

## POST-WITHDRAWAL LEGAL IMPLICATIONS OF INTERNATIONAL AGREEMENTS CONCLUDED WITHIN THE FRAMEWORK OF THE EU LEGAL ORDER FOR THE WITHDRAWING MEMBER STATE

**Mustafa T. KARAYİĞİT\***  
Araştırma Makalesi

### **Abstract**

*The article examines post-withdrawal legal implications of EU only/pure and mixed agreements for the withdrawing Member State, in particular the UK, as a contracting party and/or a successor of the EU. It underlines the complexity of the legal implications of those agreements on the basis of the nature of vertical delimitation of competences. It draws attention not only to the nature of EU competences and the agreements with their purpose, object, context and wording, but also to third contracting parties' positions (consent, refusal or dialogue etc. towards continuity or replacement of existing agreements) for the post withdrawal real legal effects of such agreements.*

**Keywords:** Brexit; Withdrawal; International agreements; Mixed agreements; Consent of third contracting parties.

### **AB Hukuk Düzeni Çerçevesinde Akdedilen Uluslararası Anlaşmaların Ayrılan Üye Devlet Açısından Ayrılma Sonrası Doğurabileceği Hukuki Etkiler**

#### **Öz**

*Makale, AB tarafından salt kendisi veya üye devletleriyle birlikte karma anlaşma olarak üçüncü akit taraflarla akdettiği anlaşmaların, ayrılma sonrası akit veya halef taraf olmaları hasebiyle, özellikle Birleşik Krallık olmak üzere, Birlik'ten ayrılan üye devletler için doğurabileceği hukuki yükümlülükleri incelemektedir. Makale bu anlaşmaların dikey yetki bölüşümünün doğası gereği doğurabileceği*

---

\* Prof. Dr., Marmara Üniversitesi Avrupa Araştırmaları Enstitüsü,  
mtkarayigit@marmara.edu.tr, ORCID: 0000-0002-5976-6401  
Makalenin Gönderilme Tarihi: 25/01/2020 Kabul Edilme Tarihi: 16/06/2020

*hukuki yükümlülüklerin karmaşıklığına vurgu yapmaktadır. Bu itibarla, sadece AB yetkilerinin ve amaç, kapsam ve lafız analizini de içerecek şekilde anlaşmaların doğasına değil, ayrıca bu anlaşmaların ayrılma sonrası gerçek hukuki etkisinde belirleyici olacak diğer akit tarafların rızası, reddi veya diyalog talebi şeklinde tezahür edebilecek muhtemel tutumlarına da dikkat edilmesi gerekliliğine işaret etmektedir.*

*Anahtar Kelimeler: Brexit; Ayrılma; Uluslararası anlaşmalar; Karma anlaşmalar; Diğer akit tarafların rızası.*

### Introduction

With the Brexit process there arises a significant legal issue of whether existing international agreements concluded by the EU alone or together with its Member States cease to have legal effect after Brexit in the UK legal system. In other words, it is uncertain whether the UK will fall with regard to such agreements into vacuum following the withdrawal. Brexit is the first experiment of withdrawal of a Member State in EU law and there is no precedent regarding the withdrawal of a member State from such an entity of intensified integration in international law. There are accordingly diverse assumptions in the literature on the legal implications of the withdrawal of a Member State on its international obligations arising from international agreements concluded within the context of the EU legal order towards third contracting parties. For instance, the European Council utters that “[f]ollowing the withdrawal, the United Kingdom will no longer be covered by agreements<sup>1</sup> concluded by the Union or by Member States acting on its behalf or by the Union and its Member States acting jointly.”<sup>2</sup> Art. 129 of the Withdrawal Agreement<sup>3</sup> seems to imply *a contrario* that after the transition/implementation process the UK shall be unbound by the obligations stemming from the international agreements concluded by the EU, by the Member States acting on its behalf, or by the EU and its Member States acting jointly. This assumption cannot be true at least for certain agreements concluded by the EU and the Member States jointly where, because of the nature of its competences, the EU could not have concluded them alone and so the Member States joined them in their own rights.

---

<sup>1</sup> There are currently 1261 agreements concluded as EU-only and mixed agreements, including those signed, but not entered into force yet.

<sup>2</sup> European Council, *Special meeting of the European Council (Art. 50) (29 April 2017) – Guidelines*, Brussels, 29 April 2017, EUCO XT 20004/17.

<sup>3</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01, OJ C 384I, 12.11.2019, p. 1–177.

The assumption of the European Commission, on the other hand, is much more modest, according to which the UK will no longer be covered by EU only/pure agreements and bilateral mixed agreements, whereas it will recover the full competence and remain party to multilateral mixed agreements.<sup>4</sup> The effect of Brexit on international agreements does not appear so straightforward either. It is nevertheless obvious that it is easier to predict truly legal implications of the EU only/pure agreements rather than mixed agreements following the withdrawal for the withdrawing Member State.

In order to define international legal obligations and rights of a withdrawing Member State after withdrawal, it is important to identify on the basis of which law and status that State might be thought to remain bound by such international agreements. The withdrawal process of the UK on the other hand *ex post facto* carries potentiality to shed light on the nature of the EU competences and opaque sides of the phenomenon of mixed agreements and is therefore important to understand further ramifications of that unique phenomenon. In that regard, the article examines the legal effect of EU only/pure and mixed agreements after the withdrawal of a Member State, in particular the UK, on her legal system both under EU and international law as a contracting party in its own right and/or a successor of the EU.

### **I. The Legal Effect of the EU Only/Pure Agreements for the Withdrawing Member State after Withdrawal**

EU-only agreements are three types:

- 1) Agreements which fall within the scope of exclusive competences and thus are concluded by the EU alone;
- 2) Agreements concluded by the Member States on its behalf because of the constraints under international law such as the non-recognised membership status of international organisations,<sup>5</sup> so the EU, to such agreements;

---

<sup>4</sup> European Commission, *Internal EU27 preparatory discussions on the framework for the future relationship: "International Agreements"*, 6 February 2018, TF50 (2018) 29 - Commission to EU 27.

