The reception of EU facultative mixity in Germany´s constitutional order

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The reception of EU facultative mixity in Germany ´s constitutional order

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I. Introduction

Mixed agreements have been a preferred form of entering into international treaties chosen by the EU and its Member States (MS), despite the complexities their usage implies. Recent attempts of the EU institutions to prefer the conclusion of EU only agreements to mixed agreements,[1] as a consequence of the broad interpretation of EU exclusive trade competences by the CJEU in Opinion 2/15[2] are motivated by the hope for increased efficiency in EU treaty making. They, however, provoke criticism with regard to democratic legitimacy and the EU principle of conferral, which constrain the EU to adopt only those legal acts for which it is competent.[3] As this criticism is particularly strong in Germany and led to constitutional challenges of EU only acts,[4] the present contribution will explain the treatment of mixed agreements in the constitutional order of Germany and explore the constitutional challenges that EU only agreements pose to the German constitutional order. This discussion will thus show the German legal order's continued preference for mixed agreements, in view of the jurisprudence of the German Federal Constitutional Court (FCC). Those constitutional challenges are particularly topical in view of the most recent case law of the CJEU that stressed the political leeway of the EU Council to choose, when it comes to the negotiation and conclusion of EU agreements based on shard competences, between either an EU only agreement or a mixed agreement.[5] This political leeway turns mixity into a facultative[6] endeavour in the hands of the Council.[7] Under the constitutional perceptions of the FCC, such type of facultative mixity meets with considerable constitutional concerns because it replaces what was formerly held obligatory mixity. Before this will be explained in more detail in the following sections, first the involvement of German constitutional organs in the life cycle of a mixed agreement (i.e. during negotiations, ratification and implementation) shall briefly be analysed.

[1] See also the discussion of this new approach in the Chapter by Kübek and Van Damme.

[2] See Council conclusions on the negotiation and conclusion of EU trade agreements, 22nd May 2018, para. 3 ff, http://data.consilium.europa.eu/doc/document/ST-9120-2018-INIT/en/pdf; P. J. Kuijper, in Neframi/Gatti (eds), Constitutional Issues of EU External Relations Law, 2018, 201 at 227.

[3] See also the observations in the Chapter by Colas.

[4] Currently, constitutional complaints against the provisional application of CETA (case 2 BvR 1368/16 at al) and the conclusion of the EU Free Trade Agreement with Singapore (case 2 BvR 882/19) are pending before the German Constitutional Court (FCC).

[5] CJEU, Case C-600/14, para. 68, Joined Cases C-626/15 and C-659/16, para. 126; see also Opinion of GA Kokott in case C-626/15, para. 107. More on this below.

[6] For this concept see already A Rosas, in Dashwood/Hillion, The General Law of EC External Relations, 2000, 206.

[7] However, EU constitutional principles like the autonomy of the EU legal order and institutional balance might restrain the Council´s leeway so that EU Only might become the default option. See M. Chamon, in Neframi/Gatti (eds), Constitutional Issues of EU External Relations Law, 2018, 137 at 151 ff; T. Verellen, 2016 CMLRev. 741 at 760 f.

II. Conclusion of Mixed Agreements under the German Constitutional Order

The conclusion of a mixed agreement by the EU and its MS in Germany usually calls for the involvement of the German Parliament in the ratification of the agreement (at least regarding those parts of the agreement that fall within national competences)[8] according to Article 59 Basic Law[9], or even according to Article 23 (1) Basic Law if the agreement implies a transfer of powers to the EU.[10] Accordingly, the ratification of mixed agreements typically requires consent by the German Parliament without which the Government cannot proceed. The negotiation of an agreement with a third party, alongside the European Commission, is the sole responsibility of the German Government that anyway is involved in the negotiation even of the EU parts of the mixed agreement by its representation in the Trade Policy Committee under Article 207 (3) TFEU. Nevertheless, even at this stage, the Bundestag already has a part to play since the mixed agreement is an EU matter for which, under Article 23 (2) Basic Law, the Bundestag and, through the Bundesrat, the Länder participate. This right to participation requires the German Government to keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time, and allows the Bundestag to state its position that has to be taken into account by the Government in the negotiations, according to Article 23 (3) Basic Law. Therefore, the Federal Government has to notify the Bundestag of planned mixed agreements as early as possible and to send it the negotiating mandates, guidelines and other initiatives for agreements of the EU. This is spelled out in sections 5 and 6 of the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union.[11] Additionally, the Government must continuously transmit to the Bundestag updated information on the course of discussions as prescribed by section 8 of that Act. This enables the Bundestag to determine the appropriate time to adopt its position. If the Bundestag adopts a position, the Government must use it as a basis for its negotiations even though it is not strictly binding on the Government. The Federal Government continuously keeps the Bundestag informed about the consideration given to its position in negotiations. If the main interests expressed in this position cannot be asserted by the Government in the negotiations, it must invoke the requirement of prior parliamentary approval in the negotiations, as provided in action 8, paragraph 4 of that Act. The Government notifies the Bundestag thereof without delay by submitting a special report. Before the final decision is adopted in Council on the pertinent EU act (e.g. on signature or conclusion of an agreement), the Government shall endeavour to reach agreement with the Bundestag. In any case however the Government retains its right, in awareness of the Bundestag's position, to take divergent decisions for good reasons of foreign or EU integration policy.

