International Agreement as an Instrument of the EU External Competences

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Abstract
The Lisbon Treaty introduced, for the first time in the history, rules of the EU powers to conclude international agreements. In the past, those rules were included in different provisions of the Treaties or in the case-law only. Now, the situation has changed and the EU Law has a specific provision incorporated into the Primary law by the Lisbon Treaty which in particular defines competences of the EU for concluding international agreements. Another provision lays down respective procedure at the EU level.
Aim of the Article is to analyse, on a basis of those provision, regulation of the EU competences to conclude international agreements. It shall focus on respective Articles of the Treaty on the Functioning of the EU as well as on the case-law relating to external competences of the EU.

Keywords: External competences of the EU, international agreements, mixed agreements, EU-only agreements, exclusive external competence of the EU, TEU, TFEU.

1. Introduction

With the Lisbon Treaty the EU acquired legal personality and as international organisation became subject of International Law. As other international organisations the EU is capable of concluding international agreements. That competence clearly stems from the settled case-law and (since 1 December 2009) also from respective articles of the Treaty on the Functioning of the European union (hereinafter "TFEU").

There is no doubt about the existence of the EU competences to conclude international agreements in legal practice (in particular because of explicit Article of the TFEU empowering the EU with respective competences[1]), however, controversy has arisen with respect to other related issues (such as nature of competences, categories of international agreements, etc.). Many of those issues have their

[1] Article 216 TFEU, inter alia, explicitly states that the EU may conclude an agreement with one or more third countries or international organisations...

roots in specific nature of the EU - union of states which conferred only part of their competences to the EU. Perhaps that is why conclusion of each and every international agreement requires thorough analysis of its content from perspective of the EU competences. In addition, it is not always clear whether a specific issue belongs either to the exclusive competence of the EU or shared competence or to the competence of the Member States. Those and other issues make the EU treaty practice more complicated than the treaty practice of any other state or international organisation.

The aim of the Article is to analyse respective provisions of the Treaties as sources of the EU competences to conclude international agreements and then to focus on different categories and types of international agreements concluded by the EU together with respective approval procedure on the EU level. Methods: analysis and synthesis.

2. EU competences to conclude international agreements and its categories

Elements of the EU competences to conclude international agreements (in particular its extent, its types, or its nature) have been subject to many disputes for a long time. Here it is necessary to include also disputes relating to its predecessors – the European Communities and to their powers to conclude international agreements.

Despite the fact that existence of the EU competences to conclude agreements was more or less accepted (as integral part of the external competence of the EU), the rest was unclear. For example, for a long time it was unclear whether the EU could have external competence in cases in which Treaty rules only provide competence for adopting legal acts within the sphere of Union.[2] Answer was given by the "legendary" ERTA judgement[3]of the Court of Justice followed by others like Cornelis Kramer and others. In these judgements the Court decided that *to establish in a particular case whether the EU (the judgement uses word "the Community") has authority to enter into international commitments, regard must be done to the whole scheme of the EU law no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of accession and from measures adopted, within the framework of those provisions, by the EU institutions*.[4]The Court of Justice summarized this principle also in its Opinion on ILO where it stated that *the Community's competence to enter into international commitments may arise from an express attribution by the Treaty or flow implicitly from its provisions. Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has competence to enter into the international commitments necessary for the attainment of that objective, even in the absence of an express provision to that effect*.[5] Later, a significant

[2] Geiger, R., Khan, D.-E., Kotzur, M. et al. (2015) European Union Treaties. A Commentary. Treaty on European Union, Treaty on the Functioning of the European Union. Munich: C.H. Beck, Hart Publishing. p. 728

[3] Judgment of 31 March 1971, Commission / Council (22/70, ECR 1971 p. 263), EU:C:1971:32

[4] Judgment of 14 July 1976, Cornelis Kramer and others (3, 4 and 6-76, ECR 1976 p. 1279), (EL1976/00475 PT1976/00515 ES1976/00445 SVIII/00155 FIIII/00163), EU:C:1976:114

