Withdrawal Agreement – An Exclusive Competence of the EU?

Peter Lysina

Department of International Law and International Relations,
Comenius University in Bratislava, Faculty of Law, Slovakia
Email: peter.lysina@flaw.uniba.sk

Abstract
In June 2016 a referendum was held in the United Kingdom of Great Britain and Northern Ireland. The referendum was held to decide whether the United Kingdom should leave or remain in the EU. Since people opted for "Leave", the negotiations between the EU and the United Kingdom on withdrawal agreement has started. The draft of the text of the withdrawal agreement was for the first time presented on 28 February, 2018.
The aim of the paperis to analyse, whether widely accepted statement that the EU has an exclusive competence to conclude the withdrawal agreement has an adequate legal basis in the Treaties. The paper shall focus on respective Articles of the Treaty on European Union, the Treaty on the Functioning of the EU as well as on the relating case-law.

Keywords: International agreements, mixed agreements, EUonly agreements, exclusive external competence of the EU, TEU, TFEU.

1. Introduction

On Thursday 23 June, 2016 a referendum was held to decide whether the United Kingdom of Great Britain and Northern Ireland should leave or remain in the EU. The referendum was first announced on 23 January 2013 by Prime Minister David Cameron. In electoral campaign he said that he wants to renegotiate[1] the relationship of the United Kingdom of Great Britain

[1] 4 issues should have been subject of the renegotiations: protection of the single market for the Member States not participating on the Eurozone; reduction of so-called "red tape"; exemption for the United Kingdom of Great Britain and Northern Ireland with respect to "ever-closer union" integration clause; restrictions on the intra-EU

and Northern Ireland with the EU and then, on a basis of re-negotiations, give people of the United Kingdom the choice between the two options – to remain in the EU (under the new terms) or to leave the EU, if elected in 2015.[2] Perhaps as a consequence, the Conservative Party won the 2015 general election and the European Union Referendum Act was introduced info the Parliament. The aim of the Act was to enable the EU referendum. And, indeed, the referendum on a basis of this Act was held in June 2016.The turnout of the vote was 72.21%. It means that more than 33.000.000 people took part on it. The results were surprising, at least for the EU. Despite many polls that indicated they would vote to "Remain" people opted for "Leave" by 51.9%. England voted for Brexit, by 53.4% to 46.6%. Wales also voted for Brexit, by 52.5% to 47.5%. On the other hand, Scotland backed staying in the EU (by 62% to 38%) as well as Northern Ireland (by 55.8% to 44.2%). The highest vote for "Leave" (76%) was recorded in Boston (Lincolnshire). The highest vote for "Remain" (96%) was recorded in Gibraltar.[3]

On a basis of the outcome on 29 March 2017, the United Kingdom of Great Britain and Northern Ireland, in line with Article 50 para. 2of the Treaty on European Union (hereinafter "TEU") notified the European Council of its intention to leave the European Union. One month later, on 29 April 2017, again in line with Article 50 para. 2 TEU a set of political guidelines was adopted by the European Council (with participation of 27 Members States only).Later, following the guidelines of the European Council, the negotiating directives were adopted by the Council on 22 May 2017. These negotiating directives set the framework for the further negotiations on withdrawal agreement.

According to Article 50 TEU the withdrawal agreement *shall be concluded on behalf of the Union*. That is why it has been widely accepted that withdrawal agreement shall be conclude as the EU only agreement. Now, the question is whether the Treaties give an adequate legal basis for this conclusion. The aim of the Article is to analyse respective provisions of the Treaties and, in particular either to confirm or to refute statement on the EU only nature of the withdrawal agreement.

