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## The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States

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# The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States

by

Gesa Kübek\*

## Abstract

*The near-death of the EU-Ukraine Association Agreement and CETA painfully illustrated that the conclusion mixed agreements, i.e. agreements that list the EU, its Member States and a third party as contractors, may be derailed by a negative vote of (sub-)national decision-makers. Such a non-ratification entails a problematic conundrum: Despite the requirement for national ratification under international law, a Member State violates the EU's legal principles of conferral and loyal cooperation when vetoing a mixed treaty in its entirety. The present paper therefore argues that the Member States are not competent to reject the EU exclusive parts of a mixed treaty in their own right. It suggests that the EU's and the Member States' legal authority to ratify mixed agreements is contingent on who owns and who exercises treaty-making power for substantive components and outlines several practical ways to align national (non-)ratification with the EU's law on competences and procedure.*

**Keywords:** European Union; Mixed Agreement; Non-Ratification; CETA; Opinion 2/15; Competences; International Agreements

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# The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States

## I. Introduction

On 6<sup>th</sup> April 2016, 61 per cent of the Dutch voters rejected their country's ratification act of the Association Agreement between the European Union (EU) and the Ukraine. The referendum was merely advisory and had a low turn-out of only 32 per cent.<sup>1</sup> Yet, the Dutch government felt obliged to act on the results of the referendum and threatened to veto the entry into force of the Association Agreement (AA) with the Ukraine for the EU in its entirety. After lengthy and difficult discussions, a "Decision of the Heads of State or Government of the 28 Member States of the European Union"<sup>2</sup> was adopted during a European Council meeting, which enabled the Dutch ratification of the EU-Ukraine AA after all.<sup>3</sup> The signature of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada paints a similar picture. In October 2016, the regional parliament of Wallonia voted against the Belgian signature of CETA. Its approval is a legal pre-requisite for the signature and ratification of commercial agreements under Belgian constitutional law. Notwithstanding the Belgian government's approval of CETA, the EU's treaty-making capacity therefore hinged upon the Walloon veto. On 27 October 2016, the Belgian government reached an agreement on the "conditions under which the federal State and the

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<sup>1</sup> Kiesraad, *Uitslag referendum Associatieovereenkomst met Oekraïne*, <https://www.kiesraad.nl/actueel/nieuws/2016/04/12/uitslag-referendum-associatieovereenkomst-met-oekraïne> (accessed 08/06/ 2017).

<sup>2</sup> *Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part*, Annex to the Conclusions of the European Council Meeting of 15 December 2016, EUCO 34/16.

<sup>3</sup> Eerste Kamer der Staten General, [https://www.eerstekamer.nl/nieuws/20170530/senate\\_approves\\_association](https://www.eerstekamer.nl/nieuws/20170530/senate_approves_association) (accessed 01/06/2017).

federated entities exercise their full authority to sign CETA”<sup>4</sup>, which paved the way for the agreement’s subsequent signature by Canada and the EU at the last minute.<sup>5</sup>

The EU-Ukraine AA and CETA were both proposed as mixed agreements, i.e. agreements to which the EU and the Member States become contractors in their own right. In the early 1980s, Claus Dieter Ehlermann noted that the phenomenon of mixity frequently presents a “list of problems”.<sup>6</sup> The “Wallonia-CETA” and “Dutch-Ukraine” incidents add a new item to that list: The non-ratification of mixed agreements by one or several Member States. As discussed elsewhere in greater detail, national mixed treaty rejection showcases the vulnerability of the EU as a non-unitary external actor. In both of the above-mentioned cases, the conclusion of an international agreement supported by the democratic representatives of the EU, twenty-seven Member States and a third state was nearly derailed by a negative vote of less than one per cent of the EU’s total population. The veto powers of sub-national decision-makers enshrined in the mixed procedure may therefore significantly compromise the effectiveness, efficiency *and* democratic legitimacy of EU external action.<sup>7</sup>

As a result, the abundance of veto players in mixed EU treaty-making leads to significant legal and political problems, above all non-ratification. This paper aims to outline how the non-ratification scenario may be addressed and forestalled in the future. It is structured as follows. The second section explains the main problem inherent to mixed treaty ratification and rejection: the clash between the international requirement for Member State ratification and the EU’s legal rules on competences and procedure. Section three and four outline legal and practical tools to address the problems posed by the non-ratification scenario, both on the Member state and on the EU level. Finally, the paper emphasises the need to re-think the choice of procedure for EU treaty making in light of the cost inherent to slow or non-ratification.

## II. When two legal orders collide: Mixed treaty ratification under international and EU law

The practical and legal problems inherent to the mixed *modus operandi* are a well-known source of discussion and criticism.<sup>8</sup> Legally, the EU legislature has rarely been required to

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<sup>4</sup> Déclaration du Royaume de Belgique relative aux conditions de pleins pouvoirs par l’Etat fédéral et les Entités fédérées pour la signature du CETA, [http://liege.mpoc.be/doc/europe/-AECG-CETA/Belgique\\_Declaration-pour-la-signature-du-CETA\\_27-oct-2016.pdf](http://liege.mpoc.be/doc/europe/-AECG-CETA/Belgique_Declaration-pour-la-signature-du-CETA_27-oct-2016.pdf) (accessed 01/06/2017).

<sup>5</sup> Commission, EU-Canada summit: newly signed trade agreement sets high standards for global trade, [http://europa.eu/rapid/press-release\\_IP-16-3581\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3581_en.htm) (accessed 03/06/2017).

<sup>6</sup> EHLERMANN C.-D., Mixed Agreements, A List of Problems, in in O’Keefe, D and H.G. Schermers (eds.) “Mixed Agreements”, Deventer, Kluwer (1983), p. 2.

<sup>7</sup> KLEIMANN David, KÜBEK, Gesa, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU - The Case of CETA and Opinion 2/15*, EUI Working Paper RSCAS 2016/58, pp. 25-26.

