Studies in Law and Justice
ISSN 2958-0382
www.paradigmpress.org/slj
Volume 4 Number 6 December 2025

# The Role of Court of Justice of the European Union in the Provisional Application of Mixed Agreements

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doi:10.63593/SLJ.2025.12.01

**Abstract**

The process of provisional application of international treaties deals with the microspheric level of international organizations as a subject of international law. The effects and legal nature of the provisional nature of treaties, especially within the context of European Union law, are part also of the present work. The method used by doctrine and jurisprudence aims to demonstrate consensus. The national norms and procedures followed by bodies that are integral to the phenomenon of the provisional nature of international agreements also serve as targets. Finally, the competences of mixed agreements, the jurisdiction of the Court of Justice of the European Union, national rules, and the influence and interpretation of the rules of the Vienna Convention on the Law of Treaties are points of further analysis.

**Keywords:** European Union Law, mixed agreements, termination of agreement, provisional application of treaties in EU law, national rules, jurisdiction, VCLT, hybrid decision, loyal cooperation

## 1. Introduction

Our analysis initiate with the principle of consensus, the distribution of competences and the provisional application of mixed agreements. In particular the practice of provisional application for mixed agreements has raised questions about the Union's ability to commit provisional application for mixed agreements at international level. In the CETA Treaty, provisional application has highlighted the Union's ability in this area for mixed agreements. The uncertainties and the identification for the parties to an agreement on the provisional application of mixed agreements include a national dimension for the Member States. The distribution of competences through the Union and Member States to a general regime of provisional application reconstructs and highlights the treaty-making power of the Union, which is limited to the stipulation for agreements that are provided for under Art. 216, par. 1 TFEU (Blanke & Mangiamelli, 2021; Kellerbauer, Klamert & Tomkin, 2024).

Equally important, Art. 5, par. 2 TEU highlights the: "(…) principle of conferral. The Union acts exclusively within the limits of the competences conferred upon it by the Member States in the Treaties to achieve the objectives established by them (…)". The Union does not undertake international commitments for matters of exclusive competence of the Member States. It is stated that the Union acts in the role of ultra vires for the provisional application of mixed agreements (Gatti, 2017; Suse & Wouters, 2018).

This limits the Union's ability to conclude an agreement on provisional application as an exclusive object for the provisions that are related to the sector of competence of its own matter (Kleimann & Kubek, 2016)[1].

On the other hand, the Council has decided to continue the provisional application for mixed agreements and the extensive interpretation according to Art. 218, par. 5 TFEU. This rule is not limited to the capacity of the Union, where in a unitary manner it puts the practice that is followed by the Union and the Member States to highlight that the Member States attribute to the Union the competences to conclude agreements on the provisional application for mixed agreements. Mixed agreements are applied in a provisional and integral manner to the Union within the practice that suggests the interpretation of the division of competences between the Union and the Member States in the provisional application of the Treaties.

The clause contains the agreement on provisional application that takes place between the third contracting state and the Union. Furthermore, the material scope of provisional application of the provisions falls within the areas of competence of the Union. The agreement on provisional application of mixed agreements that are concluded between a Member State and the Union also provides for the implementation of only those provisions that are related to the matters of competence of the Union. The Union has followed the provisional application of mixed agreements in their entirety. As for the Member States did not arise obligations at international level. The parties to the agreement on provisional application of the treaty are the Union and the third state that concluded the agreement. In particular, we recall Art. 15.10, par. 5 a), of the Free Trade Agreement between the Union, the Member States and South Korea. It is stated, in this regard, that: "(…) is provisionally applied from the first day of the month following the date on which the EU Party and Korea have notified each other of the completion of their respective relevant procedures (…)". The text of the provision that was part of the agreement on provisional application includes the European Union and South Korea.

Provisional application is voluntary, optional and based on a precise consent for the subjects, who assume rights and obligations on a provisional basis. The multinational practice, for the states and organizations which have taken part in the negotiation of the treaty, accepts its provisional application. The Member States that are considered as parties to the agreement for the application of a mixed agreement have expressed their consent and are considered parties to an agreement for the application of a mixed agreement at the moment that the consent has anticipated execution. The agreement on provisional application that has been concluded between the Union and the third state does not produce effects at international level with respect to Member States that are not party to the agreement (Sybesma Knol, 1985)[2].

