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## EDITORIAL COMMENTS

### Where do we go with Community external relations after accession?

Mixed agreements are a great Community invention; but they create problems. They create problems at the moment of accession, since all the new Member States have to accede with respect to their national competence to all existing mixed agreements (insofar as these agreements are not multilateral and the new Member States are not already a party to them). The latest Treaty of Accession acknowledges the problems inherent in going through ten ratification procedures by providing for a simplified procedure whereby the Commission negotiates this accession for the new Member States and the Council concludes on their behalf so as to make a national ratification procedure unnecessary.[1]

Mixed agreements create problems at the moment of their conclusion: in future no less than 25 Member State ratification procedures will be necessary; this may take many years during which provisional application of the complete agreement is not possible, as some Member States' constitutions do not accept provisional application.[2]

Mixed agreements create problems at the moment of their (alleged) breach. Often no declarations of competence have been made and assigning responsibility for breach as between Community and Member State(s) is not easy. Even when the alleged breach is entirely a consequence of a Community act, it may not be at all evident to third States whether it is the Community or the Member State(s) that should be held responsible, since the Community nearly always uses national administrations (even in the field of the customs union there is no Community customs administration) and national judges to implement Community law.[3] Moreover some of the

1. See Art. 6 of the Act of Accession, O.J. 2003, L 33.

2. Of the present Member States, at least Portugal and Austria have well-known difficulties with provisional application, hence the restriction of provisional application to the Community parts of a mixed agreement.

3. Exemplary in this respect are the so-called LAN cases before the WTO, which concerned the customs treatment of certain computer parts by the Irish and UK customs services and which were started by the US initially as cases against these two Member States, and in which the Community was only definitively recognized as the responsible actor at the Appellate Body

Community's most important partners, such as the US, Canada, Australia and Japan are about to be exposed only now for the first time to the phenomenon of the "bilateral' mixed agreement and to the complicated question of responsibility involved.[4] They have great difficulty accepting the bilateral character of these agreements. They still have a strong tendency to see these agreements as multilateral in nature and to regard the Community and its Member States as jointly and severally responsible in all circumstances.

These problems and difficulties would not be so troublesome if they occurred only occasionally. Mixity of agreements, however, has become the norm. True Community agreements are few and far between. There is a slight hope that the Nice text of Article 133 may contribute to a relative greater number of Community trade agreements instead of the present prevalence of mixed agreements even in the trade field. But this is likely to be balanced out by an ever more refined and restrictive interpretation of the *ERTA* doctrine,[5] both by the Court and the Council.

The origin of the *ERTA* doctrine is to be found in a number of anomalies in the Community external relations system. The black letter of the EEC Treaty gave very little in the way of external relations powers to the Community.[6] This led to the need to revert to implied treaty-making powers in respect of all matters covered by the Treaty. However, the Treaty did not contain a system which reserved certain powers specifically to the Member States as exclusive; it gave certain (potential) powers to the Community and assumed that the remainder of powers would fall to the Member States. There were no powers specifically reserved to the Member States, as there are, for instance, certain powers (such as taxation, administration of justice, etc.), reserved to the Provinces in Canada.[7]

In principle, therefore, the Community by concluding treaties could "occupy the terrain" on which it had not yet legislated internally and where Member States' legislation was in force, just as the US Supreme Court in

stage: see *EC – Computer Equipment,* WT/DS62, 67, 68, panel and Appellate Body reports adopted on 12 June 1999.

4. In the framework of its work on the international responsibility of international organizations, the ILC will also have to grapple with these problems: see ILC Report 55th Session (A/58/10), where the first steps to the difficult question of attributability are set at p. 45 et seq.

5. Case 22/70, *Commission* v. *Council*, [1971] ECR, 263, in particular paras. 17–19, see Dashwood and Heliskoski, "The classic authorities revisited", in Dashwood and Hillion (Eds.), *The General Law of EC External Relations* (London, 2000).

6. Originally, only the power to conclude trade treaties (Art. 113) and the power to conclude association agreements (Art. 238).

7. On the Canadian system: C.F. Strong, *A History of Modern Political Constitutions* (Capricorn Books, 1964), p. 120 et seq. It makes treaty-making by Canada on the powers reserved to the Provinces extremely difficult, if not impossible.

*Missouri v. Holland* ruled that a treaty on migratory birds could entail federal legislation, whereas the conservation/preservation of wildlife had been a State matter up until then.[8] This was unimaginable in the Community in the early 1970s, when *ERTA* was handed down. On the contrary, the risk was considered rather greater that, since there was no real distinction between the "federal power" and the Member States, the latter constituting the Council, the Community would not even exercise the treaty-making power minimally necessary for its international functioning, as the Member States in the Council would simply refuse to do so, afraid to lose important vestiges of their sovereignty.

