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Specific features of EU external relations law

The issue discussed in this article is the EU law in its external relationsafter the entry into force of the Treaty of Lisbon. In the law of EU in external actions there are some special features and exceptions which are found only after comparing the provisions of TEU and TFEU, and analyzing the practice of exercising EU its competences. Although the Lisbon Treaty recently expanded the scope of external exclusive EU competence, there are some exceptional moments, as in transport policy which is outside the scope of the CCP and the external competence is shared between the EU and the Member States or the Development policy which is exercised under shared competence, albeit with the caveat that the exercise of EU competence in relation to development cooperation and humanitarian aid does not pre-empt the Member States from exercising their competence. The broad scope of CFSP gives rise to the question about a borderline between the CFSP and other external policies of the EU. The title of conclusion of international agreements also has exceptional moment in area of mixed agreements which is made on the basis of the EU and Member State's joint participation.

Key words: EU law, external competence, CFSP, international agreements.

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ЕО сыртқы қатынастар құқығының ерекшеліктері

Мақалада ЕО-ң халықаралық қатынастардағы құқығының Лиссабон шартының күшке енгеннен кейінгі уақытындағы ерекшеліктері қарастырылған. ЕО құқығында өзгешеліктер мен ерекшеліктер бар, олар тек ЕО-ң негізін қалаушы екі шарт қағидаларын салыстыра отыра және ЕО құзыретін іске асыру тәжірибесін талдай келе айқындалады. Лиссабон шартының ЕО-ң сыртқы айрықша құзырет саласын кеңіткеніне қарамастан, ерекше жағдайлар әлі де бар: Көлік саясаты Ортақ сауда саясат саласынан тыс шығарылған және ЕО пен мүше мемлекеттер арасындағы бірлескен құзыреті арқылы жүзеге асады; немесе Даму саясатындағы бірлескен құзыретінің өзгешелігі, ол ЕО-ң Дамыту мақсатындағы ынтымақтастық пен гуманитарлық көмек салаларындағы құзыреті мүше мемлкеттерінің өз құзыреттерін іске асыруды тоқтатпайды деген ескертумен жүзеге асады. ОСҚС ауқымының кеңдігі үшін оның және ЕО-ң басқа сыртқы істер салалары арасындағы шекарасы туралы мәселесі туындайды. Халықаралық шарттар жасасу аясы да ерекше жағдайларға ие, аралас шарттар ЕО пен мүше мемлекеттердің бірлесіп қатысуымен жасалады.

Түйін сөздер: ЕО құқығы, сыртқы құзырет, ОСҚС, халықаралық шарттар.

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Особенности права ЕС во внешних сношениях

В данной статье рассматриваются особенности права ЕС в международных отношениях в пост-Лиссабонском периоде. В праве ЕС во внешних сношениях имеются особенности и исключения, которые выявляются только после сравнения положений ДЕС и ДФЕС, и анализа практики осуществления полномочий Европейским союзом. Не смотря на то, что Лиссабонский договор расширил сферу внешней исключительной компетенции ЕС, есть некоторые исключительные моменты: Транспортная политика, которая находится вне сферы Общей торговой политики и осуществляется совместной внешней компетентностью, распределяемой между ЕС и Государствами-членами; или осуществление совместной компетенции в Политике развития с оговоркой, что осуществление компетенции ЕС в отношении Сотрудничества в целях развития и гуманитарной помощи не пре-

дотвращает осуществления государствами-членами их компетенций. Широкая сфера применения ОВПБ вызывает вопрос о границе между ОВПБ и другими сферами внешних дел ЕС. Сфера заключения международных соглашений также имеет исключительный момент в смешанных соглашениях, которые заключатся на основе совместного участия ЕС и государств-членов.

Ключевые слова: право ЕС, внешняя компетенция, ОВПБ, международные договора.

