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Understanding the Principle of Sincere Cooperation Concerning the Ratification of Mixed Agreements: Obligation of Conduct, Obligation of Abstention and Obligation of Result**

“The chief difficulty Alice found at first was in managing her flamingo [...] besides all this, there was generally a ridge or furrow in the way wherever she wanted to send the hedgehog to, and, as the doubled-up soldiers were always getting up and walking off to other parts of the ground, Alice soon came to the conclusion that it was a very difficult game indeed.”

Lewis Carroll: Alice’s Adventures in Wonderland

ABSTRACT

Mixed agreements represent cooperation between the European Union and its member states in order to conclude more ambitious international agreements. However, these agreements are in the middle of the debates concerning EU external relations law. It is also true that some areas regarding these agreements are still underexplored, for instance, the question of ratification of these agreements. Most articles concerning this topic do not give a detailed and structured explanation about the obligations originating from sincere cooperation. However, this question is quite relevant as a possible non-ratification of a mixed agreement by a member state generates different problems. The main aim of the study is to offer this structured understanding relying on a slightly more expansive interpretation of the principle. In this case, the paper examines the concepts of the obligation of conduct, the obligation of abstention, and the obligation of result. The article highlights the different aspects of these obligations and some of the challenges the EU law and the principle of sincere cooperation face regarding the ratification of mixed agreements.

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KEYWORDS: European Union, EU law, EU external relations law, mixed agreements, sincere cooperation, loyalty, ratification

I. INTRODUCTION

Mixed agreements have existed since the external relations of the EU were established. These agreements are concluded by the EU and the member states on one side and at least one third party (a third country or an international organization) on the other,¹ therefore the member states play a significant part in these agreements. The status of the principle of sincere cooperation is particularly important related to mixed agreements, as it is the principle which generated “some of the strongest ‘ties that bind’ the Member States within the EU”.² Sincere cooperation is the principle that tries to connect and, in some cases, to balance Union and member state interests.³ In some cases, the content of this role is not particularly clear, such as regarding ratification.

Some examination appears in the literature about this phase but the length and amount of details is not satisfactory. Therefore, the research aims to examine the nature and content of obligations coming from the principle of sincere cooperation concerning the ratification of mixed agreements. To understand this, the article first examines the appearance of the principle of sincere cooperation in this field, especially in the different phases of the conclusion of mixed agreements. Second, the study focuses on the ratification phase. It concentrates on the interpretational problems of the case-law of the CJEU to highlight the problems concerning obligations. Finally, the paper investigates the nature of obligations for member states to ratify mixed agreements. In that case, the obligation of conduct, the obligation of abstention and the obligation of result need to be examined separately to give a structured answer to the question. All three categories appear in some way when the authors ask the same question. They can overlap but this shows the interconnected nature of these obligations.

Regarding the methodology, a dogmatic methodological approach is used concerning the case-law of the CJEU and scholars’ different theoretical approaches to mixed agreements. A more terminological approach is also utilised to give some clarity to the topic when it is necessary.

¹ M. Maresceau, A Typology of Mixed Bilateral Agreements, in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World*, (Hart Publishing, Oxford, 2010) 12.

² M. Klamert, *The Principle of Loyalty in EU Law*, (Oxford University Press, Oxford, 2014) 10. <https://doi.org/10.1093/acprof:oso/9780199683123.001.0001>

³ F. Casolari, EU Loyalty and the Protection of Member States’ National Interests, in M. Varju, *Between Compliance and Particularism – Member State Interests and European Union Law*, (Springer, Switzerland, 2019) 73. https://doi.org/10.1007/978-3-030-05782-4_3

II. SINCERE COOPERATION AND THE DUTY OF COOPERATION IN EU EXTERNAL RELATIONS LAW

1. The difference between sincere cooperation and the duty of cooperation

a) The identification of sincere cooperation

Sincere cooperation is unique and contradictory. On the one hand, sincere cooperation is a manifestation of the principle of *pacta sunt servanda*, the German federal fidelity (*Bundestreue*) between the Federation and the “Länder”, and among the institutions (*Organstreue*). As AG Mazák states, it functions as an enhanced obligation of good faith.⁴ Currently, Article 4(3) Treaty on European Union (TEU) contains the concept of sincere cooperation in the Treaties. It includes 1. that the Union and the member states assist each other in carrying out tasks under the Treaties; 2. the member states must take all appropriate measures to ensure the fulfilment of EU law; and 3. member states “must facilitate the achievement of the Union’s tasks” and refrain from measures which can jeopardise the objectives. The wording clearly expects a form of active conduct from the member states, and negative obligations as well.⁵

Sincere cooperation has already been incorporated in the Treaty establishing the ECSC.⁶ It is not surprising, because the essence of the legal order established by the integration is based on voluntary obedience, which seems to be quite essential for the Union from the start, even in the case of its “predecessors”. Since then, the scope and weight of sincere cooperation have grown within the EU legal order. Nowadays, it is safe to say that this principle is one of the foundations of the Union’s legal order and “the basis for the functioning of the entire integration project”.⁷ Although the common foreign and security policy in EU law is considered to be a separate legal regime, which differs from other fields of EU law in the fundamentals, loyalty found its place in there as well.⁸

It has several aspects within EU law. First, it functions as a legal principle that is used to fill the lacunae of EU law and it provides guidance concerning the interpretation of the law. In this case, sincere cooperation works purely as a legal principle of Union

⁴ M. Klamert, Article 3-5, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights*, (Oxford University Press, Oxford, 2019) 46.

⁵ Article 4(3) TEU.

⁶ Klamert, Article 3-5, 10.