<sup>8</sup> EHLERMANN, “Mixity and Problems”; CZUCZAI, Jenő, *Mixity in Practice: Some Problems and Their (Real or Possible) Solutions*, in HILLION Christophe, KOUTRAKOS Panos, “Mixed Agreements Revisited - The European Union and its Member States in the Word”, Oxford, Hart Publishing (2010), pp. 231-248; or HOFFMEISTER Frank *Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States*, in HILLION/KOUTRAKOS, “Mixed Agreements Revisited”, pp. 249 -268.



opt for the mixed procedure.<sup>9</sup> With the exception of CFSP and AFSJ agreements, EU treaty-making practice nonetheless reveals an increasing trend towards mixity.<sup>10</sup> It appears that the EU institutions have more often than not been under the impression that mixity is the simplest solution to solve external competence battles and that the negative effects of the mixed procedure can be mitigated through EU law. Indeed, mixed agreements make the EU and the Member States, at first sight, co-equal contracting parties. They are therefore ideal tools to disguise uncertainties over the question of who is legally competent to sign and ratify an agreement or individual components thereof. Mixed agreements have hence been characterised as a “pragmatic” mean to initiate a treaty’s signature and ratification process without institutional conflicts or lengthy litigation about vertical competence allocations.<sup>11</sup> Although sub-national ratification processes will of course delay the entry into force of the entire treaty, the circumvention of competence disputes through the choice of the mixed procedure may therefore save time – especially where vast components of mixed agreements are being provisionally applied. Any legal disputes cumulating after a mixed treaty’s (provisional) entry into force can be solved through a strict enforcement of the principles of exclusivity and sincere cooperation. According to the Court’s settled case law, the EU is generally competent to implement mixed agreements in areas of exclusive and shared competences. The Member States may only act independently in the framework of a mixed treaty if that action concerns exclusive national competence or shared competence where the EU has not adopted a “common position”.<sup>12</sup>

After a mixed agreement has been concluded, EU law therefore provides tools to discipline the joint exercise of external competence by the EU and the Member States. During the ratification process it is, however, more difficult to allocate the components of mixed agreements into vertical spheres of power. The mixed procedure enables the Member States to subject an international agreement to national constitutional treaty-making procedures. Consequently, the ability of national governments and parliaments to consent or reject mixed agreements flows from their status as contracting parties under international law, solely guided by national constitutional requirements. During the ratification phase, mixed agreements are thus viewed as singular instruments as all contracting parties, i.e. the EU, third parties and the Member States, must express their independent consent to be bound. Individual Member State ratification is particularly essential for bilateral mixed agreements. According to Article 24 (1) VCLT “[a] treaty enters into force in such a manner and upon

<sup>9</sup> For rare examples see Ruling 1/78, EU:C:1978:202 and Opinion 1/76, EU:C:1977:63.

<sup>10</sup> For a comprehensive account for the use of mixity in EU-treaty making practice see, in particular HELISKOSKI Joni, *Mixed Agreements as a Technique for Organizing the International Relations between the European Community and its Member States*, The Hague, Martinus Nijhoff Publishers (2001). On the CFSP and AFSJ exceptions see CREMONA Marise, *EU external relations: Unity and conferral of powers*, in Loic AZOULAI (ed.), “The question of competence in the European Union”, Oxford, Oxford University Press (2014), p. 78.

<sup>11</sup> AG Sharpston, Opinion in Case C-240/09, ECLI:EU:C:2010:436, para. 56.

<sup>12</sup> In PFOS, the Court adopted a broad definition of a common position. Accordingly “a common position take a specific form for it to exist and to be taken into consideration in an action for failure to fulfil the obligation of cooperation in good faith.” (ECJ, Case C-246/07, *Commission v Sweden* (PFOS), para 77.

such a date as it may provide or as the negotiating States may agree”. The entry into force clause of bilateral mixed treaties generally stipulates that “[t]he Agreement shall enter into force (..) following the date *the Parties exchange written notifications certifying that they have completed their respective internal requirements and procedures* (..)”.<sup>13</sup> The univocal reference to the exchange of ratification instruments by all contracting parties appears to imply that a Member State’s “no” can prevent a treaty’s entry into force.<sup>14</sup> The veto powers enshrined in the mixed procedure therefore equip the Member States with seemingly limitless power to decide over a treaty’s ratification. After an agreement has been concluded, it becomes binding within the meaning of Article 216(2) TFEU, so that the Court has the power to enforce the principles of conferral and loyal cooperation as of that point in time. Any prior application of EU legal rules during the ratification phase might, however, be perceived as a restriction of the Member States’ rights as sovereign contractors under international law.

Conversely, the Member States are bound by EU law to refrain from independent action in areas of exclusive EU competence unless “so empowered by the Union or for the implementation of Union acts” (Art. 2(1) TFEU). International agreements in areas of EU exclusive competence must therefore generally be concluded by the EU alone (“EU-only” agreements). In the *IMO* case, the Court underlined that the Member States, irrespective of their status as contracting parties under international law, breach the principles of exclusivity and loyal cooperation if they act in areas of exclusive EU competence within the framework established by an international agreement.<sup>15</sup> The same logic, arguably, applies to the non-ratification of mixed agreements: If a Member State rejects a mixed agreement in its entirety, it forestalls the exercise of the Union’s powers to ratify an international treaty for the parts falling under exclusive EU competence.<sup>16</sup> In addition to encroaching on the EU’s law on competences, the national ratification process of bilateral mixed agreements may breach Treaty rules on procedure, too. If Member States have the power to reject the entire agreement, the Council is practically forced to vote unanimously even if EU law dictates the use of QMV.<sup>17</sup> Mixed treaty ratification therefore entails a problematic conundrum: The requirement for each contractor’s independent approval under international law appears to outplay the Member States’ legal obligation under EU law. In other words, the EU’s and the Member States’ status as co-contractors threatens to set aside the vertical division of powers within the Union’s multilevel system. Does that mean that Member States can practically act on behalf of the EU, as it were, and initiate the collapse of an international agreement desired by the 28 remaining contracting parties?

<sup>13</sup> Art. 30 (1) (2) CETA (emphasis added). The provision can similarly be found in other bilateral mixed agreements.

<sup>14</sup> KLEIMANN and KÜBEK, *supra* n.7, 23.

<sup>15</sup> ECJ, Case C-45/07 *IMO*, EU:C:2009:81.

<sup>16</sup> KLEIMANN and KÜBEK, *supra* n.7, 23; VAN DER LOO, Guillaume and WESSEL, Ramses, *The Non-Ratification of Mixed Agreements: Legal consequences and Solutions* (54) CML Rev., (2017) 735–770, at 742.

<sup>17</sup> In that sense, mixity causes a similar effect as hybrid decisions, which the Court considered to be in breach of EU law in ECJ, Case C-28/12 *Commission v Council*, EU:C:2015:282.