<sup>5</sup> Even though it is to be considered a mixed agreement, the EU exercises its external competence within the context of the ILO Convention through the medium of the Member States acting jointly in the interest of the EU. See *Opinion 2/91* on Convention N° 170 of

3) Agreements concluded by all the Member States either prior to the establishment of the EEC or prior to their accession to such construction in the course of evolution in terms of the fields the EU has acquired exclusive competences and became bound on the basis of succession theory<sup>6</sup> such as the GATT 1947.

According to Art. 50 TEU the Treaties shall cease to apply to the withdrawing Member State. The reference to the Treaties is to be interpreted to cover the entire EU law, including acts adopted by the institutions, in particular international agreements concluded by the EU.<sup>7</sup> International agreements concluded by the EU shall therefore cease to apply to the UK by virtue of or as a matter of EU law. Since according to Art. 216(2) TFEU, agreements concluded by the EU are binding upon the EU institutions and on its Member States, the withdrawing Member State will no longer be a Member State and so bound by those agreements as a matter of EU law.

Following the withdrawal the agreements concluded by the EU alone would no longer be considered binding the withdrawing Member State on the basis of international law on the following grounds articulated by some legal scholars either:<sup>8</sup> Those agreements do not bind the withdrawing Member State since the EU has the international legal personality to conclude agreements not on behalf of its Member States, but on its own. Under international law the withdrawing Member State cannot therefore be considered as a contracting party to such agreements concluded within the scope of exclusive competences. Furthermore, according to Art. 29 of the Vienna Convention on the Law of Treaties (the VCLT)<sup>9</sup> unless a different intention appears from the agreement, an agreement is binding upon each party in respect of its entire territory. Territorial application clauses enshrined in such agreements and mentioning that the agreement applies to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions

---

the International Labour Organization concerning safety in the use of chemicals at work, EU:C:1993:106, paras. 5, 37.

<sup>6</sup> Joined Cases C-21/72 to C-24/72 *International Fruit Company and Others v Produktschap voor Groenten en Fruit* EU:C:1972:115, para. 18; Case C-301/08 *Bogiatzi* EU:C:2009:649, paras. 32-34.

<sup>7</sup> Eleftheria Neframi, “Brexit et les Accords Mixtes de l’Union Européenne” (2017) *Annuaire Français de Droit International* 360.

<sup>8</sup> Adam Lazowski & Ramses A. Wessel, “The External Dimension of Withdrawal from the European Union” (2016) 60 *Revue des affaires européennes* 623; Jed Odermatt, “Brexit and International Law: Disentangling Legal Orders” (2017) 31 *Emory International Law Review* 1051.

<sup>9</sup> United Nations — Treaty Series, Vol. 1155,1-18232.

laid down in those Treaties<sup>10</sup> might also clarify that the withdrawal will cease the application of such agreements to a withdrawing Member State. Because, the EU territory will no longer comprise the territory of the withdrawing Member State. Moreover, such agreements are often structured in a bilateral way and include commitments that can only be effectively exercised within the EU framework the fact of which makes it difficult or impossible to apply them to the withdrawing Member State, in particular the UK. Lastly, the matter is indeed the transfer of competences previously used by the predecessor to the successor, i.e. replacement of the former by the latter, and the Vienna Convention on Succession of States in Respect of Treaties<sup>11</sup> is interpreted to be applicable only to the effects of a succession of States in respect of treaties between States.

In such a scenario the third contracting parties deserve a notification made by the EU or the withdrawing Member State. The withdrawing Member State might therefore be expected to commence external relations with the third contracting parties with *tabula rasa* (a new beginning) in the field of existing EU exclusive external competences like decolonised territories. It should be nevertheless given thought by the UK to the question of how the withdrawal would affect the withdrawing Member State's benefits, which have been had in its capacity as an EU Member State, from the agreements concluded by the EU, although that would not be meaningful for a country such as the UK which is in the process of withdrawal from the EU primarily with the sovereignty concerns.

This scenario is nevertheless blurred when some possibilities under international law is taken into account given that the withdrawing Member State is in fact different from a newly (decolonised) independent State, which gained its independence on the basis of the principle of self-determination and whose general freedom from obligation in respect of its predecessor's agreements is to be provided on the clean slate principle. This principle is in the modern law very far from normally bringing about a total rupture in the treaty relations. As declared by the International Law

---

<sup>10</sup> Art. 17 of the Agreement between the European Community and New Zealand on sanitary measures applicable to trade in live animals and animal products, OJ 26/02/1997, L 57, 5; Art. 2 of the Agreement between the European Community and Hong Kong, China on cooperation and mutual administrative assistance in customs matters, OJ 18/06/1999, L151, 21; Art. 33 of Agreement between the European Community and Canada on trade in wines and spirit drinks, OJ 06/02/2004, L35, 3; Art. 36 of the Agreement between the European Community and Australia on trade in wine, OJ 30/01/2009, L28, 3; Art. 14 of the Agreement between the European Union and the Government of the Federative Republic of Brazil on civil aviation safety, OJ 19/10/2011, L273, 3.

<sup>11</sup> United Nations, Treaty Series, vol. 1946, p. 3.

