FRANCIS SVILANS

Ratification of mixed agreements - the quest for a coordinated procedure

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Under the heading "New Authors, New Topics", I am delighted to introduce the work of Francis Svilans. The current publication is based on his Master's Thesis submitted in fulfilment of requirements of the Master's Degree in International and European Law at RGSL.

This paper deals with the question of ratification of mixed treaties – international agreements wherein both the Community and the Member States participate. There is great uncertainty concerning the proper form to do so. This leads to constant debate involving heated power struggles between on the one hand the Commission and on the other hand the Member States. The topic is one in which I have personal experience prior to working for RGSL and I can testify to the great political interest it at times can attract.

However, the issue is not only of practical interest, but is also one of deep theoretical complexity. Even so, the reader should not be deterred by the difficulty of the topic. Mr Svilans has deftly sorted out the theoretical intricacies involved in the ratification of mixed agreements, and presents them in an accessible manner. He also suggests some rather interesting proposals for resolving the problems involved.

RGSL is proud to present this academic contribution to the current debate in EU law.

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Introduction

Occasionally the European Community exercises its external power to enter into various international agreements. Sometimes Member States are also parties to these agreements. Such agreements are referred to as mixed agreements.

If an international agreement is to be binding, the parties to it must express their consent to be bound.[1] This is known as ratification. An international agreement is only binding on a party that has ratified it: only on ratification does such an agreement form part of its legal order. For this and other reasons, ratification of mixed agreements by both the Community and its Member States is of crucial significance.

Within the Community, however, ratification of mixed agreements seems to follow no single procedure of universal application. Indeed, the process of ratification varies from treaty to treaty. For example, there is no clear practice as to the order in which agreements should be ratified, in particular:

- who should ratify first as between the Community and Member States (or, indeed, if ratification should be simultaneous), and

- how long parties may take to ratify.

Moreover, these - and the very question as to whether or not some order in this area is even desirable, even if adverted to in the past by scholars - have otherwise been left untouched.

This paper examines the scope of such procedural diversity, any consequences that might be seen to ensue as a result, and whether or not it is desirable, or indeed possible, to introduce any uniformity.

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[1] I.A.Shearer, *Starke's International Law,* 11th edition, 1994 Butterworth & Co (Publishers) Ltd., at page 413; Ian Brownlie, *Principles of Public International Law,* 5th edition, 1998 Oxford University Press Inc., at page 611.

1. Statutory basis of external powers

In order to start unravelling the possible reasons for existing practice, the evolution of the legal basis of the treaty-making power of the Community merits attention.

The EEC Treaty, the precursor of the EC Treaty, ("the Treaty") created the European Economic Community, now known as the European Community ("the Community"). The EEC Treaty conferred upon the Community international legal personality and external powers, which were limited and somewhat ill-defined. These were restricted to the Common Commercial Policy, in Article 113, and Association Agreements, in Article 238.[2] The external powers were limited, and the manner in which they were to be exercised was unclear. At the same time, it seems, it was envisaged that the external powers of the Member States remained unfettered.

The Treaty did not even mention any division of external powers between the EC on the one hand and its Member States on the other, let alone consider a joint exercise by both the EC and the Member States of their respective external powers in concluding a mixed agreement. The Treaty[3] merely enumerated Community competences, "attributed" to it, either wholly or partially, by the Member States.

The scope of the external powers grew both by progressive amendments of the Treaty to include additional areas of competence[4], and by the emergence of the concept of implied external powers, as enunciated by the Court in the *AETR* case[5] - that the Community's authority to enter into international agreements derived not only from the express, but also from other provisions of the Treaty and from measures adopted pursuant to such

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[2] Subsequent amendments have expanded this field. See Dominic McGoldrick, *International Relations Law of the European Union*, 1997 Addison Wesley Longman Ltd , at page 29.
[3] Article 5 EC Treaty.
[4] Articles 152(3), 155(3), 174(4) and 181 EC Treaty.
[5] *Commission v Council,* Case 22/70, [1971] ECR 263.

provisions[6]. Essentially, an external competence on the part of the Community flowed from an internal competence.[7]

This judgment gave birth to two concepts - implied power, and exclusive competence.

The non-exclusive competence the Community possesses (concurrent powers, potential competence) - that shared with Member States - can, in circumstances such as those described in *AETR*, become exclusive. Once exercised, the competence becomes exclusively that of the Community.[8]

The significance of the division between exclusive and non-exclusive competence is that in areas in which it has exclusive competence, the Community alone can conclude international agreements. Member States do not have the power to conclude an international agreement the subject matter of which is within the exclusive competence of the Community[9].

In spite of the Community's expanding external powers, some international agreements dealt with areas in which the Community did not possess the requisite power. This created a reason for Member State participation. Some international agreements were phrased so as to preclude Community participation, even if it possessed competence pursuant to the Treaty.

The complexity of international agreements ensured that, in most cases, Member States were able to conclude the same international agreements as the Community. These became known as mixed agreements.

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[6] At para.16.

[7] Takis Tridimas and Piet Eeckhout, "The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism", in 14 *Yearbook of European Law* (1994) page 143, at page 171 (referring to the *Fourth Lome Convention* case, *Parliament v Council,* C-316/91, [1994] ECR I-625): "*The Court implicitly rejected the argument … (that) …in an area where the Community and the Member States enjoy concurrent competence, once the Community exercises its competence the Member States may no longer exercise theirs. As Advocate General Jacobs noted, if that argument were accepted, it would mean that the Community and the Member States may never undertake joint action"*.

