

## The Interpretation of Mixed Agreements in the EU after *Lesoochránárske zoskupenie*

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### A. Introduction

Art. 47 TEU accords legal personality to the EU. This enables the Union to conclude agreements with other entities that have legal personality. The EU, however, can only conclude such an agreement on its own in a field where it has been attributed the (shared or exclusive) competence to do so. If the Union lacks the competence to conclude the entire agreement, the EU and its Member States must jointly conclude that agreement. This “mixed agreement” must be interpreted when it is applied in the national legal orders. As the EU and its Member States have jointly concluded the agreement, this raises the question whether the Court of Justice of the European Union (referred to herein as: “the Court”) or the national courts are competent to interpret mixed agreements.

This contribution deals with this question and analyses the Court’s response to it. The focus of this contribution is on the Court’s judgment in the case *Lesoochránárske zoskupenie*.

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This case concerned administrative proceedings that led to a derogation from the protection of the brown bear under the Habitats Directive 92/43/EEC<sup>1</sup> and the access of a Slovak environmental NGO to it under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (referred to herein as: the Convention). The Convention is a mixed agreement. This case is the most recent ruling of the Court that addresses the issue of its jurisdiction to interpret mixed agreements. Before this judgment is discussed, the Court's case-law on its jurisdiction that preceded that judgment is analysed, and problems that have been identified by scholars are presented. Subsequently, the Court's considerations in the judgment are analysed and put into the context of the Court's previous rulings. That is meant to uncover continuous elements of the Court's case-law as well as changes that the Court made in the judgment at hand. On the basis of those observations it is discussed what implications this judgment may have for the interpretation of mixed agreements.

The goal of this contribution is to determine the requirements that have to be met in order for the Court to be competent to interpret a mixed agreement. The Court's rulings in *Lesoochránárske zoskupenie* and preceding cases serve as a basis for this undertaking. Yet, this paper is not intended to provide an assessment of whether the Court rightfully decided the way it did.<sup>2</sup> Furthermore, it is not a forecast of the judgment's consequences for environmental law.<sup>3</sup>

## B. The interpretation of mixed agreements

### I. The core of the issue

The primary law of the European Union establishes an order of competences that attributes competences to the Union. Some of these competences are exclusive whereas others are shared by the Union and the Member States. Competences that are not attributed remain with the Member States.

As to the external relations of the EU, Art. 216(1) TFEU stipulates the competences that the Union has in relation to third parties. The Union has explicit external competences that arise from the Treaties or binding legal acts of the Union. Moreover, internal competences can imply an external competence. The EU has implicit external competences if the conclusion of an agreement is necessary to achieve one of the objectives laid down in the treaties or if the agreement is likely to affect or alter the scope of EU law.<sup>4</sup> The explicit external competences are exclusive if their legal basis stipulates them to be exclusive. Implicit ex-

<sup>1</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22/07/1992, pp. 0007 et seq.

<sup>2</sup> See, for instance: Jans, Jan H.: 'Who is the referee? Access to Justice in a Globalised Legal Order. A Case Analysis of ECJ Judgment C-240/09 *Lesoochránárske zoskupenie* of 8 March 2011'. [2011] Review of European Administrative Law, 85.

<sup>3</sup> See the discussion in the literature on this point: Krawczyk, Damian, 'The Slovak brown bear case: The ECJ hunts for jurisdiction and environmental plaintiffs gain the trophy', [2012] 14 Environmental Law Reports, Issue 28, 53, and Eliantonio, Mariolina, 'Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, nyr, and Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg* (intervening party: *Trianel Kohlekraftwerk Lünen GmbH & Co. KG*) Judgment of the Court of Justice (Fourth Chamber) of 12 May 2011, nyr.', [2012] Common Market Law Review 49, 767.

<sup>4</sup> Müller-Ibold, Till, in Lenz, C.O. and Borchardt, K.-D. (eds), *EU-Verträge, Kommentar nach dem Vertrag von Lissabon*, 5<sup>th</sup> edition (Bundesanzeiger, Cologne, 2010), Art. 216 TFEU, paras. 9 ff.

ternal competences are exclusive if Art. 3 TFEU provides that the underlying internal competence is exclusive. All other competences attributed to the Union are shared. Yet, the Member States cannot exercise these shared competences if the EU has already exercised them.<sup>5</sup>

The Union can enter into an agreement on its own if its competences, shared or exclusive, cover all provisions of the agreement that do not have the character of an annex. If the competences do not cover all of them, the EU and its Member States must jointly conclude a mixed agreement.<sup>6</sup>

This raises the question which court is competent to interpret such agreements and to what extent the Court has jurisdiction to interpret them. This is, *inter alia*, related to the questions which competences the Union exercises when concluding the mixed agreement and what influence the Union's interest in a uniform interpretation and application has.<sup>7</sup> The next sections analyse the Court's response to the issue of jurisdiction in its rulings before its judgment in the case *Lesoochránárske zoskupenie* (Case C-240/09).

## II. The competence to determine the competent court

An agreement concluded by the Union in accordance with the provisions of the Treaties is an act of the institutions of the Union in terms of Art. 267(1)(b) TFEU (ex-Art. 234(1)(b) TEC). Therefore, the Court can give preliminary rulings on the interpretation of that agreement.<sup>8</sup> In *Merck Genéricos*, the Court proceeds to hold that it has the competence "to define the obligations which the Community has thereby assumed and, for that purpose, to interpret the provisions of the TRIPS agreement".<sup>9</sup> Notwithstanding the view of some scholars who ascribe an even wider scope to these considerations,<sup>10</sup> it is evident that the Court, at least, intends to establish its judicial *Kompetenz-Kompetenz*, which means that it is competent to determine the court that is competent to interpret the agreement.<sup>11</sup>

## III. The competence to interpret

When the Court exercises its judicial *Kompetenz-Kompetenz*, it determines the Court that is competent to examine the substantive scope and content of the agreement. In the case *Dior*,

<sup>5</sup> Müller-Ibold, (fn 4), Art. 216 TFEU, paras. 15 ff.

<sup>6</sup> Müller-Ibold, (fn 4), Art. 216 TFEU, paras. 12 ff.

<sup>7</sup> Some Member States claimed that the Union only exercised its exclusive external competences. For more details: Govaere, Inge, 'A tale of the (un)expected: The backlash for all mixed agreements of the 'external' harmonisation of intellectual property', in Drexler, J., Hilty, R.M., Boy, L., Godt, C. and Rémiche, B. (eds), *Technology and Competition – Technologie et Concurrence. Contributions in honour of – Mélanges en l'honneur de Hanns Ullrich* (Larcier, Brussels, 2009), 706 f.; Karayigit, Mustafa T., 'Why and To What Extent a Common Interpretative Position for Mixed Agreements?', [2006] 11 European Foreign Affairs Review, Issue 4, 445, 447. For details on the effects of mixed agreements, cf. Schmalenbach, Kirsten, in Calliess, C. and Ruffert, M. (eds), *EUV/AEUV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, Kommentar*, 4<sup>th</sup> edition (C.H. Beck, Munich, 2011), Art. 216 TFEU, para. 43.

<sup>8</sup> Schmalenbach, (fn 7), Art. 216 TFEU, para. 53; cf. Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos L v. Merck & Co. Inc., Merck Sharp & Dohme L* [2007] E.C.R. I-7001, I-7035, para. 31.

<sup>9</sup> Case C-431/05, (fn 8), I-7036, para. 33.

<sup>10</sup> Cf. Koutrakos, Panos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure', [2002] 7 European Foreign Affairs Review, Issue 1, 25, 37 et seq.; Karayigit, (fn 7), 452.