The express consent of the Union for provisional application in mixed agreements implies the commitments at international level by the Union. Mixed agreements are classified as agreements of a bilateral nature and stipulated by the Union and Member States and from one third state to another (Rosas, 2014). Mixed agreements in bilateral treaties are based on the distribution of obligations that arise from mixed agreements that establish: "(…) obligations that can only be separated in the relationship between the Union and the Member States on the one hand and a third party on the other (…) factual bilateralisation (…) the need to configure the Union and the states as a substantially unitary entity before the counterparties (…)" (Kaspiarovich & Levrat, 2021).

Member States and the Union participate in the negotiation for the conclusion of mixed agreements, which are distinct. Member States

[1] Kleimann D., G. Kubek, affirms that: "(…) remains noteworthy, however, that the Council appeared to be of the legal opinion, reflecting past practice, that it is empowered to apply treaty parts provisionally, which, according to the views expressed by them ember states in the Opinion 2/15 proceedings (…) the scope of EU exclusive competences (such as maritime transport) or even within the scope of member states exclusive competence (i.e. portfolio investment). In sum, member states have, in past practice, evidently supported and enabled the provisional application of treaty parts that they otherwise deem to fall within the scope of shared or exclusive member states competences (…) the distinct nature of provisional application as an international legal instrument and EU treaty conclusion. Decisions of the Council under Article 218 (5) TFEU, in accordance with EU law and practice, may give effect to treaty provisions irrespective of the division of competences (…)".

[2] Draft articles on the law of treaties between States and international organizations and between international organizations, in *ILC Yearbook*, 1982, vol. II, p. 43.

participate in the conclusion of mixed agreements in matters of exclusive competence and in the capacity of sovereign states, where the agreements are concluded for international organisations without binding the Member States at international level. Special Rapporteur Reuter has developed the draft of Art. 36 bis entitled as: "Obligations and rights arising for states members of an international organization from a treaty to which it is a part". It is affirmed, in this regard, that: "(...) obligations and rights arise for states members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if: a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations (…)"[1]. The draft article met with different positions at the Vienna Conference of 1986. Art. 74 framed in an unprejudiced manner the question of suitability for treaties concluded by international organizations which thus produce effects for the Member States.

Advocate General Sharpston stated in Opinion No. 2/15 that: "(…) an international agreement is concluded at the same time by the European Union and its constituent Member States, both the Union and the Member States are, under international law, parties to that agreement (…)". And in this spirit the CJEU stated that: "(…) a mixed agreement concluded with third countries is, on the one hand, the Union and, on the other, the Member States (…)".

The same observations of the content concerned the opinion 1/19 about the accession of the European Union and the Conventions of the Council of Europe that had to do with the prevention and fight against women violence and domestic violence according to the Istanbul Convention. In this case, the CJEU has highlighted that the Member States acted within the respective competences of each contracting party. It has also highlighted the failure of one or more Member States to access the relevant convention that does not prevent the Union from concluding the agreement on the accession of the convention for the parties that are included in the matters of competence. The CJEU stated, in this regard, that: "(…) the Member States and the Council cannot validly argue that, in the absence of accession to the Istanbul Convention by one or more Member States in the matters of the Convention falling within their competence, the accession of the Union to that Convention would interfere with the competences of those Member States and would thus infringe the principles of conferral, sincere cooperation, legal certainty and unity of the external representation of the Union (…)[2] the conclusion of an international agreement by the Union is subject exclusively to the decision of the Council, reiterating that no competence is recognised to the Member States for the adoption of such a decision (…) the Council is not required to await, before deciding on the conclusion of the accession agreement by the Union, the common agreement of the Member States to be bound by the Istanbul Convention in the matters falling within their competence (…)".

From the above paragraphs, we can understand that the CJEU could confirm the impossibility for the Union and the Member States to consider with a separate manner at international level the provisional application of the relevant provisions, that are under the exclusive competence of the Member States. In this way, it implies the assumption of independent subjects

[1] Reuter P., Fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, op. cit.

