The Ratification Saga of the EU-Ukraine Association Agreement:

Some Lessons for the Practice of Mixed Agreements

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Introduction

On 6 April 2016, a referendum on the approval of the Association Agreement between the European Union (EU), its Member States and Ukraine[1] was organised in the Netherlands. This was the direct result of the Dutch Advisory Referendum Act (DAR), which existed between 1 July 2015 and 10 July 2018.[2] According to this Act, a minimum of 300,000 citizens could initiate an advisory referendum on most laws and treaties after these had been approved by both chambers of parliament. In order to be valid, at least 30 per cent of the electorate had to participate. This threshold was just met (32 per cent of participants) in the so-called 'Ukraine referendum' with over 61 per cent of the voters indicating that they rejected the approval of the association agreement in the Netherlands.

Despite its non-binding nature, the outcome of the referendum created significant political and legal problems. Politically speaking, Dutch governmental and parliamentary representatives had committed themselves to take the result of the referendum seriously, implying that the mere continuation of the internal ratification process was not an option. As a result, several legal problems emerged since the EU-Ukraine Association Agreement could only enter into force upon the approval of all parties.[3] Whereas it already happened in the past that a third country failed to ratify a mixed agreement with the EU, leading to the addition of an adjustment protocol clarifying that this country would not become a party to the agreement,[4] the situation after the Dutch referendum was significantly more complicated. For

[1] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ (2014) L 161/3.

[2] For more information concerning the key features and repeal of the DAR, see: https://www.parlement.com/id/vh8lnhrsk1yq/raadgevend_referendum (last consultation on 26 February 2019).

[3] Art. 486 of the EU-Ukraine Association Agreement.

[4] See, for instance, the Protocol Adjusting the Agreement on the European Economic Area (OJ (1994) L 1/572), which was adopted following the rejection of this agreement in a Swiss referendum. The protocol provided that all references to the Swiss Confederation in the preamble and several provisions of this agreement shall be deleted.

the first time, an EU Member State was on the verge of not ratifying a mixed agreement. Without a solution for the Dutch situation, the Council could not adopt the final Decision regarding the conclusion of the agreement. At the same time, however, a significant part of the agreement had already provisionally entered into force raising questions about the limits of this practice.

Hence, the Dutch ratification saga opened the gates to a more broader discussion regarding the consequences of the non-ratification of mixed agreements concluded between the EU, its Member States and one or more third countries. This contribution will not comprehensively deal with this issue,[5] but will only reflect upon the EU's response to the legal and political challenges related to the entry into force of the EU-Ukraine Association Agreement. After a brief contextual situation of the political and legal background of the referendum, specific attention is devoted to the 'Decision of the EU Heads of State or Government, meeting within the European Council', adopted as an annex to the 15 December 2016 European Council conclusions, which opened the gates to the ratification of the EU-Ukraine Association Agreement in the Netherlands and at the level of the EU.[6] To conclude, some general reflections are made with respect to the broader implications of the Dutch referendum saga for the practice of mixed agreements.

Political and Legal Background of the Referendum

An EU-critical foundation (*Burgercomité EU*) and a popular anti-establishment blog (*GeenStijl*) joined forces – under the name *GeenPeil* – and gathered the necessary 300,000 signatures to call for a referendum on the approval of the EU-Ukraine Association Agreement in April 2016. That precisely this agreement became the subject of a public debate was a mere coincidence and can only be explained on the basis of timing. It was simply the first legal text approved in the Dutch parliament after the DAR entered into force and, therefore, the first occasion to test its implications in practice.

It is striking that none of the official bodies gave a clear-cut answer to the question about what would happen in case the Dutch citizens would reject the Approval Act of the EU-Ukraine Association Agreement. Prime Minister Rutte communicated that the government would simply wait for the outcome of the referendum before deciding on its implications.[7] The European Parliament simply took note of the upcoming referendum and trusted that 'the decision of the Dutch people will be taken on the basis of the merits of the agreement,

[5] For a more detailed discussion on this issue, see e.g. G. Van der Loo and R. Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions', *Common Market Law Review* (2017) 735-770.
[6] European Council Conclusions, Brussels, 15 December 2016, EUCO 34/16.
[7] 'Kabinet geeft vooraf geen duidelijkheid over gevolgen referendum', at: https://nos.nl/artikel/2063440-kabinet-geeft-vooraf-geen-duidelijkheid-over-gevolgen-referendum.html (last consultation on 3 April 2019).

recognising its tangible effects on the EU and the Netherlands in particular.'[8] European Commission President Juncker, for his part, warned the Dutch population that a no vote could 'open the door to a large continental crisis' without however clarifying why this would be the case.[9] In other words, neither the Dutch government nor the EU institutions had a clear plan on how to deal with a potential 'no' vote in the referendum.

