integral part of Union law', comparable to the *Haegeman* doctrine in Community law.<sup>52</sup> This view is supported by the reference in former Article 24(6) TEU to the fact that the agreements bind the institutions.<sup>53</sup> But this provision differed from Article 300(7) EC, which did refer to the Member States. While there are good reasons to assume that decisions in the former non-Community sub-orders of the Union were also binding on Member States, and that such decisions cannot be ignored in their domestic legal orders,<sup>54</sup> particularly in view of the loyalty principle, it is not obvious that the principles of 'direct effect' and 'supremacy' formed part of pre-Lisbon Union law.<sup>55</sup> This implies that the domestic effect (applicability) of the agreements depends on national (constitutional) arrangements. As we have seen, the practice of the PJCCM agreements indeed reveals that former Article 24(5) TEU was used in a way to allow national parliaments to let their governments approve the treaty before the Union adopts the final ratification decision.

<sup>52</sup> As provided by the ECJ in relation to international agreements concluded by the European Community: Cases C-181/73 *Haegeman* [1974] ECR 449 and C-104/81 *Kupferberg* [1982] ECR 3641. See more extensively Hillion and Wessel, above n 12. See in the same line Thym, above n 4, at 38.

<sup>53</sup> Hillion and Wessel, above n 12.

<sup>54</sup> *Ibid.*

<sup>55</sup> Cf also K Lenaerts and T Corhaut, 'Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law' (2006) 31 *ELRev* 287.

### *Cross-pillar Mixity*

Is this different in the case of cross-pillar EU/EC combinations? As far as their domestic effects are concerned, the most obvious solution would be to make the domestic legal affects of EU agreements dependent on the legal status of other EU instruments in the respective pillars. Whenever the Community is also a party, this would bring in the Community rules regarding the status of international agreements. At the same time even before Lisbon the scope of the loyalty principle (then Article 10 EC) stretched beyond Community law and

is of general application and does not depend either on whether the Community competence concerned is exclusive *or on any right of the Member States to enter into obligations towards non-member countries*.<sup>56</sup>

This case law means that, even outside the sphere of Community powers, Member States were not only to refrain from infringing EC law, they should also abstain from acting in a way which would make the Community's tasks more difficult or jeopardise the attainment of the objectives of the EC Treaty.<sup>57</sup>

This is not to say that the effects of non-Community parts of cross-pillar agreements can be established only on the basis of Community law. Following the Opinion of Advocate-General Mengozzi in the *ECOWAS* case (section II.A. above), the difference between acts of the Member States and acts of the Union in pillars two or three remains important in establishing their current legal effects. However, the arguments presented here stress the role of the loyalty obligation beyond Community law; and this duty becomes even more clear when different issue areas of the Union are combined in such a way that it becomes difficult to hold on to a clear separation between the pillars.

## **B. The jurisdiction of the Court of Justice**

Ever since the *Haegeman* case referred to in section III.A. above, it has been settled case law that preliminary questions can also be asked by national courts and tribunals in relation to international agreements. With regard to the Court's jurisdiction in this regard in relation to mixed agreements, some light was shed by the judgment of the Court in *Hermès* and later in *Dior*.<sup>58</sup> Despite the possible different interpretations that can be applied to the case law of the Court in this

<sup>56</sup> Emphasis added. Cases C-266/03 *Commission v Luxembourg* [2005] ECR I-4805 and C-433/03 *Commission v Germany* [2005] ECR I-6985. See more extensively Hillion and Wessel, above n 12.

<sup>57</sup> On the application of Art 10 EC beyond the scope of Community competence, see also CWA Timmermans, 'Organising Joint Participation of EC and Member States' in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000) 239.

<sup>58</sup> Case C-53/96 *Hermès* [1998] ECR I-3603 and Joined Cases 300/98 and 392/98 *Parfums Christian Dior* [2000] ECR I-11307. See chapter six by Panos Koutrakos in this book.

*Ramses A Wessel*

regard, there seems to be a consensus that, in principle, the Court is not precluded from interpreting mixed agreements or from defining the obligations of the Community.<sup>59</sup>

Obviously this case law relates to Community law, and the question is to what extent it holds in the case of cross-pillar agreements. With regard to cross-pillar EU/EC combinations (such as the EU/EC–Switzerland agreement) one could argue that the fact that the Union joins as an additional party does not affect the jurisdiction of the Court in relation to the Community's involvement. At least as regards third pillar issues, one could even point to former Article 35 TEU, which allowed for the Court to give preliminary rulings in relation to a number of third pillar instruments, including—arguably—international agreements concluded on the basis of Article 38 TEU. The same does not hold true for possible CFSP parts in the joint EC/EU agreements, but in general it might have become quite difficult for the Court to establish clear dividing lines between the different dimensions of an international agreement. Would it really make sense for the Court to refuse to give a statement on parts of a mixed EU/EC agreement when its views would be necessary to understand the Community parts? As in classic EC/MS mixed agreements, the division of competences is not spelled out in detail in the existing EC/EU agreements, which makes it difficult for everyone involved (including the parties to the agreement and the Court) to link specific provisions in the agreement to specific pillars.