Domestic implementation of a mixed agreement follows the same rules as any other international agreement. As far as the implementation requires changes to legislative acts, the German Parliament has to take care of the amendments, except if the power to change the rules has been transferred to

[8] See G. van der Loo, in Santos Vara/Sánchez-Tabernero (eds) The Democratisation of EU International Relations Through EU Law, 2019, 210 at 219 ff. A preferable view, however, argues in favor of consent of the Bundestag to the whole of the mixed agreement, W. Weiß, Die Öffentliche Verwaltung 2016, 661 at 661 f. This does not contradict the CJEU ´s statement in Case C-28/12, para. 47 that in the negotiation and conclusion of a mixed agreement, each of its parties "must act within the framework of the competences which it has", since MS become responsible for the whole agreement under international law.

[9] See https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

[10] See M. Nettesheim, Umfassende Freihandelsabkommen und Grundgesetz, 2017, 96 ff; W. Weiß, in Kadelbach (ed) Die Welt und wir, 2017, 151 at 209 ff. *Contra* B. Grzeszick, Neue Zeitschrift für Verwaltungsrecht 2016, 1753 at 1759 ff. More detail below, IV. 3.

[11] For an English version see https://www.gesetze-im-internet.de/englisch_euzbbg/englisch_euzbbg.pdf.

the EU. In the latter case, it is the EU legislature that has to implement EU (mixed) agreements. Sometimes, the Bundestag, in the same legislative act which expresses its consent to the ratification of an international agreement, delegates the adoption of statutory rules to implement the agreement to the Government, by virtue of Article 80 Basic Law.

III. Struggling with Facultative Mixity from a German Constitutional Law Perspective on EU Competences and the Principle of Conferral

1. Shared External EU Competences, the Principle of Conferral, and the EU Council

The reservation in German constitutional law regarding (merely) facultative mixity (and its preference for obligatory mixity) is rooted in the pivotal importance that the principle of conferred powers plays, in Germany´s constitutional perspective, with regard to the scope of the EU´s powers. The EU can only exercise those powers conferred to it by the consent of the Bundestag (and Bundesrat). There are no EU powers beyond this explicit transfer, apart from limited additions by virtue of implied powers[12], which includes implied external powers, which now that the Lisbon Treaty had introduced Article 3 (2) and 216 (1) TFEU have been transformed into explicit external EU competences. The function of the principle of conferral enshrined in Article 5 TEU is to preserve the Member States' responsibilities and competences. In the words of the FCC: since the "Member States are the constituted primary political area of their respective polities, the European Union has secondary, i.e. delegated, responsibility [only] for the tasks conferred on it."[13]

Thus, the EU either has a specific power to act or adopt legal acts, or it does not have such power in which case the MS remain competent. As a consequence, the *capacity* for the EU to adopt a legal act is an objective issue determined by the EU Treaties; it cannot depend on a Council decision constitutively determining whether an international agreement can be concluded by the EU solely or jointly with the EU MS (thus making it a mixed agreement). This must be so because the powers of the EU are – more or less clearly – specified in EU primary law. If, and insofar as, the EU Treaties do not provide for a mandate of the EU to conclude an international agreement on its own account, its conclusion is and remains subject to MS competence. The EU either has the power to enter into international treaties, or it lacks this power so that the international treaty, or parts thereof, must be concluded and ratified by the MS by virtue of their retained competences. The mixity of comprehensive international agreements which partly are within and partly outside EU competences is not an option, but obligatory. From this perspective, and in line with the logic of dual federalism, there is no room for facultative mixity.[14]

However, the reality of the distribution of competences between EU and its MS is more complex than the principled dichotomy just presented. Facultative mixity is – using the words of Cremona who describes a trend in the use of EU external competences – an expression of an attempt to constrain

[12] See FCC, Lisbon decision of 30 June 2009, Case 2BvE 2/08 et al, para 237. For an English version see https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html

[13] FCC (fn 12), para 301.

[14] See R. Schütze, Classifying EU Competences, in S. Garben/I. Govaere (eds), The Division of Competences between the EU and the Member States, 2017, 33 at 43 ff.

the exercise of EU competence rather than to restrain the existence of EU competence.[15] EU primary law provides for two instances in which the EU may decide on the exercise of EU competences by its MS: first, in the case of exclusive EU competences, the EU may empower its MS to adopt legal acts (Article 2 (1) TFEU). Second, in the case of shared competences of the EU, the EU can determine not to make use of its shared competence, but to leave the exercise thereof to its MS. As Article 2 (2) TFEU provides: "The Member States shall exercise their competence to the extent that the Union has not exercised its competence" (which implies a capacity of the EU to decide not to exercise it, or only partly or jointly with the MS). This determination may be made by the Council, and may impliedly be done by deciding on the authorization for opening negotiations, by deciding on the relevant negotiating directives or by deciding on the conclusion of an international agreement (Article 218 (2), (4), (6) TFEU) as a mixed or as an EU only agreement. Without referring to Article 2 (2) TFEU,[16] the Court recently explicitly confirmed that it is for the Council to decide whether an international agreement falling within EU shared competences may be concluded with consent of the MS ((i.e. as a mixed one, whereby mixity is facultative) or by the EU alone.[17]