⁷ H.-J. Blanke, Article 4. The Relations Between the EU and the Member States, in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on European Union (TEU) – A Commentary*, (Springer-Verlag, Berlin and Heidelberg, 2013) 232. https://doi.org/10.1007/978-3-642-31706-4_5

⁸ G. Kajtár, A kettős pillérszerkezet megerősített kontúrjai a Lisszaboni Szerződés hatálybalépése után, (2010) 10 (4) *Európai Jog*, 3–14., 3.; Article 24(3) TEU.

law.⁹ Second, it functions as a subsidiary provision compared to other more specific, “loyalty-oriented” obligations of EU law. Such provisions include the duty of mutual recognition in the common market or the duty to implement directives. In this case, sincere cooperation works as a corollary to the other, more concrete obligations established in the Treaties or the secondary law of the Union.¹⁰ Third, it operates as a complementary tool to amplify the scope of other provisions of EU law. Regarding this approach, the Court has used sincere cooperation related to Article 101 Treaty on the Functioning of the European Union (TFEU) to state that member states cannot introduce or maintain measures in force that could make the competition rules for undertakings ineffective.¹¹

b) The identification of the duty of cooperation

Finally, sincere cooperation functions as an independent source of obligations which can be summarised as mostly a specific kind of duty. Usually, this obligation is called the duty of cooperation. It must be noted that there is a problem with the clarity and consistency of the terminology. Some scholars use “duty of cooperation”, the “obligation of cooperation” and “principle of sincere cooperation” as synonyms.¹² However, specifically considering the duty of cooperation as a subcategory of sincere cooperation is a widespread approach. Others try to categorise the duty of cooperation as a form of “collaboration” and the opposite of active “interaction” between legal systems and actors. It can be underlined however that such a classification can be problematic, because cooperation needs active participation in some cases.¹³

Nevertheless, it can be concluded that the duty of cooperation is a narrower concept than the principle of sincere cooperation itself. Furthermore, Klamert makes a distinction between further subcategories within this duty of cooperation, namely the duty of coordination the duty of consideration, and the duty of abstention.¹⁴ Concerning the duty of coordination, it focuses on the duties of information, notification, and consultation: a tremendous number of examples can be found in secondary law, mostly related to the internal market. The purpose of this obligation is to eliminate all the obstacles to the appropriate functioning of the common market, mostly with the due notification of national provisions to the Commission. Concerning the duty of consideration, it focuses on the transposition and the national application of directives.

⁹ Klamert, Article 3-5, 47.

¹⁰ E. Neframi, The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations, (2010) 47 (2) *CMLRev*, 324–325. <https://doi.org/10.54648/COLA2010017>

¹¹ Klamert, *The Principle of Loyalty in EU Law*, 276.

¹² C. Hillion and M. Chamon, Facultative Mixity and Sincere Cooperation, in M. Chamon and I. Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity*, (Brill and Nijhoff, Leiden, 2020) 86. https://doi.org/10.1163/9789004421981_006

¹³ Klamert, *The Principle of Loyalty in EU Law*, 33.

¹⁴ *Ibid.*

With regard to this subcategory of duty, the Court specifically stated that member states shall submit their concerns about implementation to the appropriate institution for consideration in good time.¹⁵ The duty of abstention focuses on the prohibition for the member states to take national measures or act in the international arena contrary to EU law.¹⁶

It can be understood that the duty of cooperation has a very diverse nature and it has an active and a passive side too. It is also important to highlight that this duty works not only internally but externally as well. To be more precise, the duty of cooperation originally emerged from EU external relations law.

2. Sincere cooperation and the duty of cooperation in EU external relations law

a) Sincere cooperation

Sincere cooperation appears in the EU external relations as a duty to act in the interest of the Union. This principle can generate more obligations for the member states (and Union institutions) as well. First, it can be an obligation to achieve a result that acts in the Union's interest. Second, it can also generate an obligation of conduct when the member states have to act to ensure the effective implementation of EU law or cooperate in order to guarantee the achievement of the Union interests. It can also be said that there is a duty of abstention, where the states refrain from jeopardising the Union's interests.¹⁷ These aspects represent the general approach codified in Article 4(3) TEU.

Regarding the principle of sincere cooperation, the Court also put in a lot of effort to find the place of the principle in the EU external relations. It relied on sincere cooperation concerning international agreements. Among others, it combined sincere cooperation with the provisions concerning transport policy when it formulated the ERTA doctrine. The Court specifically stated that it is not in accordance with this principle if member states exercise their external competences when this "might affect [the rules of the Union] or alter their scope".¹⁸ This became a principal approach for the Court in its later case-law.¹⁹

Sincere cooperation appears in cases concerning the membership of member states in international organizations. According to the Court, member states can act

¹⁵ Judgment of 4 July 1996, *Greece v Commission (Clearance of EAGGF accounts)*, C-50/94, para 39.

¹⁶ Klamert, *The Principle of Loyalty in EU Law*, 33., 101.

¹⁷ P. van Elsuwege, *The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations*, in M. Varju, *Between Compliance and Particularism – Member State Interests and European Union Law*, (Springer, Switzerland, 2019) 283–298. https://doi.org/10.1007/978-3-030-05782-4_13

¹⁸ Judgment of 31 March 1971, *European Commission v. Council (ERTA)*, C-22/70, paras 20–22.