Similar conclusions may be drawn with regard to the Court's jurisdiction in relation to second/third pillar combinations. Since the role of the Court was not excluded in relation to third pillar measures, and the uniform application of the agreements as part of EU law is necessary to prevent Member States from ignoring the EU agreements in their own external relations, it would have been difficult for the Court to dispose of EU cross-pillar agreements too easily. Even before Lisbon it had become increasingly difficult not to view the external relations on the basis of a Union-wide perspective.<sup>60</sup>

Lastly, the Court may have had a role to play by giving an opinion on the compatibility of a planned (mixed) agreement with the Community Treaty

<sup>59</sup> As also confirmed by the Court in Case C-431/05 *Merck Genéricos* [2007] ECR I-7001 and Case C-239/03 *Etang de Berre* [2004] ECR I-9325. See also J Heliskoski 'The Jurisdiction of the European Court of Justice to Give Preliminary Ruling on the Interpretation of Mixed Agreements' (2000) *Nordic Journal of International Law* 395; A Dashwood, 'Preliminary Rulings on the Interpretation of Mixed Agreements' in D O'Keeffe and A Bavasso (eds), *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (The Hague, Kluwer Law International, 2000) vol 1, 167; P Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure' (2002) 7 *European Foreign Affairs Review* 25.

<sup>60</sup> RA Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) 5 *European Constitutional Law Review* 1; cf also S Stetter, *EU Foreign and Interior Policies: Cross-pillar Politics and the Social Construction of Sovereignty* (London, Routledge, 2007); and A Bendiek, 'Cross-Pillar Security Regime Building in the European Union: Effects of the European Security Strategy of December 2003' (2003) *European Integration Online Papers* 9 (<http://eiop.or.at/eiop/texte/2006-009a.htm>).

### *Cross-pillar Mixity*

(Article 300(6) EC). The EU Treaty did not contain a similar provision, which means that for second/third pillar combinations this procedure could not be used, unless an effect of such an agreement on the EC Treaty could be envisaged.<sup>61</sup> However, there are no reasons to exclude the possibility of a Court opinion for cross-pillar EU/EC agreements. After all, the fact that the EU would also become a party does not deprive the Commission of the duty to make sure that no conflicts with the Community Treaty arise after the conclusion of an agreement.

#### IV. EU MIXITY AFTER LISBON

The Lisbon Treaty has integrated the European Community<sup>62</sup> into the European Union, and the new Treaty on European Union (TEU) explicitly provides that ‘The Union shall have legal personality’ (Article 47), thus bringing to an end the academic discussion on the legal status of the Union and the two different legal personalities of the Union and the Community.<sup>63</sup>

That there is still some uneasiness on the part of some Member States is reflected in Declaration No 24, attached to the Lisbon Final Act:

The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.

Like many Declarations, this one also states the obvious. After all, the principle of attributed (or conferred) powers forms a starting point in international institutional law, and is even explicitly referred to in the new TEU, this time with no exception for the CFSP:

Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. (Article 5)<sup>64</sup>

One reason for a single legal personality of the Union was to make an end to the complications relating to cross-pillar international agreements. The discussion on this issue dates back to the times of the European Convention preparing the

<sup>61</sup> See on this question also Hillion and Wessel, above n 9.

<sup>62</sup> The European Atomic Energy Community (Euratom) will not be part of the new structure and will continue to be a separate international organisation. See also Protocol 2 annexed to the Treaties.

<sup>63</sup> See, on this discussion, the many references in RA Wessel, ‘The International Legal Status of the European Union’ (1997) 2 *European Foreign Affairs Review* 109; and RA Wessel, ‘Revisiting the International Legal Status of the EU’ (2000) 5 *European Foreign Affairs Review* 507.

<sup>64</sup> On the basis of Art 5 TEU the principles of proportionality and subsidiarity also apply to all Union policy areas, although the Protocol on the Application of the Principles of Subsidiarity and Proportionality seems to focus on ‘legislative acts’ only, and these acts cannot be used for CFSP matters.