2. Competences of the EU to conclude international agreements

With the Lisbon Treaty the EU acquired legal personality. It became the subject of International Law as international organisation. As other international organisations, also the EU is capable of concluding international agreements. Despite it acquired legal personality in

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immigration. For more details, see BBC News of 23 January 2013, (2013), [Online] Available: http://www.bbc.co.uk/news/uk-politics-21148282 (23 April 2016)

[2] See BBC News of 23 January 2013, (2013), [Online]

Available: http://www.bbc.co.uk/news/uk-politics-21148282 (21February 2018)

[3] Source:European Union Referendum 2016, (2016), [Online] Available:

http://researchbriefings.files.parliament.uk/documents/CBP-7639/CBP-7639.pdf(21 February 2018)

2009 only, the EU (or its predecessor's) competence to conclude international agreements[4]was recognised many years ago, as it clearly stems from the case-law.

With the Lisbon Treaty, the legal basis for the EU competence to conclude international agreements has been set as Article 216 of the Treaty on the Functioning of the European union (hereinafter "TFEU"). All essential principles relating to competences of the EU to conclude international agreements established by the Court of Justice were incorporated into this Article.

According to Article 216 TFEU *the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.* These *agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.* On a basis of the wording of aforementioned Article there can be no doubt about the existence of the EU competences to conclude international agreements as such.

With respect to the wording of Article 216 para. 1 TFEU following four categories of competences of the EU to conclude international agreements can be distinguished:

a) The EU is capable of concluding international agreements where the Treaties so provide;

It is necessary to emphasize that particular competences of the EU to conclude international agreements are based on another Articles of the Treaties. Aforementioned provision of Article 216 para. 1 TFEU has declaratory function only and, therefore, does not create any additional competences for the EU.

b) The EU is capable of concluding international agreements where the conclusion of those agreements is necessary in order to achieve, within the framework of the EU's policies, one of the objectives referred to in the Treaties;

The aim of this competence is to guarantee parallelism with the EU´s internal competences provided for in the Treaties. It was unclear for a long time whether the EU has external competences in cases in which the Treaties provide only competences for adopting legal acts

[4] For more information, see Valuch, J., Giba, M. (2016). Kategorizáciamedzinárodnýchľudskoprávnychzmlúv v proceseratifikácie. In: Mezinárodnílidskoprávnízávazkypostkomunistickýchzemí: případyČeskérepubliky a Slovenska. Praha: Leges.p. 86. or Vršanský, P., Burdová, K. (2015). Európskysúd pre ľudsképráva a biomedicína. In: Univerzitnývedecký park a jehoprávnevýzvy v 21. storočí. Bratislava:UniverzitaKomenského, Právnickáfakulta. p. 121.

within the sphere of the EU. Answer was given by several judgements of the Court of Justice. The first one was "legendary" ERTA judgement[5] which was followed by other, e. g. Kramer.[6] By these judgements the Court of Justice decided that to establish in a particular case whether the Community has authority to enter into international commitments, regard must be done to the whole scheme of the Community law no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of accession and from measures adopted, within the framework of those provisions, by the EU institutions. The Court of Justice summarised above mentioned principles in its Opinion on ILO.[7]A restriction of these, rather simple, rules was brought about by the Court of Justice´s Opinion on competence of the Community to conclude international agreements concerning services and the protection of intellectual property.[8] Later, that Opinion was confirmed by another opinion of the Court of Justice on competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment.[9]On a basis of those opinions it is possible to conclude that an external power requires that the EU has already made use of its internal competence by adopting a legal act. Only two exceptions are accepted: entering the agreement was indispensable precondition for achieving the objectives of internal competence; and the EU acting on a basis of its internal legislative competence had expressly empowered its institutions to conclude international agreements.

c) The EU is capable of concluding international agreements where it is provided for in a legally binding act of the EU;

Existence of aforementioned competence depends on existence of a legally binding act of the EU. It means, the EU is capable of concluding international agreements only when the legally binding act provides so. While Geiger states that a legislative act is necessary,[10]Article 216 TFEU does not explicitly refer to a legislative act. Under this article, any legally binding act

[5]Judgment of 31 March 1971, Commission / Council (22/70, ECR 1971 p. 263), EU:C:1971:32