Introduction

The EU external relations law like as general EU law is complex and has specific features. As many European scholars describe, the European foreign policy is as encompassing all non-communitarised cross-border policies of the European Union institutions plus those of the Member States [1]. The EU external relations law based on the main two documents: Treaty on EU and Treaty on the Functioning of the EU. Both treaties «have the same legal values» (Article 1(3) of the TEU). In those treaties the Union has explicitly been attributed legal personality (Article 47 of the TEU) within the limits of the competences conferred to it by the Treaties based on principle of conferral (Article 5(1) of the TEU). Therefore, within those limits, although not a states, the European Union is a subject of international law.

Pursuant to Article 1(3) of the TEU «The Union shall replace and succeed the European Community». And in accordance with international law, the succession that has taken place has had the effect of the replacement of the former European Community and the continuation of the Union by the new Union in the responsibility for international relations. The Union possesses several types of external competences. So in external relations even the EU is granted legal authority, it has along with exclusive competence also has shared competences, which is exercised by EU and Member States.

In this article the EU external relations law considered in the period after the entry into force of the Lisbon Treaty, as interesting noticed by scholars «after depillarization» [2] of the European Union. The Treaty of Lisbon marks a new stage in the development of EU law. In this regard, it makes the research of a new generation of students studying the law of EU much easier, because we deal with already have enough precisely formulated into a single mechanism of EU law in external relations.

There are some specific provisions in CFSP and in concluding the mixed agreements which based on shared competence of EU and Member States. Despite exceptional moments, the European Union being a subject of international law may act in international arena, conclude international agreements, is legally responsible according to international law, and possesses a right of legation. The purpose of this article is to describe the external competences of the EU and give expanded explanation to some exceptional moments in the EU external relations law.

EU's competence in external relations

The EU external competence is being founded on the principle of conferred powers, which means that the EU may act only when there is a legal basis for action provided in the Treaties. As ECJ stated in *ERTA* case «the community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementation the regulation». In *Kramer* case ECJ had the same view that EC's have external competence when the internal regulation's implementation need for «using» this competence. After *ERTA* and *Kramer* cases it was clear the existence of EC's external competence, however, doubts persisted whether international competence existed in the absence of either express conferral of external power or the actual adoption of common international rules. *Opinion 1/76* was the final ambitious step in this expansive articulation of the implied powers doctrine: «for the EU to have external competence in a certain field it is not necessary for it to have exercised its internal competence in that field, the very existence of such international competence is sufficient» [3].

The Union possesses several types of external competences. Exclusive competence is exercised in area of customs union, conservation of marine biological resources, common commercial policy monetary policy on the euro, competition rules for the functioning of the internal market. The first tree areas have in the past identified as areas of exclusive competence by the ECJ, in those areas the conclusion of international agreements is part and parcel of the EU's policies. Shared competences between the Union and its Member States is exercised in the areas of internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, energy, and the areas of development cooperation

and humanitarian aid. The Member States exercise their competence to the extent that the Union has not exercised its competence, the Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. And according to Title V Chapter 2 of the TEU in Common Foreign and Security Policy EU's competence is exercised according to specific provisions. When the TEU and TFEU confer an exclusive competence in a certain area, only the EU may legislate and adopt legally binding acts. Thus, in a field where the powers of the Union are exclusive, the Member States have no independent role to play on the international stage. Even when the EU has not yet exercised its exclusive competence, the Member States may not act or legislate, unless they have been so empowered by the EU, or when they are implementing EU measures that instruct them to act or legislate. However, as Henri de Waele claims «in practice, most of the external activities of the Union have so far pertained to fields in which competence was shared. Shared competences necessitate a tandem approach of the EU and the Member States with regard to the issues at stake, as well as a joint effort in the relevant multilateral forums» [4].

Although the Lisbon Treaty recently expanded the scope of external exclusive EU competence, EU exercises external competence in four broad fields of external actions and in special field of the CFSP. Four broad fields of external actions are Common commercial policy; Association, partnership, cooperation and neighborhood polices; Development, technical cooperation and humanitarian aid; external dimension of other international policy. In each of this area EU has different types of external competences. Under Article 216 (1) TFEU every policy of the EU has a potential external dimension, including fields such as social policy, environmental policy and AFSJ. This provision is like a textual formula of Article 3 (2) TFEU on EU exclusive implied powers, but it seems to refer only to the existence of external competence, not to its exclusive nature. For better describing them it was made the list below.

