Competence Creep via the Duty of Loyalty?

Article 4 (3) TEU and its Changing Role in EU External Relations

Kristin Reuter

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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Examining Board

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Abstract

With the growing awareness in EU external relations that the *existence* of Member States' competence does not necessarily allow them to freely *exercise* such competence, the duty of sincere cooperation laid down in Article 4 (3) TEU is increasingly becoming the focus of academic attention. In light of the vast potential of the duty to encroach on Member State prerogatives, in combination with a number of striking developments in the Court's case law in the field of external relations, particularly in recent years, the question arises whether Article 4 (3) TEU is slowly turning into an instrument for the Union institutions to achieve a loss of national competence, disguised as restrictions on the Member States' freedom to exercise their powers. This thesis investigates which role Article 4 (3) TEU has really played in governing the relationship between the EU and the Member States in external relations. It sets out to answer the positive question of which concept of federalism dominates the exercise of external powers. Building on this foundation, the thesis ultimately endeavours to provide an answer to the normative question regarding the vision of federalism best suited to the needs of both the Member States and the EU when acting on the international scene. In order to answer these questions, the thesis seeks to transpose Halberstam's theory of the political morality in federal systems to the field of EU external relations. Looking at the interpretation given to Article 4 (3) TEU, both in its detailed reasoning and as part of a broader picture, may then allow us to appreciate the construction of the loyalty obligation as the reasoned outcome of a constitutional process involving the EU institutions, the Court of Justice and the Member States themselves. It will be argued that instead of pursuing political harmony between the Member States and the Union by way of creeping competence, Article 4 (3) TEU emphasises cooperation, compliance and complementarity in areas where the rigid division of competence would otherwise render the system of external relations ineffective.

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Introductory Chapter

The Duty of Loyalty – Competence Creep or a Liberal Vision of Federalism?

I. Introduction: Emphasising the limits to EU powers

Contemporary constitutionalism in Europe reflects a political desire to emphasise more strongly the boundaries to EU powers and to demarcate Union from national activity. With a view to "develop[ing] the Union into a stabilising factor and a model in the new, multipolar world"[1], a key issue identified in constitutional discourse has been how to ensure a "better division and definition of competence" in the EU[2]. Starting with the 2001 Laeken Declaration[3], increasing emphasis has been placed on confining the Union to an agenda which can be reliably identified in advance, characterised by a clarification of the delimitation of competences between the EU and the Member States, a focus on the retention of Member State powers, and the strengthening of mechanisms designed to ensure a controlled exercise of competence.

In order to dispel national fears of a "European superstate or European institutions inveigling their way into every nook and cranny of life"[4], the Laeken Declaration set out to simplify the division of competences between the Union and the Member States and to make it more transparent. To that end, it not only identified the need for a clearer distinction between the different types of competence as well as an efficient exercise of competence, but it also raised the question of how to ensure that a redefined division of competence did not lead to a "creeping expansion of the competence of the Union"[5].

The Treaty of Lisbon took up these impulses by stressing more clearly that the Member States are the source of the powers conferred on the Union[6]. It emphasises the principle of conferral, according to which the Union may act only within the limits of the powers expressly transferred on it by the

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1 Laeken Declaration on the Future of the European Union, European Council, annexed to the Presidency Conclusions, 14 and 15 December 2001, para II.

2 Ibid.

3 Laeken Declaration on the Future of the European Union, European Council, annexed to the Presidency Conclusions, 14 and 15 December 2001.

4 Ibid., para I.

5 Ibid., para II.

6 Article 1 (1) TEU reads: "By this Treaty, the High Contracting Parties establish among themselves a European Union […] on which the Member States confer competences to attain objectives they have in common".

Member States[7]. In addition to being mentioned in several Treaty articles[8], the principle of conferral is highlighted in Declaration 24 annexed to the Lisbon Treaty, which states that the EU's newly acquired legal personality "will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it".

Alongside the exclusive effect of the principle of conferral, the Lisbon Treaty underlines the positive aspect of conferred powers manifested in the retention of Member State powers, which is especially evident in the field of external relations[9]. The Treaty expressly confirms that "competences not conferred upon the Union in the Treaties remain with the Member States"[10]. With regard to external competences, in particular, several Declarations ensure the Member States' continuing right to act in the fields of CFSP and judicial cooperation in civil and criminal matters and police cooperation[11].

The increased emphasis on conferred competences has been accompanied by a procedural reinforcement of the principle of subsidiarity laid down in Article 5 (3) TEU, which provides that the EU may take action only where an objective can be better achieved at Union than at Member State level. Indeed, the Lisbon Treaty[12] aimed to strengthen the principle by empowering national parliaments to scrutinise legislative proposals and act as "watchdogs of subsidiarity"[13].

II. Framework for Analysis: The scope of EU *competence* vs. the scope of EU *law*

These initiatives aimed at strengthening the position of the Member States towards the EU reflect a long-standing national sensitivity to the implications of ever-expanding Union powers. To take a prominent and relatively recent example, the German Federal Constitutional Court (BVerfG) famously emphasised the limits to European integration in its 2009 judgment on the compatibility of

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7 According to Article 5 (2) TEU, "[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

8 Articles 1, 4 (1) and 5 TEU, Article 7 TFEU, see further M. Cremona, "Coherence through Law: What Difference Will the Treaty of Lisbon Make?" (2008) 3 Hamburg Review of Social Sciences 11 at 28.

9 See M. Cremona, "Coherence through Law: What Difference Will the Treaty of Lisbon Make?", 29.

10 Declaration 18 in relation to the delimitation of competences.

11 Declarations 13 and 14 regarding CFSP and Declaration 36; see further, M. Cremona, "Coherence through Law: What Difference Will the Treaty of Lisbon Make?", 29.

12 See the protocol on the application of the principles of subsidiarity and proportionality, OJ C 306/150 (17 Dec. 2007).

13 I. Cooper, "The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU" (2006) 44 Journal of Common Market Studies 281 at 288. For a critical assessment of the new role of the national parliaments, see e.g. J.-V. Louis, "The Lisbon Treaty: The Irish 'No'. National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits" (2008) 4 European Constitutional Law Review 429, R. Schütze, "Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?" (2009) 68 Cambridge Law Journal 525.

the Treaty of Lisbon with the German Basic Law[14]. The BVerfG had already in the past earned a "reputation as a concerned observer of the tendency of the EU to play fast and loose with the constitutionally fundamental principle of conferral"[15]. Unsurprisingly then, a central part of the *Lisbon* judgment was devoted to the importance of the principal of conferral and the Union's obligation to respect the constitutional and political identity of the Member States. The BVerfG even linked the principle of conferral with the protection of national sovereignty[16]. Due to their *Kompetenz-Kompetenz*, it held, the Member States remained in a position to decide which powers to transfer to the Union, instead of the Union deciding which powers to take away from the Member States. From this position of "Masters of the Treaties"[17], it followed not only that conferred powers must be exercised within the framework of the Treaties, but also that the position of the Member States may not be eroded through the interpretation of primary law[18].

This kind of liberal interpretation of the legal basis provisions by the EU institutions criticised by the BVerfG has long been recognised to lead to a creeping expansion of Union competences[19]. The phenomenon known as "competence creep" generally refers to the scope of legislative powers transferred to the EU by the Member States[20]. However, other restraints, which go beyond the *existence* of powers and impact on the Member States' freedom to *exercise* existing powers, are increasingly perceived as competence creep as well[21]. This type of creeping competence "occurs as soon as the […] Member State action can be situated within the scope of the Treaty or EU law"[22]. In these cases, "various limits imposed by EU law have to be observed, even if the subject matter at issue falls outside the scope of EU competence to act and the Member States are in principle free to regulate on the matter"[23].

In EU external relations, in particular, the noticeable divergence between the existence of Member

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[14] German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al. An English version has been published by the Court.

[15] S. Weatherill, "The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide" (2001) 12 German Law Journal 827 at 856.

[16] German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 233.

[17] Ibid., para 235.

[18] Ibid., para 238.

[19] See e.g. S. Weatherill, "Competence and Legitimacy", in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing 2009) 17, with further references.

[20] See M. Pollack, "Creeping Competence: The Expanding Agenda of the European Community" (1994) 14 Journal of Public Policy 95.

[21] See S. Prechal, "Competence Creep and General Principles of Law" (2010) 3 Review of European Administrative Law 5, see also S. Prechal, S. De Vries and H. Van Eijken, "The Principle of Attributed Powers and the 'Scope of EU Law'", in L. Besselink, F. Pennings and S. Prechal (eds.), *The Eclipse of Legality* (Kluwer Law International 2011) 213.

[22] S. Prechal, S. De Vries and H. Van Eijken, "The Principle of Attributed Powers and the 'Scope of EU Law'", 215.

[23] Ibid.

State competence and their freedom to exercise such competence has been receiving growing attention in the legal literature in recent years[24]. In this respect, the duty of sincere cooperation laid down in Article 4 (3) TEU plays a central role, giving rise to a number of different obligations that operate to restrain the Member States' freedom to act on the international scene.

A. Member State sovereignty and the principle of conferred powers

The relationship between the EU and its Member States has always been considered "a complex one"[25]. The Court of Justice attempted to shed some light on the issue by declaring that the Treaties "established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields"[26]. But although the constitutional order of the Union has significantly modified the Member States' national systems of checks and balances, it "still preserves the unique character of the Union as a polity having sovereign States as its component political entities"[27]. It is hence "obvious that the Union cannot be seen as a (federal) state and that its member states have not given up their treaty-making competence"[28].

Statehood and treaty-making competence are, in fact, the defining factors of national sovereignty in the view of the Member States, at least if we take the German Constitutional Court to represent the common position of all Member States[29]. In its above-mentioned *Lisbon* judgment, the BVerfG

[24] See e.g. J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law: Towards a Framework for Analysis", in E. Cannizaro (ed.), *The European Union as an Actor in International Relations* (Kluwer 2002) 151 at 151, S. Weatherill, "Beyond Pre-emption? Shared Competence and Constitutional Change in the European Community", in D. O'Keeffe and P. Twomey, *Legal Issues of the Maastricht Treaty* (Chancery Law 1994) 13 at 13; A. Dashwood, "The Limits of European Community Powers" (1996) 21 ELRev. 113 at 114; M. Cremona, "Defending the Community Interest: the Duties of Cooperation and Compliance", in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law* (Hart Publishing 2008) 125; J. Heliskoski, *Mixed agreements as a technique for organizing the international relations of the European Community and its member states* (Kluwer 2001) at 61; J. Heliskoski, "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements" (2000) 69 NJIL 395 at 411; R. Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Kluwer 2008), Chapter 7; B. De Witte, "Direct Effect, Supremacy, and the Nature of the Legal Order", in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP 1999) 178 at 191, E. Neframi, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations" (2010) 47 CMLRev. 323, C. Hillion, "Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'", in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited – The European Union and its Member States in the World* (Hart Publishing 2010) 87 at 87.

[25] A. Dashwood, "The Relationship between the Member States and the European Union/European Community" (2004) 41 CMLRev. 355 at 356.

[26] Opinion 1/91 r*e: Draft EEA Agreement* [1991] ECR I-6079, para 21.

[27] A. Dashwood, "The Relationship between the Member States and the European Union/European Community", 355.

[28] R. Wessel, "The Multilevel Constitution of European Foreign Relations", in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press 2007) 160 at 179.

[29] For a critical assessment of the Constitutional Court's conception of sovereignty, see T. Lock, "Why the European

started from the premise that the European Union was designed as a long-term association of sovereign states to which a number of sovereign powers were transferred[30]. The authority to exercise these powers, however, came from the Member States, in their function as permanent "Masters of the Treaties"[31]. A transfer of *Kompetenz-Kompetenz* to the Union, i.e. the competence for the EU to decide on its own competence, was therefore prohibited by the Federal Constitution[32].

The protection of national sovereignty, in the form of *Kompetenz-Kompetenz*, is closely connected to the principle of conferral. Safeguarding the Member States' position as Masters of the Treaties, the principle of conferral is not only a principle of European law, but also "the expression of the foundation of Union authority in the constitutional law of the Member States"[33]. As such, the principle is "pivotal to the relationship between the Union and the Member States"[34]. One of the cornerstones of the EU legal order, the principle enshrined in Article 5 TEU (ex Article 5 EC) foresees that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein". This means that in order to be able to act, the EU institutions need a legal basis in the Treaty which sets forth both the vertical and horizontal division of competences. The choice of such a legal basis is not at the discretion of the institutions themselves, but must be based on objective factors amenable to judicial review[35].

B. The division of competence as a safeguard of national sovereignty

In theory, the principle of conferred powers should therefore represent a reliable safeguard against unwelcome inroads into Member State sovereignty. In practice, however, the notion of limited and attributed powers in itself reveals nothing about the legal nature of these powers and the consequences which they may have for the exercise of Member State competence.

In addition to the principle of conferral, a second safeguard against inroads into sovereign state

Union is Not a State – Some Critical Remarks" (2009) 5 European Constitutional Law Review 407 at 408; D. Doukas, "The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty, but Don't Do it Again!" (2009) 34 E.L. Rev. 866 at 886; R. Bieber, "An Association of Sovereign States" (2009) 5 European Constitutional Law Review 391 at 399.

30 German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 229.

31 Ibid., para 231.

32 Ibid., para 233.

33 Ibid., para 234.

34 A. Dashwood, "The Relationship between the Member States and the European Union/European Community", 357.

35 See e.g. Case 45/86 *Commission v. Council* [1987] ECR 1493, para 11; Case C-440/05 *Commission v. Council* [1991] ECR I-2867, para 10.

authority consists in the rules on the distribution and delimitation of competences. In particular, the newly created catalogue of powers introduced by the Treaty of Lisbon plays a valuable role in this respect:

> "A protection mechanism with a formal approach is the categorisation and classification of the European Union's competences according to exclusive competences, competences shared with the Member States, and competences to carry out actions to support, coordinate or supplement the actions of the Member States, carried out for the first time"[36].

The codification of different categories of competences serves to provide transparency regarding the scope and the nature of the powers that have been transferred from the Member States to the Union[37].

C. The division of competences in external relations

In line with the Laeken mandate, the Lisbon Treaty sets out in Article 4 (1) TEU that "competences not conferred upon the Union in the Treaties remain with the Member States". Conversely, this means that if the EU wants to act externally, it needs to be determined whether a competence has been conferred on it. The Lisbon Treaty recognises two ways in which the Union may obtain international treaty-making power. In addition to *express* competences to act in a certain field contained in Treaty provisions, Article 216 TFEU explicitly acknowledges for the first time the existence of *implied* powers for EU external action[38]. The provision thus codifies some of the Court's long-standing case law[39] on the conditions under which a Union competence may arise in areas where no express power has been conferred.

According to the first of the three bases for implied powers listed in Article 216 TFEU, an external EU competence exists "where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties". This condition, based on the *effet utile* of EU law, codifies[40] the Court's approach in Opinion 1/76 by

[36] German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 302.
[37] Ibid., para 303.
[38] Article 216 (1) TFEU reads: "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope".
[39] See Chapter One for a discussion of this case law.
[40] It has been argued that the Treaty of Lisbon actually goes further than the Court of Justice, in that it appears to establish a wider basis for implied powers by loosening the link between internal objectives and external action. See

which the Union is authorised to act internationally where this is necessary to achieve a specific objective[41]. The second condition mentioned in Article 216 TFEU, recognising implied Union powers where the conclusion of an agreement "is provided for in a legally binding Union act", is derived from Opinion 1/94, in which the Court found that the adoption of an internal act based on an internal competence may give rise to a corresponding external EU competence[42]. The third condition provides for implied powers where the conclusion of an agreement "is likely to affect common rules or alter their scope". The wording of this basis for implied powers reflects the *AETR*[43] line of cases, in which the Court has developed the doctrine that the existence of a body of Union legislation in a given field gives rise to external Union powers in that field.

Following the mandate of the Laeken Declaration to "make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States"[44], the Lisbon Treaty recognises different categories of competence – exclusive, shared, complementary or supporting, and a separately listed competence for CFSP.

Where the Union enjoys exclusive powers, it alone is allowed to legislate and adopt legally binding acts, "the Member States being able to do so themselves only if so empowered"[45]. Aside from the express competences mentioned in Article 3 (1) TFEU, the Union is granted in Article 3 (2) TFEU an exclusive treaty-making power where the conclusion of an international agreement "is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as is conclusion may affect common rules or alter their scope". Although the provision does not expressly refer to Article 216 TFEU, its wording is nearly identical, which suggests that Article 3 (2) TFEU is intended to codify the same case law as the former provision forming the basis of the *existence* of implied powers[46].

J. Wouters, D. Coppens, B. De Meester, "The European Union's External Relations after the Lisbon Treaty", in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty?* (Springer 2008) 148 at 178; M. Cremona, "Defining Competence in EU External Relations: Lessons from the Treaty Reform Process", in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge University Press 2009) 34 at 56-57.

41 Opinion 1/76 *(re: Draft Agreement establishing a European laying-up fund for inland waterway vessels)* [1977] ECR 741, para 3.

42 Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty* [1994] ECR I-5267, para 95.