[8] *AETR*, see note 5 *supra.*

[9] *AETR* , see note 5 *supra.*

2. The concept of a mixed agreement

An international agreement which is the result of the Community having exercised its external powers in conjunction with the Member States is a "mixed agreement" in the broadest sense of the term.[10] The concept itself has been the subject of extensive study, as a result of which definitions abound.

In some cases[11] mixed agreements have come about for reasons entirely unrelated to competence, so it is doubtful if an authoritative definition is even possible.

International agreements exist wherein both the Community and its Member States participate, for whatever reason. For present purposes, that rather general observation will serve as an adequate definition of mixed agreement.

3. The significance of complete ratification

Ratification is the juncture at which the terms of an international agreement become binding upon its signatories.[12] It should follow that inconsistent ratification throughout the Community can result in a non-uniform legal order within the Community. Nevertheless, the necessity for ratification other than by the Community warrants closer scrutiny.

Article 300(7) of the Treaty provides that agreements concluded in conformity with that Article are binding on the Member States. According to *Kupferberg*[13]*,* the provisions of an international agreement acceded to, or concluded by, the Community, form part of Community law.

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[10] McGoldrick, note 2 *supra,* at page 78.

[11] *Opinion 1/78, International Agreement on Natural Rubber,* [1979] ECR 2871. Nor did it in Council Decision of 24 September 2001, 2001/877/EC, on the signing and conclusion on behalf of the European Community of the International coffee Agreement 2001, OJ L 326, 11/12/2001 P. 0022-0022, in paragraph 5 of the preamble: "*…notwithstanding the exclusive community competence in this matter, and in order to avoid certain temporary operational difficulties, it is appropriate to authorise the Member States to conclude the Agreement at the same time as the Community and to participate on a temporary basis in the new arrangement."*

[12] See *Racke GmbH & Co. and Hauptzollamt Mainz,* Case C-162/96, [1998] ECR I-3655: The Vienna Convention on the Law of Treaties *does not bind either the Community or the Member States* (paragraph 24), but *the rules of customary international law … are binding upon the Community institutions and form part of the Community legal order* (paragraph 46).

[13] *Hauptzollamt Mainz v Kupferberg,* Case 104/81, [1982] ECR 3641.

Costa v ENEL[14] provides that every Member State is bound by Community law, said by the Court to be supreme - overriding even the constitutional laws of the Member States.

So if Community ratification incorporates the whole of the agreement into Community law, Member State ratification is superfluous. If Community ratification transforms only those parts of the agreement within Community competence into Community law, why should there be concern over whether or not Member States ratify? Ratification on their part should have no ramifications whatsoever for Community law.

In light of the foregoing, it might be argued that ratification of a mixed agreement by participating Member States serves no worthwhile purpose.

The author does not accept the above reasoning. Although reference to bare provisions of the Treaty and selectively quoted dicta give some temporary life to such an argument, an analysis of the relationship between the Community and the Member States in its entirety suggests that Member States should ratify.

There are a number of reasons.

First, the common sense reason. If the Member States themselves have chosen to conclude an agreement, it would be unusual then to decline to ratify that agreement.

The second reason lies in the wording of Article 300 itself. The words "…*Where this Treaty provides for the conclusion of an agreement…"* are quite ambiguous – do they refer to express powers only, or also implied powers?

Third, because the provisions of a mixed agreement are binding both on Community institutions and Member States, both would have to act jointly in taking enforcement measures.[15] Ratification entitles the Member State to rights under the agreement *vis-à-vis* third states. Indeed, it may be in Community interests that its Member States have such rights. A Member State would not be able to take enforcement measures in relation to an agreement it had not ratified.

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[14] Case 6/64, [1964] ECR 585.

[15] Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States,* 2001 Kluwer Law International, at page 191.

The fourth reason why Member States should ratify mixed agreements is based on the painful issue of competences. As the Court has indicated in a number of dicta, competences should be seen as a unified body, exercised by the Community and the Member States in a manner which is of no concern to third states. If this includes the competences upon the basis of which mixed agreements are concluded (here, it is submitted, it does), then all the formalities surrounding the conclusion of such an agreement would similarly require unison on the part of both.

Fifth, there are instances where ratification by Member States is specifically prescribed. The *Law of the Sea Convention,* for example, stipulates that an international organisation can only become a party after a certain number of its Member States have ratified.[16] The extent of ratification, therefore, can have significance if any term of the agreement governing the eligibility to participate, or the efficacy of the agreement itself, is made dependent on the number or the identities of the ratifying parties.

The sixth and perhaps most important reason for ratification by Member States can be expressed as follows:

If the effect of ratification of an international agreement **by the Community only** is obscure, as a result of which the effect of the agreement within the Community legal order is unclear, then as long as it has not been ratified by the Member States, its status within the Community legal order remains in question. Ratification by all of the Member States will ensure its status within the Community legal order without the need for pointing to a specific legitimising basis.

4. Current practice

The only thing that is certain in relation to the ratification of mixed agreements is that Community institutions – the Council and the Commission – prescribe the requirements on a treaty-by-treaty basis. That is why the requirements are different from case to case. It is not proposed herein to speculate as to the reason for such divergence.

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[16] Law of the Sea Convention, Annex IX.

As early as twenty years ago one scholar offered an overview of the ratification procedure. He suggested that what took place was the following[17]:

(a) The Commission, or the Council on the basis of a proposal of the Commission, recommended to Member States that they should ratify a convention.

(b) The Council asked Member States to ratify international conventions by means of a resolution or declaration.

(c) The obligation to ratify arose out of the requirement to act within a common framework.

(d) The Council by means of legally binding measures obliged Member States to ratify a convention.

