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To What Extent Does the Conclusion of the EU-UK Trade and Cooperation Agreement Demonstrate That EU-only Conclusion Can be Legally Obligatory in Cases of Facultative Mixity?

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Abstract

'Mixity' is a phenomenon largely unique to the European Union's (EU) external relations and remains a prevalent practice despite demonstrably rendering the EU's external action more burdensome, inflexible and complicated. Whilst traditionally the principle of conferral could explain the EU's continued recourse to mixity, both judicial and Treaty developments have significantly eroded the scope for Member State exclusive external competence and the consequent obligatory nature of mixed agreements. 'Facultative mixity' has nevertheless enabled the continued use of mixed agreements as the *status quo* remains that where an agreement is not wholly covered by EU exclusive competences, the Council may choose whether to opt for mixity or EU-only conclusion; neither avenue can be legally enforced despite the complexities of mixity. The EU-United Kingdom Trade and Cooperation Agreement (TCA) showcases that concluding a comprehensive international agreement whilst avoiding the complexities of mixity, is legally possible. Whilst it has been suggested that the TCA's EU-only conclusion was merely the result of political will in the Council, this thesis argues that its EU-only conclusion would have nevertheless been legally obligatory. Exploring the benefits of EU-only conclusion, the continued efforts to legally avoid mixity and the facultative nature of the TCA, the present thesis utilises the TCA as a case study to demonstrate how the duty of cooperation can legally obligate the avoidance of mixed conclusion in certain instances of facultative mixity.

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Introduction

'Mixity' is a phenomenon, largely unique to the European Union's (EU) external relations. [1] It refers to the joint conclusion of an international agreement by the EU and its 27 member states and is viewed by many as rendering the EU's external action more burdensome, inflexible, slow and complicated.[2] Traditionally, mixed agreements emerged as a legal necessity, a product of the EU's lack of competence in external relations and the EU's constitutional framework grounded in the principle of conferred powers.[3] However, the EU's now expansive competence makes this traditional explanation no longer apt to explain the continued prevalence of the practice. Rather, mixed agreements are increasingly the product of a political choice arising from an agreement containing only EU-exclusive and "potential competences", those competences which remain internally shared but could potentially be exercised externally by the EU acting alone.[4] 'Facultative mixity' has been coined by academics as the term to describe this situation[5] and has been met with significant academic criticism[6] and judicial attention[7] over the years. However, the *status quo* remains that the Council may choose whether to opt for mixity or EU-only conclusion; neither avenue can be legally enforced despite the complexities of mixity.[8] It is therefore the scope of this paper to explore the field of facultative mixity in order to highlight the arguments put forward thus far for enforcing obligatory EU-only conclusion. The EU-United Kingdom (UK) Trade and

[1] Piet Eeckhout, *EU External Relations Law* (second edition, Oxford University Press 2011) 212.
[2] See for example: Ibid, 264; Hannes Lenk, "Mixity in EU Foreign Trade Policy Is Here to Stay: Advocate General Sharpston on the Allocation of Competence for the Conclusion of the EU-Singapore Free Trade Agreement" (2017) 2(1) European Papers 357, 385; Merijn Chamon and Thomas Verellen, "Whittling Down the Collective Interest: CETA, Facultative Mixity, Democracy and Halloumi" (Verfassungsblog, 2020) < https://verfassungsblog.de/whittling-down-the-collective-interest/> accessed 10 August 2021.
[3] Joseph Weiler, "The external legal relations of non-unitary actors: mixity and the federal principle" in Weiler, *The Constitution of Europe*, (Cambridge University Press 1999) 132.
[4] Joni Heliskoski, "Mixed Agreements: the EU Law Fundamentals" in Robert Schütze and Professor Takis Trimadis (eds) *Oxford Principles of European Union Law. Volume 1* (OUP 2018) 1176, 1178.
[5]Allan Rosas, "Mixity Past, Present and Future: Some Observations" in Merijn Chamon & Inge Govaere (eds) *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill | Nijoff 2020) 8; Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014) 183.
[6] See for example: ibid; Weiler (n 3); Eeckhout (n 1) 214.
[7] See for example: *Opinion 2/15, Opinion of the Court (Full Court) of 16 May 2017: Free Trade Agreement between the European Union and the Republic of Singapore,* [2017] ECLI:EU:C:2017:376*; Case C 600/14 Germany v Council (COTIF)* [2017] ECLI:EU:C:2017:935*; Opinion 1/08, Opinion of the Court (Grand Chamber) of 30 November 2009: General Agreement on Trade in Services (GATS)*, [2009] ECR I-11129; *Opinion 1/94, Opinion of the Court of 15 November 1994: Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty* [1994] ECLI:EU:C:1994:384.
[8] *Opinion 1/08* (n 7) para 107; Opinion 2/15 [2017] ECLI:EU:C:2016:992, Opinion of AG Sharpston delivered on 21 December 2016 para 75.

Cooperation Agreement[9] (TCA), gave rise to a situation of facultative mixity, but was concluded by the EU alone.[10] The EU and the UK are therefore the only parties to the TCA, binding its member states not by virtue of ratification but by virtue of Article 216(2) TFEU.[11] This agreement marks the starting relationship between the EU and the UK with its main pillar being – from an international perspective – a Free Trade Agreement (FTA), regulating EU-UK trade matters[12] such as the abolition of tariffs and quotas which would otherwise be governed by the rules of the World Trade Organisation (WTO). However, the TCA is substantively very comprehensive, additionally covering non-trade related issues such as fisheries,[13] judicial cooperation in criminal matters[14] and social security.[15] From an EU law perspective, the TCA is therefore an association agreement (AA), concluded on the basis of Article 217 Treaty on the Functioning of the European Union (TFEU)[16] which has allowed for the agreement's comprehensive scope. Its EU-only conclusion is therefore unalike all other existing mixed AA's, with the exception of the EU-Kosovo Stabilisation and Association Agreement[17] whose lack of mixity was largely a product of a lack of recognition by certain EU member states of Kosovo as an independent state.[18] The TCA's 'exceptional' EU-only conclusion[19] must of course be understood in light of the unique context in which it has been concluded. Most notably, its conclusion was situated in the political context of Brexit, constrained by the urgent deadline of December 31st, 2020, requiring the avoidance of a risky and lengthy ratification process. The fact remains that the EU autonomously concluded the TCA, an incredibly comprehensive AA; this consequently provides an appropriate case study to demonstrate how EU-only conclusion may not only be legally permissible but also legally obligatory. The present thesis therefore seeks to assess *to what extent the conclusion of the TCA demonstrates that EU-only conclusion can be rendered legally obligatory under*

[9] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (EU-UK) (30 April 2021) OJ L 149 (TCA).
[10] Steve Peers, "The Brexit deal - Council legal service opinion" (EU Law Analysis, 27 January 2021) < http://eulawanalysis.blogspot.com/2021/01/the-brexit-deal-council-legal-service.html > accessed 10 July.
[11] Joris Larik, "Instruments of EU External Action" in Ramses A Wessel and Joris Larik (eds) *EU External Relations Law: Text, Cases and Materials* (Hart Publishing 2020) 125.
[12] Catherine Barnard, "Rapid Response on the EU-UK Trade and Cooperation Agreement (TCA) and the EU (Future Relations) Act" (Cambridge Law Faculty, 19 January 2021) < https://www.youtube.com/watch?v=2dOccsoTy4U&t=2146s> accessed 5 July 2021.
[13] TCA, Part Two Heading Five.
[14] TCA, Part Three.
[15] TCA Part Two, Heading Four.
[16] Consolidated Version of the Treaty in the Functioning of the European Union [2012] OJ C236/47 (TFEU).
[17] Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part (EU-Kosovo) (16 March 2016) OJ L 71.
[18] Peter Van Elsuwege, "Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo" (2017) 22(3) European Foreign Affairs Review 393, 395.
[19] Peers (n 10).

EU law in cases of facultative mixity. This paper will proceed as follows: In Chapter 1, the field of mixity will be introduced and the debate surrounding facultative mixity will be analysed. Chapter 2 seeks to analyse the main provisions of the TCA in order to demonstrate its facultative nature. Chapter 3 will highlight how the duty of cooperation legally obligated the TCA's EU-only conclusion and demonstrate how its construction adequately obviates the political need for mixity.

Chapter 1: The Prevalence of Mixity

The Treaty of Lisbon[20] has been praised for providing greater clarity to the EU's conclusion of international agreements. It is worthy of such praise in so far as it has introduced a detailed and unitary procedure; Article 218 TFEU now clearly sets out the institutional divide to be expected for the conclusion of different international agreements. The Treaty of Lisbon was also pivotal in its introduction of the 'competence catalogue'[21] which has brought greater clarification to the division of competences.[22] Article 3 TFEU sets out the EU's exclusive competences, meaning those areas in which "only the Union may legislate and adopt legally binding acts".[23] Article 3(1) lays down the *a priori* exclusive competences.[24] Article 4 TFEU sets out those which are, internally, explicitly shared between the EU and its 27 member states. These 'shared competences' allow for both the EU and its member states to adopt legislation[25] but are further governed by Article 2(2) second sentence TFEU which allows member states to "exercise their competence to the extent that the Union has not exercised its competence". The inclusion of Article 3(2) TFEU was an important steppingstone for EU external relations. In codifying the infamous *ERTA*[26] and the *Opinion 1/76*[27] doctrines created by the Court of Justice of the European Union (CJEU), this provision now provides a further three cases – in addition to those explicitly laid down in Article 3(1) – where the EU has an implicit competence to autonomously conclude international agreements: (1) where provided in a legislative act, (2) where necessary for the EU to exercise an internal competence[28] or

[20] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306 (TEU).
[21] TFEU, Article 3-6.
[22] Andrea Ott, "EU External Competence" in Ramses A Wessel and Joris Larik (eds) *EU External Relations Law* (Hart publishing, 2020) 63.
[23] TFEU, Article 2(1).
[24] Rosas, 'Mixity Past, Present and Future' (n 5) 8.
[25] TFEU, Article 2(2) first sentence.
[26] *Case 22-70 Commission of the European Communities v Council of the European Communities* (ERTA) [1971] ECLI:EU:C:1971:32, paras 17, 21 and 22.
[27] *Opinion 1/76 on the Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 1977 -00741.
[28] Ibid.

(3) where it would otherwise affect common rules or alter their scope.[29] This codification was definitely not free from complexities and has led to its own array of CJEU jurisprudence seeking to clarify a perhaps confusing codification of the *ERTA* doctrine.[30] However, the Treaty of Lisbon cannot be thanked for its clarification of the phenomenon of mixity and especially of the role of Member States in the conclusion of international agreements which cover shared EU-member state competences. The Treaties remain silent on this matter.[31] As Davor Jancic notes, mixed agreements "remain alien to the wording of the Lisbon Treaty".[32] This has led to a rather audible debate amongst academics and before the CJEU in an attempt to create a concrete mechanism to govern facultative mixity.[33] By providing an overview of mixity more generally, its causes and complexities, this chapter seeks to address this debate and demonstrate why EU-only conclusion is the most legally suitable solution to the issue of facultative mixity.

I. **The Phenomenon of Mixity**

Mixity is the conclusion of an agreement by the EU and its 27 member states, requiring ratification by all 36 legislatures and the European Parliament.[34] It is a manifestation that the EU largely resembles a federation;[35] with two levels of government,[36] national and supranational, and with the latter acting only where a competence has been conferred upon it to do so. Yet it is equally an expression that the EU is not a federal state,[37] who behaves "at least to the outside world" as a unitary actor in international relations.[38] As Joseph Weiler has emphasised, practice suggests that difficulties have often arisen in Federal States with

[29] *ERTA* (n 26).
[30] ibid.
[31] Merijn Chamon, "Introduction: Facultative mixity, more than just a childhood disease of EU law?" in Merijn Chamon and Inge Govaere (eds) *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill | Nijoff 2020) 3.
[32] Davor Jančić, "TTIP and legislative-executive relations in EU trade policy" (2017) 40(1) West European Politics 202, 208.
[33] Merijn Chamon, "Constitutional limits to the political choice for mixity" in Eleftheria Neframi and Mauro Gatti (eds) *Constitutional issues of EU external relations law* (Luxembourg Legal Studies 2018) 147.
[34] Paola Conconi, Cristina Herghelegiu and Laura Puccio, "EU Trade Agreements: To mix or not to mix, that is the question" (2020) 55(2) Journal of World Trade 231.
[35] Chamon, 'Constitutional limits' (n 33)138; Robert Schütze, "Federalism and Foreign Affairs: Mixity as an (Inter)national phenomenon" in Christophe Hillion and Panos Koutrakos (eds) *Mixed Agreements Revisited: The EU and its member states in the World* (Hart Publishing, 2010) 72; Weiler (n 3) 169.
[36] Schütze (n 35) 57.
[37] Allan Rosas, "The future of Mixity" in Christophe Hillion and Panos Koutrakos (eds) *Mixed Agreements Revisited: The EU and its member states in the World* (Hart Publishing, 2010) 371.
[38] Weiler (n 3) 133; Joris Larik, "*Pars Pro Toto*: The member states' obligations of sincere cooperation, solidarity and unity" in Marise Cremona, *Structural Principles and their role in EU external relations law* (Hart Publishing 2018) 175 and 176.

respect to the internal allocation of powers and how they should be reflected externally.[39] However, on the whole, such difficulties tend to be resolved by vesting on the central/federal actor "an exclusive and all-embracing competence" in external relations.[40] Mixity as a solution to the difficulties of competence delimitations,[41] is thus a phenomenon largely unique to the EU.[42]