Commission in modern international law having regard to the need for the maintenance of system of multilateral agreements and the stability of the agreement relationships consistent with the interests of itself and the third contracting parties, as a general rule the jure continuity should apply.<sup>12</sup> The possibility of post-withdrawal binding effect of these agreements under international law should not therefore be removed in advance, where the third contracting parties insist on continuity of the application of such agreements in the territory of the withdrawing Member State. In that regard, it is still to be asked whether the withdrawing Member State would be bound under international law by the agreement concluded by the EU alone within the scope of its exclusive competences on the ground of succession theory with the following argument: the agreement was concluded by the EU on behalf of its Member States, full statehood is regained when the transferred competences returned and the international obligations would accordingly return to the withdrawing Member State pursuant to the withdrawal.<sup>13</sup>

It is worth mentioning that the fact that the Convention on Succession shall not however affect the application of any of the rules laid down therein to cases of a succession of States in respect of international agreements concluded between States and other subjects of international law independently of that Convention and to the effects of a succession of States in respect of international agreements to which other subjects of international law are also parties.<sup>14</sup> It is a renowned fact that “considerable portions of the Convention involve progressive development of international law rather than its codification”.<sup>15</sup> In the light of Art. 34 of that Convention,

---

<sup>12</sup> Report of the International Law Commission on the work of its twenty-sixth session, 6 May - 26 July 1974, Official Records of the General Assembly, Twenty-ninth session, Supplement No. 10, A/9610/Rev.1, [http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a\\_9610.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_9610.pdf&lang=EF), paras. 58-59 of Chapter II Succession of States In Respect of Treaties.

<sup>13</sup> Ramses A. Wessel, “Consequences of Brexit for International Agreements Concluded by the EU and Its Member States” (2018) 55 *Common Market Law Review* 101; Lazowski & Wessel, *supra* note 8.; Odermatt, *supra* note 8.

<sup>14</sup> Art. 3 of Vienna Convention on Succession of States in respect of Treaties 1978 nevertheless states that “The fact that the present Convention does not apply to the effects of a succession of States in respect of international agreements concluded between States and other subjects of international law or in respect of international agreements not in written form shall not affect: (a) the application to such cases of any of the rules set forth in the present Convention to which they are subject under international law independently of the Convention; (b) the application as between States of the present Convention to the effects of a succession of States in respect of international agreements to which other subjects of international law are also parties.”

<sup>15</sup> Arthur Watts, *The International Law Commission 1949-1998 The Treaties Part II*, Oxford University Press, Oxford, 1999, p. 991.

any agreement in force at the date of the succession in respect of the entire territory of the predecessor continues in force in respect of each successor so formed unless the States concerned otherwise agree or it would be incompatible with the object and purpose of the agreement or would radically change the conditions for its operation. Moreover, the provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations shall not prejudice any question that may arise in regard to an agreement from the termination of participation by a State in the membership of the international organization and in regard to the establishment of obligations and rights for States members of an international organization under an agreement to which that organization is a party.<sup>16</sup> Furthermore, why not the opposite consideration should not apply, where the succession of the Member States by the EU was recognised in the settled case law,<sup>17</sup> if the matter is the use of competences conferred actually by the Member States. Given the constitutionalised nature of the EU legal order, having been functionally compared to secession, issues arising from Brexit is already deliberated by some legal scholars reminiscent of those arising out of state succession.<sup>18</sup> Last but not least, it should not be overlooked that an agreement supposed to be concluded as a mixed agreement might be eventually concluded by the EU alone even though it does not fall entirely within the scope of EU exclusive external competences, either where the ancillary/incidental/secondary/indirect element of the agreement does not alter the main/predominant/essential element and object of the agreement and does not thus require on the basis of centre of gravity approach<sup>19</sup> to

---

<sup>16</sup> Art. 74 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations: “2.The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization. 3.The provisions of the present Convention shall not prejudice any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.”

<sup>17</sup> *International Fruit Company*, supra note 6, para. 14-18; Case C-308/06 *Intertanko and others* EU:C:2008:312, para. 41; *Bogiatzi*, supra note 6, para. 32-34; *Opinion 2/15* EU:C:2017:376, para. 248.

<sup>18</sup> Jure Vidmar, “Brexit, Democracy, and Human Rights: The Law Between Secession and Treaty Withdrawal” (2017) 35 *Wisconsin International Law Journal* 425.

<sup>19</sup> Case C-268/94 *Portuguese Republic v Council of the European Union* EU:C:1996:461, para. 24; Case C-377/12 *European Commission v Council of the European Union* EU:C:2014:1903, para. 34; Case C-244/17 *European Commission v Council of the*

consider other legal bases to conclude that agreement or where the agreement is concluded so for reasons of political expediency. To be precise, centre of gravity approach is applicable horizontally where the Union has competences for all the components of its envisaged act by making the correct choice between those competences.<sup>20</sup> On the basis of that fact for instance, even agreements, which cover fields that fall within the scope of shared external competences but are concluded by the EU alone, were deemed by the AG Sharpston to be different from agreements covering fields falling within the scope of exclusive external competences. That is because in the former case the Member States together (acting in their capacity as members of the Council) have the power to agree that the EU shall act instead of insisting that the Member States will continue to exercise their individual external competences.<sup>21</sup> What will be the legal effect of provisions of such agreements falling indeed within the ambit of the shared competences?

It goes without saying that there are agreements in the area of the Common Foreign and Security Policy and the Common Security and Defence Policy concluded as EU only/pure agreements, even though the EU has no exclusive competence in the area. It seems that the EU concluded those agreements alone, but indeed also on behalf of its Member States because of the nature of competences, for the sake of expediency to express the unity on the international front. It would not be convincing that those agreements, they are in the bilateral nature though, would cease to apply to the withdrawing Member State following the withdrawal.

For the foregoing reasons, within the European context, it is therefore possible for the insistent third contracting party to argue that the withdrawing Member State is bound even by the EU only/pure agreements under international law and those thus remain in operation for it.<sup>22</sup> In case transitional arrangements are made regarding the regulation of the legal effects of EU only/pure agreements in the withdrawal agreement within the consideration of predecessor and successor relationship, those arrangements would have limited effect when the territorial application matters in a

---

*European Union* EU:C:2018:662, para. 37; Opinion of Advocate General Kokott, Joined Cases C-626/15 and C-659/16 *Commission v Council* EU:C:2018:362, paras. 81-82.

