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Mixed Agreements in the Italian Legal Order

Carlo Tovo

1. Mixity: Continuing Relevance and Emerging Democratic Needs

Mixity is a pragmatic solution to broaden the scope of both the EU external action and the international agreements concluded by the Union. In fact, mixity allows negotiations to be conducted and agreements to be concluded by a single EU-party in field not (or not yet) preempted by Union acts. However, as noted by Rosas in this volume, mixity also generates negative 'legal externalities' or 'problems', ranging from an increase in the time and resources required to negotiate the text of an agreement on which consensus may be reached by the EU and all the Member States, to the risk of non-ratification by one or more of the Member States.

Various solutions have been proposed to reduce these externalities. Among these stands out the Commission's proposal to exclude from the scope of the new-generation free trade agreements negotiated by the EU (EUFTAS), which represent a significant and growing share of the Union's mixed agreements, the provisions related to investment protection and dispute settlement. As discussed by Kübek and Van Damme, EUFTAS would only cover EU exclusive competence and therefore be concluded as "EU-only" agreements, while the Union will negotiate separate mixed investment agreements.[1] However, not only this proposal is limited in scope to agreements concluded in the framework of the CCP, but the Council has also already reaffirmed that the decision to split trade agreements will be taken on a case-by-case basis and will essentially be based on political rather than legal grounds.[2]

Provided that the risk of non-ratification is minimized, the political reasons for mixity still outweigh the legal reasons against, both at the EU and national level.[3] As a result, it appears that mixity will remain an essential legal tool for the conduct of EU external relations.

Yet, the near derailment of the Comprehensive Economic and Trade Agreement with Canada (CETA), clearly shows that present-day mixity will require the Union and its Member States to strike a balance between, on the one hand, the need for coherence and effectiveness in the conduct of international relations and, on the other hand, the emerging demand for transparency, democratic participation and control at both the European and the national level.

It is precisely in this respect that, as this chapter will show by examining the various stages of the life of EU mixed agreements, the Italian practice could offer some guidance to the other Member States.

[1] See European Commission, 'A Balanced and Progressive Trade Policy to Harness Globalisation', COM(2017) 492 final, p. 6. This proposal is reflected in the Commission recommendations for Council decisions authorising the opening of negotiations for a Free Trade Agreement with New Zealand (COM(2017)469 final) and Australia (COM(2017) 472 final).

[2] See Council of the European Union, Conclusions on the negotiation and conclusion of EU trade agreements, Doc. 9120/18. See also section 5 of the chapter by Kübek & Van Damme.

[3] See, as to both reasons, the reflections developed by Rosas in this volume.

2. The Choice of Mixity: Legal and Political Preference for EU Exclusivity

The Italian position vis-à-vis mixity in EU external relations has been so far rather peculiar if compared with that of the other Member States. Where international agreements negotiated by the Union covered exclusive and shared internal competences, Italy has repeatedly pleaded in favour of concluding them in the EU-only rather than mixed form.

This has emerged both in the negotiations of mixed agreements and in the subsequent litigation before the European Court of Justice. The observations submitted by the Italian government to the ECJ in Opinion 1/03 on the Lugano Convention,[4] advocating in favour of the supervening exclusive competence of the then Community to conclude the Convention,[5] and the Italian position in the Council on the competence to conclude CETA are cases in point.

From a strictly legal perspective, the Italian position appears to be founded on an extensive reading of the *ERTA* doctrine,[6] now codified under Article 3(2) TFEU. More particularly, the Italian government has so far seemed inclined to adopt a broad interpretation of the notion of 'common rules' which may be affected or the scope of which may be altered by international agreements,[7] thus reducing the scope for facultative mixity. This, in turn, reflects an extensive interpretation of the pre-emption principle, close to field pre-emption, which goes far beyond the limits laid down by the new Protocol No 25.[8] Although one should be very cautious in extending by analogy the position expressed in relation to the Lugano Convention to other more political agreements, there are no indications that the Italian legal approach to mixity has evolved significantly.

Clearly, the Italian executive's preference for EU-only agreements does not only reflect legal considerations but, much like those of the other Member States for mixity, is influenced by reasons of domestic and international politics. As for the latter reasons, the letter sent by the then Minister for Economic Development to the European Commissioner for Trade, lending Italy's support to the Commission on its (initial) proposal to conclude CETA as an EU-only agreement,[9] is a very good example in this respect. Indeed, the letter clarifies that the Italian support to this proposal was the result of both a technical and political assessment, but was essentially dictated by reasons of 'mercantilist expediency'. CETA was regarded as a milestone agreement; its conclusion as an EU-only agreement would thus have ensured a more rapid entry into force and would have avoided the risk of possible non-ratification, which was perceived

[4] See Opinion 1/03 *re the Lugano Convention*, EU:C:2006:81.

[5] *Ibid*., paras 56 and 61.

[6] Based on the Case 22/70, *Commission v. Council*, EU:C:1971:32; see, *inter alia*, as to the scope and evolution of the *ERTA* doctrine, in particular after the Lisbon Treaty, Merijn Chamon, 'Implied exclusive powers in the ECJ's post-Lisbon jurisprudence: The continued development of the ERTA doctrine', (2018) 55 *CMLRev.* 4, pp. 1101–1141.

[7] In the case of the Lugano Convention, the Italian government has held that, to the extent to which the Community established a comprehensive and autonomous legal system in respect of the jurisdiction, recognition and enforcement of civil and commercial judgments, the competence to conclude international agreements in this area lied exclusively with it, regardless of the absence of any harmonization of the relevant *substantive* national rules; see Opinion 1/03 *re the Lugano Convention*, EU:C:2006:81, paras 60–61.