Yet, the question on the legal basis for the Council´s power to decide on how precisely a shared EU competence is exercised, has not been clarified by the Court, nor indeed has the question been addressed at all. Strikingly, deliberations about the decision-making within the Council on how to exercise EU competences did not play any role to the CJEU in its decision in *Neighbouring rights* (C-114/12) when the Court annulled a Council decision on negotiating an international agreement as a mixed agreement. The Court determined there that the EU had exclusive competence based on Article 3 (2) TFEU. The Court did not deal with the question – admittedly, because it may not have been raised by the defendant - whether the conclusion as mixed agreement, even in a policy area of exclusive EU external competence, could be based on an EU empowerment under Article 2 (1) TFEU. Hence, whereas in *COTIF* (C-600/14) the Court implicitly acknowledges the competence of the Council - in case of lack of QMV on concluding an agreement as an EU only agreement – to use facultative mixity, this competence was not considered in *Neighbouring rights*, and hence in effect was denied in the case of exclusive EU competence. As a result, one might argue that, whereas the Council´s will to make use of EU shared competences to enter into an EU only agreement is respected by the CJEU, it has so far been neglected when EU exclusive external competences are at stake even though an empowerment by the EU could also allow for mixed agreements insofar. Admittedly, the contested Council decision in *Neighbouring rights* did not explicitly empower the MS to join in the conclusion of the agreement, but our observation demonstrates the importance of the issue of where to find the legal basis for entrusting the Council with the power to decide on the exercise of EU shared competences.

[15] M. Cremona, EU External Relations: Unity and Conferral of Powers, in L. Azoulai (ed), The Question of Competence in the EU, 2014, 65 at 85. See also I. Govaere, in Cremona (ed), Structural Principles in EU external relations law, 2018, 71 at 90 who sees in the Court's post-Lisbon case law a "systematic preference for conferral of competence to the EU and the autonomous EU legal order alike".

[16] But see AG Kokott, Opinion in Joined Cases C-626/15 and C-659/16, para. 112 ff who clearly refers to Article 2 (2) TFEU.

[17] See Joined Cases C-626/15 and C-659/16, para. 126. In *COTIF*, Case C-600/14, para. 68; the Court remarked, on its decision in Opinion 2/15: "relevant provisions of the agreement concerned, relating to non-direct foreign investment, which fall within the shared competence of the European Union and its Member States, could not be approved by the Union alone. However, in making that finding, the Court did no more than acknowledge the fact that there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area".

The decision-making competence of the Council on how to exercise EU competences presupposes that the EU is able to enter into agreements within the realm of shared competences alone. Shared competences then need be understood as competences within which the EU could enter into "EU only" agreements, in the same way as the EU alone adopts legal acts internally. Hence, shared competences would always imply a genuine EU competence to enter into international agreements independently from the MS. Indeed this is the approach explicitly adopted by the CJEU in most recent decisions.[18]

2. Facultative Mixity and Article 216 (1) TFEU

Basing the competence of the EU Council to constitutively decide about the conclusion of an international agreement as either mixed or EU only on Article 2 (2) TFEU raises the question whether full account of Article 216 (1) TFEU is taken.

According to this rule, the mere existence of an EU shared (internal) competence in the sense of Article 2 (2) TFEU is not sufficient for the EU to have the power to enter into an international agreement. To the contrary, EU primary law postulates additional requirements for the EU entering into an international agreement autonomously, i.e. independently from the MS. The exercise of EU external competences is more demanding compared to internal competence, and rightly so, because of its more severe impact on the allocation of powers between the EU and its MS. Whereas internal law-making in the EU can easily be altered, by a new decision of the EU legislature, international agreements, once entered into, cannot be changed as easily. The other parties to the agreement must cooperate, and the theoretical option of the EU withdrawing from an agreement that no longer suits its aims and objectives may not be useful/feasible for political reasons. Consequently, international law making by the EU is much more capable of restraining the MS' prerogatives and sovereignty than mere internal EU law-making.

Consequently, the Council can only make the decision, implied in Article 2 (2) TFEU, not to exercise EU external competences to the exclusion of the Member States if the EU has an external competence to begin with. This latter question is determined by Article 216 (1) TFEU, and not by general considerations about the category of shared competences under Article 2 (2) TFEU.[19] In other words:

[18] See CJEU Case C-600/14, para. 51, 61. Opinion 2/15 was not clear in this regard, see Bungenberg, ZeuS 2017, 383 at 393-394. Some argue that the Court in Opinion 2/15 made an end to facultative mixity for areas in which competence is shared between EU and MS, see L. Ankersmit, European Law Blog https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/; Kleimann/Kübek, Verfassungsblog; M. Chamon (fn 7), 140, fn 14. One can deduce this i.a. from paras 292-293 of Opinion 2/15, which infers the need for MS consent from the shared nature of EU competence: "Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature … and *cannot, therefore, be established without the Member States' consent*. It follows that approval of Section B of Chapter 9 of the envisaged agreement *falls not within the exclusive competence of the European Union, but within a competence shared* between the European Union and the Member States" (emphasis here). Hence, one may conclude from this that the EU exercise of a shared competence requires the consent of the MS.

