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# EXTERNAL COMPETENCE OF THE EU FOR INTERNATIONAL AGREEMENTS

Unlike the state, which has absolute legal independence and general competence in matters of domestic and foreign policy, the European Union, which remains today an international organization, requires a special procedure for the legal regulation of its political initiatives and competences. After the entry into force of the Lisbon Treaty, the European Union replaced the European Community, which had existed since 1957, marking the higher level of cooperation and integration of European states. With the Lisbon Treaty, some changes were made institutionally in order to strengthen the EU as an international actor, and it was aimed to reduce the problems faced between the member states and the Union, especially with regard to representation, with the catalog of authority. The structuring of the external competence of the EU in the founding treaties, the codification of implied, exclusive and shared competences, the position of the European Court of Justice on this issue requires their detailed description and assessment in the perspective of the relations between the Union-Members and the Union-Members-Third countries.

**Keywords:** European Union, External Competence, International Agreements, External Relations, Lisbon Treaty, implied competence, shared competence, mixed agreements, ECJ.

## Introduction

The European Union (EU) is one of the influential players in world politics and trade. Its external relations are conducted through an important and, at the same time, complex network of connections. The EU is one of the leading political players, exporters, service providers, the monetary unit of which (Euro) has been and remains the second most important in the world (after the US dollar)[1]. Thus, the analysis of the external perception of such a special and global player is important from the point of view of international law and international relations.

External competence is a general concept that encompasses both the concept of the competence of the state and the concept of the competence of international organizations, which are different in their legal nature in the field of discussing and concluding international treaties and agreements with third countries and other international organizations. The EU's ability to negotiate and sign international treaties with third countries depends on its external competence provided by the EU law. According to Article 6 of the 1986 Vienna Convention[2] (did not enter into force), the EU's legal capacity, as an international organization, to conclude international treaties is determined by its internal law. According to Article 47 of the Treaty on the EU, the Union has legal personality and, as an international organization, has the right (competence) to sign agreements and assume obligations. In cases where this right comes directly from the Treaty on the Functionality of the European Union (TFEU) or the Treaty on the EU (TEU), then it is called "explicit" external competence. If the EU is not openly endowed with external competence and its external competence is based on its "internal" competences or secondary acts, then we are talking about "implied" external competences.

The external competence of the EU can also be divided into "exclusive" and "shared". "Exclusive" refers to the external competence of the EU, which in a certain area belongs exclusively to the EU and no other organization, member states of the Union or any other state has the right to discuss or conclude

[1] Aristovnik, A., Čeč, T. (2009). Compositional Analysis of Foreign Currency Reserves in the 1999–2007 Period. The Euro vs. The Dollar As Leading Reserve Currency. *Munich Personal RePEc Archive,14350*, 5.

[2] *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (Vienna, 21 March 1986). <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en> (2020, August, 25).

an international treaty in this area. If the external competence of the EU is not exclusive, and it can be used together with the EU member states, then this external competence is called "shared".

Thus, this article will examine the doctrines of the external competence of the EU, as well as its nature, expressed in the form of exclusivity or compatibility. The aim of the article is to structuralize the external competence of the EU and to identify the "imprints" of the pre-Lisbon period and the practice of the Court of Justice of the European Union on the current legal basis. The author studied the practice of the Court, the founding agreements of the EU, international agreements with the participation of the EU and member states, as well as the work of American, European, Russian, Turkish and Ukrainian scientists such as D. Chalmes, A. Rossas, F. Erbacher, P. Craig, M. Ceremona, R. Schutze, A. Ott, A. Dashwood, A. Kaczorowska, B. Van Vooren, R. Wessel, M. Biryukov, M. Marchenko, I. Lifshits, M. Sharifov, S. Baykal, I. Gocmen, M.Bayram, G.Bayraktaroglu Ozcelik, K.Smyrnova, etc.

As a result of the research, it was revealed that the Lisbon Treaty codified the position of the European Court on issues of external competence of the EU, while not fully exhausting all the issues that were relevant at that time. Having on hand a wide range of opportunities for the use of external competence: from Articles 217 and 352 TFEU to mixed agreements, the EU reserves the right to both conclude agreements using its exclusive agreements and involve Member States to share legal and financial responsibilities. The role of the Court in matters of external competence has not been completed either, which in its decisions, with rare exceptions, retains its uniqueness, vehemently defending its positions in relation to the implied and joint competence of the EU.