[5] Opinion 2/91 (ILO Convention No 170), of 19 March 1993 (ECR 1993 p. I-1061), (SVXIV/I-59 FIXIV/I-71), EU:C:1993:106, paragraph 3 of the Summary

restriction of this rather simple rule was brought about by the Court of Justice Opinion on competence of the Community to conclude international agreements concerning services and the protection of intellectual property[6] confirmed by its Opinion on competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment[7]. According to those two opinions an implicit external power required additionally that the EU had already made use of internal competence by adopting a legal act. Only two exceptions were accepted:

a) Entering the agreement was indispensable precondition for achieving the objectives of internal competence; and

b) The EU acting on a basis of its internal legislative competence had expressly empowered its institutions to conclude treaties.[8]

The aim of above mentioned examples was to point out at strong influence of the case-law on the competences of the EU to conclude international agreements (even in pre-Lisbon era).

The big change came with the Lisbon Treaty. The EU acquired legal personality[9]and became the subject of international law (as international organisation) capable of concluding international agreements on its own. The Lisbon Treaty also incorporated into Article 216 TFEU all above mentioned (as well as other) principles relating to external competences of the EU established by the Court of Justice. It is therefore possible to say that the Lisbon Treaty codified principles relating to competences of the EU to conclude international agreements into Article 216 para. 1 TFEU. In accordance with said Article *the EU may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the EU's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding EU act or is likely to affect common rules or alter their scope*.[10]

Taking into account the wording of Article 216 para. 1 TFEU it is possible to distinguish 4 categories of competences of the EU to conclude international agreements. Respecting that the EU may conclude an agreement with one or more third countries or international organisations where:

a) The Treaties so provide;

The Treaties "so provide" in Article 6 para.2 TFEU;Article 37 Treaty on European Union (hereinafter "TEU");Article 165 para.3 TFEU; Article167 para. 3 TFEU; Article 168 para. 3 TFEU; Article 207 TFEU; Article 211 TFEU; Article 212 para.3 TFEU; Article 214 para. 4 TFEU; Article 217 TFEU and Article 219 TFEU. Due to the fact that external competence of the EU is based on another Articles,

[6] Opinion 1/94 (Agreements annexed to the WTO Agreement), of 15 November 1994 (ECR 1994 p. I-5267),

(SVXVI/I-233 FIXVI/I-237), EU:C:1994:384

[7] Opinion 2/92 (Third Revised Decision on the OECD on National Treatment), of 24 March 1995 (ECR 1995 p. I-521),

EU:C:1995:83

[8]Geiger, R., Khan, D.-E., Kotzur, M. et al. (2015) European Union Treaties. A Commentary. Treaty on European Union,

Treaty on the Functioning of the European Union. Munich: C.H. Beck, Hart Publishing. p. 782

[9] See Article 47 TEU

[10] Article 216 para 1 TFEU

mentioned provision included into Article 216 para. 1 TFEU has declaratory function only and does not establish special competence for the EU.

b) The conclusion of an agreement is necessary in order to achieve, within the framework of the EU's policies, one of the objectives referred to in the Treaties;

This category was established by the case-law. The external competence of the EU codified for cases of this category is running parallel to the internal competence provided for in the Treaties. Thus, if the legislative competence addresses only the status of citizens of the EU in the territory of the EU, the EU may conclude an agreement with third states regulating the relevant rights and duties of no-EU citizens only if it is necessary for attaining the objectives of internal competence.[11]

c)It is provided for in a legally binding act of the EU;

This category is dependent on existence of a legally binding act of the EU. Once the legally binding act provides so, the EU is capable of concluding international agreements. As an example it is possible to point out at the Council decision (EU) 2016/1841 of 5 October 2016 on the conclusion on behalf of the European Union of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change.[12]

d) it is likely to affect common rules or alter their scope.

Another category explained by the case-law of the Court of Justice.[13]

3. Type of competences of the EU as a criterion for division of international agreements concluded by the EU

As it was stated above the EU has the power to conclude international agreements. It is obvious that exercise of this power shall respect other requirements and rules stemming from the Treaties. One of them (it is possible to say major requirement) is principle of conferral that sets the limits of EU competences and, at the same time, division of competences between the EU and its Member States. As it is laid down in Article 5 para. 2 TEU, under the principle of conferral, the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.[14] Competences not conferred upon the EU in the Treaties remain with the Member States. Taking into account this principle it is possible to say that in some situations the EU has the power to conclude international agreements by itself, however, in other situations it is not possible and therefore the EU shall act together with its Member States. The EU itself has power to conclude international agreements where it has exclusive competences.[15]

[11]Geiger, R., Khan, D.-E., Kotzur, M. et al. (2015) European Union Treaties. A Commentary. Treaty on European Union, Treaty on the Functioning of the European Union. Munich: C.H. Beck, Hart Publishing. p. 783

[12]OJ L 282, 19.10.2016, p. 1–3

[13] For more details on how international agreements could "affect common rules or alter their scope", see following chapter.