[8] According to Protocol No 25, "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area." On this Protocol, see also section 2 of the Chapter by Chamon and section 3.2 of the Chapter by Weiß in this Volume.

[9] Ref. Ares(2016)2484673 – 30/05/2016.

as entailing serious negative consequences for the EU trade policy and credibility as a reliable trade partner as a whole.

It could therefore be argued that, insofar as the preference for the EU-only form is made essentially dependent on a political assessment, by a given government in office, of the actual benefits of a certain agreement for the Italian commercial interests at stake, this preference could easily be changed as a result of short-term internal political dynamics. For example, it can be assumed that, in the absence of any official guidelines on the long-term national commercial policy objectives, the favor exclusivity would give way to mixity whenever the public perception of the non-trade concerns related to the proposed agreement would outweigh the economic benefits of the agreements. However, interestingly enough, this has not happened with CETA, despite the strong stance taken by Member States' parliaments, including the Italian one, in favour of both the Transatlantic Trade and Investment Partnership (TTIP) and CETA being concluded in the mixed form.[10] By the same token, this should also not be the case with other potentially mixed agreements, including others new-generation free trade agreements negotiated by the EU, that have not generated the same public concern.

What is more, regardless of any aleatory pro-trade convenience, the government has also strong domestic political incentives for adopting a supranational rather than intergovernmental reading of the vertical division of competences for concluding international agreements. One of these policy reasons, if not the main, is certainly the desire to preserve the executive primacy in the conduct of foreign relations. Indeed, as discussed below, the Italian Constitution normally requires a legislative authorization for mixed agreements to be ratified. Conversely, if the agreement is concluded in the EU-only form by the Council, the role of the Italian parliament will instead be confined to a consultative one during negotiations. Hence, by avoiding facultative mixity, the government also avoids the need to obtain the consent of the national parliament, thus depriving it of its main leverage to influence the conduct of negotiations and preserving a balance of powers which, as will be shown, is ultimately tilted towards the executive.

All in all, the governmental preference for EU supervening exclusivity seems therefore solid and substantially unchanged, although, admittedly, to date this has never materialised in an official position.

3. Executive Primacy and Parliamentary Participation in the Negotiation of Mixed Agreements

The process of negotiating and concluding an international agreement is characterized, from a national perspective, by the almost absolute primacy of the executive power over the legislative one. The most important decisions, from the starting of the negotiations to the signing of the agreement and its eventual provisional application, are in fact within the remit of the sole government, in accordance with the foreign policy exception common to the large majority of Member States' legal orders.

[10] See Conclusion of the Presidency, Conference of Speakers of the EU Parliaments, Luxembourg, 2016, para. 27.

It is against this backdrop that the law No 234/2012 on the Italian participation to the EU,[11] adopted in December 2012, has promoted a "parliamentarization" of the Italian participation in EU decision-making. This policy approach, which mirrors the parallel process of empowerment of national parliaments initiated by the Treaty of Lisbon, is essentially based on the premise that EU matters are no longer to be regarded as part of foreign policy, but should rather be considered internal affairs. As a result, the Chamber of Deputies and the Senate are now involved not only in the implementation of Union law in the Italian legal order but also in the forming of the Italian position in the EU decision-making process.

In principle, the foreign policy exception to the division of powers between the executive and legislator should therefore no longer apply as such to the EU policies and actions. In practice, though, the EU external action – including its CCP dimension – remains largely excluded from this innovation and, at least at the national level, the legislative power is still sidelined by the executive power.

Admittedly, this is largely due to Union law itself, which, insofar as the role of national executives and parliaments in the EU external action is concerned, still reflects the executive prerogative in the conduct of foreign policy, by sanctioning a strong information asymmetry in favour of the national governments. To begin with, given that the general provision governing the negotiation and conclusion of international agreements by the Union (Article 218 TFEU) is applicable to mixed agreements,[12] and taking into account that the preliminary acts adopted by the Commission and the Council pursuant to this provision do not constitute legislative acts,[13] they are not subject to the early warning mechanism laid down by Protocol No 2.[14] Not only the EU negotiating texts are exempted from the direct scrutiny of the national parliaments, but they are also classified documents and can therefore only exceptionally be accessed by members of national parliaments or the general public.[15] What is more, even if the Council

[11] Law 24 December 2012, No. 234, Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea (OJ No. 3 of 4 January 2013).

[12] As to the applicability of Article 218 TFEU procedure to mixed agreements see Case C-28/12, *Commission v. Council*, EU:C:2015:282, para. 43 ff.

[13] As the ECJ has clarified in Joined Cases C-643/15 and C-647/15, *Slovakia & Hungary v. Council*, EU:C:2017:631, paras. 62–64, "*a legal act can be classified as a legislative act of the European Union only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure*"; this is manifestly not the case of the decisions adopted on the basis of Article 218(3) and (4) TFEU, even though, according to the judgment in Case C-114/12, *Commission v. Council*, EU:C:2014:2151, para. 40, they produce legal effects as regards relations between the EU institutions and the EU and its Member States.

[14] Although, in light of its Communication on 'A Balanced and Progressive Trade Policy to Harness Globalisation' (see *supra* fn 1), the Commission now publishes both its recommendations for EUFTAs' negotiating directives and all EU negotiating proposals; see, more generally, in this respect, Ricardo Passos, 'Mixed Agreements from the Perspective of the European Parliament', in: Hillion & Koutrakos (eds), *Mixed Agreements Revisited*, Oxford, Hart Publishing, 2010, p. 291.