If the requirement for joint treaty approval were to turn mixed agreements into unitary legal instruments, in the sense that all treaty contractors assume the same legal rights and obligations, that question might have to be answered in the affirmative. Despite the requirement for independent treaty ratification, the Member States, however, only own treaty-making powers for the parts of mixed agreements that fall within national competences. Most notably, mixed agreements may themselves define the term “parties” for the EU as meaning either “the Union, *or* its Member States, or the Union *and* its Member States, in accordance with their respective powers as derived from the Treaty on the Functioning of the European Union”.<sup>18</sup> By inference, the legal authority to sign, ratify and conclude a mixed agreement, arguably, belongs “either” to the EU alone, “or” the EU and the Member States together “or” the Member States alone, depending on the allocation of competences under EU law. The EU and the Member States do therefore not always act as independent legal persons alongside each other – and may therefore not possess the legal authority to sign, ratify, conclude or terminate a mixed in its entirety. At least when it comes to areas of exclusive EU competences, the exercise of treaty-making power by the Union excludes the status of the Member States as “parties” to that exclusive EU component of a mixed agreement (i.e. parties are defined as “either (..) or”). The same is true in the reverse when it comes to exclusive Member State powers, but in view of the broad existence of EU external competence this scenario is much more unlikely. Either way, mixed treaties may themselves exclude the status of the EU and the Member States as parallel contractors for the entire agreement. The EU and the Member States enter jointly into the agreement, each having partial treaty-making powers, which, in sum, cover the entire agreement. The reach of their respective legal authority to ratify a mixed agreement depends on who owns treaty-making power and, in case of shared competences, who exercises that power for each material component.

### **III. Non-ratification from the Member State level: Aligning national treaty approval with EU law**

Starting from the assumption that the status of the EU and the Member States as “parties” in their own right does not necessarily mean that they possess the legal authority to approve or reject mixed agreements in their entirety, but, instead, that treaty-making authority depends on the allocation of competences under EU law, the non-ratification problem can be addressed on the EU as well as the Member State level. This section will look at national ratification of mixed agreements, while the next section explores solutions by the EU legislature.

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<sup>18</sup> E.g. Art. 482 of the EU-Ukraine AA.

### A. Addressing procedural incompatibilities: Towards differentiated national approval acts?

As above-mentioned, the main problem in case of individual treaty refusal by a single Member State is the circumvention of the principle of exclusivity: The requirement for independent treaty ratification might enable sub-national decision-makers to reject a treaty in its entirety, including the parts that fall within exclusive EU powers. In her 2/15 Opinion, AG Sharpston recently highlighted that: “It is true that, in principle, each party (including the Member States) must – as matters stand – choose between either consenting to or rejecting the entire agreement. However, that choice must be made in accordance with the Treaty rules on the allocation of competences. Were a Member State to refuse to conclude an international agreement for reasons relating to aspects of that agreement for which the European Union enjoys exclusive external competence that Member State would be acting in breach of those Treaty rules.”<sup>19</sup>

In practice, it will, however, be difficult to control the true motives underlying a national parliamentary or governmental “no”. The Member States’ ratification instruments are not confined to the parts of a mixed agreement that fall within national competence. Instead, Member State governments generally subject mixed treaties in their entirety to national or regional parliamentary consent.<sup>20</sup> Without confining the reach of national ratification instruments to non-exclusive competence areas, Member State governments expose EU external prerogatives to national legislative procedures. They explicitly act in fields that fall within EU exclusive treaty-making powers by approving or rejecting mixed agreements in their entirety. In their current form, the vast majority of “mixed” national ratification instruments therefore encroach on the principles of conferral and sincere cooperation. The EU and the Member States should therefore, arguably, indicate the material scope of their respective ratification acts. Indeed, if the Member States were to align the scope of their ratification instruments to the vertical allocation of competence, the EU exclusive part of mixed agreements would be explicitly shielded from a Member States’ refusal to ratify.

Obviously, modifications of the ambit of ratification instruments under national law do not alter the conditions for a mixed treaty’s entry into force stipulated by the respective treaty itself or, alternatively, the VCLT. As explained in the previous section, the entry into force clause of bilateral mixed agreements generally requires the signature and ratification of all contracting parties, i.e. the EU, its Member States and the third party. Yet, Member State governments may only be obliged to inform parliaments about their respective decision to adopt an international agreement to the extent that it falls within EU exclusive competence.

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<sup>19</sup> AG Sharpston, *Opinion 2/15*, para 568.

<sup>20</sup> To name but two examples: Article 1 of the German law to ratify the EU-Ukraine AA (Bundesgesetzblatt II, 2015 Nr. 15, vom 03.06.2015). Compare also the French *accord d’association UE-Ukraine* (Loi n° 2015-823 du 7 juillet 2015).

As noted by *Tietje*, this is precisely how Germany ratified the WTO agreements.<sup>21</sup> The conclusion of the GATS and the TRIPS, which fell within the Member States' external powers, were subjected to the approval of the German Bundestag.<sup>22</sup> Conversely, legislative bodies were merely informed about the German government's decision to ratify the GATT agreement, as it formed part of EU exclusive competence in its entirety.<sup>23</sup> More recently, the Dutch ratification act for the EU-Ukraine AA followed a similar approach. The scope of the Dutch referendum of the EU-Ukraine AA was limited to the question whether Dutch voters approve or reject the Dutch ratification instrument, which relates to the treaty only in so far as "the Kingdom [of the Netherlands] can be bound thereto".<sup>24</sup> The Dutch voters never rejected the EU-Ukraine AA in its entirety. Hence, the Dutch government would not have acted against the outcome of the referendum if it had ratified the EU exclusive parts of the AA with the Ukraine.<sup>25</sup> In practice, national ratification of mixed agreements may hence follow different institutional processes: The Council's and EP's decision to ratify the exclusive EU part of a mixed agreement can be executed by a decision of the national executive alone while the ratification of the non-exclusive part of the treaty may be subjected to the approval of the national parliaments and, potentially, referenda.

## B. Non-ratification and sincere cooperation

A reading of national constitutional law in light of EU law therefore suggests that the reach of national ratification instruments – and hence national parliamentary treaty rejection – is limited to the parts of a mixed agreement that fall within Member State competence. Member State governments may go ahead and ratify the EU exclusive parts of a treaty despite a negative parliamentary vote. Indeed, Member State governments may even be bound to follow a decision of the EU legislature to conclude the parts of a mixed agreement that fall within the EU's exclusive powers by the principle of sincere cooperation (Art. 4(3) TEU).<sup>26</sup> Accordingly, "the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."