Immediately after the referendum, Dutch Prime Minister Rutte announced a 'reflection period' to study the different options to address the main concerns of the Dutch electorate while still enabling the Netherlands to ratify the agreement.[10] In principle, the legal implications of a Dutch 'no' vote could have been rather limited. The referendum was non-binding and, therefore, did not preclude the continuation of the ratification from a legal point of view. However, from a political perspective, the political leaders could not simply ignore the outcome. This also happened after the consultative referendum on the Treaty establishing a Constitution for Europe back in 2005. Despite its consultative nature, the 'no' vote in that referendum implied that the Netherlands was unable to ratify the constitutional treaty. Taking into account the requirements of the EU Treaty amendment procedure (Article 48 TEU), this treaty could therefore simply not enter into force. One may argue that also the EU-Ukraine Association Agreement, as a so-called mixed agreement signed by the EU and its 28 Member States, potentially faced a similar fate. However, there are significant differences between the amendment of EU primary law and the ratification of a mixed agreement. Most importantly, a large part of the EU-Ukraine Association Agreement falls within the scope of EU (exclusive and shared) competences and already provisionally entered into force upon signature of the agreement.[11]

The Issue of Provisional Application

[8] Press release of European Parliament plenary session of 21 January 2016, at: http://www.europarl.europa.eu/news/en/press-room/20160114IPR09906/meps-urge-moldova-georgia-ukraine-to-pursue-reform-and-russia-to-leave (last consultation on 3 April 2019).

[9] 'Juncker: Dutch 'no' on Ukraine would lead to 'constitutional crisis', available at: https://euobserver.com/tickers/131760

[10] P. Van den Dool, 'Rutte: Resultaat Oekraïne referendum desastreus', *NRC Handelsblad*, 13 June 2016.

[11] Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Title I, II and VII thereof (*OJ,* 2014, L 161/1) and Council Decision 2014/668/EU of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII of the Agreement, as well as the related Annexes and Protocols (*OJ*, 2014, L 278/1).

The provisional application of mixed agreements is a common technique in order to overcome the long ratification procedure in all EU Member States.[12] This was also explicitly foreseen in Article 486 of the EU-Ukraine AA, according to which the parties agreed to provisionally apply specific parts of the agreement in accordance with their respective internal procedure and legislation. Within the EU legal order, this is subject to the adoption of an EU Council decision in accordance with Article 218 (5) TFEU.[13] Given the political significance of the EU-Ukraine AA, the Council agreed on an exceptional wide scope for provisional application, including, *inter alia*, the entire title on General Principles (Title I) and Financial Cooperation (Title VI), almost the entire DCFTA (Title IV), Institutional, General and Final Provisions (Title VII) and several provisions regarding political dialogue (Arts. 4-6), Justice, Freedom and Security (Arts 14 and 19) and economic and sectoral cooperation.[14] The Council decisions further clarified that the listed provisions shall be applied on a provisional basis "only to the extent that they cover matters falling within the Union's competence" without however specifying the precise division between EU and Member State competences. This constructive ambiguity is not very problematic when the Member States approve the agreement without any further considerations. In the case of the Dutch referendum, however, it resulted in a rather complex legal and political reality.