¹⁹ Klamert, *The Principle of Loyalty in EU Law*, 75.

unilaterally concerning exclusive competences in an international organisation when the Union permits them to do so. The fact that there is no common Union position concerning that specific question is not enough. Even a breach of this obligation by the Commission does not allow the member states to adopt unilateral measures that are inconsistent with their obligations originating from EU law.²⁰

Furthermore, sincere cooperation seems important with regard to negotiations between member states as well. Luxembourg and Germany started negotiations with Central and Eastern European states on inland waterway agreements. Following the opening of negotiations but before the ratification of the conventions, the Commission became entitled to negotiate the conclusion of such a convention. The Court not only referred to the principle of sincere cooperation in this context, but also the duty of cooperation.²¹

b) The duty of cooperation

Some of the concepts must be clarified here to avoid inconsistency concerning the terminology. The Court stressed in its case law that the member states and the EU have a duty to cooperate closely, in which member states' actions shall not hinder the actions of the Union.²² Furthermore, the Court also notes that the duty of cooperation is a specific obligation originated from the principle of sincere cooperation. On the other hand, the Court also stated that such an obligation is the result of the "requirement of unity" concerning the international representation of the EU.²³ According to Neframi, this statement is not surprising. Article 3(5) TEU stresses the role of the EU in the world and contains the guidelines for external action. According to the provision, the Union shall "uphold and promote its values and interests" and "shall contribute" to certain goals in the international order. These objectives cannot be achieved without the EU being able to act in an autonomous manner. A member state action which endangers the requirement of unity can undermine the effectiveness and credibility of the Union on the international stage.²⁴ As it is an objective of the Union, the requirement of unity cannot be interpreted as a general principle of law, rather an explicit phrase regarding a specific Union interest. To achieve this, sincerity of cooperation and, more specifically, the duty of cooperation is needed. Using Klamert's approach, an interrelationship with the requirement of unity can be identified. The intensity of the obligation depends

²⁰ Ibid. 198.

²¹ Judgment of 2 June 2005, *European Commission v Luxembourg (Inland Waterway)*, C-266/03; Judgment of 14 July 2005, *European Commission v Germany (Inland Waterway)*, C-433/03.

²² van Elsuwege, *The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations*, 290.

²³ 19 March 1993, *Opinion 2/91 ILO Convention N°170*, para 36.

²⁴ Neframi, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, 352–353.

on the complexity of the international agreement and the complexity of the competence question concerning that agreement. This shows that the more complex and crystallised a legal obligation, the stronger the obligation stemming from the duty of cooperation.²⁵

3. Sincere cooperation and the duty of cooperation regarding mixed agreements

The question arises of how sincere cooperation and the duty of cooperation emerge in the case of mixed agreements. In general, mixed agreements need very close collaboration between the member states and the Union. Hillion and Chamon, and Klamert stress the importance of the duty of cooperation during the whole procedure.²⁶

Its importance appears even when the choice of mixity is in question. First of all, it makes the member states themselves abstain from choosing mixed agreements if the agreement concerns EU-only elements. This comes from the ERTA doctrine, which is partially based on the principle of sincere cooperation. In this case, such an obligation creates a duty of abstention upon member states.²⁷ Second, it also concerns the question of facultative mixity which covers those situations when the Union is not obliged to conclude an agreement as a mixed one but it decides to conclude it thus. This decision is based on a political choice.²⁸ Third, Hillion and Chamon also stress that sincere cooperation could help to preserve of the democratic principle, as national parliaments can provide further democratic oversight during the whole process.²⁹

From the practice of the Court, it is clear that sincere cooperation, and more precisely the duty of cooperation, is applied throughout the whole cycle of mixed agreements.

Concerning the negotiation of mixed agreements, the Court referred to this duty for the first time in Ruling 1/78, about a draft convention proposed by the International Atomic Energy Agency and then in Opinion 2/91. In these cases, the Court highlighted that the institutions and the member states implement the draft convention together in a close association which includes the process of negotiation. However, the duty of cooperation is not mentioned in this context.³⁰ On the other hand, the Court made it clear that it has a connection with the requirement of unity. It even specifically stated that unilateral state behaviour can compromise this unity and “weaken their negotiating

²⁵ Klamert, *The Principle of Loyalty in EU Law*, 189–192.

²⁶ Hillion and Chamon, *Facultative Mixity and Sincere Cooperation*, 88.; Klamert, *The Principle of Loyalty in EU Law*, 188–203.

²⁷ ERTA, paras 20–22.

²⁸ Opinion of AG Wahl in Opinion 3/15 (*Marrakesh Treaty*), delivered on 8 September 2016, paras 120–121.

²⁹ Hillion and Chamon, *Facultative Mixity and Sincere Cooperation*, 109–110.

³⁰ Ruling of 14 November 1978, 1/78, para 34.; See the ruling in Opinion 2/91, para 36.

power”.³¹ Considering the case law, such a duty can contain specific actions from the member states including providing information, consultation, and even adopting a common position. In addition, it includes the obligation for member states to take steps sufficiently early to eliminate the risks of conflict with the known Community actions. This specifically means a duty of conduct here. On the other hand, Hillion also highlights that the duty of cooperation does not just include a duty of conduct but also a duty of abstention. Such a function comes from the division of competences. It can also be concluded that, as the process advances, the obligations become more specific and constraining.³²

The duty of cooperation applies in the conclusion phase as well. It must be clarified that the word “conclusion” has a double meaning. On the one hand, it means the whole process concerning the international agreement, starting from the negotiations until the end of the procedure with a Council decision and/or the consent of the European Parliament. In addition, it can also mean the last act in the process, when the Council accepts a decision on the conclusion of the agreement under Article 218(6) TFEU.³³ Although the literature does not classify this as a separate phase concerning mixed agreements, it can at least be said that the duties of conduct and abstention are applied here because more actors are involved in this case. It is very similar to the phase of negotiations, so such a statement does not seem to be that far-fetched. As the procedure is within EU law and ends the process, at least the duty of cooperation applies here for the member states too.