*Ramses A Wessel*

Intergovernmental Conference for the Constitutional Treaty. In 2002 the Working Group on legal personality reported the following:

A broad consensus (with one member against) emerged in the Working Group in favour of [a single personality of the Union]. The Working Group took the view that giving the Union a legal personality additional to those that now exist would not go far enough in providing the clarification and simplification necessary in the Union's external relations. *In particular*, it was suggested that if the Union were to be involved in concluding cross-pillar mixed international agreements (touching both on the competences of the Community and the Union under Titles V and VI of the TEU), the situation would be too complicated as the agreements would have to be concluded by both the Union and the Community. With a single legal personality the subject of international law will be the Union, which will replace the Community for that purpose.<sup>65</sup>

Nevertheless, some separation has been maintained. The new TEU contains all institutional provisions, whereas all policy areas (including the current EU third pillar on PJCCM) has become part of the reformed EC Treaty, the new Treaty on the Functioning of the European Union (TFEU). It is therefore striking that both the CFSP and the European Security and Defence Policy (now renamed to *Common* Security and Defence Policy, CSDP) have remained part of the TEU. Indeed, the former second pillar is the *only* policy area that will continue to have a separate status in EU law, and even within Title V on the 'General Provisions on the Union's External Action' there is a special section on 'Special Provisions on the Common Foreign and Security Policy' (see further below). The reasons for this continued separation could already be found in the mandate for the Lisbon Intergovernmental Conference, in which Member States could not agree on a transfer of the CFSP provisions from the TEU to the TFEU.

The treaty-making competence of the Union is maintained, but a distinction is no longer made between agreements based on CFSP and other agreements. On the basis of Article 216 TFEU:

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope.

That this competence stretches beyond the TFEU itself and includes the domain of CFSP is underlined by Article 37 TEU, which provides that 'the Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter' (named 'Specific provisions on the Common

<sup>65</sup> The European Convention, Final Report of Working Group III on Legal Personality, CONV 305/02, Brussels, 1 October 2002, para 10.

*Cross-pillar Mixity*

Foreign and Security Policy’).<sup>66</sup> However, as regards treaty-making *procedure* under Article 218 TFEU, see further below.

The end of separate EU and EC agreements may certainly improve the consistency of the Union’s external relations. At the same time, ‘vertical’ consistency may be enhanced by the fact that paragraph 2 of Article 216 states that the agreements shall be binding on both the Institutions and the Member States, underlining their status as an integral part of Union law. By definition, the merger of the Union and the Community and the implied ‘depillarisation’ of the Union put an end to the need for cross-pillar mixed agreements. All post-Lisbon international agreements will be concluded by the European Union. Two questions nevertheless need to be addressed here:

- a) How will agreements be concluded that relate to both CFSP and other Union issues?
- b) What is the role of the Member States?

With regard to the first question—concerning the need for ‘horizontal mixity’—the new treaty provisions are somewhat ambiguous. Although a combination of legal bases is no longer necessary, the continued separation of CFSP/ESDP from other Union policies and the specific procedures and instruments available in that area, may very well reveal problems similar to the ones we faced before, while perhaps even adding a few new ones. This already becomes clear with a view to the negotiation of international agreements. Whereas in the area of the common commercial policy the Commission takes the lead (Article 207 TFEU), Article 218 provides that (in other cases) the Council

shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union’s negotiator or the head of the Union’s negotiating team.

The initiative lies with the Commission, except for agreements which relate ‘exclusively or principally’ to CFSP, in which case the High Representative shall submit a recommendation to the Council (Article 218(3) TFEU). In practice, one may assume that CFSP agreements will be negotiated by the High Representatives or by one of the Special Envoys in his or her team, and that in all other cases the Commission will be the negotiator.<sup>67</sup> The fact that the High Representative is at the same time a member of the Commission (Article 17(4) and (5) TEU) will surely make this easier to handle.

However, the treaty-making procedures remain distinct. Article 218 TFEU makes clear that the general procedure to conclude international agreements does

<sup>66</sup> This Chapter (2) also includes Section 2: Provisions on the Common Security and Defence Policy.

<sup>67</sup> Cf also Art 17 TEU, which refers to the fact that ‘With the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union’s external representation.’