[15] See articles 7 and 15(3), Council Decision 2013/488 on the security rules for protecting EU classified information, OJ [2013] L 274/1 and articles 9(1) and 4(1)(a) of Regulation 1049/2001 of the European Parliament and of the Council 2001 regarding public access to European Parliament, Council and Commission documents, OJ [2001] L 145/43, in light of Case T-851/16, *Access Info Europe v. Commission*, EU:T:2018:69, paras 38–40 and Case C-350/12 P, *Council v. in't Veld*, EU:C:2014:2039, paras 51–52; see further James Organ, 'EU Citizen Participation, Openness and the European Citizens Initiative: the TTIP Legacy', (2017) 54 *CMLRev*. 6, pp. 1720–1729 and 1745.

were to accept the Commission's request to disclose negotiating directives and final texts of the agreements immediately after their adoption, this would apply only to FTAs.[16]

Interestingly enough, the law No 234/2012 has compensated this by information and consultation duties on the part of the government. On the one hand, the law imposes an obligation on the government of *ex-ante* providing information to the Parliament, which includes the transmission of preparatory documents.[17] On the other hand, the law introduces various political steering tools to which the Parliament may resort. First of all, the two chambers are entitled to address recommendations and guidelines to the government in view of the adoption of its position within the Council.[18] Secondly, the government is called upon to ensure the consistency of the Italian position in the Council with the political orientations eventually adopted by the Parliament, in accordance with a comply-or-explain approach similar to that envisaged by the Framework Agreement on relations between the European Parliament and the European Commission.[19] Lastly, a 30-day parliamentary scrutiny reservation may also be invoked for proposals pending before the Council, a faculty which is not limited to legislative proposals and can, therefore, be explored also for the various decisions the Council is due to adopt in the course of the negotiation and conclusion of mixed agreements.[20]

At present, these duties of information and consultation imposed by the national legislation on the government are however limited in scope. To begin with, there is no Parliament's right of immediate and full information throughout the course of negotiations such as that contained in Article 218(10) TFEU. Moreover, unless specifically requested by the Parliament, there is no obligation of consultation before the Council meetings. Furthermore, the Parliament is not entitled to adopt a binding negotiating mandate before a specific Council meeting and it is only for CFSP agreements that it can compel the government to oppose the adoption of a Council decision "*for vital and stated reasons of national policy*" under Article 31(2) TEU.[21] Finally, to date, the obligation to ensure the consistency of the Italian position in the Council with any Parliamentary guidelines is not matched by the follow-up tools provided for by the abovementioned Framework agreement to the benefit of the European Parliament, according to which the Commission shall take due account of its views throughout the negotiations.[22]

All in all, the participatory rights conferred on the Italian Parliament by the Law No 234/2012 are rather innovative and contribute to partially compensate the information asymmetry in favour of the national government sanctioned by EU law. However, so far, they do not substantially tilt the balance of powers in favour of the parliament, which is not in a position to set up a virtuous circle between the duty to inform and the power to ratify

[16] See European Commission, 'Trade for All – Towards a more responsible trade and investment policy', COM(2015) 497 final, p. 19. However, to date, the Council has seldomly followed the Commission request: see e.g. Council decision to publish the negotiating directives for the EU-Chile Modernised Association Agreement, 13553/17 ADD 1.

[17] Articles 4 and 6, Law No. 234/2012.

[18] *Ibid*., Article 6.

[19] Framework agreement on relations between the European Parliament and the European Commission, OJ [2010] L 304/47, paras. 23, 24 and 26.

[20] Article 10, Law No. 234/2012.

[21] Ibid., Article 12(2); however, this may occur only when both the Chamber of Deputies and the Senate adopt, by simple majority, an official guideline in this respect; moreover, once a period of thirty days has elapsed from the transmission of the proposed Council decision to the Parliament, the Government can vote in favor of the proposal even in the absence of any positive parliamentary vote.

[22] *Ibid*., Article 24(1).

international agreements comparable to that created by the European Parliament at the Union level.[23] Moreover, even if this legal gap were to be filled by means of the political dialogue and interparliamentary cooperation with the European Parliament, the question remains as to whether national parliaments, including the Italian one, would be willing to engage with day-to-day supervision of international negotiations.[24]

It can therefore be concluded that, despite the positive innovations introduced by law No 234/2012, the latter falls short of empowering the Italian parliament to effectively steering the national executive's action within the Council. This implies that in the process of the conclusion of mixed agreements, similarly to what would happen for an ordinary international agreement, the Italian parliament is essentially confronted with a *fait accompli*, that is, the executive decision to sign the agreement as approved by the Council. The parliament is therefore forced to confine itself to accepting or refusing the agreement as a whole in the course of the subsequent national ratification process, under an authorization power that, as will be shown in the next paragraph, has moreover been progressively eroded by the constitutional practice.

4. The Italian Ratification of Mixed Agreements: Theory, Evolving Practice …

Once the mixed agreement has been signed and initialed, it enters the legal limbo of national ratification processes, which precede the adoption of the Council decision on the conclusion of the agreement and its eventual entry into force. This is where the weakness of mixity is usually displayed and the majority of Member States' national parliaments, including the Italian one, should regain their lead over the respective governments, as holders of the power to incorporate the agreement in the national legal order. However, as anticipated, in reality, the ratification process is much more governmental than legislative.

It should be stated at the outset that, as anticipated, the Italian process of ratification of international treaties varies according to the content of the agreement. More particularly, under Article 80 of the Constitution of the Italian Republic,[25] a parliamentary authorization to the ratification of a treaty is required where an agreement has a political nature, requires arbitration or includes provisions on the legal settlement of disputes, entails a change of national borders, entails public expenditure, or requires the adoption of new legislation.

In these five cases, which are exhaustively listed in the Constitution, the latter sets out a composite ratification procedure that involves three powers: the legislative, the executive, and

[23] See Andrea Ott, 'The European Parliament's Role in EU Treaty-Making', (2016) 23 *MJ* 6, pp. 1013–14.

