4 The International Responsibility of the European Union: a Basic Interpretive Pattern

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4.1 Introduction

The legal personality of the European Community (EC) and of the European Union (EU) has been the subject of debate for a long time. Although before Lisbon there was quite a uniform consensus as to the legal personality of the European Community within the framework of the three-pillared structure of the Union,[1] with the entry into force of the Lisbon Treaty the EU has definitely been granted legal personality (Art. 47 of the Treaty on the European Union [TEU]), and thus enjoys *unitary status* in international law. This status is not equivalent to that of states but, technically speaking and despite the specific structure of the Union, is the same as that of international organizations. In other words, the EU is the holder of international obligations that it can negotiate and might breach by way of unilateral or multilateral acts and omissions.

Horizontally, from the viewpoint of primary rules (1), the main reference for understanding the international responsibility of the EU is the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[2] The 2011 ILC's Draft Articles on the Responsibility of International Organizations provide complementary guidelines as to secondary regulation (2),[3] according to the Kelsenian normative categorisation.[4]

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1 *See* ECJ, *Commission v. Council* (*European Agreement on Road Transport*), Case 22-70, Judgment of 31 March 1971, at para. 14. For a scholarly opinion *see* M. Cremona, "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law", *EUI WP No. 2006/22,* at p. 35.

2 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A/Conf.129/15, adopted on 21 March 1986, not into force yet.

3 ILC's Draft Articles on the Responsibility of International Organizations (2011) [henceforth the ILC's Draft Articles], *in* Report of the ILC to the General Assembly on the Work of Its Sixty-Thirds Session, UN Doc A/66/10 (2011), at para. 87.

4 H. Kelsen, *Pure Theory of Law*, Peter Smith, Gloucester, 1989, at p. 75.

Temporally, it is also useful to distinguish contractual responsibility arising from the exercise of international regulatory power (1),[5] from non-contractual responsibility arising from international non-regulatory conduct (2).
Vertically, in light of the Hartian normative categorisation,[6] the layered structure of the EU must be taken into account, *i.e.*, primary EU regulation (1), including the TEU, Treaty on the Functioning of the European Union (TFEU), and Charter of Fundamental Rights of the European Union (CFREU); secondary EU regulation (2), essentially encompassing regulations and directives (*droit dérivé*); and tertiary member states' regulation (3).[7]
Based on this analytical framework, the present chapter first sketches the international regulation of the responsibility of international organizations, and secondly, explores the responsibility of the EU in light of the entry into force of the Lisbon Treaty. Against the background of the relationship between EU law and international law, this chapter seeks to define a basic paradigm to understand the division of responsibility between the EU and its member states for breaches of international obligations.

4.2 The Responsibility of Intergovernmental Organizations for Internationally Wrongful Acts

The framework for the responsibility of governmental organizations within international law is defined by the ILC's Draft Articles.[8] These rules have been included since 2000 in the long-term work of the ILC, when the Draft Articles on State Responsibility were going to be adopted under the supervision of Professor James Crawford.[9]
The Draft Articles deal with both the responsibility of international organizations for internationally wrongful acts and the responsibility of states for acts in connection with the conduct of international organizations (Art. 1). By "international organization" the Draft Articles mean an "organization established by a treaty or other instrument governed by international law and possessing its own legal personality", which includes "states and other [member] entities" (Art. 2(a)).[10]

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5 For a private law approach to international law see F. Kratochwil, "The Limits of Contract", 5 EJIL 1994, p. 465; D. Anzilotti, *Cours de droit international*, Sirey, Paris, 1929.
6 H. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1961, at pp. 79 *et seq*.
7 *See* O. Quirico, "Substantive and Procedural Issues Raised by the Accession of the European Union to the European Convention on Human Rights", 20 It YIL 2010, p. 31, at pp. 32-36.
8 For a general presentation of the responsibility of international organizations, *see* C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations,* Cambridge University Press, Cambridge, 2005, at pp. 384 *et seq*.
9 UN General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/55/10), at paras. 726-729.
10 *See* M. Mendelson, "The Definition of 'International Organization' in the ILC Current Project on the Responsibility of International Organizations", *in* M. Ragazzi (Ed.), *International Responsibility Today – Essays in Honour of O. Schachter*, Martinus Nijhoff, Leiden, Boston, 2005, p. 371; N. White, *The Law of International Organizations*, Manchester University Press, Manchester, 2005, at pp. 32 *et seq*.