[14] For more details, see Siman, M., Slaštan, M. (2010). PrimárneprávoEurópskejúnie: (aplikácia a výkladprávaÚnie s judikatúrou). Bratislava:Euroiuris. p. 432. and Burda, E. (2013). Analogy in public law. In: Theoretical issues in administrative judiciary. Bratislava:UniverzitaKomenského, Právnickáfakulta. p. 54-74

[15] See Article 3 TFEU

On the other hand, where the EU competence is shared with its Member States, international agreement is concluded both by the EU and its Member States. The areas in which competences are shared defines Article 4 of the TFEU. However, it is necessary to add that international agreements concluded both by the EU and its Member States cannot be linked with shared competence only. Activity (or conclusion) by both the EU and its Member States is also required with respect to international agreements covering issues belonging to more than one of the following: exclusive competence of the EU, shared competence, exclusive competence of Member States.
As a result, based on the type of competences criterion, it is possible to distinguish between:
"EU only agreements" (where the EU only is party to an agreement) and
"mixed agreements" (where both the EU and its Member States are party/partiestoan agreement).

3.1. EU only agreements

So-called "EU only agreements" are the international agreements where the EU alone is empowered to conclude them. In other words, we are talking about international agreements concluded by the EU itself within its exclusive external competences.
Legal basis for the exclusive external competences of the EU is given by Article 3 TFEU. It means that the EU alone is empowered to conclude international agreements covering issues falling within the scope of Article 3 TFEU. Due to the nature of Article 3 TFEU and, in particular, the distinction between paras 1 and 2 of the aforesaid Article it is possible to distinguish explicit exclusive external competences and implicit exclusive external competences. Common to all kinds of external competences of the EU (either implicit or explicit) is that the Member States are pre-empted from concluding any international agreement by themselves (or independently).
In general, it is possible to say that explicit external competences are those covering issues falling within the scope of Article 3 para. 1 TFEU. But, at the same time, it is necessary to add that wording of Article 3 para. 1 TFEU is not so clear and led to several trials before the Court of Justice, in the past. For example - different views have arisen with respect to the scope of the common commercial policy (as it was modified by the Lisbon Treaty) or with respect to the scope of monetary policy. As concerns the first one, the Court of Justice put some light on it with its decisions several cases. Here it is possible to mention Daiichi Sankyo case[16] or case relating to Council Decision 2011/853/EU of 29 November 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access[17]. As it is clear from these two examples the Court of Justice in its decisions opted for extensive interpretation of the notion "common commercial policy". As a result, such conventions being signed and concluded by the EU alone and not as mixed agreements, without it being necessary to examine if and to what extent the EU has become exclusively competent under Article 3 para. 2 TFEU.[18]*A contrario* to the interpretation of the

[16] See Judgment of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland (C-414/11), EU:C:2013:520

[17] See Judgment of 22 October 2013, Commission / Council (C-137/12), EU:C:2013:675

[18]Erlbacher, F. (2017). Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty. p. 23. [Online] Available: http://www.asser.nl/media/3485/cleer17-2_web.pdf(February 1, 2018)

common commercial policy notion for the purposes of Article 3 TFEU the Court of Justice opted for different way and strict interpretation of notion "monetary policy".[19]

With respect to above mentioned it is possible to conclude that scope of explicit external competences of the EU is still "open-ended story" where major role belongs to the Court of Justice because the Court only could give the answer what belongs within the scope of Article 3 para. 1 TFEU.