[24] Although it is apparent from the COSAC, *Twenty-third Bi-annual Report*, 2015, pp. 47 ff. and 53 ff. that the majority of national parliaments has received information on ongoing trade negotiations, it appears from the COSAC, *Twenty-sixth Bi-annual Report*, 2016, pp. 9–11 and 13–14, that there has been little or no initiative to exercise an actual oversight of negotiation, let alone to try and steer the executive conduct in the Council. See, in this respect, Kolja Raube & Jan Wouters, 'The Many Facets of Parliamentary Involvement and Interaction in EU External Relations – A Multilevel Tale', in: Jancic (ed.), *National Parliaments After the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, OUP, 2017, p. 292. On the possible legal solutions to improve the parliamentary oversight of EU international negotiations, notably in the CCP field, see Carlo Tovo, 'The role of National Parliaments in the Negotiation and Conclusion of EU Free Trade Agreements', in: Bosse-Platière & Rapoport (eds), *The Conclusion and the Implementation of EU Free Trade Agreements: Constitutional Challenges*, Cheltenham, Edward Elgar, 2019, 125-142.

[25] The official English translation of the Italian Constitution can be accessed at the following link: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last accessed 16 March 2020).

the President of the Republic. Indeed, according to Articles 80, 87(8) and 89 of the Constitution, where an international agreement falls within the abovementioned categories, the competence to ratify belongs to the President of the Republic, acting on the proposal – and under the legal and political responsibility – of the Minister for Foreign Affairs, following a Parliamentary authorization. According to Article 72(4) of the Constitution, the latter authorization is given by ordinary law adopted pursuant to the ordinary legislative procedure, which implies the discussion and vote by the competent committees and the plenary of both houses of the Parliament, the Chamber of Deputies and the Senate of the Republic.

In the alternative, where an international agreement falls outside the categories of agreements listed in Article 80 of the Constitution, there is no constitutional obligation of prior authorization by the Parliament. As a result, based on a systematic interpretation of Articles 80 and 87(8) of the Constitution that has meanwhile become a constitutional convention, these agreements are concluded in simplified form by the government acting alone.

It is worth noting that, under both scenarios, Regions and other subnational entities are not involved in the ratification process and have only a limited role in the implementation of those agreements, in so far as these agreements affect areas of competence attributed to these entities by the Constitution.

Although, at first sight, the range of agreements subject to the solemn ratification procedure is particularly wide, the scope for the legislative intervention in the ratification of international agreements has been progressively constrained in practice.

On the one hand, in the absence of any framework legislation clarifying the open-ended wording of Article 80 of the Constitution, the Italian constitutional court has interpreted this provision in a very restrictive manner. More particularly, the constitutional court has adopted a narrow reading of the elusive notion of 'political nature' of a treaty, granting the government a wide margin of discretion in choosing which agreement to submit to the parliamentary authorisation, subject to a very limited *ex-post* judicial review.[26] On the other hand, the parliamentary intervention in the ratification of international agreements has been qualified as a form of control rather than of participation to, or direction of, the executive power.[27] As a result, a constant practice of remedying the non-compliance with the obligation of prior parliamentary authorization by the adoption of *ex post facto* legislative acts of authorization has been observed.[28] A practice which is by now so well established that the Parliament would not be able to invoke a violation of its competence to authorize the ratification of an agreement under Article 80 of the Constitution by claiming that Italy's consent to be bound by the agreement is invalid in light of Article 46 of the Vienna Convention on the Law of Treaties.[29]

[26] See Angela Cossiri, 'Article 80', in: Bartole & Bin (eds), *Commentario breve alla Costituzione*, Padua, Cedam, 2008, p. 731.

[27] See, along this line, Tomaso Perassi, *La Costituzione e l'ordinamento internazionale*, Milano, Giuffrè, 1952, p. 14 and Riccardo Monaco, 'La ratifica dei trattati internazionali nel quadro costituzionale' (1968) *Rivista di diritto internazionale*, p. 641; see further Laura Lai, 'Il controllo parlamentare sul potere estero del Governo: l'autorizzazione alla ratifica dei trattati internazionali in prospettiva comparata', in: *Il Parlamento della Repubblica: organi, procedure, apparati*, Roma, Camera dei deputati, 2013, pp. 999–1088, 1004, 1012–16.

[28] The most striking example is the Charter of the United Nations, signed on 26 June 1945 in San Francisco: Italy adhered on 14 December 1955, but the parliamentary authorization and the executive order were only given retroactively by the Law No 848 of 17 August 1957.

[29] According to Article 46(1) of the VCLT "a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties

As stated above, contrary to the overall tendency to limit the procedure prescribing parliamentary authorization, EU mixed agreements will hardly be removed from the democratic control of the Italian Parliament. Indeed, even if the constitutional case-law relating to 'ordinary' international treaties were applicable as such to mixed agreements concluded by the EU, these agreements usually fall within more than one of the hypotheses listed under Article 80 of the Constitution. This applies, in particular, to EUFTAs, since they usually include provisions on the legal settlement of disputes and will likely require indirect legislative adaptations, as a consequence of the regulatory cooperation they set up.

The mixed character of an international agreement concluded by the Union has, therefore, an indirect impact on the choice of the procedure for its incorporation in the Italian legal order, ultimately strengthening the democratic legitimacy of the national ratification process and of the agreement itself.