[2] CJEU, Opinion 1/19 of 6 October 2021, ECLI:EU:C:2021:198, par. 257, 258-260: "(…) in negotiating and concluding a mixed agreement, the Union and the Member States must act within the scope of the competences which they have and with due regard for the competences of any other contracting party (…) the conclusion of a mixed agreement by the Union and the Member States does not imply that the latter exercise Union competences or that the Union exercises competences of those States, but that each of those parties acts exclusively within the scope of its own competences, without prejudice to the possibility for the Council, recalled in point 248 of this opinion, to decide that the Union alone exercises a competence which it shares with the Member States in the policy area in question, provided that the majority required for that purpose is reached within the Council (…) the Member States decide not to conclude a mixed agreement which the Union decides to conclude, on the basis of the competences conferred on it alone (…)".

and of the Member States that have considered the agreement in the presence of a precise consent of the same.

**2. Hybrid Decisions and Loyal Cooperation Between Member States of the Union Before the Provisional Application**

In the national context, the agreement on the provisional application has resulted in the adoption of decisions by common agreement of the Member States with the Union. In this spirit, we recall the agreement on air transport of 2007 and the two Euro-Mediterranean agreements in the field of air transport of 2010 and 2013. As well as the agreements with Israel and Jordan, where the signature of the provisional application of the agreements has authorized the decisions that are adopted by the Council and by the representatives of the governments in the Council in a consensual manner[1].

These are decisions that are defined as hybrid acts. Such an act includes the decision of the Council for matters that are within the competence of the Union as well as the decision of the representatives of the governments for matters that are of exclusive competence of the Member States (Sanchez-Tabernero, 2015; Pieter Van Der Mei, 2016). These decisions provided that the Union and the Member States have provisionally applied the agreements and their respective national procedures for the national legislations, that are applicable according to the signature on the date indicated by them[2].

Hybrid decisions have been a practical expedient for the purposes of provisional application for mixed agreements and ensure the full participation of the Member States in the relevant national procedure of the Union. It is noted that provisional application agreements for treaties are part of conventional clauses and mixed agreements. Furthermore, the contracting parties have provisionally executed the conventional provisions for signature, as we noted in the case of the agreement on air transport between the Union, the Member States and the United States. Particularly, art. 25, par. 1 stated that: "(…) the Parties agree to apply this Agreement from 30 March 2008 (…)". The Euro-Mediterranean Air Transport Agreement between the Union, the Member States and Jordan is in the same spirit. Article 29, paragraph 2 stated that: "(…) by way of derogation from paragraph 1 of this Article, the Contracting Parties agree to apply this Agreement provisionally from the first day of the month following the date of the last note in an exchange of diplomatic notes between the Contracting Parties confirming that all procedures necessary for the provisional application of this Agreement have been completed, or, subject to internal procedures and/or national legislation, as the case may be, of the Contracting Parties, on the date occurring 12 months after the date of signature of this Agreement, whichever is earlier (…)". Equally important is the Euro-Mediterranean Air Transport Agreement between the Union, the Member States and Israel, where Article 30, paragraph 1 noted that: "(...) this agreement shall be applied provisionally, in accordance with the national legislation of the Contracting Parties, from the date of signature by the Contracting Parties (…)".

The signing of the text of the agreements assumes for the Union and the Member States the international obligation to ensure the early execution of them. The choice to proceed with the adoption of hybrid decisions is presented in a coherent manner and the obligations that are related to the provisional application of mixed agreements that the Union and the Member States have signed the relative text of the agreements ensure their cooperation.

The legality of the hybrid decisions was subject to review by the CJEU through an action for annulment of the European Commission and the decision of the Council and its representatives of the governments that authorised the signature of the provisional application of the 2011 air

[1] 2012/750/EU: Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 15 October 2010 on the signature and provisional application of the Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and The Hashemite Kingdom of Jordan, of the other part. OJ L 334, 6.12.2012, p. 1–2. 2013/398/EU: Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 20 December 2012 on the signing, on behalf of the European Union, and provisional application of the Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and the Government of the State of Israel, of the other part, OJ L 208, 2.8.2013, p. 1-2.