43 Case 22/70 *Commission v. Council (re: European Road Transport Agreement)* [1971] ECR 263, para 16.

44 Laeken Declaration on the Future of the European Union, European Council, annexed to the Presidency Conclusions, 14 and 15 December 2001, para II.

45 Article 2 (1) TFEU.

46 The phrasing of Article 3 (2) TFEU has been criticised for conflating the separate questions of the *existence* of

Exclusive external competence for the Union, however,

> "is the *exception* and, as a rule, the [Union] shares its areas of competence with the Member States because only in that way is it possible to ensure that the principle of subsidiarity [...] has appropriate scope for application"[47].

The Lisbon Treaty affirms this principle in Article 4 (1) TFEU by declaring that the Union shares competence with the Member States, unless the Treaties expressly provide otherwise[48]. Where competence is shared in a specific area, both "the Union and the Member States may legislate and adopt legally binding acts in that area"[49].

Article 2 (2) TFEU puts an end to the "enormous terminological confusion as to what are 'shared powers' in the external relations of the European Union"[50]. According to this provision, shared powers means that "[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence". This type of competence is also known as "concurrent competence"[51]. The Court of Justice already made clear in the past that the Union's external powers do not automatically flow from its internal competence. In the *AETR* judgment, the Court declared that the Member States only lose their right to enter into obligations with non-member countries as and when common rules which could be affected by those obligations come into being[52].

This type of exclusive competence, known as pre-emption[53], differs significantly from *a priori* exclusivity. Pre-emption does not as such preclude the Member States from acting, but is based on

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implied external competence and the *nature* thereof, see M. Cremona, "Defining Competence in EU External Relations: Lessons from the Treaty Reform Process", 62; see also R. Schütze, "Lisbon and the Federal order of Competences: A Prospective Analysis" (2008) 33 E.L. Rev. 709 at 713-714. In that respect, Article 3 (2) TFEU does not adequately reflect the Court's most recent case law on the nature of implied powers, which expressly affirms that implied EU competence may be both exclusive or shared with the Member States (Opinion 1/03 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] ECR I-1145, para 115). See further the discussion in Chapter One.

47 Case C-13/07 *Commission v. Council (Vietnam WTO Accession)*, Opinion of Advocate General Kokott [2009], case withdrawn, para 55, emphasis added.

48 Article 4 (1) TFEU reads: "The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6".

49 Article 2 (2) TFEU.

50 R. Schütze, "Federalism and Foreign Affairs: Mixity as an (Inter)national Phenomenon", in C. Hillion and P. Koutrakos (eds.), Mixed Agreements Revisited (Hart Publishing 2010) 57 at 81, footnote 132.

51 See e.g. Opinion of Advocate General Kokott in Case C-13/07 *Commission v. Council (Vietnam WTO Accession)*, case withdrawn, para 76: "A characteristic of *concurrent competence* (also referred to as *shared competence*) is that the Member States exercise their competence in so far as the [Union] has not exercised its competence", emphasis in the original.

52 Case 22/70 *Commission v. Council (AETR)*, paras 17 and 18, see further D. O'Keeffe "Exclusive, Concurrent and Shared Competence" in A. Dashwood and C. Hillion (Eds.), *The General Law of EC External Relations* (Sweet & Maxwell 2000) 179 at 193.

53 See further Chapter One.

the occupation of the field by existing Union law. Unlike constitutional exclusivity, the exclusive effect of pre-emption therefore depends on Union action. And although such action on the part of the Union may have the effect of pre-empting Member States from exercising their own competence, their right to act may, in theory, also be returned to them[54]. The distinction between these two different types of exclusivity is important, because they represent different conceptions of federalism[55]. However, this distinction has at times been muddied both by the Court of Justice[56] and the Treaty itself[57], which may explain why in the legal literature, pre-emption has in the past often been referred to as a form of exclusive external Union competence[58].

In addition to concurrent competences, a second type of shared powers is mentioned in the Treaties which does not have the effect of precluding Member State action. In the areas listed in Article 4 paragraphs 3 and 4 TFEU, the exercise of EU competence "shall not result in Member States being prevented from exercising theirs"[59]. Although not expressly acknowledged in the Lisbon Treaty, this category of shared competence guaranteeing the continued involvement alongside the Union in areas in which the Union has already exercised a competence is known as "parallel competence"[60]. In areas of parallel competence, independent Member State action is welcomed, for this type of competence is based on the rationale that the involvement of the Member States may result in a more intensive development of a given policy area by sharing out e.g. financial or technical burdens, as in the field of development cooperation[61]. In external relations, in particular, case law has construed this type of competence as meaning that the Member States remain "entitled to enter into commitments themselves vis-à-vis non-member countries […], either collectively or individually, or even jointly

54 M. Cremona, "Defining Competence in EU External Relations", 61.

55 R. Schütze "Dual Federalism Constitutionalised", 4: "[*A priori*] [e]xclusive competences are the hallmark of dual federalism: within their scope, only one authority exists. Exclusive powers are constitutionally guaranteed monopolies, for only one governmental level is entitled to act autonomously. Actions of other public authorities are prohibited unless authorised – a constitutional logic that inverts that of shared powers".

56 See R. Schütze "Dual Federalism Constitutionalised", 6-15.

57 M. Cremona, "Defining Competence in EU External Relations", 61, see also R. Schütze, "Lisbon and the Federal Order of Competences", 714.

58 See e.g. R. Holdgaard, *External Relations Law of the European Community*, 92: "There are two principal types of exclusive external [Union] competence. 1. Exclusivity based directly on an interpretation of the provisions in the [EU] Treaty (a priori exclusivity), 2. Exclusivity that follows from the adoption of internal [Union] measures (pre-emption)".

59 Article 4 TFEU reads: "(3) In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. (4) In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs".

60 Opinion of Advocate General Kokott in Case C-13/07 *Commission v. Council*, paras 67 and 68.

61 See ibid, para 70.

with the [Union]"[62].

Such joint exercise of powers is not only possible, but even necessary, where the Member States and the Union enjoy joint competence over a given subject-matter. Although the Treaties do not expressly mention this category of competence, they nevertheless refer to joint action in a number of provisions[63]. Joint competences tie the exercise of Union powers to that of the Member States, preventing the independent development of a given policy area by either one. In contrast with other categories of non-exclusive competence, which allow both the EU and the Member States to act autonomously within the same area and at the same time, joint competences require the Union and the Member States to act together[64].

Article 2 (5) TFEU codifies another type of non-exclusive Union powers generally subsumed under the category of "complementary competence". Specifically, it affirms the Union's power to "support, coordinate or supplement the actions of the Member States" in the areas listed in Article 6 TFEU[65]. In the same way that parallel powers do not preclude Member State action in a given area, complementary Union competence cannot have the effect of superseding Member State competence in these areas[66]. Consequently, complementary competences allow Member States to "act next to and in addition to the EU"[67].

Not included in the different categories of exclusive, shared and complementary competences listed in Article 2 TFEU is the Common Foreign and Security Policy (CFSP). Since it is instead listed separately in paragraph 4 of the provision[68], it remains "far from clear what competence CFSP constitutes under the Lisbon Treaty"[69]. Although CFSP competence does share certain characteristics of both shared and complementary competences[70], it has nevertheless been described as "a type of sui generis competence"[71].

62 See Opinion of Advocate General Kokott in Case C-13/07 *Commission v. Council*, para 68, with further references.
63 See R. Schütze, "The European Community's Federal Order of Competences", 85-87.
64 R. Schütze, "The European Community's Federal Order of Competences", 71 and 85.
65 Article 6 TFEU lists seven areas: the protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative co-operation.
66 Article 5 (2) TFEU states: "In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas".
67 J. Wouters, D. Coppens, B. De Meester, "The European Union's External Relations after the Lisbon Treaty", 168.
68 Article 2 (4) TFEU reads: "The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy".
69 J. Wouters, D. Coppens, B. De Meester, "The European Union's External Relations after the Lisbon Treaty", 161.
70 M. Cremona, "Defining Competence in EU External Relations", 65.
71 Ibid. Similarly, J. Wouters, D. Coppens, B. De Meester, "The European Union's External Relations after the Lisbon Treaty", 169.

D. Conferral, competences and other limits to integration

The principle of conferred powers and the objective of a clear delimitation of competences cannot determine the boundaries to the scope of EU powers in every respect. The Member States' quest for integration, it was recognised by the BVerfG, must accept a certain "tendency of political self-enhancement" of the Union institutions[72]. Integration reaches its limits, however, where the EU claims a power that has not been transferred on it by the Member States, or where the application of existing powers leads to *de facto* amendments to the Treaty[73]. In particular, such amendments occur where the institutions "re-define expansively, fill lacunae or factually extend competences"[74].

This kind of "liberal interpretation of the legal basis provisions by both the EU institutions and, in particular, the ECJ" is what is traditionally considered a "competence creep"[75]. Competence creep is constitutionally objectionable from the Member State point of view, not only because it risks transgressing the principle of conferred powers, but also because it ultimately leaves it up to the Union to decide on its own legal foundations[76]. Competence creep, in other words, leads to a loss of *Kompetenz-Kompetenz*, which is the essence of national sovereignty in the understanding of the BVerfG.

These concerns over the boundaries of EU law have long led to national fears of "creeping federalism", which assume that "[t]he powers have all been going towards Brussels and away from nation states"[77]. Such anxieties stem from a "deficit in confidence about the Union's readiness to operate within its constitutional limits"[78]. The general perception is "that competence has crept outwards, both in identification of its existence and readiness to exercise it"[79]. And far from offering a mechanism of control against constitutional expansionism, the Court of Justice is considered "part of the problem not the solution"[80].

The risk of *de facto* extensions of EU competence can be, according to the BVerfG, considered particularly high in the case of a number of Treaty provisions which allow for an autonomous amendment of the scope of primary Union law without the formal requirement of statutory

72 German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 237.
73 Ibid., para 238.
74 Ibid., para 238.
75 S. Prechal, S. De Vries and H. Van Eijken, "The Principle of Attributed Powers and the 'Scope of EU Law'", 214.
76 German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 238.
77 See, for example, A. Grice, "Hain warns of 'creeping federalism' in EU", The Independent, 22 July 2002, citing Peter Hain, the British minister for Europe at the time.
78 S. Weatherill, "Competence creep and competence control" (2004) 23 Yearbook of European Law 1 at 17.
79 Ibid.
80 Ibid.

ratification by the Member States. Thus, the division of competences may not be modified through Treaty revision procedures[81], nor via special bridging clauses that may change the voting conditions in the Council[82] or the flexibility clause contained in Article 352 TFEU which allows for EU action without a specific legal basis[83].

E. New forms of competence creep

As the principle of conferral and the delimitation of competences only govern the scope and nature of the powers divided between the EU and the Member States, but not the extent to which they may be *exercised*, the Member States rely heavily on "protection mechanisms […] concerning the *exercise* of competences" which are "intended to ensure that the powers conferred at European level are exercised in such a way that the competences of the Member States are not affected"[84]. These mechanisms include the duty to respect the Member States' national identities stated in Article 4 (2) TEU and more specific obligations of the EU institutions, such as the principles of subsidiarity and proportionality laid down in Article 5 TEU and the principle of sincere cooperation incorporated in Article 4 (3) TEU[85].

However, it is increasingly recognised that general principles of law, such as precisely these principles aimed at safeguarding Member State powers, may lead to creeping competence[86]. As we saw above, the notion of competence creep is traditionally associated with a generous application by the Court of Justice of legal basis provisions. According to a broader understanding of competence creep[87], however, also the limits imposed on the Member States' freedom to *act* can constitute significant inroads into national sovereignty.

This more comprehensive conception of creeping competence is based on the observation that the technique of bringing a matter within the scope of EU law, which is increasingly used by the Court of Justice, may trigger the use of certain EU competences or create new positive obligations for the Member States[88]. Although matters within the scope of Union law are not *per se* matters on which

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81 German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., paras 307-314.
82 Ibid., paras 313-321.
83 Ibid., paras 325-328.
84 Ibid., para 304, emphasis added.
85 Ibid.
86 S. Prechal, "Competence Creep and General Principles of Law".
87 See S. Prechal, S. De Vries and H. Van Eijken, "The Principle of Attributed Powers and the 'Scope of EU Law'"; see also S. Prechal, "Competence Creep and General Principles of Law".
88 S. Prechal, S. De Vries and H. Van Eijken, "The Principle of Attributed Powers and the 'Scope of EU Law'", 246.

the EU is competent to act, the "distinction between the 'scope of the Treaty' and 'competence of the EU institutions' is often blurred, or both notions are – erroneously – conflated"[89].

Where Member State action can be situated within the scope of EU law, the Member States may be limited in their freedom to act, even in areas outside the scope of Union competence. The Court of Justice employs different techniques in order to assess whether a given act is within the scope of Union law, which all have in common that "Member State action is more often 'inside' than 'outside' the scope of EU law"[90]. Particularly contentious are those situations in which limits of EU law lead to the creation of new, positive obligations for the Member States to act. After all, for the Member States "it may make quite some difference whether they have to observe limits or actively take measures"[91]. As such obligations may, furthermore, lead to harmonization without the required approval of the EU legislature, the shift from negative to positive obligations raises questions about their compatibility with the principle of conferred powers:

> "The problem with the principle of attributed powers here is twofold: The Member States are obliged to act without EU legislative measures to that effect having been adopted first; this implies that similar obligations are imposed on the Member States as in the case of such measures, however without the (procedural) guarantees that are inherent to a legal basis"[92].

Against this background, it is hardly surprising that restraints on Member States' competence based on the scope of EU law are "often perceived as a loss of sovereign powers and for that matter creeping competences"[93], even if they do not concern the scope of competences in a strict sense. The Member States and the various actors on the national scene often do not make any distinction between the separate questions of scope of EU law and competence to act[94].

F. Existence *vs.* exercise *of competence in external relations*

In the field of EU external relations, the realisation that a competence retained by the Member States does not necessarily mean that this competence may be freely exercised is not new. Within the last decade or so, the legal literature has increasingly accepted that the relationship between the treaty-

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89 Ibid. at 214.
90 Ibid. at 245.
91 S. Prechal, "Competence Creep and General Principles of Law", 14.
92 S. Prechal, S. De Vries and H. Van Eijken, "The Principle of Attributed Powers and the 'Scope of EU Law'", 241.
93 S. Prechal, "Competence Creep and General Principles of Law", 19.
94 S. Prechal, S. De Vries and H. Van Eijken, "The Principle of Attributed Powers and the 'Scope of EU Law'", 214.

making powers of the Union and those of the Member States cannot be conceived of solely in terms of competence[95]. Although it was "[i]ntuitively […] already accepted for quite a while" that a simple power perspective did not consider the extent to which a competence could be exercised[96], and tentative observations to that effect were submitted in the literature early on[97], recent years have seen increased academic attention being paid to the fact that Member States may be restrained in the exercise of their powers due to the potential effect of such exercise on the EU legal order. According to the traditional conception, the relationship between the Union and its Member States constituted a "zero-sum game" by which an X-amount of powers was distributed between the EU and the Member States: while the particular distribution of competences could be subject to change, the amount of powers belonging to the Union, the Member States, or both at the same time, would remain the same[98]. Particularly in the field of EU external relations, however, this competence-focused perspective is insufficient at addressing the legal reality of action involving non-EU actors, in which "the edifice of [Union] law is not only vulnerable to distortions or potential distortions from within, but also from without"[99].

In light of the inadequacy of a simple power perspective, a number of recent academic contributions[100] have adopted Dashwood's distinction between the scope of EU *competences* and the scope of application of EU *law*, according to which "[d]iscovering the limits of [the authorisations the Treaty has given the institutions] is not the same as discovering the limits of the Treaty's scope of application"[101]. The Member States' obligations under EU law may therefore restrict the exercise of national powers "beyond the scope *ratione materiae* of the doctrines of exclusivity"[102], including pre-emption, even in areas outside of EU competence[103].

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95 See e.g. J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law", 151, S. Weatherill, "Beyond Pre-emption?", 13; A. Dashwood, "The Limits of European Community Powers", 114; M. Cremona, "Defending the Community Interest"; J. Heliskoski, *Mixed agreements as a technique for organizing the international relations of the European Community and its member states*, 61; J. Heliskoski, "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements", 411; R. Holdgaard, *External Relations Law of the European* Community, Chapter 7; B. De Witte, "Direct Effect, Supremacy, and the Nature of the Legal Order", 191, E. Neframi, "The Duty of Loyalty", C. Hillion, "Mixity and Coherence in EU External Relations", 87.

96 J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law", 152.

97 See U. Everling, "Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?", in *Festschrift für Mosler* (Springer 1983) 173 at 186.

98 R. Holdgaard, *External Relations Law of the European Community*, 125, and J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law", 153-156.

99 J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law", 153.

100 See M. Cremona, "Defending the Community Interest"; E. Neframi, "The Duty of Loyalty"; R. Holdgaard, *External Relations Law of the European Community*, 126.