However, the Community, instead of "obliging" Member States to ratify an international convention, could itself decide either to participate in the international convention and then take the necessary measures of application, or, without participating in the convention, take autonomous measures to apply its provisions.

The description, whilst accurate, is so general as to be of limited assistance.

An examination of Council instruments in this regard reveals an attitude that can best be described as flexible.

Thus, at times Member States are required to inform in writing when they have ratified.[18] At others the Council recommends that Member States ratify by a certain date[19], and on occasions the Council recommends that ratification takes place as soon as possible but in any event no later than a particular date[20].

The language is even less onerous in instruments which merely require that the Community and its Member States shall coordinate the positions they adopt,[21] or where it is noted that the EU undertook to encourage all States,

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[17] G.L.Close, "Self–restraint by the EEC in the exercise of its external powers", 1 *Yearbook of European Law* (1981), page 45, at page 53.
[18] Council Regulation (EEC) No 954/79 of 15 May 1979, OJ L 121, 17/05/1979 P.0001-0004.
[19] Council Recommendation (79/487/EEC) of 15 May 1979, OJ L 125, 22/05/1979 P.0018-0018.
[20] Council Recommendation (79/114/EEC) of 21 December 1978, OJ L 033, 08/02/1979 P.0031-0031.
[21] Council Decision 98/392/EC of 23 March 1998, OJ L 179, 23/06/1998 P.0001-0002.

which have not yet done so, to sign and ratify.[22] The most liberal approach has been that requiring each Member State to approve an Agreement in accordance with its own constitutional requirements.[23]

On the other hand, at times the Council has declared that, because the Community and its Member States share competence, it is necessary for them to ratify simultaneously in order to guarantee uniform and complete application,[24] and that the Community and Member States shall ensure that the provisions of a particular agreement will be amended within a year from its entry into force.[25]

Most of the above are rather mild in their tone, but the difference in approaches is considerable. While not every international agreement will have the same significance within the Community, nevertheless a more uniform practice in an area dominated by procedural diversity seems attractive.

By comparison, the Commission appears to take a sterner line, calling on Member States to take steps to accelerate ratification of an agreement and to ensure that subsequent agreements are ratified within two years of signature.[26] However, even the Commission adopts a placid approach when it recommends that Member States sign and ratify at the earliest opportunity[27], and requests Member States to become signatories, adding that simultaneous accession of the Community and the Member States is not obligatory.[28]

5. Duty of close cooperation

In order to enhance cooperation between the Community and its Member States, reference is sometimes made to the duty of cooperation. Although the source of the duty is the Treaty itself[29], it has been given various expressions by the Court - close co-operation, unity of action, common action.

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[22] Council Decision (2001/286/CFSP) of 9 April 2001, OJ L 099, 10/04/2001 P.0003-0003.
[23] Internal Agreement 2000/770/EC of 23 June 2000, OJ L 317, 15/12/2000 P.0355-0372.
[24] Council Decision 2001/539/EC of 5 April 2001, OJ L 194, 18/07/2001 P.0038-0038, section (4) of preamble, and Article 2.
[25] Council Decision 2001/877/EC of 24 September 2001, OJ L 326, 11/12/2001 P. 0022-0022.
[26] Communication from the Commission to the Council and the European Parliament, Brussels, 6.9.2000, COM(2000) 497 final, at page 6.
[27] Commission Staff Working Paper SEC (1998) 2249, Brussels, 23.12.1996 at page 4.
[28] Commission proposal for three Council Decisions, Brussels, 22.06.1999, COM(1999) 308 final, 99/0129 (ACC), 99/0130 (ACC), 99/0131 (ACC).
[29] Article 10 EC Treaty.

Thus in *Opinion 1/94*[30] the Court ruled that where it was apparent that the subject matter of an agreement fell partly within the competence of the Community and partly within that of Member States, it was essential to ensure **close cooperation** between Member States and Community institutions, both in the process of negotiating and concluding, and in fulfilling the commitments entered into. That obligation was said to flow from **the requirement of unity in the international representation of the Community.**

This author would suggest that the Court might have misdirected itself in identifying the source of the obligation as "the requirement of unity in the international representation of the Community." It is not a discrete source of the obligation, but, rather, another expression of the duty which originates in Article 10. In *Commission v Council*[31]*,* this requirement of unity in international representation was said to have originated in a line of Court rulings.[32] However, retracing this line simply leads back to Article 10.

Ruling 1/78[33] refers to a **close association** between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into. Other than the Euratom Treaty "equivalent" of Article 10 (the two are not identical), no source is indicated for this proposition.

Opinion 2/91[34] cites the above *Ruling 1/78* as the source of the requirement for close cooperation. In the same paragraph[35] it equates the importance of close association with the duty of cooperation. Elsewhere,[36] it rules that both parties must take all measures necessary to **ensure cooperation** in the treaty procedure, including ratification. This wording is replicated in *Opinion 1/94*[37]*.*

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[30] *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property,* [1994] ECR I-5267*,* at para.108.
[31] Case 25/94, [1996] ECR I – 1469.
[32] Ruling 1/78*, Draft Convention of the International Atomic Energy Agency on the Physical Protection of nuclear Materials, Facilities and Transports,* [1978] ECR 2151; Opinion 2/91, *Convention No.170 of the International Labour Organization concerning Safety in the Use of Chemicals at Work,* [1993] ECR I-1061.
[33] See note 32, *supra,*at para.34.
[34] See not 32, *supra.*
[35] See para.36.
[36] See para.38.
[37] See para.108.