These norms are directly relevant to the EU insofar as they define the framework for the responsibility of the Union as such as well as for the division of responsibility between the Union and its member states.

According to the ILC's Draft Articles, the responsibility of an international organization arises from negative or positive conduct attributable to the organization and in breach of an international obligation (Art. 3). Based on classical international legal theory,[11] the conduct of the agents of an organization is considered attributable to the organization itself (Art. 6). Furthermore, the conduct of a state organ is attributable to an international organization that exercises effective control over it (Art. 7). An international organization is also regarded as responsible when it compels or authorizes a state to adopt measures that are not in conformity with an international obligation (Art. 17). Typical rules on circumstances precluding wrongfulness (Arts. 20 *et seq.*), sanctions (Arts. 28 *et seq.*), invocation of responsibility (Arts. 43 *et seq.*), and countermeasures (Art. 50 *et seq.*) apply. Breaches of obligations *cogentes* are of special gravity and entail specific (collective) sanctions (Arts. 41 and 42).

Thus, a general pattern is envisaged setting out substantive and procedural rules, which can be temporally re-conceived based upon: (1) the breach of an international obligation and its attributability; (2) invocation of responsibility; (3) sanctions and (4) their enforcement. Within this context, two basic issues are decisive in attributing responsibility to an international organization, namely, (1) identifying the perpetrator of an alleged breach; and (2) identifying the bearer of the international obligation concerned by the alleged breach.[12]

The Draft Articles on the responsibility of international organizations have been criticized, especially insofar as they do not take into account the difference between various existing organizations, such as the EU, United Nations (UN), World Trade Organization (WTO), and UN Educational, Scientific and Cultural Organization (UNESCO).[13] In particular, upon request by the UN General Assembly and the ILC, the European Commission submitted comments on the Draft Articles and pointed out that the EC/EU is not a "classical" international organization.[14] In fact, the EC/EU has specific legislative powers that make

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11 *Cf.* I. Brownlie, *Principles of Public International Law,* Oxford University Press, Oxford, 2008, at pp. 433 *et seq*. and 675 *et seq*.

12 According to M. Hoffmeister, "Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", 21/3 EJIL 2010, p. 723, at p. 745, in order to attribute internationally unlawful conduct to the EU these questions should be reformulated as follows: (a) Who is the perpetrator of the alleged breach? (b) Who has the ability to bring an end to the alleged breach? (c) Who bears the international obligation invoked concerning the alleged breach?

13 M. Wood, M. Vicien-Milburn & E. Wilmshurst, *Legal Responsibility of International Organizations in International Law,* Chatam House, 2011, pp. 5 *et seq*. *See also* F. Hoffmeister & P.J. Kuijper, "The Status of the European Union at the United Nations: Institutional Ambiguities and Political Realities", *in* J. Wouters, F. Hoffmeister & T. Ruys (Eds.), *The United Nations and the European Union: an Ever Stronger Partnership,* TMC Asser Press, The Hague, 2006, p. 9.

14 *See* ILC, Responsibility of International Organizations, Comments and Observations Received from International Organizations, UN Doc. A/CN.4/4/545 (2004) at p. 5.

it – at least in part – a "supra-state".[15] However, the Draft Articles are an important general reference on the matter and provide useful guidance in exploring the responsibility of different organizations – a complex area of law that is still underdeveloped.[16] In fact, it would be extremely difficult to exhaustively regulate all of the different international organizations under such a general instrument.