<sup>11</sup> Holdgaard, Rass, 'Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda v. Merck & Co. Inc. (M & Co.) and Merck Sharp & Dohme Lda (MSL)*, Judgment of the Court of Justice (Grand Chamber) of 11 September 2007, [2007] ECR I-7001', [2008] 45 CMLRev., Issue 4, 1233, 1239.

the Court answers the question whether it is competent to interpret Art. 50 of the TRIPS agreement. That provision regulates the procedural means with which the authorities of the signatory parties have to protect intellectual property rights. The case concerned the protection of industrial designs. This is a field in which the then European Community had not legislated at that time, despite its shared competence to do so. Having established its competence to define the Union's obligations, the Court proceeds to hold that "in particular" it has jurisdiction to interpret a provision so as to meet the needs of the referring courts when they protect rights arising under the Union's legislation and that it had jurisdiction if that provision was capable of applying to situations that fall within the scope of EU law.<sup>12</sup> The Court considers that Art. 50 of the TRIPS agreement applies to situations falling within the scope of EU law because that provision also applies to the Community trade mark. The fact that it also applies to EU legislation creates a Union interest in a uniform interpretation.<sup>13</sup> The Court concludes that it is competent to interpret that provision although the facts of the case were solely related to industrial designs. In its judgment in the case *Anheuser-Busch*, the Court expressly extends its jurisdiction to the interpretation of substantive provisions of the TRIPS agreement.<sup>14</sup>

The conclusions that scholars draw from this case-law significantly vary. Some scholars argue that the Court established a far-reaching jurisdiction that covers all mixed agreements in their entirety, including fields falling within the exclusive competence of the Member States. They invoke the Court's competence to define the obligations that the Union has assumed and the "in particular"-clause.<sup>15</sup>

Other scholars find that the Court's jurisdiction is subject to further requirements. Some refer to the Court's consideration on the Union's interest in a uniform interpretation of the provision, which would not have been necessary if the jurisdiction had already been established.<sup>16</sup> Others point to the requirement that the provision must be capable of applying to a situation that falls within the scope of EU law.<sup>17</sup> This requirement would lead to the interest in a uniform interpretation because the Court linked that interest to the fact that the provision is capable of applying to EU law.

It is submitted that the view of the second group of scholars is to be preferred. The Court's reference to the Union's interest in a uniform interpretation and the fact that it concludes its

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<sup>12</sup> In the case *Hermès* the Court holds that it is competent to interpret, invoking that Art. 50 of the TRIPS agreement also applies to the EU trade mark. The issue of that case was whether the Court was competent to interpret although the facts of the case only concerned a national trade mark. See: Case C-53/96 *Hermès International v. FHT Marketing* [1998] E.C.R. I-3603, I-3648, para. 32.

<sup>13</sup> Joined cases C-300/98 *Parfums Christian Dior SA v. Tuk Consultancy BV* and C-392/98 *Ascco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV* [2000] E.C.R. I-11307, I-11357 f., paras. 33 et seq.

<sup>14</sup> Case C-245/02 *Anheuser-Busch Inc. v. Budějovický Budvar, národní podnik* [2004] E.C.R. I-10989, I-11037, paras. 41 et seq.; cf. Karayigit, (fn 7), 453.

<sup>15</sup> Müller-Ibold, (fn 4), Art. 218 TFEU, para. 22; Koutrakos, (fn 10), Interpretation under the Preliminary Reference Procedure, 38.

<sup>16</sup> Holdgaard, (fn 11), 1243; Koutrakos, Panos, 'Interpretation of Mixed Agreements', in Hillion, C. and Koutrakos, P. (eds), *Mixed Agreements Revisited, The EU and its Member States in the World* (Hart, Oxford and Portland/Oregon, 2010), 121; Kokott, Juliane and Schick, Kai-Guido, 'Parfums Christian Dior SA v. Tuk Consultancy BV, and Ascco Gerüste GmbH v. Wilhelm Layher GmbH & Co. KG. Joined Cases C-300/98 and C-392/98', [2001] 95 Am. J. Int'l L., 661, 665; Opinion of AG Ruiz-Jarabo Colomer, Case C-431/05, (fn 8), I-7012, paras. 41 et seq., who regrets that the Court did not expressly make it a "fundamental requirement".

<sup>17</sup> Schmalenbach, (fn 7), Art. 216 TFEU, para. 54; Heliskoski, Joni, 'Joined cases C-300/98, *Parfums Christian Dior SA v. Tuk Consultancy BV*, and C-392/98, *Ascco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV*, judgment of 14 December 2000, nyr', [2002] 39 CMLRev., Issue 1, 159, 171.

jurisdiction from this interest clarifies that the Court's jurisdiction is subject to more requirements than the mere conclusion of the agreement by the Union. Moreover, in view of the principle of conferred powers, a general extension of its jurisdiction to fields where the Union does not have any competence would hardly be justifiable.<sup>18</sup> The Court's ruling shows that the interest in a uniform interpretation empowers the Court to interpret provisions that lie in fields that, in the absence of EU legislation, could be regulated by Member States.<sup>19</sup> It remains to be seen whether this interest can extend the jurisdiction to fields where the Union has no competences at all – despite all counter-arguments.

#### IV. The competence to determine direct effect

In *Dior*, the Court distinguishes between its competence to determine the substantive scope and content of a provision and its competence to determine whether a provision has direct effect. The Court holds that the competence to determine the direct effect of Art. 50 of the TRIPS agreement is contingent upon the field within which the right that the applicant seeks to protect falls. It finds that it is for the national courts to determine whether a provision has direct effect if the Union has not legislated in that field (of shared competence), such as the field of industrial design. If the Union has legislated in that field, as it has in the field of trademarks, Art. 50 of the TRIPS agreement, as all other provisions of the WTO agreement and its annexes, will not have direct effect, but the national rules will have to be applied in the light of the wording and the purpose of that provision.<sup>20</sup> The approach that underlies this criterion is that the Court is not competent to determine whether a provision has direct effect if the Union has not exercised its internal shared competence.

The practical impact of this criterion is that the Court may be competent to interpret a certain provision because it is capable of applying to EU law, but not competent to determine its direct effect in cases that concern a field in which the Union has not (yet) legislated.<sup>21</sup> The *dictum* is confirmed in the case *Merck Genéricos*. Furthermore, the Court considers in that case that the EU legislation in the field of patent law was not of “sufficient importance” for the “*Dior* criterion” to be met.<sup>22</sup> The Court thus seems to supplement the requirement with the criterion that the EU legislation in the field in which the Union must have legislated must be of “sufficient importance”.

The distinction between the jurisdiction to interpret and the jurisdiction to determine the direct effect of a provision has been widely criticised. Many scholars consider the determination of the direct effect of a provision to be inherent to the interpretative jurisdiction of a court.<sup>23</sup> Others apprehend a fragmented interpretation of mixed agreements that contravenes the Union's interest in a uniform interpretation.<sup>24</sup>

<sup>18</sup> Koutrakos, (fn 16), *Mixed agreements*, 133; Govaere, (fn 7), 707.

<sup>19</sup> For instance, the field of industrial designs in the case *Dior*; see: Karayigit, (fn 7), 453, who generalises this observation, regardless of that interest.

<sup>20</sup> Joined cases C-300/98 and C-392/98, (fn 13), I-11360 f., paras. 47 et seq. *Holdgaard* calls the question whether the Union has legislated the *Dior* criterion, in: Holdgaard, (fn 11), 1244.

<sup>21</sup> Koutrakos, (fn 10), *Interpretation under the Preliminary Reference Procedure*, 44 et seq.; especially with regard to its impact: Holdgaard, (fn 11), 1246.

<sup>22</sup> Case C-431/05, (fn 8), I-7036, paras. 34 et seq.

<sup>23</sup> Koutrakos, (fn 16), *Mixed agreements*, 123; Heliskoski, (fn 17), 174.

<sup>24</sup> Koutrakos, (fn 10), *Interpretation under the Preliminary Reference Procedure*, 44; pointing to this scenario, but not necessarily criticising: Govaere, (fn 7), 710, who considers it logical that the Member States who have ratified the agreement according to their constitutional rules remain competent to determine the agreement's domestic effects. Such an approach of the Court contravenes the Court's purpose, implies Karayigit, (fn 7), 465.