[6] Judgment of 14 July 1976, Cornelis Kramer and others (3, 4 and 6-76, ECR 1976 p. 1279), (EL1976/00475 PT1976/00515 ES1976/00445 SVIII/00155 FIIII/00163), EU:C:1976:114

[7]See Opinion 2/91 (ILO Convention No 170), of 19 March 1993 (ECR 1993 p. I-1061), (SVXIV/I-59 FIXIV/I-71), EU:C:1993:106, paragraph 7

[8]See Opinion 1/94 (Agreements annexed to the WTO Agreement), of 15 November 1994 (ECR 1994 p. I-5267), (SVXVI/I-233 FIXVI/I-237), EU:C:1994:384, paragraphs XIV - XVI of the summary

[9]See Opinion 2/92 (Third Revised Decision on the OECD on National Treatment), of 24 March 1995 (ECR 1995 p. I-521), EU:C:1995:83, paragraphs 3 - 5 section V

[10] Geiger, R., Khan, D.-E., Kotzur, M. et al. (2015) European Union Treaties. A Commentary. Treaty on European Union, Treaty on the Functioning of the European Union. Munich: C.H. Beck, Hart Publishing. p. 783

is sufficient - either legislative or non-legislative. On the other hand, a legislative act is required with respect to the exclusive competence of the EU as it stems from Article 3 TFEU. Therefore, it is necessary to distinct between the exclusive competences of the EU to conclude international agreements (as laid down in Article 3 TFEU) and the competences of the EU to conclude international agreements as such (framework is given by Article 216 TFEU). Therefore, we cannot agree with Geiger´s statement. As a conclusion - existence of any legally binding act of the EU is sufficient - either legislative or non-legislative.

d) The EU is capable of concluding international agreements where it is likely to affect common rules or alter their scope.

Another category where the strong impact of the case-law of the Court of Justice is visible. At the same time, it is the most complicated one and therefore it has been subject to several requests for opinions of the Court of Justice and, unfortunately, also to several inter-institutional trials. With regard to the aim of this paper, it is impossible to mentioned all of the judgements and the opinions of the Court of Justice relating to situations where it is likely to affect common rules or alter their scope. However, on the other hand, it is worth to mention at least some of them.

For example, in the Opinion 1/13 the Court of Justice has held that *there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, where those commitments fall within the scope of those rules. In particular, the scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already covered to a large extent by such rules.*[11] That Opinion has been later confirmed by the judgement in the Green Network case where the Court declared that *there is a risk that common Community rules might be adversely affected by international commitments undertaken by Member States, or that the scope of those rules might be altered, which is such as to justify an exclusive external competence of the Community, when those commitments fall within the scope of those rules. A finding that there is such a risk does not presuppose that the areas covered by the international commitments and those covered by the Community rules coincide fully. In particular, the scope of Community rules may be affected or altered by such commitments where the latter fall within an area already largely covered by such rules. In addition, the Member States may not, outside the framework of the Community institutions, enter into such commitments, even when there is no possible contradiction between those commitments and the common Community rules*.[12]

With respect to situations where it is likely to affect common rules or alter their scope the Court of Justice does not limit itself to existing rules only. In above mentioned Opinion 1/13 it also stated that *since the EU has only conferred powers, any competence, especially where*

[11] Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraphs 71 and 73

[12] Judgment of 26 November 2014, Green Network (C-66/13), EU:C:2014:2399, paragraph 29

it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish.[13]

With respect to above mentioned examples of the case-law it is possible to conclude that conclusion of international agreement may affect common rules of the EU or alter their scope when those commitments fall within the scope of those rules within an area already covered to a large extent by such rules. Any discretion of Member States relating to those rules which has to be exercised within the limits imposed by the EU law is considered as part of the regulation.