Finally, implementation the phase must be examined separately too. In this phase, the mixed agreement has already entered into force, and binds the member states as well, under Article 216(2) TFEU, as it is part of the Union law.³⁴ The Court specifically underlined “the close association” between the member states and the Union concerning the fulfilment of the obligations they entered into.³⁵ Among the scholars, Hillion emphasises the importance of the duty of cooperation and makes classification based on the level of interdependence between member states and Union institutions. Concerning the relationship between the requirement of unity and the duty of cooperation, this seems logical. According to him, the duty of cooperation is “more imperative” when the member states and the Union exercise the competences in a very interrelated manner. Beyond that, such an imperative could not only result in an

³¹ PFOS, para 64.

³² C. Hillion, *Mixity and coherence in EU external relations: The significance of the ‘duty of cooperation’*, (2009) (2) *CLEER Working Papers*, https://www.asser.nl/upload/documents/9212009_14629cleer09-2full.pdf (Last accessed: 30 December 2021) 16.

³³ F. Erlbacher, Articles 216–219, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights*, (Oxford University Press, Oxford, 2019) 1668.

³⁴ Judgment of 28 October 1982, *Hauptzollamt Mainz v Kupferberg*, C-104/81, para 45.

³⁵ Opinion 2/91, para 36.

obligation of conduct, but also in an obligation of result.³⁶ Neframi even emphasizes the fact that, as mixed agreements bind the member states, the principle of supremacy (and potentially other relevant rules) does not just specify this duty of loyalty but also absorbs it. Therefore, if there is a breach concerning the implementation of the mixed agreements in these competences, the relevant provision is Article 216(2) TFEU and not Article 4(3) TEU.³⁷

The two authors' interpretations are therefore different. Hillion's approach is based on the interpretation that sincere cooperation can function as a corollary with other obligations established under Union law. In this case, the duty of cooperation works the same way, and the interpretation of the provisions concerning the autonomy of EU law combined with the principle of sincere cooperation/duty of cooperation can generate an obligation of result. On the other hand, Neframi's approach stresses the role of sincere cooperation as *lex generalis*. In this case, the more specific provisions within EU law can generate obligations for the member states. Concerning this issue, it is also possible to say that an obligation of result seems logical. Consequently, it can be said that an obligation of result can appear in both cases.

III. SINCERE COOPERATION AND THE DUTY OF COOPERATION, AND THE RATIFICATION OF MIXED AGREEMENTS

Although Article 218 does not mention ratifications concerning international agreements, they can be related to EU law. Mixed agreements that are signed by the Union and the member states must be approved in accordance with their constitutional procedures as well. Therefore, both the European Union and the member states become parties to it. This means that mixed agreements need the approval of national parliaments (sometimes with the approval of regional parliaments) and national referenda in certain cases for ratification by all member states.³⁸ According to the supporters of mixed agreements, ratification establishes more democratic legitimacy

³⁶ Hillion, *Mixity and coherence in EU external relations: The significance of the 'duty of cooperation'*, 19–20.; Judgment of 7 October 2004, *European Commission v France (Étang de Berre)*, C-239/03, paras 28–29.

³⁷ Neframi, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, 331–335.

³⁸ D. Kleimann and G. 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*, 23–24. <https://doi.org/10.54648/LEIE2018002>

for such agreements.³⁹ However, this issue has disadvantages as well. First, it needs quite a long time to get the consent of all the national and regional parliaments, therefore ratification can be lengthy. In addition, there are so many actors during the whole process. Consequently, it is a more significant possibility that some member states will not ratify the mixed agreement.⁴⁰

Regarding the consequences of non-ratification, mixed agreements can be classified into bilateral and multilateral mixed agreements. Such a situation is less problematic in the case of multilateral mixed agreements. In most cases, multilateral mixed agreements enter into force once there are enough signatory states that ratified that instrument. For those member states which did not ratify the agreement, it does not enter into force. However, it is possible for them to join the mixed agreement later. Such a mixed agreement is incomplete.⁴¹ In the case of bilateral mixed agreements, it has more serious consequences. Such agreements usually include a clause stating that it enters into force if all the contracting parties have completed their constitutional procedures and ratified it.⁴² Consequently, if a member state does not ratify the agreement, it does not enter into force even though the EU and the other member states completed their necessary procedures for the mixed agreement to enter into force. Consequently, the Union cannot practice its competences. In this case, it does not matter that the agreement contains provisions that stress EU exclusive competences. It has to be underlined that there is no legal effect externally until the member state has notified the other parties of the fact of non-ratification.⁴³

1. The interpretational oddities of the Court's case law

It is very hard to tackle this issue in the case-law of the Court, as it is almost silent on the matter. In Opinion 2/91, the Court briefly stated that “it is [...] for the Community institutions and the Member States to take all the measures necessary so as best to

³⁹ M. Chamon and T. Verellen, Whittling Down the Collective Interest: CETA, Facultative Mixity, Democracy and Halloumi, *Verfassungsblog*, 07.08.2020, <https://verfassungsblog.de/whittling-down-the-collective-interest/> (Last accessed: 30 December 2021).

⁴⁰ Kleimann and Kübek, The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15, 24.