Seen in the light of these opposing forces, the *ERTA* doctrine developed by the Court of Justice was a stroke of genius: it extended the treaty-making power of the Community by implied powers, it left the exercise of this potentially vast expansion to the political judgement of the Council[9] and therefore, potentially at nil, but at the same time *forced* the Council to use its treaty-making power when this was absolutely necessary, namely when internal Community law was about to be affected by an international agreement or its scope altered thereby.[10]

However, as suggested above, the doctrine may have become over-refined. The Court has developed the "minimum norms approach" to the question whether Community law is affected or not by an international agreement.[11] This almost automatically turns, for instance, all international agreements in the environmental and social sectors into mixed agreements, since the Council is simply unwilling to exercise the potential treaty-making power of the Community in those areas beyond the subject matter that has irrevocably become exclusive Community competence under the *ERTA* doctrine. A similar phenomenon is to be observed in the Justice and Home Affairs area, where

8. *Missouri v. Holland*, 252 US 416, reprinted *inter alia* in Henkin, Pugh, Schachter, Smit (Eds.), *International law, Cases and Materials*, 2nd ed. (St. Paul, 1987), p. 190. See also Henkin, *Foreign Affairs and the Constitution*, 2nd ed. (Oxford, 1996), pp. 190–194.

9. Except in the situation described in Opinion 1/76, when the exercise of the potential power was necessary for the realization of one of the objectives of the Treaty, but even this necessity was considered by most to be a question of political judgement by the Council.

10. Case 22/70, cited *supra* note 5, at para 22.

11. Opinion 2/91 (ILO Convention N° 170), [1993] ECR I-1061. This approach stands for the proposition that where the Community has internally agreed on minimum norms, Member States have retained the power to conclude treaties going beyond, or merely containing the possibility to go beyond, the Community minimum norms. Because of Art. 176 EC, this renders virtually all environmental agreements mixed. A much more rational approach to Community treaty-making in the environmental field would be to use criteria of proximity and globality. Member States would continue to conclude environmental agreements with their immediate geographical neighbours, whereas all global environmental problems should be attacked at the Community level.

the enormous legislative activity in the civil co-operation and asylum sectors, together with the transformation of "Schengen" into instant Community law after Amsterdam, have caused an enormous potential growth for the application of the *ERTA* doctrine, but where in reality it is being applied very restrictedly by the Council. For instance, when an environmental treaty also contains special rules on civil liability for trans-boundary harm, the Council is much more likely to restrict Community conclusion of such an agreement to the rules on jurisdiction, where they deviate from the Brussels I norms[12] and, therefore, are deemed to affect these rules, than to exercise the treaty-making power in respect of environmental matters pursuant to Article 174(4) EC, thus turning the agreement into a mixed one rather than a Community one. The consequences of the "Open Skies" judgments of the Court[13] are also to draw the line between exclusive Community competence and Member State competence right down the middle of the subject matter covered by most international aviation agreements, thereby making any Community agreement in this sector inevitably mixed.

It can be seen, therefore, that as a consequence of the (over-)refinement of the *ERTA* doctrine and its application by the Council, there is hardly a major sector of Community policy in which international agreements would regularly have to be concluded, where mixity can be avoided.

In this way the *ERTA* doctrine would seem to be turning possibly into a drag on a rational exercise of Community external relations powers, rather than continuing to be a stimulus for the use of such powers. It is presently used more to bring about mixity than to accept full Community treaty-making power. Given the increased problems that mixity entails, as set out at the beginning of this editorial, because of the greater number of Member States and other factors, the question should be asked whether the Union/Community would not be better off with a system where treaty-making powers are more clearly divided up between Community and Member States[14] than by continued application of the *ERTA* doctrine within the present system. This question is all the more urgent because the Convention has left it largely to

12. Regulation 44/2001, O.J. 2001, L 12/1. Typically the rules of such conventions in the field of environmental calamities (and also transport and nuclear matters) contain a special civil liability regime containing rules on the limitation of liability, on choice of forum and applicable law, of which the latter two deviate from the Brussels I system.

13. See *inter alia* Case C-471/98, *Commission* v. *Belgium*, [2002] ECR 3689.

14. The so-called parallel treaty-making powers laid down in the Treaty's chapters on the environment and on development have brought no clarity in the matter whatsoever, since *ERTA* can be applied in these areas as well, Declaration N° 10 annexed to the Final Act of the Maastricht Treaty.

one side[15] and has probably added to the complication by maintaining a certain separation between Union agreements and Community agreements with different rules applying to each and keeping the non-contamination provision of Article 47 TEU in modified form (Art. III-209 Constitution). There would seem to be good reason to ask the IGC to have one more go at the question of treaty-making power so as to make it into a more rational system for a Community of 25 and beyond, and less dependent on mixity resulting from a narrow interpretation of the *ERTA* doctrine. If that turns out to be impossible, given the pressure presently put on the conclusion of the IGC, the Council could perhaps consider whether it is possible to rely on the Community's treaty-making power without insisting in all cases that it must have become exclusive in conformity with a narrow approach to the *ERTA* jurisprudence. Otherwise the Union's/Community's functioning in international relations is likely to remain hobbled by the difficulties set out above for a long time to come.

15. The Constitution makes a somewhat cavalier attempt at codifying *ERTA* and Opinions 1/76 and 1/94 in one paragraph of Art. III-225.