101 A. Dashwood, "The Limits of European Community Powers", 114.

102 R. Holdgaard, *External Relations Law of the European Community*, 126.

103 Contrast, however, G. Gaja, "Restraints imposed by European Community Law in the Treaty-making Power of the

G. Restraints based on the scope of EU law – The impact of Article 4 (3) TEU

It is not a coincidence that the growing awareness of the discrepancy between the scope of Union competence and the scope of Union law has been most prominent in the field of EU external relations. In this area, international EU and Member State action creates rights for third states, which are obviously not bound by EU law. Where incompatibilities arise between Member States' international obligations and their obligations towards the Union, it is "difficult, time-consuming and perhaps embarrassing"[104], if possible at all, to revise or terminate inconsistent international obligations owed to third countries. In external relations, more than in any other area of EU law, it is therefore fundamental to avoid incompatibilities between Member States' international activity and their obligations under Union law from the outset.

As Treaty objectives cannot exclusively be pursued through actions of the Union institutions,

> "the Member States, too, have a part to play through the observance of rules that require them sometimes to take action, but more often to refrain from exercising, or from exercising fully, powers that would normally be available to them as incidents of sovereignty."[105]

This logic is reflected in the principle of sincere cooperation[106] incorporated in Article 4 (3) TEU (ex Article 10 EC, previously Article 5 EC). The provision lays down that

> "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

After leading an initially "dormant existence"[107] in which it was considered incapable of limiting national rights[108], the principle of sincere cooperation became "very important for the development of the [Union]" in the 1980s[109]. Notwithstanding its growing significance as a constitutional principle

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Member States", in I. Cameron and A. Simoni (eds.), *Dealing with Integration: Perspectives from Seminars on European Law* (Iustus 1998) at 112: "Over matters for which the [Union] lacks treaty-making power, Member States are to be considered as exclusively competent. They are not only generally free to conclude agreements or not; they also generally do not have to comply with any obligation under [Union] law when concluding an agreement. While the [Union] may acquire in the future competence over some of these matters, there would be little justification for suggesting a system for monitoring Member States' agreements in these areas".

104 J. T. Lang, "Community Constitutional Law: Article 5 EEC Treaty" (1990) 27 C.M.L. Rev. 645 at 669.

105 A. Dashwood, "The Limits of European Community Powers", 114.

106 The terms "principle of sincere cooperation" and "duty of loyalty" will be used interchangeably hereinafter, with both denoting the concept of loyal cooperation expressed in Article 4 (3) TEU.

107 K. Mortelmans, "The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions" (1998) 8 Maastricht Journal of European and Comparative Law 67 at 69.

108 See Opinion of AG Mayras in Case 192/73 *Van Zuylen,* [1974] ECR 731.

109 K. Mortelmans, "The Principle of Loyalty to the Community", 69.

underpinning the entire EU legal order, it had still at the end of the 1990s "received only limited attention from commentators"[110]. However, in the same way that the insufficiency of the simple power perspective has started to attract attention from legal commentators, the potential of the duty of loyalty to impact on the Member States' freedom to act has increasingly been acknowledged in recent years. Particularly in the field of external relations, the development of Article 4 (3) TEU by the Court has led to a growing awareness of the restraints imposed on the Member States' powers.

Article 4 (3) TEU has been recognised to be "the most important and the most dynamic single Article in the [EU] Treaty"[111]. It owes its significance to the fact that Union loyalty is a highly flexible legal concept, capable of operating in different ways in various situations in order to meet the needs and objectives of the Union and the Member States[112]. Depending on the nature of the Member State action at issue, the duty of loyalty can give rise both to a substantive obligation to give primacy to EU law and to procedural obligations which manifest themselves in a duty to cooperate with EU institutions[113]. According to the principle of primacy, the Member States are obliged to give precedence to EU law where EU rules conflict with national rules or obligations. Article 4 (3) TEU, however, goes beyond primacy[114], by imposing a duty on the Member States not to interfere with the working of Union law even when the national measure in question is not directly contrary to EU rules[115].

Once it had been accepted that Article 4 (3) TEU was capable of making a "difference to the legal situation which would result anyway from other Articles of the Treaty"[116], the salient questions that arose concerned the scope of the provision: "how far does it go, and what are the limits on the duty to cooperate?"[117].

As the common feature of all loyalty restraints imposed by the Court of Justice, it emerged that Article 4 (3) TEU was "always used in combination with some other rule of [EU] law which provides specific content to the general duty of cooperation"[118]. It was therefore considered necessary to identify another rule of Union law with which a Member State was required to cooperate, with the

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110 Ibid.

111 J. T. Lang, "The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections" (2001) 26 E.L. Rev. 84.

112 See S. Hyett, "The Duty of Cooperation: a Flexible Concept", in A. Dashwood and C. Hillion (eds.), *The General Law of E.C. External Relations* (Sweet & Maxwell 2000).

113 M. Cremona, "Defending the Community Interest", 126.

114 See further E. Neframi, "The Duty of Loyalty", 325.

115 J. T. Lang, "The Duties of Cooperation of National Authorities and Courts under Article 10 EC", 85.

116 Ibid. at 84.

117 Ibid.

118 Ibid. at 87.

result that the duty of loyalty was incapable of being invoked separately[119]. Furthermore, it was assumed that the principle entailed only obligations of best efforts, and not a duty to achieve a specific result. In the field of external relations, specifically, it was deduced from the Court's jurisprudence that in international negotiations, Article 4 (3) TEU "may impose no more than a duty to *negotiate*" on the Member States in order to try to achieve a particular outcome for the Union, but it "cannot impose a duty to achieve the desired *result*"[120].

In the last decade, however, these boundaries of the principle of sincere cooperation have been progressively expanded by the Court of Justice. Recent case law[121] suggests that Article 4 (3) TEU may also apply as an autonomous obligation, the infringement of which is penalised by the Court[122]. As far as the scope of obligations imposed by Article 4 (3) TEU is concerned, recent cases have shown a transformation of the procedural duty of cooperation into an obligation of *result*[123].

H. Article 4 (3) TEU – A vehicle for competence creep in external relations?

These recent developments in the interpretation of Article 4 (3) TEU have attracted criticism of the Court going so far as to describe the principle of sincere cooperation as "first and foremost a 'duty to remain silent'", tempting the rhetorical question "[h]ow active can you be, if you cannot speak up, or can just act as backing vocals of the European Commission's solo performance?"[124]. The imagery invoked was suddenly no longer one of Member States cooperating with the EU institutions out of a sincerely felt spirit of *fidelité fédérale* and solidarity towards the Union[125], but rather one of "frustration", inflicted upon the Member States by the strict compliance obligations based on the duty of cooperation[126]. Where these compliance obligations are construed in such a strict manner that the Member States' freedom to act is as limited as it is in those areas in which they enjoy no

[119] See P. J. Kuijper, "Re-reading External Relations Cases in the Field of Transport: The Function of Community Loyalty", in M. Bulterman, L. Hancher, A. McDonnell & H.G. Sevenster (eds.), *Views of European Law from the Mountain, Liber Amicorum for Piet-Jan Slot* (Kluwer 2009) 291 at 293; J. T. Lang, "The Duties of Cooperation of National Authorities and Courts under Article 10 EC", 87; see also the Opinion of AG Slynn in Case 308/86 *Lambert* [1988] ECR 4369.

[120] J. T. Lang, "The Duties of Cooperation of National Authorities and Courts under Article 10 EC", 92, emphasis added.

[121] Cases C-433/03 *Commission v. Germany* [2005] ECR I-6985 and C-266/03 *Commission v. Luxembourg* [2005] ECR I-4805, Case C-246/07 *Commission v. Sweden* [2010] ECR I-3317.

[122] E. Neframi, "The Duty of Loyalty", 324.

[123] See Chapters Two and Five.

[124] A. Delgado Casteleiro and J. Larik, "The Duty to Remain Silent: Limitless Loyalty in EU External Relations?" (2011) 36 E.L. Rev. 524 at 525.

[125] The literature often cites these principles, together with the German equivalent of "Gemeinschaftstreue", as the basis for loyalty obligations imposed by the Court of Justice, see also E. Neframi, "The Duty of Loyalty", 324.

[126] A. Delgado Casteleiro and J. Larik, "The Duty to Remain Silent", 526.

competence whatsoever, the question inevitably arises whether the duty of cooperation is turning into a *competence* provision, rather than a provision regulating the *exercise* of competences:

> "Can it be said that, by preventing the Member States from acting in a field which belongs to the category of shared competences, the Court has broken down this distinction and moved loyalty into the area of *division of competences*?"[127]

Such criticism alleging that the Court encroaches on national prerogatives is, in fact, not new. The introduction and subsequent expansion of the concepts of implied powers and pre-emption in the 1970s[128], both based on the duty of loyalty laid down in Article 4 (3) TEU, has still recently been held responsible for a "progressive erosion, or rather a weakening of the principle of conferred powers as the guiding notion of the question of division of powers in the [Union] legal system"[129].

In the light of such developments, the Court of Justice has been ascribed a tendency to adopt an "expansive approach" to the scope of Union powers in external relations, which manifests itself in a teleological interpretation of the power-conferring provisions of the Treaty, on the one hand, and by a restricted understanding of Member State powers, on the other[130].

Notions of judicial expansionism raise the more general question of the limits of the EU's legislative reach into the domain of the Member States. The potential of this reach has been characterised as "not only dynamic but […] perhaps […] limitless"[131]. Along the same lines, it has been remarked that "there simply is no nucleus of sovereignty that the Member States can invoke, as such, against the [Union]"[132].

According to the BVerfG, the real risk for inroads into national sovereignty was epitomised by Article 352 TFEU (ex Article 308 EC)[133]. The provision provides a basis for action where the Treaties do not grant the necessary specific competence, but EU action is required in order to *attain the objectives* set out therein[134]. As such, Article 352 TFEU pursues the same goal as Article 4 (3)

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[127] G. De Baere, "'O, Where is Faith? O, Where is Loyalty?' Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the Light of the PFOS Case" (2011) 36 E.L. Rev. 405 at 417, emphasis added.

[128] See further Chapter One.

[129] A. Goucha Soares, "The Principle of Conferred Powers and the Division of Powers between the European Community and the Member States" (2001) 23 Liverpool Law Review 57 at 64.

[130] Ibid.

[131] J. Weiler and N. J. S. Lockhart, "'Taking Rights Seriously': the European Court and its Fundamental Rights Jurisprudence" (1995) 32 C.M.L. Rev 51 at 64.

[132] K. Lenaerts, "Constitutionalism and the Many Faces of Federalism" (1990) 38 AJCL 205.

[133] German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 328.

[134] Article 352 para. 1 TFEU reads: "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."

TEU. Both provisions ensure that all "appropriate measures" be taken for the "attainment of the Union's objectives". In the light of this "functionally broad" nature, Article 352 TFEU has been labelled "perilous to confidence in the vitality of the principle of attributed competence"[135]. Already the Laeken Declaration, in its quest for a "better division and definition of competence" that would ensure that a redefined allocation of powers did not lead to a creeping expansion of EU competence[136], had identified Article 352 TFEU as "generating special sensitivity"[137]. The provision, in fact, raises constitutional objections because it allows for an autonomous amendment of the scope of primary Union law without the requirement of statutory ratification by the Member States[138]. As the "indefinite nature of future application" of Article 352 TFEU was found capable of transferring *Kompetenz-Kompetenz* to the Union, the BVerfG declared that its application presupposed the ratification by both national chambers[139] with the same threshold that applies to constitutional amendments[140].

The objections of the BVerfG to a vaguely defined power-conferring provision such as Article 352 TFEU not only gives an insight into national scepticism towards the provision itself, but it also highlights the potential for competence creep inherent in broadly framed provisions aimed at achieving Treaty objectives more generally. In this respect, the duty of cooperation laid down in Article 4 (3) TEU is no different from Article 352 TFEU. If applied in such a way as to deprive Member States of their retained treaty-making powers, the duty of cooperation is capable of weakening the principle of conferral and providing the Union with the power to decide on its own competence to an extent which rivals that of Article 352 TFEU. Indeed, the principle of sincere cooperation takes this potential for encroachments on national sovereignty even one step further, not least because it has been shaped by the Court of Justice into a "general constitutional principle, far beyond its explicit wording"[141]. The use of the flexibility clause under Article 352 TFEU, furthermore, requires a unanimous decision by the Council with the consent of the Parliament[142] and imposes an obligation on the Commission to inform national parliaments of corresponding law-making proposals[143], whereas Article 4 (3) TEU foresees no procedural safeguards to avoid that its

[135] S. Weatherill, "Competence creep and competence control", 42.
[136] See section II of the Laeken Declaration.
[137] S. Weatherill, "Competence creep and competence control", 41.
[138] German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 328.
[139] Ibid.
[140] P. Kiiver, "The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU" (2010) 16 European Law Journal 578 at 579.
[141] S. Weatherill, "Beyond Pre-emption?", 31.
[142] Article 352 para. 1 first sentence TFEU.
[143] Article 352 para. 2 TFEU.

application unduly restrains the exercise of Member State competence.

III. Research Question: The role of Article 4 (3) TEU in governing the relationship between the Union and its Member States in external relations – which type of federalism?

The question of whether the use of Article 4 (3) TEU causes a creep of competence away from the Member States towards the Union leads to a more general, fundamental discussion about the right balance between the preservation of Member States' freedom to act as subjects of international law, on the one hand, and dynamism in European integration, on the other. The tension between these two competing interests represents the "basic problem of federalism"[144]. Federalism[145] describes the way in which political power has been divided vertically – as opposed to a horizontal division between legislative, executive and judicial arms of government – between the constituent parts of a given system[146]. In assessing the question of "how to create a set of central institutions strong enough to pursue common ends effectively at home and exert influence abroad, while at the same time preserving the autonomy of the Member States"[147], different conceptions of federalism accord a different weight to the competing interests at stake, in accordance with the respective ideology underlying each conception.

A. Halberstam's theory of political morality in federal systems

Where federalism refers to the *exercise* of powers within a system of multilevel governance instead of focussing on the catalogue of *powers* divided between the actors, the ideology which underlies federalism has been termed "political morality"[148]. The present thesis will take inspiration from

[144] E. A. Young, "Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism" (2002) 77 N.Y.U.L. Rev. 1612 at 1614.

[145] This definition of federalism will be adopted for the remainder of the study, even if there is no general consensus on the exact definition of the term "federalism", for further references regarding the debate over the uncertainty of the concept see e.g. E. T. Swaine, "Subsidiarity and Self-Interest: Federalism at the European Court of Justice" (2000) 41 Harv. Int'l. L. J. 1 at 1.

[146] N. Emiliou, "Subsidiarity: Panacea or Fig Leaf", in D. O'Keeffe and P. M. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing 1994) 65.

[147] E. A. Young, "Protecting Member State Autonomy in the European Union", 1614.

[148] See D. Halberstam, "Of Power and Responsibility: The Political Morality of Federal Systems" (2004) 90 Virginia L. Rev. 731, see also D. Halberstam, "Beyond Competences: Comparative Federalism and the Duty of Cooperation", *Towards a European Constitution: from the Convention the IGC and Beyond*, The Federal Trust for Education and Research, Goodenough College, London, July 1-2, 2004, available at http://www.fedtrust.co.uk/uploads/constitution/halberstam.pdf.

Halberstam's theory of the political morality in federal systems, which asks whether an actor in a divided power system "may act solely on the basis of political self-interest or whether the actor must take into account the needs of the system as a whole"[149].

In order to provide answers to this question, the theory distinguishes three approaches. At one end of the spectrum, there is the so-called "entitlements approach", focussed entirely on political self-interest. According to this approach, allocated powers may be used without regard to whether the exercise of these powers serves the system as a whole[150]. Both regulatory competition and cooperation between the institutional actors is supported by the *entitlements* view, as long as the choice between competition and cooperation serves the actors' own political interests. Each actor may employ the regulatory tools at its disposal according to self-interested political calculus[151]:

> "Under the *entitlements* view, this is as it should be: Federalism is all about arms' length relations among competing political institutions."[152]

At the other end of the spectrum of political morality, the "conservative fidelity" approach seeks to counteract the diversity of policies and interests inherent in a divided power system. Instead of focussing on the political self-interest of each institutional actor, *conservative fidelity* aims to harmonise the interests of the various actors throughout the system[153]. It does so by imposing a duty on the actors involved to consider the substantive policy interests of all other actors throughout the system at all times. Ultimately, this approach results in a "unitary alignment of interests that mimics the existence of a unitary system"[154].

In between these two opposed conceptions, Halberstam locates the so-called "liberal fidelity" approach. This type of political morality "celebrates the multiple persistent disequilibria of power to which federalism gives rise"[155]. Unlike *conservative fidelity*, which considers conflict between the various actors "an embarrassment to the proper functioning of the system"[156], its *liberal* counterpart actually promotes productive engagement throughout the system. In fact, *liberal fidelity* is based on the idea that "one of the prime virtues of federalism lies in generating vibrant […] interaction by a greater number of constituencies […] regarding the needs of the political system as a whole"[157]. In

[149] D. Halberstam, "Beyond Competences", 3; see further D. Halberstam, "Of Power and Responsibility".
[150] D. Halberstam, "Beyond Competences", 3.
[151] D. Halberstam, "Of Power and Responsibility", 733.
[152] D. Halberstam, "Beyond Competences", 3.
[153] Ibid.
[154] D. Halberstam, "Of Power and Responsibility", 736-737.
[155] D. Halberstam, "Beyond Competences", 4.
[156] D. Halberstam, "Of Power and Responsibility", 737.
[157] D. Halberstam, "Beyond Competences", 4.

contrast with the focus on self-interest predominant under the *entitlements* approach, however, the *liberal* vision of fidelity recognises that "no institution enjoys powers for its own sake, but only as part of a division of powers justified with reference to the system as a whole"[158].