2.1. Withdrawal agreement as a special competence?

The competence of the EU to conclude the withdrawal agreement has been established by Article 50 TFEU. According to paragraph 2 of this Article, *the EU shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the EU*. Respecting of wording of Article 50 paragraph 2 TEU there should be no doubt on existence of the EU competence to conclude the withdrawal agreement. However, the question is whether this competence falls within the scope of Article 216 TFEU or we are talking about a special competence, additional to those falling within the scope of Article 216 TFEU.

With the aim of answering that question it is necessary to compare the competence established by Article 50 TEU with four categories of competences included in Article 216 TFEU as they were analysed above. Here it is clear that the competence to conclude the withdrawal agreement falls within the scope of Article 216 TFEU as the first category (the EU is capable of concluding international agreements where the Treaties so provide). Thus, it is possible to conclude that the EU may conclude the withdrawal agreement because the Treaties so provides and we cannot talk about a special competence of the EU falling outside the scope of Article 216 TFEU.

3. Nature of the EU competence to conclude the withdrawal agreement

While the existence of the competence of the EU to conclude the withdrawal agreement is clear, nature of this competence is ambiguous. Although it has been widely accepted that withdrawal agreement shall be concluded as the EU only agreement, the question is whether the argument on exclusive nature of that EU competence has an adequate legal basis. The Treaties provide the answer, in particular their articles focused on division of the competences between the EU and its Member States. That is why an analysis of respective

[13] Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 74

articles of the TFEU seems to be necessary. On a basis of this analysis it would be possible to distinguish between agreements to be concluded within the exclusive competence of the EU and those to be concluded as mixed agreements. And, finally, it would be possible either to confirm or to refute the argument on existence of the exclusive competences of the EU to conclude the withdrawal agreement.

Before we start the analysis as such it is useful to recall that exercise of the EU competences to conclude international agreements is subject to all requirements and rules stemming from the Treaties. One of the essential is the principle of conferral laid down by Article 5 TEU. According to Article 5 paragraph 1 TEU *the limits of the EU competences are governed by the principle of conferral*. The same Article in its paragraph 2 adds that under the principle of conferral, *the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*. *Competences not conferred upon the EU in the Treaties remain with the Member States.* That principle sets out the limits of the EU competences and, at the same time, division of competences between the EU and its Member States.

As concerns the competences of the EU to conclude international agreements, with respect to the principle of conferral we can say that in some situations the EU has the power to conclude international agreements by itself (where the Member States have conferred competences to the EU), however, in other situations (where the respective competences have remained with the Member States) it is not possible and, therefore, the EU shall act together with its Member States. The EU alone has power to conclude international agreements within the scope of its exclusive competences. On the other hand, within the scope of the competences shared between the EU and its Member States, international agreements should be concluded both by the EU and its Member States.

It should be noted that the exclusive competences of the EU (incl. the external exclusive competence) are defined within the Article 3 TFEU while the shared competences (incl. the external exclusive competence) are listed in Article 4 TFEU.[14]As a result, with respect to international agreements concluded by the EU, we should distinct between: "EU only agreements" (where the EU alone is party to an agreement) and "mixed agreements" (where both the EU and its Member States are parties to an agreement).

[14] For more details, see Siman, M., Slaštan, M. (2010). PrimárneprávoEurópskejúnie: (aplikácia a výkladprávaÚnie s judikatúrou). Bratislava: Euroiuris. p. 432.,Burdová, K., Vozáryová, M.(2017). Aplikácianariadení EÚ z oblastirodinnéhopráva v podmienkachSlovenskejrepubliky. Bratislava: Justičná revue., p. 736-751., or Trnovszká, L. (2017) Európskyexekučnýtitul pre nesporenárokyakonástrojjustičnejspolupráce v civilnýchveciach v Európskejúnii. In: Míľnikypráva v stredoeurópskompriestore. Bratislava: UniverzitaKomenského, Právnickáfakulta. p. 182-189.