<sup>20</sup> Opinion of Kokott AG, *ibid.*, para. 82.

<sup>21</sup> Opinion of Advocate General Sharpston, *Opinion 2/15* EU:C:2016:992, para. 75.

<sup>22</sup> Giorgio Sacerdoti, "The United Kingdom's Post-Brexit Trade Regime with the European Union and the Rest of the World: Perspectives and Constraints" (2017) 20 *Journal of International Economic Law* 905.



conventional relationship. Even though Art. 34 of the Convention gives freedom to predecessor and successor to agree contrarily that the agreement will not continue in force, it is not certain to what extent that agreement would bind or create obligations/rights for the third contracting parties under the principle of *pacta tertiis nec noent nec prosunt* enshrined in Art. 34 VCLT without their consent.

## **II. The Legal Effect of the Mixed Agreements for the Withdrawing Member State after the Withdrawal**

Mixed agreements are agreements that are concluded by the EU and its Member States which constitute together a contracting party vis-à-vis third contracting parties on the ground that the EU either has no comprehensive exclusive competences within the entire spectrum of the subject matter(s) of those agreements or it has not been allowed to exercise its non-exclusive/potential competences alone because of the judicial constraints ascertained in the settled case law.

The status of Member States in mixed agreements and the legal effect of the withdrawal on the status of the withdrawing Member State in mixed agreements should initially be analysed to understand the role of the Member States in such agreements. The EU and the Member States together constitute a contracting party to a mixed agreement and the Member States involve in such agreements alongside the EU not as a mere appendage of the EU, but also in their own rights with full discretion as sovereign/autonomous contracting State Parties.<sup>23</sup> That is because, according to the settled case law, where the EU competence is not exclusive the Member States are entitled to enter commitments themselves with third parties either collectively or individually or jointly with the EU,<sup>24</sup> though in accordance with the principle of duty of sincere cooperation. Within the context of mixed agreements, every Member State therefore has ability to act independently as an actor under international law, which reflects its continuing international competence, and participate in those agreements, after all, as a sovereign State Party, not as a mere appendage of the EU, in accordance with the duty of sincere cooperation, and each Member State accordingly remains free under international law to terminate any such agreements in accordance with the termination procedure under those agreements.<sup>25</sup> On that ground for

---

<sup>23</sup> Opinion of Sharpston AG *Opinion 2/15*, supra note 21, para. 77.

<sup>24</sup> Case C-316/91 *European Parliament v Council of the European Union* EU:C:1994:76, para. 26.

<sup>25</sup> Opinion of Sharpston AG, supra note 21, para. 77.

instance, the UK is considered by the Panel as a member of the WTO with all the rights and obligations pertaining to such membership and arising from the WTO Agreement, which are not contingent on its status as an EU Member State.<sup>26</sup> In the case of accession to the EU, the fact that the accessing Member States to the EU involve into the existing mixed agreements concluded by the EU and the present Member States through an act or a protocol<sup>27</sup> and those agreements shall therefore become binding on these new Member States without national ratification process under their national constitutional law<sup>28</sup> nonetheless cannot change this conclusion. To remind the process of treaty-making, the conclusion of the mixed agreements indeed also requires ratification, in addition to ratification at the EU level, in the each legal systems of the Member States which involve in those agreements according to the national constitutional laws and even one Member State with its veto power can block the entire ratification process and so their entry into force.

Moreover, mixed agreements are generally concluded without any prior declaration of delimitation of vertical competences and even to make so would appear meaningless with the course of time because of the dynamic nature of vertical competence delimitation in the EU. On this ground contracting parties to such agreements may mean the EU and the Member States, or the EU or the Member States depending in each situation on the subject-matter of dispute, the legal basis of the EU competence in EU law,

---

<sup>26</sup> Report of the Panel, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, 30 June 2010, WT/DS316/R, para. 7.174; Lorand Bartels, “The UK’s status in the WTO after Brexit”, 2016, <https://www.peacepalacelibrary.nl/ebooks/files/407396411.pdf>, last accessed 02.02.2019.

<sup>27</sup> The accession of the new Member States and mixed agreements mentioned in paragraph six “shall be agreed by the conclusion of a protocol to such agreements or conventions between the Council, acting unanimously on behalf of the Member States, and the third country or countries or international organisation concerned”. See Art. 6(2) of the Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union Is Founded, OJ L 236/33, 23.09.2003.

<sup>28</sup> See Art. 5 of ACT concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (94/C 241/08); Art. 6 of the Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union Is Founded, OJ 23.09.2003 L 236/33.

the relevant provisions of the agreement, the respective up-dated vertical delimitation of external competences connected also strongly to the delimitation of internal competences and the degree of internal harmonisation in EU law to be deduced by the EU judiciary on a case-by-case basis.<sup>29</sup>

For the preceding reasons, since the Member States are bound by mixed agreements not only as the EU Member States under EU law, particularly under Art. 216(2) TFEU, but also as distinct State parties under international law, even the possibility of cease of binding effect of mixed agreements following the withdrawal for the withdrawing Member State as a matter of EU law would not end its status of contracting party under international law.

Due to the complexity of the matter of post withdrawal legal effects of mixed agreements and the abovementioned lack of precedent in EU and international law, there are also numerous different assumptions about their post withdrawal legal effects even with decent justifications. On the one end of the spectrum, the European Council contemplates that following the withdrawal, the withdrawing Member State will no longer be covered by agreements concluded by the EU and the Member States acting jointly.<sup>30</sup> On the other end of the spectrum, Macrory and Newbiggin argue that the withdrawing Member State will assume all the competences previously resting with the EU and would accordingly be bound post withdrawal automatically by all (provisions of) mixed agreements.<sup>31</sup> Contractual stability with the third parties could thus be preserved by the withdrawing Member State.