The principle of exclusivity enshrined in Article 2(1) TFEU is, doubtlessly, "an obligation arising out of the Treaties". Moreover, the Commission's proposal to conclude a (mixed)

<sup>21</sup> TIETJE Christian, *Ganz, aber doch nur teilweise – die Beteiligung des Deutschen Bundestages an gemischten völkerrechtlichen Abkommen der EU*, VerfBlog, <http://verfassungsblog.de/ganz-aber-doch-nur-teilweise-die-beteiligung-des-deutschen-bundestages-an-gemischten-voelkerrechtlichen-abkommen-der-eu/> (accessed 12 June 2017).

<sup>22</sup> Deutscher Bundestag, *Entwurf eines Gesetzes zu dem Übereinkommen vom 15. April 1994 zur Errichtung der Welthandelsorganisation*, Drucksache 12/7655 (neu).

<sup>23</sup> Deutscher Bundestag, *Information über die multilateralen Übereinkommen der GATT-Uruguay-Runde, die nicht unter die nationale Gesetzgebungszuständigkeit fallen*, Drucksache 12/7986.

<sup>24</sup> Staatsblad van het Koninkrijk der Nederlanden, Jaargang 2015 (315).

<sup>25</sup> VAN ELSUWEGE Peter, *What will happen if the Dutch vote 'No' in the Referendum on the EU-Ukraine Association Agreement?*, VerfBlog, <http://verfassungsblog.de/what-will-happen-if-the-dutch-vote-no-in-the-referendum-on-the-eu-ukraine-association-agreement/> (accessed 0 June 2017).

<sup>26</sup> KLEIMANN and KÜBEK (2017), *supra* note 7, 24.



international agreement, as well the Council's subsequent decision to do so, form "acts of the institutions of the Union". The conditions for triggering Art. 4(3) TEU in the non-ratification scenario are thus fulfilled. The Court, too, acknowledged the duty of cooperation with regard to the ratification of mixed agreements in Opinion 2/91. Here, it held that the EU institutions and the Member States must "take all the measures necessary" so as to best ensure sincere cooperation when ratifying mixed agreements.<sup>27</sup> It is yet unclear whether the Court's 2/91 conclusions imply concrete obligations of results. Several scholars have argued that sincere cooperation can be invoked to set "a deadline for the Member States within which they have to have completed (positively or negatively) their procedures for ratification".<sup>28</sup> A duty of the Member States to ratify a mixed agreement in parts remains contested as the right to approve or reject a treaty was deemed a constitutional prerogative of each contractor under international law.

Yet, ratification of the EU exclusive parts of mixed agreements by Member State governments does not deprive national or regional parliaments of their constitutionally guaranteed right to approve or reject national ratification instruments. Nor does it prevent the initiation of a national referendum. (Sub-)national players may continue to refuse the application of a mixed agreement, provided that they remain the competent decision-maker. By inference, the power to subject a treaty's ratification to national legislative measures ends where Member States have transferred all decision-making authority to the Union level. EU exclusive competences remain outside the reach of national legal acts, including treaty ratification instruments. It is for the EU Parliament – and not for national parliaments – to endow mixed treaty components that fall within the Union's exclusive competence with democratic legitimacy.<sup>29</sup> Of course, the representative of a dissenting Member State may issue a negative vote in the Council. In case the EU legislature nevertheless decides to conclude the agreements (by QMV), national governments may however – in the spirit of loyal cooperation – ratify the parts of a mixed agreement that fall within exclusive EU competence.<sup>30</sup> In doing so, governments would take "all the measures necessary" to ensure that national non-ratification does not result in the death of an agreement the EU as a whole wishes to conclude.

An obligation of the Member States to ratify a mixed agreement was said to constitute a potential violation of the fundamental notion under international law that a "consent to be bound" can only be expressed voluntarily.<sup>31</sup> To be sure, the application of Art. 4(3) TEU

<sup>27</sup> *Opinion 2/91*, EU:C:1993:106, para 38.

<sup>28</sup> KUIJPER Pieter-Jan, *Of "mixity" and "double-batting" - EU external relation law explained*, inaugural lecture at the University of Amsterdam, *VossiuspersUva*, (2008), 20. See also KLAMERT Markus, *The Principle of Loyalty in EU Law*, Oxford, OUP (2013), 202 and, more critically, CZUCZAJ *supra* n.8, 244.

<sup>29</sup> KLEIMANN and KÜBEK, *supra* note 7, 26.

<sup>30</sup> *Ibid*, 24.

<sup>31</sup> VAN DER LOO and WESSEL, *supra* n. 16, 744.

cannot be stretched to mandate Member State ratification of a mixed agreement in its entirety. Obliging member State governments to ratify the EU exclusive part of a treaty if so desired by the EU legislature can, however, hardly be viewed as a non-voluntary consent under international law, even if that Member State were to be outvoted in the Council. Otherwise, “EU-only” treaty conclusion by QMV would similarly constitute a violation of international law. Nevertheless, inducing Member State governments to ratify the exclusive EU parts of a mixed agreement would, in all likelihood, cause political upheaval as it facilitates the application of a treaty that has been (partially) rejected by national parliaments or citizens.

#### **IV. Possible EU responses to non-ratification issues: Towards new negotiating strategies?**

In view of the, arguably, limited reach of the Member States’ “mixed” ratification authority in areas of EU exclusive competence, the following section addresses potential EU responses to the non-ratification problem. It looks at provisional application, interpretative declarations, incomplete mixity as well as the new negotiating strategies to separate the “shared” and the “EU-only” components of mixed agreements.

##### **A. Interpretative Declarations**

The adoption of interpretative declarations as solutions to the CETA and EU-Ukraine AA ratification crises show that the EU is clinging on to a unitary view of mixed agreements, trying to facilitate a positive ratification outcome for the entire treaty in all of its Member States. As highlighted by van der Loo and Wessel, such declarations, legally, “hardly do more than stating the obvious” and thus primarily aim at de-escalating political uproar.<sup>32</sup> Indeed, treaty hostility within the Member States may be best prevented by including ratification fears of (sub-)national actors – including those relating to the interpretation of a treaty – during the negotiation period.<sup>33</sup> Art. 30.1 CETA, for instance, provides for the possibility to make such declarations an “integral part to the agreement” instead of adopting them as responses to non-ratification dilemmas under the Vienna Convention on the Law of Treaties (VCLT). In order to become an “integral part” of a mixed treaty, declarations would have to be included in the general ratification process.<sup>34</sup> To do so, the EU must ensure maximum levels of transparency, while Member State governments must consult with national and regional parliaments and forward any (interpretative) preoccupations to their representative in the Council. The Council could then decide to include such concerns

<sup>32</sup> VAN DER LOO and WESSEL, *supra* note 16. Their article includes a very detailed analysis of the legal nature and effect of interpretative declarations.