[2] 2007/339/EC: Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, OJ L 134, 25/05/2007, p. 1–3.

transport agreement with the United States[1]. The proposal of the European Commission for the provisional application of the agreement had nothing to do with the participation of the Member States as was argued by the European Parliament. The hybrid decision violated Art. 13, par. 2 TEU and pars. 2, 5 and 8 of Art. 218 TFEU under two aspects. First, the European Commission ruled that the primary law of the Union was identified by the Council as the only institution of a nature competent to adopt the relevant decision on the authorisation of the signature for the provisional application of agreements with third countries and international organisations. The Member States participating in the adoption of a hybrid decision as provided for by Art. 218 TFEU aims at a unilateral derogation for the Council from the procedures that outline its own provision according to the rules and principles for the functioning of the European institutions.

The CJEU highlighted the: "(…) clear distinction between the areas of activity of the Union and the areas in which the Member States retain the right to exercise their competences (...) to merge an intergovernmental act and an act of the Union, since such a merger would distort the Union procedures provided for in Art. 218 TFEU, depriving them of their object (...)"[2].

The participation of the Member States concerning the formation of the act authorising the signature and provisional application of the agreements creates confusion in international relations and the legal personality of the Union, as it violates the objectives of the Treaties regarding the principle of sincere cooperation ,as provided for by Art. 13TEU according to the institution of acting without weakening the general institutional framework of the Union. The European Commission complained that the decision was in conflict with the voting rule and Art. 100, par. 2 TEU and 218, par. 8TFEU regarding the Council acting by qualified majority. Thus, the hybrid decision was adopted unanimously.

Some member countries such as the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Poland, Portugal, the United Kingdom, Northern Ireland, and Sweden in Council have tried to adopt a hybrid decision for the provisional application of a mixed agreement that has guaranteed the objectives for a unique representation of the Union in international relations. It was also a direct expression of the principle of loyal cooperation in collaboration between Member States and the Union. The Council highlighted that the adoption of a hybrid decision has demonstrated in a direct way the participation of the Member States, which appeared consistent with the mixed character of the agreements in this regard. The arguments and the dispute seem to present a tension between the need for autonomy of the organization and the prerogatives of the Member States as sovereign states participating in the negotiation and conclusion of mixed agreements. The European Commission, the European Parliament, the Council and the Member States have intervened and expressed their positions, that were contrary to the principles and rules that governed the functioning of the Union.

According to Art. 13, par. 2TEU the CJEU acts within the limits of the powers that are conferred by the Treaties and the procedures in terms of finality that are provided for. Furthermore, the CJEU highlights the formation of the will of the institutions of the Union that are not derogable for the institutions and the Member States. According to Art. 218, par. 5TFEU the CJEU and the Member States have not had competence to adopt decisions relating to the provisional application of international agreements. The mixed character of the agreement does not seem to modify Art. 218 TFEU in the area of negotiation and conclusion of agreements. The CJEU stated, in this regard, that: "(...) a mixed agreement concluded with third countries are, on the one hand, the Union and (...) the Member States (...) (for the) negotiation and conclusion of such an agreement, each party must act within the limits of the competences that are attributed to it and with due respect for the competences of any other contracting party (...)"[3].

The division of competences between the Union and the Member States has highlighted that both parties have taken the relevant decisions, which were distinct for the provisional application and mixed agreements. The participation of the

[1] CJEU, C-28/12, Commission v. Council of 29 April 2015, ECLI:EU:C:2018:282, published in the electronic Reports of the cases.

[2] CJEU, C-28/12, Commission v. Council of 29 April 2015, op. cit.

[3] CJEU, C-28/12, Commission v. Council of 29 April 2015, op. cit.