Moreover, this criterion leaves many questions unanswered. First, the “field” in which the EU must have legislated cannot be easily defined. In *Merck Genéricos*, the Court examines the field of patent law because Art. 33 of the TRIPS agreement concerned the term of protection accorded to patents.<sup>25</sup> In the case *Étang de Berre*, which concerned France’s failure to fulfil its obligations arising from the Convention for the protection of the Mediterranean Sea against Pollution, the Court examines the field of environmental protection to justify its jurisdiction. It is evident that this field is abstract from the facts of the case, which merely concerned the protection of the sea.<sup>26</sup> It needs to be noted, however, that *Étang de Berre* concerned an action for failure to fulfil obligations (Art. 258 TFEU; ex-Art. 226 TEC) and, therefore, a different kind of procedure. Moreover, the Court applies a different criterion in that case, namely whether a field is “in large measure covered by EU law”. In his opinion on the case *Merck Genéricos*, Advocate General Ruiz-Jarabo Colomer reflects on the difficulty to determine the adequate field. Referring to *Étang de Berre*, he considers that the field of intellectual property law could also have been examined if it was regarded as a single sector.<sup>27</sup> Many scholars also consider the criterion too vague in that regard.<sup>28</sup>

Secondly, the extent to which the Union must have legislated is not evident. In *Dior*, the Court does not provide any criterion as to how much legislation would be sufficient. In *Merck Genéricos*, it holds that the legislation has to be “of sufficient importance”, and that Directive 98/44/EC,<sup>29</sup> which regulates the patentability of biotechnological inventions and, therefore, a very specific field, is not sufficient.<sup>30</sup> Except for this minimum standard, the Court does not give any further indications as to what that means.<sup>31</sup> The reactions of the scholars mirror the confusing character of the Court’s ruling. Their speculations range from fragmented pieces of legislation that set minimum standards up to complete harmonisation.<sup>32</sup> The former opinion would serve the Union’s interest in uniform interpretation. The latter opinion, however, would confirm the view of some Member States that the Court’s jurisdiction presupposes the Union’s exclusive competence in the particular field concerned because complete harmonisation precludes the Member States from exercising their shared competences.<sup>33</sup>

As can be deduced from the Court’s rulings, the *Dior criterion* is a very vague tool to determine the Court’s competence to examine whether a provision has direct effect. In the next chapters, it is examined whether the Court upholds the *Dior* criterion in *Lesoochránárske zoskupenie* and, if it does, whether it clarifies the criterion’s content in its ruling.

<sup>25</sup> Case C-431/05, (fn 8), I-7037 f., paras. 40 et seq.

<sup>26</sup> Case C-239/03 *Commission v. France (Étang de Berre)* [2004] E.C.R. I-9325, I-9339, para. 28.

<sup>27</sup> Opinion of AG Ruiz-Jarabo Colomer, Case C-431/05, (fn 8), I-7015, para. 53.

<sup>28</sup> Koutrakos, (fn 16), Mixed agreements, 131 f.; Holdgaard, (fn 11), 1243 f.

<sup>29</sup> Directive 98/44/EC of the European Parliament and the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30/07/1998, pp. 0013 et seq.

<sup>30</sup> Case C-431/05, (fn 8), I-7038, para. 41.

<sup>31</sup> Case C-431/05, (fn 8), I-7038, para. 46.

<sup>32</sup> Koutrakos, (fn 10), Interpretation under the Preliminary Reference Procedure, 45; Holdgaard, (fn 11), 1244 f., who also considers *Étang de Berre* (see fn 26). The applicability of that ruling in the context of a procedure under Art. 267 TFEU, however, is questionable.

<sup>33</sup> *Opinion 1/94*, [1994] E.C.R. I-5267, I-5411, para. 77; I-5416 f., para. 97. Cf. fn 7.

## C. The Court's judgment in the case *Lesoochranárske zoskupenie*

### I. Background and issue

On March 8<sup>th</sup>, 2011, the Court delivered its judgment in the Case C-240/09. The Court was requested to give a preliminary ruling in terms of Art. 267 TFEU. The core of the national proceedings that led to this request was a contentious appeal of a Slovak NGO (*Lesoochranárske zoskupenie VLK* (LZV), in English: WOLF Forest Protection Movement; referred to herein as: "the NGO")<sup>34</sup> to the Najvyšší súd Slovenskej republiky (the Slovak Supreme Court; referred to herein as: "the Supreme Court").<sup>35</sup>

Prior to that procedure, the NGO had requested the Ministerstvo životného prostredia Slovenskej republiky (the Ministry of the Environment of the Slovak Republic; referred to herein as "the Ministry") to inform it of any administrative procedures that were capable of affecting the protection of the environment. Early in 2008, the Ministry notified the NGO of several applications of hunting associations for derogation from the protection enjoyed by brown bears under the Habitats Directive. The Ministry granted the necessary permission to one of the hunting associations on April 21<sup>st</sup>, 2008.

Beforehand, the NGO had requested to be a party to the proceedings under Art. 14 of the Slovak Administrative Procedure Code, invoking the Convention. Art. 9(2) and (3)<sup>36</sup> of the Convention oblige the parties to the Convention to grant members of the public access to administrative or judicial procedures, in the framework of which those can challenge acts or omissions by private persons and public authorities. The Ministry, however, expressly denied the NGO this status in its decision of June 26<sup>th</sup>, 2008, considering that Art. 9(2) and (3) of the Convention did not have direct effect.<sup>37</sup>

The NGO filed an action against this decision with the Krajský súd v Bratislave (Bratislava Regional Court). This court concluded Art. 9(3) of the Convention not to grant the NGO the right to be a party to the proceedings and, therefore, not to have direct effect. Subsequently, the NGO lodged an appeal with the Slovak Supreme Court. After its application for an accelerated procedure had been rejected by the Court,<sup>38</sup> the Supreme Court decided to refer three questions to the Court. The first question was whether Art. 9, and in particular paragraph 3, of the Convention could be recognised as having direct effect, the EU not having implemented its obligations that arise from the Convention through secondary legislation. The second question was whether those provisions, which have become a part of EU law, could be recognised as having direct applicability or direct effect of EU law within the

<sup>34</sup> See this organisation's website: <http://www.wolf.sk/en/en-home> (last accessed on 12/04/2014).

<sup>35</sup> Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* [2011] E.C.R. I-1255, I-1285 et seq.

<sup>36</sup> Art. 9(3) of the Convention reads as follows:

"In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

<sup>37</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1265 f., paras. 21 et seq.

<sup>38</sup> Order of October 23<sup>rd</sup>, 2009, Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* [2011], available under (only in French): [http://curia.europa.eu/juris/cgi-bin/gettext.pl?lang=fr&num=79908976C19090240\\_1&doc=T&ouvert=T&seance=ORD](http://curia.europa.eu/juris/cgi-bin/gettext.pl?lang=fr&num=79908976C19090240_1&doc=T&ouvert=T&seance=ORD) (last accessed on 12/04/2014).

meaning of the settled case-law of the Court of Justice. The third question concerned the interpretation of the term “act of a public authority” in Art. 9(3) of the Convention.<sup>39</sup> This contribution deals with the Court’s answer to the first two questions. On the surface, the issue is the interpretation of Art. 9 of the Convention as to whether it has direct effect. Yet, against the background of previous rulings of the Court,<sup>40</sup> this entails the examination of the Court’s jurisdiction to determine which court interprets the Convention and of its jurisdiction to interpret the Convention.

## II. The Opinion of the Advocate General

Advocate General Eleanor Sharpston delivered her opinion on the questions referred to the Court on July 15<sup>th</sup>, 2010.<sup>41</sup> Her considerations are confined to Art. 9(3) of the Convention.<sup>42</sup> As has been suggested by submissions of the parties to the proceedings, she deals with the jurisdiction of the Court before examining whether that provision has direct effect. Having reviewed previous rulings of the Court, Sharpston proceeds to point out that the Convention as an instrument in terms of Art. 216(2) TFEU (ex-Art. 300(7) TEC) has become an integral part of EU law. In the absence of any allocation of competences to third parties, she deduces from this that the Court has jurisdiction to examine the division of competences between the EU and its Member States and to define the obligations that the EU has assumed. She substantiates her opinion by referring to *Merck Genéricos*<sup>43</sup> and by considering that only the Court is able to fulfil that task in order to prevent fragmentation and legal uncertainty.<sup>44</sup>

Here, Sharpston confines herself to concluding the Court to be competent to determine which court is best suited to decide whether Art. 9(3) of the Convention has direct effect.<sup>45</sup> This, on the one hand, is remarkable because some scholars also derive the Court’s jurisdiction to interpret the provisions from the Court’s considerations in *Merck Genéricos*.<sup>46</sup> On the other hand, it may imply that she deems that debate irrelevant because of the special regime that the Court previously applied to cases where the direct effect of a provision was in question.