However, other constitutional practices, notably related to the extent of and arrangement for parliamentary participation in the process of ratification, seem to apply to mixed agreements to the same extent as they apply to other international agreements. These practices all lead in the same direction of permitting a form of executive steering of the legislative process authorizing treaty ratification, to the point of transforming a formal co-decision procedure into a mere consent procedure.[30]

Firstly, the government has exclusive power of initiative in relation to laws authorizing ratification.[31] It is interesting to note that this power also extends to the essential precondition for such authorization to apply, that is, the assessment, although subject to judicial review, on the applicability of the Article 80 of the Constitution to the specific agreement at issue.[32] Secondly, concerning the life cycle of the legislative proposal put forward by the government, the constitutional court has accepted the practice of *ne varietur*, according to which the parliament can only accept of refuse *en bloc* the treaty, without imposing any parliamentary reservations.[33] The ratification is also generally qualified as an act of government, which in principle the President of the Republic may never refuse to sign, once authorized by

as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance." Conversely, if a State concludes a treaty in violation of the internal distribution of competence laid down by its Constitution, this could in principle lead to the invalidity of the treaty. Pursuant Article 46(2) VCLT, though, the manifest character of the violation is dependent upon it being "objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith". Notwithstanding the fact that Article 80 of the Italian Constitution is clearly a national rule of fundamental importance within the meaning of Article 46(1) VCLT, its violation cannot be regarded as manifest to the extent to which the violation of the legislative competence to ratify a mixed agreement is condoned by the existing constitutional practice; see, in this sense, Enzo Cannizzaro, *Diritto Internazionale*, Torino, Giappichelli, 2018, p. 154 and Benedetto Conforti, *Diritto Internazionale*, Napoli, Editoriale Scientifica, 2018, p. 87.

[30] See further, on the evolution of the constitutional practice related to parliamentary authorisation of ratification, Giuliano Vosa, 'The Role of the Italian Parliament in the Stipulation of International Treaties: Rise and Decline of the "Authorisation Model"', in: Lupo & Piccirilli (eds), *The Italian Parliament in the European Union*, Oxford, Hart Publishing, 2017, pp. 35–53 and Ettore Palazzolo, *Ordinamento costituzionale e formazione dei trattati internazionali*, Milano, Giuffrè, 2003.

[31] Cf. further Vincenzo Lippolis, *La Costituzione italiana e la formazione dei trattati internazionali*, Santarcangelo di Romagna, Maggioli 1989, p. 131.

[32] See Lai, *supra* fn 27, p. 1004.

[33] Cf. Italian constitutional court, Judgment No. 295 of 14 December 1984, IT:COST:1984:295.

Parliament.[34] Thirdly, and more significantly, the constitutional court has also admitted the possibility for the government to postpone *sine die* the production of legal effects of an international agreement after the adoption of the law authorizing its ratification, by avoiding the deposit of the ratification.[35]

The practice presented above is clearly reflected in the statistics emerging from the register of laws authorizing the ratification of international agreements, established by the Senate in 2013, from which two interesting figures emerge. On the one hand, an increasing number of international agreements is subject to ratification.[36] On the other hand, while the duration of the parliamentary process of authorization is equivalent or shorter to that of the ordinary legislative procedure, the actual entry into force of international agreements signed by Italy has repeatedly been significantly delayed, largely due to government's failure to put forward the required draft legislative act.[37]

In the case of EU mixed agreements, in particular, the average length of the ratification process has so far been approximately 30 months and, quite obviously, the more wide-ranging and politically relevant the mixed agreement to be ratified was, the longer the ratification process took.[38] While the association agreements with Ukraine, Moldova and Georgia constitute a notable exception in this respect, having been ratified only 15 months after their signing,[39] the process of ratification of CETA is still pending.[40]

The tendency presented above towards confining the parliamentary intervention in the ratification process to a mere formal approval has significant legal implications, not only for the democratic legitimacy of (mixed) agreements, but also, and more significantly, under EU law. These implications will be assessed in the next paragraph.

5 … and Their Legal Implications under the Principle of Sincere Cooperation

The constitutional practice summarized in the previous paragraph has at least two relevant consequences in light of the principle of loyal cooperation under Article 4(3) TEU, concerning the provisional application and the ratification of mixed agreements, respectively. In essence,

[34] See, along this line, Flavia Dimora, 'Article 87', in: Bartole & Bin (eds), *Commentario breve alla Costituzione*, Padua, Cedam, 2008, p. 786.

[35] See Italian constitutional court, Order No. 282 of 29 September 1983, IT:COST:1983:282.

[36] More particularly, 56% out of 47 treaties signed in 2014, 70% out of 82 agreements signed in 2015 and 77% out of 55 treaties signed in 2016 were subject to the solemn process of ratification.

[37] See further Susanna Cafaro, *La ratifica dei trattati internazionali, una prospettiva di diritto comparato – Italia*, Bruxelles, European Parliamentary Research Service, 2018, p. 35 ff.

[38] See, among the most significant examples, the laws authorizing the ratification of the EU-South Korea free trade agreement (Law No. 138/2015), the EU-Central America Association Agreement (Law No. 139/2016) and the Partnership and cooperation agreement between the EU and the Philippines (Law No. 186/216), adopted almost 5 years after the signing of the agreements, or the law authorizing the ratification of the EU-Vietnam framework agreement on comprehensive partnership and cooperation (Law No. 56/2016), adopted almost 4 years after the signing of the agreement.

[39] See Laws of 29 September 2015, No. 169, and of 7 December 2015, Nos 217 and 218, respectively.

[40] The draft bill authorizing the ratification of CETA was promptly tabled by the Gentiloni government in May 2017 (disegno di legge No. 2849) and approved by the competent parliamentary committee of the Senate, but was never discussed by the plenary and lapsed with the dissolution of the Parliament on the occasion of the 2018 general election; after the elections, the draft bill has not yet been retabled, despite the various parliamentary questions referred to the government in this respect: contrary to the previous minister of agriculture (Centinaio) the current competent minister of the newly formed centre-left coalition government (Bellanova) has announced her intention to start the process of ratification of CETA; however, it appears that the majority party (five-star movement) still opposes this move, which is moreover not expressly envisaged in the government programme.

to the extent to which, from a national law perspective, the executive is *de facto* the principal actor responsible for both the negotiation and the ratification of the international agreements, it can be argued that the duty of sincere cooperation imposed by EU law is particularly stringent, both in relation to the provisional application and to the ratification of the mixed agreement at issue.