Unlike the *entitlements* approach, the two latter approaches based on fidelity always entail the claim that "an institution must temper its political self-interest with a general concern for the federal enterprise as a whole"[159]. The two fidelity approaches, in turn, differ in the fact that the liberal vision of fidelity focuses on "what the federal enterprise as a whole demands in any given case", while the conservative approach indiscriminately encourages political harmony between the actors[160].

B. Different visions of federalism for Article 4 (3) TEU

If we accept that the principle of sincere cooperation in external relations is applied in such a way as to lead to a creeping expansion of Union competence in areas in which no correlative powers exist for the EU, then it must be assumed that the EU institutions are pursuing an *entitlements* approach towards European integration. The Member States are not only no longer free to exercise their own competence as they wish, but they also lose the power to decide on the scope of future transfers of powers to the EU. Depriving the Member States of their *Kompetenz-Kompetenz*, the Union empowers itself to act or prevents the Member States from acting where this is necessary for the fulfilment of its own political self-interest. In deciding which restraints to impose on the exercise of Member State competence, the Union does not take account of the needs of the system as a whole, nor of the national interests of the Member States.

Where the *entitlements* approach prevails, federalism is viewed as no more than "the product of an arm's length bargain among otherwise hostile adversaries to overcome historically situated political obstacles"[161]. This vision of federalism is certainly what appears to be dominating the reasoning of the German Federal Constitutional Court in its *Lisbon* Judgment. In the opinion of the BVerfG, European integration is "a voluntary, mutual *pari passu* commitment which secures peace and strengthens the possibilities of shaping policy by joint coordinated action"[162]. Far from being "tantamount to submission to alien powers"[163], integration is aimed at creating a close association of

[158] D. Halberstam, "Of Power and Responsibility", 737.
[159] D. Halberstam, "Beyond Competences", 1-2.
[160] Ibid.
[161] D. Halberstam, "Of Power and Responsibility", 821.
[162] German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 220.
[163] Ibid.

sovereign states which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States as permanent masters of the Treaties[164]. The Court's understanding of the EU as an association of states reduces the European Union to a purely "functional" community of sovereign states[165]. Thus, the Union is "presented as a foreign entity" and not as part of the national identity[166].

However, if federalism in EU external relations is understood as more than a constant bargaining between opponents, then the fidelity approach is more appropriate to describe the dominant political morality. The fidelity approach, in fact, aims to "creat[e] something more", such as "a polity, the political integration of previously separate polities, or the joining of institutional actors in a common enterprise of governance"[167]. This common enterprise or polity may be based either on a static or on a dynamic model. A static model is pursued by the *conservative fidelity* approach. The objective of this type of political morality is to achieve an optimal allocation of powers between the institutional actors and to maintain this hierarchy of the system permanently[168]. The *liberal fidelity* approach, by contrast, rejects the static notion of hierarchy. Here, coexistence and mutual obedience are based on a more dynamic concept. Instead of hierarchical subjugation, interaction among the actors is the "result of repeated, voluntary acceptance of the necessary discipline that holds the […] system together"[169]. Unlike the *entitlements* approach, the two fidelity visions of federalism do not approve of the *creation* of new powers by way of creeping competence. However, a *strengthening* of already existent EU powers which amounts to restrictions of Member State competence is acceptable where this is in the interest of the system as a whole.

The question of which of these three types of political morality is most evident in the exercise of powers in EU external relations law, however, has not received any in-depth attention in the legal literature to date. Some tentative assessments of a more general role of Article 4 (3) TEU, which go beyond the impact of the provision in a specific case, have been formulated. Against the background of recent case law involving the principle of sincere cooperation, the duty of loyalty is increasingly being presented as pursuing an *entitlements* approach. According to this understanding of Article 4 (3) TEU, the provision may impose potentially "limitless loyalty"[170] on the Member States in order

[164] Ibid., paras 229 and 231.
[165] D. Doukas, "The Verdict of the German Federal Constitutional Court on the Lisbon Treaty", 871.
[166] R. Bieber, "An Association of Sovereign States", 397.
[167] D. Halberstam, "Of Power and Responsibility", 821.
[168] Ibid.
[169] Ibid. at 822.
[170] As suggested by A. Delgado Casteleiro and J. Larik, "The Duty to Remain Silent", 530.

to further the needs of the Union in any given case. The duty of loyalty is, furthermore, directly associated with the loss of national sovereignty. Under this view, the loyalty obligation contains principles "which transform the status of sovereign States into that of Member States of the European Union"[171].

C. Which kind of political morality for EU external relations?

These assessments of the way in which Article 4 (3) TEU has been developed by the Court of Justice, however, are mostly based on the perspective of the Member States and do not evaluate the needs of the Union system as a whole. Concerns over sovereignty and *Kompetenz-Kompetenz* notwithstanding, can we readily assume that an *entitlements* view is *not* the right approach to safeguarding the interests of the Union *and* the Member States on the international scene? In the daily reality of external relations, characterised by interactions with third countries which are not bound to respect either EU law or EU interests, would it not make sense to empower the Union to speak with a single voice on behalf of the Member States in all negotiations? The Court of Justice, in fact, found early on that if Member States were to adopt positions in international negotiations which differed from those which the Union intended to adopt, they "would thereby distort the institutional framework, call into question the mutual trust within the [Union] and prevent the latter from fulfilling its task in the defence of the common interest"[172]. The Court's call for "strict uniformity"[173], made in the context of the Common Commercial Policy (CCP), was subsequently echoed in the legal literature also with regard to policy areas not comprised by the CCP at the time. Thus, the Court's findings in Opinion 1/94[174] that the Union and the Member States were jointly competent to conclude the WTO Agreements were received as "fatal for the coherence of the Union"[175] and "a programmed disaster"[176].

And all other areas of EU notwithstanding, should not at least the exercise of CFSP competence be based on an *entitlements approach*, in the sense that it is the Member States which act according to

[171] E. Neframi, "The Duty of Loyalty", 323.
[172] Opinion 1/75 *Understanding on a Local Cost Standard* [1975] ECR 1355.
[173] Ibid.
[174] Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty*, see further Chapter One.
[175] A. Maunu, "The Implied External Competence of the European Community after the ECJ *Opinion 1/94* – Towards Coherence or Diversity?" (1995) L.I.E.I 115 at 124.
[176] P. Pescatore, "*Opinion 1/94* on Conclusion of the WTO Agreement: Is There an Escape from a Programmed Disaster?" (1999) 36 C.M.L. Rev. 387.

political self-interest? As the BVerfG held in its *Lisbon* judgment, a decision adopted under CFSP did not fall under supranational law, but "would only exist in the context of international law"[177]. If it is true that the "European Union does not yet take the step towards a *system* of mutual collective security"[178], then surely the Member States cannot be obliged to take any interests into account other than their very own.

As an alternative approach to Article 4 (3) TEU, it could be argued that the *conservative fidelity* vision of Union loyalty is most appropriate in the field of external relations. This type of political morality endeavours to achieve a state of governance in which tasks are divided between the constituent entities in such a way that each unit has some areas on which it makes the final decisions. Once the optimal division of powers has been established, the objective is to protect the powers of each level of governance from intrusions by other levels[179]. In the legal literature, we may find such a *conservative fidelity* vision of Article 4 (3) TEU which has been expressed with specific regard to EU external relations. According to this evaluation of the loyalty obligation, the significance of Article 4 (3) TEU is slowly fading. While it originally seemed to play a "central and indispensable role", the argument goes, the increasing rule-intensiveness of the domain of external relations has led to a decreasing need for the loyalty obligation[180]. In this view, Article 4 (3) TEU is of an entirely complementary, secondary nature, while the prime objective is the allocation of powers within the Union framework. The loyalty obligation merely serves "to force the Member State […] 'to behave'" with the rules that are already in place[181]. This "help" becomes less and less necessary, however, once the rules adopted by the Union become stronger or more complete[182]. To put it in Halberstam's terms, once the optimal allocation of competence has been achieved, the system has found its permanent equilibrium and the duty of loyalty has no further relevance[183].

If, however, neither the *entitlements* approach nor the *conservative fidelity* view prove to be sufficient to fulfil the interests of both the Union and the Member States in external relations, is the liberal vision of fidelity perhaps better suited to the needs of all actors throughout the system? A

[177] German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., para 390.
[178] Ibid., emphasis added.
[179] See D. Halberstam, "Of Power and Responsibility", 821, with further references.
[180] P. J. Kuijper, "Re-reading External Relations Cases in the Field of Transport", 293: "To the extent that the rules, and especially the procedural rules in the field of the [EU]'s foreign relations powers, become more numerous and more precise, there will be less scope to invoke a breach of [Union] loyalty and more scope to accuse Member States of simply having infringed the procedural rules directly. The notion of [Union] loyalty cannot stand on its own; it is invoked as a complement to a [Union] rule that in a particular situation lacks sufficient effect to compel a Member State […] to act in conformity with it."
[181] Ibid.
[182] Ibid.
[183] See D. Halberstam, "Of Power and Responsibility", 821.

liberal fidelity reading of Article 4 (3) TEU has been advocated with respect to governing the EU-Member State relationship on the internal level. This view emphasises the provision's character as a pragmatic solution for the management of diversity which accommodates both the interests of the Member States and those of the Union itself: in a legal order which "ultimately rests on the voluntary obedience of its Member States", the duty of loyalty "has a key role in generating solutions to open questions and thus containing conflicts that may arise in a polycentric and diverse polity"[184].

In his theory on political morality, Halberstam himself promotes the *liberal fidelity* view as the approach which "best exploits the productive democratic potential of a mature system of divided powers"[185]. Having identified all three conceptions of political morality as present in the EU system, he concludes that only the liberal vision of fidelity is a "promising approach to deciding intergovernmental power disputes in federal systems"[186]. This approach is preferable because of its "symmetrical potential" to protect both the central government and the constituent states[187].

More generally, the *liberal fidelity* view of federalism is an expression of the pluralist approach to constitutionalism advocated by Halberstam[188]. Like the *liberal fidelity* view, the idea of pluralism considers the plurality of actors as a "source of strength, not weakness"[189]. Pluralism offers a "middle course" between local and global constitutionalism[190]. In terms of political morality, local and global constitutionalism may be viewed as an expression of the *entitlements* view, in the sense that the former subjects the global realm to national interests, while the latter incorporates the national and the global into a single unity of interest[191]. On the pluralist view, by contrast, neither the global nor the local level is necessarily privileged over the other. In addition to a lack of hierarchy, the idea of pluralism is based on mutual autonomy and mutually embedded openness to the authority of the other level of governance. Like the *liberal fidelity* view, pluralism promotes "conversation, contest,

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[184] A. Von Bogdandy, "Founding Principles", in A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Second Edition (Hart Publishing 2010) 42.

[185] D. Halberstam, "Beyond Competences", 2.

[186] D. Halberstam, "Of Power and Responsibility", 737.

[187] Ibid. at 765.

[188] See D. Halberstam, "Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance", in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 85; D. Halberstam, "Local, Global and Plural Constitutionalism: Europe Meets the World", in G. de Búrca and J. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge University Press 2012) 150; see also D. Halberstam, "Pluralism in Marbury and Van Gend", in M. P. Maduro and L. Azoulai (eds.), *The Past and the Future of EU Law: Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 26.

[189] D. Halberstam, "Local, Global and Plural Constitutionalism", 175.

[190] Ibid. at 151.

[191] Ibid. at 161.

and conflict" among the different actors[192].

Applied to the field of EU external relations, *liberal fidelity* would require common external action of both the Union and the Member States and a strict limitation of "speaking with one voice" to those areas in which common or unilateral Member State action would seriously undermine the fulfilment of all interests involved. Exclusive Union action is thus not necessarily considered the best option to achieve the most favourable outcome of external action, neither for the Member States, nor for the Union itself[193]. Instead of encouraging exclusivity, *liberal fidelity* seeks to unfold the full potential of the divided power system by fostering constructive engagement between the units of governance throughout the system[194].

D. The Research Question

Against this background, the thesis sets out to provide an answer to the positive question of which concept of federalism dominates the exercise of powers in EU external relations. Looking at the vast potential of the principle of sincere cooperation to encroach on Member State prerogatives in combination with the striking developments in the Court's case law in the field of external relations, particularly in recent years, the question arises whether Article 4 (3) TEU is slowly turning into an instrument for the Union institutions to promote a loss of competence at national level, disguised as restrictions on the Member States' freedom to exercise their powers. Or can the limitations imposed on the exercise of Member State competence, instead, be deemed to form part of a broader strategy, aimed at furthering both Union and Member State interests? In assessing these questions, Halberstam's distinction between the three different visions of political morality becomes fundamental. If Article 4 (3) TEU is applied in such a way as to ensure exclusive Union action in as many instances as possible, the underlying rationale of federalism differs significantly from a simple increase in restrictions on the exercise of Member State powers where the strengthening of existing EU powers vis-à-vis parallel powers of the Member States is required to ensure unified action for the common interest. Has the loyalty obligation been employed mostly, as intended by the Masters of the Treaties, as a "general obligation to help and not hinder"[195] the achievement of common

[192] Ibid. at 171.

[193] See also M. Cremona, "Defending the Community Interest", 125-126.

[194] D. Halberstam, "Of Power and Responsibility", 825.

[195] J. T. Lang, "The Duties of Co-operation of National Authorities and Courts under Article 10 EC", 86: "The original [Union] treaties were not intended to be exhaustive or to be sufficient for ever. The authors knew that the [Union] would develop, and that they had not written everything that would be needed to govern the relations between the

objectives for their own benefit? Or has its application gone further than that, reducing simultaneous involvement of both the Member States and the Union and furthering uniformity for the sole purpose of furthering the Union's political self-interest? In order to assess the role which Article 4 (3) TEU has really played in governing the relationship between the EU and the Member States in external relations, the present study sets itself the goal to obtain a holistic view of the development of the principle of sincere cooperation. To that end, it will seek both to examine the application of Article 4 (3) TEU in specific cases and to shed light on its changing role in external relations more generally. This approach of looking at the interpretation given to Article 4 (3) TEU both in its detailed reasoning and as part of a broader picture will then, it is hoped, allow us to appreciate the construction of the loyalty obligation as a reasoned outcome of a constitutional process involving the EU institutions, the Court of Justice and the Member States themselves.

Building on this foundation, the thesis ultimately endeavours to provide an answer to the normative question regarding the vision of political morality best suited to fulfilling the needs of the Member States *and* the EU when acting on the international scene. To that end, it seeks to transpose Halberstam's theory of political morality to EU external relations and test whether his argument in favour of a *liberal fidelity* approach is equally workable in this field as it is on the internal level. Are Member States interests really safeguarded best if the scope for unilateral action is limited for the sake of complementarity? Or does it make more sense to reduce simultaneous involvement of both the Member States and the Union with a view to achieving uniformity? Alternatively, can the interests of both the Union and the Member States be furthered most if each actor is assigned strictly divided areas of competence in which it is free to act without any kind of interaction between the two? And to what extent do these findings differ with regard to the CFSP?

IV. Research Methodology

In his assessment of which vision of political morality can best describe a given situation under EU law, Halberstam relies on two different indicators. Firstly, he looks at the *type* of restraints imposed on the Member States and, secondly, he examines the *rationale* underlying the specific restraint. The type of obligation which limits the exercise of Member State competence is, therefore, not *per se*

[Union] and its Member States. […] But they did need to say something, and what they wrote was a general obligation to help and not hinder. Article [4 (3) TEU] is where it is found."

sufficient to determine which approach to federalism is being pursued in the specific case.

A. A typology of restraints

Article 4 (3) TEU has given rise to a variety of compliance obligations of both a substantive and a procedural nature. The provision has been used extensively by the Court of Justice in its justification for the core constitutional principles in EU external relations law, including primacy of Union law, the doctrine of pre-emption, and the duty of cooperation.

Within the context of legal restraints on the Member States in external relations, the principle of primacy may be considered to be the "heart of the legal matter"[196], for it ensures *substantive* compatibility between Member State agreements and rules of EU law. Primacy is the leading conflict rule developed in the case law of the Court of Justice, providing that Union law takes precedence over Member State law in case of conflict, and only to the extent of that conflict. What is less straightforward, however, is whether Member States "must simply accept this supremacy and give way to [Union] law, or whether they must do more"[197]. The Court of Justice may require that Member States affirmatively repeal national rules which conflict with Union law, even if the Member State concerned interprets national law in such a way as to eliminate a positive conflict with the Treaties[198].

In contrast with primacy, the doctrine of pre-emption discussed above is concerned with impediments to EU law rather than actual conflicts. It is aimed at *avoiding* normative conflicts by means of preventing the Member States from entering into certain international obligations deemed damaging to the Union's interests. Pre-emption of a given field means that the Member States lose their competence to conclude international agreements that could potentially affect present or future Union legislation[199]. Limiting the possibility for law-making by the Member States, the doctrine of pre-emption thus goes further than primacy.