Subsequently, in order to determine the court that is competent to interpret, Sharpston applies the *Dior* criterion and examines whether the EU has legislated in the particular field that Art. 9(3) of the Convention concerns. First, she considers whether secondary legislation that concerns the subject-matter of an administrative decision, *in casu* (a derogation from) the protection of the brown bear, and that does not regulate the access to justice can be taken into account. In her opinion, such “downstream” legislation cannot be taken into account. She argues that a different view would result in a fragmented interpretation of the

<sup>39</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1266 f., paras. 24 et seq.

<sup>40</sup> Joined cases C-300/98 and C-392/98, (fn 13), I-11344 et seq.; Case C-431/05, (fn 8), I-7026 et seq.

<sup>41</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1259 et seq.

<sup>42</sup> AG Sharpston points out that paragraph 2 of that Article is regarded as having been incorporated into EU law (through Directive 2003/35/EC). That is why the issue of its direct effect does not arise, see Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1268 f., paras. 34 et seq.

<sup>43</sup> Case C-431/05, (fn 8), I-7035, paras. 31 et seq., which AG Sharpston paraphrases and with which she agrees.

<sup>44</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1274 f., paras. 58 et seq.

<sup>45</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1275, para. 62. AG Sharpston, however, leaves room for a wider interpretation of the Court’s considerations in *Merck Genéricos*.

<sup>46</sup> See *inter alia*: Koutrakos, (fn 10), Interpretation under the Preliminary Reference Procedure, 38, on the identical consideration in *Dior* (in: Joined cases C-300/98 and C-392/98, (fn 13), I-11357, para. 33).



provision because the scope of the downstream legislation would eventually determine the competent court.<sup>47</sup>

These considerations show that Sharpston applies the *Dior* criterion to provisions of an international treaty other than the TRIPS agreement. Previously, it was merely applied in *Dior* and *Merck Génériques* where the direct effect of provisions of the TRIPS agreement was in question. Furthermore, it is worth noting that she asserts that downstream legislation does not play any role in the framework of the *Dior* criterion.

The Court has never thoroughly dealt with this matter.<sup>48</sup> The result of the examination and the relevance of “downstream” legislation may depend to a large extent upon the field that is chosen as a frame of reference. In *Dior*, for instance, the Court merely established that the European Community had sufficiently legislated in the field of trademarks although Art. 50 of the TRIPS agreement is a procedural provision.<sup>49</sup> Therefore, if, *in casu*, “environmental protection” is chosen instead of “access to justice in environmental matters”, the legislation that is aimed at protecting the brown bear can no longer be regarded as irrelevant “downstream” legislation.

Sharpston goes on to examine what the most suitable definition is of the field that is used in the *Dior* criterion. She rejects the broad field of “environmental law”, arguing that paragraph 3 of Art. 9 of the Convention creates obligations that are distinct from those imposed by the other paragraphs of Art. 9, which are already incorporated. Her approach eventually boils down to the conclusion that the examined field is defined and can only be covered by the implementation of Art. 9(3).<sup>50</sup>

Her considerations rely heavily on the Council’s declaration in the annex to Council Decision 2005/370/EC, which approved the European Community’s accession to the Convention. Therein, the Council considers that the obligations that arise from that provision have not been fully implemented by the Union. It then states that the Member States are responsible for implementing Art. 9(3) of the Convention as far as acts and omissions by private persons and public authorities other than the EU’s own institutions are concerned.<sup>51</sup>

In the persistent absence of legislation implementing Art. 9(3), Sharpston concludes that this provision does not fall within the scope of a field in which the EU has legislated. Therefore, the Advocate General is of the opinion that the national courts are competent to decide whether the provision has direct effect.<sup>52</sup>

Here, Sharpston distinguishes this case from the cases *Dior*, *Merck Génériques* and *Étang de Berre*. Instead of choosing the abstract context of the international agreement or the concerned provision,<sup>53</sup> she chooses the (scope of the) very provision itself as a frame of refer-

<sup>47</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1276, paras. 67 et seq.

<sup>48</sup> In *Merck Génériques*, for instance, the Court considered the legislation in the field of patent law. It did not deal with legislation that was only linked to the subject-matter of the administrative decision (in: Case C-431/05, (fn 8), I-7037 f., paras. 41 et seq.).

<sup>49</sup> See Joined cases C-300/98 and C-392/98, (fn 13), I-11360, para. 47.

<sup>50</sup> This can be deduced from the last sentence of para. 76 of AG Sharpston’s Opinion, whose aim is to provide a pragmatic solution that is based upon the specific circumstances of the case.

<sup>51</sup> Decision 2005/370/EC of 17 February 2005, OJ L 124, 17/05/2005, pp. 0001 et seq. The acts and omissions of EU institutions are regulated by Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25/09/2006, pp. 0013 et seq.

<sup>52</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1277, paras. 72 et seq.

<sup>53</sup> In *Dior*, for instance, the Court merely established that the Community had sufficiently legislated in the field of trademarks although Art. 50 of the TRIPS agreement is a procedural provision (Joined cases C-300/98 and C-

ence. The main reason for this approach appears to be the existence of the Council's declaration on the division of competences.<sup>54</sup> With regard to *Étang de Berre*, which was a ruling following an action for failure to fulfil obligations, other factors, such as the applicability of other criteria and the different procedure, may play a role. Sharpston, however, does not elaborate on this.

Thereafter, presupposing that the Court does not agree with her conclusion, Sharpston deals with the question whether Art. 9(3) of the Convention has direct effect and the interpretation of the term "act of a public authority". The discussion of these aspects lies outside the scope of this contribution.

### III. The Court's judgment

In this section, the Court's considerations on the first two questions are analysed and contentious points are discussed.

#### 1) The Convention's status in the legal order of the EU

As the Convention has been concluded in accordance with the procedure laid down in Art. 218 TFEU (ex-Art. 300 TEC), so states the Court, this agreement is binding upon the Union and the Member States according to Art. 216(2) TFEU. Subsequently, the Court concludes that the Convention has become "an integral part of the legal order of the European Union" from the facts that the Union has signed the Convention, and has approved it by Council Decision 2005/370/EC.<sup>55</sup> It *inter alia* refers to the Court's ruling in *MOX plant* where the Court distinguished between a provision belonging to the legal order of the EU and a provision coming within the scope of Union competence.<sup>56</sup>

This consideration is far from unambiguous. In paragraph 36, the Court holds that a specific issue that has not been addressed through secondary legislation only becomes part of EU law if that issue is regulated in agreements that the EU and its Member States have concluded and if that issue concerns a field in large measure covered by EU law.<sup>57</sup> If EU law and legal order of the EU were used as synonyms, this would be very confusing because the status of a specific issue that the agreement, which is an integral part of the legal order of the EU, regulates would be subject to more requirements than the status of the agreement itself. There is no evident reason why the Court should come to this conclusion. Therefore, it is submitted that the terms "legal order of the EU" and "EU law" have different meanings with the latter, at least, including the treaties, binding acts of the Union's institutions and the obligations that the EU has assumed in international agreements.<sup>58</sup>

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392/98, (fn 13), I-11360, para. 47). In *Merck Genéricos*, Art. 33 of the TRIPS agreement, which regulates the term of protection which is accorded to patents, lies in the sphere of patent law (in: Case C-431/05, (fn 8), I-7037, para. 39). In *Étang de Berre*, the Barcelona Convention for the protection of the Mediterranean Sea against pollution falls within the scope of the field "environmental protection" (Case C-239/03, (fn 26), I-9339, para. 28).

<sup>54</sup> In fn 57 of her Opinion, AG Sharpston puts emphasis on the importance of this aspect when this case is distinguished from *Étang de Berre*.

<sup>55</sup> Case C-240/09, (fn 35), I-1301, paras. 29 f.

<sup>56</sup> The Court refers to Case C-459/03 *Commission v. Ireland (MOX plant)* [2006] E.C.R. I-4635, I-4700, paras. 82 et seq.

<sup>57</sup> Case C-240/09, (fn 35), I-1303, para. 36.