⁴¹ G. Van der Loo and R. A. Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, (2017) 54 (3) *CMLRev*, 740–742. <https://doi.org/10.54648/cola2017059>

⁴² G. Van der Loo, Less is more? The role of national parliaments in the conclusion of mixed (trade) agreements?, (2018) (1) *CLEER Working Papers*, https://www.asser.nl/media/4164/cleer018-01_proof-01.pdf (Last accessed: 30 December 2021) 14.

⁴³ Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 742–743.

ensure such cooperation [...] in the procedure [...] of ratification of Convention No. 170”.⁴⁴ This points out the lacuna here, so a few comments must be made.

First, in Opinion 2/91, the Court did not specifically mention the principle of sincere cooperation. The duty of cooperation can be referred to in the case of ratification but the connection is not that clear. Second, the Court’s terminology is not consistent. When the Court refers to the duty of cooperation, it specifically refers to the “close association between the institutions of the Community and the member states [...] in the process of negotiation and conclusion”.⁴⁵ Later, the Court stresses the necessity for cooperation between the Union and the member states during the conclusion. At the end of the reasoning, the Court refers to the ratification but not to the conclusion of the agreement.⁴⁶ It seems contradictory, as the conclusion of the agreement is considered a separate act during the process concerning mixed agreements. Such a statement can even create the belief that the duty of cooperation is not applied with regard to ratification. Third, the Court’s case law is silent as to whether there is an obligation of result concerning the ratification of mixed agreements. This question is valid, as this obligation regarding the implementation of mixed agreements contributed to creating an obligation of result under certain circumstances.

Furthermore, the ratification occurs in *Commission v. Ireland* as well; however, the text mentions neither the ratification nor the duty of cooperation. In the case, the Court based its reasoning on the obligation to join the Berne Convention for the Protection of Library and Artistic Works but such an obligation came from the provisions of the EEA Agreement. The Commission started infringement proceedings based on those provisions, where the Court specifically relied on the protocols and the provisions of the agreement.⁴⁷ The Court specifically stated that the provisions of that convention concerned copyright and related rights which fall within the scope of application of the EU Treaties. Moreover, these provisions created rights and obligations which are covered by EU law. On this basis, the Court stressed that there is a Union interest here for the contracting parties (in this case, the member states) to join this convention.⁴⁸ Consequently, there is an obligation of result here but without mentioning the principle of sincere cooperation.

⁴⁴ Opinion 2/91, para 38.

⁴⁵ Ibid. para 36.

⁴⁶ Ibid. paras 37–38.

⁴⁷ Judgment of 19 March 2002, *European Commission v. Ireland*, C-13/00, ECLI:EU:C:2002:184, paras 1–10.

⁴⁸ Ibid. paras 18–19.

2. Contradictions concerning the interpretational oddities

First, the duty of cooperation is not that clear. To start with, there is some sort of obligation of conduct here. Of course, this obligation does not seem to be strong at first glance because 1. it is not necessarily connected to the principle of sincere cooperation; 2. the terminology is not very clear concerning this phase; and 3. the exact content of this term is confusing. Furthermore, there is no obligation of result based on the principle of sincere cooperation or its subcategory. On the other hand, a Union interest generated a duty of ratification of an international agreement for the member states in *Commission v. Ireland*. Interestingly, sincere cooperation and the duty of cooperation are not mentioned in that case.

Second, it is well known that, most of the time, there is no delimitation of competences concerning mixed agreements, because this enables the EU to be ambitious during the negotiations. On the other hand, the core of mixity in practice is that the agreement contains provisions that can be connected to either shared competences or Union exclusive competences. In general, if a bilateral mixed agreement is not ratified by at least one member state, the Union cannot practice its competences concerning the topic. According to Van der Loo and Wessel, exclusive competences do not enable member states to veto those provisions which fall under these competences. In addition, there are cases where the member states justify the non-ratification of a mixed agreement with arguments based on issues concerning Union exclusive competences.⁴⁹ This seems problematic, because the member states cannot influence these matters (only with the consent of the Union); only the EU can do so.⁵⁰

Third, it is clear that the Court stated that there was an obligation of result concerning a mixed agreement that approach was not based on sincere cooperation. On the other hand, one of the most essential functions of the principle of sincere cooperation is to balance the Union and the individual interests of the member states. As this particular topic is not very clear, further examination seems essential.

Fourth, the problem can also be relevant from the viewpoint of international law. It is well known that the state in public international law has the prerogative to accept that is bound by an international treaty. In the case of ratification, the state has freedom to decide about this. On the other hand, EU law authors also emphasise that member states' freedom is not absolute when they practice (or do not practice) their

⁴⁹ Van der Loo and Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 743.

⁵⁰ Chamon and Verellen, *Whittling Down the Collective Interest: CETA, Facultative Mixity, Democracy and Halloumi*.

right to accept that they are bound by mixed agreements.⁵¹ The Court did not reflect on this question either.

IV. OBLIGATIONS CONCERNING THE PRINCIPLE OF SINCERE COOPERATION

The analysis of the different phases of the concerning mixed agreements, the analysis of the Court case-law concerning the ratification, and the practice of bilateral and multilateral mixed agreement highlighted certain points related to the obligation of conduct, abstention, and result. In this case, it is advisable to look at the different branches of obligations to see the exact content.

1. The obligation of conduct

The Court's case-law specifically concerning the question of ratification is not clear regarding the principle of sincere cooperation, or more precisely, the duty of cooperation. It emphasises a duty for the member states and the institutions to cooperate each other but it does not stress the importance of the duty concerning the ratification that much. However, it can be concluded that a duty of cooperation is present in this phase related to mixed agreements.