The problem is that the principle, as enunciated in the above cases, is little more than an exhortation for the Community and the Member States to work together. (The wording should be contrasted with that used in the *AETR* case,[38] where Article 10 (then 5) of the Treaty was the source of the obligation to cooperate **to attain the objectives of the Treaty** (emphasis added)).[39]

Thus, the mandatory cooperation to attain Community objectives has been diluted to a duty to strive for cooperation. The means appear to have become the ends in themselves.[40]

The duty, as presently defined, is of only limited use in the relationship between the Community institutions and the Member States. It is certainly appropriate in an area as sensitive, and central to the idea of sovereignty, as is foreign policy. However, it is debatable whether what is essentially a technical procedure (that of ratification) should be accorded the same status as foreign policy, and therefore dealt with as sensitively.

There is little case law on what can be done if the duty is not observed.[41] On the other hand, there *is* a judgment on what can be done in the event of a Member State not ratifying on time. In *Commission v Ireland*[42] the Court ruled, in no uncertain terms, that a Member State must ratify a mixed agreement when requested to do so by the Community. Interestingly, it makes no reference at all to the duty described above.

The judgment is well worth considering. Its significance will probably become apparent after the Court has ruled in similar matters. Subsequent similar rulings may indicate a departure from the conciliatory, almost consensual approach. As such, it may be a case of the pendulum beginning to

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[38] See note 5, *supra,* para.21.

[39] But compare with judgment dated 14 December 2000 in *Masterfoods Ltd v HB Ice Cream Ltd.,* Case C-344/98, [2000] ECR I-11369, at para.49: "*… the Member States' duty under Article 5 …to take all appropriate measures … to ensure fulfilment of the obligations arising from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding … ".*

[40] But see Opinion of Advocate General Saggio in *Portugal v Council,* Case C-149/96, [1999] ECR I-8395, at para.35: "*… the principle of cooperation … is intended to ensure that the objectives of the Treaty are achieved."* See also Declarations on Council Decision 2000/278/EC, OJ C 103, 11/04/2000 p. 0001-0001 : "*In order to fulfil this obligation* (to cooperate closely), *the Council and the representatives of Governments of the Member States meeting within the Council will endeavour to reach a common position, acting by common agreement."* So the Member States confer with the Member States, thus discharging the obligation to cooperate!

[41] I. Macleod, I. D. Hendry, and Stephen Hyett, "The External Relations of the European Communities", 1996 Oxford University Press Inc., at page 149.

[42] See *Commission v Ireland,* Case C-13/00, [2002] ECR I-02943.

swing in the other direction – a return to the unequivocal language of *AETR,* which had been eroded, diluted, and transformed over time into loosely defined duties and concepts such as flexibility.[43]

6. Current problems

The following problems have been identified in examining current practice. The list is not exhaustive, nor is each one a discrete problem in the strict sense – some overlap exists inasmuch the same problem may be presented from different angles.

Delay *per se*

Delay is illustrated most vividly by a 1978 Protocol and a 1990 Convention, neither of which has yet been ratified by all Member States.[44]

It has been suggested that delay of ratification on the part of the Member States delays ratification on the part of the Community.[45] It is unclear why this need be so, unless the Community itself has chosen to ratify only after the Member States have done so.

The Community institutions themselves have adverted to the length of time taken for ratification.[46]

In relation to mixed agreements, being international agreements in which a "collection" of parties participates, it is reasonable to expect that, within the confines of that group, there are strong reasons for synchronising,

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[43] Jo Shaw, "Flexibility and Legitimacy in the EC", in Den Boer, Guggenbuhl, and Vanhoonacker (editors), *Coping with Flexibility and Legitimacy after Amsterdam*, 1998 European Institute of Public Administration, at page 26.

[44] "Final Report on the first evaluation exercise – mutual assistance in criminal matters" (2001/C 216/02), OJ C 216, 01/08/2001 p.0014-0026:" *While all the Member States … have ratified the 1959 European Convention, the 1978 Protocol … is not yet ratified by one Member State and was ratified by another only in 2000. The 1990 Money Laundering Convention has been ratified by 14 of the Member States… Apart from those specific cases, the experts noted that it nearly always took a long time (often more than five years and sometimes up to twenty years) to ratify conventions".*

[45] McGoldrick, note 2 *supra,* at page 87.

[46] Final Report on the first evaluation exercise – mutual legal assistance in criminal matters 2001/C 216/02, at III(a); The European Convention 19 July 2002 Working Group No VII on external action mandate, CONV 206/02; Commission proposal 12 July 2002 COM(2002) 396 final, at pages 3 and 5; The European Convention 3 July 2002 discussion paper CONV 161/02 Section C, one of the questions raised in which is whether or not procedures for mixed agreements can be simplified. This is relevant not only in identifying problems, but also for seeking solutions.

ratification of the agreement, as far as is feasible.[47] Delayed ratification by Member States has been said to delay Community ratification, and cause even more severe consequences.[48]

Consistency

It has been said to be important, to avoid a situation of diverging reservations between the EC and/or its Member States, albeit in the context of reservations rather than ratifications. Such reservations, it is said, would create legal uncertainty as to the obligations and responsibility of the EC and its Member States *vis-à-vis* third States as well as to the law applicable in the domestic law of the State having made the reservation. A disparate pattern of objections would create confusion as to the law applicable between them and third States.[49]

A disparate pattern of ratifications is likely to have a similar effect.[50]

Shifting competences

Difficulty can arise if a mixed agreement has been signed, but prior to ratification the Community adopts common rules, theoretically rendering