<sup>58</sup> The last part of Case C-240/09, (fn 35), I-1303, para. 36, suggests this conclusion as well because the Court holds that the issue needs to be covered "in large measure" by EU law – if the mixed agreement were part of EU

It also is a recital from *Merck Genéricos*.<sup>59</sup> After the Court's ruling in that case, this consideration encountered heavy criticism. Mixed agreements include obligations that the Union could not have assumed without the cooperation of the Member States because the Union does not have any external competence.<sup>60</sup> The consideration implies that even such obligations can be integrated into the legal order of the EU.<sup>61</sup> It is, however, worth noting that this status of the provisions does not so far result in a wider scope of the Court's jurisdiction to interpret because the Court upholds the *Dior* criterion in *Merck Genéricos*.<sup>62</sup> It rather seems that the considerations of the Court are not meant to distinguish between provisions that it is competent to interpret and those that it does not have jurisdiction to interpret. Indeed, the Court appears to create EU law in the narrow sense and EU law in the broad sense, the latter being the legal order of the European Union.<sup>63</sup>

This is odd because all this implies that the Court does not have jurisdiction to interpret the entire legal order of the EU. Be that as it may, this consideration may serve another purpose. Read in conjunction with the second sentence of paragraph 30 and paragraph 31,<sup>64</sup> this consideration serves as a ground for the Court's jurisdiction to give preliminary rulings and to define the obligations of the Union. Arguably, the Court may thus seek to justify its judicial *Kompetenz-Kompetenz* that it believes can be exercised only within the legal order of the European Union.<sup>65</sup>

## 2) The judicial *Kompetenz-Kompetenz*

The Convention is an integral part of the legal order of the EU. The Court derives from this status its competence to give preliminary rulings on the interpretation of the Convention.<sup>66</sup> It proceeds to point out that the Convention was concluded under shared competence and holds that:

*[...] the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention [...].*<sup>67</sup>

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law, the Court would not have to consider this because the issue has already been regulated, *i.e.* covered, by the mixed agreement.

<sup>59</sup> Case C-431/05, (fn 8), I-7035, para. 31.

<sup>60</sup> See fn 6.

<sup>61</sup> That is why *Holdgaard* considers this a disregard for the principle of conferred powers. See: *Holdgaard*, (fn 11), 1242. Yet, the Court acknowledges in its ruling in C-240/09 that there are obligations that remain in the sole responsibility of the Member States, which does not leave room for a transfer of competences (Case C-240/09, (fn 35), I-1302, para. 31).

<sup>62</sup> *Koutrakos* raises doubts about the justifiability of such an extension of the Court's jurisdiction, in: *Koutrakos*, (fn 16), *Mixed agreements*, 133.

<sup>63</sup> This has already been suggested above by the discussion on the different meanings of legal order of the EU and EU law, which may also be regarded as 2<sup>nd</sup> class and 1<sup>st</sup> class EU law. *Holdgaard* calls the 2<sup>nd</sup> class parts an "entirely new type of Community law obligation" in: *Holdgaard*, (fn 11), 1241. This notion is also encouraged by the Court's ruling in *MOX plant* where the Court holds that the United Nations Convention on the Law of the Sea is an integral part of the legal order of the EU, but considers that it will be treated in the same way as non-mixed agreements only to the extent that its provisions fall within the scope of the competences of the Union. Cf. Case C-459/03, (fn 56), I-4700 et seq., paras. 82 et seq.

<sup>64</sup> Case C-240/09, (fn 35), I-1301 f., paras. 30 f.

<sup>65</sup> Although he disagrees with the Court on the way it justifies its judicial *Kompetenz-Kompetenz*, *Holdgaard* regards the Court as the court best suited to exercise that competence, cf. *Holdgaard*, (fn 11), 1240.

<sup>66</sup> Case C-240/09, (fn 35), I-1301, para. 30.

<sup>67</sup> Case C-240/09, (fn 35), I-1301, para. 31.

The Court refers to its considerations in *Dior* and *Merck Genéricos*, which only slightly differ.<sup>68</sup> As Advocate General Sharpston points out in her opinion,<sup>69</sup> this consideration primarily justifies the Court's jurisdiction to determine which court is best suited to examine whether the provision has direct effect.

A conclusion that goes beyond this would not correspond with the structure of the Court's ruling in this case. In the following paragraph 32, the Court states additional requirements for the competence to interpret.<sup>70</sup> From a dogmatic perspective, the preceding consideration cannot be the basis for the competence to interpret if this competence is subject to further requirements unless these requirements are formulated as restrictions. The wording of paragraph 32,<sup>71</sup> however, suggests a positive requirement. That is why paragraph 31 *in casu* only justifies the Court's judicial *Kompetenz-Kompetenz*. Concerning the competence to interpret, it may be held that the requirements stated in the preceding considerations and paragraph 31<sup>72</sup> apply to it as well. The wording of paragraph 31 allows this interpretation because "to define the obligations" does not limit the Court's jurisdiction to the judicial *Kompetenz-Kompetenz*.<sup>73</sup>

### 3) The exercise of the judicial *Kompetenz-Kompetenz*

#### *a) The criteria*

As has been pointed out in the previous section, the Court proceeds to set out the criteria for the exercise of its competence to determine which court is competent to interpret. In paragraphs 32-34, it establishes a criterion that has a structure similar to the *Dior* criterion's. If the Union has exercised its powers and adopted provisions to implement the obligations that derive from Art. 9(3) of the Convention, so states the Court, EU law applies and the Court is competent to examine if that provision has direct effect.<sup>74</sup>

This consideration, however, differs from the *Dior* criterion on an important point. In *Merck Genéricos*, the Court requires the Union to have legislated the field in which the provision lies.<sup>75</sup> Hence, the Court does not necessarily require an implementation of the obligations arising from the provision at hand. One may argue that the changes to this consideration in this case merely constitute alterations of the wording, but do not change its meaning because the Court refers to this very consideration. Yet, this argument is not persuasive because of the "field" that the Court selects to examine in *Merck Genéricos*. In that case, the Court chooses to examine the field of "patent law" instead of the field "terms of protection of patents" that would have been the appropriate choice if the Court had focused

<sup>68</sup> "For that purpose" is replaced with "in order to", cf. Case C-431/05, (fn 8), I-7036, para. 33.

<sup>69</sup> Cf. Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1273, para. 55; concurring: Holdgaard, (fn 11), 1240.

<sup>70</sup> Case C-240/09, (fn 35), I-1302, para. 32.

<sup>71</sup> "Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) [...] would continue to be covered by the national law [...]"

<sup>72</sup> *I.e.* (1) conclusion in accordance with Art. 218 TFEU, (2) signed and approved by the Union and (3) conclusion under shared competence.

<sup>73</sup> Concurring: Koutrakos, (fn 10), Interpretation under the Preliminary Reference Procedure, 38. The judgment's German version suggests this even more: "[...] *dafür zuständig*, [...] *die Vorschriften des Übereinkommens von Aarhus auszulegen* [...]"

<sup>74</sup> Case C-240/09, (fn 35), I-1302 f., paras. 32 et seq. The Court does surprisingly not refer to the Union's interest. Arguably, it considers it self-evident.

<sup>75</sup> Case C-431/05, (fn 8), I-7036, para. 34.

on the implementation of Art. 33 of the TRIPS agreement.<sup>76</sup> Such a high level of abstraction from the issue addressed in *Merck Genéricos*, however, can hardly be reconciled with the narrow wording that the Court uses here.

Paragraph 36 of the Court's judgment sets out another criterion. A specific issue is also part of EU law where that issue is regulated in agreements concluded by the EU and the Member States, and concerns a field in large measure covered by EU law.<sup>77</sup> In paragraph 42, the Court refers to the Union's interest in a uniform interpretation that is not addressed when the Court deals with the narrower criterion.<sup>78</sup> This does not subject the jurisdiction on the basis of the wider criterion to an additional requirement. This is because the Union's interest in a uniform interpretation follows from the fact that the respective provision in the mixed agreement concerns a field in large measure covered by EU law, as is evident from the paragraphs 36, 38 and 42.