<sup>33</sup> KLEIMANN and KÜBEK, *supra* note 7, 25-26.

<sup>34</sup> *Greece v. United Kingdom* (Preliminary Objection) I. C. J. Rep. 1952, p. 28

in the negotiating directives send to the Commission and thereby address reasons for non-ratification before their cumulate in treaty rejection.

The ongoing disputes in national parliaments about the (non-)ratification of CETA illustrates, however, that the rejection of mixed agreements by sub-national players may not always be forestalled through the adoption of interpretative declarations alone. In the end, declarations appear to be more of a political tool, seeking to clarify the objective and content of a treaty without modifying its substance or procedure.

## B. Non-signature vs. Non-ratification

When it comes to a Member State's rejection of a mixed agreement, timing may be an essential element. Has the treaty been rejected at the signature stage, or later, during the ratification process? The signature of a mixed treaty may be accompanied by its provisional application.<sup>35</sup> When blocking the signature of a mixed agreement, the Member States therefore simultaneously threaten the provisional application of that treaty. Conversely, once a mixed agreement has been provisionally applied, a Member State's rejection of that treaty during the ratification stage does not initially affect its provisional application. Indeed, it has already been argued that a mixed treaty's provisional application can only be terminated by the EU legislature and not by a single Member State.<sup>36</sup> This finding also corresponds with the text of mixed agreements. While the entry into force of a mixed agreement requires the deposition of "instruments of approval" by all listed parties, the provisional application "shall be effective" following "the Union's" as well as the third parties notification – the Member States' independent approval is generally not mandated by these clauses.<sup>37</sup> By inference, the clauses stipulating the termination of a treaty's (provisional) application in bilateral mixed agreements usually use the term "party" in singular ("either party"), which underlines that the legal authority to denounce already enforced treaties is ultimately vested in the Union or the third state and not the Member States.<sup>38</sup> Can the Union legislature therefore shield the EU (exclusive) components of a mixed treaty from unilateral Member State rejection through provisional application?

Legally, the "endless provisional application" scenario may indeed be possible. Although provisional application has been developed as a temporary tool to bridge the gap between signature and conclusion, a treaty remains (partially) effective as long as its provisional entry into force has not been terminated. There is no legal rule requiring a time limit for provisional application. Politically, the Council may, however, seek a joint solution that supports

<sup>35</sup> Art. 25 VCLT and Art. 218(6) TFEU.

<sup>36</sup> KLEIMANN and KÜBEK, *supra* n.7, 20-21 and VAN DER LOO and WESSEL, *supra* n.16, 754f.

<sup>37</sup> E.g. Art.486(3),(4) EU-Ukraine AA. See, conversely, Art.486(1) on ratification, which specifically relates to "the parties" instead of "the Union and Ukraine" (Art.486(3)).

<sup>38</sup> E.g. Art. 486(7) EU-Ukraine AA.



a Member State's unilateral desire to reject a mixed treaty that has been provisionally applied. For example, the Council has already stated that "provisional application must be and will be terminated (...) in accordance with EU procedures" should CETA's ratification fail "permanently and definitely".<sup>39</sup> The "endless provisional application" scenario might hence lack political support. In addition, the actual entry into force of the agreement between the remaining contractors has another decisive advantage: the entry into force of a mixed treaty may facilitate the application of the entire treaty, i.e. also the parts that fall outside the scope of provisional application, between the third state, the EU and/or the non-rejecting Member States.

### C. Incomplete Mixed Agreements

The previous sections argued that Member State ratification instruments do not cover exclusive EU competences, so that the Member States may not reject a mixed agreement in its entirety. Practically, a Member State's refusal to ratify would then require reservations from those parts of the agreement that fall within external Member State powers. All other parties to the agreement, i.e. the EU, the remaining Member States and the third party, must (silently) consent thereto (Art. 20(5) VCLT). However, such broad Member State reservations or "opt-outs"<sup>40</sup> question the choice of the mixed procedure in the first place. If a Member State decides to reject the ratification of a mixed treaty for the part falling within national prerogatives, only the EU exclusive treaty parts apply in its territory. Consequently, the contracting status of the dissenting Member States equals an empty shell: All obligations for EU exclusive competence are assumed by the Union alone, so that the dissenting Member State might have well been deleted as contractor altogether. The same is true for mixed agreements that are rejected by a Member State after they provisionally entered into force. Without Council termination, the EU exclusive part of the treaty continues to apply provisionally as an "EU-only agreement in limbo".

In the wake of the EU-Ukraine AA and CETA crises, incomplete mixity has been suggested as a tool to facilitate the entry into force of a mixed treaty between the remaining contractors.<sup>41</sup> Assuming that a Member State refuses to ratify a mixed agreement, it may still be concluded as an incomplete mixed agreement by the remaining parties to it, i.e. the EU, the rest of its Member States and the third party. Irrespective of being deleted as an independent party, the dissenting Member State is bound by the EU's decision to conclude the agreement (Article 216(2) TFEU). The resulting "incomplete" mixed agreement applies on its territory to the extent that it falls under EU external competence. All areas that fall within

<sup>39</sup> Council of the European Union, CETA – Statement to the Council Minutes, 2016/0205 (NLE), Statement 20.

<sup>40</sup> On "opt-outs" in mixed treaty-making see also VAN DER LOO and WESSEL, *supra* n. 16, 763-764.

<sup>41</sup> VAN ELSUWEGE, *supra* n. 25. KLEIMANN and KÜBEK, *supra* n.7, 26 and VAN DER LOO and WESSEL, *supra* n. 16, 746-749.

external Member State competence would, in turn, not apply in the territory of the dissenting state.<sup>42</sup>

In practice, incomplete mixity can either be initiated as an *ex post facto* response or *ex ante* solution to the non-ratification dilemma.