On the other hand, the concept of implicit exclusive external competences of the EU is different than that of explicit ones. Firstly, while explicit competences are listed in Article 3 para. 1 TFEU, implicit competences are not mentioned in the same way. In Article 3 para. 2 TFEU it is possible to find that *the EU shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the EU or is necessary to enable the EU to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*. As it is clear from the wording of Article 3 para. 2 TFEU, implicit external competences are competences that exist as an "addition" to those listed in Article 3 para. 1 TFEU (stemming from words *"shall also have"*). Erlbacher emphasises that provision of Article 3 para. 2 TFEU has given rise to most of the institutional disputes in the post-Lisbon Treaty discussion on external relations.[20] Common to all of these disputes is that the Court of Justice opted for extensive interpretation of the Article.[21] However, there are still open questions relating to that provision. Therefore, in the near future it is likely to expect other requests for the Court of Justice´sopinion based on Article 218 para. 11 TFEU.[22]

Article 3 para. 2 TFEU covers 3 different situations:

The first one is quite clear – the EU is exclusively competent to conclude international agreement when its conclusion is provided for in a legislative act. *Whenever the EU has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts.*[23]As pointed out by the Court of Justice– *a legal act can be classified as a legislative act of the European Union only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure*.[24]Respecting that it is possible to conclude that the EU is exclusively competent to conclude international agreement when its conclusion is provided for in a

[19] See Judgment of 27 November 2012, Pringle (C-370/12, Publié au Recueilnumérique), EU:C:2012:756

[20]Erlbacher, F. (2017). Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty. p. 24. [Online] Available: http://www.asser.nl/media/3485/cleer17-2_web.pdf (February 1, 2018)

[21] See e. g. Judgment of 4 September 2014, Commission / Council (C-114/12), EU:C:2014:2151; Judgment of 26 November 2014, Green Network (C-66/13), EU:C:2014:2399

[22] The same requests as in case of the Opinion 2/15 (EU-Singapore Free Trade Agreement), of 16 May 2017 (Digital Reports), EU:C:2017:376

[23] Opinion 1/94 (Agreements annexed to the WTO Agreement), of 15 November 1994 (ECR 1994 p. I-5267) (SVXVI/I-233 FIXVI/I-237), EU:C:1994:384, paragraph 95

[24] Judgment of 6 September 2017, Slovakia / Council (C-643/15), EU:C:2017:631, paragraph 15.

legal act adopted on the basis of a provision of the Treaties which expressly refers to legislative procedure.

The second situation relates to the necessity of allowing for the EU to exercise its internal competence. As it was mentioned above, the situation is based on requirement of parallel exercise of the internal competences provided for in the Treaties and of the external competences in the same area. Besides the parallelism, Article 3 para. 2 TFEU adds another requirement - the "necessity". *If the necessity is given the EU will enjoy exclusivity irrespective of whether internally the competence is shared or complementary*.[25]

And finally, the third situation relates to cases when conclusion of international agreement may affect common rules of the EU or alter their scope. This situation is the most complicated one and therefore it has been subject to several requests for the Court of Justice opinions and to several inter-institutional trials.

In that regard, the Court of Justice *has held that there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, where those commitments fall within the scope of those rules*.[26]Here the Court added that existence of risk of such situation it is not sufficient. *Such international commitments may affect EU rules or alter their scope when the commitments fall within an area which is already covered to a large extent by such rules*.[27] However, the Court of Justice does not take into account only exiting rules. The impact of future development of those rules is important, too. Taking into account all of those elements *exclusive competence must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. That analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish*.[28]Finally, the Court added that certain level of the Member States discretion which has to be exercised within the limits imposed by the EU law, means that the Member States are not free to determine, in an un-harmonised manner, the overall boundaries of the exception or limitation.[29] Therefore, such exception or limitation cannot be considered as an area which is un-covered by the EU rules.

Based on that, conclusion of international agreement may affect common rules of the EU or alter their scope when those commitments fall within the scope of those rules within an area already covered to a

[25] See Kaczorowska-Ireland, A.(2016). European Union Law. London: Routledge. p. 182

[26] See Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 71, and Judgment of 26 November 2014, Green Network (C‑ 66/13), EU:C:2014:2399, paragraph 29

[27] Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 73

[28] Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 74, and Judgment of 26 November 2014, Green Network(C‑ 66/13), EU:C:2014:2399, paragraph 33

[29] See Opinion 3/15 (Marrakesh Treaty on access to published works), of 14 February 2017 (Digital Reports), EU:C:2017:114, paragraphs 122 - 128

large extent by such rules. Any discretion of Member States relating to those rules which has to be exercised within the limits imposed by the EU law is considered as part of the regulation.