3.1. EU only agreements

The title "EU only agreements" refers to these international agreements which are concluded by the EU alone within its exclusive external competences. As it was indicated above, legal basis for the exclusive external competences of the EU is given by Article 3 TFEU. On a basis of this Article, the EU alone is empowered to conclude international agreements covering issues falling within the scope of Article 3 TFEU. At the same time, the Member States are pre-empted from concluding such international agreement independently. With respect to two paragraphs of Article 3 TFEU it is possible to distinct between explicit exclusive external competences (paragraph 1) and implicit exclusive external competences (paragraph 2).[15]

3.1.1. Explicit external competences of the EU to conclude international agreements

As it was mentioned above, the explicit external competences are those covering issues falling within the scope of Article 3 paragraph 1 TFEU. Here we can find a) customs union; b) the establishing of the competition rules necessary for the functioning of the internal market; c) monetary policy for the Member States whose currency is the euro; d) the conservation of marine biological resources under the common fisheries policy; e) common commercial policy. Taking into account wording of Article 3 paragraph 1 TFEU in conjunction with Article 216 TFEU it is possible to conclude that the EU shall have the explicit external competences to conclude international agreements whenever it has (in line with article 216 TFEU) competences to conclude international agreements covering issues falling within the scope of Article 3 paragraph 1 TFEU.

With precise wording of Article 3 paragraph 1 TFEU, the scope of explicit external competences of the EU seems to be quite clear. Unfortunately, the opposite is true.

Interpretation of Article 3 paragraph 1 TFEU led to several trials before the Court of Justice, in the past. As an example it could be pointed out on Daiichi Sankyo case[16] or case relating to Council Decision 2011/853/EU of 29 November 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access.[17]With these two examples the Court of Justice opted for extensive interpretation of the notion "common commercial policy". As a result, such conventions being signed and concluded by the EU alone and not as mixed agreements, without it being necessary to examine if and to what extent the EU has become exclusively competent under

[15] For more details, see Mokrá, L. (2008). Aktuálneotázkyzmenyprávnehoporiadku v EÚ v nadväznostinaLisabonskúzmluvu.In: Európskesprávneprávo. Bratislava:UniverzitaKomenského. p. 103-114.

[16]See Judgment of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland (C-414/11), EU:C:2013:520. paragraphs46, 48, 49, 51, 52, 60, 61.

[17] See Judgment of 22 October 2013, Commission / Council (C-137/12), EU:C:2013:675. paragraphs 52, 53, 57, 58, 64, 65, 76.

Article 3 paragraph 2 TFEU.[18]On the other hand, strict interpretation was preferred with respect to interpretation of the "monetary policy" notion.[19]

With these examples, it is possible to conclude that despite precise wording of Article 3 paragraph 1 TFEU, exact scope of explicit external competences of the EU is still under discussion and it is up to the Court of Justice to give the answer on scope of Article 3 paragraph 1 TFEU.

3.1.2. Implicit external competences of the EU to conclude international agreements

The concept of implicit external competences of the EU has been established by Article 3 paragraph 2 TFEU. This concept is quite different that of explicit competences mentioned above. While explicit exclusive competences are listed (exhaustive list) in Article 3 paragraph 1 TFEU, implicit exclusive external competences are only indicated in Article 3paragraph 2 TFEU. According to this paragraph *the EU shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the EU or is necessary to enable the EU to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*.

As it stems from words *"the EU shall also have exclusive competence for the conclusion of an international agreement"* implicit exclusive external competences are "additional" to those listed in Article 3 paragraph 1 TFEU. Due to its wording it is possible to agree with Erlbacher who emphasises that Article 3 paragraph 2 TFEU has given rise to most of the institutional disputes in the post-Lisbon Treaty discussion on external relations.[20]Common to all of the judgements delivered by the Court of Justice with respect to the implicit exclusive external competences of the EU is extensive interpretation of the notions included within the paragraph 2 of Article 3 TFEU. Another important thing is that the case-law has not yet solved all the potential issues relating to the implicit exclusive external competences of the EU. Therefore, in the near future it is likely to expect other requests addressed to the Court of Justice´s opinion based on Article 218 para. 11 TFEU.