After an international agreement has been concluded, a contracting party can be “deleted” through the conclusion of an “Adjustment Protocol” between the remaining parties. As noted by *van Elsuwege*, this is precisely what happened after the Swiss Confederation rejected to ratify the European Economic Area Agreement (EEA) in the 1990s.<sup>43</sup> The remaining EEA member states signed the Adjustment Protocol to the EEA as a new agreement under international law - without Switzerland. The Protocol thus deleted Switzerland from the preamble of the EEA and modified legal effect of material provisions where required.<sup>44</sup> In the aftermath of a non-ratification crisis, the conclusion of an Adjustment Protocol between the EU, the remaining Member States and the third State would therefore pave the way towards treaty conclusion. The dissenting Member State, to be sure, retains full voting rights in the Council. It may therefore veto the adoption of an Adjustment Protocol for agreements that must be concluded unanimously, such as Association Agreements (Article 218(8) TFEU). If the envisaged agreement is subject to QMV, a dissenting Member States may, however, be overruled by the remaining Member States as represented in the Council and subsequently be bound by the EU’s conclusion of the resulting incomplete mixed agreement.<sup>45</sup>

In multilateral treaty-making practice, it is common to use the incomplete mixed procedure as an *ex ante* mechanism to prevent substantive ratification delays or even non-ratification. In order to avoid blockage by a single party, multilateral treaties tend to enter into force after a ratification threshold is exceeded. It is not necessary that all contracting parties ratify the agreement individually.<sup>46</sup> Hence, multilateral mixed agreements may be “incomplete” at the point of their entry into force. This was, for instance, the case for the recently concluded Paris Agreement. According to its Article 21(1), the agreement enters into force after 55 parties accounting for 55 per cent of the global greenhouse gas emission deposited their respective ratification instruments. The EU’s conclusion crossed the ratification threshold and therefore prompted entry into force.<sup>47</sup> Only seven Member States had ratified the agreement individually at the time.<sup>48</sup> Nevertheless, the entry into force caused by the EU’s

<sup>42</sup> KLEIMANN and KÜBEK, *supra* n.7, 24; VAN DER LOO and WESSEL, *supra* n. 16, 747-748.

<sup>43</sup> VAN ELSUWEGE, *supra* n.25.

<sup>44</sup> Protocol adjusting the Agreement on the European Economic Area, [1994] OJ L 001, pp. 0572 – 0605.

<sup>45</sup> KLEIMANN and KÜBEK, *supra* n.7, 24

<sup>46</sup> VAN DER LOO and WESSEL, *supra* n. 16, 746-749.

<sup>47</sup> Council Decision on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, Interinstitutional File: 2016/0184(NLE).

<sup>48</sup> United Nations, “Paris Agreement – Status of Ratification”, [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php) (accessed 03/06/ 2017).

conclusion of the Paris Agreement rendered it legally binding within all Member States, as it fell within the Union's external powers.<sup>49</sup> To date, all Member States have also ratified the Paris agreement in their individual capacity, turning it into a "complete" mixed agreement.

Agreements that enter into force via a ratification threshold can hence be vetoed by a group, but never by an individual player. Why are ratification thresholds not used for the conclusion of bilateral mixed agreements? It is true that bilateral mixed agreements contain substantive obligations between two parties only: The European Union and a third party. However, bilateral mixity currently requires 29 parties to ratify the agreement in their own right. The threat that one party vetoes an agreement desired by the majority is, in fact, a result of the multitude of players involved in "bilateral" mixed treaty procedure. Just as multilateral treaties, bilateral mixed agreements may therefore benefit from procedural safeguards to prevent the allocation of unilateral veto rights during the ratification process.<sup>50</sup> The entry into force of bilateral mixed agreements could, for example, be made conditional on the deposition of the ratification instruments by two-thirds of its contracting parties, which must necessarily include the EU and the third party (otherwise the substantive obligation would practically lose all effectiveness).

It is important to note that the introduction of ratification thresholds does not "end mixity". Mixed agreements, with or without a ratification threshold, cannot be concluded by the EU alone. The size of the threshold determines how many Member States must ratify the agreement in addition to the EU to prompt entry into force. The use of thresholds does therefore not deprive the requirement for national ratification of all of its effect, as a group of Member States can still veto the conclusion of a mixed agreement for the EU in its entirety. Through the re-design of the entry into force clause it becomes, however, impossible for a single Member State to forestall the exercise of EU exclusive treaty-making powers outside the Council to begin with.

#### D. Declarations of competence

In addition to the introduction of a ratification threshold, the EU and the Member States may be advised to adopt a declaration of competence that indicates which areas of the agreement fall under the EU's and which under the Member States' external competence. First, such a declaration ought to state the reach of the Union's exclusive treaty-making powers. More importantly, as noted by AG Sharpston, a declaration of competence may be used as a tool to specify, "very clearly the precise aspects of shared competence which the Member States (acting in their capacity as members of the Council) have agreed shall be

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<sup>49</sup> Art. 191 4) TFEU in conjunction with Art. 216(2) TFEU.

<sup>50</sup> VAN DER LOO and WESSEL, *supra* n.16, 746-749.

exercised by the European Union, on the one hand, and which are (still) being exercised by the Member States, on the other hand”.<sup>51</sup>

In the event of non-ratification, a Member State practically “opts-out” from shared competences that have been defined as national prerogatives under the declaration of competences. By inference, an incomplete mixed agreement becomes binding on the territory of the dissenting Member States to the extent that it falls under EU exclusive as well as shared competence that the Council decided to exercise by the Union. Without a declaration of competence, the EU automatically exercises its shared treaty making powers when concluding an incomplete mixed agreement (Art. 216 TFEU). In other words, incomplete mixed agreements that fall within EU exclusive and shared competence (hence: no Member State exclusive powers) would fully apply on a dissenting Member States’ territory.<sup>52</sup> It is therefore in the clear interest of the Member States to specify precisely which competences they choose to exercise in their individual capacity.