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[47] See Rachel Frid, *The Relations Between the EC and International Organizations,* 1995 Kluwer Law International, at page 152, regarding *Opinion 2/91*: *The legal consequences of the duty of cooperation … are that convention No. 170 can be ratified neither by the Community nor by the Member States on their own. The Community cannot do so for the dependent territories of the Member States and the Member States cannot ratify the parts of the convention that fall under the exclusive competence of the Community. Therefore, if a Member State would ratify the convention without prior coordination with the community institutions and the Member States, this Member State may be considered to be in breach of its duties under Community law.*

[48] See also discussion paper attached to note on EU External Action from Praesidium to Convention, The European Convention, Brussels, 3 July 2002, CONV 161/02 at page 5: "… (mixed agreements) *are subject to … national ratification procedures as regards those provisions coming under the competence of the Member States. …common accord of the Member States is required even for provisions covered by Community competence … failure by one Member State to ratify the provisions falling within its competence means that the entire agreement, including the provisions falling inside Community competence, cannot enter into force."* The same paper raises the following questions: *… could one improve coherence between the external aspects of Community policies (e.g. environment, agriculture) and other external policies within (a) the commission and/or (b) the Council? Could one simplify procedures for mixed agreements?*

[49] Commission Staff Working Paper, SEC (1998) 2249, Brussels, 23.12.1998 at pages 3-4.

[50] See Commission proposal for Regulation of the European Parliament and of the Council on the Prohibition of Organotin Compounds on Ships, Brussels, 12.07.2002, COM (2002) 396 final, 2002/0149 (COD) at page 5: *"… Member States might introduce national measures with a different scope and application date. Such non-harmonised introduction of the prohibition … in the Community would be a detriment to the shipping industry and easily result in a distortion of competition between Member States. Therefore, a simultaneous prohibition should be achieved."*

ratification on the part of Member States superfluous for Community purposes. The problem is aggravated by the Court's reluctance to delineate the boundary between competences.

A general problem with ratification is the growing complexity of international agreements, leading to more complex mixity, superimposed on the obscurity of respective competences referred to above.[51] This can lead to problems in identifying who should be responsible for what. While the Court shuns precise allocation of competences, it insists at the same time that the Community have a specific "proper legal basis" for concluding an international agreement.

This is a complex problem, which warrants separate study. Seen simply, it illustrates the desirability of prompt ratification. But the problem is that the assumption of an exclusivity by the Community, after signature but prior to ratification, might create a perception on the part of the Member States that they need not ratify. Such a perception would be ill-founded, for reasons broached earlier.[52]

Discrimination

Ultimately, the Member States can take as long as they wish to ratify[53], and in certain circumstances, can also determine if the Community will be able to accede to an agreement.[54] Very much depends on the good faith of Member States. However, this observation applies to the Treaty generally, although Member States are unlikely to frustrate the Treaty itself and risk the political cost. With something as inconspicuous as ratification, though, the political pressure should be less acute.[55]

Responsibility

One scholar has opined that there is a problem with conventions which have been ratified by certain Member States but not (or not yet) ratified or implemented by the Community, both in relation to the question of

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[51] See Heliskoski, note 15, *supra.*
[52] See the reasons listed on page 5, *supra*.
[53] See Shearer, note 1, *supra,* at page 414. See also C.-D.Ehlermann, "Mixed Agreements: A List of Problems" in O'Keeffe, Henry G.Schermers (editors), *Mixed Agreements*, 1983 Kluwer Law and Taxation, page 3, at page 17, par. 2.4 for a suggested solution.
[54] For example, the Law of the Sea Convention.
[55] See also C.-D.Ehlermann, note 53, *supra.*

competence, and the question of the application of the Convention's obligations among Member states and their compatibility with the other Treaty obligations.[56]

In the same vein, the Court in *Opinion 1/94*[57] has adverted to the possible future need for economic cross-retaliation. Incomplete ratification in that event, it is submitted, would compromise the efficacy of any measures. As another scholar has observed,[58] practice suggests that individual Member States frequently lag behind, in some cases with the intention of remaining outside the agreement altogether, and that a survey of ratification practice confirms that Member States are often reluctant to accept a legal obligation to deposit their instruments of ratification or approval at a particular time or in a certain manner.[59]

Lack of unity

At times Member States, by deferring ratification, are able to derive, through Community law, a benefit from international agreements, and at the same time avoid liability under those agreements. This can create the impression of a Community bereft of co-ordination and unity.[60]

While sovereign states have the authority (albeit restricted in certain cases)[61] to enter into international agreements, the Community's right to undertake international commitments is not as apparent. Some internal measures permit the Community to commence negotiating an international agreement, but it must always identify the legal basis. The choice of basis can be complex, and is subject to judicial review[62]. The risk of review can be obviated by seeking the Court's opinion beforehand, but the process is complicated nevertheless.[63] The Court itself has said that Article 300 sets out

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[56] Andreas R. Ziegler, *Trade and Environmental Law in the European Community*, 1996 Oxford University Press, at page 207.
[57] Note 30, *supra.*
[58] Note 15 *supra,* at page 94.
[59] See Macleod, note 41 *supra,* at page 155.
[60] See *Opinion 1/94,* note 30, *supra.*
[61] *Commission v Italy,* Case 10/61, [1962] ECR 1, and *Opinion 2/00, Cartagena Protocol on Biosafety,* (6 December 2001), [2001] ECR I – 9713.
[62] It can be even more difficult in agreements involving more than one of the Communities, where negotiations are conducted by one institution, but exercising two (separate?) capacities. See Commission proposals for two Council Decisions, Brussels, 15.10.2001, COM(2001) 520 final, 2001/0225 (CNS).
[63] Macleod, note 41 *supra,* at page 82.

several possible procedures, and the exact procedure to be followed will depend on the substantive competences of the Community in relation to the subject matter of the proposed agreement.