Member States has taken distinct decisions for the report of the provisional application of mixed agreements. The participation for the Member States and the formation of the will of the Union on the provisional application of the agreement entails the relative interference for the Member States within the sphere of competence of the Union. The Council has participated in the formation of an act, which falls within the exclusive competence of the Union. The Council has participated in the formation of the act, which does not fall within the exclusive competence for the individual Member States and that each Member State should adopt the regulations according to domestic law. The CJEU stated, in this regard, that: "(…) in reality two distinct acts, namely, on the one hand, an act concerning the signature, on behalf of the Union, of the agreements in question and their provisional application by the latter (…) concern the provisional application of those agreements by the Member States, without it being possible to distinguish the act reflecting the will of the Council from that expressing the will of the Member States (…)"[1].

In this regard, the Advocate General Mengozzi specified that: "(…) the participation of the Member States in the internal procedure for the formation of the Union's will to the provisional application constitutes a dangerous precedent of contamination of the autonomous decision-making process of the Union institutions capable of undermining the autonomy of the European Union as its own legal system (…) It may generate the impression that the Union cannot autonomously decide to proceed with the signature and provisional application of agreements within which it exercises its competences (...)" [2]. These are positions that are shared by the CJEU and which have not failed to refer to the autonomy of the European legal order and to the legal system that distinguishes the international legal system from the legal systems of the Member States.

The CJEU has highlighted the principle of sincere cooperation between Member States and the Union. It puts into practice a close cooperation for the negotiation, execution, conclusion of mixed agreements that does not involve the derogation of procedural rules, where Art. 218 TFEU has clearly expressed. The Council could not do away with the rule of majority voting, where qualified its provision since the related act of the will of the Member States for the provisional application of the agreement implied the unanimous consent for the representatives of the governments. The provisional application of the treaties must maintain in a distinct manner the scope of procedures, that are not unified and integrated in nature. The CJEU has concluded that the decision challenging the violation of Art. 13 TEU and Art. 218 TFEU has followed its annulment (Verellen, 2016) [3] based on consolidated guidelines for the jurisprudence of the CJEU, where that certainly creates criticisms in this regard. The rationale for the CJEU was the privilege for the protection of the principle of autonomy of the legal order of the Union and the independence for the organization in its external action. In this spirit, the concept of national autonomy of the legal order of the Union is understood as independent for the Union and the legal systems of the Member States. The principle of autonomy of the legal order of the Union presents itself as a limit for the principle of loyal cooperation for the Member States and the Union. It is admitted that the action through Member States and the Union is not resolved with the adoption of a mixed decision, that manifests the will of the Union and the Member States that are gathered in Council.

The CJEU has highlighted that the non-derogability of procedural rules governing the formation for the will and the functioning of the European institutions are based on the principle of sincere cooperation within mixed agreements that do not justify the deviation of procedural rules of Art. 218 TFEU and the rule of qualified majority voting, which establishes the provision only in the cases provided for by the Treaties. The principle of sincere cooperation between Member States and the Union has to do with the majority voting rule as a known limit.

[1] CJEU, C-28/12, Commission v. Council of 29 April 2015, op. cit.

[2] See also the conclusions of the Advocate General Paolo Mengozzi presented on 29 January 2015 in case: C-28/12, Commission v. Council, ECLI:EU:C:2015:43, published in the electronic Reports of the cases.

[3] Verellen affirms that: "(...) a context of mixity, not only the autonomy of the Union legal order must be protected, but the autonomy of the individual Member States qua sovereign States under international law as well. Only this reading would fit with international law's foundational doctrine of sovereignty. From this point it follows that it is not sufficient for the ECJ to ground the argument in favour of the full effectiveness of Article 218TFEU in the "New Legal Order" claim (…)".

The CJEU has tried to examine the use of hybrid decisions for the provisional application of mixed agreements, which operate in the interpretative effort that tries to reconcile the principle of autonomy and majority voting with the principle of sincere cooperation under the adoption of hybrid decisions. In decisions of this nature, the provisional application of mixed agreements allows the Union and the Member States to ensure the participation of the Member States in an agreement on the provisional application. The adoption of hybrid decisions within the scope of provisional application of mixed agreements has avoided disagreements between Member States and the Union, thus highlighting what the Constitutional Court of Germany has evidenced in relation to the CETA agreement. It was the same court that relied on the Union and the Member States, namely the conclusion of an agreement on the provisional application of CETA and the implementation through the adoption of common positions, that are adopted by the Council itself through Art. 218, par. 9 TFEU[1].