In the middle of the spectrum, the European Commission contends that the withdrawing Member State will no longer be covered by bilateral mixed agreements such as association agreements, cooperation and partnership agreements, aviation agreements and the European Economic Area as well as the EU only/pure international agreements, whereas it will remain party to multilateral mixed agreements in terms of which it will recover the full competence such as the WTO agreements and the Paris Climate Agreement.<sup>32</sup> The UK Government compatibly contemplates that the UK

---

<sup>29</sup> *Opinion 1/91* EU:C:1991:490, para. 33.

<sup>30</sup> European Council, *supra* note 2.

<sup>31</sup> Richard Macrory & Joe Newbiggin, "Brexit and International Environmental Law", the Centre for International Governance Innovation, *Brexit: The International Legal Implications*, Paper No. 8, December 2017, <https://www.cigionline.org/publications/brexit-and-international-environmental-law>, last accessed 05.07.2019.

<sup>32</sup> European Commission, *supra* note 4; This is also roughly the consideration of the UK Government. See Department of Exiting the European Union, "Guidance International Agreements if the UK leaves the EU without a deal", Updated 4 April 2019,

will continue to meet, for instance, its international trade and environmental commitments regarding some mixed agreements which cover areas of both the EU and Member State competence such as the WTO Agreement and the Paris Agreement on Climate Change, the Montreal and Gothenburg Protocols, the Stockholm Convention, the Convention on Biological Diversity and the Convention on International Trade in Endangered Species.<sup>33</sup> In that regard, the UK should even consider to what extent it will have freedom to regulate its trade with third countries. Given that the purpose of a customs union is to facilitate trade between the constituent members of the customs union and not to raise barriers to the trade with third countries and “the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies”,<sup>34</sup> one wonders whether a withdrawing Member State which is heading in the opposite direction of Turkey would be able to adopt a trade policy with third countries restrictive than the current common commercial policy of the EU, in particular with regard to common customs tariff and common non-tariff border restrictions. It seems that the UK does not seem to have an unfettered freedom, totally unbound of the common commercial policy that appears as a ceiling in terms of restrictions, to regulate its trade relations from scratch under WTO law.

In the same line, according to Wessel, different considerations apply to bilateral and multilateral mixed agreements. In the former case the UK would probably need to withdraw, which could be given effect to by way of a notification to third parties or through renegotiations not automatically, whereas in the latter case, the UK can perhaps remain a party, but a notification regarding the changed situation and an adjustment of certain commitments may be required pursuant to negotiations between the EU, its remaining Member States, the UK and third States parties.<sup>35</sup>

---

<https://www.gov.uk/government/publications/international-agreements-if-the-uk-leaves-the-eu-without-a-deal/international-agreements-if-the-uk-leaves-the-eu-without-a-deal>, last accessed 22.07.2019.

<sup>33</sup> Department of Exiting the European Union, “Factsheet 8: Environmental Principles”, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/714379/180511\\_EUWB\\_Environmental\\_Protections\\_factsheet\\_10\\_May\\_18.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714379/180511_EUWB_Environmental_Protections_factsheet_10_May_18.pdf), last accessed 03.06.2019; See also Stefano Fella, “UK replacement of the EU's external agreements after Brexit”, House of Commons Briefing Paper, Number 8370, 23 May 2019, file:///E:/Brexit-MixedAgreements/Fella.pdf, last accessed 15.07.2019.

<sup>34</sup> *Turkey – Textiles*, WT/DS34/R, para. 9.121; *Turkey – Textiles*, WT/DS34/AB/R, paras. 55-57.

<sup>35</sup> Ramses A. Wessel, “You Can Check Out Any Time You Like, But Can You Really Leave? On ‘Brexit’ and Leaving International Organizations” (2016) 13 *International Organizations Law Review* 197; Wessel, *supra* note 13.

Neframi correspondingly distinguishes two types of mixed agreements: a) Mixed agreements concluded by the third parties, such as bilateral mixed agreements forming association or cooperation between the EU and third parties, with the intention to establish conventional links with the EU and so the participation of the Member States is required by EU law because of the principle of attribution; b) Mixed agreements concluded by third parties with the intention to establish conventional links with the Member States and the participation of the EU is required because of the principle of attribution. According to her the withdrawal of a Member State will thus affect the status of contracting party of the withdrawing Member State in the former case, the withdrawal thus ceases conventional links with and so the application of such agreements to that withdrawing Member State, which is internationally bound only as a Member State of the EU and does not become autonomous as a contracting party after loss of that membership status. That is because, in the former case the participation of the Member States to such mixed agreements cannot be envisaged beyond their EU membership. On the other hand, although the legal status of contracting party will be lost by virtue of EU law with the withdrawal, the withdrawing Member State will remain contracting party to the mixed agreement in the latter case under international law. This is so even if its position is to be renegotiated as a result of the termination of its participation in the composite contracting party formed with the EU and the other Member States.<sup>36</sup>

Robert also differentiates the mixed agreements as agreements concluded by the withdrawing Member State as a member of the EU; and agreements, which could have been concluded by the withdrawing Member State alone, were nonetheless concluded jointly with the EU. This distinction is broadly in line with the distinction between bilateral and multilateral agreements respectively. He thinks that where the Member State acts together with the EU to conclude the mixed agreement as an element of the composite entity, as a component of a party or with the wording of the Advocate General as a mere appendage of the EU, albeit not being as a distinct and full contracting party to be able to conclude it alone, a withdrawing Member State with the loss of the status of EU membership would no longer be considered party to such a mixed agreement. This would be all the more true where the mixed agreement itself specifies or defines territorial application<sup>37</sup> in accordance with the TEU and TFEU.<sup>38</sup>

---

<sup>36</sup> Neframi, *supra* note 7.