3.2. Mixed agreements

Mixed agreements are the international agreements which are concluded by both the EU and its Member States on one part and third states or international organisations on the other part.[30] The reason why it is necessary to conclude those international agreements by the EU and its Member States is because neither the EU itself, nor the Member States have enough competences to do it alone. In other words, neither the EU nor the Member States powers cover all the issues of the international agreement. It means that the mixed agreement is proper solution in following situations: all issues of the international agreements fall within the scope of shared competences; some issues of the international agreements fall within the scope of exclusive competences of the EU and the rest beyond that competences (e. g. shared competences and/or exclusive competences of the Member States). Here it is necessary to draw an attention to the judgement of the Court of Justice in which the Court stated that in the areas where the EU competence *"is not exclusive, the Member States are entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the EU"*.[31] In the light of aforesaid judgement, only an exclusive competence of the EU may keep the Member States from joining the international agreement.[32]

As concern delineation of mixed agreements it is necessary to emphasise that the Court of Justice has not given detailed delineation of area of competences, yet. Possible reason has been indicated in the ruling 1/78 where the Court, inter alia, stated *it is not necessary to set out and determine, as regards other parties to the convention, the division of powers in this respect between the Community* (the EU)*and the Member States, particularly as it may change in the course of time*.[33]The reasoning given by the Court in this case is reasonable. The division of powers changes continuously and any rigidity could cause serious problems for the future. However, in the same ruling the Court held that *question of implementation of the international agreement should be resolved on the basis of the same principles as govern the division of powers with regard to the negotiation and conclusion of the international agreements*.[34] That approach was also confirmed in another judgement where the Court

[30]Burdová, K. (2011).ČlenstvoEurópskejúnie v HaagskejkonferenciimedzinárodnéhoprávasúkromnéhoIn: Bezpečnostné priority súčasnosti a novépohľadynavývojmedzinárodnéhopráva. Bratislava: UniverzitaKomenského v Bratislave, Právnickáfakulta. p. 164

[31]Judgment of 2 March 1994, Parliament / Council (C-316/91, ECR 1994 p. I-625) (SVXV/I-47 FIXV/I-55), EU:C:1994:76, paragraph 26

[32]Geiger, R., Khan, D.-E., Kotzur, M. et al. (2015) European Union Treaties. A Commentary. Treaty on European Union, Treaty on the Functioning of the European Union. Munich: C.H. Beck, Hart Publishing. p. 784

[33]Ruling 1/78, of 14 November 1978 (ECR 1978 p. 2151), (PT1978/00711 ES1978/00613 SVIV/00187 FIIV/00193). EU:C: 1978:202. paragraph 35

[34]Ruling 1/78, of 14 November 1978 (ECR 1978 p. 2151), (PT1978/00711 ES1978/00613 SVIV/00187 FIIV/00193). EU:C: 1978:202. paragraph 36

stated (when) *it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community* (the EU) *and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community* (the EU) *institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community* (the EU). *The Community* (the EU) *institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard*.[35] It is clear that practice of mixed agreements brings many challenges and difficulties for the EU and its Member States. However, as it was correctly pointed out by Craig and De Búrca*whatever difficulties there may be in managing mixed agreements, these difficulties do not provide a reason for altering the classification of competence, or for arguing that it should be exclusive*.[36]

As concerns mixed agreements themselves, as a rule, they are bilateral agreements where the EU and its Member States act on the one part and the third country on the other (e. g. Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part[37]). Of course, multilateral international agreements are possible, too (e. g. Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000[38]).In the EU's treaty practice, it is also possible to find international agreements where the EU and its Member States act as separate parties to agreements (e. g. Paris Agreement adopted under the United Nations Framework Convention on Climate Change[39]).