The logic of the court was in favor of the privilege for the guarantee of compliance with the rules that regulate the relative functioning of the institutions of the Union, observing that the argument was contrary to hybrid decisions according to the principle of autonomy of the Union, that was surmountable of the different expressions of will of the two different subjects. Hybrid decisions according to the determination of the Council and relative to the provisional application of the Union and the provisions that fall within their own competence matters are determined by the representatives of Member States that apply, between the parties of the agreement, the matters of relative competence of the Member States. The admissibility for hybrid decisions and the relative rule of qualified majority voting affirms compliance with these rules for the functioning of the institutions. They guarantee the transparency of the work of the institutions, the interpretations that are restrictive and excessive for the procedural rules, that prevent the modalities of organization for the adoption of organization according to the unforeseen needs in time. It is obvious that the need for new forms of collaboration between Member States and the Union acts in a unitary manner towards the provisional application of mixed agreements.

### 3. Mixed Agreements, Termination and Provisional Application

Art. 218 TFEU through the relative silence for the decision of the termination of provisional application by the Union and par. 5 of the same article relating to decisions for the authorization of provisional application (Van Der Loo & Wessel, 2017) deal with the termination that reaches the hands of the Council. The related issues deal with disputes that do not concern the identification of a national procedure that follows the formation of the will of the Union and that thus provisionally terminates the relationship between Member States and the Union through the termination for the provisional application of mixed agreements.

The position and ability of Member States to terminate the provisional application of mixed agreements is part of a difficult work for the provisional application of CETA. This work highlights the possibility for Member States to unilaterally terminate the provisional application of mixed agreements. Member states unilaterally terminate the provisional application of CETA, which according to the German Constitutional Court in the judgment of the 2016 the: "(...) Federal Government should not be able to undertake the courses of action it proposed for avoiding a potential ultra vires act or a violation of the constitutional identity, it has, as a final resort, the possibility of terminating the provisional application of the Agreement by means of a written notification (...)"[2].

The applicants' instance was annulled and the German court stressed that the Member States

[1] "(…) constitutional identity (Art. 79(3) GG) brought about by the competences and procedures of the committee system can-in the context of the provisional application at any rate-be countered in various ways. An inter-institutional agreement, for example, might ensure that decisions taken pursuant to Art. 30.2(2) of the CETA draft may only be passed on the basis of a common position unanimously adopted by the Council pursuant to Art. 218(9) TFEU (see also BVerfGE 142, 123 211 and 212 para. 171) (…) would also correspond to state practice (cfr. Art. 3(4) of the Decision of the Council and the representatives of the Governments of the Members States of the European Union, meeting within the Council, on the signature and provisional application of the Protocol to Amend the Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part, Official Journal EU no. L p. 223/2) (…)".

[2] BVerfG, Sentence of 13 October 2016, 2 BvR 1368/16-, ECLI:DE:BverfG:2016:rs20161013.2bvr136816, par. 1-73, and especially par. 3: http://www.bverfg.de/e/rs20161013_2bvr136816en.html.

neutralised the effects of a decision ultra vires per the Council, according to which the provisional application of an agreement unilaterally puts the application in the manner foreseen by an agreement. The provisional application of CETA is based on the provisions on matters of exclusive competence for the Member States. It means that each Member State has the right not to continue the provisional application of the agreement. The declaration n. 21 signed by Austria and Germany and the declaration n. 22 of Poland in the Council highlighted the cessation of provisional application of the CETA. It is noted, in this regard, that: "(...) Parties to CETA, may exercise the rights resulting from Art. 30.7., par. 3, letter c) (…)". Particularly, Art. 30.7, lett. c) terminates the application and provisional title of the CETA thus allowing a written communication with legal effects from the first day of the month following the notification. Therefore, the agreement on the provisional application of the CETA had as its content art. 30.7 and the cessation of the provisional application.