This criterion corresponds to the standard that the Court applied in the case *Étang de Berre*.<sup>79</sup> In contrast to the criterion discussed above, this standard allows for the choice of an abstract field, such as "environmental protection" in the case *Étang de Berre*. This field has been chosen although the convention involved merely concerned the protection of the sea.<sup>80</sup>

The relation of these two criteria remains unclear at first glance because paragraph 36 does not refer to the competence to examine whether a provision has direct effect at all. It becomes clearer if the following is considered: the second consideration says that the issue is part of EU law provided that the named requirements are met. In paragraph 33 the Court holds that it is competent to interpret if EU law applies.<sup>81</sup> If this issue, which is regulated by the very same agreement to which both criteria refer, is part of EU law, EU law applies. Consequently, the Court is competent to determine whether a provision in a mixed agreement has direct effect if the issue at hand is addressed by that agreement and lies within an (abstract) field that is in large measure regulated by EU law.

Deviating from Advocate General Sharpston's opinion,<sup>82</sup> the Court introduces a new two-step test. At first, it examines whether or not the obligations that arise from the mixed agreement have been implemented. This is the narrow criterion that indicates whether or not the EU has exercised its internal competences, and whether or not the Member States can still exercise their shared competences. The second criterion is the examination whether the issue at hand is regulated in an agreement and lies within a field that is in large measure covered by EU law.<sup>83</sup> In the light of the first criterion, this implies that the wider criterion presupposes the absence of secondary legislation implementing the provision. Moreover, the wider criterion presupposes that the EU has exercised its shared competences when concluding the mixed agreement because the issue could otherwise not form part of EU law.<sup>84</sup>

<sup>76</sup> Cf. Case C-431/05, (fn 8), I-7037, para. 37.

<sup>77</sup> Case C-240/09, (fn 35), I-1303, para. 36.

<sup>78</sup> Case C-240/09, (fn 35), I-1304 f., para. 42.

<sup>79</sup> Case C-239/03, (fn 26), I-9339, para. 29.

<sup>80</sup> See fn 26.

<sup>81</sup> Case C-240/09, (fn 35), I-1302, para. 33.

<sup>82</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1275 f., paras. 63 et seq.

<sup>83</sup> On the relation of the requirements of those two criteria: Koutrakos, (fn 16), Mixed agreements, 125.

<sup>84</sup> With this criterion, the Court picks up its considerations in *Étang de Berre* and *MOX plant*. Already in *MOX plant*, the Court holds that the EU can enter into agreements even "if the specific matters covered by those agreements are not yet, or are only very partially, the subject of rules at Community level". Furthermore, the Court finds

*b) Application of the two-step test*

The Court draws the conclusion that it is competent to interpret the Convention and, therefore, to determine whether Art. 9(3) has direct effect.<sup>85</sup> The starting point of the Court's reasoning is the object of the dispute in the main proceedings. The Court expressly considers that the NGO wants to be a party to an administrative procedure that concerns the protection of the brown bear. It goes on to point out that the brown bear is mentioned in Annex IV(a) to the Habitats Directive. Therefore, the brown bear is protected under Art. 12 of that Directive. Subsequently, the Court concludes that the main proceedings fall within the scope of EU law.<sup>86</sup>

These considerations constitute an answer to the question whether the specific issue at hand meets the broader criterion of the two-step test. According to Council Decision 2005/370/EC, the Union exercised its explicit external competence laid down in Art. 192(1) TFEU (ex-Art. 175(1) TEC) when concluding this agreement.<sup>87</sup> Moreover, the legislation that protects the brown bear is sufficient for the Court to conclude that the field that Art. 9(3) of the Convention regulates is covered in large measure by EU law.<sup>88</sup> It needs to be added that the Habitats Directive cannot be regarded as an implementation of Art. 9(3) of the Convention because it does not concern the access to justice at all. This reasoning is further confirmed by the Court's reference to Regulation (EC) No. 1367/2006, which implements Art. 9(3) as far as acts and omissions of the EU institutions are concerned. The Court holds that this Regulation does not constitute an implementation of that provision.<sup>89</sup> Therefore, only the 2<sup>nd</sup> step of the test leads to the Court's conclusion.

Yet, it is not entirely evident which field the Court takes as a frame of reference.<sup>90</sup> Its reference to the Union's external competence in Art. 192 TFEU suggests that it is, at least, related to environmental law, and so do its considerations on the environmental aspects of the main proceedings. That would also explain why the Court did not address the issue of "downstream" legislation, which the Advocate General thoroughly addressed. The reason would be that the Habitats Directive is not regarded as downstream legislation.

Just as little evident is the standard that is applied when the Court examines whether a field is in large measure covered by EU law.<sup>91</sup> The Court merely mentions the Habitats Directive and concludes the field to be covered in large measure by EU law.

It is unusual, however, that the Court only refers to one piece of legislation. In *Étang de Berre* the Court refers to three directives in the field of the protection of the sea.<sup>92</sup> Klamert asserts that the Court deviates from *Étang de Berre* in *Lesoochranárske zoskupenie* because

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that the exercise of this external competence plays a key role in the answer to the question whether or not the concluded agreement falls within the scope of EU law. Cf. Case C-459/03, (fn 56), I-4700, paras. 93 et seq. For a more thorough analysis of that judgment, cf. Koutrakos, (fn 16), Mixed agreements, 126 f.

<sup>85</sup> Case C-240/09, (fn 35), I-1305, para. 43.

<sup>86</sup> Case C-240/09, (fn 35), I-1303 f., paras. 37 f.

<sup>87</sup> Decision 2005/370/EC, (fn 51), p. 0001, preamble.

<sup>88</sup> The Court confirms this analysis in para. 40 where it holds that the declaration of competence does not question its jurisdiction as EU law covers the field in large measure.

<sup>89</sup> Case C-240/09, (fn 35), I-1304, para. 41.

<sup>90</sup> Concurring: Klamert, Marcus, 'Dark Matter—Competence, Jurisdiction and "the Area Largely Covered by EU Law: Comment on *Lesoochranárske*', [2012] 37 European Law Review, 340, 343.

<sup>91</sup> As is the term "legislation of sufficient importance" which the Court used when it applied the *Dior* criterion in *Merck Genéricos*, cf. Case C-431/05, (fn 8), I-7038, para. 46. The term provoked substantial criticism, *inter alia* from Koutrakos (in: Koutrakos, (fn 16), Mixed agreements, 131), who puts his criticism as follows: "[...] it is as if one were expected to guess, almost intuitively, [...]"

<sup>92</sup> Case C-239/03, (fn 26), I-9339, para. 28.

it does not require a “substantial record of interconnected legislative activity”.<sup>93</sup> This argument is not persuasive because neither in *Étang de Berre* nor in Opinion 2/91, to which *Klamert* also refers, does the Court provide for a minimum standard.<sup>94</sup> The only minimum standard may be derived from *Merck Génériques*. In that case the Court examines the field of patent law. It concludes that Directive 98/44/EC, which regulates the patentability of biotechnological inventions and, therefore, a very specific field, is not sufficient.<sup>95</sup>

Furthermore, it is very doubtful whether the Court deviates from this minimum standard here. First, the Court applies a different criterion in *Merck Génériques*, namely whether there is legislation “of sufficient importance”. Secondly, in *Lesoochránárske zoskupenie* the Court does not define the examined field, which makes it uncertain whether the protection of the brown bear is only a specific field within a more abstract field or the examined field itself. Furthermore, what may have played a role in *Lesoochránárske zoskupenie* is that the Habitats Directive directly concerned the main proceedings. Arguably, the closer the legislation is related to the dispute in the main proceedings, the lower the density of the legislation has to be and the more specific the legislation may be.

Thereupon, the Court recites a consideration from *Hermès* and *Dior* in which the Court links the fact that the provision falls within the scope of EU law to the Union’s interest in a uniform interpretation of this provision. The Court concludes from this that it has jurisdiction.<sup>96</sup> This is a new line in the Court’s jurisprudence because uniform interpretation did not play a role in previous rulings on the jurisdiction to determine whether or not a provision has direct effect.<sup>97</sup> This might be an indication that the Court no longer upholds the differentiation between the interpretation and the direct effect of a provision.

The Court also points out that the declaration of competence does not play a major role. It holds that the declaration of competence does not change the fact that the issue has been regulated in an agreement that lies in a field covered in large measure by EU law.<sup>98</sup> As the Court bases its jurisdiction upon the wider criterion, the declaration of competence cannot question the jurisdiction of the Court.