Formally speaking, the Dutch referendum only concerned the Approval Act of the EU-Ukraine Association Agreement as adopted in the Dutch Parliament. It, therefore, only dealt with the participation of the Netherlands to the agreement. As far as the EU's participation is concerned, a separate ratification procedure under Article 218 TFEU implies a proposal of the Commission, the consent of the European Parliament and the adoption of a Council decision concluding the agreement. However, this legal logic of mixity is difficult to respect in the absence of a clear separation between the provisions falling under EU and Member State competences. The Dutch Approval Act did not specify which parts of the Association Agreement it covered and, therefore, implied that the precise scope of the actual referendum

[12] For a detailed analysis of the provisional application of international agreements concluded by the EU, see C. Flaesch-Mougin, I. Bosse-Platière, 'L'application provisoire des accords de L'Union Européenne', in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds.), *The European Union in the World. Essays in Honour of Marc Maresceau*, (Martinus Nijhoff Publishers, 2014), 293-323.

[13] Article 218 (5) TFEU provides that the Council 'shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force'.

[14] Combined reading of Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Title I, II and VII thereof (*OJ,* 2014, L 161/1) and Council Decision 2014/668/EU of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII of the Agreement, as well as the related Annexes and Protocols (*OJ*, 2014, L 278/1).

was not clearly defined.[15] In any event, the referendum campaign was not limited to issues of Member State competence but concerned the approval of the Association Agreement as a whole. Whereas this may be not be entirely correct from a legal point of view, it seems politically speaking very difficult to make a neat distinction between the EU and Member State level of ratification. Without the internal approval of the Netherlands, the Council could not adopt its final decision regarding the conclusion of the agreement.

Significantly, the negative outcome of the Dutch referendum did not affect the provisional application of the Association Agreement. This is logical since the latter only concerned those matters falling within the Union's competence. However, in the absence of a deadline for the finalisation of the ratification process, the question emerged whether the provisional application could continue infinitely if one of the Member States failed to finalise the ratification process. In this respect, it appears that the duty of sincere cooperation, laid down in Article 4(3) TEU, plays a significant role. It follows from the established case law of the Court of Justice that Member States and EU institutions are bound to cooperate closely in the process of negotiation and conclusion of mixed agreements, including at the stage of ratification.[16] Of course, this duty cannot imply that Member States are obliged to ratify the agreement in the end. As observed by Van der Loo and Wessel, this would not only undermine the meaning of national ratifications but it would also violate the fundamental international law principle that a consent to be bound can only be expressed voluntarily.[17] However, it may well be argued that the duty of sincere cooperation requires the Members States to take action in order to define a final position regarding their approval or disapproval of the agreement. In other words, a deliberate obstruction or indefinite postponement of the internal ratification procedure would contradict the Member States' duties under Article 4 (3) TEU.

In the hypothesis that a Member State finally rejects the internal ratification of a mixed agreement, a new problem emerges in the sense that this does not automatically terminate its provisional application. The latter is a matter of EU competence and is based upon a Council decision adopted on the legal basis of Article 218 (5) TFEU. It is, therefore, logical that a termination of the provisional application follows the same procedure.[18] However, mixed

[15] As observed by Van der Loo and Wessel, "the Dutch citizens could not know what they were voting for". See: Van der Loo and Wessel, *op. cit.* note 5, p. 758. As suggested by Kuijper, it is therefore recommendable that the national approval acts of mixed agreements should contain a proviso clarifying that they only concern the approval of those elements falling within Member State competences. See: Kuijper, "Post-CETA: How we got there and how to go on", ACELG Blog, 28 Oct. 2016, at: https://acelg.blogactiv.eu/2016/10/28/post-ceta-how-we-got-there-and-how-to-go-on-by-pieter-jan-kuijper/ (last consultation on 3 April 2019).

[16] See, *inter alia*, Opinion of 15 November 1994, *WTO*, 1/94, EU:C:1994:384, para. 108, and Opinion of 6 December 2001, *Protocole de Cartagena sur la prévention des risques biotechnologiques*, 2/00, EU:C:2001:664, para. 18; and Judgment of 20 April 2010, *Commission v. Sweden*, C-246/07, EU:C:2010:203, para. 73, and Judgment of 28 April 2015, *Commission v Council*, C-28/12, EU:C:2015:282, para. 54 ; Opinion of 19 March 1993, *ILO Convention*, 2/91, EU:C:1993:106, para. 38.

[17] Van der Loo, Wessel, *op. cit.* note 5, p. 744.