At least at the time of its inception,[43] mixity touched the core of the EU's *sui generis* constitutional framework,[44] the principle of conferral.[45] Enshrined in Article 5(1) and defined in Article 5(2) Treaty on European Union (TEU) this principle provides that the EU "enjoys only conferred powers".[46] On the one hand, mixity in part remains a symptom of the EU's lack of overarching competence.[47] On the other hand, mixity is a symptom of the EU's inability to legally preclude member states from exercising a shared competence which it has not itself previously exercised – in other words due to Article 2(2) TFEU.[48] The legitimacy, or lack thereof, of these explanations for the prevalence of mixity becomes apparent when the EU's international relations are broken down into three different branches of international agreements: (a) EU exclusive, (b) obligatory mixity and (c) facultative mixity.

a. EU Exclusive Agreements

International agreements belonging entirely "to the sphere of exclusive competence"[49] can only be concluded by the EU acting alone. When faced with a claim against mixity, the Court is often initially tasked with the question of whether the competences at issue are exclusive. In addition to the EU's *a priori* exclusive competences,[50] Article 3(2) TFEU's codification of the *ERTA* doctrine[51] and its generous application by the CJEU,[52] has rendered many

[39] Weiler (n 3) 168.
[40] ibid.
[41] ibid.
[42] Rosas, 'Mixity past, present and future' (n 5) 8; Weiler (n 3) 170.
[43] Heliskoski (n 4) 1176.
[44] Weiler (n 3) 132.
[45] Heliskoski (n 4) 1176.
[46] *Opinion 1/03, Opinion of the Court (Full Court) of 7 February 2006: Competence to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters,* European Court Reports 2006 I-01145 para 124.
[47] Merijn Chamon, "Existence or exercise of EU Competence? From Supervening Exclusivity to institional balance in limiting facultative mixity" in Merijn Chamon & Inge Govaere (eds) *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill | Nijoff 2020)
[48] Chamon, 'Constitutional limits' (n 33) 140.
[49] Rosas, 'Mixity past, present and future' (n 5) 14.
[50] TFEU, Article 3(1).
[51] *ERTA* (n 26) paras 17, 21 and 22.
[52] Sonja Boelaert, "Mixity versus Unity: a View from the Other Side of the Rude de la Loi' in Marijn Chamon & Inge Govaere (eds) *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill | Nijoff 2020) 252; Allan Rosas, "EU External Relations: Exclusive Competence Revisited" (2015) 38 Fordham International Law Journal 1073, 1091; Christina Eckes and Païvi Leino-

previously shared competences, now EU-exclusive. The most notable development concerns the Court's approach to establishing when common rules are affected, or the 'conditions' for Article 3(2) exclusivity. As confirmed by the Court, where an international agreement overlaps to a large extent within common EU rules, it is capable of affecting or altering their scope.[53] More precisely, as highlighted by Allan Rosas,[54] the CJEU has clarified that there is no need for the envisaged international agreement and the EU rules to coincide fully[55] and common rules may even pertain to foreseeable future EU legislation.[56]

'Lowering the threshold'[57] for implicit EU-exclusivity has thus further increased the obligatory EU-only conclusion of international agreements.[58] It limits the scope of mixity as external competences are increasingly less dependent on the Council's decision to exercise them.[59] Even dating back to 1999, Weiler had already acknowledged the pre-emptive effect which both the *de jure* expansion of EU competences and *de facto* expansion (via both the *ERTA* and *Opinion 1/76* effects) could have on member state international action.[60] Now in 2021, thanks to the entry into force of the Treaty of Lisbon, CJEU developments and an expansive EU acquis, the number of domains in which mixity may arise has decreased.

b. Obligatory Mixity

The second branch of agreement legally obligates mixed conclusion as they cover competences which have not, even partially, been conferred to the Union.[61] It is inherent in the principle of conferral that the Union cannot enter into an international agreement covering competences exclusive to the member states[62] without their consent. Weiler argues that this

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Sandberg, "'In view of the exceptional and unique character' of the EU-UK Trade and Cooperation Agreement – an Exception to Separation of Powers within the EU?" (European law blog, April 2021) <https://europeanlawblog.eu/2021/04/15/in-view-of-the-exceptional-and-unique-character-of-the-eu-uk-trade-and-cooperation-agreement-an-exception-to-separation-of-powers-within-the-eu/> accessed25 August 2021

[53] *Opinion 2/15* (n 7) para 201; *Opinion 1/13, Opinion of the Court 14 October 2014: Hague Convention on the civil aspects of international child abduction [2014] ECLI:EU:C:2014:2303* para 73; *Opinion 3/15, Opinion of the Court 14 February 2017: Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled [2017] ECLI:EU:C:2017:114,* para 107.

[54] Rosas, 'EU External Relations' (n 52) 1085.

[55] *Opinion 1/03* (n 46) para 126.

[56] Ibid.

[57] Chamon, 'Existence or exercise' (n 47) 113.

[58] Rosas, 'Mixity past, present and future' (n 5) 9.

[59] Marise Cremona, "External Competences and the Principle of Conferral" in Robert Schütze and Professor Takis Trimadis (eds) *Oxford Principles of European Union Law. Volume 1* (OUP 2018) 1134.

[60] Weiler (n 3) 175.

[61] Rosas 'Mixity past, present and future' (n 5) 14.

[62] TFEU, Article 5(2)

is in fact the "only *legal* justification for "genuine" mixity".[63] The Treaties do not provide a list of 'member state exclusive' competences however examples would include an agreement regulating the volume of third country economic migrants[64] or matters of substantive criminal law.[65]

The so called 'pastis metaphor'[66] laid down by Advocate General (AG) Kokott in her Opinion in *Commission v Council (2009)* demonstrates the impact of the inclusion of a member state exclusive competence in an agreement. At issue was the EU's ability in the WTO General Council to approve Vietnam's accession to the WTO. Most of the policy areas covered by the WTO fall under the now expansive scope of the EU's Common Commercial Policy[67] for which it has exclusive competence.[68] However, Article 61 of the TRIPS[69] agreement for example, concerns the application of criminal penalties for the infringement of intellectual property rights. As has been confirmed by the CJEU, the "determination of the type and level of the criminal penalties to be applied" is not a power which has been vested in the EU.[70] It followed that the member state involvement was obligatory.

However, obligatory mixity is increasingly rare given the limited areas of competence that the EU does not at least share with its Member States.[71]As Weiler evidenced, "those who wish to see the disappearance of mixed agreements would simply count on the continued substantive expansion of Community competence"[72] and this has precisely been the result of subsequent EU treaty reforms. This was made evident in AG Sharpston's Opinion on *Opinion 2/15*[73] where she dismissed the Council's attempts at claiming member state exclusive competences.[74] Article 216(1) TFEU was at the forefront of this dismissal[75] as it regulates the *existence* of external competences. In particular, the second limb of 216(1) provides that the EU may conclude international agreements where it is "necessary in order

[63] Weiler (n 3) 177.
[64] TFEU, Article 79(5); Paula García Andrade, "The legal feasibility of the EU's external action on legal migration: the internal and external intertwined" (2013) 15 European Journal of Migration and Law 263, 276.
[65] Claudio Matera and Mauro Gatti, "Facultative Mixity in the Area of Freedom Security and Justice" in Merijn Chamon & Inge Govaere (eds) *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill | Nijoff 2020) 205.
[66] *C-13/07 Commission v Council* [2009] ECLI:EU:C:2009:190, Opinion of Advocate General Kokott delivered on 26 March 2009, para 121.
[67] TFEU, Article 207.
[68] TFEU, Article 3(1)(e).
[69] The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
[70] AG Kokott *Opinion C-13/07* (n 66) para 154.
[71] Boelaert (n 52) 265.
[72] Weiler (n 3) 178.
[73] AG Sharpston *Opinion 2/15* (n 8).
[74] Ibid para 562; David Kleimann, "Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General" (2017) EUI Working Paper RSCAS 2017/23 22
[75] Ibid.

to achieve, within the framework of the Union's policies, one of the objectives referred to in the treaties".[76] This has allowed for internally shared competences[77] to exist, at minimum, as externally shared competences.

Article 4(1) TFEU furthermore states that the EU "shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6." A notable example in this regard is the de-pillarisation of the Common Foreign and Security Policy (CFSP), brought about by the Lisbon Treaty.[78] Although the special characteristics of the CFSP, which are beyond the scope of this paper, do render this a *sui generis* shared competence,[79] a drop of CFSP would no longer trigger mixity. By way of example, provisions on political dialogue[80] – now covered by the CFSP – had previously obligated mixity. As Peter Van Elsuwege highlights, the inclusion of political dialogue provisions in the EU-Kosovo agreement, and its EU-only conclusion demonstrate that this is no longer the case.[81]

With the Lisbon Treaty, the expansive external relations competence of the Union thus significantly calls into question whether the principle of conferral is actually capable of justifying the prominent use of mixity.[82]

c. Facultative Mixity

'Facultative mixity' arises where an international agreement covers both EU-exclusive and 'potential competences' or *concurrent* competences.[83] Competences which are internally shared between the EU and member state but fail to meet the Article 3(2) TFEU conditions, are potential in the sense that the EU can decide whether to exercise them exclusively or jointly with its member states.[84] As Heliskoski indicates, both Article 2(2) TFEU and the Court's case law confirm this.[85] For the purposes of the present paper, 'facultative mixity' refers precisely to the existence of an agreement to which a choice between mixity or EU-only conclusion is attached – not to the mixed agreement itself.

Portfolio investment, or foreign non-direct investment, is a prime example of a competence which gives rise to this 'choice'. Unlike foreign direct investment – the

[76] TFEU, Article 216(1)
[77] TFEU, Article 4
[78] AG Sharpston *Opinion 2/15* (n 8) footnote 19.
[79] Peter Van Elsuwege, "Old Habits Die Hard: Questions of Facultative Mixity in Relation to the Common Foreign and Security Policy" in Merijn Chamon & Inge Govaere (eds) EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity (Brill | Nijoff 2020) 170.
[80] Chamon 'Constitutional limits' (n 33) 141 footnote 20.
[81] Van Elsuwege, 'Old Habits Die Hard' (n 79) 180
[82] Heliskoski (n 4) 1177.
[83] Rosas, 'Mixity past, present and future' (n 5) 13.
[84] Heliskoski (n 4) 1178; Eeckhout, (n 1) 214.
[85] Heliskoski (n 4) 1179.

acquisition of company securities in a third country – portfolio investment does not fall under Article 3(1) TFEU. As confirmed in *Opinion 2/15,* it is also immune to the *ERTA* effect given the lack of secondary EU legislation laying down common rules in this area.[86] Portfolio investment remains a shared competence[87] and could therefore potentially be exercised by the EU, although *Opinion 2/15* did momentarily confuse this.[88] The CJEU made an error in its calculation – which it later corrected – by finding that following the inclusion of portfolio investment, "the envisaged agreement cannot be approved by the European Union alone".[89] In doing so, the CJEU failed to acknowledge the existence of facultative mixity and replaced it with obligatory mixity even though the competence at issue was not exclusively held by the Member States.

Luckily for the argument of the present paper, the CJEU corrected its error in the *COTIF* judgement[90] and in so doing has re-opened the debate on facultative mixity.[91] The Court acknowledged that it had not intended to suggest that the existence of a shared competence in an agreement would obligate mixity. Rather, that paragraph 244 of *Opinion 2/15* was unique to the Singapore Agreement for which the requisite threshold in the Council to exercise the competences exclusively, could not have been reached.[92]

It has become quite evident in a line of CJEU case law and AG Opinions[93] since *Opinion 2/15* that the existence of potential competences in an agreement does give rise to a choice which is political in nature and is left to the member states in their capacity as Council members.[94] This was made very clear in AG Sharpston's opinion on the Singapore Agreement where it was suggested that the member states in the Council have an unfettered political choice to permit the EU to act alone, or to jointly exercise the competence.[95] The Court's case law gives no indication however as to whether there is ever a correct choice. Contrastingly, advocates for EU-only conclusion, characterise such agreements as "false mixity"[96] given mixity is not the product of the legal principle of conferred powers, but rather a political 'necessary evil'.[97]

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[86] *Opinion 2/15* (n 7) para 235.
[87] Ibid, para 305.
[88] Chamon, 'Constitutional limits' (n 33) 140.
[89] *Opinion 2/15* (n 7) para 244.
[90] *COTIF* (n 7) para 68.
[91] Christina Eckes, "Antarctica: Has the Court of Justice got cold feet?" (European Law Blog, 2018) <https://europeanlawblog.eu/2018/12/03/antarctica-has-the-court-of-justice-got-cold-feet/> accessed 20 August 2021
[92] *COTIF* (n 7) para 68.
[93] Opinion 3/15 ECLI:EU:C:2016:657, Opinion of AG Wahl delivered on 8 September 2016 para 119; AG Sharpston Opinion 2/15 (n 8).
[94] *COTIF* (n 7) para 68; *Cases C-626/15 and C-659/16 Commission v Council (MPA Antartic)* [2018] ECLI:EU:C:2018:925, para 126; AG Sharpston*, Opinion 2/15* (n 8) para 75.
[95] AG Sharpston, *Opinion 2/15* (n 8) para 75.
[96] Rosas, 'Mixity past, present and future' (n 5) 13; Weiler (n 3) 178.
[97] Conconi et al (n 34) 231; Eeckhout (n 1) 214.