As concerns Article 3 paragraph 2 TFEU itself, this provision regulates three different situations:

a) The EU is exclusively competent to conclude international agreement when its conclusion is provided for in a legislative act

[18]Erlbacher, F. (2017). Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty. p. 23. [Online] Available: http://www.asser.nl/media/3485/cleer17-2_web.pdf [Online] Available (February 1, 2018)

[19] See Judgment of 27 November 2012, Pringle (C-370/12, Publié au Recueilnumérique), EU:C:2012:756

[20]Erlbacher, F. (2017). Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty. p. 24. [Online] Available: http://www.asser.nl/media/3485/cleer17-2_web.pdf (February 1, 2018)

Unlike Article 216 TFEU (which requires any legally binding act for establishing of the EU external competence as such), exclusive external competence of the EU shall be based on a legislative act. As the Court of Justice decided – *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*.[21] On a basis of above mentioned judgement, it is possible to conclude that the EU is exclusively competent to conclude international agreement when its conclusion is provided for in a legal act adopted on the basis of a provision of the Treaties which expressly refers to legislative procedure. In these situations the Court adds that *whenever the EU has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts.*[22]

b) The EU is exclusively competent to conclude international agreement when it is necessary to enable the Union to exercise its internal competence

The situation is based on requirement of parallel exercise of the internal competences of the EU and of the external competences in the same area. Besides that, Article 3 paragraph 2 TFEU brings another requirement - the "necessity". As it stems from the case-law, (only) if the necessity is given the EU will enjoy exclusivity.[23] At the same time it is necessary to emphasise - in aforementioned situation, the exclusive external competence of the EU is established irrespective of whether internal competence of the EU is exclusive, shared or complementary.

c) The EU is exclusively competent to conclude international agreement when its conclusion may affect common rules or alter their scope

The third situation where the implicit external exclusive competence of the EU is established relates to international agreements when their conclusion is likely to affect common rules or alter their scope. As it was pointed out above - in the chapter 2, this situation is the most complicated one and therefore it has been subject to several requests for the Court of Justice opinions and several inter-institutional trials, as well. Since this type of exclusive competence matches up with Article 216 TFEU and universal competence of the EU to conclude international agreements, it is not necessary to analyse it again. Therefore, it is sufficient to refer to analysis given in chapter 2 (under letter d). As it was pointed out in that analysis, conclusion of international agreement may affect common rules of the EU or alter their scope when those commitments fall within the scope of those rules and within an area already

[21] Judgment of 6 September 2017, Slovakia / Council (C-643/15), EU:C:2017:631, paragraph 15.

[22] Opinion 1/94 (Agreements annexed to the WTO Agreement), of 15 November 1994 (ECR 1994 p. I-5267)

(SVXVI/I-233 FIXVI/I-237), EU:C:1994:384, paragraph 95

[23] See Kaczorowska-Ireland, A. (2016). European Union Law. London: Routledge. p. 182

covered to a large extent by such rules. Any discretion of Member States relating to those rules and exercised within the limits imposed by the EU law is considered as part of the regulation.

3.2. Mixed agreements

Mixed agreements are these international agreements which are concluded by both the EU and its Member States.[24]The necessity of parallel conclusion by the EU and its Member States is given because neither the EU, nor the Member States powers cover all the issues of the international agreement. The mixed agreement should be the proper solution for the following situations: the international agreements as such fall within the scope of shared competences; some issues of the international agreements fall within the scope of exclusive competences of the EU and the rest beyond that competences (e. g. competences of the Member States).