The provisional application of CETA has highlighted that the agreement on provisional application of the Union and Canada only concerns matters within their competence. Member States are not party to an agreement on provisional application of CETA. The statements of Poland, Germany and Austria are clear and do not distinguish a treaty applied provisionally from a provisional application agreement such as the case between Canada and the Union, creating thus a relative confusion for the position of the Union and Member States within the scope of the provisional application of CETA. Member States can unilaterally interrupt the nature of a provisional application when they are parties to an agreement on provisional application. Any Member State that has expressed its consent to provisional application can autonomously exit from it in accordance with the modalities provided for by the lack of a rule based on art. 25VCLT.

The Advocate General Sharpston stated in this regard that: "(…) an international agreement is signed by both the European Union and its Member States, each Member State remains free, under international law, to terminate that agreement in accordance with the procedure provided for that purpose in the agreement itself (…) that state participates in the agreement as a sovereign State Party, and not as a mere appendix of the European Union (and in this respect it is entirely irrelevant that the European Union played the leading role in negotiating the agreement) (…) acting autonomously as a subject of international law reflects the fact that it retains its international competence (…)"[1]. The termination of the provisional application of one or more Member States does not overturn the position of the Union, since mixed agreements and the Union and the Member States are distinct.

Another important aspect that is controversial and causes effects of provisional application of mixed agreements is to ask for ratification the Union and the Member States according to Art. 25 VCLT (Bartles, 2012; Van Der Loo & Wessel, 2017; Suse & Wouters, 2018; Tovo, 2019). The will of one or more Member States that have not ratified the mixed agreement has to do with the termination of its provisional application. The Council's declaration on the cessation of provisional application of CETA states that: "(...) the ratification of CETA is permanently and definitively prevented by a judgment of a Constitutional Court or by the completion of other constitutional processes and by formal notification by the government of the state concerned, provisional application must and will be terminated (...) will be taken in accordance with EU procedures (...)".

In the CETA agreement, the provisional application clause of the agreement seeks to expressly regulate the modalities according to which the parties terminate their provisional application. The termination of provisional application according to par. 2 of Art. 25VCLT is based on the parties to the agreement regarding provisional application, who have not agreed anything on the matter. Thus, provisional application terminates and notifies the conclusion of a treaty for other states and organizations that give rise to provisional application. The provisional application of mixed agreements with exclusive mode for the Union and third states as provided by par. 2 of Art. 25VCLT for the termination of provisional application, is exclusively linked with the Union.

At international level, the expression of the will

[1] See also the conclusions of the Advocate General Eleonor Sharpston presented on 21 December 2016 in the opinion 2/15, Accord de libre-échange avec Singapour of ECLI:EU:C:2016:992, published in the electronic Reports of the cases, par. 77.

of one or more Member States not to ratify the agreement does not automatically mean the cessation of the provisional application of the agreement by the Union. Political opportunities push the Union to put an end to the provisional application of the agreement, which is not ratified by one or more Member States.

**4. Jurisdiction in Mixed Agreements, Violation of National Rules and Provisional Application**

Mixed agreements are perhaps the only cases in which the Union has expressed its consent for the provisional application of a full type outside the framework of the competences it attributes to the treaties. There are two different points that deserve to be examined. On the one hand, we have the enforcement of agreements applied provisionally for the violation of rules on competence in provisional application. On the other hand, we have a second level, according to which violations of the validity of the agreement have provisional application as their object. We recall again the guidance on provisional application of the ILC. International organizations cannot call upon the national rules of organizations that go outside the obligations that derive from provisional application. The Union is bound to the application of a mixed agreement that violates its own national rules and regulate the competence to stipulate matters for the Member States. The Union fails to fulfil its obligations arising from the provisional application of a mixed agreement, where the third State invokes the international responsibility of the Union and the relevant requirements which are relevant for international law are met. The Union was not contrary to the national rules of the organization relating to the division of competences between the Union and the Member States, which remove the responsibility arising from a failure to implement provisions, which have as their object the provisional application.

The provisional application of mixed agreements involves a certain disruption to the institutional balance concerning the relations between Member States and the Union within the field of external relations. The Union with respect to the provisional application of mixed agreements has acted in violation of national rules, that are relevant to its own stipulation. The Union and the Member States with respect to the provisional application of mixed agreements are concentrated on governments and institutions. The adoption of hybrid decisions gives rise to the violation of rules and principles that regulate the relative functioning of the Union. The violations and the annulment of decisions that also authorize the provisional application are examined by the CJEU.