II. The Debate: "*To Mix or not to Mix"?*[98]

Traditionally, it is argued that mixity emerged as a "pragmatic solution".[99] The joint conclusion of international agreements allowed the Union to best organise its federation consisting of internationally sovereign States,[100] to circumvent its lack of expansive competence in external relations[101] and its lack of explicit legal personality.[102] However, with the entry into force of the Treaty of Lisbon, these issues no longer require a solution.[103] This begs the question, why does mixity continue to exist and should this still be the case? If there is no *need* for member state to co-sign an agreement, is the EU not better placed to sign and conclude the agreement autonomously?[104] This section seeks to highlight the reasons for and the consequences of the practice of mixity in order to shed light on the extent to which EU-only conclusion of facultative agreements would be more appropriate.

a. Continued Existence of Mixity

As explained above, international agreements may contain member state exclusive competences which necessitate mixity. However, the Treaty of Lisbon sought to thoroughly increase the Union's competence and it suffices to look at provisions such as Article 217 TFEU and Article 24(1) TEU to find evidence that the EU's external competence is vast. The "non-existence" of competences is thus decreasingly blameworthy of the continued existence of mixity.[105]

The expansive scope of the EU's external relations is nonetheless worthy of some blame. This becomes evident when one examines AA's, which have all, bar EU-Kosovo[106] and the TCA, been concluded as mixed agreements. Article 217 TFEU allows for the conclusion of agreements 'establishing an association involving reciprocal rights and obligations, common action and special procedure.' As the CJEU has clarified in the case of

[98] Conconi et al (n 34).
[99] Heliskoski (n 4) 1174; *Case C-240/09 Lesoochranárske zoskupenie* [2010], ECLI:EU:C:2010:436, Opinion of AG Sharpston delivered on 15 July 2010 para. 56; Guillaume Van der Loo and Ramses A Wessel, "The non-ratification of mixed agreements: legal consequences and solutions" (2017) 54(3) Common Market Law Review 735, 753.
[100] Heliskoski (n 4) 1175.
[101] Weiler (n 3) 177.
[102] Wolfgang Koeth, "Member States and EU Agreements: Is it really national parliaments that are standing in the way of EU strategic autonomy?" (EIPA Paper, European Institution of Public Administration) April 2021, 8; Ramses A Wessel, "The International Legal Status of the European Union" (1997) 2(1) European Foreign Affairs Review 109, 122.
[103] TEU, Article 47.
[104] Koeth (n 102) 8.
[105] Heliskoski (n 4) 1180.
[106] EU-Kosovo SAA (n 17).

Demirel,[107] AA's can therefore contain commitments with non-member countries 'in all the fields covered by the treaties.'[108] Subsequently, such agreements are incredibly vast and stretch far beyond mere tariff and quota issues and on to political dialogue, security and human rights; policy areas in which member states have a vested interest in remaining as involved as possible. This is often what academics refer to as the 'politicisation' of trade policy;[109] Article 217 agreements are heavily politicised. When faced with facultative mixity, the Council therefore tends to opt for a mixed agreement.

A fear of the "*ERTA* effect" also explains member state support for mixity.[110] Member states are concerned that the Union's exercise of an external competence autonomously, could prevent their conclusion of future international agreements covering the same subject-area as it would be deemed to affect common rules or alter their scope.[111] The CJEU has in part suggested that Article 3(2) TFEU - the codification of the *ERTA* doctrine – relates solely to internal secondary legislation.[112] However, this has proven to be insufficient in reassuring Member States. There is also a fear of what Merijn Chamon refers to as the "reverse *ERTA* effect" whereby the conclusion of an international agreement by the EU alone would preclude, or significantly limit, the Member States' ability to internally legislate on the subject matter of the agreement.[113]

b. Consequences of Mixity

As mixity results in both desirable and undesirable consequences it is important to set out the legal and political justifications for and against mixity. This will allow us to better understand on the one hand, why the Council tends to opt for mixed agreements, and on the other hand, why it may be more appropriate to replace this with a tendency to conclude EU-only agreements.

Democratic Legitimacy and sovereignty

National Parliaments play an important role in providing the EU with democratic legitimacy and it may seem logical to give them a vote on the conclusion of an agreement which affects their citizens. Member States view the loss of parliamentary involvement in important areas

[107] *C- 12/86 Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 1987 -03719.
[108] Ibid para 9.
[109] Maria Garcia, 'Slow Rise of Trade Politicisation in the UK and Brexit' (2020) 8(1) Politics and Governance 348-359.
[110] Rosas, 'Mixity past, present and future' (n 5) 17; Weiler (n 3) 177.
[111] Weiler (n 3) 177.
[112] *Opinion 2/15* (n 7) para 234.
[113] Chamon, 'Constitutional Limits' (n 33) 148.

of international relations as problematic for democracy.[114] This concern also follows a trend in the increased politicisation of EU trade agreements as referred to above – and as legal bases are an issue for internal EU law, I refer to 'trade agreements' as the broad term for the EU's agreements with third countries independent of their legal basis. This 'politicisation' may stem from political salience as was the case with the TTIP[115] and Brexit.[116] It may also stem from regulatory alignment, human rights concerns, sustainable development or environmental protection. Whatever the spark, many of the EU's New Generation Trade Agreements have "a more tangible effect"[117] on citizens than the more technical trade issues and consequently attract the attention of National Parliaments. In the TTIP negotiations for example, a prominent issue amongst Member States was the closer approximation of regulatory standards for chemicals and genetically modified organisms with the United States and the possible lowering of EU standards.[118]

It is clear that in the Common Commercial Policy (CCP), and the conclusion of international agreements on the basis of Article 207 TFEU, "national parliaments have almost become redundant".[119] This is due to the increased scope of the CCP and also the extension of qualified majority voting in the Council in this area.[120] In the 2009 *Lisbon Judgement,* the German Constitutional Court expressed its concern for precisely this development.[121] As Allan Rosas has previously highlighted, mixed agreements inherently require unanimity which is another reason for Member State preference for the practice.[122] However, this is not a convincing "cause"[123] of the prevalence of mixity with regards to AA's the conclusion of which according to Article 218(8) para 2 TFEU requires unanimity in the Council, nonetheless.

When mixity is facultative and Member State involvement is not *a priori* excluded, many Member States therefore argue that you should opt for the more democratic option and involve national parliaments in the process. At the forefront, Germany has expressed its constitutional concerns with respect to facultative mixity and the political choice vested in the

[114] Wolfgang Weiß, 'The Reception of EU facultative mixity in Germany's constitutional order' in Marijn Chamon & Inge Govaere (eds) *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill | Nijoff 2020) 377.
[115] Jančić (n 32) 202; Piet Eeckhout and Manuel Lopez-Escudero, *The European Union's external action in times of crisis* (Hart Publishing, 2016) 113.
[116] Garcia (n 109).
[117] Jancic (n 32) 204.
[118] ibid 202; Eeckhout and Lopez-Escudero (n 115) 206.
[119] Christilla Roederer-Rynning & Morten Kallestrup, 'National parliaments and the new contentiousness of trade' (207) 39(7) Journal of European Integration 811, 813.
[120] ibid 813.
[121] German Constitutional Court, Decision of 30 June 2009 2 BvE 2/08 < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html>.
[122] Allan Rosas, "The European Union and Mixed Agreements" in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell, 2000) 202; Eeckhout (n 1) 221.
[123] Eeckhout (n 1) 221.

Council.[124] Mixed agreements require the consent of the German Parliament by virtue of Article 23(1) and Article 59 Basic Law.[125] Germany's constitutional perspective with regards to EU law as a whole, is firmly rooted in the principle of conferral.[126] The German Constitutional Court has in multiple policy areas, expressed its position as the guardian of the bridge of conferral,[127] ensuring that the EU acts only in so far as the Member States have conferred upon it the competence to act; and the area of international agreements is no exception. As Weiß summarises, the German position is that if "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 Member State competence".[128] Essentially, this position advocates for obligatory mixity in any instance of non-exclusive EU competences and the consequent eradication of the political choice inherent in facultative mixity. Potential competences do not provide, according to this perspective, a sufficient mandate for EU-only conclusion.[129] When the National Parliament is "deemed decisive for the democratic legitimacy of EU level rulemaking,"[130] their exclusion from the decision-making process on the basis of a Council decision (and not from a conferral of competence) is inconceivable from a constitutional perspective. From this standpoint, the conclusion of a comprehensive EU-only agreement covering externally shared EU-Member State competences, such as the TCA, is consequently liable to strip the agreement of the necessary democratic scrutiny.[131]

Intertwined in Member State backing of mixity is also a claim to sovereignty. It could be argued that their participation and consent in the process, is "part and parcel of Statehood".[132] Member State view EU-only conclusion as compromising their name on the international plane,[133] preferring mixity as this safeguards their identity as sovereign States and prevents them from becoming invisible and overshadowed by the EU.[134] As Eekhout highlights this cause of mixity existed even dating back to the early 1980s[135] as evident in the work of Ehlermann.[136]

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[124] Weiß (n 114) 364.
[125] Basic Law for the Federal Republic of Germany 1949.
[126] Weiß (n 114) 366.
[127] Mattias Wendel, "Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference" (2014) 10 European Constitutional Law Review 263, 273.
[128] Weiß (n 114)367.
[129] ibid.
[130] ibid 378.
[131] Peter Van Elsuwege, "A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law" (2021) 6(1) European Papers 785, 794.
[132] Boelaert (n 52) 253.
[133] Rosas, 'Mixity past, present and future' (n 5) 9.
[134] Chamon, 'Constitutional limits' (n 33) 147.
[135] Eeckhout (n 1) 220 and 221.
[136] Claus-Dieter Ehlermann, "Mixed Agreements—A List of Problems" in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Kluwer, 1983) 4-9..

Increased Comprehensiveness

Conconi et al. argue that one key advantage of a mixed agreement is that it allows for a more comprehensive trade agreement, covering non-trade related issues and thus providing a more beneficial deal to both parties (the EU and its third country partner).[137] With regards to the Singapore FTA for example, it was clear following the CJEU judgement in *Opinion 2/15* that mixity may arise when the EU pursues objectives falling under areas such as the Common Transport Policy[138] or Portfolio Investment.[139]However, as debunked above, there is a misconception that an agreement covering shared EU-Member State competences necessitates mixity. In the field of facultative mixity it is legally possible for the EU to autonomously conclude the agreement and this has been re-confirmed by the CJEU in its judgement of *COTIF.*[140] In such an instance, the choice falls to the discretion of the EU legislature and is "political in nature".[141] As the scope of potential competences has increased, the same result can now largely be achieved if the Council decides to exercise the Member State shared competences exclusively.

Lengthy and risky ratification

Mixity has proven to come with a high price tag.[142] The main obstacle of mixity is the risk that any national parliament will either hold up the ratification process or even block the agreement's conclusion altogether. Conconi et al. demonstrate in table A-1 of their paper just how complex the ratification of mixed agreements can be.[143] With a total of 36 federal chambers needed to approve an agreement, and a possible 16 national referendums, the process is far from straightforward.[144] The two most prominent and most often cited examples are the "Wallonia-CETA and Dutch-Ukraine incidents."[145]Academics often rely on the developments in their conclusion as prime examples of mixity being a "burdensome approach to EU foreign trade policy".[146] It was the Belgian region of Wallonia whose veto on CETA's signature delayed the process and the Dutch referendum against conclusion of the EU-Ukraine agreement that almost risked its non-ratification. As Conconi et al have

[137] Conconi et al (n 34) 248.
[138] *Opinion 2/15* (n 7) para 168.
[139] ibid para 243.
[140] *COTIF* (n 7).
[141] AG Wahl, *Opinion 3/15* (n 93) para 119.
[142] Koeth (n 102) 10.
[143] Conconi et al (n 34) 254.
[144]ibid 254.
[145] Gesa Kübek, "The Non-ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States" (2018) 23(1) European Foreign affairs Review 21, 22.
[146] Lenk (n 2) 385.

highlighted, the Dutch Parliament opposition to the agreement could have risked "the broader geo-political EU's strategy towards the Russian Federation"[147].

Unity of External Action

Tied to the risk that international agreements may be 'capsized' by National Parliaments, is the threat which mixity poses to the unity of EU external action. It is a serious concern that "the predictability and credibility of the EU as a global actor will suffer"[148] at the hands of mixity. Presenting a powerful, confident and united front in negotiations is very important for the efficiency of EU trade policy and external relations more generally. If third country negotiators find that individual Member States do not agree on certain mandates, they could abuse this difference of opinion,[149] weakening the EU's negotiating leverage. AG Kokott emphasised as much in her Opinion on Vietnam's accession to the WTO – "for non-member countries it may be sufficient, in negotiations 'with Europe', to apply pressure to individual Member States in order circuitously to force concessions from the Community as a whole".[150] The significant delays which mixity brings to the entry into force of an agreement additionally undermines the "effectiveness of the EU's external action"[151] and incidents such as the CETA-Wallonia veto portrays "some odd behaviour" to third countries.[152]

This concern drives academics such as Piet Eeckhout to advocate for EU-only agreements where mixity can legally be avoided.[153] It is also at the heart of the inter-institutional debate on mixity and strongly drives the Commission's opposition to the practice.[154] The Commission argues that due to mixity "the Community's unity of action vis-à-vis the rest of the world will thus be undermined and its negotiating power greatly weakened".[155] In contrast to Eekhout's view and also that of the Commission's, the Court's solution to this 'practical concern' is not to obligate EU-only conclusion but rather to enforce the duty of cooperation[156] to "make mixity manageable".[157]

Side-lining the European Parliament

[147] Conconi et al (n 34) 244.
[148] Koeth (n 102) 4.
[149] Larik, 'Instruments of EU External Action' (n 11) 123.
[150] AG Kokott C-13/07 (n 66) para 73.
[151] Eeckout (n 1) 258.
[152] Joris Larik, "EU External Relations Law and Brexit: 'When Pluto was a planet' (2020) 4(1) Europe and the World: A law review 1, 4.
[153] ibid.
[154] Boelaert (n 52) 252.
[155] *Opinion 1/94,* (n 7) para 7.
[156] *Opinion 1/08* (n 7) para 107.
[157] Chamon, 'Constitutional limits' (n 33) 159.