<sup>37</sup> Art. 204 of Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part mentions that "This Agreement shall apply, on the one hand, to the territories in which the Treaty

Some legal scholars nevertheless think that the withdrawing Member State ceases to be bound by the EU-only elements of mixed agreements, as an EU Member State, in accordance with Art. 216(2) of the TFEU,<sup>39</sup> although other provisions will remain in force for it. After Brexit the validity

---

establishing the European Community is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territory of the Republic of Chile."; Art. 13 of Agreement on maritime transport between the European Community and its Member States, of the one part, and the government of the People's Republic of China, of the other part includes that ""This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and, on the other hand, to the territory of China."; Art. 360(1) of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other states that "For the EU Party, this Agreement shall apply to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties."; According to Art. 46 of Framework Agreement on Comprehensive Partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part "This Agreement shall apply to the territory in which the Treaty establishing the European Community is applied under the conditions laid down in that Treaty, on the one hand, and to the territory of Indonesia, on the other."; Art. 61 of Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part states that "This Agreement shall apply to the territory in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied under the conditions laid down in those Treaties, on the one hand, and to the territory of Mongolia, on the other."; Art. 52 of Framework Agreement between the European Union and Its Member States, on the One Part, and the Republic of Korea, on the Other Part stresses that "This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territory of the Republic of Korea."; Art. 3 of the Agreement for scientific and technological cooperation between the European Union and the Arab Republic of Egypt setting out the terms and conditions for the participation of the Arab Republic of Egypt in the Partnership for Research and Innovation in the Mediterranean Area (PRIMA) declares that "This Agreement shall apply, on the one hand, to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and, on the other, to the territory of Egypt."; Art. 141 "This Agreement shall apply, on the one hand, to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and on the other hand, to the territories of the EAC Partner States."; According to Art. 11 of Agreement on A Sustainable Fisheries Partnership between the European Union and the Republic of Senegal, "This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union is applied and under the conditions laid down in that Treaty, and on the other hand to Senegal."

<sup>38</sup> Loïc Robert, "Le Brexit et les accords mixtes: un exemple d'imbroglio juridique", 13 octobre 2017, <https://brexit.hypotheses.org/1000>, last accessed 12.06.2019.

<sup>39</sup> Guillaume Van der Loo and Steven Blockmans, "The Impact of Brexit on the EU's International Agreements", CEPS Commentary, 15 July 2016, <https://www.ceps.eu/ceps-publications/impact-brexit-eus-international-agreements/>, last accessed 15.05.2019.

of the legal commitments assumed remains untouched and thus the UK, as a party to the mixed agreements, shall remain bound by its legal commitments towards the third contracting parties, as third parties will remain legally bound towards the UK in accordance with the principle of *pacta sunt servanda*.<sup>40</sup>

As the Member States involve in mixed agreements alongside the EU in their own rights with full discretion as autonomous contracting State Parties and because of the nature of vertical delimitation of competences, bindingness under international law of their provisions for the withdrawing Member State as a contracting party could be regarded as a rule and their non-bindingness as an exception in order to enable it to remain a party to them after the withdrawal. That conclusion is underpinned by the fact that it is fairly difficult to separate provisions of mixed agreements and determine that the Member States are bound by certain provisions merely. Besides, such agreements might have been implemented by the combination of EU and national acts.<sup>41</sup> Additionally there would be occasions of EU only/pure agreements, such as the SEA Protocol and the First Amendment to the Espoo Convention, which supplement a previous mixed agreement<sup>42</sup> or vice versa. Moreover, the settled case law<sup>43</sup> regarding the choice of single legal basis for the purpose of concluding an agreement where the purpose and component is twofold, one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental/subsidiary/secondary/indirect in relation with the former, also applies to the mixed agreements. On which legal basis it would be fair to draw certain conclusions about implications of the withdrawal on the obligations of the withdrawing Member State: the legal basis of the main purpose/component or the legal basis which in fact would be required for the incidental/indirect purpose/component of the mixed agreement? Furthermore, to assume the partition of the mixed agreement provisions

---

<sup>40</sup> Yuliya Kaspiarovich & Nicolas Levrat, "The UK and EU Mixed Agreements after Brexit: the Case of the EEA", 24 October 2018, LERU Brexit Seminar, <https://www.europeanfutures.ed.ac.uk/article-7323>, last accessed 21.06.2019.

<sup>41</sup> There are some examples where the agreement is a Member State only agreement, but it is also implemented by EU legislation as in the case of MARPOL 73/78 (the International Convention for the Prevention of Pollution from Ships), which was not considered by the CJEU binding the EU though due to the absence of a full transfer of the powers previously exercised by the Member States to it. *Intertanko*, supra note 17, paras. 49-50; See UKELA (UK Environmental Law Association), "Brexit and Environmental Law The UK and International Environmental Law after Brexit", 2017, <https://www.ukela.org/content/doclib/320.pdf>, p. 17, last accessed 01.04.2019.

<sup>42</sup> *Ibid.*, p. 11.

<sup>43</sup> *Commission v Council*, supra note 19, para. 34.

possible, it could be determined on a case-by-case basis by the Court of Justice of the European Union (the CJEU) whose post withdrawal decisions however will no longer be binding for the withdrawing Member State. The partition would also affect the package deal conception of every agreement. To what extent such a division would be practicable arises as another matter not only to save coherence of the agreement, but also complementary and non-cumulative nature of joint participation of the EU and the Member States to mixed agreements.<sup>44</sup> Likewise, the connection between the internal and external aspects of the fields, as being also the basis of implied powers doctrine, in terms of the existence and exercise of those competences in concluding and implementing mixed agreements should not be overlooked in this determination. It is also to be taken into account the fact that whereas in the Rome Treaty, association agreements were explicitly foreseen as a category of agreements to be concluded by the Community alone and the Member States' final say was protected through unanimity, because of the political importance and pre-accession dimension they were concluded as mixed agreements, except (non-pre-accessional) association agreements concluded with Malta and Cyprus.<sup>45</sup> Lastly, natural and legal persons might also invoke their directly effective acquired rights before the courts of the withdrawing Member State post withdrawal at least on the basis of the principle of legitimate expectations. To be precise, determination of legal effect by the executive would not always be decisive and binding for the courts of the withdrawing Member State. Thus taking into consideration the rights of third parties, even acquired rights of natural and legal persons under international customary law,<sup>46</sup> and potential disputes with third parties regarding the international commitments entered by the EU with its Member States under international law strengthens the assumption that the withdrawing Member State will remain bound by its international commitments entered in such agreements. In that regard it seems odd to make free the withdrawing Member State from its international commitments assumed already in mixed agreements and think that third parties would give blind consent to such a contemplation.