Declarations of competence have previously been held as static instruments that are unable to take account of the changing nature of EU external competence allocation.<sup>53</sup> In order to allow for the greatest degree of flexibility and to avoid inter-institutional competence battles, such declarations were often imprecisely drafted.<sup>54</sup> Yet, there is a simple way to adapt to future changes in the allocation of powers between the EU and the Member States: The EU may update its declaration of competence. In case of unilateral non-ratification, the updated declaration of competence automatically alters the number of “opt-outs” that apply in the territory of the dissenting Member States. The EU’s declaration of competence attached to the Paris Agreement, for instance, specifies that: “The European Union will continue to provide information, on a regular basis on any substantial modifications in the extent of its competence in accordance with Article 20(3) of the Agreement”.<sup>55</sup>

Indeed, Article 20(3) of the Paris Agreement obliges regional organization to “declare the extent of their competence” and to “inform the Parties, of any substantial modification in the extent of their competence.” Consequently, international agreements may itself demand clarity over allocation of powers between the EU and the Member States at the point of treaty conclusion and at any future point in time.<sup>56</sup> In view of the threat inherent to non-

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<sup>51</sup> AG Sharpston, *Opinion 2/15*, para 76.

<sup>52</sup> One example is the above-mentioned incomplete mixed ratification of the Paris Agreement, which falls within shared competences: After the EU concluded the agreement, it applied in the territory of all Member States. The subsequent national ratification was merely a formality, as the EU already exercised shared treaty-making powers.

<sup>53</sup> Ruling 1/78 *Euratom*, EU:C:1978:202 para 35.

<sup>54</sup> DELGADO CASTELEIRO Andres, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?* (2012) 4 EFA Rev., 491-510.

<sup>55</sup> United Nations, *Paris Agreement – Status of Ratification*, [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php) (accessed 25 June 2017).

<sup>56</sup> The EU’s declaration of competence attached to the Paris Agreement is framed in terms of policy objectives and is therefore, admittedly, imprecise. Yet, there may once again be a simple explanation for this: Art. 194 (4) TFEU explicitly states that the EU and the Member States have parallel external competence in the field of environmental policy. As the EU’s external competence

ratification of mixed agreements, the EU and the Member State might desire a clearer delineation of external powers prior to the negotiation and conclusion process. The following outlines that there is indeed a paradigm shift in the conception of mixity that builds on the need for legal certainty of external competence allocations.

#### E. Splitting “EU-only” and “mixed” treaty components: The emergence of a new architecture

The first section showed that the trend towards mixity follows from its perception as convenient tool to avoid institutional competence battles or lengthy litigation. The non-ratification scenario questions the use of the mixed procedure to superficially fill legal gaps in the allocations of external competence as between the EU and the Member States. The dramas inherent to the signature and ratification of CETA and the EU-Ukraine AA painfully showcased that the costs of weakening the EU as a credible, legitimate and effective external actor<sup>57</sup> may outweigh the benefits associated with escaping the “jungle of external competence”.<sup>58</sup> Moreover, the previous sections highlighted that legal solutions to the non-ratification of mixed agreements require national “opt-outs” and therefore precise knowledge over the extent of the EU’s and the Member States’ respective external powers.<sup>59</sup>

The recent desire for ultimate clarity over the delineation of external competence is reflected in the design of preliminary questions forwarded to the Court of Justice. In Opinion 2/15, the Commission had asked the Court to classify each substantive issue area contained in contemporary trade and investment agreements as either exclusive, shared or Member State exclusive competence, respectively.<sup>60</sup> The outcome of Opinion 2/15 showed that the Court is indeed willing to provide a precise *ex-ante* allocation of external powers as between the EU and the Member State.<sup>61</sup> At least in the area of trade and investment, mixity will therefore no longer be perceived as a pragmatic tool to disguise allocations of competence. Instead, clarity over the reach of the EU’s exclusive competence will facilitate the establishment of a “new architecture” that builds on the negotiation of separate “EU-only” and the “mixed” agreements.<sup>62</sup> Such a solution may also be relevant for EU treaty-making in other

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exists “without prejudice to Member States’ competence to negotiate in international bodies and to conclude international agreements”, the declaration of competence attached to the Paris Agreement is not about empowering either the EU or the Member States to act, but only to roughly indicate the limits of the Union’s competence. In any event, the possibility for “updates” can be used to draft more precise declarations in the future.

<sup>57</sup> KLEIMANN and KÜBEK, *supra* n. 7. 25.

<sup>58</sup> KLAMERT, *supra* n 28,184.

<sup>59</sup> VAN DER LOO and WESSEL (supra note 16) show that persisting legal uncertainties over vertical external competence allocations are one of the largest challenges for incomplete mixity.

<sup>60</sup> Opinion 2/15, *Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU*, [2015] OJ C 363/22. For an analysis see KLEIMANN David and KÜBEK, Gesa, *The Singapore Opinion or the End of Mixity as We Know It*, VerfBlog, <http://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/>.

<sup>61</sup> *Opinion 2/15*, EU:C:2017:376, para 305.

<sup>62</sup> <http://e8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/08/COM-proposal-splitting-trade-deals.pdf> (05/10/2017).



material areas, provided that a significant treaty component falls within the EU's exclusive powers.<sup>63</sup>

The latest textual proposals regarding the opening of negotiations for free trade agreements (FTAs) with Australia and New Zealand<sup>64</sup> indeed show that the Commission aims at tailoring the content of future FTAs to the scope of the EU's exclusive competence as defined in Opinion 2/15.<sup>65</sup> If successful, the FTAs with Australia and New Zealand will provide a blueprint for broad "EU-only" FTAs that are shielded from individual Member State (non-)ratification. From a policy perspective, it will be interesting to see if the Council agrees with the Commission's new approach or, alternatively, attempts to insert any "triggers of mixity" in its negotiating directive – and how the Commission and the EP would react in such a scenario. It seems that the Commission, as the EU's principle negotiator for non-CFSP related matters<sup>66</sup>, enjoys enough leeway to initiate a splitting of the "EU-only" and "mixed" part of agreements if so desired. Article 17(1) TEU mandates the Commission to take "any appropriate initiative" to ensure the Union's interests and its external representation. To that end, the Commission may use its discretion to determine the "subject-matter, objective and content" of legislative proposals and, if justified, withdraw from them even against the Council's will.<sup>67</sup> Moreover, the Council already limited itself, in its submission in Case C- 425/13, to asserting that negotiating directives "cannot be understood as implying an obligation for the Commission to achieve the 'recommended result'".<sup>68</sup> The Court, too, concluded that: "It is contrary to Article 218(4) TFEU for the positions established by the special committee or, as the case may be, the Council itself to be binding".<sup>69</sup>

Indeed, an obligation to precisely follow the Council's demands would disregard the mutual character of negotiations. The negotiator needs a certain degree of flexibility to facilitate compromise solutions with third states. After the recent non-ratification dramas, the EU's treaty partners might request a separation of the exclusive and the non-exclusive parts of envisaged agreements to raise the chances of smooth ratification.<sup>70</sup> The Commission can

<sup>63</sup> There is, however, an additional layer of complexity inherent to separating the exclusive from the non-exclusive components of mixed agreements that use trade liberalization as an incentive to trigger political, judicial or social reform. This is, for instance, the case for Association Agreements. In absence of the "golden carrot" of membership, trade might be the only incentive for neighbouring countries to agree to conclude the remaining part of the agreement.