As seen, mixity is supported by democracy by engaging National Parliaments. However, democracy also emanates from the European Parliament who, thanks to the Lisbon Treaty, has an increasingly prominent role in the conclusion of international agreements. By virtue of Article 218(6)(a) TFEU and subsection (v) in particular, EP consent is required for the conclusion of most international agreements. It is argued that mixity strengthens, to the fullest, the dual democratic legitimacy of the EU as envisaged in Article 10 TEU,[158] as both the EP and NP are given a consent right. However, mixity is also capable of side lining the European Parliament by rendering its consent a mere formality. After provisional application pending what can often be a several years long wait for Member State ratification, the EP lacks the political competence to veto the agreement which, as Eeckhout notes, is a *fait accompli.*[159] The, "If I can't be there, you should not be there either" mindset,[160] has therefore pushed the European Parliament to side with the Commission in its opposition to mixity.

Furthermore, as Kübek highlights, non-ratification of a mixed agreement may also compromise its democratic legitimacy. The EU-Ukraine AA and CETA ratifications showed how mixity may allow an international agreement to be "derailed by a negative vote of less than 1% of the EU's total population."[161]

To conclude, whilst mixity may attach an enhanced level of democratic legitimacy – deriving from national parliaments – to a comprehensive international agreement, it is no longer a requirement for the conclusion of most comprehensive agreements. Mixity has however, proven to come with a high risk of non-ratification which not only jeopardizes the conclusion of the agreement at issue but equally undermines the unity of the EU's external representation, and the democratic legitimacy which the EP brings to the table.

III. **The existent limitations to facultative mixity**

Legally, it is possible for the EU to conclude comprehensive and far-reaching agreements whilst avoiding the complexities of mixity.[162] There is a lack of consensus however on whether this can and should be legally required. At one end of the debate lie the Commission[163] and academics such as Rosas, Eekhout and Weiler who view mixity as "an unnecessary burden, making the EU a more cumbersome and inflexible international actor, difficult to negotiate with and slow to ratify agreements."[164] Such authors remain unconvinced

[158] Weiß (n 114) 380.
[159] Eeckhout and Lopez-Escudero (n 115) 118 – 120.
[160]Boelaert (n 52), 253.
[161] Gesa Kubek (n 145) 22.
[162] Koeth (n 102)12.
[163] *Cases C-626/15 and C-659/16 Commission v Council (MPA Antartic)* [2018] ECLI:EU:C:2018:362, Opinion of AG Kokott delivered on 31 May 2018para 75.
[164] Eeckhout (n 1) 264.

that advantages such as increased democratic legitimacy can defend the prevalence of mixity and instead argue that the disadvantages call for mixity to be avoided unless truly necessary.[165] At the other end of the debate lie those who acknowledge the inefficient nature of mixity but support the political choice inherent in facultatively mixed agreements, finding the practical disadvantages intertwined with mixity to be an uncompelling legal argument against the practice.[166] The case law of the CJEU suggests that the Court lies on the latter end of the debate. As Boelaert has highlighted,[167] the CJEU has repeatedly emphasised this: "the need for unity and rapidity of external action" and the difficulties which may arise when concluding a mixed agreement "cannot change the answer to the question of competence".[168] In order to address whether a compelling legal argument exists for enforcing EU-only conclusion of facultative agreements, this section will provide an overview of the solutions that have been put forward thus far for limiting the Council's political choice.

a. Absorption Theory

One line of argument highlighted by Chamon is the extension of the 'absorption doctrine' to the exercise of competences. Generally, this doctrine applies to the decision of a legal basis.[169] In essence, an agreement with a main objective, containing provisions pertaining to ancillary objectives should be based solely on the legal basis tied to that main objective as it absorbs the latter and they do not require a separate legal basis.[170] AG Wahl tried to apply this doctrine to a case of obligatory mixity by implying that an agreement containing exclusive Member State competences which were ancillary to the main objective of the agreement, would not necessitate mixity.[171] This stands in contrast with the afore mentioned pastis metaphor whereby a single drop of Member State exclusivity (no matter how ancillary to the main objective) obligates mixity.[172] However, whilst I would agree that it seems a stretch to apply this doctrine to cases of obligatory mixity, Chamon has highlighted that its use to avoid facultative mixity is supported by the case law of the Court of Justice.[173] *Opinion 1/78* is the cited example,[174] where the Court found that the inclusion of shared competences in an

[165] Chamon, 'Constitutional limits' (n 33) 149.
[166] Boelaert (n 52) 256; Chamon, 'Constitutional limits' (n 33) 165; German Constitutional Court (n 121); AG Sharpston *Opinion 2/15* (n 8).
[167] ibid 256.
[168] *Opinion 1/08,* (n 7) para 107.
[169] Chamon, 'Constitutional limits' (n 33) 142.
[170] C-155/07 *Parliament* v *Council* [2008] ECLI:EU:C:2008:605; Case C-268/94 *Portugal v Council* [1996] ECLI:EU:C:1996:461 para 39*; Case C-377/12 Commission v Council (Phillipines PCA)* [2014] ECLI:EU:C:2014:1903.
[171] AG Wahl, Opinion 3/15 (n 93) para 122.
[172] AG Kokott, *C-13/07* (n 66) para 121.
[173] Chamon, 'Constitutional limits' (n 33) 145.
[174] ibid 145.

agreement falling under Article 207 TFEU could not alter the exclusive nature of that competence where they are merely ancillary.[175] Citing the same judgement, Weiler had highlighted that the Court was clearly willing to extend the Union's competence externally "if the agreement in its essentials did fall within" its actual competence.[176] However it remains unclear how this doctrine would apply to AA's where the predominant legal base is not *a priori* exclusive.

b. Duty of Cooperation

The duty of cooperation has become a significant constraint on mixity[177] and as this paper argues that this principle provides for the most convincing argument in favour of EU-only conclusion of facultative agreements, it will be addressed in greater depth in Chapter 3. For the present analysis it is worth highlighting that the Court first established a duty of cooperation with respect to the EEC Treaty in *Opinion 2/91 ILO* where it stated that this duty "results from the requirement of unity in international representation of the Community".[178] This normative link between the duty of cooperation and the achievement of the 'unwritten requirement' of unity in the EU's external representation, has been affirmed in a line of CJEU judgements.[179] The duty of cooperation is itself a central constitutional principle of the EU's legal order, codified in Article 4(3) TEU as the principle of sincere cooperation.[180] The principle entails a duty to ensure that action is not taken that would jeopardise the attainment of the Union's objectives.[181]

As Boelaert indicates, Article 4(3) TFEU could be read to imply that when the EU has the possibility to exercise a potential competence it should do just that – although she deems such a reading as 'superficial'.[182] The general line of argument here, as explained by Klamert, is that the duty of cooperation is breached by opting for mixity – in cases of facultative mixity – as this jeopardises or at least heavily complicates the attainment of the

[175] *Opinion 1/78*, *Opinion of 4 October 1979: International Agreement on Natural Rubber*, EU:C:1979:224, para 56.
[176] Weiler (n 3) 181.
[177] Christophe Hillion, "Mixity and Coherence in EU External Relations: The significance of the 'Duty of Cooperation'" in Christophe Hillion and Panos Koutrakos (eds) *Mixed Agreements Revisited: The EU and its Member States in the World* (2010, Hart Publishing).
[178] *Opinion 2/91*, *Opinion of the Court of 19 March 1993: Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work*, [1993] ECLI:EU:C:1993:106, para 36.
[179] Hillion, 'Mixity and coherence' (n 177) 91.
[180] ibid 91; *Case C-459/03 Commission v Ireland (MOX Plant)* [2006] ECLI:EU:C:2006:345, para 174.
[181] Article 4(3) TEU; *C-518/11 UPC Nederland BV* [2013] ECLI:EU:C:2013:709 para 59; AG Wahl *Opinion 3/15* (n 93) para 120.
[182] Boelaert (n 52) 259.

Union's objectives.[183] However, the Court has denied that this principle implies an obligation to conclude the agreement in mixed form.[184] Rather, it is the opinion of Court and certain academics that the duty of cooperation is merely a 'cipher' for the management of mixed agreements.[185]

c. Urgency

In AG Wahl's Opinion on *Opinion 3/15,* he evidenced that the Council would, in opting for mixity, make a manifest error of assessment if "the urgency of the situation and the time required" for mixity would "seriously risk compromising the objective pursued".[186] In his opinion, urgency is an acceptable legal argument in favour of EU-only conclusion. As Chamon highlights this could amount to a legal argument on the basis of both EU and international law.[187] On the one hand, mixity where urgent ratification is needed may violate Article 18(a) Vienna Convention on the Law of the Treaties (VCLT)[188] which obliges parties to refrain from defeating the object and purpose of the agreement prior to its conclusion.[189] On the other hand, it could amount to a breach of the duty of cooperation as defined above. However, the Court has not addressed the legitimacy of either argument.

Mixity remains a prominent practice in the EU's external relations and the debate surrounding whether legal limitations can be imposed on facultative mixity, remains unresolved. This has led many authors to question whether mixity will remain the norm in the EU's external relations.[190] As evident, various avenues have been sought in an attempt to enforce EU-only conclusion when mixity is facultative, yet the Court's case law suggests that no argument carries with it sufficient legal force to limit the Council's political discretion on the matter.

[183] Klamert (n 5) 193.
[184] *C-226/03 Commission v Luxembourg* [2005] ECLI:EU:C:2005:341.
[185] Klamert (n 5) 191; Chamon, 'Constitutional limits' (n 33) 149; Boelaert (n 52) 260.
[186] AG Wahl, *Opinion 3/15* (n 93).
[187] Chamon, 'Constitutional limits' (n 33) 157.
[188] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p 331
[189] Chamon, 'Constitutional limits' (n 33) 156.
[190] Eeckhout and Lopez-Escudero (n 115) 112; Chamon and Govaere, 'Introduction' (n 31) 2.

Chapter 2: The TCA: a case of facultative mixity?

Signed and provisionally applied on the 28th of December 2020,[191] the TCA is an incredibly comprehensive trade agreement, spanning over 1449 pages.[192] The contents of the TCA can be subdivided into six main pillars.[193] The first sets out the common and institutional provisions such as its lack of direct effect and the requirement of VCLT interpretation.[194] The second is the FTA pillar and lays down the rules governing EU-UK trade in goods and services,[195] enforcing a level playing field and sustainable development,[196] and those concerning aviation,[197] transport[198] and fisheries.[199]The third pillar deals with law enforcement and judicial cooperation in criminal matters,[200] including rules on surrender.[201] The fourth concerns more substantive but smaller fields of cooperation such as health and cyber security[202] and the UK's participation in EU programmes.[203] Pillar five concerns dispute settlement[204] and the final pillar contains annexes and protocols expanding on the provisions of the TCA[205].

As previously discussed, from an EU perspective the TCA, although dealing with cooperation in various substantive policy areas, is based entirely on one legal basis, Article 217 TFEU. As Van Elsuwege highlights, this tactical choice "avoids the more complex exercise of determining the substantive legal bases" via the often conflict provoking[206] 'centre of gravity test'.[207] However, the lack of substantive legal bases renders the nature of the competences contained in the agreement less clear. It is of course evident from Recital 6 of

[191] Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information [2020] OJ L 444/2
[192] TCA
[193] Barnard (n 12).
[194] TCA, Part One, Title II, Article 4
[195] TCA Part Two, Heading One.
[196] ibid, Title XI.
[197] TCA Part Two Heading Two, "Aviation".
[198] TCA Part Two Heading Three, "Road Transport".
[199] TCA Part Two Heading Five.
[200] TCA Part Three.
[201] ibid, Title VII.
[202] TCA Part Four.
[203] TCA, Part Five.
[204] TCA, Part Six.
[205] TCA, Page 435 onwards.
[206] Van Elsuwege, 'EU-UK' (n 131) 792.
[207] Case C-155/07 (n 170).

the Council Decision concluding the TCA[208] and from the leaked Council Legal Service (CLS) opinion,[209] that the choice to conclude the TCA as an EU-only agreement was political in nature; a consequence of the urgent need for an agreement on the 31st December 2020. As seen above, such a choice exists only when an agreement gives rise to a case of facultative mixity which therefore suggests that the EU at least has shared competence in all areas[210] covered by the TCA. Nonetheless, the act of 'deciding' to conclude the TCA failed to address the division of powers contained in the text of the TCA.[211] The extent of 'clarification' was provided by a leaked CLS Opinion which still, due to time constraints "does not provide an in-depth examination of all aspects, nor does it provide a comprehensive and detailed competence analysis."[212] This failure to agree on the exact division of competences is a rather common corollary of mixed agreements, as Eeckhout highlights,[213] mixity is often used as a tool to avoid "tension and inter-institutional struggle".[214] However, following the TCA's EU-only conclusion, a failure to delimitate competences calls into question the EU's ability to act alone and coincidentally, the facultative nature of the TCA. As Allan Rosas emphasises, distinguishing between obligatory and facultative mixity is important "for any general attempt to avoid mixity altogether and opt for EU-only agreements".[215] The scope of this chapter is therefore to analyse the main, and most contentious provisions of the TCA and demonstrate how the competences contained therein give rise to facultative mixity and permitted EU-only conclusion.