At the same time the laws of some Member States prescribe the method of ratification of mixed agreements, thereby implicitly conferring a particular legal status on what has been, at least in part, a Community act.

The importance of unity itself has been adverted to by scholars.[64]

Legal basis

Theoretically the Community can be challenged, after it has ratified an international agreement, as to the proper basis for concluding it. What if such challenge is upheld *ab initio,* after ratification not only by the Community, but also by the Member States? Can ratification by Member States be regarded as having been implicitly dependent upon consent expressed by the Community? Can ratification in those circumstances be said to have been of any effect at all if the legal basis for concluding the agreement did not exist at the outset? This is another difficulty that highlights the desirability of speedy, ordered ratification.

Declaring respective competences

The texts of several international agreements, in which the participation of international organizations is anticipated, require those organizations and their members to enumerate their respective competences. Whilst a seemingly reasonable requirement externally, it is something that the Court has tended to discourage internally.[65]

The attitude of the Court is understandable in one sense – it regards disputes over competences as futile in the long term, preferring to emphasize instead united action as an expression of the value, to the Community and the

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[64] Marise Cremona, "External Economic Relations and the Amsterdam Treaty" in *Legal Issues of the Amsterdam Treaty,* David O'Keeffe and Patrick Twomey (editors), 1999 Hart Publishing, page 255 at 245: "*If the Community is, with respect to third States, responsible for the effective performance of obligations under the agreement as a whole it is clearly important that a uniform view is adopted throughout the Community as to the scope of those obligations."*

[65] *Ruling 1/78,* and subsequent case law.

Member States jointly, of any enterprise upon which both embark.[66] But to obscure the division of competences in one area of Community law, and insist on specifying a legal basis in another (in certain circumstances, closely related) area, can create uncertainty.

Being problems relating to mixed agreements in themselves, they are problems with ratification only in the consequential sense. It is not suggested here (not yet, anyway) that problems with ratification of mixed agreements are best eradicated by eradicating mixed agreements (although that is a tempting prospect to some), but the possibility of simplifying the larger picture at least is worth examining.

Uniformity

One of the fundamental objectives of the EC Treaty was to introduce into the Community as much legislative harmony as possible. The Court has stated on a number of occasions the desirability of uniformity of Community law. As every mixed agreement, ultimately, becomes a part of Community law in some form, it is debatable if the relatively tortuous procedure applicable to the conclusion of international agreements enhances uniformity.

Presumably, if the matter affects the ability of the Community to pursue the aims of the Treaty, the Court will assume jurisdiction. If the Community will have had a proper legal basis to conclude the agreement in question, that should be a simple issue. Other than to say that this problem is linked to that of **lack of unity,** further consideration can too easily lead to a discussion of the status of only partially ratified agreements, which is also an area that merits separate examination.

Internal obligations

This problem relates to the respective liabilities of the Community and its Member States - not to third parties, but *inter se*[67]. Although at international

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[66] See opinion of Advocate General Jacobs in *Commission v Council,* Case C-29/99, [2001] ECR 0, at para.111–113.
[67] See opinion of Advocate General Jacobs in *Commission v Parliament,* Case 316/91 [1994] ECR I-625 at para.69.

law liability is joint[68], it has also been suggested that liability should depend on each party performing or not performing its part of an agreement. But such separate parts of the agreement can be difficult to determine.

The Community might wish to enforce an agreement as a whole by reference to a provision falling entirely within the competence of the Member States. What if the Member States are disinclined to act, for reasons best known to themselves, and unrelated to the EC Treaty? Can the duty of close cooperation, referred to above, or Article 10, apply in such a situation?[69] It has been suggested that at times Member States undertake surreptitious, autonomous negotiations in matters in which the Commission is negotiating a Community position.[70]

Other problems are such as that described in relation to the Basel Convention.[71] This convention, which was signed by the Community and the Member States, prohibited any movement of hazardous waste between parties and non-parties. For a time, only France had ratified it, thus creating an obligation under the convention to discriminate against other Member States and thereby contravene the Treaty. If the Community and all Member States had ratified simultaneously, the problem would not have been as acute.

Treaty development

The range of specific external competences of the Community has increased with the development of the EC Treaty, and these competences are enumerated in the Treaty. Basically they speak of fostering cooperation with other states[72], making provision for cooperation with other states, and cooperating with other states[73]. Perhaps the tone is too mild to be effective. Lately, though, the tone has assumed a certain sharpness, ruling that the

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[68] See ChristianTomuschat "Liability for Mixed Agreements" in O'Keeffe & Schermers, note 53 *supra,* at page 130.
[69] See Line Holdgaard and Rass Holdgaard, *The External Power of the European Community,* available at www.rettid.dk/2001/200106.pdf, visited 21 May 2002 at page 175: "*Ratification in (at present) 15 Member States is a lengthy process. Furthermore, the problems of practical co-ordination under uncertain 'legal' requirements of the 'duty of close co-operation' have at times been substantive."*
[70] Pieter Jan Kuyper, "The EC's Common Commercial Policy: Which way the Swing of the Pendulum?" 88 *American Society of International Legal Procedure* 294 (1994) at page 295.
[71] Andreas R.Ziegler, *Trade and Environmental Law in the European Community*, 1996 Oxford University Press, at page 207,at page 208.
[72] Article 152(3) EC Treaty.
[73] Articles 174(4) and 155(3) EC Treaty.