On the one hand, as to the ratification of mixed agreements, given the almost-exclusive right of legislative initiative granted to the government, it can be considered that the latter has specific obligations under EU law in relation to the conduct and the outcome of the ratification process.[41] Firstly, the executive is under a best-effort obligation to ratify the provisions of the agreement falling within Union competences. Secondly, and in addition to that, the government can also be deemed to be under a legal obligation to start the process of ratification of the entire mixed agreement, including the provisions that are not covered by a EU competence, by presenting to the parliament the required legislative proposals accordingly.

On the other hand, insofar as the provisional application of mixed agreements is concerned, the abovementioned constitutional practice impacts on the possible consequences of a parliamentary decision not to ratify the agreement, in particular with regard to the termination of provisional application. Given the substantially unitary character of the mixed agreement and the indivisibility of the obligations stemming from it,[42] it would *prima facie* seem that any Member State, as part of the single EU contracting party, may unilaterally terminate the provisional application of the agreement eventually decided by the Council, including as a result of a parliamentary vote against the ratification of the agreement.[43] Both EU and international law, however, oppose such a conclusion. According to the former, in particular, any unilateral termination would lead to a breach of the principles of conferral, primacy and loyal cooperation.[44]

It is precisely in relation to the latter principle that the Italian practice is particularly relevant.[45] Indeed, as outlined above, the Italian executive is *de facto* steering both the negotiation and the ratification of the agreement. At the same time, the executive is the sole

[41] See in this respect, Jenö Czuczai, 'Mixity in Practice: Some Problems and Their (Real or Possible) Solution' and Frank Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States', in: Hillion & Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, pp. 234 and 256.

[42] See Case C-316/91, *Parliament v. Council*, EU:C:1994:76, para. 29; see further, as to the essentially unitary character of mixed agreements, the Chapter by Rosas in this volume and, as to the responsibilities stemming from mixed agreements, Stanislas Adam et al., *L'Union européenne comme acteur international*, Bruxelles, Éditions de l'Université de Bruxelles, 2015, pp. 62–64 and Bart Van Vooren & Ramses Wessel, *EU External Relations Law*, Cambridge, CUP, 2018, pp. 62–63.

[43] See, along this line, the Statements to the Council minutes (No 21, 22 and 37) entered by Germany and Austria, Poland and Belgium on the occasion of the adoption by the Council of the decision authorizing the signature of CETA, Council of the European Union, Doc. 13463/1/16 REV 1.

[44] As to the legal arguments against the unilateral termination of provisional application of mixed agreements by Member States under EU and international law, see further Tovo, *supra* fn 24; see also, in this respect, Mauro Gatti, 'Provisional Application of EU Trade and Investment Agreements: A Pragmatic Solution to Mixity Issues', in: Fach Gómez (ed.), *La Política de la Unión Europea en Materia de Derecho de Las Inversiones Internacionales*, Barcelona, J.B. Bosch, 2017, pp. 70, 72 and David Kleimann & Gesa Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15', (2018) 45 *LIEI* 1, p. 28.

[45] As to the applicability of the duty of sincere cooperation in the framework of provisional application of mixed agreements, cf. the joint reading of Case C-246/07, *Commission v. Sweden*, EU:C:2010:203, paras 73–75 and Case C-28/12, *Commission v. Council*, EU:C:2015:282, para. 54.

responsible for formally notifying the Council of the national intention to terminate provisional application.[46] Hence, the government should be deemed to be required to retable the legislative proposal authorizing the ratification of the agreement in case of a first negative parliamentary vote before any such notification. Insofar as the government has not opposed the Council decision on the signing and provisional application of the mixed agreement, it could moreover be maintained that the executive is under a duty to abstain from terminating provisional application.[47]

6. The Legal Fate of Mixed Agreements in the Italian Legal Order after Their Ratification

Once the mixed agreement is ratified in accordance with the procedure prescribed by the Constitution, it still has to enter into the Italian legal order, given its essentially dualist character. In fact, to produce legal effects in Italy, international agreements shall be incorporated into the national legal order by means of reference to – or, less frequently, reproduction of – the text of the agreement. This is done in a so-called enforcement order, having the force of law, which is generally included in the law authorizing the ratification.

After its incorporation, the value of an agreement is that of an *interposed parameter of constitutionality"*, that is, that of a sub-constitutional norm which concretises the constitutional obligation laid down in the first paragraph of Article 117 of the Constitution, according to which the "*legislative powers shall be vested in the State and the Regions in compliance with the Constitution and the constraints deriving from EU legislation and international obligations*".[48] It follows that, the legislative and regulatory acts that conflict with an international agreement can be declared unconstitutional and annulled by the constitutional court, pursuant to the centralized procedure for the review of constitutionality, but the provisions of the agreement shall still comply with constitutional norms.

The question therefore arises as to whether this legal status applies also to mixed agreements, insofar as, once concluded by the Council and entered into force, they are (also) EU binding legal acts.

In principle, one could distinguish the provisions of the agreement falling within the residual national competence from those falling within EU competences. The former provisions should have the same destiny of ordinary international agreements concluded by Italy alone, while the latter provisions should be treated as Union law provisions.