I. Exclusive competences

a. Trade

Part Two, Heading One of the TCA concerns 'trade' and covers trade in goods[216] and services and investment,[217] digital trade,[218]movement of capital,[219] intellectual property rights,[220] public procurement,[221] SME's[222] and trade and investment in the energy sector.[223]

[208] Council Decision on the signing of the TCA (n 182).
[209] Peers (n 10).
[210] Ibid.
[211] Thomas Burri, "The Last legacy of Brexit: An unlawfully concluded Trade and Cooperation Agreement" (2021) SSRN Electronic Journal 9.
[212] Peers (n 10).
[213] Eeckhout (n 1) 221.
[214] Ehlermann (n 136) 9.
[215] Rosas 'Mixity past, present and future' (n 5) 14.
[216] TCA, Part Two, Heading One, Title I
[217] ibid, Title II.
[218] Ibid, Title III.
[219] Ibid, Title IV.
[220] Ibid, Title V.
[221]Ibid, Title VI.
[222] Ibid, Title VII.
[223] Ibid, Title VIII.

Additionally, the same heading regulates the trade and investment environment by including rules on transparency,[224] good regulatory practices,[225] maintaining a level playing field and sustainable development.[226] The entirety of Heading One falls under the EU's *a priori* exclusive competence of the Common Commercial Policy (CCP) as was confirmed in the leaked CLS Opinion.[227]

Article 207(1) TFEU clarifies that trade in goods, trade in services, commercial aspects of intellectual property and foreign direct investment are covered by the CCP. This therefore encompasses Title I – VII of the TCA. Furthermore, the same provision[228] refers to agreements relating to the 'achievement of uniformity in measures of liberalisation' and to measures for the protection of trade which is precisely the contents of Title VIII, Title IX and the first three Chapters of Title XI TCA.

The CJEU has expanded on the explicit wording of the CCP by confirming that whether a part of an agreement falls under the CCP depends on whether it is "intended to promote, facilitate or govern such trade and has direct and immediate effects on it."[229] As Marise Cremona emphasises, this test 'gives an impression of inevitability of outcome' meaning that most 'trade' issues fall under the CCP.[230] The exceptions to this rule being Portfolio investment[231] and Investor State Dispute Settlement,[232] neither of which are covered by the TCA.

Following *Opinion 2/15* it has been confirmed that even the sustainable development provisions contained in the TCA[233] which enforce commitments on labour/social standards and environment/climate standards, fall under the CCP. By virtue of Article 207(1) TFEU, the CCP is now directly linked to Article 21 TEU which requires the Union to pursue, via the CCP, objectives such as the promotion of sustainable development. The CJEU has therefore confirmed that the Treaties have established sustainable development as forming "an integral part" of the CCP.[234]

The TCA enforces a 'level playing field' for trade and investment between the EU and the UK and in doing so mandates that both trade and investment "take place in a manner

[224] Ibid, Title IX.
[225] Ibid, Title X.
[226] Ibid, Title XI.
[227] Peers (n 10) 29.
[228] TFEU, Article 207(1)
[229] *C-414/11 Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* [2013] ECLI:EU:C:2013:520, para 51.
[230] Marise Cremona, "Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017" (2018) 14(1) European Constitutional Law Review 231,241.
[231] TFEU, Article 207(1); *Opinion 2/15* (n 7) para 225.
[232] *Opinion 2/15* para 292.
[233] TCA, Heading One Chapter six – eight.
[234] *Opinion 2/15,* (n 7) para 147.

conducive to sustainable development".[235] Examples of this are the non-regression clauses, forbidding the parties from lowering the level of protection below the levels of labour, social,[236] environmental and climate[237] standards previously in place. This is similar to Chapter 13 of the EU-Singapore FTA which, inter alia, prohibited the parties from reducing the level of social and environmental protection below international standards to which they had previously committed.[238] As the Court emphasised, it would be incoherent, "to hold that the provisions liberalising trade between the European Union and a third State [or in the present case, maintaining liberalisation[239] and establishing a level playing field] fall within the common commercial policy and that those which are designed to ensure that the requirements of sustainable developments are met when that liberalisation of trade takes place fall outside it."[240]

Consequently, Part Two, Heading One of the TCA is sufficiently linked to trade to fall under the EU's exclusive external competence under the CCP.

b. Aviation: Air Safety

Part 2, Heading Two concerns 'aviation' which is subdivided into Title I which covers 'air transport' and Title II covering 'air safety'.[241] Article 100(2) TFEU provides the general legal base for adopting legislation in the field of air transport but unlike the CCP for example, this is not *a priori* exclusive to the EU;[242] rather it is covered under the umbrella of the "transport" shared competence under Article 4(2)(g) TFEU. With respect to Article 100(2)'s predecessor, Article 84(2) EC, the Commission had argued in the *Open Skies* line of cases,[243] that aviation had become an exclusive competence by virtue of the *ERTA* doctrine.[244] The Court's response is important in two regards: firstly, the CJEU confirmed that no common rules on air transport existed that would be affected or whose scope would be sufficiently altered to render exclusive EU external action necessary.[245] In this case, AG Tizzano emphasised the application of the *ERTA* doctrine in *Opinion 1/94* with regards to transport: the "Member

[235] TCA, Part Two Heading One, Title XI, Chapter 1, Article 355(1).
[236] Ibid, Chapter 6, Article 387(2).
[237] Ibid, Chapter 7, Article 391(2).
[238] *Opinion 2/15* (n 7) para 158.
[239] TCA Part Two, Heading One, Title I, Article 15.
[240] *Opinion 2/15* (n 7) para 163.
[241] TCA, Part 2, Heading One, Title II.
[242] Article 100(2) TFEU.
[243] Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany* [2002] ECLI:EU:C:2002:63.
[244] Wybe Th. Douma, "Come Fly with me? Brexit and Air Transport" in Juan Santos Vara and Ramses A Wessel (eds) *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 95.
[245] ibid 95.

States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be 'affected' by those obligations come into being".[246] Secondly, the CJEU confirmed that the *ERTA* doctrine could however apply in the field of aviation if the conditions were met.[247] In 2002, at the time of the rulings, the CJEU only found three areas in which such common rules existed and could be translated into an exclusive external competence. Writing now in 2021, the EU has adopted more legislation in this area and has increased its set of common rules[248] now covering passenger rights[249] and safety and security standards.[250]

Title II TCA deals with the safety of civil aeronautical products and services[251] including the recognition of certificates and requirements for designs of products and traffic management.[252] This overlaps to a large extent with Regulation 2018/1139 establishing "common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency"[253] which inter alia, regulates the 'airworthiness' of aircrafts and their components and the certification and approval of their designs.[254] An overlap equally exists with respect to the TCA's provisions on the exchange of information regarding aviation accidents or product safety concerns[255] which is governed, within the EU, by Article 74 Regulation 2018/1139.[256] In the Council's leaked service opinion this Title of the TCA is confirmed as covering "matters that have become exclusive by exercise or are largely covered by EU acquis that will be or risk being affected by the Agreement"; whilst no further explanation is given, footnote 25 refers to the Regulation I have previously mentioned.[257] It follows that Part 2, Heading Two,

[246] C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, Commission v the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany [2002] ECLI:EU:C:2002:63, Opinion of AG Tizzano delivered on 31 January 2002 para 65*;* *Opinion 1/94* (n 7) para 77.
[247] European Air Law Association, "EU's External Aviation Relations: The Question of Competence" (June 2013) 2013 EALA Prize, 20.
[248] ibid 21.
[249] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EEC) No 295/91 [2004] OJ L 46.
[250] Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 [2018] OJ L 212/1.
[251] TCA, Part 2, Heading Two, Title II, Article 443.
[252] Ibid, Article 446.
[253]Regulation (EU) 2018/1139.
[254]Ibid, Chapter III, Section I.
[255]TCA, Part 2, Heading Two, Title II, Article 451
[256]Regulation (EU) 2018/1139, Article 74
[257] Peers (n 10) para 29, footnote 25.

Title II is an EU exclusive competence – Heading I will be discussed further under 'potential competences'.

c. Road Transport

Part 2, Heading Three concerns 'road transport' and undertakes commitments in the transport of goods and passengers between the UK and the EU. Internally, road transport falls under an EU-Member State shared competence and may therefore be rendered externally exclusive where the international commitments concern an area "which is already covered to a large extent by such rules".[258] Heading Three Title I and II commit to ensuring 'continued connectivity' in the transport of, respectively, goods and persons by road. This lays down standards for operators and rules regulating market access. As confirmed by the CJEU in *Opinion 2/15,* this area is largely covered by common rules via the common transport policy.[259] Regulation 1072/2009[260] lays down rules on the international carriage of goods by road throughout the territory of the EU which for EU-UK relations is now regulated under Title I TCA.[261] Regulation 1073/2009[262] regulates the international carriage of passengers by coach and bus within the EU's territory which largely overlaps with Title II of the TCA,[263] Article 475 of which also regulates "passenger transport by coach and bus" between the UK-EU and within the EU and the UK territories.[264] Equally, Articles 477-481 of the same Title deal with the authorisation of transport operators which overlaps with Regulation 1071/2009 governing the admission to the occupation of 'road transport operator' in the EU.[265] It follows that Part 2 Heading Three of the TCA concerns an externally EU exclusive competence by virtue of the third limb Article 3(2) TFEU.

[258] *Opinion 3/15* (n) para 73.
[259] Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (Text with EEA relevance) [2009]
OJ L 300/72; Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services and amending Regulation (EC) No 561/2006 (Text with EEA relevance) [2009] OJ L 300/88.
[260] ibid, Article 1.
[261] TCA, Part 2, Heading Three
[262] Regulation (EC) No 1073/2009 (n 259) Article 1.
[263] TCA, Part 2, Heading Three
[264] ibid.
[265]Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC [2009] OJ L 300/51, Article 1.

d. Fisheries

Part 2, Heading Five concerns fisheries and deals with cooperation in marine conservation[266] but also the allocation of fishing quotas and access to waters.[267] The CLS leaked Opinion confirmed the *a priori* exclusive nature of Heading Five of the TCA, but we were left with no further explanation as to why.[268] According to the TFEU's internal competence catalogue, fisheries is a shared competence (article 4(2)(d) TFEU) with the exception of the conservation of marine biological resources under the common fisheries policy which is an exclusive EU competence (Article 3(1)(d)). It can be deducted from the case law of the Court that the EU has acquired an exclusive competence to conclude international agreements in this field.[269] In particular, the CJEU has confirmed in the *FAO* judgement that the allocation of fishing quotas is a 'traditional means of managing fishing resources' and falls under the EU's *a priori* exclusive competence.[270] Given this matches the content of Heading Five, it should follow that the EU has, per Article 3(1) TFEU, exclusive competence in this field.

e. Law enforcement and Judicial Cooperation in Criminal Matters

Part Three of the TCA[271] concerns law enforcement and judicial cooperation in criminal matters. In particular this part deals with the following matters: the exchange and transfer of data,[272] cooperation on operational data,[273] cooperation with Europol[274] and Eurojust,[275] surrender,[276] mutual assistance,[277] exchange of criminal record information,[278] anti-money laundering,[279] freezing[280] and dispute settlement.[281] According to the CLS opinion, this part of the TCA has become an EU exclusive competence by virtue of Article 3(2) TFEU.[282] However, in keeping with the selective and vague theme of the Opinion,[283] no further analysis is provided.

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[266] TCA, Part 2, Heading Five, Chapter Two
[267] ibid Chapter Three.
[268] Peers (n 10).
[269] Rosas, 'EU External Relations' (n 52) 1078.
[270] *C-25/94 Commission v Council (FAO) [1996] ECR I-01469,* para 46.
[271] TCA, Part Three
[272] Ibid, Title II and II.
[273] Ibid, Title IV.
[274] Ibid, Title V.
[275] Ibid, Title VI.
[276] Ibid, Title VII.
[277] Ibid, Title VIII.
[278] Ibid, Title IX.
[279] Ibid, Title X.
[280] Ibid, Title XI.
[281] Ibid, Title XIII.
[282] Steve Peers (n 11).
[283] Eckes and Leino-Sandberg (n 52).

This Part of the TCA deals with competences covered by the EU's Area of Freedom Security and Justice (AFSJ) competence contained in Title V of the TFEU. The AFSJ concerns in essence the internal security of the EU. However, whilst previously this was pursued "almost exclusively" via internal EU cooperation, the EU has increasingly realised that as many crimes have an external dimension, achieving real 'internal security' requires external cooperation in judicial and criminal matters.[284] As Brodowski highlights, "by creating a secure external environment, negative external influences to the internal [AFSJ] are lessened".[285]

Since the Treaty of Lisbon, Article 4(2)(j) TFEU provides that the AFSJ is a competence shared by the EU and its Member States. ASFJ issues may thus either be caught by Article 3(2) TFEU or may result in a case of facultative mixity. As Matera and Gatti acknowledge, whilst the ASFJ acquis is expansive and thus susceptible to the *ERTA* doctrine, this domain remains politically sensitive in nature.[286] The Treaties have consequently added greater constraints to the exercise of this competence than is the case for other shared competences.[287] Article 72 TFEU for example places "a limit to the level of intrusion that EU rules can have" in this field.

As Jörg Monar evidences, the Treaty of Lisbon has nonetheless significantly expanded the EU's internal competence in this area which has the knock-on effect of expanding the scope for EU external autonomous action, where the Article 3(2) TFEU conditions are met.[288] Article 85 and 88 TFEU are particularly relevant as they provide for the legal bases establishing Eurojust and Europol, respectively. The EU's internal legislation establishing these agencies[289] therefore renders EU action necessary to 'establish cooperative relations'[290] between them and the UK's counterparts.