[18] *Ibid.*, p. 761.

agreements often only generally provide that "either party may give written notification to the Depository of its intention to terminate the provisional application of this agreement".[19] This has been interpreted, amongst others by the German Constitutional Court in relation to the EU-Canada Comprehensive Economic Trade Agreement (CETA), as a right for EU Member States to unilaterally terminate the provisional application.[20] Nevertheless, in order to put such a Member State decision into effect, an EU Council decision would still be needed. This can also be derived from the proviso 'in accordance with EU procedures' in a statement from the Council regarding the termination of provisional application of CETA:

> If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. *The necessary steps will be taken in accordance with EU procedures*.[21]

The only remaining issue is then whether the EU is under a legal obligation, as a matter of EU law, to effectively terminate the provisional application of the agreement once it has become clear that a Member State has permanently and definitely failed to ratify a mixed agreement. There are certain arguments for such a conclusion. First of all, also the EU institutions are bound by the duty of sincere cooperation and must, therefore, respect the decision of EU Member States not to become party to a mixed agreement. Second, the practice of provisional application can only be tolerated in anticipation of the agreement's entry into force. When it is clear that an agreement will not fully enter into force, due to the decision of non-ratification in one or more Member States, the legal basis for provisionally applying the EU's international agreements no longer exists.[22] The main difficulty, of course, concerns the determination of a Member State's permanent and definitive inability of ratification. Arguably, a ruling of a Constitutional Court that an agreement is inconsistent with the national constitutional order may constitute such a situation but even then the option of a national constitutional amendment should not be excluded. Moreover, it appears that also the reason for non-ratification is to be taken into account. For instance, withholding ratification in order to obtain additional commercial concessions from a third country, seems unacceptable in light of the Member States' duty of sincere cooperation and the exclusive nature of the EU's competence in this respect.[23]

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[19] E.g. Art. 486 of the EU-Ukraine AA.

[20] Bundesverfassungsgericht, 2 BvR 1368/16. Applications for a Preliminary Injunction in the "CETA" Proceedings Unsuccessful. *Press Release No. 71/2016 of 13 October 2016*. Retrieved from https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html (last consultation on 3 April 2019).

[21] Statement from the Council regarding the termination of provisional application of CETA, *OJ* (2017) L 11/15.

[22] See: A. Suse and J. Wouters, 'The Provisional Application of the EU's Mixed Trade and Investment Agreements', Leuven Centre of Global Governance, Working paper No. 201, May 2018, p. 20.

[23] *Ibid.*

Finally, even in the hypothesis that EU institutions adopt the necessary instruments to terminate the provisional application of a mixed agreement due to internal ratification obstruction in one of the EU Member States, the question remains whether a so-called 'incomplete' mixed agreement can be concluded instead. The notion of incomplete mixity implies that the EU and the remaining Member States that have ratified the agreement can go ahead.[24] Whereas there are several examples of 'incomplete' multilateral mixed agreements, significant legal hurdles need to be overcome in order to apply this mechanism in relation to bilateral mixed agreements. This essentially concerns the procedural requirement that the latter agreements can only enter into force upon ratification by all the parties and the already explained ambiguity surrounding the precise delimitation of EU and Member State competences.[25]

Hence, taking into account the numerous legal and political uncertainties and complexities, it is obvious that the decision to terminate the provisional application of a mixed agreement due to ratification problems in an EU Member State is only to be considered as a last resort. The outcome of the Dutch referendum provided a good opportunity to reflect upon the various options to reconcile the concern of the Dutch voters, on the one hand, and the general interest in proceeding with the ratification process of the association agreement, on the other hand. From a legal perspective, the easiest solution would have been the addition of a unilateral declaration on behalf of the Netherlands. Such a declaration could clarify the Dutch views on the interpretation of certain provisions but, given its unilateral and non-binding nature, its legal implications would be rather limited. It was, therefore, quickly ruled out as a potential solution within the domestic debate. The other alternative of an opt-out for the Netherlands in the form of binding protocol sounded more attractive from a Dutch perspective but appeared much more difficult to achieve in the sense that it required the approval of all other parties to the agreement. Ultimately, a rather creative solution was found in the form of a decision of the EU Heads of State or Government, adopted as an annex to the 15 December 2016 European Council conclusions.[26] As will be explained in more detail in the following section, this option reconciled the Dutch call for a binding solution with the other parties' interest in a finalisation of the ratification procedure without any amendments to the text of the association agreement.