[19] An additional problem occurs with respect to protocol (25) on the exercise of shared competences, according to which "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area". For external shared competences, this means that not any exercise of shared competences internally in a specific policy field can translate into a comprehensive external competence; this protocol has to be considered in interpreting Article 216 (1) TFEU, last alternative. Against this background, broad constructions of the ERTA principles in CJEU case law also post Lisbon (as A. Rosas, Fordham Intl Law J 2015, 1073 at 1087 f, 1091; I. Govaere (fn 15), at 76 f; M. Chamon, CMLRev 2018, 1101 report) must meet with considerable reserve. This

if specific parts of a proposed international agreement to be entered into by the EU fall within EU shared competences, this in itself is not sufficient to claim an EU competence to enter into it autonomously. The stipulations of one of the alternatives of Article 216 (1) TFEU must be met, otherwise the EU does not have any external competence at all. In a similar way, the former CJEU case law had required, for determining "whether the Community has the competence to conclude an international agreement and whether that competence is exclusive", "a comprehensive and detailed analysis" of common EU rules and the proposed international agreement with a view to ensure that the agreement "is not capable of undermining the uniform and consistent application of the Community rules". [20] This test is now reflected in the Article 216 (1) alternative of assessing whether the proposed agreement "may affect common rules or alter their scope".

Only then there is an (at least shared) EU competence to enter into an international agreement, and only then the Council may decide not to exercise them, but to enter into a (facultative) mixed agreement instead. If the stipulations of Article 216 (1) TFEU are not met for those parts of the agreement that fall within shared competences, the EU does not have any competence to enter into the agreement with regard to those parts, even though the EU is competent to exercise shared competence by enacting internal legislation insofar. If the EU, in such case, does not have a competence to enter into the international agreement, even though the content of the agreement falls within shared internal competences, there is no room for the Council to decide about mixity or no mixity. By necessity, the agreement then must be entered into by the EU MS alone insofar; there is no space for mixity. To be clear: where an agreement also contains other provisions falling within the exclusive competence of the EU under Article 3 TFEU, or for which the requirements of Article 216 (1) TFEU are met, this must be concluded as a mixed one.

In sum, due to the principle of conferred powers, facultative mixity (in the sense of a constitutive competence of the Council to decide whether a given international agreement is concluded either as EU only agreement or as a mixed agreement) can only exist if the EU has a competence to enter into

problem can be exemplified taking the Court´s Opinion 3/15, para. 122, where it acknowledged an exclusive EU competence also insofar as an EU directive had left leeway to the EU MS, even though the agreement, that as well left leeway to its parties insofar, actually had no effect on common rules (see M. Cremona in Schütze/Tridimas, Oxford Principles of EU law, Vol 1, 2018, at 1133). The Court, however, denies the relevance of protocol 25 in interpreting Article 3 (2), see Case C-114/12, para. 73, even though Article 3 (2) contains a similar constraint to the scope of EU competences ("*in so far as* its conclusion may affect common rules or alter their scope"; emphasis here). How can there be an exclusive EU external competence, if there is no external EU competence at all under Article 216 (1) to which protocol 25 applies as Article 216 (1) is about shared (external) competences? Also in pre-Lisbon times, the CJEU case law implied that the mere existence of a shared EU internal competence in itself is not sufficient for recognizing an EU external competence; there were additional conditions that had to be met, see Opinion 2/92, para. 32, Opinion 1/94, paras 74-75 and Opinion 1/03, para. 114 f.

[20] CJEU, Opinion 1/03, para. 133. Confirmed in slightly different language by CJEU, Opinion 1/13, para. 74: "any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis must take into account the areas covered by the EU rules 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". (italicization WW).

international agreements by virtue of Article 216 (1) TFEU[21], and not simply in any case in which an international agreement falls within the ambit of shared internal EU competences. This understanding of the interrelatedness of Article 2 (2) and 216 (1) TFEU may explain why AG Sharpston held that the EU cannot simply assert external competence over any area of shared competence irrespective of whether it has chosen to exercise that right internally.[22]

The approach to determining shared competences in EU external relations developed here may face the objection that the EU legal practice does not pay much attention to Article 216 (1) TFEU. As has been stated recently, Article 216 (1) TFEU has rarely been used by the CJEU and the EU institutions as a legal basis for concluding international agreements even though the EU´s competence for entering into treaties must be based on a substantive EU competence in conjunction with Article 216 (1) TFEU.[23] The latter has been expressed in welcome clarity by AG Kokott.[24] It is, however, not clear whether the CJEU shares this opinion as it held that Article 2 (2) TFEU "does not state that a prerequisite of the Union having an external competence that is shared with its Member States is the existence, in the Treaties, of a provision explicitly conferring such an external competence on the Union."[25] The Court thereby did not mention Article 216 (1) TFEU which constitutes this explicit provision that determines whether the EU has an external competence to begin with.[26]

Furthermore, the legal requirements of Article 216 (1) TFEU do not pose a significant barrier to EU external competences. Where there exists a shared internal EU competence, the establishment of a comparatively broad external competence does not appear to raise great difficulties as the CJEU does not pay considerable attention to Article 216 (1) TFEU and its stipulations.[27] In consequence, on the

[21] Meeting the stipulations of the alternatives of Article 216 (1) TFEU requires reading it in conjunction with EU internal competences, as they reference to them, with the exception of its first alternative ("where the Treaties so provide").

[22] AG Sharpston, Opinion in Opinion 2/15, para. 74.

[23] M. Cremona, 2018 EUConst 231 at 249; idem, in Neframi/Gatti (eds), Constitutional Issues of EU External Law, 2018, 29 at 57.