**"Explicit" and "implicit" external competence of the EU**

For a clearer clarity of the external competence of the EU, it is necessary to identify the legal regulation that creates this competence and enables the EU to use it. As mentioned above, this competence is explicitly provided for in the succession agreements (the Treaty on the Functioning of the EU and the Treaty on the EU) or is implied (hidden) in the rules of EU internal law.

***Explicit external competence***

According to clause 1 of article 216 TFEU, the European Union can use external competence, first of all, if there is an appropriate legal basis in the constituent agreements. External competence is openly granted by the EU by the TFEU provisions in certain areas. The EU Treaty also contains provisions giving the EU explicit external competence. For example, according to Article 217 TFEU, the EU has the right to conclude agreements with other countries to create associations. Also, you can point to paragraph 2 of Article 6 of the TEU according to which the EU joins the European Convention on Human Rights (ECHR) and Article 8 of the TEU, which enables the EU to build relations with its geographical neighbors.

Although the catalog of competences and their nature are foreseen in Articles 3-6 TFEU, these Articles do not provide for a provision on the external competence of the EU. In addition, many provisions on the external competence of the EU are foreseen in Part V of TFEU, although there are no provisions on external competence in such areas as agriculture, transport, and the environment in this part. Thus, Articles 3-6 TFEU, which provide for a catalog of internal EU competencies, leaves the provisions on external competencies to specific and detailed Articles of the Treaty, which detail certain areas of EU policy. For example, Article 209 includes open provisions on humanitarian aid and development, Article 207 provides for the external competence of the EU in the field of transportation. Clause 4 of Art. 191 provides for an open provision on the external competence of the EU in the field of the environment and gives the Union the right to conclude international agreements. Paragraph 4 of Article 191 TFEU also provides for a provision on the external competence of the EU in environmental matters. Also, direct external competence is provided for in the TFEU in clause 3 of article 79 on the re-acceptance of illegal immigrants, clause 5 of article 165 on education policy with third countries, clause 3. Article 166 on vocational training, paragraph 3 of Article 167 on culture, paragraph 3 of Article 168 on health, paragraph 3. Article 171 on trans-European networks, Article 186 on research and technological progress, paragraph 3 of Article 212 on economic, financial and technical cooperation with third countries, paragraph 1. Article 219 on currency union, clause 1. Article 220 on cooperation with the bodies of the United Nations (UN) and its specialized agencies, with the Council of Europe (CE), with the Organization for Security and Cooperation in Europe (OSCE) and with the Organization for Economic Cooperation and Development (OECD).

It is necessary to distinguish between some of the provisions that provide explicit external powers of the EU. For example, the provisions on external competence in the field of common trade are detailed and

finally settled[1], and paragraph 4 of Article 191 TFEU on international cooperation of the EU on environmental issues, which provides for the external competence of the EU, includes more restrictive provisions. It follows from this that in some cases, even in the presence of explicit external competence, reference should be made to the doctrine of implied competence and the provisions granting the general competence of the EU below.

***Implied external competence***

As we have already said, the European Union has internal and external competences to achieve the goals stipulated in the Treaties. External competence was openly codified by the Lisbon Treaty and is provided for in Article 47 of the DES. Prior to this, the external competence of the EU was determined by substantive law and secondary EU documents. Such external competence is usually called "implied". Since the beginning of the 1970s, the legal provisions of the Constituent Treaties disclosing the content and scope of the external competence of the EU (until 2007 – also of the EEC and the European Community) have been interpreted more than once by the EU Court of Justice (hereinafter, the Court).

The Court's monumental decision on the "implied" external competence of the EU is the ERTA decision of 31 March 1971[2]. In 1970, the European Commission challenged the right of member states to conclude European Road Transport Agreement. Although the Court rejected the Commission's claim, the Court accepted the EU's implied external competence by formulating the provision that *"The Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty".* In the Court's opinion, the authority to conclude international treaties derives not only from the provisions of the Treaty, which directly (or explicitly) endowed the institutions of the Community with such a right, but also from other provisions of the Treaty, as well as legal acts adopted by the institutions of the Community within the framework of such provisions. As can be seen, the Court has endowed the Community with external competence based on internal competence. In cases where the external competence derives indirectly from the internal competence of a certain area, it is necessary for the Community to regulate the relevant area by acts of secondary law. Thus, the Court established that the internal competence of the Community to regulate a particular field of activity also implies external competence to conclude international treaties and by this the Court, as a Community institution, has actually expanded, at the expense of the Member States, the external competence of this international organization by interpreting the Constituent Treaty.