4. Conclusion of international agreements (respective procedure at the EU level)

As concerns the procedure of the conclusion of international agreements at the EU level it has been codified within Article 218 TFEU. Said Article makes no difference between international agreements to be concluded in the exclusive competence of the EU and those to be concluded as mixed agreements. It is because the division of competences and the distinction between EU only agreements and mixed agreements has no impact on negotiation phase. The practice is decided on case-by-case basis. It is generally accepted that the European Commission may act as a sole negotiator for the whole agreement according to mandate given by the Council.[40]

As it was stated above, provisions on the procedure within the EU are contained in Article 218 TFEU which focuses on internal procedure and competences of the EU institution within that procedure. It is applicable for all kind of international agreements with one exemption. Special rules apply to those international agreements concluded in the area of common trade policy; these provisions area laid down in Article 207 para. 4 TFEU.

[35]Judgment of 19 March 1996, Commission / Council (C-25/94, ECR 1996 p. I-1469). EU:C: 1996:114.paragraph 48

[36] Craig, P., DeBúrca, G. (2011). EU Law, Text, Cases and Materials, fifth edition. Oxford: Oxford University Press. p.335

[37] OJ L 326, 9.12.2017, p. 7–35

[38] OJ L 317, 15.12.2000, p. 3 - 353

[39] OJ L 282, 19.10.2016, p. 4–18

[40] Craig, P., DeBúrca, G. (2011). EU Law, Text, Cases and Materials, fifth edition. Oxford: Oxford University Press. p.335

The procedure at the EU level starts with the negotiation phase. The first step is adoption of the Council´s decision on opening of the negotiations. In that decision, the Council authorises the EU negotiator and it can also adopt the negotiation directives. As concerns the EU negotiator, in practice the Council does not conduct the negotiations itself but it authorises either the European Commission or the High Representative of the EU for Foreign Affairs and Security Policy, depending on the objects of the international agreement. According to Article 218 para. 3 TFEU, the recommendation for a decision of the Council on opening of the negotiations shall be submitted to the Council by the European Commission, or by the High Representative of the Union for Foreign Affairs and Security Policy (where the agreement envisaged relates exclusively or principally to the common foreign and security policy). In line with Article 218 para. 4 TFEU, in the decision on opening of the negotiations the Council may address directives to the EU negotiator and designate a special committee in consultation with which the negotiations must be conducted. In practice, respective working party of the Council is usually designated as a special committee. For example, the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons has been designated as a special committee for negotiations in respect to the EU accession to the European Convention on Human Rights.

Also the European Parliament is involved in the first - negotiation - phase. According to Article 218 para. 10 TFEU the European Parliament shall be immediately and fully informed at all stages of the procedure. For the time being, taking into account paragraph 40 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making[41], details on practical arrangements for cooperation and information-sharing are subject to intensive inter-institutional discussion.

The Council decision on opening of the negotiations has its procedural legal basis in Article 218 para. 3 and 4 TFEU. Substantial legal basis is not necessary since the content of an international agreement is subject of discussion only (and therefore it is not possible to fix substantial legal basis at this stage of the procedure).

As an example of this decision (or rather recommendation[42] for a decision) can be mentioned the recommendation for a Council decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union.[43]

[41]Under paragraph 40 *The three Institutions acknowledge the importance of ensuring that each Institution can exercise its rights and fulfil its obligations enshrined in the Treaties as interpreted by the Court of Justice of the European Union regarding the negotiation and conclusion of international agreements.*

The three Institutions commit to meet within six months after the entry into force of this Agreement in order to negotiate improved practical arrangements for cooperation and information-sharing within the framework of the Treaties, as interpreted by the Court of Justice of the European Union.

[42] The European Commission is not entitled to submit proposal for a decision at this stage. Therefore, the decision be recommendedonly.

[43]COM (2017) 218 final

The second phase of the procedure at the EU level is connected with signature of the international agreement. According to Article 218 para. 5 TFEU the Council shall adopt decision authorising the signing of the international agreement on a proposal by the negotiator. The decision on signature is logical consequence of negotiations. By that decision the President of the Council is usually authorised to designate the person or persons empowered to sign respective international agreement on behalf of the EU. It is obvious that the EU negotiator (as direct participant to negotiations) has the best information on the state of play and therefore is capable of deciding when the agreement is ready to be signed. Here it is necessary to add that different international agreements require different procedure of signing. Signature of an agreement by the EU itself only follows the decision on signature. However, mixed requires needs to be signed by each Member State first and only then comes the signature by the EU. Signature by the EU (on a basis of the Council decision) is usually the last one and takes its place only after the Member States signatures.