[24] Opinion of AG Kokott, Case C-137/12, paras. 43-45; Case C-81/13, paras. 102-105. The Court in its decision on this case did not comment on the need to add Article 216 (1) to Article 114 TFEU as legal basis but only assessed that Article 207 TFEU was the correct legal basis. On this issue see also Cremona (fn 19), at 1131. Contra Konstadinidis, "EU foreign policy under the doctrine of implied powers: Codification drawbacks and constitutional limitations", 39 EL Rev. (2014), 511 at 521-522 who opines that Article 216 (1) alone is the substantive legal basis.

[25] Case C-600/14, para. 66.

[26] See also CJEU, Opinion 1/13 para, 67: "The competence of the EU to conclude international agreements may arise not only from an express conferment by the Treaties but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/03, EU:C:2006:81, paragraph 114 and the case-law cited). The last-mentioned possibility is also referred to in Article 216(1) TFEU." See also CJEU, Case C-600/14 para. 45. Hence, instead of identifying external EU competences on the basis of interpreting EU primary law provisions, the Court prefers reference to its pertinent case law, even if it is pre-Lisbon, and refers to the new wording of the relevant Treaty provisions only as confirming this pre-Lisbon case law without diligently reading and subsuming the new Lisbon provisions. Making a similar point I. Govaere, (fn 15), at 77: "Rather than making an abstract assessment on the basis of the Treaty provisions, the CJEU indicated that … an assessment of the ERTA criteria need to be made in concreto".

[27] Cf. Opinion 2/15, paras. 239-241: As the TFEU establishes a shared competence on free movement of capital between EU MS and third states in Article 63 TFEU, any international discipline insofar that may contribute to the complete realization of this objective may be seen to fall within Article 216 (1) TFEU, 2nd alternative

basis of recent CJEU case law, it appears that internal and external competences are almost equivalent in their scope, and that external competences are even more comprehensive as they do not necessarily require exercise of internal competences but reference to one of the EU´s objectives.

All this might result from a certain negligence or very broad and surficial reading with which the Court treats the stipulations of Article 216 (1) TFEU, combined with its recourse to pre-Lisbon case law, which paves the way for introducing criteria beyond the wording in Article 216 (1) TFEU or Article 3 (2) TFEU, such as for instance the criterion whether not only rules in force, but also "foreseeable future developments" may be taken on board when the requirement of "common rules" being "affected" or "their scope" being "altered" is tested.[28]

This raises concerns under the principle of conferral. Broad and more or less unprecise competence provisions carry "the threat that [they] could be without limits".[29] From the perspective of the FCC, the transfer of sovereign powers to the EU requires substantively "determined and … limited" transfer clauses. Hence, the FCC demanded a narrow interpretation of such an undetermined EU competence in the case of Article 83 (2) TFEU, which - in a similar way as Articles 216 (1) TFEU, 2nd alternative ["where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties"] – allows for EU measures, if "essential to ensure the effective implementation" of EU policies.[30] Another provision that was deemed problematic under the principle of conferral and the resulting requirement for determined competence rules was Article 352 TFEU, which also has a broad reference to the need for EU action to be "necessary within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties".[31] I will revert to this below.

In addition, at least since the entry into force of the Lisbon Treaty, once an implicit external shared competence is found, this appears to almost always be an exclusive one. This results from the almost (but not completely) identical formulations of Articles 3 (2) and 216 (1) TFEU. This almost complete equation between shared and exclusive external competence "reflect[s] the tendency of early [CJEU] case law to elide the distinction between the existence of implied external competence and its exclusivity by including in the Treaties two provisions, very similar but not identical in wording"[32], so that there is a "potentially large expansion of exclusive external competence"[33], the limits of which

("conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives"). What is lacking there, however, is an evaluation by the Court of the necessity as required under Article 216 (1) TFEU. In para. 293 the Court again simply states that since the ISDS cannot fall within the exclusive competence of Article 207 TFEU, it is covered by shared competences, without indicating any legal basis for a shared competence. See also Case C-600/14, para. 60, where the Court implicitly opines that if an agreement contributes to the achievement of an objective, it is necessary in the sense of Article 216 (1) TFEU 2nd alternative without providing for an explanation for equating suitability with necessity.

[28] For the use of this criterion see Opinion 1/13, para. 74. On this issue see also I. Govaere, 2015 CMLRev 1277 at 1292-1294, 1306 who however looks more favourably on the construction of the terms of Article 216 (1) TFEU in light of pertinent ECJ case law.

[29] See FCC (fn 12), paras. 361 ff.

[30] Article 83 (2) TFEU: "If the approximation of criminal laws and regulations of the Member States proves *essential to ensure the effective implementation of a Union policy* in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions" (emphasis here).

[31] See FCC (fn 12), para. 326-328.

[32] M. Cremona, EUConst (fn 23), at 246. For this tendency of the early CJEU case law see also M. Cremona (fn 15), 68.