A further important practice of the Court is the Opinion of 26 April 1977 numbered 1/76[3] on the draft Agreement establishing a European Fund for the Conservation of Inland Water Transport Vessels between the Community and Switzerland. This Agreement also provided for the payment of compensation to carriers using the funds of the "savings fund" created under the Agreement. The Court declared this Agreement to be inconsistent with the Treaty on the European Economic Community in force at that time. The reason for this conclusion was the structure and functionality of the "savings fund". But the main importance of this Opinion is that the Court has reiterated that the EU's mandate may not only be explicit, but also implicit. The court also accepted the possibility of external jurisdiction in cases where a specific purpose is designated by the Treaty, although there is no adopted legal act.

As seen, the Court, by its decisions, has a huge impact on the external relations of the Member States and the EU. The court clearly identifies situations where external competence is based on secondary acts adopted on the basis of internal competence (ERTA principle) and situations where external competence is possible in the absence of a legal act (Conclusion no. 1/76).

Years later, in November 2002, in the "Open Skies case" series, the Court made another decision recognizing the EU's implied external competence. These cases involved seven countries (Denmark[4],

[1] Devyust, Y. (2011). The European Union`s Competence in International Trade After the Threaty of Lisbon. *Georgia Journal of International and Comparative Law*, 39, 639-661.

[2] Judgment of the Court of 31 March 1971. *Case 22-70. Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61970CJ0022>. (2020, August, 25).

[3] Opinion of the Court of 26 April 1977. *Opinion 1/76. Opinion given pursuant to Article 228 (1) of the EEC Treaty – 'Draft Agreement establishing a European laying-up fund for inland waterway vessels'.* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CV0001>. (2020, August, 25).

[4] Judgment of the Court of 5 November 2002. *Case C-467/98. Commission of the European Communities v Kingdom of Denmark.* <http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-467/98&jur=C>. (2020, August, 25).

Finland[1], Belgium[2], Luxembourg[3], Austria[4] and Germany[5]) that entered into direct agreements with the United States on free flights without any EU consent. The EU Commission has filed a complaint against these countries with the Court for violation of its exclusive external competence. These cases became good opportunities for a more detailed disclosure of the essence of the doctrine of implied external competence.

The Court ruled that internal competence can be the basis for granting external competence only if they are simultaneously exercised. According to the Court, "implying external competence is possible in cases where external competence is required in addition to internal competence in order to achieve and achieve the goals stipulated in the EU Treaty". Thus, the Court has moved away from the concept of unrestricted granting of external competence by the EU when it is necessary to implement internal competence. It should be noted that along with this determination, the Court ruled that in these cases there is no such situation and the EU does not have exclusive external jurisdiction in the matter of international agreements with the United States on air transportation services. Along with this, the Court clarified that the EU has exclusive external competence in matters of prices for domestic flights and electronic reservations, which are provided for in some provisions of the EU framework Directives (3rd EU package) and also apply to carriers of third countries.

In its Opinion dated February 7, 2006 (Lugano case)[6] under number 1/03, the Court cited a methodology for analyzing the EU competence and the subject of an international agreement (in this case, the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil Cases) to establish the existence of powers The EU to conclude such an agreement. Having previously recognized the EU's implied competence stemming from internal competences, as recognized in the ERTA decision, the Court indicated that when analyzing EU competence, along with EU rules and the provisions of the relevant international agreement, one should take into account both "the essence and content of these rules and provisions", which should not affect the internal legal order of the EU. The reason for this is to maintain a level of uniformity and consistency in the application of EU rules and the flawless functioning of its system. At the same time, the Court noted that the disconnection clause, which contains the Lugano Convention, does not affect the definition of the exclusive competence of the EU in concluding an international agreement, and, moreover, is an indicator of the possible impact of the agreement in the internal legal order of the EU. At the same time, the Court noted that the disconnection clause, which contains the Lugano Convention, does not affect the definition of the exclusive competence of the EU in concluding an international agreement, and, moreover, is an indicator of the possible impact of the agreement in the internal legal order of the EU[7].

With the entry into force of the Lisbon Treaty[8], the number of subjects of explicit external competence of the EU has increased, but at the same time, issues of implied external competence remain relevant. As we have said, the Lisbon Treaty codified the external competence of the EU through the provisions of TFEU and TEU. Clause 1 of Article 216 TFEU states: *«The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or here* ***the conclusion***

[1] Judgment of the Court of 5 November 2002. *Case C-469/98. Commission of the European Communities v République de Finlande.* <http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-469/98&jur=C>. (2020, August, 25).