First, the duty of cooperation covers at least an obligation of conduct.⁵² According to the practice of the Court and the literature, the duty of cooperation involves (at least) procedural obligations.⁵³ These obligations concerning the procedural rules are considered very broad, because specific member state actions can be relevant concerning such an obligation. As Hillion states, the duty is used by the Court as a basis for interpreting procedural issues, regardless of their being outside the scope of EU law.⁵⁴ Therefore, this obligation of conduct has a lot of similarities with the other phases concerning mixed agreements.

Second, it is argued the duty of cooperation is connected to the principle of sincere cooperation in this phase as well. Concerning an obligation of conduct, Van der

⁵¹ Van der Loo and Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 743–744.

⁵² Hillion, *Mixity and coherence in EU external relations: The significance of the 'duty of cooperation'*, 19.; van Elsuwege, *The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations*; *Commission v. Sweden*, (2011) AJIL, 105, N°2, 309.

⁵³ van Elsuwege, *The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations*, 289–290.

⁵⁴ Hillion, *Mixity and coherence in EU external relations: The significance of the 'duty of cooperation'*, 11.

Loo uses a general approach here, when he states that the Court underlined the existence of the duty of cooperation in this context, which correlates with the requirement of unity.⁵⁵ It is logical to say that the duty of cooperation is generally connected to the principle of sincere cooperation, as it is its subcategory. If such a duty is present in every phase concerning a mixed agreement, even in the implementation phase, it would be illogical to say it is not there in the ratification phase of. However, the statement regarding the opinion of the Court is not precise. The Court stresses the correlation between the requirement of unity and the duty of cooperation in *Opinion 2/91*,⁵⁶ but not the connection with sincere cooperation, mostly because of the confusing use of terminology. Additionally, Hillion underpins the fact that the Court transformed this existing correlation from the context of the Euratom treaty to EU law, and pointed that this correlation exists within the context of EU law too.⁵⁷

a) The content of the obligation of conduct

The obligation of conduct covers the so-called best-efforts obligation. Such an obligation includes specific actions that the actors must undertake during the process. These actions do not guarantee the success of the result, but the actors do everything in their powers during the process to fulfil their obligations.⁵⁸ It is very logical to say at this point that the best-efforts obligation (and, in this case, an obligation of conduct too) has some sort of negative side, which can cover elements concerning abstention. It can be underlined too that the best efforts obligation covers the duty to perform specific actions.⁵⁹ This obligation originates from the fact that member states had ample opportunities to express their concerns about the content and the provisions of mixed agreements from the negotiations phase until the adoption of decisions on signing and concluding the agreement.⁶⁰ According to Tovo, a best efforts obligation does not cover all the provisions of a mixed agreement, just those that fall within Union competences.⁶¹ Some comments must be made here. Sometimes national parliaments in practice decide

⁵⁵ Van der Loo and Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 743–744.

⁵⁶ *Opinion 2/91*, para 36.

⁵⁷ Hillion, *Mixity and coherence in EU external relations: The significance of the ‘duty of cooperation’*, 5.

⁵⁸ van Elsuwege, *The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations*, 293.

⁵⁹ Van der Loo and Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 745.; Hillion, *Mixity and coherence in EU external relations: The significance of the ‘duty of cooperation’*, 20.

⁶⁰ Van der Loo and Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 745.

⁶¹ C. Tovo, *Mixed Agreements in the Italian Legal Order*, in M. Chamon and I. Govaere (eds): *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity*, (Brill and Nijhoff, Leiden, 2020) 355.

on the ratification of a mixed agreement as a whole.⁶² However, it is not in accordance with EU law, as it breaches the allocation of competences.⁶³ Additionally, a member state conduct concerning the provisions related to member state competences can influence Union actions as well. It is hence advisable to apply the best-efforts obligation to all provisions of the mixed agreement.

The best-efforts obligation covers some elements. First, it contains the obligation that member states must commence the ratification procedure. If a member state does not initiate such a procedure, it breaches the best-efforts obligation. The time factor can matter. First, it is logical to say that this obligation could include a clause that the procedure should be initiated without undue delay.⁶⁴ However, it is possible not to take the delay into account if the member state has good reasons to do so.⁶⁵ Second, a certain time limit can be possible here if the Union so decides, as was mentioned regarding the practice of multilateral mixed agreements. However, Czuczai is right that such an approach would be unrealistic because it would restrict the sovereignty of a member state too much if these time limits do not take the internal affairs of certain member states into account. In addition, a lack of a parliamentary majority would be also a very weak reason for initiating infringement proceedings based on a breach of a best-efforts obligation.⁶⁶ Consequently, the consideration of a possible delay should be based on a case-by-case examination rather than a fixed time limit.

Second, the best-efforts obligation covers informing and consulting with Union institutions.⁶⁷ This duty does not change its nature, not even in the implementation phase.

Third, the question arises of the relationship between the domestic rules concerning ratification and the best-efforts obligation. It is clear that it is a member state prerogative to decide on the rules concerning the ratification of international agreements and the transformation of the obligations into domestic law. However, it is also true that the domestic rules of the member states should be in accordance with the best-efforts obligation and the domestic rules should function properly in order to carry out the ratification procedure. A dysfunctional procedure could hinder *inter alia* finishing the ratification procedure in a timely manner. For instance, if the procedure makes the ratification of mixed agreements unreasonably long in a very explicit manner, there is a clear breach of the duty of cooperation. It is important to note that the

⁶² Van der Loo, *Less is more?* 18–20.

⁶³ Judgment of 28 April 2015, *European Commission v Council*, para 47.

⁶⁴ Hillion and Chamon, *Facultative Mixity and Sincere Cooperation*, 97.