As to international practice, in 1949 the International Court of Justice (ICJ) stated that the UN has objective legal personality, separate from that of its member states, and is thus a subject of international law liable for damage inflicted on third parties.[17] Furthermore, in an advisory opinion delivered in 1980 the Court added that "international organizations are subjects of international law and as such are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties".[18] Thus, customary and treaty law as well as general principles of law are binding upon international organizations.[19]

In the same vein, the European Court of Justice (ECJ) stated that the EC "must respect international law in the exercise of its powers",[20] and further established its jurisdiction under Article 234 of the EC Treaty to review the legality of a Community act based on the infringement of international legal rules.[21] In light of the three-layered structure of the Union's regulatory system, it is therefore clear that secondary EU acts must be in conformity with international legal obligations established by general principles of law and treaty law. In contrast, the relationship between primary EU regulation and international law is a complex issue, which should be approached based on the primacy – at least – of general principles of international law, as provided for in Articles 3(5) and 21 of the TEU.[22]

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15 In contrast, the argument that the EC/EU is a global actor party to different international agreements is not fully convincing, since usually international organizations can become parties to international treaties according to the 1986 Vienna Convention (*see,* more extensively, S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment?", *in* M. Ragazzi (Ed.), *International Responsibility Today,* Martinus Nijhoff, Leiden, Boston, 2005, p. 405, at pp. 405-407).

16 I. Brownlie, "The Responsibility of States for the Acts of International Organizations", *in* Ragazzi, 2005, p. 355, at p. 357.

17 *See* ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Rep.1949, p. 174. *See also* Wood *et al.* 2011, at p. 2.

18 ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Rep. 1980, p. 73, at pp. 89-90.

19 *See* White 2005, at p. 216.

20 ECJ, *Poulsen*, Case C-286/90, Judgment of 24 November 1992, at para. 9. *See also* ECJ, *Kadi, Al Barakaat International Foundation v. Council*, Joined Cases C-402/05P and C-415/05P, Judgment of 3 September 2008, at para. 291.

21 ECJ, *Racke GmbH & Co. v. Hauptzollamt Mainz*, Case C-162/96, Judgment of 16 June 1998, at paras. 45-46, where the ECJ stated that "the European Community must respect international law in the exercise of its powers" and is therefore required "to comply with the rules of customary international law".

22 P. Mori, *Rapporti tra fonti nel diritto dell'Unione Europea – Diritto primario,* Giappichelli, Torino, 2010, at pp. 7-8; Cremona, 2006, at pp. 27-28, 33 and 36. However, the priority of international agreements – especially those embodying fundamental international law principles – over primary EU rules cannot be excluded, as provided for in Article 6(3) of the TFEU, concerning the relationship between, on the one hand, the TEU and the TFEU and, on the other, the ECHR.

4.3 The International Responsibility of the European Union in Light of the Lisbon Treaty

4.3.1 A Stronger International Legal Commitment and a More Transparent Division of Competences between the European Union and Its Member States

Subjectively, the Lisbon Treaty conferred unitary legal personality upon the EU, which brought about the abolition of the (horizontally) three-pillared structure of the Union, including the EC (1), Common Foreign and Security Policy (CFSP) (2), and Police and Judicial Cooperation in Criminal Matters (PCJ) (3).

This is of particular relevance to the division of competences. In fact, before Lisbon acts within the first pillar were adopted in accordance with legislative procedures. In contrast, the other two pillars were based on intergovernmental cooperation among member states. Owing to the three-pillared structure of the Union, the EC enjoyed separate legal personality, but several competences overlapped. This gave rise to confusion in the conclusion of international agreements, since it was possible for the EU to conclude treaties relating to different pillars, but different procedures were necessary as to the EC, and thus third parties negotiated with and were bound towards different legal entities.[23]

Under the Treaty of Lisbon the three pillars merged into the EU, where legislative acts are adopted based mainly on co-decision. Externally, given that it is vested with legal personality (Art. 47 of the TEU), the EU is now able to conclude treaties in the fields falling within its competence. This makes it clear to third parties that they negotiate with and are bound towards a unique legal person, acting according to procedures established under Article 218 of the TFEU.[24] This also makes it clear that the EU as such is responsible for breaches of international legal obligations.