[2] Judgment of the Court of 5 November 2002. *Case C-471/98. Commission of the European Communities v Kingdom of Belgium.* <http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-471/98&jur=C>. (2020, August, 25).

[3] Judgment of the Court of 5 November 2002. *Case C-472/98. Commission of the European Communities v Grand Duchy of Luxemburg.* <http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-472/98&jur=C>. (2020, August, 25).

[4] Judgment of the Court of 5 November 2002. *Case C-475/98.Commission of the European Communities v Republic of Austria.* <http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-475/98&jur=C>. (2020, August, 25).

[5] Judgment of the Court of 5 November 2002. *Case C-476/98. Commission of the European Communities v Federal Republic of Germany.* <http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-476/98&jur=C>. (2020, August, 25).

[6] *Opinion pursuant to Article 300(6) EC*. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= CELEX:62003CV0001:EN:HTML>. (2020, August, 25).

[7] Opinion 1/03 para. 154.

[8] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (entered into force on 1st December 2009). < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex% 3A12007L%2FTXT>.

***of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.»***

As we can see, Clause 1 of Article 216 TFEU provides for three situations in which the EU can use implied external competence:

1. *In order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties;*
2. *Is provided for in a legally binding Union act;*
3. *Is likely to affect common rules or alter their scope.*

The first situation is very similar to the provision of Article 352 TFEU, which provides for the general internal competence of the EU. But it should be noted that n1. Article 216 does not oblige the EU to adhere to parallelism in defining its external competences. The only condition in this case when using external competence is its focus on achieving the goals stipulated in the Agreements.

In the second situation, acts of secondary law adopted by the EU are required, which will form the legal basis for international agreements with one or several third countries. In this case, in order to determine the external competence of the EU, it is necessary to identify the relationship between the secondary EU act and the content of an international agreement, for the signing of which competence is required.

The third situation is a reflection of the ERTA decision in Article 216 TFEU, which stated that the EU has an implied external competence in the presence of common rules[1]. At the same time, the Treaty deprives the Member States of the competence to conclude international agreements with one or more third countries if these agreements may influence or modify the general rules of the EU, as stated by the Court in Conclusion 1/03 (Lugano). Thus, as we see paragraph 1 of Article 216 TFEU, which provides for the implied external competence of the EU, is a codification of the pre-Lisbon jurisprudence of the Court.

**The Nature of external competence**

Another important point in the external competence of the EU is its nature, which shows its character, expressed in its use exclusively by the EU or jointly with the member states. Along with this, the founding agreements provide for the subsidiary (residual) external competence of the EU.

**Exclusive external competence** can explicit as well as implied (implied exclusive external competence). The court used this term in its practice already in the 50s of the last century[2]. At that time, the supremacy of EU law over international agreements signed by member states with third countries was not yet fully determined. In the pre-Lisbon period, there was no precise, complete and precise definition of the exclusivity of the external competence of the EU and its prevention before the member states, as provided later in paragraph 2 of Article 2 TFEU. In its decisions and opinions, the Court determined the existence of exclusive or joint external competence. In its Opinion No. 1/03, the Court determined that external competence can be both exclusive and joint. In its Open Skies Judgment, the Court determined that if an international agreement affects the general rules of the EU, then the EU agreement has exclusive external jurisdiction over that agreement. In this judgment, the Court used the criterion of "necessity" to determine the existence of external competence, although in the Lugano Opinion the Court held that this criterion was important for determining the exclusivity or compatibility of external competence. The Court, in this Opinion, established that if there is an internal competence of the EU or member states, they simultaneously have external competence, and "necessity" determines the nature of this competence (and not its existence)[3].

According to the current clause 1 of Article 3 of the TFEU, the following areas fall within the exclusive competence of the EU:

- customs union;
- the establishing of the competition rules necessary for the functioning of the internal market;
- monetary policy for the Member States whose currency is the euro;
- the conservation of marine biological resources under the common fisheries policy;
- common commercial policy.

[1] Judgment of the Court of 31 March 1971. *Case 22-70. Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport,* para 30. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61970CJ0022>. (2020, August, 25).

[2] For example: Judgment of the Court of 23 February 1961. *Case 30/59 Limburg v High Authority of the ECSC.* ECR 1, para. 22.

[3] Case 1/03 para 37 and etc.

Despite the fact that the above areas are related to the EU internal policy, all foreign policy activities related to these areas are also within the EU competence. Thus, the external competence on all these issues is under the exclusive external competence of the EU.