*Ramses A Wessel*

not apply where agreements relate exclusively to CFSP. The main difference concerns the role of the European Parliament which, depending on the type of agreement, has to give its consent or is to be consulted. In the past the diverging procedures formed one of the main reasons for the Council not to opt for cross-pillar agreements (see above). In the new situation, agreements that exclusively deal with CFSP are to be based on the specific procedure, whereas all other agreements follow the general treaty-making procedure. But what if an agreement covers both CFSP and other policies? Obviously, the general procedure (including the role of the Parliament) would be the one to follow, but would this also be acceptable for an agreement which would principally address CFSP or CSDP issues? Time will tell, but it seems fair to conclude that the Union may still be in need of ‘cross-sector’ agreements that are to be based on two separate Council Decisions when agreements cover issues that principally, but not exclusively, relate to CFSP.

In that respect, the *ECOWAS* case mentioned in section II.A. above may be given a different meaning post-Lisbon. In its judgment the Court quite strongly underlined the need to preserve the *acquis communautaire* as mentioned in current Article 47 TEU. Since Lisbon, the new Article 40 TEU protects not only the *acquis communautaire*, but also the ‘CFSP *acquis*’, thereby hinting at a less hierarchical relationship between the two:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under [the CFSP Chapter].

One may assume that the Court would not come to a similar conclusion under the current legal regime. After all, new Article 40 may give more room for both CFSP and other Union measures to be treated the same.<sup>68</sup>

The second question concerns the involvement of Member States (‘vertical mixity’). The combination of CFSP and other Union policies in international agreements may alter the role of Member States and their need to become a party. Part of the confusion surrounding the previous relation of Member States to EU international agreement was based on the absence of a clear provision indicating the Union’s legal personality. New Article 47 TEU has put an end to this confusion and it will be more clear that—from an institutional point of view—ratifications at the domestic level are not necessary.<sup>69</sup> Ironically, for some

<sup>68</sup> Cf Hillion and Wessel, above n 9.

<sup>69</sup> Cf also the discussion during the 2002 European Convention on legal personality and the procedure for concluding agreements. The Working Group reported that ‘if the subject-matter of an

### *Cross-pillar Mixity*

Member States this may trigger a renewed interest in EU agreements, in the sense that they may wish to become a party whenever they feel that the agreement relates to competences that have not been transferred. In particular, in the absence of an Article 24(5) provision—which did not return after Lisbon—which could be used to point to domestic constitutional requirements, Member States may wish to give their national parliaments a chance to approve an agreement by becoming a party themselves.

### V. CONCLUSION

While ‘mixity’ had become the solution in the Community to overcome the division of competences,<sup>70</sup> the international agreements concluded in the other former pillars of the European Union were exclusively concluded by the Union. Despite a rather extensive combination of competences, real mixity is scarce. Most second/third pillars combinations could in fact have been based on Article 38 TEU (PJCCM) only, and EU/EC combinations occurred in just two instances. This means that both ‘vertical mixity’ and ‘horizontal mixity’ have not gained the popularity one could have expected by looking at the tendency of the EU to take a ‘holistic approach’ to matters. As far as the involvement of Member States is concerned, the expected time-consuming ratification procedures, as well as the perhaps still unclear division between the Union and its Member States, may have played a role. The latter may also have influenced the limited number of EU/EC combinations, but here time could have been saved by allowing the Union to join an agreement in the area of CFSP and PJCCM rather than using the classic EC/Member States combination.

Since the entry into force of the Lisbon Treaty, the need for cross-pillar combinations has obviously disappeared. However, we have seen that the distinct procedure for the conclusion of CFSP agreements may very well call for the conclusion of ‘cross-sector’ international agreements. The new Treaty at the same time allows the Court to stimulate cross-sector references<sup>71</sup> to prevent the different dimensions of the Union’s external relations from developing in isolation. Ironically, Member States may show a renewed interest in EU agreements,

international agreement is covered partly by the exclusive competence of the Union and partly by the competence of the Member States (traditional ‘mixed agreements’), the Member States must approve the part of the agreement that comes within their national competence in accordance with their respective constitutional requirements. But insofar as Article 24 TEU refers to agreements covered by the Union competence, and once the Union has legal personality and concludes them, national procedures are not justified. See Report of Working Group III, above n 65, para 30.

<sup>70</sup> Although empirical research revealed that the number of mixed agreements adds up to about 10% only, which contradicts the popular view that by now most agreements concluded by the Community are mixed. See N Betz, ‘Mixed Agreements—EC and EU’, paper presented at the GARNET Conference, ‘The European Union in International Affairs’, Brussels, 2008.

<sup>71</sup> Rather than making these more difficult, as was the case in the *ECOWAS* judgment.



*Ramses A Wessel*

and may even ask for mixed agreements to be concluded also in the area of CFSP. With the explicit reference to the Union's legal personality in the new Treaty, they may become more aware of their own external competences.