As noted though, mixed agreements are *de facto* indivisible and have a substantially bilateral character.[49] Not only both types of provisions are intertwined, but, even after the

[46] See, in this sense, Statement (No 20) from the Council, to be entered on the occasion of the adoption by the Council of the decision authorising the signature of CETA, Council of the European Union, Doc. 13463/1/16 REV 1.

[47] By analogy with the Opinion of AG Mengozzi in Case C-28/12, *Commission v Council*, EU:C:2015:43, para. 63, which in turn refers to Ruling 1/78 re *the Draft Convention of the IAEA on the Physical protection of Nuclear Materials, Facilities and Transports*, EU:C:1978:202, para. 33; see, along this line, Christophe Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the 'Duty of Cooperation'', in: Hillion & Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, pp. 106–111.

[48] See further Italian constitutional court, Judgments No. 348 of 22 October 2007, IT:COST:2007:348, paras. 4.4.-4.7. and Judgment No. 349 of 22 October 2007, IT:COST:2007:349, para. 6.2.

[49] This applies in particular to EUFTAs and all the other mixed agreements concluded by the single EU-party with a single third country or organisation; rights and obligations stemming from multilateral mixed agreements,

clarifications provided by the ECJ in its Opinion 2/15 on the EU-Singapore FTA and in the *COTIF I* case[50], it remains difficult to determine the nature of a given competence covered by the agreement, and the declarations of competence attached to it to define the scope of its provisional application are of little help in this respect. Besides, the single EU party is jointly responsible for the rights and obligations stemming from the entirety of the agreement. Indeed, it is precisely to avoid the EU being held responsible for failures to comply with the agreement originated in one of the non-ratifying Member State, that the Union ratification is deposited after those of all the Member States.[51]

As a result, it can be considered that all the provisions of a mixed agreement will ultimately share the same fate in the national legal order.

On the one hand, this implies that a single Member State can derail the conclusion of a mixed agreement after its signing and ratification by other Member States. Indeed, since the latter cannot be forced to ratify an international agreement and the Council decision concluding the agreement is adopted only after the completion of the national ratification procedure, pending the entire process of national ratifications the agreement does not produce any legal effects, except for those stemming from the provisional application of (some of) its provisions. On the other hand, once the mixed agreement has been ratified and concluded, EU law determines its legal status as a whole in the national legal orders.

In particular, as from their entry into force, international agreements concluded by the Union bind the Member States as for their implementation according to Articles 216(2) and 291(1) TFEU and enjoy primacy in the Italian legal order.[52] In light of the CJEU case law, it can be considered that these principles also apply to mixed agreements, regardless of the division of competences between the EU and Member States.[53]

It is true that, insofar as mixed agreements (especially EUFTAs) are usually explicitly devoid of direct applicability, their provisions would not be capable of directly affecting the situations of natural or legal persons in the national legal order and neither could they be invoked against the contracting Member States or other private parties.[54] Nonetheless, precisely because of their dual nature as international agreements and EU legal acts, mixed agreements enjoy a reinforced legal status in the Italian legal order.

To begin with, these agreements are excluded from the scope of revocatory referenda. The constitutional court has in fact promoted a particularly extensive interpretation of the

such as United Nation Convention on the Law of the Sea, may instead more easily be distinguished and distributed between the EU and the signatories Member States.

[50] Opinion 2/15 re *the Singapore FTA*, EU:C:2017:376 and Case C-600/14, *Germany v. Council*, EU:C:2017:935.

[51] See, on this practice, Guillaume Van der Loo & Ramses Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions', (2017) 54 *CMLRev.* 3, pp. 746 and 750.

[52] On the incorporation of international law into the EU legal order see, *inter alia*, Federico Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea*, Milano, Giuffré, 2008.

[53] Cf. Eleftheria Neframi, 'Mixed agreements as a source of European Union Law', in: Cannizzaro, Palchetti & Wessel (eds), *International Law as Law of the European Union*, Leiden, Martinus Nijhoff Brill, 2011, pp. 325–349 and Joris Larik, 'Pars Pro Toto: The Member States' Obligations of Sincere Cooperation, Solidarity and Unity', in: Cremona (ed.), *Structural Principles in EU External Relations Law*, Oxford, Hart Publishing, 2018, p. 185.

[54] See further Koen Lenaerts, 'Direct applicability and direct effect of international law in the EU legal order', in: Inge Govaere et al. (eds), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden, Martinus Nijhoff Brill, 2014, pp. 45–64, 56 ff.

constitutional clause (Article 75 of the Constitution) prohibiting referenda on the laws authorizing the ratification of international treaties. This ban has been applied not only to the specific legislative authorizing act but also to all other "provisions the legal effects of which are so closely related to the scope of those laws such that the inadmissibility is implied in Article 75 of the Constitution".[55] The latter 'provisions' have been deemed to comprise not only enforcement orders, which are usually included in the same authorization law, but also other laws strictly related to the scope of the agreements and legislative acts that are necessary to implement EU law provisions.[56] National laws ratifying mixed agreements and, if needed, all subsequent implementing legislation therefore benefit from a double protection from referenda to the extent to which they are also aimed at implementing EU law obligations flowing from Articles 216(2) TFEU and 4(3) TEU.

Furthermore, since, once entered into force, mixed agreements enjoy primacy over conflicting national legislation, national judges are under a twofold obligation under EU law, depending on the characteristics of the specific provision of the agreement at issue.[57] If the latter contains a clear, precise and unconditional obligation, and the national court is unable to interpret national law in compliance with EU law, then the national judge is required to disapply any national legislation and practice which is contrary to the agreement.[58] If, on the contrary, the EU law provision has no direct effect – as is the case, for example, for the majority of EUFTAs' provisions – national judges are nonetheless required to interpret, to the fullest extent possible, national law in conformity with the agreement, including for those provisions that are not covered by EU exclusive competences.[59]

If a consistent interpretation of national law cannot be delivered, and a conflict between the latter and a provision of the mixed agreement lacking direct effect is therefore identified, the jurisprudence of the Italian constitutional court comes into play.[60] According to its settled case-law, national judges are then obliged to refer the question to the constitutional court. The latter, in turn, is required to annul the conflicting national provisions *ex tunc*, if necessary following a preliminary reference to the CJEU.