#### 4) Concluding remarks

The Court’s ruling in this case confirms some principles of the previous case-law, but also alters the Court’s stance on some important aspects. As to the former, it upholds that mixed agreements that have been concluded in accordance with the treaties form an integral part of the legal order of the EU. This confirms the reasoning that the Court applies in *MOX plant* and *Merck Génériques*.<sup>99</sup> Furthermore, reiterating its opinion in those two rulings, the Court derives its judicial *Kompetenz-Kompetenz* from this status of the agreement. Yet, as in *Dior* and *Merck Génériques*, the Court holds that the competence to decide whether or not a provision has direct effect remains subject to further requirements.

<sup>93</sup> *Klamert*, (fn 90), 348.

<sup>94</sup> *Opinion 2/91*, [1993] E.C.R. I-1075, I-1080, para. 25.

<sup>95</sup> Case C-431/05, (fn 8), I-7038, para. 41.

<sup>96</sup> Case C-240/09, (fn 35), I-1304 f., paras. 42 f.

<sup>97</sup> Neither the ruling in *Merck Génériques* nor the ruling in *Dior* contains considerations on this specific interest as far as the direct effect of a provision is concerned. In *Dior*, the Court accepted a fragmented application of Art. 50 of the TRIPS agreement because the EU had not legislated in the field of industrial designs and patents whereas it had sufficiently legislated in the field of trade marks. See for more details: fn 20.

<sup>98</sup> Case C-240/09, (fn 35), I-1304, para. 40.

<sup>99</sup> Case C-459/03, (fn 56), I-4708, para. 126, and Case C-431/05, (fn 8), I-7035, paras. 31 et seq.

As for the latter, the Court applies a new broad criterion to its jurisdiction to determine whether a provision has direct effect. Whereas the Court uses the criterion “legislation of sufficient importance” in *Merck Genéricos*, it uses the criterion “in large measure covered by EU law” in the case at hand. The new criterion is also used to determine the Court’s jurisdiction in cases where an action for failure to fulfil obligations is brought before the Court, as *Étang de Berre* shows.

## D. The judgment’s implications for the interpretation of mixed agreements

### I. General observations

The discussion of the judgment confirms some tendencies that can be observed in the previous rulings of the Court. First, the Court upholds that mixed agreements form an integral part of the legal order of the EU, as it did in *MOX plant* and *Merck Genéricos*.

Secondly, the judgment indicates that the Court’s competence to determine whether or not a provision has direct effect is not questioned by the fact that the Union has not exercised its shared internal competences to implement a mixed agreement. The exercise of the EU’s shared external competences and the fact that the field within which the issue at hand lies is covered in large measure by EU law suffice for the Court to be competent to determine the direct effect. This implies that the EU exercises its shared competences when concluding mixed agreements. It further implies that there is no need for the exclusivity of the Union’s competence and no need for a preclusion of the Member States’ internal competence to legislate. Some scholars even argue that the mere existence of the shared competence, if necessary based upon basic principles of EU law, is sufficient if and insofar as the external shared competence has been exercised through the mixed agreement.<sup>100</sup>

### II. The distinction between different procedures

In the analysis of the Court’s ruling in *Étang de Berre*, it is observed that the Court applied different criteria if an action for failure to fulfil obligations was brought than if a preliminary ruling was requested.<sup>101</sup> It may be argued that the Court draws a distinction between those two kinds of procedures when it determines its jurisdiction.<sup>102</sup>

After the Court’s judgment in Case C-240/09, this suggestion can no longer be upheld. The Court applies the criterion that it used in *Étang de Berre* in the framework of the preliminary ruling procedure. Furthermore, the Court concludes that the criterion is met from the

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<sup>100</sup> Karayigit, (fn 7), 460 f., who refers to the Court’s ruling in *Dior* (with regard to the interpretative jurisdiction; see: fn 17). This implies that the Member States can no longer exercise their shared external competence. Cf. Schlacke, Sabine, ‘Stärkung überindividueller Rechtsschutzes zur Durchsetzung des Umweltrechts – zugleich Anmerkung zu EuGH, Urteil vom 8. März 2011 – Rs. C-240/09’, [2011] Zeitschrift für Umweltrecht, Heft 6, 312, 315, who bases the Court’s jurisdiction upon the EU’s shared competence and the principle of effectiveness.

<sup>101</sup> In *Étang de Berre*, the Court examined whether the field within which a provision lies is in large measure covered by EU law. In *Dior*, in the framework of a preliminary ruling, the Court examined whether the provision in question applies to EU legislation to justify its interpretative jurisdiction, and it examined whether the provision falls in a field where the EU had legislated so as to justify its jurisdiction to determine direct effect.

<sup>102</sup> Koutrakos, (fn 16), Mixed agreements, 136 f., who casts away this idea by referring to the Union’s interests in those procedures – the uniformity of application of the provision and the compliance with the provision respectively – that are closely related.



existence of the Union's interest in a uniform interpretation and derives its jurisdiction from that.<sup>103</sup> This shows that the Court applies the criterion that was previously exclusively used in the procedure following an action for failure to fulfil obligations, and yet draws the same conclusion as in other preliminary rulings if this criterion is met. Therefore, it is submitted that the type of procedure does not influence the Court's examination of its jurisdiction.

### III. The special status of the direct effect of a provision

In *Dior* and *Merck Génériques*, the Court distinguishes between its interpretative jurisdiction and its jurisdiction to determine whether a provision has direct effect. The Court seemed to attach more requirements to the latter than to the former. In its ruling in Case C-240/09, the Court alters the *Dior* criterion and concludes the Court to be competent to determine the direct effect of a provision if the issue at hand has been regulated in agreements and lies in a field that is in large measure covered by EU law.

This change in the Court's jurisprudence at least reduces the differences between the new broad criterion for the Court's jurisdiction to determine direct effect and the criterion for the Court's interpretative jurisdiction. The new broad criterion picks up the Court's approach in *Étang de Berre* and, therefore, no longer expressly requires secondary legislation in the field in which the issue at hand lies. However, the Court, when applying this criterion, has hitherto not succeeded in justifying its jurisdiction without referring to secondary legislation.<sup>104</sup>

Notwithstanding this observation, it is submitted that the Court no longer upholds the differentiation between its interpretative jurisdiction and its jurisdiction to determine whether a provision has direct effect. In addition to the wording of the criterion, the Court's reference to its considerations on its interpretative jurisdiction in *Dior* constitutes a major argument in favour of this opinion. The Court holds that the provision at hand partially applies to situations that fall within the scope of EU law because the Habitats Directive protects the brown bear. It deduces from this the Union's interest in a uniform interpretation of the provision and, therefore, its jurisdiction.<sup>105</sup> In *Dior*, the Court uses the same reasoning. This implies that the very existence of the Union's interest is subject to the same requirements that the Court set out in *Dior*. This interest did not play any role in previous rulings on the Court's jurisdiction to determine the direct effect of a provision. Therefore, the Court, at least, applies the same standard to the question whether an interest of the Union exists in cases where the Court's jurisdiction to determine the direct effect of a provision is in question.

It is true that this does not necessarily prove that the new *Dior* criterion corresponds to the criterion that the Court applied in *Dior* to determine whether or not a provision also applied to EU law and to establish the Court's interpretative jurisdiction. In *Dior*, the Court at least did not mention the criterion "in large measure covered by EU law". It would, however, be inappropriate to deduce a further differentiation from this. Arguably, the considerations of the Court rather suggest that there is a general criterion, namely "the provision in a mixed agreement can also apply to a situation that falls within the scope of EU law?", that gives

<sup>103</sup> Case C-240/09, (fn 35), I-1301 f., paras. 29 et seq.

<sup>104</sup> Cf. *inter alia* Koutrakos, (fn 16), Mixed agreements, 125, dealing with the Court's ruling in *Étang de Berre*. In Case C-240/09, the Court relies on the Habitats Directive as secondary legislation in the field in which the issue in question lies.

<sup>105</sup> Case C-240/09, (fn 35), I-1304 f., paras. 42 f.

rise to the Union's interest if it is met, and that there are different ways to meet it with the two-step test being one of them. As this test does not require secondary legislation in the field concerned, this criterion makes this case distinct from *Dior* and *Merck Génériques* where the Court would only establish its jurisdiction to determine direct effect if secondary legislation existed. This discourages the notion of a further distinction. It rather suggests that the two-step test will be used in other contexts as well because it does not contain any requirements that are unique to the determination of the direct effect of a provision.