[33] M. Cremona (fn 15), at 73.

may even be "difficult to establish".[34] Also the Singapore Opinion of the CJEU does not clearly show a willingness of the Court to distinguish between Articles 216 (1) and 3 (2) TFEU. Even though it held that disciplines on non-direct foreign investment fall within shared, but not within the exclusive competence under Article 3 (2) TFEU,[35] this distinction was based on the non-applicability of the pre-emption rationale of Article 3 (2) TFEU (in its last alternative) to rules under EU primary (rather than secondary) law.[36]

Even if shared and exclusive external powers could be differentiated, the principle of subsidiarity applicable to shared external competences – at least when following the terms of Article 5 (3) TEU that do not contain a carve-out for external competences - would in effect become meaningless. After all, Article 216 (1) TFEU mandates "the conclusion of an agreement [in so far as] necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties." As a result, the shared EU competence established under this proviso will by necessity stand the subsidiarity test: approving the necessity of the conclusion of an agreement by the EU equates to approving the need for EU action under the subsidiarity principle.[37]

3. Constitutional problems in Germany with conceiving EU competences broadly

These developments in the CJEU's jurisprudence and the institutional practice of the EU institutions lead to the legally unavoidable replacement of (what was thought to be) oblgiatory mixity by facultative mixity. The result of which could be perceived to mean that the EU – as is common in federal systems – enjoys very expansive external powers that go even beyond its internal legislative competences,[38] and which can no longer be effectively contained, neither by the rules on distribution of competences between the EU and its MS, nor by the principle of subsidiarity. Hence, one may raise the concern that EU law has once again come closer to becoming a federal state and to undermining the MS' statehood. This is worrying in particular in the era of globalization, where almost all areas of policy become internationalized and dependent on international cooperation. Consequently, what used to be merely internal affairs/domaine reservé entrusted to the domestic legislator, has now become the object of international agreements for which increasingly only the EU is competent. Effectively then the principle of conferral no longer is effective, which contrasts with its high importance endorsed by the several iterations of it in the Treaties (Articles 4, 5, 13 (2) TEU, 7 TFEU, and Declaration 18), provisions that justify the insistence of domestic Constitutional Courts on this principle.[39]

The constitutional problem that thereby results for the German legal order is further exacerbated by the more or less constitutive force of Council decision-making on the exercise of EU competences, acting without sufficient control by the CJEU. In view of the FCC "if the institutions are permitted to re-define expansively, fill lacunae or factually extend competences, they risk transgressing the predetermined integration programme and acting beyond the powers granted to them. They are moving on a road at the end of which there is the power of disposition of their foundations laid down in the treaties, i.e. the competence of freely disposing of their competences. There is a risk of

[34] M. Cremona (fn 15), at 85. Post-Lisbon cases confirm the view that the CJEU lowered the threshold for finding in favour of an EU exclusive external competence, see M Chamon (fn 19), 1101 ff.

[35] Opinion 2/15, paras. 235-243. See again M Cremona (fn 23), at 249.

[36] A positive indication of differentiation between 216 (1) and 3 (2) is CJEU, Case C-600/14 para. 87.

[37] Cf the argument made by M. Cremona (fn 19), p. 1135.

[38] Cf. J. H. Weiler, The external legal relations of non-unitary actors: mixity and the federal principle, in The Constitution of Europe, 1999, 184 ff.

[39] See again FCC (fn 12), para. 301

transgression of the constitutive principle of conferral and of the conceptual responsibility for integration incumbent upon Member States if institutions of the European Union can decide without restriction, without any outside control, however restrained and exceptional, how treaty law is to be interpreted."[40] In this line of thinking, as shown already above, the lack of determination of the "EU only" (both shared and exclusive) external competences causes profound constitutional concerns as the requirement of determinacy of EU competences is central to the FCC´s construction of the democratic legitimation of EU legal acts for the German constitutional order, and is directly related to its perception of the principle of conferral.[41] In light of this, the classic justification for mixed agreements, i.e. avoiding the intricacies of determining exactly who (either EU or MS) has the competence for which parts of an agreement, still is valid, as the constitutional problems identified here from a domestic perspective become irrelevant for assessing the competence conformity of an EU mixed agreement, because the MS and their parliaments retain a constitutive say.

IV. German Constitutional Preference for Mixity, and Resulting Requirements

From a German constitutional perspective, there are three reasons that support the preference for (facultative) mixity over the "EU-only" conclusion of a comprehensive EU FTA. From this German point of view, (facultative) mixity is better than no mixity, if the mandatory mixity of an EU FTA is no longer available.

1. Germany´s continued presence in global (trade) politics

From a domestic constitutional perspective, one may prefer mixity over EU only agreements as the mixed character of an agreements guarantees Germany´s continued presence at the international level. In its Lisbon decision, the FCC expressed concerns about too broad a reading of the EU´s exclusive competences in the area of CCP, because this might lead to an alienation of substantive German parliamentary involvement. The FCC examined whether the enlarged exclusive CCP competence of the EU under Article 207 TFEU might lead to "an inadmissible curtailment of the [German] statehood presupposed and protected by the Basic Law and of the principle of the sovereignty of the people due to a loss of the freedom to act in not insignificant areas of international relations."[42] Given the allocation of competences in the area of external trade brought about by the Lisbon treaty, the FCC finally decided that such inadmissible curtailment of Germany´s role and self-determination in international trade relations "cannot occur", as the MS still are allowed to be present in the WTO being "the central forum for the worldwide dialogue on trade issues and the negotiation of corresponding trade agreements".[43] The Court stressed the need for Germany´s continued "legal and diplomatic presence" in global trade negotiations within the WTO, as this was held to be "the precondition for participating in the discourse on fundamental socio-political and economic policy issues and to then explain and discuss the arguments and the results at national level."[44]

Against this backdrop, mixed agreements are to be preferred over EU only agreements as choosing the mixed form ensures the continued presence of Germany on the international level, which gives it the

[40] FCC (fn 12), para. 238.
[41] See FCC (fn 12), para. 236, 238: "The integration programme of the EU must be sufficiently precise … If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally important tension will arise with the principle of conferral".
[42] See FCC (fn 12), para 375.
[43] Ibid.
[44] Ibid.

capacity to still have a direct say in negotiations and to represent its interests. Even though the deliberations of the FCC referred to the high importance of the WTO for the regulation of international trade and regulatory issues, this must apply also to other international institutions and agreements of significance for international relations, in particular to free trade and investment negotiations, all the more as these have become increasingly comprehensive, deal with regulatory issues and are pursued as a replacement for the currently contested and partly paralyzed role of the WTO.