The Common commercial policy:

Trade in goods – exclusive competence by basis of *Opinion 1/94*, but even ECJ decided that all WTO agreements on trade in goods fell within the EU's CCP, the Member States in principle retained their competence over other modes of supplying services [5].

Trade in services – exclusive external competence, according to the Article 207(1) of TFEU), but Article 207 (4) (3) TFEU provides exceptionally for unanimity in the field of trade in cultural, audiovisual, social, educational and health services [6].

The commercial aspects of intellectual property, foreign direct investment – exclusive external competence [7];

Transport policy – shared competence between EU and Member states under Article 4(2)(g) of TFEU and remains outside the scope of CCP (Article 207 (5) TFEU);

Association agreements – shared competence, despite the fact that pursuant to the provision of Article 218 (6)(i) TFEU the Council after obtaining the consent of the European Parliament shall adopt the decision concluding the association agreements, nearly all this agreements were concluded as mixed agreements [8] (which will be discussed in the third part of this article);

The third field of EU external actions:

Development policy – shared competence, albeit with the caveat that the exercise of EU competence in relation to development cooperation and humanitarian aid does not pre-empt the Member States from exercising their competence. Certain Treaty provisions are framed in terms of the EU and Member States coordination their action in relation to development cooperation and humanitarian aid programmes [9] (according to the Article 210 of TFEU);

Economic, financial and technical cooperation with third countries – shared competence. Because even it is not included in the list of areas coming within shared competence in Article 4 (2) of TEU, the Article 4 (1) of TEU states that if an area does not come within exclusive competence or within the category where the EU is limited to supporting, coordinating or supplementing Member States action it is considered as shared competence area.

Humanitarian aid – shared competence. Because it also does not fall within the category of exclusive or shared competence as mentioned above. But it should be noted that notwithstanding inclusion within shared competence, this still leaves open the precise scope of the EU's competence in this area. It means that the EU is empowered to establish the framework within which humanitarian aid operations are to be conducted.

External dimension of other international policy:

Environmental policy – shared competence (Article 191 (4) of TFEU);

Social policy – exclusive competence. Only where there is EU legislation which could be

affected by the provisions of the international agreement (according to the provision of Article 3(2) TFEU);

Energy policy – shared competence (Article 194 TFEU);

Areas of freedom, security and justice (AFSJ) – shared competence (under Article 4 (2)(j) TFEU;

When it is discussing the competence of EU in external relations, it should be noted, that The Court of Justice possesses competence under the Article 19 of the TEU and hence as a matter of international law to ensure that «in the interpretation and application of the Treaties the law is observed». The Court therefore determines the status and scope of the legal obligations that flow from the application of Union laws and hence the legal effects deriving from the doctrine of Union law supremacy.

Specific provisions in CFSP

Foreign and security policy is governed by the special and specific procedural rules. They are set and enforced by the European Council and the Council of Europe, acting on the basis of unanimity, unless otherwise provided by special treaties and regulations. The main difference between this two bodies' authority is that European Council defines general guidelines in CFSP, whereas the Council of Europe frames and takes the decisions for defining and implementing it on the basis of the European Council's guidelines (Article 22 of the TEU).The implementation of decisions rests with the High Representative and the Member States of the EU. Functions of the European Parliament and the Commission in this area are limited to a maximum narrowed and regulations on specific issues contained in the agreements. This is highlighted by the fact that the provisions on CFSP are included in Title V of the TEU whereas all other areas of the EU's external action are laid down in Part V of the Treaty on the TFEU.