⁶⁵ Klamert, *The Principle of Loyalty in EU Law*, 202.

⁶⁶ J. Czuczai, *Mixity in Practice, Some Problems and Their (Real or Possible) Solution*, in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World*, (Hart Publishing, Oxford, 2010) 244.

⁶⁷ Van der Loo and Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 744.

existence of a referendum does not seem to be a breach of the best-efforts obligation. A referendum is an opportunity for citizens to participate in the democratic process on specific EU-related questions.⁶⁸ However, if the necessary state organs were not involved in the procedure or there was no procedure at all to ratify a mixed agreement (which is obviously a theoretical option), that would be a breach of the duty of cooperation as well. Such a situation could endanger the requirement of unity in the same manner as when the member state does not commence the necessary proceedings at all. In such a case, an internal legal problem concerning EU external relations would be externalized.⁶⁹

2. The obligation of abstention

It is not that easy to separate the obligation of abstention from the obligations of conduct and result. It has connections with both types of obligation. However, literature tends to separate an obligation of abstention, and such a duty can be applied regarding the ratification of mixed agreements as well. Concerning this phase, this obligation means that member states refrain from jeopardising the ratification of mixed agreements.⁷⁰

In this case, more subparts must be separated concerning this duty. First, the obligation of abstention can be closely connected to the obligation of conduct. The duty in this sense serves as the other side of the coin.⁷¹ If there is a best-efforts obligation on how member states should act during the ratification phase, there is also a duty regarding which actions they should not perform. Therefore, it is understandable that member states obliged to abstain from actions which could undermine the ability of the EU to be a strong and united actor in international relations.⁷²

Second, another aspect of the duty of abstention can be mentioned here, which focuses specifically on the division of competences. As an example, a certain type of *ultra vires* decision must be mentioned here related to the duty of abstention. It is highly problematic when a member state justifies the non-ratification of a member state with an argument concerning EU exclusive competences. The breach here is at least twofold. First, it is clear that such a decision by a national parliament breaches the principle of conferral. It is a rather serious breach, as there are other methods to settle such a problem. For instance, the state can directly try to solve it within the system of the

⁶⁸ T. Lock, Articles 10-12, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights*, (Oxford University Press, Oxford, 2019) 111.

⁶⁹ L. A. Campo, Case-620/16 (OTIF) – Why EU-external relation debates should remain EU-internal, *European Law Blog*, 15.05.2019, <https://europeanlawblog.eu/2019/05/15/case-c-620-16-otif-why-eu-external-relation-debates-should-remain-eu-internal/> (Last accessed: 30 December 2021).

⁷⁰ Hillion, Mixity and coherence in EU external relations: The significance of the ‘duty of cooperation’, 18.

⁷¹ Van der Loo, Less is more? 18–19.

⁷² Klamert, *The Principle of Loyalty in EU Law*, 191.

European Union, through its representation.⁷³ It must be mentioned however that the lack of delimitation of competences does not help to solve such a problem either. In addition, the member state does not fulfil the best-efforts obligation in this case. The state should refrain from such acts during the procedure concerning the ratification. Furthermore, the lack of consultation and information can be mentioned here as a further breach of an obligation of conduct.

Finally, another aspect related to the division of competences can be mentioned here. It can be argued that if a member state does not ratify a bilateral mixed agreement, the Union cannot practice its competences.⁷⁴ It can be underlined that the member states should not veto the application of those provisions that belong to Union competences. There are some comments which can be important. It must be underlined that there is no delimitation of competences in these cases, and this keeps the dynamic character of a mixed agreement in place.⁷⁵ Although it is understandable that the allocation of competences is essential, it is hard to argue in favour of an expansive interpretation of Union law if there is no delimitation of competences in the first case. It is very hard to find a clear obligation here. This approach is not convincing because of two reasons. First, there is no delimitation of competences, consequently, it is hard to find a breach of the principle of conferral here. Second, this would neglect the dynamic nature of the mixed agreement.

3. The obligation of result?

In this context, a possible obligation of result means the obligation to ratify a mixed agreement in which the outcome is the ratification itself. A principle of international law, the free consent must be taken into account. This principle states that the member states are free to express that they are bound by an international agreement. This originates from the sovereignty and the equality of states,⁷⁶ and it is also expressed in the preamble of the Vienna Convention on the Law of Treaties.⁷⁷ It is well said that the member states are not “mere appendage of the European Union” but sovereign

⁷³ Chamon and Verellen, *Whittling Down the Collective Interest: CETA, Facultative Mixity, Democracy and Halloumi*.

⁷⁴ Kleimann and Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15*, 23.

⁷⁵ Van der Loo and Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 752–758.

⁷⁶ M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Martinus Nijhoff, The Netherlands, 2009) 48. <https://doi.org/10.1163/ej.9789004168046.i-1058>

⁷⁷ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155. 331., Preamble.

parties;⁷⁸ therefore their positions matter concerning such conduct. This free consent is a right that is also an embodiment of the principle of good faith. Concerning an obligation of result in the case of possible ratification, authors deny that the principle of sincere cooperation, or more precisely the duty of cooperation, would generate an obligation of result in this case.⁷⁹ Furthermore, it is also stressed that the unity of external representation is not enough to give such a strong Union interest-oriented base for a general and unconditional duty of obligation.⁸⁰ Advocate General Hogan supports such a conclusion and further agrees that this would breach the principle of conferral.⁸¹ Two comments must be stressed here. First, it is not exactly true that there is no duty of ratification of an international agreement concerning Union law. In *Commission v. Ireland*, the Court stressed the problem that the member state did not adhere to an international convention, an obligation formed in the EEA Agreement, in a mixed agreement. In this case, there is a duty to ratify an agreement coming from an international agreement and the Court stressed this obligation in the context of EU law. Second, it can be deduced from this case that the obligation came from a strong Union interest which concerned the question of free consent. Concerning these questions, the question of the Union interest must be mentioned here.