In addition to primacy and pre-emption, Member States are under an obligation of effective implementation of Union law. According to Article 216 (2) TFEU, international agreements concluded by the Union are binding on the Member States, which means that the Member States

[196] B. De Witte, "Old-fashioned Flexibility: International Agreements between Member States of the European Union", in G. de Burca and J. Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?* (Hart Publishing 2000) 31 at 45.
[197] D. Halberstam, "Of Power and Responsibility", 771-772.
[198] D. Halberstam, "Beyond Competences", 7.
[199] See Chapter One.

fulfil an obligation towards the Union by implementing them. Article 216 (2) TFEU can, therefore, be considered an expression of the principle of primacy[200].

Another obligation stemming from the duty of loyalty under Article 4 (3) TEU is the duty of cooperation. Unlike the doctrines of primacy, pre-emption and implementation, the duty of cooperation is not intended to achieve substantive compliance with EU law, imposing procedural restraints only[201]. These procedural duties include the obligation to inform and consult the relevant Union institutions before taking unilateral action on the international scene.

B. Restraints and their rationales

These different obligations flowing from Article 4 (3) TEU of course vary in the intensity with which they interfere with the Member States' freedom to act. Procedural obligations, for one, do not seek to achieve substantive policy agreement. Instead, they are primarily intended to "address structural power gaps in the implementation of [Union] law"[202]. Duties of this kind may be reconciled with a liberal understanding of fidelity, as they "require cooperation only in situations in which a primary duty already commits the member state to the accomplishment of the substantive goal specified in the [EU] Treaty"[203]. In other words, procedural obligations are not free-standing, generalised duties for the harmonisation of interests throughout the Union, but apply only when a specific legal relationship exists between the Member State and the Union[204].

Procedural obligations may turn into substantive ones, however, where the Member States are not only required to use *best efforts* to fulfil the procedural duty, but are actually under an obligation of *result*. The result may also consist in a negative obligation *not* to act.

Compared with their procedural counterpart, substantive compliance obligations are decidedly more intrusive than obligations of a procedural nature, in that they significantly narrow the scope of permissible Member State action. Nevertheless, obligations of a substantive kind generally do "not seek to suppress political dissent", but instead attempt to "ensure the effectiveness of the federal legal system by demanding clear legal rules throughout the system"[205].

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[200] E. Neframi, "The Duty of Loyalty", 331.

[201] This distinction between substantive and procedural compliance obligations is adopted from M. Cremona, "Defending the Community Interest".

[202] D. Halberstam, "Beyond Competences", 6.

[203] D. Halberstam, "Of Power and Responsibility", 771.

[204] D. Halberstam, "Beyond Competences", 6.

[205] Ibid. at 7.

Thus, both procedural and substantive compliance obligations may be read in a way which is consistent with a *liberal fidelity* approach. Both types of duties implicitly distinguish "between the substantive policy choice and the effectiveness of decisionmaking or implementation". Instead of seeking to harmonise interests at the policy-making stage, their goal is to "help the European Union overcome debilitating obstructionism both at the input level, for example in gathering necessary information, and at the output level, such as in the enforcement of E.U. Policies"[206]. In the absence of such obligations, "the European Union's vertical division of powers would have rendered the central government largely ineffective and the project of European integration hopeless"[207].

Neither if seen from the perspective of national sovereignty can such obligations be considered objectionable. The *liberal fidelity* approach seeks to maximise the potential for success of all actors involved in a given system of multilevel governance. In the case of the EU, which was after all created by Member States for the attainment of their own objectives, the fulfilment of both Member State *and* Union interests should generally go hand in hand. As long as substantive restraints, even if they include a prohibition to act altogether, are imposed with a view to achieving a more effective functioning of the system of EU law, they should therefore be considered compatible with the principle of conferred powers. It does not jeopardise the Member States' *Kompetenz-Kompetenz* and can, therefore, be reconciled with the understanding of national sovereignty underlying the reasoning of the BVerfG, according to which Member States remain sovereign as long as they retain their position as Masters of the Treaties. Where, however, these restraints are imposed with the sole intent of furthering the unitary alignment of interests, this constitutes a significant inroad into Member State competence and sovereignty. In that case, restrictions on the Member States' powers serve only the interests of the Union, detached entirely from the will of the Member States as Masters of the Treaties.

However, aside from fostering the effective functioning of the legal order, substantive compliance obligations can also be indicative of an entirely different rationale. In these cases, the intent is to "impose harmonious political relations among the various actors" throughout the system and "try to create political unity where the institutional architecture calls for pluralism"[208]. Instead of encouraging engagement between the different actors like a *liberal fidelity* approach would, such a *conservative* approach "insists on harmony even where there is none"[209]. This rationale fundamentally takes issue with federalism itself and with the existing state of integration in the

[206] Ibid. at 9.
[207] D. Halberstam, "Of Power and Responsibility", 778.
[208] D. Halberstam, "Of Power and Responsibility", 778.
[209] D. Halberstam, "Beyond Competences", 9.

particular area[210].

C. The Union interest

In EU external relations, the observation that there are different rationales underlying loyalty obligations imposed on the Member States is not new. These rationales are reflected in the concept of "Union interest" which was first expressed in the Court's case law in the 1970s[211]. Over the years, the Court has oscillated between different rationales for the imposition of obligations based on Article 4 (3) TEU[212]. The Union interest has thus been linked to a variety of rationales, including the "effective implementation of common rules", the "preservation of their *effet utile*", the "facilitation of the exercise of Union competence" and "the requirement of unity"[213].

Despite its long-standing application by the Court of Justice, the concept of Union interest has only in recent years started to receive academic attention as a principle useful for defining the scope of the EU loyalty obligation[214]. Academic opinion, however, is divided on the more general Union interest underlying the strategy of the Court of Justice in its construction of the duty of loyalty. According to one understanding, the Union interest in external relations lies in the unity of representation of the EU and its Member States[215]. This unity rationale has been making a recurring appearance in the Court's reasoning, featuring in early case law all the way until recent Opinions[216]. As this unity is challenged by the autonomy of the Member States, the underlying concept of the principle of unity is "to merge all voices into one, and thus to obliterate plurality on the ground that it undermines the [Union's] international posture"[217]. As the requirement of unity is often linked to uniformity and exclusivity[218], adopting this type of Union interest would mean "somehow regard[ing] shared competence as second-

[210] D. Halberstam, "Of Power and Responsibility", 778.
[211] See Opinion 1/75 *Understanding on a Local Cost Standard*; see further See M. Cremona, "Defending the Community Interest", 127.
[212] See C. Hillion, "Mixity and Coherence in EU External Relations", 88-92.
[213] This classification is adopted from E. Neframi, "The Duty of Loyalty", 325.
[214] See M. Cremona, "Defending the Community Interest"; E. Neframi, "The Duty of Loyalty".
[215] See e.g. L. Azoulai, "The Acquis of the European Union and International Organisations" (2005) 11 E.L. Rev. 196 at 217; A. Hatje, *Loyalität als Rechtsprinzip der Europäischen Union* (Nomos 2001).
[216] See, for example, Case 22/70 *Commission v. Council (AETR)*; Opinion 1/75 *Understanding on a Local Cost Standard*; Opinion 2/91 *re: Convention No. 170 on safety in the use of chemicals at work* [1993] ECR I-1061; Opinion 1/2003 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*.
[217] C. Hillion, "Mixity and Coherence in EU External Relations", 92.
[218] See e.g. Opinion 1/2003 at para 122: "[T]he Court has found there to be exclusive [Union] competence in particular where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of [Union] law."

best"[219]. With its nature of fostering an "instinctive territoriality reflex in the EU-MS interactions"[220], the requirement of unity can be considered a perfect example of the *conservative fidelity* approach which seeks to obtain a unitary alignment of interests between the Union and the Member States.

Under a different view of the Union interest, the loyalty obligation is "being reorientated to pursue *consistency* and *coherence* in the intrinsically multifarious action and international representation of the Union"[221]. In contrast with the requirement of unity, a Union interest based on consistency and coherence does not seek to obliterate plurality through the means of exclusivity, but instead it embraces and exploits "the fortune of diversity"[222] by ensuring that "all voices speak the same *language*" as opposed to insisting on the same *voice*[223].

Another conception of the Union interest in external relations advocates a definition of the loyalty obligation in terms of *effet utile*[224]. Aimed at the completion of Union objectives, the principle of *effet utile* focusses on achieving both substantive and procedural compliance with Union law. The application of the dynamic notion of *effet utile*, however, is limited in that it must "be linked to the demands of the [Union] legal order"[225]. Furthermore, compliance aimed at achieving the *effet utile* of EU rules "requires an identifiable Union law norm with which the Member States should comply, and not merely a not-yet-exercised capacity to act"[226].

These latter two conceptions of the Union's interest in loyal cooperation are consistent with a *liberal* vision of fidelity. They both focus on what the legal order as a whole demands in a given case, with both accepting diversity over unity and neither one seeking to achieve substantive harmonisation at the policy-making stage. The objective is to maximise the potential of Union action, either by way of common action or, if necessary, by excluding Member State participation. As long as the Union can develop its full potential in external relations, the imposition of any loyalty obligation to that end must be deemed to be in the interest of the Member States as well. The Union interest understood in a *liberal fidelity* sense is, therefore, neither an expression of the political self-interest of the EU, "no[r] simply an expression of the collective interest of the Member States"[227]. Instead, it "represents an

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[219] M. Cremona, "Defending the Community Interest", 125.
[220] C. Hillion, "Mixity and Coherence in EU External Relations", 114.
[221] Ibid. at 92; see also G. De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) at 252, emphasis added.
[222] C. Hillion, "Mixity and Coherence in EU External Relations", 114.
[223] Ibid. at 92, emphasis added.
[224] See M. Cremona, "Defending the Community Interest", 169.
[225] Ibid.
[226] Ibid.
[227] M. Cremona, "Defending the Community Interest", 127.

aspect of the autonomy of the Union system[228].

IV. Structure of the thesis

In order to assess which vision of political morality dominates the construction of the loyalty obligation in external relations, and in order to be able to then test the argument that *liberal fidelity* approach is best suited to the needs of the Union and the Member States in this area, the thesis will follow Halberstam's two-step approach of examining first the *nature* of the restraint imposed and then analysing the *rationale* – or Union interest – guiding the decision to impose the specific restraint. A thorough appreciation of how the Union interest has evolved from case to case is only possible if the relevant cases are grouped according to the type of restraint they impose. Thus, the thesis will cover all substantive and procedural obligations mentioned above: the substantive duties of primacy, pre-emption, implementation, as well as the procedural obligation to cooperate. The order in which these different obligations are dealt with, however, will be a different one. The thesis, in fact, is structured in the order of the extent to which a given obligation reduces the Member States' freedom to act, starting with the most intrusive obligations and ending with those obligations which allow the Member States a broad scope for participation.

Thus, Chapter One examines how Article 4 (3) TEU operates to pre-empt Member State action in external relations. It addresses questions relating to who should act in a given case, exploring how the doctrine of implied powers governs the preclusion of Member State powers. To that end, the chapter will trace the development of the different types of implied powers, with the main focus being on the doctrine of pre-emption established in the classic *AETR* judgment and developed further in subsequent case law. The aim of the chapter is to investigate the relationship between the exercise of EU powers and the nature of the implied powers such an exercise gives rise to.

In contrast with Chapter One, which deals with the question of how the duty of loyalty restrains Member State *competence* in order to prevent the assumption of conflicting legal obligations, Chapter Two focuses on questions pertaining to how the duty of loyalty restrains Member State *action* in order to prevent incompatibilities with EU law. It picks up where Chapter One leaves off by looking first at the effect on the Member States' freedoms to act in areas in which pre-emption has already taken place, before addressing the same questions with regard to areas where powers remain

[228] Ibid.

shared. To that end, the chapter explores the question of what impact the exercise of EU powers has on the Member States' freedom to exercise their own powers, examining the role of the *AETR* doctrine in situations in which the Member States have already exercised their powers by entering into an international agreement and the Union subsequently obtains an *AETR*-type competence in the field. By contrast, where no *AETR* type pre-emption has taken place, the Member States remain, in theory, free to exercise their powers as they wish. However, the start of concerted Union action may also in these cases restrain the Member States' freedom of action.

Chapters Three and Four shift the focus away from questions relating to the modalities of *action* towards questions of substantive *compliance*. Primacy is the key obligation in this respect. The two chapters deal with the problem of resolving normative conflicts between Member State rules and Union law. Chapter Three examines the restraints imposed on the Member States in relation to international agreements concluded by the Member States before joining the EU. This type of situation differs from those discussed in the previous chapter by virtue of the fact that pre-accession agreements enjoy a particular kind of protection afforded by Article 351 TFEU. However, as we will see, Member States are required to bring prior agreements into conformity with EU law.

Chapter Four raises the same questions discussed in Chapter Three in a different context. Unlike the previous chapter, however, Chapter Four does not concern areas of EU competence, focusing instead on international Member State agreements concluded with third countries in fields where there is *no* EU legislation in place, either because the area falls outside Union competence or EU competence is parallel in nature. Even in such areas, the fundamental economic freedoms and the general principle of non-discrimination apply, with the result that the powers retained by the Member States must be exercised in a manner consistent with EU law.

Chapter Five turns to those situations in which both the Member States and the Union *jointly* exercise their powers. This occurs where the EU and the Member States enter into a mixed agreement. The chapter examines when and how the duty of loyalty crystallises into concrete legal obligations where the Union and the Member States have concluded international agreements together. In this context, Article 4 (3) TEU entails both substantive and procedural compliance obligations. Chapter Five first looks at the obligations that concern the interpretation and implementation of those parts of a mixed agreement which falls within national competence, before turning to the procedural restraints imposed by the duty of sincere cooperation.

Chapter One

Implied Powers – From Pre-emption to Complementarity

I. Introduction

Foreign affairs powers of the Union can flow from Treaty provisions expressly providing for a corresponding external competence, but they can also be found to exist by way of implication from legislative powers. Despite its sceptical stance on European integration, the German Federal Constitutional Court (BVerfG) accepted in its Lisbon judgment[229] that

> "[a]ny integration into peacekeeping systems, in international or supranational organisations opens up the possibility for the institutions thus created to develop independently, and in doing so, to show a *tendency of political self-enhancement*, even, and particularly if, their bodies act according to their mandate."[230]

A tendency on the part of the Union towards interpreting powers along the lines of US doctrine of implied powers was, according to the BVerfG, generally in line with the principle of conferred powers and, therefore, had to be "tolerated"[231].

Until the Court of Justice recognised the existence of implied Union competence in the 1970s, these powers were widely considered, if ever found to exist, to be of a shared nature[232]. In fact, even express competence to act in any given field was initially shared between the Union and the Member States, both on the internal level as well as far as international relations were concerned. The principle of exclusivity was "well known to federal constitutions but alien to the original EEC Treaty"[233] and did not appear on the "canvas of shared competence"[234] until it was introduced into the Union legal order by the Court of Justice in the 1970s[235].

However, the assumption that implied powers were shared did not prevent the Court from adopting a different approach. When it laid the foundation for the implied powers doctrine in the *AETR* case, the

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[229] German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al., see further the Introductory Chapter.
[230] Ibid., para 237, emphasis added.
[231] Ibid.
[232] H. Krück, *Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften* (Springer 1977) at 107.
[233] T. Schilling, "A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle" (1994) 14 YEL 203 at 221.
[234] R. Schütze, "Dual Federalism Constitutionalised", 6.
[235] See Opinion 1/75 *Understanding on a Local Cost Standard*.

Court found this type of competence to be of an exclusive nature, with the result that the principle of implied competence became equivalent with the principle of pre-emption. Unlike *a priori* exclusivity, which deprives the Member States immediately and irreversibly of all external powers, regardless of whether the Union has exercised its exclusive competence or not[236], pre-emption follows from the interpretation of the Treaty on a case-by-case basis.

The finding that the existence of implied powers was equivalent to pre-emption of Member State competence constituted a significant inroad into Member State sovereignty. Whenever the Union acquires an exclusive competence in a given area, the Member States are deprived not only of their regulatory powers in the field, but also of the "most widely-accepted characteristic of the sovereign state"[237], that is, the possibility to enter into agreements with third countries outside the framework of Union law. In the case of pre-emption, this effect is further exacerbated by the fact that entire policy areas may automatically be removed from Member State competence once it has been regulated by the Union, even if only in part. Such an "aggressive policy of automatic field preemption" would then be incompatible with a *liberal fidelity* view of federalism[238]. *Liberal fidelity*, in fact,

> "generally counsels *against* automatic exclusivity of central government powers as well as inviolability of specific substantive areas of constituent state authority, in favor of preserving constructive democratic policy engagement between the different levels of government."[239]

The aim of the present chapter is to examine which view of political morality has governed the Court's approach to implied powers and how it has developed over time. As a theoretical basis for the subsequent discussion, Section II will first outline the different types of pre-emption that operate to restrain Member States' external competence, assigning each to its corresponding model of federalism. Section III will then turn to the Court's case law, tracing the evolution of the implied powers doctrine from an instrument of pre-emption to a mechanism favouring the complementarity of Member State and Union action governed by the duty of loyalty under Article 4 (3) TEU. The process culminating in the recognition by the Court of Justice that implied powers may be shared, however, is contrasted with the Court's incremental broadening of the conditions under which implied Union powers become exclusive, as will become apparent in Section IV. Against this background, Section V will seek to shed light on the way in which these two separate strands of the

[236] K. Lenaerts, "Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de la 'preemption'", in P. Demaret (ed.), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (Story 1988) 39 at 41.