Concerning extra-contractual liability, the Treaty of Lisbon strengthens the EU commitment to respect fundamental international legal obligations, in both its internal and external policy. This core commitment is embodied in Articles 2, 3, and 21 of the TEU, but is fragmentarily enforced also through other rules, such as Article 11 of the TFEU. Thus, the EU declares its intention to respect and promote basic international legal principles such as peace, sustainability, human dignity, freedom, democracy, equality, the rule of law

23 *See,* for instance, ECJ, *European Parliament v. Council and European Parliament v. Commission*, Joined Cases C-317-04 and C-318-04, concerning the agreement between the EC and the US on Passenger Name Records wrongly concluded based on Art. 95 of the EC Treaty and renegotiated based on Arts. 24 and 38 of the TEU with a change in the Treaty partner. *See also* M. Cremona, "Defining Competence in EU External Relations: Lessons from Treaty Reform Process", *in* A. Dashwood & M. Marescau (Eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape,* Cambridge University Press, Cambridge, 2008, p. 34, at p. 38.

24 J.-C. Piris, *The Lisbon Treaty – A Legal and Political Analysis,* Cambridge University Press, Cambridge, 2010, at p. 87; C. Damians, G. Davies & G. Monti, *European Union Law: Cases and Materials,* Cambridge University Press, Cambridge, 2010, at p. 633.

and human rights. This means that, if in the pre-Lisbon period EC responsibility arose in practice mostly out of violations of international agreements,[25] in the post-Lisbon era EU international responsibility is more likely to arise also out of violations of general international legal obligations.[26]

As regards contractual liability, the Treaty of Lisbon clarifies the internal division of competences between the EU and its member states. However, this division also applies to the exercise of external EU power, and thus to the conclusion of international agreements, by virtue of the principle of parallelism. According to this principle, internal EU powers are necessarily matched by parallel external competences.[27] The doctrine of parallelism is considered valid in this paper and necessary to remedy the uncertainty of the language of Article 216(1) of the TFEU.[28]

More specifically, the Lisbon Treaty introduces a precise categorization in the founding Treaties and distinguishes three main types of competences: exclusive competences, shared competences, and supporting competences (Art. 2 of the TFEU), including a non-exhaustive list of the fields governed by each of them (Arts. 3-5 of the TFEU). Therefore, the boundaries of each competence are more clearly defined and transparent, both internally and externally. This attempt at clarification takes place in the vein of the Laeken Declaration[29] and reduces the necessity of resorting to implied powers.[30] Moreover, it aims to disentangle potential conflicts of competence that emerged in the past between the EC and its member states and to facilitate treaty implementation.[31]

Within this framework, Article 3(1) of the TFEU expands and clarifies the areas of exclusive EU competence, largely by codifying previous ECJ case law.[32] In the regulatory areas where it is vested with exclusive competence, the EU is the only subject able to legislate. As a consequence, the role of the member states is limited to the application of EU acts,

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25 *See* Cremona 2006, at p. 27; Kuijper and Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", 1 IOLR 2004, p. 111, at p. 116.

26 It is, however, important to remark that the status and content of fundamental international legal obligations, i.e. general principles of (international) law, and their relationship to EU law, remain subject to dispute (*see,* for instance, Brownlie 2008, at pp. 4 *et seq.* and 16 *et seq.*).

27 J. Klabbers, "The EU and International Law – Personality, Capacity, Powers", <ivr-enc.info>; Summaries of EU Legislation – International Agreements, <europa.eu/legislation_summaries>.

28 Art. 216(1) of the TFEU provides: "The Union may conclude an agreement with one or more third countries or international organizations *where the Treaties so provide*" (*emphasis added*). Arts. 2-5 of the TFEU, which now regulate the internal competences of the Union, literally do not "provide for" external competences.