---

<sup>44</sup> Neframi, *supra* note 7.

<sup>45</sup> Marc Marescau, "A Typology of Mixed Bilateral Agreements" in Christophe Hillion & Panos Koutrakos (eds.), *Mixed Agreements Revisited – The EU and its Member States in the World*, Hart Publishing, Oxford, 2010, p. 17 and 19.

<sup>46</sup> Acquired rights of natural and legal persons, especially nationals of third contracting parties, could be considered an obligation of a contracting party not to be impaired referred in Art. 43 of VCLT notwithstanding the withdrawal. See Michael Waibel, "Symposium on Treaty Exit at the Interface of Domestic and International Law Brexit and Acquired Rights" (2018) 111 *American Journal of International Law* 440.



On the other hand, although the arguments articulated regarding the successor status of the withdrawing Member State within the context of EU only/pure agreements are also valid within the context of mixed agreements, to interpret the withdrawing Member State as the full successor of the EU regarding the provisions of mixed agreements concluded by the EU would prima facie constitute a wider interpretation. Remaining a party to mixed agreements after the withdrawal does not therefore mean that the entire agreement will apply to the withdrawing Member State, but to be adjusted within the framework of wording, context, structure, purpose and object of that agreement and to be determined on a case-by-case basis dependent on the divisibility of the agreement and division of commitments entered in it.<sup>47</sup> The context of mixed agreements would also support renegotiation, since, given the nature of package deals and compromises, an element of the package was the status of the withdrawing Member State as an EU Member State.<sup>48</sup> The withdrawing Member State therefore might need to renegotiate agreements in order to renovate its relations with the third contracting parties.

Since most mixed agreements do not contain provisions on the consequences of the withdrawal of parties, entire or certain provisions of the agreement will not terminate automatically, so the consent of the third contracting parties will be needed in accordance with Art. 54 of the VCLT for the withdrawal of the Member State as a party from those agreements.<sup>49</sup> In accordance with Art. 56 VCLT where the agreement contains no provision regarding its termination the EU or the withdrawing Member State may give twelve months' notice of the withdrawal and so change of its territorial application. Art. 62 of the VCLT allows also the EU to invoke exit as a fundamental change of circumstances (*rebus sic stantibus*). Insofar as the withdrawing Member State or the EU does not follow these procedures, the withdrawing Member State would be deliberated remaining bound by the provision of mixed agreements in accordance with the deliberation given above. In other words, even in such a scenario there is nevertheless no automatic termination under international law, thus a legal instrument such as a protocol might be needed to confirm that the withdrawing Member State

---

<sup>47</sup> Robert G. Volterra, "Brexit Negotiations Series: "The Impact of Brexit on the UK's Trade with Non-EU Member States Under the EU's Mixed Free Trade Agreements"", 17 May 2017, <https://www.law.ox.ac.uk/business-law-blog/blog/2017/05/brexit-negotiations-series-impact-brexit-uk%E2%80%99s-trade-non-eu-member>, last accessed 05.05.2019; Fella, supra note 33.

<sup>48</sup> Panos Koutrakos, "Negotiating International Trade Treaties after Brexit", (2016) 41 *European Law Review* 475.

<sup>49</sup> Wessel, supra note 13.

takes over the rights and obligations it previously assumed under that agreement as an EU Member State and that it joins that agreement as a third party the fact of which makes the nature of that agreement transform from bilateral to multilateral one.<sup>50</sup>

### Conclusion

The article underlines the complexity of the legal consequences of withdrawal in the external relations of the EU and the withdrawing Member State. It is not easy to resolve all the adverse consequences of withdrawal on existing international agreements not only for the EU and the withdrawing Member State, but also for the third parties. In that regard, the process of disentanglement will be as painful as the degree/intensity of integration. The lack of precedent in EU and international law forces the Brexit process to draw its own path of forming a precedent for any subsequent withdrawals.

The article especially draws attention in that process to the significance of inevitable positions of the contracting third parties towards the presumed legal consequences of withdrawal on such agreements in ascertaining the real effects. Given the spectrum of the articulated assumptions in the literature even with the plausible justifications, it seems that not only the nature of EU competences and the agreements with their purpose, object, context and wording, but also third contracting parties' positions (consent, refusal or dialogue etc. towards continuity or replacement of existing agreements irrespective of a (no) deal scenario) towards those assumptions will be decisive for the actual legal effect of agreements following the withdrawal. The withdrawing Member State might accordingly re-negotiate entirely or partially the existing international agreements concluded by the EU alone and jointly with the Member States in order to re-establish/renovate/realign its relationship with the third contracting parties by not necessarily starting from scratch but probably from the combination of residue rights and obligations based upon their provisions remaining in force for itself.

### Bibliography

Bartels, Lorand "The UK's status in the WTO after Brexit", 2016, <https://www.peacepalacelibrary.nl/ebooks/files/407396411.pdf>.

European Commission, *Internal EU27 preparatory discussions on the framework for the future relationship: "International Agreements"*, 6 February 2018, TF50 (2018) 29 - Commission to EU 27.