2. Democratic Legitimacy of EU lawmaking

Since the FCC held that the MS still are the primary political area (see above), the legitimacy of EU lawmaking, including the conclusion of international agreements, is pivotally fed by domestic parliaments.[45] This view might not necessarily correspond to the requirements of legitimacy of the exercise of public powers on EU level, since pursuant to Article 10 (2) TEU the EU is based on a dual legitimacy without any indication on the precise relationship between the two sources. Nevertheless, from a German domestic constitutional perspective, the involvement of the Bundestag in the EU rule-making processes is deemed decisive for the democratic legitimacy of EU level rulemaking. The European Parliament is perceived to add merely supplementary legitimacy. Its involvement, even if decisive, cannot replace the legitimacy of EU rule-making coming from the MS, as the latter's participation remains necessary in the 'derived' EU public order which is merely responsible for tasks delegated to it by the MS. At the EU level, the role of domestic parliaments is recognized and concretely provided for in Article 12 TEU and in the relevant protocols on Domestic Parliaments and Subsidiarity. In particular in subsidiarity control, domestic parliaments have a role to play directly on the EU level. However, this role only pertains to legislation to be adopted in legislative procedures. It does not apply to the conclusion of international agreements even though they may transfer lawmaking powers to other institutions, for example to treaty bodies.[46] Thus, domestic parliaments are not provided with any role in the exercise of EU treaty making powers on EU level, even though their importance is recognized with regard to internal EU legislation. This gap should be addressed by formally giving the domestic parliaments the same role at the external level as they do for internal law-making.

At the domestic level, parliamentary involvement differs a lot in the conclusion of mixed agreements compared to EU only agreements. Whereas an "EU only" agreement allows for the involvement of the German Bundestag only insofar as it has rights of participation in the domestic, internal decision-making within the German Government on the German position in the EU Council decision-making on the negotiation and conclusion of an EU agreement, the involvement of the Bundestag in the negotiation, conclusion and ratification of a mixed agreement is much more direct and more significant. As Germany is a genuine party to a mixed agreement in its own right, the German ratification requires prior consent by the Bundestag (see already above). Thus, Parliament can veto a mixed agreement by denying its consent. In contrast, if the agreement is concluded as an "EU only" agreement, the Bundestag can only adopt a position that gives some guidance to the German Government´s representative in the EU Council, without having a decisive say. It is a mere recommendation based on Article 23 (3) Basic Law. Hence, the choice made by the Council between concluding an EU agreement either as a mixed or as an EU only agreement is determinative for the scope and significance of the Bundestag´s participation in the decision-making about the conclusion of

[45] See FCC (fn 12), para. 262; already BVerfGE 89, 155 at 184 f - Maastricht; A. Voßkuhle, Juristenzeitung 2016, 161 (166).

[46] For democracy concerns in this regard see J. Mendes, 2017 European Papers 489 ff; W. Weiß, 2018 EuConst 532 ff.

the agreement. The difference is clearly significant. From a constitutional perspective, it may raise concerns if the executive branch of government conclusively and unilaterally decides on the scope of the legislature´s prerogatives.

A facultative type of mixity (where actual mixity depends on the choice by the Council) does not guarantee the involvement of the German Bundestag to the same degree as obligatory mixity. The Bundestag might try to convince the German representative to vote in favor of mixity and veto the choice of an EU only agreement, but has no effective means to enforce its position to this end, as it is only entitled to make non-binding recommendations to the Government in EU affairs, as explained above (II).

Irrespective of this, significant domestic parliamentary involvement can only be secured by concluding EU FTAs as mixed agreements. Due to involvement of domestic parliaments in their conclusion, the democratic legitimacy of mixed agreements can be ensured also with regard to the domestic political area. The democratic legitimacy of EU international agreements is thereby strengthened since the dual legitimacy on which the EU is based according to Article 10 TEU will be ensured to its fullest extent. Moreover, the involvement of domestic parliaments may increase transparency and public debate about international policies. All of this speaks in favour of opting for mixed agreements being obligatory.

3. Consent of the Bundestag required (under certain circumstances) even in case of an EU Only FTA

Under German constitutional law, one may even require German parliamentary involvement in the conclusion of a comprehensive "EU only" FTA if these agreements confer considerable substantive rule-making powers to treaty bodies provided in the agreements. There are different, cumulative reasons for this.