<sup>64</sup> Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia and New Zealand, respectively, COM/2017/0472 final and COM/2017/0469 final.

<sup>65</sup> In *Opinion 2/15*, the Court found that portfolio investment and ISDS/ICS fall within shared competences. Substantively, the FTA proposals for New Zealand and Australia relate to FDI liberalisation only and thus exclude portfolio investment liberalisation and investment protection – although *Opinion 2/15* does not object to including FDI protection disciplines in an "EU only" FTA. While the proposals foresee the establishment of "an effective and binding dispute settlement mechanism", there is no mentioning of ISDS/ICS, suggesting the use of state-to-state dispute settlement only.

<sup>66</sup> The High Representative for of the Union for Foreign Affairs and Security Policy acts as the lead negotiator for CFSP agreements (Art. 218 (3) TFEU). As CFSP agreements are generally concluded by the EU alone, they are not further discussed at this point.

<sup>67</sup> ECJ, Case C-409/13, *Council v Commission* EU:C:2015:217, para 74. See also KUIJPER Pieter-Jan, Post-CETA: How we got there and how to go on, <https://acelg.blogactiv.eu/2016/10/28/post-ceta-how-we-got-there-and-how-to-go-on-by-pieter-jan-kuijper/>.

<sup>68</sup> ECJ, Case C-425/13 *Commission v Council*, EU:C:2015:174, para 87.

<sup>69</sup> *Ibid*, para 88.

<sup>70</sup> See also AG Sharpston, *Opinion 2/15* who argued that splitting the EUSFTA in separate "EU-exclusive" and a "mixed" treaties primarily depends in the preferences of the EU's treaty partner (here: Singapore); para 567.

accommodate such demands by using its discretion to deviate from the Council's negotiating directive, if needed, and limit the contents of an envisaged agreement to material issue areas that fall within EU exclusive competences only. In a second step, the Commission could propose the opening of negotiations for a supplementary (mixed) agreement to the Council.<sup>71</sup> The Council, to be sure, may reject the Commission's mixed proposal as well as the relating "EU-only" agreement. Similarly, the EP – who is generally in favour of broad EU-only treaty-making powers – enjoys veto powers for most EU treaties in their entirety.<sup>72</sup> As vetoing an agreement may mean external inaction for both the EU and the Member States, this is, however, an option of last resort. It is unlikely that either one of the EU institutions actually wishes to remain silent on the international arena altogether.

## V. Conclusion

Until to date, there is an ongoing trend in EU treaty-making practice to opt for mixed agreements by choice. It appears that the EU legislature has more often than not been under the impression that mixity is the simplest option to escape external competence battles and that the negative effects of the mixed procedure can be mitigated through EU law. The non-ratification scenario questions such a systematic use of mixity as it showcases a problematic conundrum: When rejecting a mixed agreement in its entirety, a Member State violates the principle of conferral and loyal cooperation by forestalling the EU's capacity to exercise its exclusive external competence. The veto powers enshrined in the requirement for national ratification under international law appear to outplay the vertical division of competence in the EU's multilevel system.

As a result, the threat of non-ratification painfully showcases the vulnerability of "mixed" EU external action. A Member States' refusal to ratify a mixed agreement turns EU treaty-making into a purely intergovernmental affair: The EU risks being out-vetoed by (sub-)national players, even if Member States transferred the requisite treaty-making powers partially or entirely onto the supranational Union level. In particular, the threat of a *de facto* loss of its exclusive powers questions the EU's external relations authority and capacity. So far, the EU has been stumbling from crisis to crisis, relying on political more than legal tools to avert treaty rejection at the last minute. In the future, the non-ratification of mixed agreements by one or several Member States is unlikely to vanish into thin air. Despite the lack of any procedural parameters in the Lisbon treaty, mixity is, and continues to be, an established legal practice. As a result, it is, arguably, time for the EU institutions and the Member States to work out a new *modus vivendi* that considers the problems inherent to mixed treaty-making prior to the start of negotiations. Such an arrangement should give procedural treaty-making preoccupations the same importance as substantive considerations. Hence,

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<sup>71</sup> Art. 218 (3) TFEU.

<sup>72</sup> Art. 218 (6) (a) (v) TFEU.

the benefits of maintaining a single mixed agreement ought to be carefully balanced against the cost of slow or non-ratification. Where mixity is deliberately selected as the mode of treaty-making, various legal and practical avenues might be explored to address potential non-ratification *ex-ante*.

This paper argued that despite the requirement for national ratification, the EU and the Member States do not always act as independent contractors alongside each other. The text of mixed treaties may itself exclude the status of the Member States as “parties” in areas of exclusive EU competence. So far, the EU institutions as well as the Member States have clung to a unitary view of mixed treaty ratification, aiming to facilitate regional or national parliamentary approval of the entire agreement. Legally, the Member State’s individual capacity to ratify, reject or terminate mixed agreements, however, only concerns non-exclusive competences exercised on the national level. The material reach of the EU’s and the Member States’ treaty-making powers should, arguably, be explicitly pointed out in their respective ratification instruments as well in declarations of competences attached to mixed agreements. Either way, there are various practical ways to enforce such division of ratification authority between the EU and the Member States, ranging from separated national governmental and parliamentary ratification acts over the use of ratification thresholds to new negotiating techniques that split “EU-only” and “mixed” treaty components. Such solutions necessitate a careful analysis of the allocations of external competence as between the EU and the Member States and the best approach may well be decided on a case-by-case basis. Yet, the EU, arguably, needs to take account of all appropriate means to prevent its independent external capacity from being undermined by (sub-)national players. Otherwise, the EU and the Member States risk being trapped in internal decision-making preoccupations without being able to conduct – joint or individual – external relations.

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**List of abbreviations**

AA	Association Agreement
AFSJ	Area of Freedom, Security and Justice
CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
CJEU	European Court of Justice
EU	European Union
EP	European Parliament
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization



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