[237] M. Cremona, "The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community" (1982) 3 OJLS 393 at 393.

[238] D. Halberstam, "Beyond Competences", 27.

[239] Ibid. at 26, emphasis added.

Court's case law on implied powers relate to each other, before the final section attempts an assessment of the findings of this chapter in relation to the area of the CFSP.

II. Implied powers and the principle of conferral – Three visions of federalism

The first time that the Court of Justice dealt with the question of whether Union powers were capable of arising by way of implication was in the 1971 *AETR* case[240], the "arguably […] single *most important* judgment the Court has handed down in the field of [EU] external relations law"[241].

The case concerned the European Transport Road Agreement (AETR) regulating the work of crews engaged in international transport, which had been signed under the auspices of the UN Economic Commission for Europe. The EU Commission was of the view that the Union alone was competent to conclude the AETR and brought an action against the Council.

However, the Treaty provision governing the conclusion of international EU agreements at the time (Article 228 EEC, now Article 218 TFEU) expressly laid down that Union competence in external matters could only be exercised "where [the] Treaty [so] provides"[242], which suggested that "there was external competence only where the Treaty expressly provided for it"[243]. The Treaty did not, however, establish a competence for the Union in the field of road transport. Indeed, only very few Treaty articles concerning commercial policy and association referred to the conclusion of international agreements by the EU. Neither did the Treaty contain a principle of parallelism, unlike the ECSC Treaty. While the latter Treaty provided for a Union competence to "perform its functions and attain its objectives" in international relations[244], the EEC Treaty merely established that the Community had legal personality[245].

The absence of express treaty-making power notwithstanding, the Commission opposed the Member States' plan to conclude the AETR, arguing that competence to conclude the agreement had passed on to the Union when it had adopted Regulation 543/69 in the field of road transport[246].

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240 Case 22/70 *Commission v. Council (AETR)*.

241 P. Eeckhout, "Bold Constitutionalism and Beyond", in M. P. Maduro and L. Azoulai (eds.), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 218 at 218, emphasis added.

242 See further Opinion of AG Dutheillet de Lamothe in Case 22/70 *AETR* [1971] ECR 284 at 293.

243 P. Eeckhout, "Bold Constitutionalism and Beyond", 218

244 Article 6 ECSC provided: "In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives."

245 Article 210 EEC.

246 Regulation 543/69 [1969] OJ L 77/49.

Advocate General Dutheillet de Lamothe considered that the recognition of such a Union competence would be tantamount to those "implied powers" granted by the US Supreme Court in order to supplement the powers of the federal institutions. In EU law, however, such a transfer of competence was subject to the principle of conferral. Although conferred powers could be construed widely in matters relating to *intra*-EU questions, their application to the conclusion of agreements with *third* countries was more limited:

> "It appears clear from the general scheme of the Treaty of Rome that its authors intended strictly to limit the [Union's] authority in external matters to the cases which they expressly laid down."[247]

Therefore, the recognition of implied powers for negotiations with third countries "would far exceed the intentions of the authors of the Treaty"[248]. Indeed, as we saw in the previous chapter, if the attribution of implied competence to the Union cannot be reconciled with the Member States' *Kompetenz-Kompetenz* as Masters of the Treaty, then a competence creep must be deemed to have taken place at EU level, jeopardising the protection of national sovereignty[249].

As is well known, the Court of Justice did not share the Advocate General's concerns over the compatibility of implied external powers with the principle of conferral. Instead, as further discussed below, it not only ruled that EU powers to conclude an international agreements could arise by way of implication, but at the same time, it also found this type of competence to be exclusive. And thus, the doctrine of "pre-emption" in EU external relations law was born.

The doctrine of pre-emption has its origins in the constitutional law of the United States[250], but it "very slowly" became a constitutional principle in the EU of its own right[251]. Indeed, together with the principles of direct effect and primacy of Union law, it may be considered "one of the foundations of the European [Union's] normative supranationality"[252]. Like the notions of exclusivity and implied powers, pre-emption in Union law is a creation of the judiciary. It refers to "the preclusion of national regulatory powers that results from a decision by the judicial branch"[253]. More generally, pre-emption is a means for the Court of Justice to balance and allocate decision-making power among the Union institutions and the legislative and administrative bodies of the Member

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[247] Opinion of AG Dutheillet de Lamothe in Case 22/70 *AETR,* 293.
[248] Ibid.
[249] For the relationship between the notions of conferred powers, *Kompetenz-Kompetenz* and competence creep, see the Introductory Chapter, Section II.
[250] K. Lenaerts, "Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de la 'preemption'", 42.
[251] R. Schütze, "Supremacy without Pre-Emption? The Very Slowly Emergent Doctrine of Community Pre-Emption" (2006) 43 CMLRev. 1023.
[252] A. G. Soares, "Pre-emption, Conflicts of Powers and Subsidiarity" (1998) 23 ELRev. 132 at 133.
[253] Ibid.

States[254].

Broadly speaking, pre-emption can be understood as "a formal doctrine that defines the circumstances in which Member State law will be invalidated on the basis of its conflict with the legislation of the [Union] institutions"[255]. However, the pre-emptive exclusivity established in *AETR* is by no means the only technique available to the Court for invalidating conflicting Member State rules. Indeed, in the *AETR* judgment, the Court of Justice "could easily have adopted a different approach"[256]. What, then, are the different methods available to the Court for resolving a conflict between Member States' international obligations and their obligations towards the Union (A.)? And what vision of political morality do the different approaches reflect (B.)?

A. A typology of pre-emption

In order to find a solution to the problem that the AETR concerned a subject covered by EU rules, the Court of Justice could have relied on an approach "outside the sphere of exclusive treaty-making competence" by applying a rule of *primacy*[257]. Primacy of EU law is one of the fundamental principles of Union law and serves to resolve conflicts between the EU and the Member States concerning the ranking of Union law above national law. According to the principle of primacy, the Member States are obliged to give precedence to EU law where Union rules conflict with national rules. Primacy always requires a material conflict between Union law and national law, applying where Member State legislation "literally contradicts a *specific* [Union] rule"[258]. Where a direct conflict is found to exist, Member State legislation will always be invalidated. Therefore, in keeping with the terminology of pre-emption, the principle is sometimes termed "*direct conflict* pre-emption" or "*rule* pre-emption"[259], even if, strictly speaking, its effect on Member State provisions is not pre-emptive in nature.

Like rule pre-emption, a second modality of pre-emption applies in situations of a material conflict

[254] E. D. Cross, "Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis" (1992) 29 CMLRev. 447 at 447.

[255] Ibid.

[256] P. Eeckhout, "Bold Constitutionalism and Beyond", 219.

[257] Ibid.

[258] R. Schütze, "Supremacy without Pre-Emption?", 1042.

[259] See e.g. R. Schütze, "Supremacy without Pre-Emption?"; E. D. Cross, "Pre-emption of Member State Law in the European Economic Community"; A. G. Soares, "Pre-emption, Conflicts of Powers and Subsidiarity"; similarly M. Waelbroek, "The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation", in T. Sandalow and E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. II (OUP 1982) 548. Note, however, that in general EU external relations literature, the term "pre-emption" is generally used in the narrower sense, referring to occupation of the field.

between Union and national law. However, the exclusionary effect of Union legislation in this case does not presuppose a conflict between Member State rules and a specific provision of EU law. The pre-emptive effect is solely based on a finding that the national measure interferes with the proper *functioning* of the common market or impedes the *objectives* of the Union legislation[260]. For this reason, the third modality has been termed "*obstacle* pre-emption"[261].

By contrast, a third category of pre-emption, known as "occupation of the field" or "field pre-emption", *precludes* Member State action from the outset. This is the case if the Union legislator has regulated a field "so exhaustively that the [Union] has allowed no room for additional Member State law"[262]. If the Member States were to take action in fields in which Union rules have been adopted, the effective functioning of EU law would be jeopardised, preventing the Union from carrying out the tasks which have been conferred upon it[263]. The mere occupation of a field is sufficient to exclude Member State involvement, irrespective of whether a *material* normative tension exists between Union legislation and Member State rules[264]. This type of preclusion of Member State law operates even in the absence of EU rules:

> "We are concerned here with a situation where there may not exist a specific [Union] measure, but where the entire policy area – the legal space – has become occupied, or even potentially occupied, by the [Union] in the sense that it is the duty of the [Union] to fill and regulate that area. When pre-emption operates, Member States will be prevented from introducing measures – and hence the temporal dimension – even in the absence of, or before the adoption of, a specific [Union] rule."[265]

The principles of primacy and field pre-emption are closely related and share many practical consequences. Being both "designed to ensure the primacy of the [Union] over the Member States", the two concepts represent "two sides of the same coin"[266]. However, they should not be equated, for they operate in substantially different ways. Field pre-emption logically precedes primacy: it precludes Member State action not because rules of Union law apply which prevail in cases of conflict, but simply because national action in a given area is not permitted, even if no EU norm

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[260] E. D. Cross, "Pre-emption of Member State Law in the European Economic Community", 463, R. Schütze, "Supremacy without Pre-Emption?", 1041.

[261] See e.g. A. G. Soares, "Pre-emption, Conflicts of Powers and Subsidiarity"; R. Schütze "Supremacy without Pre-Emption?"; E. D. Cross, "Pre-emption of Member State Law in the European Economic Community".

[262] E. D. Cross, "Pre-emption of Member State Law in the European Economic Community", 459.

[263] L. and R. Holdgaard, "The External Powers of the European Community" (2001) 1 RETTID 108 at 166.

[264] R. Schütze, "Supremacy without Pre-Emption?", 1040.

[265] S. Krislov, C. D. Ehlermann and J. Weiler, "Political Organs and the Decision-Making Process in the United States and the European Community", in M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration through Law, Methods, Tools and Institutions* (Gruyter 1986) 3 at 90.

[266] Ibid.

exists with which national rules can come into conflict[267].

B. The different types of pre-emption and their impact on Member States' treaty-making powers

Their close relationship notwithstanding, the differences between the two concepts are of paramount significance for the Member States in determining the scope for national law-making powers in a given area. When the Court of Justice applies the doctrine of primacy, the Member States are only precluded from taking those measures which are in direct conflict with a given Union rule. Indeed, both obstacle pre-emption and rule pre-emption affect only the specific national provision at issue and not every national measure in the field. Therefore, these two modalities have a less restrictive effect on the Member States' powers than occupation of the field. Moreover, they allow the national authorities to redraft their measures in a way that will avoid the obstruction of Union objectives[268].
The mere fact that obstacle and rule pre-emption have a similarly limited scope for restraint does not, however, mean that their application reflects the same approach to federalism. On the contrary, the visions of political morality which they represent could not be more different. An approach based on the primacy of Union rules promotes productive engagement throughout the system, imposing restraint only in case of actual conflict of rules and resolving such a conflict with a view to furthering the needs of the system as a whole. By encouraging interaction among the Member States and the Union until a normative conflict arises, the *liberal* vision of fidelity focuses on what the system "as a whole demands in *any given case*"[269]. As such, primacy can be reconciled with a *liberal fidelity* approach to federalism[270]. In the context of implied external competence, an example of this approach would be the recognition of implied Union powers which are *non-exclusive* in nature[271].
By contrast, the pre-emptive effect of obstacle pre-emption is solely based on a finding that the national measure impedes the *objectives* of the Union legislation[272]. Where powers are created which have previously not been recognised, it must be assumed that this occurs with a view to furthering the political self-interest of one of the actors. Such an approach then indicates an *entitlements* view

[267] S. Weatherill, *Law and Integration in the European Union* (OUP 1995) at 137.
[268] E. D. Cross, "Pre-emption of Member State Law in the European Economic Community", 467.
[269] D. Halberstam, "Of Power and Responsibility", 736, emphasis added.
[270] See D. Halberstam, "Beyond Competences", 4.
[271] On the nature of non-exclusive implied competence, see M. Klamert and N. Maydell, "Lost in Exclusivity: Implied Non-exclusive External Competences in Community Law" (2008) 13 E.F.A. Rev. 493.
[272] E. D. Cross, "Pre-emption of Member State Law in the European Economic Community", 463, R. Schütze, "Supremacy without Pre-Emption?", 1041.

of federalism[273]. The "necessity"-test developed in Opinion 1/76, as we will see below, can be considered an example of this type of federalism.

Compared with primacy, field pre-emption is "more clean-cut and it is more dramatic in its exclusionary effect on national powers"[274]. When the Court applies the field pre-emption principle, Member State rules are precluded in relation to the entire *area* in question[275]. Field occupation is, therefore, the "most comprehensive"[276] and "most powerful"[277] type of pre-emption. It operates irrespective of whether the national measures actually conflict with or impede the objectives of Union legislation, of whether they are existing or subsequently adopted, and of whether they were subjected to a specific pre-emption analysis or not[278].

The creation of implied powers, as will be further discussed below, may generally be considered in line with a *conservative fidelity* approach, which seeks to create political unity where the institutional architecture calls for pluralism[279]. *Conservative fidelity* does not advocate the creation of new powers by way of creeping competence. However, a strengthening of already existent EU powers is acceptable where this is in the interest of the system as a whole. The creation of corresponding external powers in areas which have been sufficiently regulated by the Union is, therefore, not an expression of the *entitlements* view of federalism. Once the occupation of a given field automatically equips the Union with an *exclusive* competence in the area, this goes beyond a mere enhancement of already existing powers. By precluding an entire legislative area from the reach of national competence, field pre-emption has the effect of overcoming the regulatory competitiveness between the EU and its Member States[280]. The absolute exclusion of Member State powers within an occupied field, in fact, "reproduces the effects of a 'real' exclusive competence" for the whole policy area[281]. Like in the case of obstacle pre-emption, there is an "evident antagonism" between the notion of field occupation and the doctrine of subsidiarity[282]. Designed as a legal instrument to oppose "certain centripetal tendencies caused by application of the material content of determined technical features

[273] D. Halberstam, "Beyond Competences: Comparative Federalism and the Duty of Cooperation", 3.
[274] S. Weatherill, *Law and Integration in the European Union*,123.
[275] J. Weiler, "The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle", in J. Weiler, *The Constitution of Europe* (CUP 1999) 133 at 173.
[276] E. D. Cross, "Pre-emption of Member State Law in the European Economic Community", 465.
[277] R. Schütze, "Supremacy without Pre-Emption?", 1040.
[278] E. D. Cross, "Pre-emption of Member State Law in the European Economic Community", 467.
[279] Ibid. at 778.
[280] S. Weatherill, *Law and Integration in the European Union*, 137.
[281] R. Schütze, "Supremacy without Pre-Emption?",1040.
[282] A. G. Soares, "Pre-emption, Conflicts of Powers and Subsidiarity", 139. The doctrine of subsidiarity essentially incorporates the principle of attributed Union competence and the notion that Union action should not go beyond what is necessary to achieve its objectives. For a detailed analysis see e.g. G. De Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" (1998) 36 JCMS 217.

such as pre-emption", subsidiarity is not compatible with a method for the adjudication of conflicts of competences which "favours a centralising perspective of the division of powers"[283]. An example of field pre-emption can be found in Opinion 2/91, as we will see in Section III[284]. The following section, however, will first look at how the Court of Justice has construed the principle of field pre-emption and what view of political morality underlies the Court's approach to *AETR* competence, outlining how this approach has evolved in subsequent case law.

III. Implied powers and their relationship with exclusivity – The scope of implied competence

When the Court of Justice recognised the existence of implied powers in the 1970s, it considered them to be synonymous with the exclusivity of Union competence. By ruling that the exercise of the EU's regulatory powers internally gave rise to exclusive powers externally for the entire policy area concerned, the Court introduced two new and distinct concepts in a single case, namely the principle of implied powers and the principle of field pre-emption in EU external relations law. The present section seeks to disentangle the two concepts interwoven in the Court's approach to implied powers, asking how the changing scope of implied competence can be reconciled with the principle of conferred powers. To that end, this section will trace the evolution of the Court's approach to implied powers from the bold assertion of Union powers in the early cases (A.), through the period of clarification in the 1990s (B.), to the Court's declaration in Opinion 1/03 that implied powers may be shared (C.).

A. The early case law – An incremental broadening of the scope of implied competence

i. AETR

When the Court of Justice was first faced with the question of implied external competence in *AETR*, Advocate General Dutheillet de Lamothe urged the Court to reject the Commission's view that authority in external matters could be transferred to the Union by way of the adoption of a EU Regulation, as that would make it very difficult "to establish a criterion which avoids ambiguity or

[283] Ibid., at 140.
[284] Opinion 2/91 *Convention No. 170 on safety in the use of chemicals at work* [1993] ECR I-1061.

legal uncertainty"[285]. Therefore, he proposed "a relatively strict interpretation of the Treaty" in this case[286].