---

<sup>50</sup> *Ibid.*

- European Council, *Special meeting of the European Council (Art. 50) (29 April 2017) – Guidelines*, Brussels, 29 April 2017, EUCO XT 20004/17.
- Department of Exiting the European Union, “Factsheet 8: Environmental Principles”, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/714379/180511\\_EUWB\\_Environmental\\_Protections\\_factsheet\\_10\\_May\\_18.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714379/180511_EUWB_Environmental_Protections_factsheet_10_May_18.pdf).
- Department of Exiting the European Union, “Guidance International Agreements if the UK leaves the EU without a deal”, Updated 4 April 2019, <https://www.gov.uk/government/publications/international-agreements-if-the-uk-leaves-the-eu-without-a-deal/international-agreements-if-the-uk-leaves-the-eu-without-a-deal>.
- Fella, Stefano “UK replacement of the EU's external agreements after Brexit”, House of Commons Briefing Paper, Number 8370, 23 May 2019, <file:///E:/Brexit-MixedAgreements/Fella.pdf>.
- Lazowski, Adam & Ramses A. Wessel, “The External Dimension of Withdrawal from the European Union” (2016) 60 *Revue des affaires européennes* 623.
- Neframi, Eleftheria “Brexit et les Accords Mixtes de l’Union Européenne” (2017) *Annuaire Français de Droit International* 360.
- International Law Commission, Report of the International Law Commission on the work of its twenty-sixth session, 6 May - 26 July 1974, Official Records of the General Assembly, Twenty-ninth session, Supplement No. 10, A/9610/Rev.1, [http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a\\_9610.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_9610.pdf&lang=EF).
- Kaspiarovich, Yuliya & Nicolas Levrat, “The UK and EU Mixed Agreements after Brexit: the Case of the EEA”, 24 October 2018, LERU Brexit Seminar, <https://www.europeanfutures.ed.ac.uk/article-7323>.
- Koutrakos, Panos “Negotiating International Trade Treaties after Brexit”, (2016) 41 *European Law Review* 475.
- Macrory, Richard & Joe Newbiggin, “Brexit and International Environmental Law”, the Centre for International Governance Innovation, *Brexit: The International Legal Implications*, Paper No. 8, December 2017, <https://www.cigionline.org/publications/brexit-and-international-environmental-law>.
- Marescau, Marc “A Typology of Mixed Bilateral Agreements” in Christophe Hillion & Panos Koutrakos (eds.), *Mixed Agreements Revisited – The EU and its Member States in the World*, Hart Publishing, Oxford, 2010.
- Odermatt, Jed “Brexit and International Law: Disentangling Legal Orders” (2017) 31 *Emory International Law Review* 1051.

- Robert, Loïc “Le Brexit et les accords mixtes: un exemple d’imbroglio juridique”, 13 octobre 2017, <https://brexit.hypotheses.org/1000>.
- Sacerdoti, Giorgio “The United Kingdom’s Post-Brexit Trade Regime with the European Union and the Rest of the World: Perspectives and Constraints” (2017) 20 *Journal of International Economic Law* 905.
- UKELA (UK Environmental Law Association), “Brexit and Environmental Law The UK and International Environmental Law after Brexit”, 2017, <https://www.ukela.org/content/doclib/320.pdf>.
- Van der Loo, Guillaume and Steven Blockmans, “The Impact of Brexit on the EU’s International Agreements”, CEPS Commentary, 15 July 2016, <https://www.ceps.eu/ceps-publications/impact-brexit-eus-international-agreements/>.
- Vidmar, Jure “Brexit, Democracy, and Human Rights: The Law Between Secession and Treaty Withdrawal” (2017) 35 *Wisconsin International Law Journal* 425.
- Volterra, Robert G. “Brexit Negotiations Series: “The Impact of Brexit on the UK’s Trade with Non-EU Member States Under the EU’s Mixed Free Trade Agreements”, 17 May 2017, <https://www.law.ox.ac.uk/business-law-blog/blog/2017/05/brexit-negotiations-series-impact-brexit-uk%E2%80%99s-trade-non-eu-member>.
- Waibel, Michael “Symposium on Treaty Exit at the Interface of Domestic and International Law Brexit and Acquired Rights” (2018) 111 *American Journal of International Law* 440.
- Watts, Arthur *The International Law Commission 1949-1998 The Treaties Part II*, Oxford University Press, Oxford, 1999.
- Wessel, Ramses A. “You Can Check Out Any Time You Like, But Can You Really Leave? On ‘Brexit’ and Leaving International Organizations” (2016) 13 *International Organizations Law Review* 197.
- Wessel, Ramses A. “Consequences of Brexit for International Agreements Concluded by the EU and Its Member States” (2018) 55 *Common Market Law Review* 101.

### EU Cases

- Joined Cases C-21/72 to C-24/72 *International Fruit Company and Others v Produktschap voor Groenten en Fruit* EU: C:1972:115.
- Opinion 2/91* on Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, EU:C:1993:106.

Case C-316/91 *European Parliament v Council of the European Union*  
EU:C:1994:76.

Case C-268/94 *Portuguese Republic v Council of the European Union*  
EU:C:1996:461.

Case C-308/06 *Intertanko and others* EU:C:2008:312.

Case C-301/08 *Bogiatzi* EU:C:2009:649.

Case C-377/12 *European Commission v Council of the European Union*  
EU:C:2014:1903.

Opinion of Advocate General Sharpston, *Opinion 2/15* EU:C:2016:992.

*Opinion 2/15* EU:C:2017:376.

Opinion of Advocate General Kokott, Joined Cases C-626/15 and C-659/16  
*Commission Council* EU:C:2018:362.

Case C-244/17 *European Commission v Council of the European Union*  
EU:C:2018:662.

#### **WTO Cases**

*Turkey – Textiles*, WT/DS34/R.

*Turkey – Textiles*, WT/DS34/AB/R.