A Creative Solution to the Conundrum

[24] Vander Loo and Wessel, *op. cit.* note 5, p. 740.
[25] *Ibid.*, pp. 746-758.
[26] Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Annex tot he European Council Conclusions on Ukraine (15 December 2016), available at: https://www.consilium.europa.eu/nl/press/press-releases/2016/12/15/euco-conclusions-ukraine/ (last consultation on 8 April 2019).

The formula of a 'Decision of the EU Heads of State or Government, meeting within the European Council' is not new in the EU's legal practice. It has been used in the past in order to agree on certain guarantees for Denmark and Ireland in the wake of the negative referenda on the Treaty of Maastricht (December 1992) and the Treaty of Nice (June 2009) respectively and to decide on the location of the seats of a number of EU institutions and bodies. More recently, the "new settlement for the United Kingdom within the European Union", adopted before the Brexit referendum in response to David Cameron's request for a binding and irreversible new deal, also followed the same logic. In that context, an opinion of the Council's legal service already observed that this is "a Decision of the Member States of the European Union, of an intergovernmental nature, not a Decision of the European Council as an institution of the European Union".[27]

In other words, the Decision is an instrument of international law by which the Member States agree on how they understand the EU-Ukraine Association Agreement. The European Council conclusions and an opinion of the European Council's legal counsel explicitly note that the Decision is legally binding on the 28 Member States and can only be amended or repealed by common accord of their Heads of State or Government.[28] Both the title and the content of the instrument point in that direction. Yet, the legal implications are limited to the EU Member States alone: its provisions cannot create any legal obligations for Ukraine (unless Ukraine would formally declare its acceptance of the Decision). In that sense, it differs from the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States.[29] The latter is a binding source of interpretation in the sense of Article 31 of the Vienna Convention on the Law of Treaties (VCLT). A similar solution was used in relation to the draft Withdrawal Agreement between the EU and the UK. In order to provide the UK with additional legal guarantees regarding the interpretation of certain provisions of this agreement, most notably regarding the future border between Ireland and Northern Ireland, an additional 'Instrument' was agreed between the parties on 11 March 2019. The latter expressly refers to Article 31 VCLT to underline that it is a legally binding clarification of what the parties agreed in a number of provisions of the Withdrawal Agreement, which can be used as a document of reference if issues arise regarding the implementation of this agreement.[30]

[27] Opinion of the Legal Counsel regarding the Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, Brussels, 8 February 2016, EUCO 15/16.

[28] Opinion of the Legal Counsel regarding the Draft Decision of the Heads of State or Government, meeting within the European Council, on the association agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Brussels, 12 December 2016, EUCO 37/16.

[29] Joint Interpretative Statement on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, OJ (2017) L 11/3.

[30] Instrument relating to the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2019) 61, 11 March 2019,

The Decision on the EU-Ukraine Association Agreement, on the other hand, is of a different nature. It is a unilateral interpretation which can only be used to assess the intentions of the EU Member States when becoming parties to the agreement. It does not prejudice the interpretative position of Ukraine and cannot affect the content of the rights and obligations contained in the agreement itself. The Decision also does not entail a formal reservation or opt-out from specific provisions of the agreement. Hence, upon finalisation of the final ratification requirements, the EU-Ukraine Association Agreement fully entered into force as a mixed agreement binding upon the EU and all its Member States. As such, its legal status is not different from that of the largely comparable Association Agreements with Moldova and Georgia, which were not subject to a popular referendum and already entered into force without major discussions.

The Decision identifies six issues representing the main concerns that were raised during the referendum, i.e. the link between the agreement and Ukraine's membership perspectives, the consequences of cooperation in the field of security, access to the national labour market, the financial implications of the agreement and, finally, problems of corruption and the state of the rule of law and democracy in Ukraine. Hence, the Decision must be regarded as an answer to the often false information that was spread during the referendum campaign. For instance, the 'no-camp' proclaimed that the Association Agreement is an entry ticket towards Ukraine's future EU membership, potentially leading to the involvement of Dutch soldiers in the Donbas region and a significant increase of financial support to a largely corrupt political system.