Monar also highlights Article 82 TFEU which provides the internal legal base for adopting legislation on judicial cooperation in criminal matters and notes that the use of this basis to strengthen the EU's internal acquis, could provide "a stronger common platform" for the

[284] Dominik Brodowski, "Judicial Cooperation Between the EU and Non-member states" (2011) 2(1) New Journal on European Criminal Law 21, 22.
[285] Ibid.
[286] Matera and Gatti (n 65) 189 and 192.
[287] ibid 192; TFEU, Article 72.
[288] Jörg Monar, "The External Dimension of the EU´s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon" (2012) Swedish Institute for European Policy Studies 26
[289] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA [2018] OJ L 295/138; Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/53
[290] TCA, Part Three, Title V, Article 564; Title VI, Article 580.

conclusion of international agreements in the same field.[291] In the recent proceeding of *Opinion 1/19,* certain Member States have argued that Article 82(2) and Article 83(1) TFEU, concerning judicial cooperation in criminal matters, only allow for minimum rules to be adopted.[292] It should be recalled that in order for Article 3(2) TFEU to render a shared competence exclusive, the EU must have already laid down common rules, going beyond mere 'minimum standards' and that Member State international action would otherwise affect those rules.[293] As the case concerned the correct legal basis, the AG did not conclude on the application of Article 3(2) TFEU in this field. However, he did acknowledge that even in the absence of 'common rules', the competences would remain potential.[294]

f. Thematic Cooperation

Part Four of the TCA covers cooperation in health security[295] and cyber security,[296] both Titles involving EU-UK cooperation over cross-border threats and seeking to involve the UK in already existing EU systems and agencies. Title I for example, enables the UK to access the EU Early Warning and Response System,[297] set up via Decision No 1082/2013/EU,[298] which is of particular importance in the context of the Covid-19 pandemic as it aims to combat threats to cross-border health. Title II concerns dialogue and exchange of information to combat cross-border cyber security threats and additionally provides for the UK's participation in a number of activities under the EU Network and Information Systems Cooperation Group[299] and the EU Agency for Cybersecurity.[300] These matters are regulated by current EU legislation[301] and these bodies have been set up by the EU.[302] As this Part of TCA appears to be specific to matters for which the EU has already adopted common rules,

[291] Monar (n 288) 26.
[292] *Opinion 1/19* [2021] ECLI:EU:C:2021:198, Opinion of AG Hogan delivered on 11 March 2021, para 103.
[293] Ibid, 101.
[294] Ibid, 112.
[295] TCA, Part Four, Title I.
[296] TCA, Part Four, Title II.
[297] TCA, Part Four, Title I, Article 702(3).
[298] Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] OJ L 293/1
[299] TCA, Part Four, Title II, Article 706.
[300] ibid, Article 707.
[301] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union [2016] OJ L 194/1
[302] Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) [2019] OJ L 151/5; Directive (EU) 2016/1148 Article 1(2)(b).

it follows that by virtue of Article 3(2) TFEU the EU has an exclusive competence over the EU-UK's 'thematic cooperation'.

II. Potential competences

Internally shared competences that are not rendered exclusive by virtue of Article 3(2) TFEU give rise, in external relations to 'potential competences'[303] which may – as seen, at the discretion of the Council – be exercised by the EU alone. This section will analyse the EU's potential competence to confirm that no situation of obligatory mixity arises.

a. Aviation: Air Transport

Progressively since 1992, the EU has developed a common internal air transport market which provides for the free movement of air services within the EU.[304] This is now provided for in Regulation 1008/2008 which regulates Member State air transport rights within the EU.[305] However, as highlighted above this is insufficient to give rise to the *ERTA* effect. As Wybe Douma emphasises the case law of the CJEU, including in particular *Opinion 1/94,* clarify that what is now Article 100(2) TFEU specifically provides that without the Council creating a competence to negotiate EU air transport agreements with third countries, Member States can continue to do so.[306] As this is a 'sovereignty sensitive' area given each country's sovereign right over their own air space,[307] Member States have been reluctant to allow for EU regulation of air transport rights with third countries.[308] Consequently, at present the only legislation in this respect is Regulation 847/2004 which confirms that Member State are competent to conclude international aviation agreements.[309] *What does this mean for the nature of the competence of Part Two, Heading Two, Title I of the TCA?* Air transport rights remains an area of *potential competence.* This is evident from paragraph 30 of the Council Legal Service Opinion where this field is referred to as falling under "potential EU competences".[310] Furthermore, Regulation 2019/502 concerning air traffic rights with third countries during the UK's withdrawal period, strongly suggests at Recital (7) that this is a

[303] Eekhout (2011) (n 9) 214.
[304] Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes [1992] OJ L 240.
[305] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) [2008] OJ L 293.
[306] Douma (n 244) 95.
[307] European Air Law Association (n 247) 4.
[308] Douma (n 244) 94.
[309] Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries [2004] OJ L 157/7.
[310] Peers (n 10) para 30.

competence which is shared by the EU and its Member State and which the Council can decide to exercise externally.[311] However, writing prior to the negotiation of the TCA but looking forward at the possible EU-UK aviation relations, Douma notes that "it is clear that such an agreement will be a mixed agreement."[312] This standpoint is evocative of the type of 'necessary mixity' which I previously referred to[313]as it is not a legal requirement but has generally become a political necessity giving rise to what Rosas refers to as "false mixity".[314] I would therefore conclude that the air transport rights competence under the TCA could be exercise by the EU.

b. Judicial Cooperation in Criminal Matters: Surrender

Part Three, Title VII of the TCA deals with "Surrender" and sets out the future extradition arrangements between the UK and the EU which had previously been governed by the European Arrest Warrant (EAW) system. According to Thomas Burri, this title obligates mixity as it concerns substantive criminal law;[315] a competence which has not been conferred to the EU.[316] One argument he advances is that in requiring Member States to surrender nationals on the basis of an EAW-like system, Member States abandon their ability to apply national criminal law and approve that applied in another Member State. He finds that this would be acceptable 'procedural criminal law coordination' only if limited to EU Member States, but as the same level of mutual trust cannot exist with third countries, ratification by member states would be needed for the TCA.[317] This line of argument rests on the assumption however, that the surrender system under the TCA is comparable to the EAW.

The EAW was originally adopted in 2002[318] and has remained an EU Member State system with no participation from third countries. In the negotiations leading up to the conclusion of the TCA, it became evident that although aiming for an enhanced level of judicial cooperation, it was equally important to "take account of the fact that a third country

[311] Regulation (EU) 2019/502 of the European Parliament and of the Council of 25 March 2019 on common rules ensuring basic air connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union [2019] OJ L 85 I/49
[312] Douma, (244) 99.
[313] Thesis, Page 8.
[314] Rosas 'Mixity past, present and future' (n 5) 13.
[315] Burri (n 211)
[316]Matera and Gatti (n 65) 205.
[317] Burri (n 211) 14.
[318] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190.

cannot enjoy the same rights and benefits as a Member State." [319] The actual arrest warrant under the TCA does replicate the previous Form A procedure under the EAW[320] and is generally based on the principle of double criminality whereby surrender is subject to the condition that the 'offence' at issue is classified as such under the law of the executing State. Like the EAW, Article 599 TCA[321] also stipulates certain offences and conditions under which the need for double criminality is abolished. However, whilst mutual trust and cooperation formed "the cornerstone of the EAW", the same cannot be said for the TCA.[322] Rather the TCA system is based on a 'reciprocity logic'[323] as evident for example in Article 597 which enforces the principle of proportionality as a replacement to the principle of mutual recognition under the EAW.[324] This is also evident in Article 604 TCA which enhances the importance of human rights protection[325] by requiring assurances to be obtained when a Member State is concerned about fundamental rights protection. Overall, there is generally more leeway for the Member States (and the UK) to refuse surrender than under the EAW.

The judicial cooperation provisions of the TCA can be contrasted with the Istanbul Convention;[326] a case of obligatory mixity.[327] The Commission, a prominent advocate of EU-only conclusion, even accepted that the "provisions on substantive criminal law" are the exclusive responsibility of the Member States.[328] However, Chapter V of the Convention requires parties to criminalise specific criminal offences and ensure that certain justifications for those offences cannot be invoked: this is not comparable to the scope of this Tile of the TCA.[329]

The EU has also already concluded extradition agreements with third countries without resorting to mixity. The EU-USA mutual legal assistance agreement (MLA)[330] and the

[319] Annex to the Council Decision (EU, Euratom) 2020/266 of 25 February 2020 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement
ST/5870/2020/INIT [2020] OJ L 58/53 cit., part III, para. 1, page 115.
[320] Eward Grange, Ben Keith and Sophia Kerridge, "Extradition under the EU-UK Trade and Cooperation Agreement" (2021) 12(2) NJECL 213, 217.
[321] TCA, Part Three, Title VII, Article 599.
[322] Sören Schomburg, "General provisions under the EU-UK Trade and Cooperation Agreement" (2021) 12(2) New Journal of European Criminal Law 202, 208
[323] Yanhong Yin, 'EU-UK Surrender Agreement: A copy of the EU-Iceland and Norway One?' (European Law Blog, 2021) < https://europeanlawblog.eu/2021/03/10/eu-uk-surrender-agreement-a-copy-of-the-eu-iceland-and-norway-one/> accessed 28 July 2021
[324] Grange et al. (n 320) 218.
[325] Yin (n 323).
[326] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (November 2014).
[327] Matera and Gatti (n 65) 205.
[328] European Commission, 'Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence', COM(2016) 109, para 2.2; Claudio Matera and Mauro Gatti (n 284) 206.
[329] TCA, Part Three, Title VII.
[330] Agreement on mutual legal assistance between the European Union and the United States of America [2003] OJ L 181

Norway and Iceland MLA[331] are the cited as examples in this regard – although they were concluded pre-Lisbon and therefore in a very different setting and are difficult to apply analogously.[332] Nonetheless the Norway/Iceland MLA is helpful to the present analysis. In response to the conclusion of this extradition agreement, in 2008 the Hungarian Constitutional Court issued a decision declaring that the provisions on double criminality were unconstitutional by virtue of breaching the principle of *nulla poena sine lege*.[333] As Brodowski highlights, Hungary was not able to prevent the Union from concluding the extradition agreement concerning the abolition of double criminality for certain provisions;[334] precisely because it did not require Member State ratification. This is reinforced by the CJEU judgement of *C-303/05* which concerned the abolition of double criminality under the EAW[335] and in which the Court confirmed that this did not result in a harmonisation of criminal law of the Member States. There is thus significant evidence to suggest that Title VII does not concern substantive criminal law and would not obligate mixity.

c. Social Security

Social security is coordinated by Part Two, Heading Four, Title I of the TCA and the Social Security protocol. This covers nine branches of social security ranging from sickness benefits, to unemployment benefits.[336] The CLS highlights social security coordination as falling under a shared competence. It acknowledges that generally international agreements containing provisions on social security coordination are concluded as mixed agreements but that "this is a matter of political choice".[337]

As emphasised by Paula Garcia Andrade, Article 217 TFEU has allowed for the EU to include rules on social security coordination regulating in particular the status of migrants legally resident in EU Member States.[338] Furthermore, it is evident that under the AFSJ, social security coordination does exist as an external competence. Article 79(2)(b) TFEU provides for an internal legal basis for the EU to adopt legislation on social security rights of third country nationals. As Andrade highlights, an implied external competence, by virtue of Article 216(1) TFEU, can be deduced from this provision as there would be an 'added value'

[331] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 may 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto [2004] OJ L 26.
[332] Matera and Gatti (n 65) 193.
[333] Brodowski (n 285) 33.
[334] ibid.
[335] *C-303/05 Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECLI:EU:C:2007:261.
[336] TCA, Protocol on Social Security Coordination, Title I Article SSC.3.
[337] Peers (n 10).
[338] Andrade (n 64) 274.

to the EU's conclusion of international agreements in this area.[339] Like many of the AFSJ legal bases that I have previously referred to, Article 79(2)(b) is also subject to the caveat of 'no harmonisation'[340] which means that any internal legislation coordinating social security would be insufficient to qualify as common rules within the meaning of Article 3(2) TFEU. This domain consequently does not fall under an externally exclusive EU competence,[341] but rather remains a *potential* competence.

Article 79(5) TFEU does reserve a Member State exclusive competence to determine the volumes of admissions of economic migrants into their territory from third countries. As Andrade highlights, "mixity would be legally mandatory"[342] where this matter is included in an agreement as the EU lacks a conferred competence to act.[343] The TCA however in no way regulates the entry of legal migrants and it follows that this Title of the TCA could be concluded by the EU.

d. Dispute Settlement

Part Six of the TCA establishes a dispute settlement framework to resolve disputes concerning the interpretation and application of the TCA, arising between the EU and the UK. The Court confirmed in *Opinion 2/15* that the creation of a dispute settlement mechanism between the EU and the third country party to an international agreement, fell under a shared competence.[344] The AG's Opinion sheds greater light on why this is the case. Like sustainable development, dispute settlement frameworks of this type, are 'accessory to' the substantive provisions of the TCA.[345] Consequently, the division of competences between the EU and the Member States for the dispute settlement mechanism "is necessarily the same as for the substantive provisions to which they relate".[346] As seen above, the TCA covers shared competences and thus, like the EU-Singapore TCA, Part Six remains an EU-Member State shared competence which could be exercised by the EU.

[339] Ibid 267
[340] TFEU, Article 79(4).
[341] Andrade (n 64) 276.
[342] ibid 276.
[343] TEU, Article 5(1).
[344] *Opinion 2/15* (n 7) para 305.
[345] AG Sharpston *Opinion 2/15* (n 8) 523.
[346] ibid 529.

Chapter 3: The TCA: a case of legally obligatory EU-only conclusion

Although concluded as an EU-only agreement, this chapter explores the counterfactual scenario in which the Council concludes the TCA as a mixed agreement. Expanding on the possible limitations to the political choice inherent in facultative mixity, provided in Chapter 1, I seek to highlight why this would not have been legally permissible.