According to clause 2. Article 3 TFEU, the EU has exclusive external competence in cases where an international agreement affects or changes the general rules of the EU. Since this exclusivity of external competence is tied to a condition (the impact of an international agreement on the general rules of the EU) it is called *"conditional exclusive external competence"* [1].

Conditional exclusive external competence is also possible in cases where the effectiveness of internal competence is possible only when it is actively used together with external competence. Paragraph 2 of Article 3 of the TFEU openly states that the EU has exclusive external competence in concluding international agreements, if this is required for the use of internal competence.

One of the important decisions of the Court on the issue of conditional exclusive external competence is Decision No. C-114/2 in the case "European Commission v. Council of the EU" [2] dated 4 September 2014. In this Decision, the Court ruled that even if international obligations do not openly contradict the general rules of the EU, but affect its provisions or change them, then the acceptance of these obligations (signing of international agreements) is under the exclusive external competence of the EU[3].

***Shared external competence***

In contrast to the exclusive competence of the EU, in the area of shared competence, regulation can be carried out at the level of both the EU and its member states. According to clause 1 of Article 4 of the TFEU, the EU has shared competence with the member states in cases where the Treaties grant it competence that does not fall within the areas provided for in Articles 3 and 6. As you can see, joint competence is a kind of "residual" competence. In foreign policy, shared external competence means the ability of both the EU and the member states to pursue international policy in the same area. Below we will divide the shared external competence into shared preventing external competence and shared non-preventing external competence.

Paragraph 2 of Article 2 TFEU provides for shared competence of the EU and the Member States of a preventive nature. With shared preventing external competence, there is a competition of competences between the EU and the member states, in which the use of this competence by the EU prevents the competence of the member states to conduct foreign policy activities in this direction. After the EU has used its competence in this direction, its competence becomes exclusive. The preventive effect was also stated by the Court in the ERTA Decision. According to this doctrine, the EU's activity in a certain area using its competences deprives the member states of competences in the same area. This prevention comes both from the substantive and procedural obligations assumed by the member states in accordance with the internal legal order of the EU, and from the EU's "principle of loyalty". In its Opinion No. 1/03, the Court also refers to the principle of efficiency (effective use of EU law) and considers it to be the rationale and basis for the doctrine of "preventive effect" [4]. In turn, the member states have adopted special provisions in the Treaties[5] in order to limit the falling of some shared competences in the zone of exclusive competence of the EU. Also, the only article of Protocol No. 25 establishes that the use of its competence by the EU in a certain area, covers only elements that are directly related to the competence used and, therefore, does not cover the entire area and the uncovered part still remains in the joint competence of the EU and the Member States. Shared competence of a non-preventative nature is a competence, when used by the EU, the Member States do not lose their competence in the relevant policy area. As an example, for a shared external competence of a non-preventative nature, we can cite the competences listed in Articles 4 and 6 of TFEU, which provide for complementary, supporting and coordinating EU competences. It should be noted that the mechanism of non-prevention of external competences of the participating countries when using the EU's competence is obliged to the principle of loyalty as established in paragraph 3 of Article 4 of the TFEU.

[1] Craig, P.,De Burca, G. (2015). *EU LAW Text, Cases and Materials*. 6th Edition. Oxford University Press, 79.

[2] Judgment of the Court (Grand Chamber), 4 September 2014. *Case C-114/12. European Commission v Council of the European Union.* <http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0114&lang1=en&type=TXT&ancre=>. (2020, August, 25).

[3] Case C-114/12, paras. 70-71.

[4] Opinion 1/03, § 128.

[5] For example, TFEC article 27 par.6 "The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization.

It should also be noted that there are ***mixed agreements*** that have an important place in the concept of shared external competence of the EU, since one of the important problems in using shared external competence is the process of discussion and negotiation in connection with international agreements. To solve this problem, EU law uses the term "mixed agreements". International agreements can be signed by the EU either individually or with the participation of all or some of the member states. "Mixed agreements" refers to agreements in which the EU itself and all or some of the EU Member States participated.