The CJEU by annulling the decisions that are contested provides the effects of the decisions according to Art. 264, par. 2 TFEU. The effects of the decision for the acceptance of the relative request for annulment have been requested by the Council and by the European Commission with the support of the European Parliament, Czech Republic, Germany, France, Finland and Portugal.

The procedure for annulling decisions contested under paragraph 1 of Article 264 has effects *erga omnes* and *ex tunc*. The CJEU has highlighted that the effects of the annulled act provide for the maintenance of such effects until the issuing of an act that is free from defects. The effects of the annulment can have serious negative consequences when the immediate effects of the annulment entail negative consequences for the legitimacy of the contested act, that is contested for reasons of incompetence and for defects of substantial form[1].

The CJEU highlighted the conditions for the maintenance of the contested effects by stating that: "(…) the contested decision made it possible for the Union to apply provisionally the Accession Agreement and the Additional Agreement (…) the immediate adoption of such a decision could have serious consequences for the Union's relations with the third states concerned as well as for economic operators operating on the air transport market, who were able to benefit from the provisional application of the said agreements (…)"[2]. The reasons of legal certainty according to the CJEU highlighted that the maintenance of the effects of the contested decisions until their entry into force within the time limit set for the ruling should be decided by the Council according to paragraphs 5 and 8 of Art. 218 TFEU.

**5. Conclusions**

As we understand until now legal certainty justifies the maintenance of effects for decisions

[1] CJEU, C-103/12. European Parliament and European Commission v Council of the European Union of 26 November 2014, ECLI:EU:C:2012:2400, published in the electronic Reports of the cases.

[2] CJEU, C-103/12. European Parliament and European Commission v Council of the European Union of 26 November 2014, op. cit., par. 61.

that are challenged and require serious consequences for annulment with immediate effects as well as the decision that is challenged in the Union with other parties of the provisional application. The annulment by the CJEU, the decision of the Council and the representatives of the Member States allow the authorization for the provisional application of an agreement that does not produce direct consequences for the relevant national legal systems of the Member States of the Union. The provisional application discipline for treaties regulates exclusively international law. The validity of their agreements that are concluded between organizations and states and not directly and subordinated to compliance with procedural and substantive rules, regulates the competence of organizations in matters of provisional application. Violating national rules on competence in matters of treaties does not imply the invalidity of consent for an agreement on the international level thus giving basis to most of an asymmetry in the legal status of the act. The considerations are part of a context of international organizations in a general way and in a special way in the law of the Union. It is concluded that annulling decisions of the Council, which are related to provisional application in the matter of mixed agreements does not overturn the validity of a consensus of the Union regarding provisional application at international level.

This is a position that is confirmed by the guidance on provisional application of the ILC and the general rules of treaty law between states and international organizations, including agreements on provisional application. International organizations do not challenge the validity of a consent of provisional application on the basis of violations of national norms and in the competence of provisional application. The guidance of the ILC as an exception to the relative principle of violations manifested by national norms on the competence of the provisional application has an interesting importance that is also specified in the analogical application of the norm according to Art. 46 of the Vienna Convention of 1986. In it, the national norms are fundamental and also integrate the exception for the norms that are relative for the distribution of competence between organizations and Member States. Exceptions for manifest violations require the consent to provisional application for mixed agreements, as expressed in the relevant norms on competence.

Extending, exceeding according to Art. 46 of the Vienna Convention of 1986 with application to the spirit of the Union highlights the poor application of a practice as well as many perplexities and complexities relating to the distribution of competence in the matter of treaties between Member States and the Union. The national rules of the Union in the area of the treaty making power and the distribution of competences between Member States and the Union are complex to a violation that is hardly manifested in an objective way by the organizations and states. The ordinary and good faith practice is not always a reality for the determination of competences for purposes of provisional application within the general scheme of the distribution of competences according to the conclusion of agreements with the same difficulties presented.

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