Member States retain competence, (in accordance with Article 174(4) EC), to negotiate and conclude international agreements in the field of environmental protection **only if** the agreements constitute more stringent protective measures compatible with the Treaty, and are notified to the Commission, and that strict compliance with those conditions is essential for securing the unity of the common market and the uniform application of Community law.[74]

Specific requirements

Provisions of a proposed agreement can highlight the problem of uncoordinated ratification. Article 3 of Annex IX of the *Law of the Sea Convention* requires that an international organization may ratify only after a majority of its Member States are ratified. Occasionally, multilateral agreements stipulate that the agreement will only enter force after ratification by a particular number of parties[75].

Changing perceptions

The issue under consideration appears to have been obscured, to some extent, by expressions such as "common position" and other CFSP – type language, which tends to downgrade the importance of the problem. One commentary[76] regarding Article 228a, (now 301) reads: "… reference to the 'common position' and 'joint action' establishes clearly the interface between the EC Treaty and the CFSP. And it is the overlapping of these two pillars that may create inconsistencies and lead to paradoxical results."

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[74] *Opinion 2/00, Cartagena Protocol on Biosafety,* (6 December 2001), [2001] ECR I – 9713.

[75] Ehlermann, in O'Keeffe & Schermers, see note 53 *supra,* at page 12, cites Antarctic Convention and TIR Convention.

[76] Stratos V. Konstadinidis (editor), *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market*, 1996 Dartmouth Publishing Company Limited, at page 28. See also: Monica den Boer, Alain Guggenbuhl and Sophie Vanhoonacker (editors) *Coping with Flexibility and Legitimacy after Amsterdam*, 1998 European Institute of Public Administration, at page 21.

7. Possible solutions

It would seem that the procedure of ratification of mixed agreements could be improved in a number of ways, both substantive and procedural. These vary in scope from fundamental to barely intrusive. Any solution must depend on how seriously any problem is regarded by those affected, and those able to bring about changes.

Abolition of mixed agreements

The abolition of mixed agreements is included here for one reason only - to highlight the role played by the division of competences. It stands at one extreme, and would extend further than is necessary to resolve any problems regarding ratification. The temptation to refer to it at all arises from occasional suspicion that mixed agreements were not contemplated by the Treaty, they were not necessary anyway (certainly not in the convoluted way in which they have been applied), and that everyone would have been better off had they never existed.. Although scholars have mused about their legitimacy within the Community legal order from time to time, it is not realistic to expect that Member States will forego something that they like doing – taking part in the Community's international agreements. Moreover, the Court's tendency to downplay the division of competences signifies that mixed agreements are likely to become more, rather than less, prevalent.

Definition of respective competences

Defining respective competences would not of course dispense with the need for mixed agreements altogether, but it would curtail their incidence to a significant degree.

Defining competences would mean separating Community competences from those of the Member States, so that each international agreement is concluded by either – but never (or seldom) both. As such, this is a version of the previous solution. The separation can occur in three ways:

- respective competences are defined for all foreseeable time;
- respective competences are revisited at regular intervals, or
- respective competences continue to flutter capriciously as at present.

Thus the solution would simply disentangle the two protagonists wherever possible (assuming that they even wish to be disentangled, which is a dubious assumption). It would not necessarily impose limits on the expansion of Community competence. But it *would* mean that, once the Community is empowered to conclude an agreement characterized as relating to a subject matter within its competence, it will be so empowered notwithstanding that certain "non-core" elements of the agreement do not fall within that competence. The practice of dissecting agreements and severing the contested parts (or contesting the severed parts) would cease.

Other restrictions of mixed agreements

Mixed agreements could be restricted to those involving parallel competences, allowing for ratification in the manner described in the Euratom Treaty.[77] All other agreements would be left to the Community. The ancillary participation of Member States in implementing the latter would be pursuant to Article 10. Here, the incidental participation of Member States for reasons unrelated to Community law would not create a mixed agreement, although there could still be a duty analogous to that in Article 102 of the Euratom Treaty.

Uniform legislation

This solution, also based on divided competences, would fundamentally alter the structure of Community law, and is as feasible as the abolition of mixed agreements. Community law would consist of uniform legislation, proposed by the Community and adopted by Member State legislatures, thereby obviating much of the disagreement over sovereignty. It would not mean abandoning the *acquis communautaire.* Existing Community law could form the basis for uniform legislation.

Although there is no reason why such course of action is impossible, the idea is too ambitious at this stage.

All solutions based on a permanent division of competences are likely to be attractive to the Commission, although not to the Member States, who are not prepared to abandon their supervisory role.

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[77] Article 102.

Action by Community institutions

The Community wields the power to introduce an instrument outlining a code of procedure. To avoid the appearance of unilateral action, it should be adopted by the Council rather than the Commission. The basis could be Article 308 of the EC Treaty, which, according to the Court in *Opinion 2/91*[78], as commented in legal literature,[79] is designed to fill the gap in the absence of a specific power required to attain an objective of the Treaty. Existing Council instruments might serve as a model for an instrument of universal and continuous application.[80]

Other modes of common agreement

There is nothing that would preclude the Community and its Member States from reaching a common decision adopting a code of procedure, either treaty-based or informal.[81]

Amendment of the Treaty

It has been suggested that Treaty provisions on the implementation of mixed agreements would reduce the need for disputes on legal basis.[82] Although amendment of the Treaty might seem a somewhat disproportionate solution, it