29 Laeken Declaration on the Future of the European Union, 15 December 2001.

30 This doctrine nevertheless still applies by virtue of Art. 216 of the TFEU, which provides: "The Union may conclude an agreement with one or more third countries or international organizations … 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". On the necessity of resorting to implied powers in external EU action, *see* Cremona 2008, at pp. 50 *et seq*.

31 *Ibid.*, at pp. 40 *et seq*.

32 On exclusive EC competence before Lisbon, *see* Cremona 2006, at pp. 2 *et seq*.

unless the Union delegates power to states, under Article 2(1) of the TFEU. Reflexively, the EU is the only subject able to conclude parallel international treaties.

Exclusive competence is provided for in the areas of customs union; competition rules necessary for the functioning of the internal market; monetary policy for the member states whose currency is the euro; conservation of marine biological resources under the common fisheries policy; and common commercial policy. Moreover, according to Articles 3(2) and 216 of the TFEU exclusive competence exists for the conclusion of an international agreement when this is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as the conclusion of a treaty may affect common rules or alter their scope.

Outside the areas covered by exclusive EU competence, the Union is vested with shared competence, supporting competence, and special competence (Article 2 of the TFEU).

Under Article 4(1) of the TFEU, shared competences are general prerogatives, according to which both the EU and its member states are authorized to adopt binding acts and parallel international treaties.

According to Article 4(2) of the TFEU, the EU has (preferential)[33] shared competence in the following areas: internal market; social policy aspects defined in the TFEU; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; and common safety concerns in public health matters provided for in the TFEU.

Under Article 4(3)-(4) of the TFEU, the EU has (non-preferential)[34] shared competence with respect to the member states in the matter of research, technological development, space, development cooperation, cooperation with developed countries, and humanitarian aid.

Article 6 of the TFEU provides that the EU can only intervene to support, coordinate or complement the action of member states in the areas of protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection, and administrative cooperation.

The EU also has special competences in certain fields. In particular, under Article 5 of the TFEU the Union is responsible for ensuring the coordination of economic and employment policies, and thus the EU defines the guidelines to be followed by member states. Under Article 24 of the TEU, the Union has competence in all fields connected with the CFSP, which is defined particularly by the President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy.

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33 This means that a member state can exercise regulatory power only if the EU does not exert its competence.

34 Article 4(3)-(4) of the TFEU provides that "the exercise of that [EU] competence shall not result in member states being prevented from exercising theirs".

Finally, the "flexibility clause" – established under Article 352 of the TFEU – vests the EU with the ability to act beyond the powers conferred upon it by the Founding Treaties, if a pursued objective so requires.[35]

4.3.2 *The Relation between Competences, International Obligations and Responsibility of the European Union and Its Member States*

The reshuffle of competences introduced by the Lisbon Treaty, especially with regard to the basic distinction between exclusive and non-exclusive competences, has an important impact on the attribution of responsibility to the EU.

The fact that the Lisbon Treaty clarifies the Union's regulatory power is a crucial factor for determining international responsibility *in contrahendo*. This also influences – at least to a certain extent – the attribution of contracted international obligations to the EU and its member states, and thus ultimately the determination of the subject responsible for their breach, in light of Article 4 of the ILC's Draft Articles.[36]

The core regulation in the matter is provided for in the above-mentioned Articles 2(1) and 3 of the TFEU, according to which member states can no longer act internally and conclude parallel external treaties in areas covered by exclusive EU competence, unless they are so empowered by the Union. On the international plane, this regulation entails that in areas of exclusive competence the Union is the sole bearer of responsibility *in contrahendo*,[37] for instance in the field of the common commercial policy.