Where it is necessary the Council shall, on a proposal by the negotiator, also decide on a provisional application of the international agreement before its entry into force. Here can be stressed that the EU (the Council on a proposal by negotiator) is empowered to decide on a provisional application of those provisions of the international agreements falling within the scope of exclusive competences of the EU only.

The example of the decision on signature and provisional application is proposal for a Council decision on the signature and provisional application of the Agreement between the European Community and the Republic of Lebanon on certain aspects of air services.[44]

The third phase relates to decision concluding the international agreement. Decision is adopted by the Council on a proposal by the negotiator, again. Procedural legal basis is given by Article 218 para. 6 TFEU. At this stage (and the previous stage as well) it is necessary to couple procedural legal basis with substantial legal basis. The reason is simple – now, the content of the agreement is clear.

The decision concluding the agreement is the last step of the procedure at the EU level. By this decision, the president of the Council is usually authorised to designate the person empowered to make the notification (e. g. approval) provided in respective international agreement. Apart from the previous two decisions where the European Parliament role was rather passive (the European Parliament has right to be immediately and fully informed "only"), here his role is more active. Although there is one exception regarding the agreements relate exclusively to the common foreign and security policy. The Council shall adopt the decision concluding the agreement after obtaining the consent of the European Parliament or when the consent is not necessary[45] after it consulted the European Parliament.

As it was mentioned above (with respect to the decision on signature) there are different procedure requirements for different international agreements. Only the decision on conclusion is required with respect to agreements concluded by the EU alone (EU only agreements). On the other hand, regarding mixed agreements, the national approval (ratification) is usually required before the Council decides on conclusion of the agreement.

Finally, throughout the whole procedure Article 218 TFEU also lays down special provisions on voting of the Council. General rule is - adoption of decision concluding the agreement by qualified majority. Secondly, in line with Article 218 para. 8 TFEU the Council shall act unanimously when the

[44] COM (2005) 62 final

[45] See Article 218 para. 6 a) TFEU

agreement covers a field for which the unanimity is required regarding the adoption of EU act as well as the association agreements and the agreements referred to in Article 212 TFEU with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

5. External competences of the EU exercised through the Member States

Apart from what was mentioned above it is also necessary to mention specific situation relating to both exclusive external competence of the EU and shared external competence of the EU. This situation occurs in cases where international agreements contain provisions which fall within the exclusive external competences of the EU or shared external competences of the EU, but the EU itself cannot, for some reason, be a contracting party to respective international agreement (e. g. International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001). That is why those international agreements are concluded by the Member States only. And, although in such cases it seems that the participation of the Member States in international agreements is a manifestation of their (unconditional) will, their participation is, in fact, part of the EU's external competence. And while only the Member States act as contracting parties, this is done on the basis of an authorisation given by the EU.[46] On the contrary, without the consent of the EU, the conclusion of such an international agreement would not have been possible or, would be qualified as an infringement of EU law.

6. Conclusions

The EU competence to conclude international agreements, as a part of the external competence of the EU, its extent, its types, or its nature belong to one of the most complicated areas of the EU law. This competence of the EU is not completely new one. It has been created for a long time. Its current shape has been influenced by the case-law of the Court of Justice. At a later stage major principles relating to external competences of the EU established by the Court of Justice were codified by the Lisbon Treaty. Today, the basis for the EU competence to conclude international agreements is given by Article 216 TFEU. This Article in its para. 1 distinguishes 4 categories of external competences of the EU where the EU is capable of concluding international agreements. Another important requirement for the EU treaty practice is given by the principle of conferred powers. On a basis of that principle it is necessary to distinguish exclusive and shared competence of the EU to conclude international agreements. Within the first one only the EU alone is capable of concluding international agreements (so called EU-only agreements). The second one requires parallel activity by the EU and its Member States (so called mixed agreements). However, the treaty practice of the EU also recognises some exemptions from above mentioned rules. Those relate to situations when international agreement falls within the exclusive competences of the EU or shared competences but the EU itself cannot be a contracting party to respective international agreement.

[46] See Council Decision of 19 September 2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention)

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