The Intra-Community Effects of Mixed Agreements
Uniform Status Versus Division of Competence

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1 Introduction

In 1964, the European Court of Justice (ECJ) stated that "by contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and thus have created a body of law which binds both their nationals and themselves." (ECJ, Case 6/64, *Flaminio Costa* v. *E.N.E.L.*, [1964] *ECR* 585, at 601). It has been deduced from this famous section that European Community law constitutes a legal system of its own, situated between national and international law. Thus, the Community itself is "a hybrid conglomerate situated somewhere between a State and an intergovernmental organisation" (ROSAS, 1998, p. 125). The consequences of the autonomy of this legal matter which have aptly been characterized in legal writings by using the term "supranationality" are still not entirely resolved.

Amongst other things, much controversy still affects the field of the European Community´s external relations and the Community´s role as an actor under international law. Although it cannot be disputed that the Community, being an inter-

national organization with sovereign rights and duties, does not only have the competence for the conclusion of bilateral or multilateral agreements on certain policy fields (for example the common commercial policy [cf. Article 310 EC]), but also has the power to exercise its internal competences as appropriate external ones if such acting towards third subjects of law is necessary (ECJ, Case 22/70, *Commission* v. *Council*, [1971] *ECR* 263, para. 15/19; Case C-476/98, *Commission* v. *Germany*, [2002] *ECR* I-9855, paras. 83 *et seqq*.), a closer observation reveals that the scale of such external competences is generally not of exclusive character.

Hence, problems arise in case some parts of a multilateral agreement fall within the *exclusive* competence of the Community and others within the *exclusive* competence of all or some of its member states. In such a situation (cf. ROSAS, 1998, pp. 131 *et seq*.: "obligatory mixity"), the agreement has to be concluded by both the Member States and the Community in terms of a so-called mixed agreement. In contrast, should the agreement in question affect subject areas for all of which the Community as well as the Member States respectively hold *concurrent* competences, the conclusion of a mixed agreement – although legally admissible – is not necessary (ROSAS, 1998, pp. 130 *et seqq*.; PROELß, 2004, pp. 419 *et seq*., note 710).

Contrary to the Treaty establishing the European Atomic Energy Community (cf. Article 102), the EC Treaty does not contain any provision which deals with the conclusion of mixed agreements in general terms. The concept and practice of concluding such agreements is, however, generally recognised in both legal writings and case law (see, for example, ECJ, Case 12/86, *Demirel* v. *Stadt Schwäbisch Gmünd*, [1987] *ECR* 3719, paras. 8 *et seq*.; Opinion 1/94, [1994] *ECR* I-5267, paras. 108 *et seqq*.; HELISKOSKI, 2001, p. 2; SCHERMERS, 1983, pp. 23 *et seqq*.; HERMES, 2002, pp. 48 *et seq*.). In respect of the special case of the common commercial policy this view has meanwhile found formal confirmation in Article 133 (6) subpara. 2 EC ruling that "agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States." With regard to other subject areas, examples of international treaties which were concluded under the terms of a mixed agreement are, *inter alia*, the Agreement establishing the World Trade Organization, the United Nations Convention on the Law of the Sea (UNCLOS), and most of the Community´s association agreements under Article 310 EC (see HELISKOSKI, 2001, pp. 249 *et seqq*. for a list of 154 mixed agreements concluded between the Community and all or some of its Member States on the one hand and third parties on the other in the years 1958-2000).

The mere fact, however, that the concept of mixed agreements has found general recognition in theory and practice does not implicate that its legal consequences were beyond doubt. On the contrary, *Allan Rosas* has rightly stated that