As to post-contractual responsibility, given that exclusive EU competence generates international obligations for both the EU and its member states (Art. 216(2) of the TFEU), responsibility of the EU might arise because of the conduct of member states' organs. So far, for instance, the responsibility of the EC has been challenged in addition to that of the member states, either jointly or separately, for breach of intellectual property rights under the TRIPS agreements, whose commercial aspects are now encompassed by the CCP and thus exclusively regulated by the EU.[38]

Areas covered by shared competence under Article 4 of the TFEU may lead to international agreements concluded by both the EU and its member states. Within this context,

35 For a clear presentation of the limits of the powers of the EU, *see* Cremona 2008, at pp. 47-50.

36 *See* Cremona 2006, at p. 24; Kuijper and Paasivirta 2004, at p. 114.

37 R.A. Wessel, "The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities", in Dashwood and Marescau 2008, p. 152, at p. 186; Damians *et al.* 2010, at p. 647.

38 WTO, *Denmark, Measures Affecting the Enforcement of Intellectual Property Rights*, Notification of a Mutually Agreed Solution, WT/DS83/2, IP/D/9/Add.1, 13 June 2001; *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, Notification of a Mutually Agreed Solution, WT/DS125/2, IP/D/14/Add.I, 26 March 2001; *EC – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, Notification of a Mutually Agreed Solution, WT/DS125/1, IP/D/13/Add.1, 26 March 2001.

the attribution of international obligations to the EU and its member states is not always clear cut, especially in the case of mixed agreements, *i.e.* agreements jointly negotiated by the EU and its member states.[39]

As a general rule, it is usually maintained that whenever it proves impossible to attribute certain parts of a given agreement exclusively to either the Union or member states – namely because of the absence of an explicit and clear declaration of competence towards third parties[40] – if a third state asks in vain for information as to the division of responsibility between the EU and its member states, or receives an uncertain answer, both the EU and its member states should be jointly and severally liable for contractual – at least in the case of mixed agreements – and extra-contractual international responsibility.[41]

Thus, for instance, in a case concerning the application of the EC–ACP Lomé Convention on Development Aid, to which both the EU and its member states are parties under shared competence, the ECJ stated that the Community and its member states are jointly liable to third parties for the fulfilment of treaty obligations, unless specific provisions of the Convention explicitly provide for separate responsibility.[42]

This approach, which envisages a sort of "confusion" of responsibility, complements the commitment of the EU and its member states to cooperate in the negotiation, conclusion and implementation of international agreements in the case of shared competence.[43]

The logic of joint liability provides a procedural solution to the tension between third states' demand for certainty as to responsibility and the Union's concern for autonomy. However, a case-by-case assessment seems necessary, and formal mechanisms should preferably be established to disentangle the division of responsibility between the EU and its member states. For instance, Annex IX to the UN Convention on the Law of the Sea (UNCLOS) and Article 4(5) of the Kyoto Protocol, to which both the EU and its member states are parties, provide for mechanisms for apportioning responsibility between the EU and its member states. Similarly, the Draft Legal Instrument on the Accession of the EU to the European Convention on Human Rights (ECHR), to which all EU member states are already parties, deals with the establishment of a system for clearly dividing responsibility

39 Cremona 2006, at p. 17.

40 Talmon 2005, at p. 418.

41 For a theoretical framework of joint and several responsibility applied to the division of responsibility between international organizations and their member states, *see* Brownlie 2005, at pp. 361-362; S. Yee, "The Responsibility of States Members of an International Organization for Its Conduct as a Result of Membership or Their Normal Conduct Associated with Membership", *in* Ragazzi 2005, p. 435; Kuijper & Paasivirta 2004, at pp. 122-123.

42 ECJ, *Parliament v. Council*, Case C–316/91, Judgment of 2 March 1994, at para. 29. *See also* Cremona 2006, at p. 21; Talmon 2005, at p. 417; J. Heliskoski, *Mixed Agreements as a Technique for Organising the International Relations of the European Community and Its Member States,* Kluver Law International, The Hague, 2001, at pp. 161-166.