However the legal source of EU competence in CFSP is provided by the Article 2 (4) TFEU that the Union shall have competence, in accordance with the provisions of the TEU, to define and implement a common foreign and security policy, including the progressive framing of a defense policy. The nature of this EU's competence is not clear clarified whether it shared or not between EC and Member States. For the question «why Treaty drafters did not clearly define CFSP as shared with the Member States» Eeckhout argues that «one reason for this may be that shared competence is described as having a pre-emptive effect, according to the Article 2(2) TFEU in areas of shared competence, the Member States shall exercise their competence to the extent that the Union has not exercised its competence and both EU and the Member States have competence to legislate and adopt legally binding acts; but Article 24 (1) TEU excludes the adoption of legislative acts within the scope of the CFSP» [10]. Then the CFSP is not shared competence, because it is not an area of general law-making where the EU's acts have a pre-emptive effect on national competence.

The matters of the scope of CFSP competence is defined in Article 24(1) TEU as covering «all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defense policy that might lead to a common defense». However, CFSP does not cover the aspects of foreign policy that are dealt with by the TFEU, such as matters relating to trade or the environment. This TEU provision shows that the scope of CFSP is too broad and gives rise to the question about a borderline between the CFSP and other external policies of the EU. This problem even within the newly integrated EU with its single legal personality is further underscored by the improved clause governing the relationship between the two fields of EU external actions.

The Article 40 TEU now sets the CFSP on an equal footing with all other EU policies and provides that neither shall affect the other. Before adoption of the Lisbon Treaty the priority was given to the Community's powers in other external actions over the CFSP. It reinforced by ECJ in *ECOWAS* case decision, where the Court found that a measure designed to combat the proliferation of small arms and light weapons in Western Africa could not be adopted under the CFSP provisions because it equally concerned the application of the Union's competence in the field of development cooperation [11]. The EU under former Article 47 TEU had to respect the competences of the Community, whether exclusive or not, even if they had not been exercised.

Nevertheless the main difference between CFSP and EU's other external policies is the nature of their legislative instruments. Despite the fact that the adoption of legislative acts within the scope of the CFSP is excluded, the Article 25 TEU stipulates that the EU shall conduct the CFSP by defining general guidelines, adopting decisions which define actions and positions to be undertaken by the EU, or adopting decisions defining arrangements for implementation of it has been argued that CFSP instruments are best understood as «international law decisions» [12], which bear a close affinity to

EU law in that they are binding upon both Member States and the EU institutes and are adopted by the Council as the primary decision-making body.

Another specific moment in CFSP is that the ECJ has no jurisdiction with respect to its provisions. However, CFSP activities do not escape judicial supervision entirely. If a legal issue arises concerning the meaning of Article 218 of TFEU in relation to CFSP agreement, the ECJ would have jurisdiction to address it [13]. Three situations where ECJ has jurisdiction are:

Reviewing the legality of restrictive measures against natural or legal persons adopted under the CFSP provisions;

Reviewing whether a proposed agreement is compatible with the Treaties;

Monitoring compliance with Article 40 TEU to determine whether the CFSP or ordinary EU law prevails in cases where the matter is contested.

EU's authority in concluding the international agreements

The legal source of EU's authority in conclusion of international agreements are the Article 216 of TFEU which clarifies whether the EU has competence to conclude international agreements and the Article 3 (2) of TFEU where it is stated whether that competence is exclusive or not.

According to the Article 216 of the TFEU the Union may conclude agreements with one or a group of third countries or international organizations, if it is envisaged by the founding treaties or if their detention is necessary to achieve the goals envisaged by the founding treaties or other legally binding acts of the Union, and if it is necessary due to changes in content and meaning of the general rule of EU law. If an international agreement is made pursuant to Article 216 of TFEU on the ground that it is necessary to achieve a Union objective within the framework of a Union's policy, this will probably be interpreted as exclusive competence for the purpose of Article 3(2) of TFEU on the ground that the agreement is necessary to enable the EU to exercise its internal competence. However, as cited by Eeckhout analysis of Tizzano AG in his Opinion in the *Open Skies* cases, the decision on such necessity is to be taken by the competent EU institutions in accordance with Treaty procedures [14]. Nowadays in the sphere of conclusion of international treaties the Council is the main decision-maker pursuant to the Article 218 TFEU.