It is also necessary to emphasise that the Court of Justice has not yet given detailed delineation of area of competences. Perhaps, it is so because *the division of powers … between the Community and the Member States, particularly as it may change in the course of time*.[25]Indeed, the division of powers changes continuously and any rigidity could cause problems. It is clear that practice of mixed agreements brings many challenges and difficulties for the EU and its Member States. However, we can agree with statement made by Craig and De Búrca *whatever difficulties there may be in managing mixed agreements, these difficulties do not provide a reason for altering the classification of competence, or for arguing that it should be exclusive*.[26]

4. Withdrawal agreement as an EU only agreement?

Let´s start with widely accepted hypothesis that the EU could be exclusively competent to conclude the withdrawal agreement. That hypothesis is based, inter alia, on the fact that Article 50 TEU confers the competence to the EU (with the words *"…the Union shall negotiate and conclude an agreement with…"*). Yes, it is true that aforesaid Article does not use words "the EU and its Member States...".However, another articles dealing with the EU competences to conclude international agreements also use the same wording. For example, under Article 216 TFEU *"the Union may conclude an agreement…"*. The same words we can find also in Article 8 TEU, Article 79 TFEU and in others. But none of these articles was

[24]Burdová, K. (2011). ČlenstvoEurópskejúnie v HaagskejkonferenciimedzinárodnéhoprávasúkromnéhoIn: Bezpečnostné priority súčasnosti a novépohľadynavývojmedzinárodnéhopráva. Bratislava: UniverzitaKomenského v Bratislave, Právnickáfakulta. p. 164

[25]Ruling 1/78, of 14 November 1978 (ECR 1978 p. 2151), (PT1978/00711 ES1978/00613 SVIV/00187 FIIV/00193). EU:C: 1978:202. paragraph 35

[26] Craig, P., De Búrca, G. (2011). EU Law, Text, Cases and Materials, fifth edition. Oxford: Oxford University Press. p.335

intended to establish an exclusive competence of the EU. Their meaning is different – to enable the EU competence to conclude international agreements (as it is envisaged in Article 216 TFEU - *the EU may conclude an agreement with one or more third countries or international organisations where the Treaties so provide*). Nature of these competences (either exclusive or shared) is another questions to be answered with respect to Article 3 TFEU.

Another argument in favour of the withdrawal agreement as "EU only" is that Article 50 TEU does not explicitly require a ratification by the Member States in accordance with their respective national requirements. It is the truth. But the same approach is applied with respect to all above mentioned Articles (that enable the EU to conclude international agreements). In addition to that, nor Article 50 TEU, neither another above mentioned articles exclude ratifications by the Member States.

On a basis of aforementioned it is possible to conclude that Article 50 TEU itself does not establish exclusive competence of the EU to conclude the withdrawal agreement. Therefore, it is necessary to consider nature of this competence from the perspective of ordinary rules for the division of competences between the EU and the Member States (Articles 3 - 6 TFEU). Another argument for application of ordinary rules for the division of competences is that these rules represent the core of the EU law and as such cannot be bypassed.

On a basis of what was mentioned above it is possible to say that (in line with Article 3 TFEU) the EU has the exclusive competences to conclude international agreements when:

a) International agreement covers one or more of following issues - customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy. Here it is necessary to stress that respective international agreement shall include only above mentioned issues. Otherwise, the EU should act together with its Member States and conclude international agreement as mixed agreement.

b) Conclusion of an international agreement is provided for in a legislative act of the EU.

c) Conclusion of an international agreement is necessary for enabling the EU to exercise its internal competence.

d) Conclusion of an international agreement may affect common rules or alter their scope.

With respect to this, the withdrawal agreement could be an "EU only agreement" only if it falls within the scope of above mentioned situations. As concerns the letter a) and explicit exclusive external competences of the EU, it is clear that these types of competences do not refer to withdrawal agreement. In other words, the withdrawal agreement does not fall within the scope of aforementioned types of exclusive external competences of the EU. As concerns the paragraph 2 of Article 3 TFEU, it refers to "the conclusion of an international agreement" which the withdrawal agreement is (or should be, at least). But this is not sufficient obviously.