43 *See* D. Verwy, *The European Community, the European Union and the International Law of Treaties,* Cambridge University Press, Cambridge, 2004, at p. 158.

between the EU and its member states, including a co-defence mechanism in the case of joint responsibility.[44]

In practice, before the Lisbon Treaty a claim for international responsibility against the EC never failed for the reason that it was brought against the wrong party.[45] In fact, the EC was considered bound as a signatory in respect of a whole agreement, in the case of both exclusive and shared competence.[46]

4.3.3 Discretionary Power as a Basic Criterion to Ultimately Divide International Responsibility between the EU and its Member States

In light of Article 6 of the ILC's Draft Articles, the EU can act through its 'institutions, bodies, offices, and agencies and their servants", and is thus liable for regulatory and non-regulatory acts of its organs. Thus, attribution of responsibility for breach of international obligations is relatively simple when the EU acts exclusively through its organs (Art. 291(2) of the TFEU).

In contrast, attribution of responsibility is more problematic when member states' organs are vertically involved in the implementation of EU internal or external acts through their administrative organs under Article 291(1) of the TFEU.[47]

In principle, whenever the administration of a member state mechanically implements Union's acts, for instance, in the case of a regulation, only the EU should be responsible.[48] In contrast, when states enjoy a margin of discretionary power in implementing the Union's acts, they exercise discretion between different regulatory options. The question thus arises as to whether such limited control over member states' conduct is sufficient to attribute state conduct to the Union.

According to an important scholarly opinion, attribution of member states' conduct to the Union is possible based on the ECJ jurisprudence, which, dealing with cases where

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44 *See* Steering Committee for Human Rights (CDDH)-UE and European Commission, Draft Legal Instrument on the Accession of the EU to the ECHR, CDDH-UE(2011)16, 19 July 2011, Article 3.

45 G. Gaja, Second Report to the ILC on Responsibility of International Organizations, UN Doc. A/CN.4/541 (2004) at p. 6, para. 11; Kuijper and Paasivirta 2004, at p. 123.

46 ECJ, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, Case C-12/86, Judgment of 30 September 1987, at para. 7; WTO, Appellate Body, *European Communities – Custom Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, Report of 5 February 1998. *See also* A. Rosas, "The European Union and International Dispute Settlement", *in* L. Boisson de Chazournes, C. Romano & R. Mackenzie (Eds.), *International Organizations and International Dispute Settlement: Trends and Prospects,* Transnational Publishers, 2002, p. 49, at p. 57.

47 S*ee* Hoffmeister 2010, at pp. 723 *et seq*. On the attribution of the conduct of member states to international organizations, *see* ECtHR, Grand Chamber, *Agim Behrami and Bekir Behrami v. France*, Application No. 71412/01, and *Ruzhdi Saramati v. France, Germany and Norway*, Application No. 78166/01, Decision on Admissibility of 2 May 2007, esp. at para. 151.

48 This stance is nevertheless controversial (*see* Cremona 2006, at p. 35; Kuijper and Paasivirta 2004, at pp. 126-128).

member states had to implement EU directives, emphasized that the legality of member states' measures is ultimately governed by Union law.[49] Therefore, whenever EU acts govern the conduct of a member state that is in breach of an international obligation, the EU should be internationally responsible.[50] The member state should, in turn, be internationally responsible based on the margin of discretionary power it enjoys, if any.[51]

In the same vein, in the absence of EU action, if the conduct of a member state breaches an international obligation, EU responsibility might arise for omission of due control over the organs of the member state.