The first step of the procedure, negotiation of an agreement is the task of the Commission which initiates the whole process, albeit under the political leadership of the European Council. Here it should be noted that pursuant to the Article 218 (3) TFEU in the case of an agreement which relates exclusively or principally to the CFSP, the High Representative has exclusive power to recommend the opening of negotiations.

Outside the scope CFSP agreements involves the participating of European Parliament. According to the Article 218 of the TFEU, the decision concluding the agreement is adopted by the Council after obtaining the consent of the European Parliament in the following cases: association agreements, agreements on EU accession to the Council of Europe's Convention on Human Rights, agreements establishing a specific institutional framework, agreements with important budgetary implications, agreements concerning fields to which either the ordinary procedure applies or where the consent by the European Parliament is required in the case of the special legislative procedure. In other cases the Council concludes an agreement after consulting with the EP. The procedures relating to derogations or modifications of international agreements, suspension of agreements or the establishment of positions to be adopted in a body set up by an agreement do not offer any particularity. The European Parliament shall be «immediately and fully informed at all stages of the procedure» (Article 218(10) of the TFEU). Except with regard to commercial policy agreements which are negotiated and concluded in accordance with Article 207 of the TFEU, agreements are negotiated and concluded in accordance with the procedure laid down in Article 218 of the TFEU.

However there are four exceptional cases in which unanimity is required:

When the agreement covers a field for which unanimity is required for the adoption of internal rules;

When it concerns an association agreement referred to in the Article 217 TFEU;

When a cooperation agreement is concluded with a country which is officially a candidate for the accession;

Agreement on accession to the European Convention on Human Rights which will enter into force only after it has been approved by the Member States in accordance with their respective constitutional requirements.

In the title of concluding of international agreements by EU the particular position is taken by the mixed agreements, which have as contracting parties both the EU and the Member States. This kind of conclusion is made on the basis that the EU

and Member state's joint participation is required, because not all matters covered by the agreement fall exclusively within EU competence or exclusively within Member States competence. Another case when a mixed agreement could be used is where competence over the subject matter of the agreement is shared between the EU and the Member States.

The detailed typology of mixed agreements on the basis of the nature of the competence given by Rosas attracts attention. He distinguished between parallel and shared competence: parallel competence implies that the EU's participation in agreement is just like that of any other contracting party and has no direct effect on the rights and obligations of Member States, whereas the shared competence entails some division of rights and obligations contained in the agreement [15].

According to Article 216 (2) the agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. The main aim of this provision is the reducing risk that Member States' action might contribute to the international responsibility of the EU by omitting executing measures or by adopting legislation incompatible with provisions contained in agreements concluded by the EU through the application of the principle of supremacy regardless of the rank that international obligations might assume in Member States' legal orders [16].

Conclusion

The EU has is one of the most important role in the international arena and its influence does not stop to increase. The intention of Treaties drafters to make EU external relations law more systematized realm is demonstrated by including into the provisions of Treaties the preceding decisions of ECJ which relates to the Union's external competence. Nonetheless the wide scope for external actions goes on to be with exceptional reservations. The existing of shared competence in some areas of external policies and adopting the adding Declaration to the Lisbon Treaty which mentions the CFSP none affection to the responsibilities of the Member States show the reluctance of Member States to give to the EU sheer legal authority. In a field where the powers of the Union are exclusive, the Member States have no independent role to play on the international stage. Even when the EU has not yet exercised its exclusive competence, the Member States may not act or legislate, unless they have been so empowered by the EU. However, in the history of adopting agreements on association there was only practice of exercising shared competence. Despite the fact that the Union may conclude agreements with one or a group of third countries or international organizations and agreements may be concluded if it is necessary to achieve the objectives of the EU, the mixity will continue to be possible even in respect of areas in which the TFEU declares that the Union has exclusive competence but which are not entirely covered by this competence. The facts described above has proved that the internal political terms define the EU external relations law and that it will be very difficult for the Union's external action to step to the stage of the strong common foreign policy.

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