For the exclusivity of the EU, conclusion of the withdrawal agreement shall be either provided for in a legislative act of the EU; or necessary to enable the EU to exercise its internal competence; or in so far as its conclusion may affect common rules or alter their scope.

As concerns the first condition, it is clear that conclusion the withdrawal agreement has never been provided for in a legislative act of the EU. Therefore, the competence to conclude the withdrawal agreement cannot be considered as an exclusive under that condition.

With respect to the second condition, the EU has an exclusive competence to conclude international agreement if it is necessary for enabling the EU to exercise its internal competence. However, it seems to be more than difficult to find any "internal competence of the EU" which would require exclusive nature of the EU competence to conclude the withdrawal agreement.

The third condition relates to situations in which conclusion of an international agreement may affect common rules or alter their scope. Here we can point out on opinion of Flavier and Platon who states that if the withdrawal agreement only extends, for a certain period of time, certain "common rules" to the United Kingdom of Great Britain and Northern Ireland, one could argue that it could be concluded by the EU alone under the third condition. At the same time, they add that such an interpretation could be rejected by the Court of Justice, who could consider that extending the common rules to a (future) third country does not, *sensustricto*, "affect" them nor "alter" their scope.[27]We can agree that such interpretation of the third condition is questionable and, indeed, most probably could be rejected by the Court of Justice. On the other hand, it is also necessary to emphasize that the withdrawal agreement will most probably cover not only issues falling within the scope of the exclusive competence of the EU. As such it should be concluded as mixed agreement and ratified by all the Member States in accordance with their domestic constitutional requirements.

5. Conclusions

The EU competence to conclude the withdrawal agreement is established by the Article 50 TEU. This quite short article does not create new competence falling outside the scope of Article 216 TFEU (which establishes the competence of the EU to conclude agreements as such). Since, the competence to conclude the withdrawal agreements can be perceived as "ordinary" competence (the same as other stemming from Article 216 TFEU in conjunction with other articles of the Treaties), this competence shall respect all the principles of the EU law applicable with respect to conclusion of international agreements. Here it is necessary to emphasize, in particular, the principle of conferral and the principle of division of the competences between the EU and its Member States. Those two principles (but others, as well) give an answer to the question of the nature of the withdrawal agreement (EU only agreement vs. mixed agreement). The widely accepted is that the EU alone is capable of concluding the withdrawal agreement. This argument has been accepted by the legal practice as well as by the legal theory. In addition, no major discussion took its place on the nature of the EU competence to conclude the withdrawal agreement.

However, the analysis (above) has proven some doubts relating to legal basis of the exclusive nature of the EU competence to conclude the withdrawal agreement. Those are of grammar

[27]Flavier, H., Platon, S. (2016). Brexit: A Tale of Two Agreements? [Online] Available: http://europeanlawblog.eu/2016/08/30/brexit-a-tale-of-two-agreements/ (February 28, 2018)

nature (Article 50 TEU cannot be interpreted as sufficient legal basis for the exclusive nature of the EU competence) and of substantial nature, too. The major objection against the exclusive nature is based on interpretation of Article 3 TFEU with respect to content of the withdrawal agreement. On a basis of the analysis we are not convinced that the withdrawal agreement fulfils requirements laid down by Article 3 TFEU in its paragraph. From that perspective a mixed agreement would be better.

On a basis of aforementioned it is possible to conclude – we understand the reason why the withdrawal agreement should be concluded as "EU only" – political reasons are simple – we need to guarantee "smooth withdrawal procedure" without any constrains stemming from respective national approval procedures (requested with respect to mixed agreement). At the same time, legally speaking, it is also clear that, in line with Article 50 TEU, the United Kingdom of Great Britain and Northern Ireland should withdraw from the EU in 2 years after the notification of its intention to withdraw and other Member States cannot prevent it from doing so, or even delay its exit. These facts are, of course, of major importance. However, the question is whether their importance could excuse possible incompatibilities with the rules established by the Treaties in Articles 3 – 6 TFEU (division of the competences).

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