#### IV. A single criterion?

As has been suggested in the preceding section, the Court has introduced a general criterion that governs the Court's interpretative jurisdiction and its competence to determine whether a provision has direct effect. The Court holds that the fact that the provision can apply to a situation that falls within the scope of EU law gives rise to the Union's interest in a uniform interpretation thereof. This interest eventually justifies the Court's jurisdiction.<sup>106</sup> A provision can apply to a situation that falls within the scope of EU law in different ways. The two-step test that has been described above is one of them. Another way can be encountered in the Court's considerations on its interpretative jurisdiction in its *Dior* ruling. In that case, the Court holds that it is competent to interpret a provision when requested to do so by national courts that were called upon to order provisional measures for the protection of rights arising under EU legislation and falling within the scope of the mixed agreement in question. Moreover, it decides that it is competent to interpret a provision if that provision is capable of applying to EU legislation, regardless of the fact that that legislation was not concerned by the specific circumstances of the case.<sup>107</sup>

If the criterion is general, all the different ways in which a provision can apply to a situation that falls within the scope of EU law must be capable of justifying the Court's jurisdiction, irrespectively of the circumstances of the case. In view of the case at hand and *Dior*, this would mean that the Court may justify its jurisdiction to interpret Art. 9(3) of the Convention by referring to the fact that this (procedural) provision also applies to proceedings that concern derogations from the protection of the brown bear. These derogations are subject to restrictions laid down in Art. 16 of the Habitats Directive.<sup>108</sup> Hence, the provision is capable of applying to situations that fall within the scope of EU law.<sup>109</sup> An analogous application of the Court's ruling in *Dior* would, therefore, indicate the existence of the Union's interest in a uniform interpretation and justify the Court's jurisdiction. In view of the Court's ruling in *Dior*, where Art. 50 of the TRIPS agreement only needed to apply to the Community trade mark and not to EU law in the field of industrial design, this would also have to apply to cases where the protection of the brown bear is not concerned at all.

The general character of this criterion is far from certain. *Klamert* submits that if the Court had applied this general criterion, the Court could have based its jurisdiction to determine the direct effect of Art. 9(3) of the Convention upon Regulation (EC) No. 1367/2006 because Art. 9(3) of the Convention can also apply to that Regulation.<sup>110</sup> He further submits that the introduction of the new criterion would not have been necessary because it would

<sup>106</sup> On the characteristics of the Union's interest, cf. Koutrakos, (fn 16), Mixed agreements, 135 et seq.

<sup>107</sup> Joined cases C-300/98 and C-392/98, (fn 13), I-11357 f., paras. 34 f.

<sup>108</sup> Case C-240/09, (fn 35), I-1303, para. 37.

<sup>109</sup> Viewing this reasoning as a good solution to the case examined in this contribution: Klamert, (fn 90), 345.

<sup>110</sup> Klamert, (fn 90), 345.

have been sufficient to state that Art. 9(3) of the Convention can also apply to the protection of the brown bear under the Habitats Directive.<sup>111</sup> These reasons make it uncertain whether this criterion is actually general and, if so, will prevail in future cases.

## V. Open questions

Several questions remain unanswered. One of them concerns the wider criterion of the two-step test. It is anything but evident what the “field” is that serves as a frame of reference for the criterion “in large measure covered by EU law”. In the case *Lesoochranárske zoskupenie*, the Court does not specify that field and leaves plenty of room for scholars to speculate. The same applies to the meaning of “in large measure”. The Court merely states that the fact that the brown bear is protected under the Habitats Directive suffices for the criterion to be met.<sup>112</sup>

The following problem also concerns the justification of the Court’s jurisdiction. As has been observed by some scholars, the Court has so far avoided answering the question whether the Court can have interpretative jurisdiction in the complete absence of internal legislation.<sup>113</sup> This problem persists after the Court’s ruling in *Lesoochranárske zoskupenie* where the Court refers to the Habitats Directive. It remains unclear whether the wider criterion of the two-step test and the general criterion can be met if the Union has merely exercised its external shared competences.

The Court’s ruling in *Lesoochranárske zoskupenie* concerns the Aarhus Convention and significantly deviates from the Court’s judgments in *Dior* and *Merck Genéricos* as far as the Court’s jurisdiction to determine whether a provision has direct effect is concerned. Those rulings concerned Art. 50 of the TRIPS agreement. Hence, it is questionable whether the Court applies a different regime to the TRIPS agreement. A reason may be the fact that WTO agreements cannot have direct effect in the framework of EU law.<sup>114</sup> It remains to be seen whether the Court makes such a distinction.

## E. Conclusion

The aim of this contribution has been to determine the requirements that have to be met for the Court to be competent to interpret a mixed agreement in the framework of a preliminary ruling. The analysis in this contribution suggests a two-tier answer to this question. The first step consists in the determination of the Court’s judicial *Kompetenz-Kompetenz*. The Court holds in *Lesoochranárske zoskupenie* that it is competent to determine the court that has jurisdiction to interpret the mixed agreement if the Union and the Member States have jointly concluded the agreement under shared competence, if the EU has concluded it in

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<sup>111</sup> Klamert, (fn 90), 345.

<sup>112</sup> See sub-section C.III.3.b.

<sup>113</sup> Koutrakos, (fn 16), Mixed agreements, 124 f., who raises the question whether covering elements other than secondary legislation in a particular field may be sufficient for the criterion to be met. He refers to the Court’s ruling in *Étang de Berre* in which the Court solely referred to secondary legislation; cf. Karayigit, (fn 7), 460, who describes the same phenomenon, but points to *Dior* as an example to prove the opposite. This opinion, however, is inspired by his broader interpretation of that ruling (see section B.II).

<sup>114</sup> In *Dior* and *Merck Genéricos*, the Court applied that rule and imposed on the Member States the duty to interpret their national rules in the light of the WTO agreements if the EU had legislated in the field which the provision in question concerned. Cf. Case C-431/05, (fn 8), I-7036, paras. 34 f.

accordance with Art. 218 TFEU, and if the Union has signed and approved it. It thereby confirms its reasoning in *MOX plant* and *Merck Genéricos*,

The second step poses the question whether the Court is competent to interpret the mixed agreement. The Court, having established its judicial *Kompetenz-Kompetenz*, holds that it has such jurisdiction if the provision at hand is capable of applying to situations that fall within the scope of EU law. If this is the case, the Union's interest in a uniform interpretation of this provision arises. This interest justifies the Court's jurisdiction. It is submitted that the Court no longer distinguishes between its interpretative jurisdiction and its jurisdiction to determine whether a provision has direct effect, thereby deviating from its rulings in *Dior* and *Merck Genéricos*.

It is advocated here that several criteria may lead to the conclusion that a provision in a mixed agreement can apply to a situation falling within the scope of EU law. First, the Union has exercised its internal competences and has implemented that provision. Secondly, the provision can apply to a right that arises under EU law. Thirdly, the situation at hand has been regulated in the concerned mixed agreement and lies in a field that is in large measure covered by EU law. Fourthly, the provision applies to an issue not concerned by the case in question and that issue falls within the scope of EU law.

Unfortunately, the considerations on the third criterion that has been applied in *Lesoochranárske zoskupenie* display a lack of clarity. Neither with regard to the "field" that is taken as a frame of reference nor as to the meaning of "in large measure" does the Court provide guidance. Moreover, it is still unclear whether or not sources of EU law other than secondary legislation can be invoked to meet this criterion.

It remains to be seen whether these conclusions will be confirmed by the Court, and whether the Court will resolve the lack of clarity detected here. To date, no more recent judgment has been delivered on this issue. As to the applied criteria, some scholars and Advocate General Sharpston reckon that the Court is not inclined to provide clarity.<sup>115</sup> The political sensitivity of mixed agreements and the various contexts to which they apply seem to force the Court to retain more flexibility than legal certainty can bear.

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<sup>115</sup> Opinion of AG Sharpston, Case C-240/09, (fn 35), I-1277, para. 73; Koutrakos, (fn 16), Mixed agreements, 137.