Mixed agreements can be categorized as "binding" and "artificial". “Binding mixed agreements” are those agreements in which part of the subjects of the agreement fall under the exclusive competence of the EU, and part – within the competence of the member states. If the subject of the agreement is fully under the exclusive competence of the EU, but the member states put their signatures on international agreements, then such agreements are usually called "artificial mixed agreements." It should be noted that "mixed agreement" should be regarded not only under the heading of "shared competence". Mixed agreements can contain different categories of competencies by signing agreements with third countries or by organizing both on the part of the EU and the EU member states. In other words, “mixed agreements” are not the result of “shared competence”, since with joint competence, the Union and the member states can act autonomously and conclude separate agreements. In fact, and with the approval of the Court in its decisions of the past thirty years, "mixed agreements" are a tolerant solution between the EU and the member states to involve the latter in the joint signing of international agreements if there are objective and subjective reasons for the involvement of member states in international agreements. to which the EU is a party within its competence. But in any case, the Council concludes mixed agreements on behalf of the EU only after all member states themselves have ratified the agreement in accordance with their constitutional traditions.

In conclusion, it should be noted the ***complementary (residual) external competence of the EU***, provided for in Article 352 TFEU. This article is the legal justification for the use of the external competence of the EU in “unforeseen circumstances”. Article 352 TFEU states: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament." As seen, the use of Article 352 as a legal basis for external competence is tied to certain conditions. First, the absence of any explicit or implied competencies is required, which indicates the secondary importance of the legal basis under Article 352. In other words, the external competence of the EU can rely on Article 352 TFEU only in cases where there are no explicit or implied competencies in the founding agreements. Another important condition for the application of Article 352 is “necessity”. The EU should not have any other effective instrument other than the conclusion of an international agreement to achieve its goal. It is also important that the condition of “necessity” (as it follows from a secondary legal basis for external competence) did not contradict the principle of subsidiarity and did not go beyond the general framework of the EU external competences established by the founding treaties. The Court also has an ambiguous position on the use of residual external competence on the basis of Article 352 TFEU. One of the landmark findings of the Court is Opinion No. 2/94 of 1994 on the EU’s accession to the European Convention on Human Rights, which the EU intended to sign on the basis of the competence conferred by Article 308 TEC (which is the pre-Lisbon version of Article 352). The court concluded that Article 308 cannot be used to expand the powers and activities of the European Community provided for in the founding agreements and cannot serve as a “tool” for changing the provisions of the founding agreements, which can only be changed in the established procedural form[1].

Thus, Article 352 TFEU cannot serve as a basis for changing the legal order and organizational structure of the EU. Along with this, according to clause 4 Article 352 TFEU “Article 352 cannot be the basis for taking measures to achieve goals in matters of common foreign and security policy”.

**Conclusion**

The external competence of the EU has been and remains one of the debated issues in EU law. From the first years of its establishment, the Court of Justice of the European Union has considered the issue of the

[1] Opinion of the Court of 28 March 1996. *Opinion 2/94. Opinion pursuant to Article 228 of the EC Treaty Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para. 70. <http://curia.europa.eu/juris/liste.jsf?pro=AVIS&num=c-2/94>.

external competence of the EU and interpreted the founding treaties that the external competence of the EU can follow from a Community legal act regulating "internal competence". Such decisions and opinions of the Court as "ERTA", "Open Skies", "Lugano", etc. made their contribution to both the legal and scientific basis of this area. These decisions formulated the main principles of the external competence of the EU. The codification of the position of the Court took place with the entry into force of the Lisbon Treaty, which reflected in the constituent agreements (TEU and TFEU) the catalog of external competencies and highlighted their characteristics. Thus, in the current editions, explicit and implied external competences of the EU are defined, as well as external competences that can be used exclusively by the EU or jointly with the member states are highlighted. But has the Lisbon Treaty fully resolved the issue of external competence and its exercise by EU member states and institutions? The answer is unequivocal: No. The court still continues to consider cases in this direction and the member states challenge the EU's competence to participate in the discussion and conclusion of international agreements, and sometimes challenge its exclusive right, and the EU institutions seek consensus on this issue between the EU and the member states. As one of the effective tools for overcoming the issue of external competence, "mixed agreements" were chosen, which enable the EU and its members to participate together both in the discussion and in the conclusion of agreements with third countries and international organizations. But we believe in the near future these agreements will also be the subject of consideration of the Court in order to identify the competences of its participants and their responsibility for the implementation of the agreements. At the same time, the EU Court continues to vehemently protect its monopoly position in the EU legal order, trying to prevent the conclusion of international treaties providing for the jurisdiction of other bodies of international justice, thereby retaining its exclusive approach to the issue of the EU's external competence.

In conclusion, it should be noted that the issue of the external competence of the EU is not completely exhausted in science and remains relevant for wide discussion and study.

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