The same principles should also apply for decisions taken by bodies established by mixed agreements, to the extent to which, in light of the CJEU case-law, these decisions would form part of the EU legal order from the moment of their adoption, by virtue of their functional link with the agreement.[61] It follows that, if these decisions were directly applicable[62], national

[55] See Italian constitutional court, Judgment No. 16 of 2 February 1978, IT:COST:1978:16 (translated by the author).

[56] See, among others, Italian constitutional court, Judgment No. 27 of 30 January 1997, IT:COST:1997:27 and Judgment No. 45 of 3 February 2000, IT:COST:2000:45.

[57] For a recent overview of the applicable principles governing primacy and direct effect of EU law in national legal orders, see Case C-573/17, *Popławski*, EU:C:2019:530, paras 52–68 and cited case-law.

[58] *Ibid*., para. 58.

[59] *Ibid*., paras 60–68 and cited case-law; as to the applicability of these principles to international agreements see Case C-240/09, *Lesoochranárske zoskupenie*, EU:C:2011:125, paras 45–51.

[60] See Judgment No. 170 of 5 June 1984, IT:COST:1984:170 and, more recently, Judgment No 269 of 7 November 2017, IT:COST:2017:269, para. 5.1. and cited case-law.

[61] Case C-192/89, *Sevince*, EU:C:1990:322, paras 9–10 and Case C-188/91, *Deutsche Shell*, EU:C:1993:24, para. 17.

[62] See, as to the capacity of these decisions to have direct effect (and primacy) in the EU legal order, Joni Heliskoski, 'Case 370/07, Commission v Council, Judgment of the European Court of Justice (Second Chamber) of 1 October 2009', (2011) 48 *CMLRev.* 2, p. 558.

courts will be entitled, or obliged, to refer questions for preliminary ruling to the Court of Justice concerning their interpretation or validity, at whatever stage of the national proceedings including after an interlocutory procedure for the review of constitutionality and, eventually, would be required to disapply conflicting national law.[63]

7. Conclusions: an Italian Way for Limiting the Downsides of Facultative Mixed Agreements

Mixity will remain an essential legal tool for the conduct of EU external relations. Present-day mixity will, however, require the Union and its Member States to strike a balance between the need for coherence and effectiveness in the conduct of trade relations and the emerging demand for transparency, democratic participation and control at both the European and the national level. It is precisely in this respect that the Italian approach to mixity could offer some guidance to the other Member States.

The Italian approach to mixity could somehow be described as being based on a 'pro-trade pragmatism' as to the division of competences, both between the EU and the Member States and between the legislative and executive power at the national level, with legal principles being resorted to only where necessary to preserve the national interests, as shown by the so-called Grappa incident.[64] This pragmatism is reflected in the legal status of mixed agreements in the Italian legal order: once these agreements are incorporated into Italian law, their substantially bilateral and indivisible character positively affects their legal status, which is strengthened compared to other international agreements. However, it is in the process of negotiation and ratification of mixed agreements that the peculiarities and advantages of the Italian approach are more evident.

Insofar as the negotiation of mixed agreements are concerned, the executive preference for EU-exclusivity has been balanced with innovate information and consultation rights accorded to the parliament by law No 234/2012. On the one hand, as regards EUTFAs, if the Commission's proposal to negotiate EU-only free trade agreements and separate mixed investment agreements were adopted by the Council, this participatory tools would be essential to ensure the democratic legitimacy of both agreements at the national level. On the other hand, and more generally – if further strengthened and fully exploited to create a virtuous circle similar to that established by the European Parliament between information on and approval of international agreements concluded by the Union – these information and consultation rights could prove to be an effective tool to ensure a rapid ratification of mixed agreements, to the extent to which they would allow any parliamentary objection to be raised by the government already in the negotiation phase.

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[63] The *obiter dictum* of the constitutional court in judgment No. 269/2017, pt 5.2, according to which, where the national legislation conflicting with obligations stemming from directly applicable EU law provisions would touch upon fundamental rights protected by both the constitution and the Charter of Fundamental Rights, ordinary judges would be required to refer the matter first to the Italian constitutional court in order to solve the eventual conflict of norms in light of the Constitution, has in fact been partially revised by the subsequent Judgment No 63 of 20 February 2019, IT:COST:2019:63, para 4.3. and Order No. 117 of 6 March 2019, IT:COST:2019:117, para. 2, rendered by the same Court, that reiterated the faculty/obligation for a national court to refer questions for preliminary ruling to the Court of Justice, in accordance with the settled ECJ case law, see Case C-322/16, *Global Starnet*, EU:C:2017:985, paras 21–25.

[64] See Allan Rosas, 'The Future of Mixity', in: Hillion & Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, p. 370.

As to the ratification of the mixed agreements, the Italian constitutional practice of constraining both the scope and the means of parliamentary authorisation may, at first sight, cast doubt as to its legitimacy. The symmetry existing between the negotiation and ratification of (mixed) international agreements as to the balance of powers between the executive and the legislature – which in both cases is strongly tipped in favour of the former – may nonetheless generate positive externalities. Not only does it strengthen the effectiveness of the principle of sincere cooperation, but it also helps to find the most appropriate balance of European democratic oversight of and national participation to mixed agreements.

All in all, the 'Italian way' of limiting the downsides of mixity as presented in this Chapter could be an inspiration for the other Member States to follow.