As a general rule, it can be logically concluded that the basic parameter to subjectively apportion responsibility between the EU and its member states is the normative control that the EU exercises (action), or is supposed to exercise (omission), over member states' conduct. When the Union's rules (ought to) govern the legality of Member states' conduct, the latter should be attributable to the Union.[52] Therefore, the internal regulatory competence of the EU provides a paradigm for establishing the Union's international responsibility for conduct of its member states under its normative authority. This is consistent with Articles 7 and 17 of the ILC's Draft Articles.[53]

Controversial EU Directive 2008/101, which recently included aviation activities in the EU Emission Trading Scheme, provides an interesting example for the application of this logic. In fact, Article 3(e) of the Directive provides that member states play a role in administering the annual allocation of GHG allowances in the aviation sector. However, decisions in the matter

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49 *See* Hoffmeister 2010, at p. 742, mentioning especially ECJ, *Commission v. Ireland (Mox Plant)*, C–459/03, Judgment of 20 May 2006.

50 Talmon 2005, at pp. 413-414.

51 But *see* Cremona 2006, at pp. 34-35.

52 This logic should also apply when the EU or its member states act beyond the limits of their competence, *i.e. ultra vires* as regards the internal division of competences. In fact, Art. 27(2) (Internal Law of States, Rules of International Organizations and Observance of Treaties) of the 1986 Vienna Convention provides that "an international organization party to a treaty may not invoke the rules of the organization as a justification for its failure to perform the treaty". Furthermore, Art. 8 (Excess of Authority or Contravention of Instructions) of the ILC's Draft Articles provides: "The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions".

53 Art. 7 (Conduct of Organs of a State or Organs or Agents of an International Organization Placed at the Disposal of Another International Organization) provides: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization *if the organization exercises effective control over that conduct*" (*emphasis added*). Art. 17 (Circumvention of International Obligations through Decisions and Authorizations Addressed to Members) provides: "1. An international organization incurs international responsibility if it circumvents one of its international obligations by *adopting a decision binding* member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization; 2. An international organization incurs international responsibility if it circumvents one of its international obligations by *authorizing* member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization" (*emphasis added*).

are taken by the EU Commission, and member states mechanically implement them. Thus, if it is assumed that EU Directive 2008/101 is inconsistent with Article 2(2) of the Kyoto Protocol,[54] which provides that states must avoid unilateral action and limit or reduce GHG emissions from aviation bunker fuels through the International Civil Aviation Organisation, only the EU should be considered internationally liable for member states' action aiming to limit GHG emissions from foreign companies in the aviation sector.

Based on these premises and given that the Lisbon Treaty did not fundamentally modify the EU regulatory system – at least with regard to the basic distinction between primary and secondary EU law and "tertiary" member states' regulation – it can be assumed that the logic of the division of responsibility in the case of intertwined acts and omissions of the EU and its member states has not changed from the pre-Lisbon period.

4.4 Conclusion

The Lisbon Treaty introduced three basic changes as regards the international responsibility of the EU. First, by abolishing the three-pillared structure of the Union and by conferring legal personality upon the EU as such, the Treaty simplified and expanded EU international responsibility. Secondly, the Treaty committed the EU to enhanced respect of general international legal obligations. Thirdly, by establishing a clearer internal division of competences between the EU and its member states, the Treaty increased the transparency of parallel EU international responsibility – certainly *in contrahendo*, and, to a certain extent, also for breaches of contractually established international legal obligations.

More specifically, as to the division of responsibility between the Union and its member states, international agreements concluded by the Union generate international obligations and responsibility for both the EU and its member states regardless of the exclusivity of competence *in contrahendo*. Furthermore, when acts or omissions of the EU and its member states are intertwined, responsibility should be attributed to the EU not only for acts or omissions of its organs, but also for conduct of its member states' organs ultimately acting (or non-acting) as instruments of the Union whenever the conduct of those organs is, or ought to be, governed by the EU. The responsibility of the member states should, in turn, be based on the margin of discretionary power they enjoy, if any.

Such a general scheme provides at least basic guidance in approaching issues of attribution of responsibility in the case of breaches of international obligations committed by the EU and its member states. In this respect, since liability still depends upon the unchanged three-tiered structure of the EU, the systematic criterion for dividing responsibility between the EU and its member states does not radically vary from the pre-Lisbon period.

54 On this issue, *see* CJEU, case C-366/10.