In essence, the Decision only confirms the text of the Association Agreement. This is particularly clear with respect to the importance of the fight against corruption and respect for democratic principles, human rights and fundamental freedoms and the rule of law as 'essential elements' of the association and the possibility to adopt appropriate measures in case of non-fulfilment of obligations. This can with so many words be derived from Articles 2, 3, 14, 22, 459 and 478 of the Association Agreement. Also with respect to the other issues, the Decision merely states the obvious. The Association Agreement does not provide for free movement of persons and only includes a modest section on mobility of workers (Article 18), which is nothing more than a stand-still provision. In the field of security cooperation, Articles 7 and 10 of the Agreement refer to the aim of gradual convergence in the area of foreign and security policy but this clearly falls short of providing for collective security guarantees. Finally, also with respect to the membership issue it is plainly evident that nothing in the Association Agreement leads to the conclusion that Ukraine is granted the status of a candidate country. This being said, the agreement does not exclude Ukraine's right to apply for membership under Article 49 TEU nor does it predetermine the EU's position if such a hypothetical scenario would materialise. The Decision does not and cannot affect this reality; it simply observes that

available at: https://ec.europa.eu/commission/sites/beta-political/files/instrument.pdf (last consultation on 8 April 2019).

there is no direct or automatic connection between the Association Agreement and Ukraine's membership perspectives.

Concluding Remarks

The Decision of the EU Heads of State or Government proved to be a legally creative solution, which allowed to overcome the deadlock in the ratification process of the EU-Ukraine Association Agreement. It allowed the Dutch parliament and the Council to finalise all remaining ratification procedures so that the agreement could fully enter into force on 1 September 2017. From a legal point of view, the implications of this solution are fairly limited. It did not change a letter to the text of the agreement nor did it impose any additional legal commitments on the parties. However, from a political point of view, it signals the Member States' cautious approach regarding the granting of potential membership perspectives to Ukraine in the future. Moreover, the adoption of a decision regarding the interpretation of key provisions of the agreement after most parties and their parliaments already approved this agreement can hardly be regarded as a good practice.[31]

Instead of constructing *ex post* solutions to unexpected problems in the ratification process, a more proactive approach in the practice of concluding mixed agreements seems recommendable. In the first place, the question arises whether the option for mixity is always required. It is well known that the choice for mixity is not necessarily a result of legal orthodoxy but frequently the consequence of crude political interests on behalf of the Member States.[32] Second, in cases where the mixed formula is deemed appropriate the early involvement of national parliaments may prevent the emergence of ratification problems at a later stage. In practice, the role of national parliaments in the conclusion of mixed agreements is often disregarded. However, as illustrated with the Dutch referendum saga as well as the discussion relating to CETA, their role cannot be underestimated. In addition to the European Parliament, which has the right to be directly informed about all stages of the negotiating procedure under Article 218 (10) TFEU, national parliaments are expected to monitor and control the actions of their national governments in the Council and to stimulate a domestic debate concerning the content and significance of international agreements before their actual conclusion.[33] Third, the Dutch referendum saga revealed the importance of the duty of sincere cooperation

[31] R. Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement', *European papers* (2018), p. 1308.

[32] P. Van Elsuwege and M. Chamon, 'The meaning of 'association' under EU law: a study on the law and practice of EU association agreements', Study of the AFCO committee of the European Parliament', February 2019, at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU(2019)608861_EN.pdf (last consultation on 8 April 2019).

[33] G. Van der Loo, 'Less is more? The role of national parliaments in the conclusion of (mixed) trade agreements', *CLEER Working Papers* 2018/1, available at: https://www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20181-van-der-loo/ (last consultation on 8 April 2019).

in managing the ratification process of mixed agreements. Taking into account that EU Member States cannot unilaterally terminate the provisional application of mixed agreements, which only concerns the areas falling under EU competence, the involvement of the EU institutions is indispensable to deal with a potential non-ratification at the national level. At the same time, the duty of sincere cooperation requires the EU institutions to respect the outcome of the Member States' internal ratification process. As a result, a system of 'checks and balances' may be observed where all parties involved are required to work together in order to ensure the smooth entry into force of mixed agreements.