The threshold for proving that the Council erred in opting for mixity when it is facultative, is rather high. As AG Wahl emphasised in *Opinion 3/15,* the Court's case law[347] supports the conclusion that the Council's political discretion to decide on the fate of a facultative agreement, is subject only to a limited judicial review, reserved for instances where the decision is "manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue".[348] When drawing in on the duty of cooperation and need for unity in international representation, the likelihood that the TCA as a mixed agreement would have surpassed this threshold is significantly increased. This Chapter seeks (1) to analyse the duty of cooperation and unity of external representation as legal arguments, (2) to explore the application of these principles to the TCA and (3) conclude by examining how the TCA is structured to respect the benefits associated with mixed agreements.

I. Duty of Cooperation and Unity of External Representation as a legal argument

As introduced in Chapter 1, the principle of the duty of cooperation seeks to ensure that the Member States, the EU and its institutions "refrain from any measure which could jeopardise the attainment of the European Union's objectives".[349] Whilst the Court has never invoked the unity of external representation as a principle in its own right, it appears that in the field of external relations the two are intertwined.[350] In fact the Court's case law suggests that in the process of negotiating and concluding an agreement, the Union's "institutions and the Member States must take all necessary steps to ensure the best possible cooperation" to ensuring that unity in external representation is maintained.[351] Already in 1977, the Court had suggested that mixity and its "tendency to over-emphasize" the role of individual Member States, at the expense of the independence of the Union's external action, was dangerous and problematic.[352] Eeckhout nicely summarises the Court's ruling in *Opinion 1/*76.[353] He

[347] *C-440/14 P National Iranian Oil Company v Council* [2016] ECLI:EU:C:2016:128.
[348] AG Wahl *Opinion 3/15* (n 93) 120.
[349] *C-518/11* (n 181) para 59.
[350] Larik 'Pars Pro Toto' (n 38) 183.
[351] *FAO* (n 270) para 48.
[352] Eeckhout (n 1) 216; Marise Cremona, "The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community" (1982) 12 OJLS 414.
[353] *Opinion 1/76.*

notes that the Court considered the participation of certain Member States in the negotiation of the agreement as calling into question the competence of the Union's institutions by altering their role in the bodies that had been set up under the agreement at issue. Whilst providing a historical overview of the Court's limited facultative mixity case law, Eeckhout strongly advocates that facultative mixity most often violates Article 4(3) TEU as it hampers the EU's ability to achieve its desired objectives.[354] The afore mentioned section of *Opinion 1/76* is relied upon by the likes of Eeckhout to evidence the need to avoid mixity wherever possible and as even placing a duty on the Council to provide a "specific justification" for mixity in cases of a facultative agreement.[355] However, literature suggests that many are sceptical of the validity of these principles as arguments against mixity:[356] two main oppositions are raised to its validity and will be explored in this section.

a. Legality of the doctrine

Firstly, it is viewed as 'practical' in nature and not capable of attaching legal liability to a Council decision for mixity.[357] In the case of *FAO,* the Court did however suggest that the duty of cooperation could translate into a legal obligation.[358] The case concerned the Commission's opposition to a Council decision on the conclusion of an international agreement in the framework of the UN Food and Agriculture Organisation (FAO) in so far as it gave the Member States the right to vote on its adoption. The AG Jacobs notes at the outset of his Opinion that this case displayed yet another "instance of interinstitutional controversies on the scope of the Community's external competence".[359] Uniquely however, the case concerned an interinstitutional arrangement, section 2.3 of which laid down how external representation was to be achieved, depending on whether the 'thrust of the issue' lay in an area of exclusive Community competence, or shared.[360] According to the Court, this provision fulfilled the duty of cooperation and as the Council failed to observe it, they were found in breach and its decision was annulled. Christophe Hillion interestingly draws in on the Court's wording at paragraph 49 of the judgement where it was stated that the arrangement signified a duty of cooperation "within the FAO" meaning within that particular agreement and suggesting that other international agreements would require other

[354] Eeckhout (n 1) 217.
[355] ibid 216.
[356] Boelaert (n 52).
[357] AG Kokott C-13/07 (n 66) para 89 and 90; Larik 'Pars Pro Toto' (n 38) 183.
[358] *FAO* (n 270).
[359] *Case C-25/94 Commission v Council (FAO)* [1996] ECR I-1469, Opinion of Mr Advocate General Jacobs delivered on 26 October 1995.
[360] Hillion (n 177) 94.

arrangements, fulfilling the same duty.[361] It should be emphasised however that the Court's *Dior*[362] judgement "supports the proposition that the duty of cooperation need not be formalised in an inter-institutional agreement."[363]

Similarly, Chamon refers to the *PFOS* judgement[364] which also concerned the exercise of a shared competence within the framework of an agreement.[365] The duty of cooperation was invoked in combination with the principle of unity in the international representation of the EU to prevent Member State action which "resulted in splitting the international representation" of the (now) Union.[366]

The legality of the duty of cooperation may now more simply be attached to the Treaties' codification in Article 4(3) TEU. As Joris Larik highlights, it has become legally binding by virtue of being a rule of primary EU law.[367] Furthermore the CJEU has confirmed this with respect to the provision's predecessor – Article 10 European Communities Treaty (TEC).[368] According to Van Elsuwege and Hans Merket, this judgment removed all doubt that there is a legal basis for the duty of cooperation.[369]

It is important to acknowledge that, although more balanced than ex Article 10 TEC,[370] Article 4(3) TEU remains largely one-sided. Both the positive[371] and negative obligations[372] contained in the provision are addressed to the Member States rather than to the Union and its institutions. However, as Kamiel Mortelmans evidences, the CJEU has on multiple occasions confirmed the applicability of the principle of duty of cooperation on the institutions' actions.[373] With regards to the Council in particular, the author points to[374] the joint cases of *Portugal and Spain v Council* [2002] in which the CJEU held that the Council could not adopt a measure that would be in "breach of the duty of sincere cooperation attaching to the Council as an institution".[375] Furthermore, Article 13(2) TEU also states that "the institutions shall practice mutual sincere cooperation" and therefore implies that the principle is

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[361] ibid 94.
[362] *Joined Cases C-300/98 Christian Dior and C-392/98 Assco Gerüste [2000]* ECR I-11307.
[363] ibid 96.
[364] C-246/07 *European Commission v Kingdom of Sweden (PFOS) ECR 2010 I-03317.*
[365] Chamon, 'Constitutional limits' (n 33) 159.
[366] *PFOS* (n 364) para 55.
[367] Larik 'Pars Pro Toto' (n 38) 184.
[368] *Case C-266/03* (n 184).
[369] Peter van Elsuwege and Hans Merket, "The role of the Court of Justice in Ensuring the unity of the EU's external representation" CLEER Working Paper 2012/5 37, 38.
[370] ibid.
[371] TEU, Article 4(3) second sentence
[372] TEU, Article 4(3) third sentence
[373] Kamiel Mortelmans, "The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions" (1998) 5 Maastricht J Eur & Comp L 67, 68 -70.
[374] ibid 73.
[375] *Joined Cases C-63/90 and C-67/90 Portugal and Spain v Council* [1992] ECLI:EU:C:1992:381, para 53.

applicable to the institutions.[376] This suggests that a Council Decision concluding an international agreement must respect the legal duty of cooperation.

b. Duty to avoid mixity

Secondly, it is argued that even if the duty of cooperation can be deemed legal in nature, necessary EU-only conclusion cannot be read into that duty. The CJEU has in fact suggested that the duty of cooperation does not obligate mixity as it is "of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries".[377] Hillion refers to two notions of the duty of cooperation, (1) *duty amounting to an obligation of result,* and (2) *duty amounting to an obligation of conduct.*[378] It is apparent from the Court's case law and the work of numerous academics that with regards to mixity, an obligation of conduct or a 'best efforts' obligation applies.[379] In other words, there appears to be a majority view that the duty of cooperation regulates the management of mixity rather than the initial choice.[380] Hillion in fact referred to the two notions of the duty within the context of concluded mixed agreements and their implementation; nonetheless they are applicable to the duty more generally. The writer argues that in the implementation of mixed agreements no obligation of result exists but rather an obligation of conduct meaning that Member States must try their best to reach common positions.[381] With respect to the procedural obligations under a mixed agreement however, an obligation of result arises because the obligation requires a particular action or abstention.[382] The same logic can be applied to the Council's discretionary choice, it must give rise to a result either in terms of mixity or EU-only conclusion.

The application of the duty of cooperation to the exercise of external competences is not alien to the Court's case law. In fact, the *ERTA* doctrine emanates precisely from the Court's use of Article 4(3) TEU's predecessor[383] to prohibit Member States from exercising external competences when this would 'affect common rules or alter their scope'.[384] The CJEU read Article 5 European Economic Communities Treaty to mean that where the (now)

[376] Van Elsuwege and Merket (n 360) 39.
[377] *C-226/03* (n 184).
[378] Hillion (n 177) 105.
[379] Eleftheria Neframi, "The duty of loyalty: rethinking its scope through its application in the field of EU external relations" (2010) 47 Common Market Law Review 323, 355.
[380] ibid 356.
[381] Hillion (n 177) 105.
[382] Ibid.
[383] Van Elsuwege and Merket (n 369) 46.
[384] *ERTA* (n 26).

Union had adopted rules which are "promulgated for the attainment of the objectives of the treaty", Member States could not act if that attainment would be jeopardized.[385]

I would argue that two simultaneous objectives are pursued in the conclusion of any given international agreement: (1) the agreement-specific objective and (2) the overarching objective of unity in external representation. Where the Council's decision to involve Member States in the conclusion of an agreement is liable to risk the attainment of both objectives, it follows that mixity would breach the duty of cooperation. Eeckhout and Weiler argue that the complexities of mixity give rise to a positive obligation to conclude the agreement with the EU acting autonomously.[386] This argument rests on the latter objective, the 'unity of external representation' of the EU: asserting the Union's unitary identity on the international scene is "an autonomous objective that should not be jeopardized by Member States' international action"[387] and whilst EU-only agreements guarantee the EU's assertion as a unitary and unified actor, mixity carries with it an inherent risk of fragmentation.[388] If conclusion of an international agreement in mixed form poses an appreciable threat to the Union's objective, it could be argued that the duty of cooperation imposes on the Council a legal duty of result – that result being EU-only conclusion.

II. **A mixed TCA equals a breach of the Duty of Cooperation**

The TCA falls within the scope of the duty of cooperation.[389] As demonstrated, the TCA concerns competences falling in part with the Union and in part with the Member States and the Court has confirmed that in such cases of shared competence, a duty of cooperation arises.[390] In this particular case of facultative mixity, the Council opted for EU-only conclusion, however this section seeks to analyse whether this result could have, regardless, been legally imposed on the basis of the principle of duty of cooperation. The TCA show cases certain consequences of mixity, most notably (a) the risk of non-ratification, and (b) that of urgency and legal certainty, which seriously jeopardize the attainment of the EU's objectives. It is therefore the scope of this section to use the TCA to highlight instances where opting for mixity would breach the duty of cooperation and consequently legally obligate EU-only conclusion.

[385] Ibid paras 21 and 22.
[386] Chamon, 'Constitutional Limits' (n 33) 160.
[387] Neframi (n 379) 354.
[388] ibid, 353
[389] Hillion (n 177) 102.
[390] *Opinion 1/94,* (n 7) para 108.

a. Non-ratification

Finding itself in the unique position of withdrawal from the EU, there was a pressing need for a future relationship to be concluded, such that neither the EU nor the UK could risk a scenario where a Member State failed to ratify the TCA.

It is often argued that the threat of non-ratification "painfully showcases the vulnerability of mixed agreements".[391] However, as Guillaume Van der Loo and Ramses A Wessel acknowledge, the consequences of non-ratification of mixed agreements are glossed over by both the CJEU and literature.[392] Incomplete ratification by the Member States in cases of bilateral mixed agreements is rather complex given their 'entry into force-clauses' which require ratification by all parties before the agreement can enter into force. Not only does this make the exercise of potential competences more precarious but non-ratification is an additional threat of *de facto* loss of EU exclusive powers where the EU seeks to conclude a comprehensive agreement. [393]

Although legally, Member State consent is not needed for the Union to exercise its exclusive external competences, in the case of a single comprehensive agreement – such as the TCA – Member States ratify or veto the agreement in its entirety and one single Member State is therefore capable of blocking even the Union's exercise of its exclusive competences under that agreement.[394] In the ratification of CETA for example, the Cypriot parliament vetoed its conclusion over the protection of Halloumi cheese which concerned rules of origin, a competence falling under the CCP. As Chamon and Thomas Verellen noted, this "halloumi-incident is a classic illustration of how mixity makes the EU's external action more burdensome and complicated" than necessary.[395]

As Van der Loo and Wessel suggest, non-ratification is of increased relevance and probability in the context of more greatly politicised agreements.[396] Given the politicised nature of Brexit it is not difficult to imagine that national parliaments have divided opinions on what the EU should or should not be conceding to the UK. This argument ties in interestingly to Conconi et al. writing on the 'distributional effects of trade agreements'[397] where they highlighted that the EU's trade agreements tend to increase welfare at the aggregate level but nonetheless create losses in certain regions or sectors.[398] The fact that the individual

[391] Kubek (n 145)39.
[392] Van der Loo and Wessel (n 99) 740.
[393] Kubek (n 145) 39
[394] ibid 26.
[395] Chamon and Verellen (n 2).
[396] Van der Loo and Wessel (n 99) 736.
[397] Conconi et al. (n 34) 244.
[398] Ibid.

national parliaments "represent the interests of voters in narrower geographical constituencies" means they are more likely to hijack an agreement that does not favour those regional/sectoral interests.[399] This is heightened in the case of the TCA, as it differs to other trade agreements and even AA's. AA's are most often used as pre-accession instruments as was the case with the EU-Turkey AA,[400] or as alternatives to membership such as the European Economic Area AA.[401] Such agreements increase the level of cooperation and liberalisation. Rather, concluded with a former EU member state, the TCA provides for a level of cooperation and regulatory alignment that, although seeking to minimise divergence, is nonetheless decreased when compared to the starting relationship. The potential for regional and sectoral 'loss' is therefore increased.