a) The question of strong Union interest

Concerning the implementation phase, it was argued that there was a strong Union interest, namely the principle of supremacy, which was supported by the duty of cooperation from and between member states. The same argument about a strong Union interest appears from Klamert, related to the ratification of mixed agreements. As he states, “[t]he stronger and more specific such interest is, the stronger will be the obligation imposed on the Member States.”⁸² On the other hand, he does not mention an obligation of result in this context. On the other hand, the question still arises whether a very strong and specific Union interest combined with the duty of cooperation can generate not just an obligation of conduct regarding ratification but an obligation of result as well. In this case, it must be mentioned that I do not wish to establish a hierarchical relationship between the obligations of conduct and result. On the other hand, an obligation of result seems to be a stricter obligation concerning ratification from a member state viewpoint than an obligation of conduct, simply because the member states must achieve a certain result with very little regard to the circumstances in the first case.

⁷⁸ Opinion of AG Sharpston in Opinion 2/15. (*Singapore FTA*), delivered on 21 December 2016, para 77.

⁷⁹ Van der Loo, *Less is more?* 22.; Hillion and Chamon, *Facultative Mixity and Sincere Cooperation*, 99.

⁸⁰ Hillion and Chamon, *Facultative Mixity and Sincere Cooperation*, 203.

⁸¹ Opinion of AG Hogan in Opinion 1/19. (*Istanbul Convention*), ECLI:EU:C:2021:198, delivered on 11 March 2021, paras 203–204.

⁸² Klamert, *The Principle of Loyalty in EU Law*, 202.

In this case, I do not wish to give a precise definition of “Union interest”, or even “strong Union interest”. In general, even the science of international relations does not have a definition for “interest” based on consensus that specifically focuses on these questions.⁸³ There are however some attributes of these interests within EU law. Union interest is not just the collective interest of the member states but it also represents the autonomy of the European Union, which has already been used in different fields of EU law.⁸⁴ The founding Treaties refer to several types of Union interests (“interests of the European Union”, “fundamental interests”, “general interest” and “strategic interests”) but none of them is defined.⁸⁵ It is also true that Union interest is the basis of sincere cooperation. Even Article 4(3) states that member states facilitate the Union’s “objectives”. The main function of that loyalty is to prevent conflict rather than preclude member state actions, but it is also possible to generate stronger obligations for the member states,⁸⁶ which can manifest certain Union interests. As Klamert underlines, it depends on how concrete and mature, in a legal sense, the expression of Union interest is.⁸⁷ It means that if there is a very clear and strong Union interest based on a very detailed and concrete Union obligation, it can generate very strong obligations.⁸⁸

It can be concluded that the duty of cooperation combined with a very strong Union interest can be a basis for such a duty, and therefore an obligation of result. On the other hand, it must be underlined that such interest has to be extremely strong and legally crystallised to counterweigh the principle of free consent. However, such a possibility seems to be only theoretical now, because there is no test or standard which could give some guidance in this field. This should be the task for the Court in the future, or a possible Treaty reform. However, the involvement of the member states is essential for understanding the nature of Union interest.

V. CONCLUSION

The study separated three different types of obligations: the obligation of conduct, the obligation of abstention, and the obligation of result. Although these categories seem to overlap, it was necessary to form a structured understanding of the phases of

⁸³ B. Horváthy, The Concept of ‘Union Interest’ in EU External Trade Law, (2014) 55 (3) *Acta Juridica Hungarica*, 263. <https://doi.org/10.1163/ej.9789004168046.i-1058>

⁸⁴ M. Cremona, Defending the Community Interest: The Duties of Cooperation and Compliance, in M. Cremona and B. De Witte, *EU Foreign Relations Law – Constitutional Fundamentals*, (Hart Publishing, Oxford and Portland, Oregon, 2008) 127.

⁸⁵ Horváthy, The Concept of ‘Union Interest’ in EU External Trade Law, 263–264.

⁸⁶ Cremona, Defending the Community Interest: The Duties of Cooperation and Compliance, 130.

⁸⁷ Klamert, *The Principle of Loyalty in EU Law*, 123.

⁸⁸ *Ibid.*

ratification. This approach also allowed the possibility for an expansive interpretation in this case to be explored.

Regarding the obligation of conduct, the best-efforts obligation is formulated by the literature, which observes that ratification must be commenced by each member state and should be done without undue delay. In addition, it covers the duty of information and consultation. However, another specificity can be identified, namely that the domestic procedure should be properly established and the relevant national organs should be involved in the ratification.

Regarding the obligation of abstention, it is mostly the other side of the coin of the obligation of conduct. In addition, the member states should abstain from stating reasons for a (possible) non-ratification if those reasons are under Union competences. Combining with the duties coming from the conduct side, these problems can be tackled by the duty of cooperation.

Regarding the obligation of result, it must however be understood that member states have accepted obligations coming from Union law as well. As the principle of sincere cooperation and the principle of free consent come from good faith, some consensus should be found here. A possible path is the identification of a strong Union interest. The biggest problem is that the concept of Union interest is underdeveloped in EU law. This is a task for the CJEU in the future to give content to that expression. The whole situation looks like the croquet field from *Alice in Wonderland*. Both the EU and the member states try to use their flamingos to hit the hedgehogs but it is hard to manage. It is a very difficult game indeed.