Not only did the Court choose not to follow the Advocate General by establishing the principle that Union powers could arise by implication from secondary legislation, but it also provided for such competence to be exclusive in nature. In a first step, the Court of Justice acknowledged that competences to act externally may derive not only from an express conferral by the Treaty but, in addition, "may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the [Union] institutions"[287]. The Court thus agreed with the Commission's argument that the Union's external competence could flow from primary or secondary Union law, and went on to specify the circumstances under which external powers may be conferred upon the EU. According to the Court, such competence arose

> "each time the [Union], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules [...]"[288].

The Court thus laid the basis for the principle of parallelism, also known as *in foro interno in foro externo*, according to which Union competence to conclude international agreements runs in parallel with the development of its internal competence[289].

In a next step, the Court provided the legal implications of the conferral of competence based on secondary law adopted internally:

> "[...] the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules"[290].

The retained powers of the Member States were, therefore, pre-empted, with the result that the Union was exclusively competent to conclude the agreement in question[291]. It is important, here, to recall the distinction between the existence and the nature of implied competence and its application by the

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[285] Opinion of AG Dutheillet de Lamothe in Case 22/70 *AETR* at 291.

[286] Ibid. at 294.

[287] Case 22/70 *AETR,* para 16.

[288] Ibid., para 17.

[289] D. McGoldrick, *International Relations Law of the European Union* (Longman 1997) 48. The terminology of "parallelism" has been criticised, however, for being inadequate. According to Dashwood and Heliskoski, the relationship between internal and external competence would better be described in terms of "complementarity", since the emphasis should not be on the *measures* taken for the achievement of Union objectives, but on the policy itself, which is to be implemented through a combination of internal and external measures. See A. Dashwood and J. Heliskoski, "The Classic Authorities Revisited" in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (Sweet and Maxwell 2000) 3 at 10.

[290] Ibid.

[291] It should be noted, however, that Member State participation in the *AETR* agreement was specifically sanctioned so as not to jeopardise the successful outcome of the negotiations which had been initially carried out by the Member States before competence had been transferred to the Union.

Court of Justice. The Court appeared to infer from the mere existence of Union competence that it was of an exclusive nature. The Union's powers to negotiate and conclude the agreement in question

> "exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the [Union] institutions would be incompatible with the unity of the Common Market and the uniform application of [Union] law"[292].

The *AETR* judgment thus had two dramatic consequences. First, it expanded the Union's *power* potential. Ruling that the existence of internal Union rules gave rise to a corresponding external competence, the Court confirmed that the EU could be competent even in the absence of an express provision in the Treaties. Second, it introduced a significant *prohibitory* potential for Union rules: holding that Member State action was excluded in a given area once the Union legislator had occupied that legal space, the Court linked the existence of implied competence to its exclusive nature.

Against this background, can the *AETR* judgment be deemed to represent an *entitlements* approach to federalism? Both the Council and the Advocate General had argued that the mere granting of powers to the Union by way of implication would contravene the principle of conferral[293]. This view was also supported by the prevailing opinion in the legal literature at the time[294].

Under international law, however, it is generally assumed that the principle of conferred powers "is flexible enough to accommodate the existence of powers in international organisations which were *not* expressly attributed in their constituent instruments"[295]. In the *AETR* case more specifically, the Court's creation of implied powers may be reconciled with the principle of conferral:

> "The [Union] only has those competences that have been conferred on it, but […] that does not mean that the [Union] can only act on the external front when it has explicitly been granted the competence to do so […]."[296]

While the *existence* of implied competence may, therefore, be deemed to be in accordance with conferred powers, the same does not necessarily hold true for the exclusive *nature* of such competence. By ruling that to the extent to which the Union had adopted legislation, the Member States were not able to undertake obligations in a given field, irrespective of any normative tension

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[292] Ibid., paras 30-31.

[293] Case 22/70 *AETR*, para 9; Opinion of AG Dutheillet de Lamothe in Case 22/70 *AETR* at 293.

[294] See E. Stein and L. Henkin, "Part I: the International Dimension", in M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration through Law – Europe and the American Federal Experience* (Gruyter 1986) 43.

[295] See A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty – Reformed Enough?", in F. Laursen (ed.), *The EU in the Global Political Economy* (PIE Peter Lang 2009) 67 at 69, emphasis added.

[296] G. De Baere, *Constitutional Principles of EU External Relations*, 20.

between Union law and Member State rules, the Court established the presumption that all Member State commitments in matters regulated internally by the Union were capable of affecting EU rules or altering their scope. As such, the Court's reasoning is a perfect example of field pre-emption. The combination of the broad power potential and the prohibitory nature of the *AETR* judgment effectively created an "absolute entitlement" for the Union to regulate the external aspect of transport policy[297]. In fact, the *AETR* doctrine "created conditions which could lead to the usurping of the competences of the Member States externally as well as internally through the back door"[298].

ii. Kramer

The question of the nature of implied powers arose again a few years later in *Kramer*[299]. In this preliminary reference concerning the application of the 1959 North East Atlantic Fisheries Convention, the Court had to decide whether the Union alone had the authority to enter into commitments in the field of fisheries conservation despite the fact that the majority of the Member States at the time were parties to the Convention.

The Court recalled that the Union enjoyed internal powers to take measures for the conservation of biological resources of the sea, but contrary to the situation in *AETR*, internal rules had not been adopted and the field had consequently not been occupied by the Union yet. Having already hinted in its *AETR* judgment at the existence of different ways in which implied external competence could arise[300], the Court acknowledged explicitly that external competences could be found to exist by implication[301]. After reiterating the principle established in *AETR*, the Court went on to specify that Union competence to enter into international agreements could be drawn from "the whole scheme of the Treaty"[302]. The Court of Justice thus not only confirmed the existence of complied competence, but it also interpreted it "more broadly" than the initial *AETR* case[303].

With regard to the specific case, the Court argued that fisheries conservation could only be effectively ensured through a system of rules binding on all members of the convention. It followed

[297] This reasoning is adopted by analogy from Halberstam's assessment of the Court's approach to the internal market in Dassonville, see D. Halberstam, "Beyond Competences", 12.

[298] A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty", 69.

[299] Joined Cases 3, 4 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279.

[300] In para 17 of the *AETR* Case the Court introduced the principle of implied powers by pointing out one circumstance in which it can arise "in particular", that of internal legislation having been promulgated prior to the conclusion of an international agreement.

[301] A. Dashwood and J. Heliskoski, "The Classic Authorities Revisited", 10.

[302] Joined Cases 3, 4 and 6/76 *Cornelis Kramer and others*, paras 19/20.

[303] A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty", 70.

"from the very nature of the activity in question" that the Union, by virtue of its internal powers, was competent to enter into commitments concerning such a system[304]. Relying on "the aim of 'encouraging rational use of the biological resources of the sea'"[305], the Court effectively extended the substantive scope of Union competence to fishing on the high seas[306]. This emphasis on the teleological interpretation of internal EU powers had the effect of creating an equally teleological interpretation of external Union competence, leading to a "wide construction" of the scope of implied powers[307].

The broad scope of implied external competence did not, however, mean, that Member State action was excluded in the specific case. Having established a Union competence over the matter, the Court went on to consider whether the obligations arising from the convention had been assumed by the EU. It declared that the mere existence of a legislative power did not suffice to deprive the Member States of their concurrent powers, but only an actual exercise of its powers could lead to exclusive competence[308]. Given that the Union had not yet made use of its powers, the Court held that the Member States retained their competence to act. Nevertheless, once the transitional period of the Member States' authority to enter into international commitments regarding conservation measures had expired[309], the EU would be solely competent to become active in the field[310].

iii. Opinion 1/76

From *AETR* and *Kramer*, it appeared that the existence of implied powers was dependent on the existence of internal rules. Shortly after *Kramer*, the Court of Justice rebutted this presumption in Opinion 1/76[311]. In the absence of any internal Union legislation on the matter, the Court was asked to rule on the compatibility with the EEC Treaty of an agreement aimed at regulating certain aspects of navigation in the Rhine and Moselle basins. After confirming the doctrine of implied powers as developed in *AETR*, the Court clarified that such Union powers were not limited to cases in which an internal power had already been exercised, but could equally be based on the necessity for the

304 Joined Cases 3, 4 and 6/76 *Kramer*, paras 30-33.
305 Ibid., para 27.
306 P. Koutrakos, *EU International Relations Law* (Hart Publishing 2006) 91.
307 Ibid.
308 Joined Cases 3, 4 and 6/76 *Kramer*, para 39.
309 Article 102 of the Act of Accession obligated the Council to adopt measures for the conservation of the resources of the sea no later than five years after accession.
310 Joined Cases 3, 4 and 6/76 *Kramer*, para 41; see also Case 804/79 *Commission v. United Kingdom* [1981] ECR 1045, discussed in Chapter Two.
311 Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741.

attainment of one of the objectives of the Union, in this case the implementation of a common transport policy[312]. In the specific case, only a Union agreement was capable of organising navigation on the Rhine in such a way as to include also the third country involved, which made Union competence in the field indispensable[313].

The Court of Justice thus created a second basis for implied powers, different from the *AETR* principle founded on pre-emption. According to this second basis, implied powers arise where this is "necessary for the attainment of one of the objectives of the [Union]"[314]. While the *AETR* doctrine links the exclusion of Member State competence to the existence of EU rules, the doctrine of necessity established in Opinion 1/76 pursues an approach based on "effet utile, the implication of powers necessary to achieve an expressly defined objective"[315]. As such, it represents an example of obstacle pre-emption, creating powers which have previously not been recognised.

However, while obstacle pre-emption generally operates on the basis of primacy in cases of incompatibilities with Union law, the Court's ruling in Opinion 1/76 raised the question of whether its approach went beyond primacy, pre-empting Member State action in an entire field of law. Notwithstanding its finding of implied Union powers to conclude the agreement, the Court sanctioned the participation of the Member States. Even if the Court did not expressly mention "exclusivity", it has been widely accepted that the Court did accord exclusive external competence to the Union in Opinion 1/76[316]. The theory of exclusivity seems to rest on the assumption that, had the Member States not been bound by pre-existing obligations, their participation in the conclusion of the agreement would not have been considered necessary and the EU would have had the sole authority to undertake commitments in the field. Some commentators, however, find that assumption "puzzling"[317], not least because it would have implied a significant expansion of the scope of exclusive competence[318]. In Opinion 1/2003, the Court finally laid all doubts regarding the nature of implied competence based on the "necessity"-criterion to rest by expressly stating that the Opinion

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312 Opinion 1/76, para 4.

313 The fact that some of the concerned Member States were nevertheless able to participate in the conclusion of the agreement was solely due to their obligations already assumed prior to the establishment of the Union.

314 Opinion 1/76, para 4.

315 M. Cremona, "Defining Competence in EU External Relations", 51.

316 In its submissions to Opinion 1/94, the Commission referred to "exclusive external competence" in the context of Opinion 1/76; as far as the legal literature is concerned, see e.g. M. Cremona, "External Relations and External Competence: The Emergence of an Integrated Policy", in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (OUP 1999) 137 at 153; P. Pescatore, "External Relations in the Case Law of the Court of Justice of the European Communities", (1979) 16 CMLRev. 615 at 623.

317 See A. Dashwood and J. Heliskoski, "The Classic Authorities Revisited", 13; similarly, P. Koutrakos, *EU International Relations Law*, 95.

318 P. Koutrakos, *EU International Relations Law*, 95.

1/76-type competence did indeed give rise to exclusivity[319].

iv. The early cases – A bold assertion of Union competence

The picture which emerged from the early case law on implied competence was rather fragmented. On the one hand, the Court approached the subject of implied external competence with "an inexorable dynamism of enhanced supranationalism"[320]. Instead of relying on the principle of primacy of European law in cases of conflict with Member State rules, the Court opted for a different approach based on the *avoidance* of conflicts by means of pre-emption. It not only *empowered* the Union to enter into international agreements on the basis of the existence of internal rules, but it also *precluded* the Member States from further action in areas in which the Union had legislated. Such a "bold" claim of external powers had a significant impact on both the political and the constitutional level:

> "Exclusive competence is exceptional in the [Union's] constitutional order, and where it affects the external sovereignty of the Member States, it is even more delicate."[321]

The introduction of the *AETR* doctrine meant that the scope of Member State powers would increasingly diminish over time, as the number of fields in which the EU enjoyed exclusive competence was bound to increase in parallel with its growing legislative activity. The boundaries of this doctrine were, furthermore, expanded incrementally. Thus, in *Kramer*, the Court adopted a teleological approach, relaxing the requirement of promulgated internal legislation to give rise to exclusive implied powers upon the expiry of a certain period of time set for the exercise of Union competence. In Opinion 1/76, finally, it granted the Union an implied competence in the absence of any internal Union rules in the field whatsoever.

On the other hand, the period between the *AETR* case and the adoption of the Single European Act (SEA) in 1986 saw a significant broadening of the scope of the Treaties aimed at the centralisation of powers away from the Member States[322]. This increase in the substantive scope of the Union's regulatory activity provided legal bases which *expressly* attributed external relations competences to the Union. It thus appears that the Member States "did not hesitate in equipping the [Union] with the

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[319] Opinion 1/2003 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145, para 115.

[320] J. H. H. Weiler, "The Transformation of Europe" (1990-1991) 100 Yale L. J. 2403 at 2410.

[321] P. Eeckhout, "Bold Constitutionalism and Beyond", 219.

[322] See A. Goucha Soares, "The Principle of Conferred Powers and the Division of Powers between the European Community and the Member States", 67-68.

necessary tools to act on the global plane"[323].

The *creation* of implied powers by the Court of Justice, accordingly, did not appear to go against the interests of the Member States. What was of "greater concern", instead, was the exclusive nature of the newly created type of competence[324]. The Court left no doubt that the competence granted to the Union in *AETR*, *Kramer* and Opinion 1/76 belonged either to the Union or to the Member States, but could not be shared. Member State action in the field was precluded, unless concurrent competence was considered necessary "in order to avoid a legislative vacuum"[325] created by the pre-emption of Member State competence. Complementary action of the Union and the Member States was, however, not foreseen. Once Member State involvement ceased to be necessary, all Member State power was excluded by the mere fact that the Union had obtained an external competence or had acted in a particular field. The principle of implied Union competence therefore "remained very 'exclusive' indeed"[326].

Whether intended or not, by equating the existence of implied competence with exclusivity, the Court established the presumption that all Member State commitments in matters regulated internally by the Union were capable of affecting those rules or altering their scope. In the legal literature, the Court's apparent "confusion"[327] between the existence and the nature of a competence led, at the time, some commentators to deduce from this ruling a general principle of implied exclusive competence, arguing that there was no place for concurrent or parallel powers whenever a matter belonged to the Union's sphere[328].

Leaving many questions unanswered, the *AETR* case essentially allowed for two interpretations. Before the *AETR* doctrine was brought before the Court again, the question arose whether it implied

> "that the [Union] has exclusive competence over the subject-matter on which the [Union] has legislated, and that Member States have no longer any competence to adopt international agreements in that subject matter[329]".

Alternatively, the other interpretation of the *AETR* doctrine was

> "that the [Union] has exclusive competence to enter into international agreements which would 'affect' the [Union] measures or 'alter their scope', but Member States would remain competent to enter into

[323] A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty", 74.
[324] Ibid.
[325] M. Cremona, "External Relations and External Competence", 153.
[326] R. Schütze, "Dual Federalism Constitutionalised", 15.
[327] See, for example, P. Koutrakos, *EU International Relations Law*, 85.
[328] See P. Pescatore, "External Relations in the Case-Law of the Court of Justice of the European Communities" (1975) 12 CMLRev. 615 at 624.
[329] J. Temple Lang, "The ERTA Judgment and the Court's Case-Law on Competence and Conflict" (1986) 6 YEL 183 at 197.

agreements in the same area provided that they did not have this result"[330].

While the first interpretation "suggests that a whole subject [...] is transferred from national competence to [Union] competence as a result of the adoption of [Union] measures", the second one "merely says that in cases of conflict, [Union] law prevails, and that national measures and treaties which may not conflict with [Union] law must not interfere in practice with its operation either"[331].

B. The period of clarification – Taking account of the Member States' role as Masters of the Treaty

In the light of the uncertainty surrounding the conditions under which common rules were affected within the meaning of the *AETR* doctrine and the criteria for necessity to conclude an agreement in order to attain one of the Treaty objectives as laid down in Opinion 1/76, the Member States reacted by introducing a non-exclusive power in the field of environmental cooperation in the SEA and by expressly providing for further non-exclusive powers in the Maastricht Treaty[332]. In addition, the Treaty set out fundamental principles governing the vertical division of powers, including the principles of conferred powers, subsidiarity and proportionality[333]. The Member States,

> "qua *pouvoir constituan*t, […] thus sought to regain control and limit the competence creep phenomenon, catalysed notably by the Court's competence jurisprudence."[334]

The Court of Justice did not have the opportunity to elaborate further on implied powers and their legal nature until the 1990s. When it finally did, however, it opted for a more nuanced and more restrictive approach to the exclusivity of implied powers, reflecting the dynamic and interactive nature of the Union's order of competences.

i. Opinion 2/91

Opinion 2/91[335] concerning ILO Convention No. 170 on the use of chemicals at work built on the foundations laid by the Court's early case law. The Court was called upon to decide whether the conclusion of the convention fell within the competence of the Union and, if so, whether that

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330 Ibid.
331 Ibid. at 202.
332 See J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law", 154.
333 See further A. Goucha Soares, "The Principle of Conferred Powers", 70-74.
334 C. Hillion, "A Look Back at the *Open Skie*s Judgments", in M. Bulterman, L. Hancher, A. McDonnell & H.G. Sevenster (eds.), *Views of European Law from the Mountain, Liber Amicorum for Piet-Jan Slot* (Kluwer 2009) 257 at 258.
335 Opinion 2/91 *Convention No. 170 on safety in the use of chemicals at work*.

competence was exclusive.