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[78] See note 32, *supra*.
[79] Juliane Kokott and Frank Hoffmeister, "General commentary", 90 *American Journal of International Law* 664 (1996) at page 665.
[80] Declarations on Council Decision 2000/278/EC, OJ C 103, 11/04/2000 P.0001-0001.Consider also something in the nature of Council Common Position of 11 June 2001 on the International Criminal court (2001/443/CFSP). Such an instrument would be more efficacious for present purposes if the Commission were explicitly included.
[81] Pieter J. Kuijper, "The Conclusion and Implementation of the Uruguay Round Results by the European Community", available at http://www.ejil.org/journal/Vol6/No2/art2.html#TopOfPage , visited 19 July 2002: "*The Commission and Council can choose between two approaches in devising … a formula or 'Code of Conduct.' Given that the Court seems to anchor the 'duty of cooperation' somehow in the treaty or in the principles of Community law it would seem appropriate to create a treaty-based instrument … It would give some solid treaty-based contents to the treatment of mixed competence matters … The alternative is an informal code, as was in the process of being discussed before Opinion 1/94 … Another example is the so-called PROBA-20 document which laid down the compromise solution on the mixed conclusion of commodity agreements after Opinion 1/78 …it would seem the best course of action to opt for an informal instrument, but one that should not be clung to, if circumstances change or one of the parties … does not live up to the commitments given.*"
[82] McGoldrick, note 2, *supra,* at page 185.

has been broached in a discussion as to the desirability of a specific provision regarding the external power of the Community.[83]

The duty of cooperation

This concept, as adverted to in the context of current practice, can serve as a solution. If, having its roots in Article 10, it is accorded the force that it was in the *AETR* case, it could also serve as the basis for an unequivocal ruling relating to the Member States' duties as regards ratification of mixed agreements. Such ruling could be as binding as any other doctrine to emanate from the Court. The advantage of such solution is that it can be introduced quickly, simply and without any disruption of the Community system. It is a solution that achieves the maximum, while outlaying the minimum.

The possible disadvantage is that it relies wholly on the direction taken by the Court. That, in turn, largely depends on the will and discretion of the Court itself. To say that, over the years, the Court has eroded it own jurisprudence, would not be proper. The Court, as any other Community institution, is subject to prevailing political culture. Indeed, it has been suggested that the reason may be the need to extend the scope of the Article 10 duty beyond the Community and into the EU.[84]

Given that the Court was able to rule as unequivocally as it did in *Commission v Ireland*[85], there is reason to hope that the Court may yet be a vehicle for the necessary change. Although the matter did not explicitly concern the duty of cooperation (the Commission relied on a ratification date contemplated by the Convention), it did relate, effectively, to the consequences of not cooperating.

For the duty of cooperation to be effective, it must be accorded appropriate judicial recognition, and its application given concrete scope.

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[83] Joni Heliskoski, "Should There Be a New Article on External Relations?" in *International Law Aspects of the European Union,* Martti Koskenniemi (editor), 1998 Kluwer Law International, at page 273. See also Alan Dashwood's comments in relation to Opinion 2/00 in *Common Market Law Review* 39, pp.353–368, 2002, at page 368: *If there are genuine practical problems associated with mixed agreements, …a solution should be sought through building a consensus in favour of an amendment to the EC Treaty, that would establish appropriate procedures under the treaty for implementing such agreements.*

[84] Ramses A. Wessel, "The Inside Looking Out: Consistency and Delimitation in EU External Relations", in *Common Market Law Review* 37, pp.1135–1171, 2000, at page 1150.

[85] See note 42, *supra*.

Simplification – the Euratom approach

Despite what the Court said in *Commission v France*[86], the Euratom Treaty ("Euratom") has some attraction when considering how coordinating ratification of mixed agreements might be improved.

Arguably, the equivalent of Article 102 is not appropriate, because each mixed agreement is different, and the provision might not therefore be uniformly applicable. That is true – Article 102 is the legislative embodiment of the doctrine of parallelism, and mixed agreements involving parallel competences are only one of a number of different kinds of mixed agreements. Euratom seems to have envisaged only one comparatively straightforward form of mixed agreement, while the EC Treaty contemplates a wider range of more complex mixed agreements. But in spite of that, it may actually be suited to at least some of the areas covered by the EC Treaty, such as the environment.[87] Any references to a "common position" could include a concrete prescription regarding ratification.

One possible reason for the difference between Euratom and the EC Treaty is that the competences of the EAEC was fixed, whilst those of the (European) Community were in a state of perpetual development. This is also said to have created difficulties with international agreements in which third states have required respective competences to be specified.

This is not really a problem. As far as international agreements are concerned, there is no difficulty at all – *internally* – in specifying respective competences, even in the absence of an indication that these might change. For example, an agreement might be concluded at a time when the Community enjoys competences A, B and C, while the Member States enjoy competences D, E and F. These respective competences are made known to third states. Subsequently, the Community assumes competences D and E. Some time later, for whatever reason, a third state imposes sanctions on the Member States in relation to failure to comply with an obligation relating to competence D. The Member States can then seek an indemnity from the Community, or negotiate

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[86] *Commission v France*, Case C-327/91, [1994] ECR I-3641.
[87] Lena Granvik, "Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness", in Koskenniemi, note 83 *supra*, at page 255.

with the third state concerned, together with the Community, to achieve an appropriate resolution. Internally, the situation should not cause any problems.

Conclusion

Of all of the possibilities referred to above, a limited application of the Euratom provisions seems the most preferable. Common agreements and other Community instruments, though useful, have limited effect, being easier to change or even disregard. Inclusion of suitable provisions in the Treaty, on the other hand, can lead to an unobtrusive expansion in the scope of their application, assisted, where necessary, by the Court.

The Court's reluctance to divide competences between the Community and the Member States anoints joint participation as the preferred mode of exercise of external powers. The disappearance of mixed agreements is therefore unlikely.

A solution based on judicial interpretation lacks appeal for lack of certainty, although it is only a matter of judicial will to make it work.

The other solutions seem too fundamental for realistic consideration.