But to what extent is potential non-ratification of the TCA a legally persuasive argument against mixity? As highlighted above, the duty of cooperation mandates that any action taken does not jeopardize the attainment of the Union's envisaged objectives or as AG Wahl stated, "seriously risk compromising the objective pursued".[402] With regards to the UK-specific objective, it suffices to look at the Political Declaration and the infamous Article 50(2) TEU to determine that the EU sought to create a framework for the future relationship between the Union and the UK, which is "ambitious, broad, deep and flexible".[403] The TCA legal basis – Article 217 TFEU – is also an indication of the intended comprehensive nature of the agreement. The premise of the second objective, the unity of external representation, is that the EU aims to act in unity vis-à-vis the UK.

The enforcement of the duty of cooperation against Member State refusal to ratify an agreement could arguably ensure the attainment of both objectives by (1) ensuring the agreement is concluded and (2) ensuring the Member States showcase a united front. However, this is not a convincing argument: the duty of cooperation cannot be enforced so as to obligate national ratification of a mixed agreement. Not only would this render national ratification completely futile[404] but, as Kleimann and Kübek highlight, the use of EU law to enforce ratification on Member States would amount to a breach of their rights under international law.[405] Equally, Article 4(3) TEU imposes a constitutional limitation[406] to the duty of sincere cooperation whereby the EU is required to respect the "essential State functions"

[399] Ibid, 244.
[400] Merijn Chamon and Peter Van Elsuwege, "The meaning of 'association' under EU law: A study on the law and practice of EU association agreements" (2019) PE 608.861, 25.
[401] ibid 28.
[402] AG Wahl, *Opinion 3/15* (n 93) para 121.
[403] Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] 2020/C 34/01 OJ C 34/ 1, 3.
[404] Guillaume Van der Loo and Ramses A Wessel (n 275) 744.
[405] David Kleimann & Gesa Kübek, "The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15" (2018) 45(1) Legal Issues of Economic Integration 13, 25 and 30.
[406] Larik 'Pars Pro Toto' (n 38)

of the Member States; forcing national ratification of an agreement would violate this. Whereas this solution is not a legally viable option, enforcing EU-only conclusion is.

It follows that where the likelihood of non-ratification of an agreement is high, the failure to ratify that agreement would be seriously prejudicial to the objectives of the Union and where the agreement at issue covers competences for which the Union is at minimum potentially competent, a legal obligation of EU-only ratification should arise.

b. Urgency and Legal Certainty

As previously emphasised, an agreement between the EU and the UK was needed on the 31st of December 2021. The lack of mixity has therefore often been put down as a political decision to address the 'urgency of the situation'. [407] As set out in Chapter 1, AG Wahl provides the example of a situation where the urgency of the situation would mean that mixed conclusion would "seriously risk compromising the objective pursued."[408] In fact, it is the argument of this paper that although 'urgency' is often deemed a 'practical concern', it triggers the legal duty to cooperate.

As Kleimann and Kübek highlight, the time necessary for ratification of all member states in case of a mixed agreement is far greater than that needed for just EU-only conclusion. Urgent deadline aside, a long ratification process nonetheless "causes a great amount of legal uncertainty" for both the EU and the third party.[409] This is exacerbated in the case of the UK-EU relations given the relationship would have quickly gone from EU-membership to WTO-terms; a situation most often referred to as "hard-Brexit" or "no-deal".[410] Whilst this may seem political in nature, it should be recalled that the EU's objective was to conclude an agreement with the EU and not resort to WTO rules.[411] Avoiding mixity thus allowed for the EU to avoid seriously compromising the attainment of the objectives pursued; thereby respecting the duty of cooperation.

The long process of ratification of a mixed agreement is often 'remedied' by provisional application, now provided for in Article 218(5) TFEU.[412] In theory, had the TCA been mixed, provisional application of the agreement could have helped the 'urgency of the situation'. However, as Wessel highlights provisional application does not necessarily prevent subsequent non-ratification.[413] As Member States remain within their right to refuse to ratify an agreement after its signature and provisional application, the inevitable outcome

[407] Van Elsuwege, 'EU-UK' (n 131) 796.
[408] AG Wahl, *Opinion 3/15* (n 93).
[409] Kleimann and Kübek (n 405) 24.
[410] Van Elsuwege, 'EU-UK' (n 131) 786.
[411] Political Declaration [2020] (n 403) 27.
[412] Van der Loo and Wessel (n 99) 19.
[413] ibid.

is a dearth of legal certainty, "especially for the third country".[414] In the legally uncertain climate of Brexit, I would argue that such a situation did not fall in line with the objectives of either party.

It is worth emphasising that the CJEU has confirmed the link between ensuring legal certainty and the duty of cooperation. In the *PFOS* judgement, Sweden's actions within the framework of a mixed agreement had created a situation of legal uncertainty, not just for the EU and its Member States but also for the third party.[415] Whilst situated in a different context, the Court's reasoning suggests that where legal uncertainty is the inevitable result of an action, this could breach the duty of cooperation – this can therefore be applied by analogy to the choice of concluding a mixed agreement in such a precarious situation as Brexit.

By way of conclusion, it is worth noting that an evolution by analogy of EU principles is far from uncommon in the Court's case law. The principle of unity in external representation itself did not initially emerge as a principle to be applied between the EU and its Member States.[416] Incidents were brought to the Court's attention that required a legal solution[417] and the principle, being the most apt solution, evolved to its current status. The conclusion of the TCA as a mixed agreement, had this situation occurred and been the subject of an Article 218(11) TFEU Opinion, may well have triggered the next step in its evolution.

III. **A well-constructed TCA**

Having dispelled the misconception that the TCA fell partly within Member State exclusive competences and having demonstrated how the duty of cooperation could have been used to enforce EU-only conclusion, it is important to analyse the TCA from a more formative perspective. In so doing I seek to evidence that it is a well-constructed EU-only agreement which obviates the political need for mixity.

a. Supplementing Agreements

The TCA although substantively very comprehensive in the sense that it covers a wide variety of policy areas, is actually broadly defined and envisages the conclusion of further supplementing bilateral agreements[418] with the UK to expand on the different dimensions of the agreement. As Van Elsuwege highlights, this is "a rather innovative form of

[414] ibid 759 and 760.
[415] *PFOS* (n 364) para 99.
[416] Larik 'Pars Pro Toto' (n 38) 182.
[417] *PFOS* (n 364).
[418] TCA Part One, Title I, Article COMPROV.2.

association"[419] whereby the TCA merely forms "the core of a rather sophisticated legal structure".[420] Not only can these agreements be 'tailor-made'[421] to specific areas but interestingly for the present paper, Article 2 TCA acknowledges that future supplementing agreements may also be concluded as mixed agreements.[422] For example, the TCA does not cover political dialogue, an area which is commonly covered by AA's and which Member States have frequently insisted on including in agreements in order to insist on mixity.[423] A supplementing agreement on political dialogue may well be concluded in mixed form and nonetheless fall under the overall framework of the TCA[424] whilst simultaneously having avoided the cumbersome mixed conclusion of the TCA itself.

b. Governance Structure

Part One Title III of the TCA establishes the agreement's institutional framework. Within this framework, the Partnership Council is the leading political body and is responsible for overseeing the implementation of the agreement and ensuring the TCA objectives are met.[425] The Partnership Council is made up of representatives of both the Union and the UK[426] and chaired by members of the EU Commission and the UK Government.[427] Assisting the Partnership Council are an extensive number of specialised committees each tasked with more specific areas of the TCA – there is for example a "Trade Partnership Committee", a "specialised committee on transport" and a "Specialised Committee on Law Enforcement and Judicial Cooperation". Their role is in part to further supervise the implementation of the TCA in their respective specialised areas.

The EU has clarified that all Member States can send a national representative to attend Partnership Council and Committee meetings.[428] This allows Member States to be involved during EU-UK discussions despite the lack of mixity.[429] As Lazowski suggests, the

[419] Van Elsuwege, 'EU-UK' (n 131) 792.
[420] ibid, 787.
[421] Adam Lazowski, "Mind the fog, stand clear of the cliff! From the political declaration to the post-Brexit EU-UK legal framework – Part 1" (2020) 5(3) European Papers 1105, 1118.
[422] TCA Part One, Title I, Article 2(2)(a).
[423] Chamon, 'Constitutional limits' (n 33) 141.
[424] Van Elsuwege, 'EU-UK' (n 131).
[425] TCA Part One Title III, Article 7(3).
[426] ibid, Article 7(1).
[427] ibid, Article 7(2).
[428] Commission, "Proposal for a Council Decision on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information" COM/2020/856 final/2Preamble (5).
[429] Van Elsuwege, 'EU-UK' (n 131) 795.

Partnership Council may thus "play a leading role as a platform for dialogue between the European Union, its Member States, as well as the authorities in London."[430]

c. 'Without Prejudice to…'

As highlighted previously in this paper, Member States tend to insist on mixity as a reaction to their fear of the *"ERTA effect*". In Weiler's excerpt on mixity, he suggests the future construction of a scenario where *de lege ferenda,*[431] the EU can conclude an international agreement beyond its exclusive competences which thus avoids the complexities of mixity but is not "totally unacceptable to Member States since the effect of *ERTA* and *Opinion 1/76* would not come into operation".[432] The TCA is an example of the construction envisaged by Weiler. The Council Decisions signing[433] and concluding[434] the TCA reassures[435] the Member States that the TCA commitments, "shall be without prejudice to the respective competences of the Union and of the Member States" in any future/ongoing international agreements.[436] This consequently rules out the *ERTA* effect. Similarly, Recital 5 of the Council Decision signing the Kosovo SAA states that its conclusion as an EU-only agreement "is without prejudice to the nature and scope of any similar agreements to be negotiated in the future".[437] Christina Eckes and Païvi Leino-Sandberg find this attempt at avoiding pre-emption to be 'unconvincing', arguing that practice suggests that such comprehensive EU-only agreements nonetheless restrict Member State "ability to determine policy in the areas covered by it".[438] The authors equally acknowledge however that whilst practice may create a presumption that this is legal, practice is not capable of altering the fact that this would be illegal.[439]

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[430] Lazowski (n 421) 1139.
[431] Weiler (n 3).
[432] ibid 178.
[433] Council Decision on the signing of the TCA (n 160) Article 10.
[434] Council Decision (EU) 2021/689 of 29 April 2021 on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information ST/5022/2021/REV/1 OJ L 149/2, 30.4.2021 Article 10.
[435] Van Elsuwege, 'EU-UK' (n 131).
[436] Council Decision on the signing of the TCA (n 160) Article 10.
[437] Council Decision (EU) 2015/1988 of 22 October 2015 on the signing, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence. , of the other part
[438] Eckes and Leino-Sandberg (n 52).
[439] Ibid.

Not only may the duty of cooperation legally obligate EU-only conclusion, but this highlights how an agreement's formation may also alleviate the political need for mixity.

Conclusion

The practice of mixity attaches to it a plethora of inconveniences, both for the ability of the EU to conclude its desired international agreement, and for the unity of the EU's external representation as a whole. Following landmark developments such as the *ERTA* judgement and the Treaty of Lisbon, both the existence of EU competence in external relations and its exclusive nature has monumentally increased, yet the prevalence of mixity has not decreased as a result. If taking the traditional view that mixity is a symptom of the EU's constitutional principle of conferral,[440] as more competences are conferred at least in part to the EU,[441] fewer agreements require Member State involvement and mixity should (and legally could) remain a phenomenon of the past. However, a vast amount of 'potential competences' still exist, which are neither *a priori* exclusive, nor has the EU sufficiently legislated internally to render Member State external action liable to affect those rules or alter their scope.[442] The inclusion of such competences in an international agreement, continues to give rise to a situation of facultative mixity; the choice between EU-only conclusion or mixity. In the eyes of many, this remains a political choice vested with the Council[443] and EU-only conclusion cannot be legally enforced. However, viewed as an unnecessary burden, it has been the aim of many academics and the Commission to structure a valid *legal* argument against mixed conclusion in cases of facultative mixity. Yet so far, both the CJEU and the defenders of mixity remain unconvinced that such arguments are capable of legally compelling the Council to leave mixity behind. This thesis has argued that the EU-UK TCA demonstrates how EU-only conclusion can, on the basis of the duty of cooperation, become a legal obligation in cases of facultative mixity. The EU-UK TCA is one of the first incredibly comprehensive international agreements to have been concluded by the EU alone and this thesis has sought to demonstrate how the complexities of mixity would have caused its mixed conclusion to jeopardise the attainment of the EU's objectives, in regard of both achieving a comprehensive EU-UK future relationship and maintaining the unity of the EU's representation vis-à-vis the UK. The high chance of non-ratification, coupled with the urgency

[440] Weiler (n 3) 132.
[441] TFEU, Article 4.
[442] *ERTA* (n 26); Article 3(2) TFEU.
[443] Chamon, 'Constitutional limits' (n 33) 165.

of the situation and the need for legal certainty would therefore have rendered the mixed conclusion of the TCA 'manifestly inappropriate having regard to the objective' which the EU was seeking to pursue.[444] In conclusion, the TCA provides a case study of how EU-only conclusion may not only be legally permissible for agreements of such a comprehensive nature but may also be legally obligatory.

[444] AG Wahl *Opinion 3/15* (n 93) 120.

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