First, German constitutional law, pursuant to Article 23 (1) Basic Law, requires parliamentary consent in any case of transferring powers to the EU level.[47] This applies not only if new powers are transferred by amending EU primary law, but also in comparable cases of dynamic EU treaty development that is already provided in the EU treaties. Likewise, a broad interpretation of provisions in EU primary law could as well raise the need for Parliamentary consent under Article 23 (1) Basic Law. Correspondingly, if competence provisions in EU law are highly unprecise, their use may become subject to the requirement of Parliamentary consent in the same way. One example in this regard is Article 352 TFEU, already mentioned above. Insofar, due to its "indefinite nature of future application of the flexibility clause, its use [i.e. the exercise of the competence enshrined in Article 352 TFEU by the EU] constitutionally requires ratification by the German Bundestag and the Bundesrat on the basis of Article 23 (1) second and third sentence of the Basic Law. The German representative in the Council may not express formal approval on behalf of the Federal Republic of Germany of a corresponding lawmaking proposal of the Commission as long as these constitutionally required preconditions are not met."[48]

[47] Which reads: "With a view to establishing a united Europe, … the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the EU as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basis Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79".
[48] FCC (fn 12), para. 328.

As the legal basis for transferring comprehensive powers to treaty bodies is not *clearly* settled in EU law,[49] the transfer of comprehensive powers by the EU to these treaty bodies which go beyond a pure application of rules of the agreements can be perceived under German constitutional law as a transfer of new powers to the EU or as a transfer of powers to new bodies established under international law by which European integration enters into a new phase. Such novel transfers of powers require consent by the Bundestag under Article 23 (1) Basic Law, because the already transferred powers of the EU may (and in this author´s view: do) not cover such (exercise of) EU competences. These are currently some of the main issues in the pending constitutional complaint against CETA and its establishment of a series of treaty bodies having considerable powers.[50]

Second, from the competence of the German Parliament to transfer powers to the EU the FCC also inferred a responsibility of the German constitutional institutions to watch over the course of EU Integration and to oversee the EU institutions´ use of their transferred powers (so-called responsibility for integration).[51] This responsibility is anchored in Article 23 Basic Law and the right to democracy which underlies the right to vote in general elections to the Bundestag, enshrined in Article 38 (1) and the democratic principle enshrined in Article 20 Basic Law. From this responsibility the Court inferred – inter alia - effective participatory rights and even constitutive consent requirements of the Bundestag to the German vote in the EU Council in case of EU decisions that effectively enlarge the EU´s competences or alter its decision-making procedures in a way that affects its democratic essence.[52]

Even though the FCC has not yet applied this jurisprudence to international (trade) agreements of the EU, the FCC did apply them to the Treaty establishing the European Stability Mechanism, an international agreement closely related to EU law.[53] Their application to comprehensive EU only FTAs might result in the FCC demanding a constitutive participation of the German Bundestag in the conclusion and/or implementation of international agreements in specific cases, in particular where rule-making is delegated to treaty bodies. In these cases, the respect for the principle of conferral will require additional procedural safeguards[54] to the benefit of the German Parliament, i.e. a right to vote on the EU agreement. The best way to safeguard this will of course be the conclusion of the agreement as a mixed one.

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[49] For the CJEU the competence for institutional arrangement is part of the material external competence of the EU, see CJEU, Opinion 1/76, ECLI:EU:C:1977:63, para. 5 and recently Opinion 2/15. Nevertheless, it is unsettled so far, how far these competences go. What are institutional arrangements? Can treaty bodies be mandated with comprehensive rule-making powers? According to the CJEU, the treaty bodies play a role in the application and implementation of the agreements (see CJEU, Case C-73/14, ECLI:EU:C:2015:663, para. 65), but what does this include?

[50] See the decision of 13 October 2016 (preliminary injunctions), Case 2 BvR 1368/16 et al., paras 58 ff. For an English version see https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/10/rs20161013_2bvr136816en.html .

[51] See FCC (fn 12), paras. 238 ff.

[52] FCC (fn 12), para. 245, 261, 275, 305 ff.

[53] FCC, Judgement of 12 September 2012 (preliminary injunctions), Case 2 BvR 1390/12 et al, paras. 105 ff – ESM; Judgement of 18 March 2014, paras. 159 ff. For English versions see https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html and https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/03/rs20140318_2bvr139012en.html.

[54] Cf. FCC (fn 12), para. 275 ff.

V. Conclusion

From a German constitutional perspective, facultative mixity is to be welcomed insofar as it is preferable to the otherwise EU only conclusion of international agreements. (Facultative) mixity ensures the continued relevance of the MS in international affairs, reduces possible democratic legitimacy concerns, and allows for a constitutionally required constitutive role of domestic parliaments. These benefits of course come at a cost: the cost are the protracted ratification procedures of mixed international agreements, and overall the increased complexity of having many negotiating partners and the intricacies for the unity of external representation of the EU (which however are remedied, or at least mitigated, by the duty of loyal cooperation).

From a German constitutional perspective, mixity may not only be an option, depending on the decision making in the Council (and hence facultative), but in certain circumstances even a constitutional requirement to ensure respect for the principle of conferral on EU level (and hence obligatory). Strengthening the role of national parliaments even in case of international agreements concluded by the EU alone may be a possible and attractive way out of a perceived lack of democratic legitimacy of EU external action. Accordingly, the Council encouraged its Members "to consult their national parliaments and other stakeholders" and "to continue to involve their parliaments and interested stakeholders appropriately"[55] in order to prepare the internal Council decision-making when FTAs are being negotiated and concluded by the EU.. Furthermore, also the control capacities of the European Parliament could be augmented in the implementation phase of international agreements, in particular when the latter are very comprehensive both with regard to their content and institutional arrangements allowing for the dynamic and autonomous development of the FTA's 'acquis'.

[55] Council conclusions (fn 2), para. 7 f.