For the first time, the Court made an express distinction between the existence of implied powers and their exclusive nature. Referring to its *AETR* judgment, it stated that

> "the exclusive or non-exclusive nature of the [Union's] competence [...] may also depend on the scope of the measures which have been adopted by the [Union] institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis"[336].

Applying this rule to the specific case, the Court had no difficulty finding an external implied competence resulting from internal EU legislation, but it stopped short of accepting its exclusive nature. As the internal Union measures laid down minimum standards only, the conclusion by the Member States of an agreement providing for more stringent rules could not affect the content of the Union legislation[337].

Compared with its case law on implied competence from the 1970s, the Court introduced a stricter definition of the conditions under which implied Union powers became exclusive. Exclusivity no longer arose automatically from the adoption of internal rules, but was linked to the scope and content of these rules. In contrast with its strict stance on the *nature* of implied powers, however, the Court adopted a broad approach to the *scope* of implied powers. Germany, Spain and Ireland had submitted that the wording of the original *AETR* case only referred to Union rules adopted within the framework of a common policy. With regard to the specific rules at issue, this was not the case[338]. In the view of the Court, however, it was "of little significance whether those measures do or do not come under a common policy"[339]. Instead, it followed from (current) Article 4 (3) TEU that Member States were to facilitate the achievement of the Union's tasks in all areas corresponding to the Treaty objectives[340].

The broadening of the scope of implied powers notwithstanding, Opinion 2/91 is noteworthy for opening the door for the discussion of concurrent implied competences and the circumstances under which these could be based on internal legislative powers[341]. The Court thus introduced a new perspective on implied powers, one that recognised the possibility that Member State commitments

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[336] Ibid., para 9.
[337] Ibid., para 18.
[338] Opinion 2/91, para 10.
[339] Ibid., para 3.
[340] Ibid.
[341] S. Griller and K. Gamharter, "External Trade: Is There a Path Through the Maze of Competences?", in Griller and Weidel (eds.), *External Economic Relations and Foreign Policy in the European Union* (Springer 2002) 66 at 79; similarly A. Dashwood and J. Heliskoski, "The Classic Authorities Revisited", 17.

may "happily co-exist"[342] with Union rules. Concurrent competence was no longer seen as two separate sets of power, but could rather be understood as describing overlapping competences. In contrast with the Court's early case law on implied powers – where Member State participation was sanctioned in order to remedy the lack of substantive powers or practical problems on the part of the Union – the new approach accepted shared powers flowing not from a lack of authority, but from the "*retention* of competence by the Member States"[343].

ii. Opinion 1/94

The Court's willingness to react to the political developments at the time was put to the test in Opinion 1/94[344]. The request for an Opinion was made in the aftermath of the Uruguay Round of multilateral trade negotiations which established the World Trade Organisation (WTO), when the question arose whether the Union enjoyed exclusive competence to conclude all of the envisaged WTO Agreements. The controversy centred in particular around the EU's competence over the TRIPs and the GATS Agreements. The Commission argued that the agreements fell within the scope of the CCP in their entirety and that, alternatively, the areas covered by the GATS and the TRIPs gave rise to implied exclusive powers. With particular regard to the GATS, the Commission argued that exclusive implied competence arose from the fact there was no area or specific provision contained in the agreement in respect of which the Union did not enjoy the corresponding powers to adopt measures at the internal level[345].

The Court of Justice, however, rejected this argument. Reiterating the *AETR* principle, the Court first recalled that the external competence of the Union could only become exclusive once common rules had been established internally. However, common rules had to exist on all matters falling under the policy, which was not the case for the field of transport[346]. As far as the fields of services and intellectual property rights were concerned, the Court reached the same conclusion that "complete harmonisation" was essential for the granting of implied exclusive powers[347]. The *AETR* requirement based on the existence of "common rules"[348] was thus modified to mean that common rules could

[342] A. Dashwood and J. Heliskoski, "The Classic Authorities Revisited", 17.
[343] M. Cremona, "External Relations and External Competence", 158.
[344] Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty* [1994] ECR I-5267.
[345] Ibid., para 74.
[346] Ibid., para 77.
[347] Ibid., paras 96 and 103.
[348] Case 22/70 *AETR*, para 17.

only be found to exist where a given field had been completely harmonised. As far as the nature of such a competence was concerned, common rules were found to give rise to exclusivity only if they specifically provided for the negotiation and conclusion of an international agreement falling within their scope or if they laid down rules relating to third-country nationals[349].

Neither did the Court accept practical reasons relating to potential distortions within the internal market arising from the conclusion of bilateral agreements as a valid argument for exclusivity in the absence of internal legislation[350]. The Commission's alternative contention based on the necessity argument was swiftly rejected for not reflecting the circumstances of Opinion 1/76. According to the Court, Opinion 1/76 had to be distinguished from the situation at issue in Opinion 1/94 in that the attainment of the freedom of establishment and the freedom to provide services at internal Union level was not "inextricably linked" to the treatment afforded to third-country nationals[351]. Only where internal powers were capable of being "effectively exercised" at the same time as external powers could exclusive Union competence arise[352]. The necessity test established in Opinion 1/76 was thus modified in such a way as to become an "ineffectual concept without any realistic prospect for future application"[353].

In addition to limiting the applicability of the necessity test of Opinion 1/76, the Court of Justice reinstated the distinction between the existence and the nature of implied competence[354]. The Court tightened the criteria for exclusivity it had laid down in *AETR* by requiring that the Union needed to have achieved *complete* harmonisation in a given field[355]. It thus displayed a "conservative reading, if not overturning of *AETR*"[356]. In terms of political morality, this ruling was, therefore, far from "conservative", indicating a *liberal fidelity* approach instead. Indeed, the Court sent out a clear signal that "mixity of competences [was] there to stay"[357]. As a result, Opinion 1/94 was considered a "watershed"[358] ushering in a new phase in the articulation of the principle of implied powers[359].

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[349] Opinion 1/94, para 95.
[350] Ibid., para 79.
[351] Ibid., para 86.
[352] Ibid., para 89.
[353] A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty", 77.
[354] Ibid. at 77.
[355] Opinion 1/94, para 96, emphasis added.
[356] A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty", 76.
[357] N. Emiliou, "The Death of Exclusive Competence" (1996) 21 E.L. Rev. 294.
[358] A. Dashwood and J. Heliskoski, "The Classic Authorities Revisited", 3.
[359] N. Lavranos, "Opinion 1/03, Lugano Convention" (2006) 43 C.M.L. Rev. 1087 at 1088.

C. The consolidation of the doctrine – Towards a balanced approach

Opinions 2/91 and 1/94 not only led to the consolidation of the principle of implied powers, but they also contributed to its acceptance by the Union institutions when the Council expressly referred to it in its Decision concluding the WTO Agreements[360]. Nevertheless, they left open a number of questions relating to the scope of the doctrine of implied powers and the conditions under which this type of competence became exclusive.

i. The Open Skies *cases*

In the *Open Skies* cases, a series of parallel enforcement proceedings challenging bilateral aviation agreements concluded by eight Member States with the United States[361], the Court had the opportunity to address the issue of shared implied competence again. Having enacted extensive secondary legislation on air transport, the Commission had been seeking since the early 1990s to obtain a comprehensive mandate for the negotiation of a Union agreement in the field[362]. The Commission, in essence, argued that the Member States had disregarded the EU's exclusive external competence to conclude air transport agreements, which flowed from Opinion 1/76-type necessity or, alternatively, from the *AETR* doctrine.

According to the Commission, the Union had obtained exclusive competence, since the conclusion of an Open Skies agreement was necessary in order to attain the objectives of the Treaty. Given the international nature of air transport, purely internal measures were not effective to regulate the activities covered by the agreements. Bilateral Member State agreements in the area would lead to "discrimination, […] distortions of competition and the destabilisation of the [Union] market"[363]. The Member States, on the other hand, argued that a Union agreement in the field was not necessary

[360] Council Dec. 98/800 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L 336/1.

[361] Case C-466/98 *Commission v. UK* [2002] ECR I-9427, Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519, Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575, Case C-469-98 *Commission v. Finland* [2002] ECR I-9627, Case C-471/98 *Commission v. Belgium* [2002] ECR I-9681, Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741, Case C-475/98 *Commission v. Austria* [2002] ECR I-9797, Case C-476/98 *Commission v. Germany* [2002] ECR I-9855.

[362] See e.g. Case C-467/98 *Commission v. Denmark*, op. cit., para 16. For a detailed description of the Commission's activities in the field of air transport before the conclusion of the Open Skies agreements, see e.g. R. Greaves "The Community's External Competence: Air Transport Services" (2003) 52 ICLQ 499; C. N. K. Franklin "Flexibility vs. Legal Certainty: Article 307 EC and Other Issues in the Aftermath of the Open Skies Cases" (2005) 10 EFAR 79.

[363] See e.g. Case C-467/98 *Commission v. Denmark*, para 47.

within the meaning of Opinion 1/76 and that, in any event, this type of implied competence did not create exclusive powers for the EU[364].

The Court rejected the Commission's claim based on necessity on the grounds that the aims of the Treaty regarding air transport could be achieved through the adoption of autonomous rules. The institutions were free to arrange concerted action in relation to the US or prescribe the external approach to be taken by the Member States in the field. In the specific case, therefore, the exercise of internal competence was not dependent on a simultaneous exercise of external competence[365].

Applying the *AETR* test next, the Court examined whether the Union had obtained exclusive external competence by way of exercising its internal competence. After summarising its previous case law concerning the conditions under which the Union acquired an implied competence, the Court examined the EU Regulations relied upon by the Commission. These did not, however, govern the situation at issue and the Open Skies agreements could, therefore, not be deemed to fall within an area largely covered by Union legislation[366].

Nevertheless, the Court found exclusive Union competence to exist for a small number of individual subject matters. By exercising its internal competence, the Union had acquired an exclusive competence to enter into international agreements concerning the freedom of non-EU carriers to set fares and rates and obligations relating to computerised reservation systems (CRS) offered for use or used in its territory[367]. The Court made clear that this competence was indeed exclusive in nature. It was not sufficient that the Member States had, by virtue of treaty amendments, provided for *compliance* with the EU rules concerned. The Member States had failed to fulfil their obligations towards the Union by entering into such commitments on their own, even if, as the Court conceded, the substance of those commitments did not conflict with Union law[368]. In this context, the Court recalled the rationale of the original *AETR* judgment based on the principle of sincere cooperation[369]. By concluding international agreements over matters covered by exclusive Union competence, the Member States had consequently failed to fulfil their obligations under Article 4 (3) TEU[370].

The *Open Skies* judgments were met with criticism regarding the Court's shortcomings in distinguishing the concept of implied powers from its legal effects. Several authors expressed their

[364] Ibid., para 51.
[365] See e.g. Case C-467/98 *Commission v. Denmark*, paras 59-62.
[366] Ibid., paras 92-93.
[367] Ibid., paras 97-103.
[368] Ibid., para 101.
[369] Ibid., para 110.
[370] Ibid., para 112.

perplexity in view of the "confusion" and "muddling" of the separate issues of existence and nature of a competence which the Court of Justice still displayed more than thirty years after the introduction of the principle of implied powers[371]. Discussing a possible exclusive competence, it seemed to rule out the possibility of shared implied competence by stating that

> "[i]t must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the [Union] acquires an external competence by reason of the exercise of its internal competence."[372]

In the view of the Court, either the common rules were affected, giving rise to exclusive Union powers, or the Member States continued to be competent. Complementary action by the EU and the Member States did not appear to be an option for the Court. The Court could have easily avoided any mention of the matter, as the *Open Skies* cases did not require any distinction between the existence and the nature of the Union's competence, but instead, it "deliberately chose to obscure" this distinction[373].

The Court's muddling of the two aspects of the implied powers doctrine notwithstanding, the *Open Skies* cases cannot be taken to represent a return to an *entitlements* view of federalism. On the contrary, the Court's approach has been applauded for its matter-of-fact approach to Union competence. Unlike the early case law, the *Open Skies* judgments display no attempt at furthering European integration or strengthening the Court's position as promoter of the European polity[374]. Instead of showing a subtle awareness of the internal politics of commercial air traffic, the Court "treats [Union] legislation as a *purely formal* trigger for the transfer of exclusive competence"[375]. Similarly, the Court's approach to the Commission's necessity-based argument is "seemingly strict", where it holds that distortions in the flow of services in the internal market do not in themselves affect common rules and are therefore not capable of establishing an external Union competence[376]. The Court's assessment in *Open Skies* thus reflects its respect for the principles of conferred powers

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[371] See e.g. G. De Baere, *Constitutional Principles of EU External Relations*, 20; Holdgaard, "The European Community's Implied External Competence after the Open Skies", 389; P. Koutrakos, *EU International Relations Law*, 123.

[372] See e.g. Case C-467/98 *Commission v. Denmark*, para 81.

[373] R. Holdgaard, "The European Community's Implied External Competence after the Open Skies", 389.

[374] R. Post, "Constructing the European Polity: *ERTA* and the *Open Skies* Judgments", in in M. P. Maduro and L. Azoulai (eds.), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 234 at 246.

[375] R. Post, "Constructing the European Polity: *ERTA* and the *Open Skies* Judgments", 246, emphasis added.

[376] C. Hillion, "*ERTA*, *ECHR* and *Open Skies*: Laying the Grounds of the EU System of External Relations", in M. P. Maduro and L. Azoulai (eds.), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 224 at 228.

and subsidiarity[377].

What emerges from the *Open Skies* judgments then is a balancing by the Court of the two different strands of its case law on implied competence[378]. On the one hand, the Court continued the trend established in its 1990s jurisprudence of circumscribing the limits to exclusive implied competence, while, on the other hand, it emphasised the Member States' obligations under Article 4 (3) TEU. Where common rules are affected, the Member States remain precluded from acting and cannot rectify a failure to fulfil their obligations under Article 4 (3) TEU by achieving compliance with EU rules. Thus, the Court

> "not only acts as the *garant* of the [Union] interest against individual Member States' encroachment, it also preserves, at another (meta) level, the Member States' powers as primary law makers of the EU"[379].

ii. Opinion 1/2003

In Opinion 1/2003[380], the Court of Justice took the opportunity to clarify the nature of implied powers. The request for an opinion concerned the conclusion of the new Lugano Convention replacing a 1988 convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which had been concluded between the EU Member States and the majority of EFTA countries. Against the background of a Union Regulation adopted in the area, the Court had to decide whether conclusion of the new convention fell entirely within the Union's exclusive competence or whether it was shared with the Member States.

It first summarised its previous case law on the existence of implied powers, confirming that implied powers could arise in a two-fold manner – it could either flow from measures adopted by the EU institutions within the meaning of *AETR* or from the necessity to attain a specific Treaty objective within the meaning of Opinion 1/76[381].

Remarkably, then, for the first time since the creation of implied powers in its *AETR* judgment some 35 years earlier, the Court of Justice explicitly stated that implied Union competence may be

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[377] C. Hillion, "*ERTA*, *ECHR* and *Open Skies*: Laying the Grounds of the EU System of External Relations", in M. P. Maduro and L. Azoulai (eds.), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 224 at 228.

[378] See C. Hillion, "*ERTA*, *ECHR* and *Open Skies*: Laying the Grounds of the EU System of External Relations", 228-229.

[379] Ibid. at 226.

[380] Opinion 1/2003 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145.

[381] Ibid., para 114.

exclusive or *shared* with the Member States[382]. This did not mean, however, that the competence to conclude the agreement at issue in the specific case was shared too. In its assessment, the Court appeared to exclude the applicability of the necessity principle from the outset without providing any further explanation, basing its analysis on the *AETR* doctrine instead[383]. With regard to the *AETR* principle, however, the Court made clear that where the basis for implied competence was the existence of internal rules, any considerations concerning the *effet utile* of EU rules were out of place. When addressing the argument that the envisaged convention had to be analysed taking account of the legal basis of the internal measures in the field, i.e. Article 81 TFEU (ex Article 65 EC), which provided for the adoption of measures "in so far as necessary for the proper functioning of the internal market", the Court considered the legal basis to be "irrelevant" in determining whether an agreement affected Union rules[384].

The Court then dedicated itself to an analysis of the specific rules at issue. To that end, it examined the Union legislation relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[385]. It is noteworthy that the Court went on to examine the scope, nature and content of the relevant EU legislation, but this served the purpose of determining the *nature* of the Union competence and not its existence[386]. The Court seemed to have little doubt that within the field covered by the Lugano Convention, the Union had acquired an implied competence within the meaning of the *AETR* principle. After a separate examination of the provisions of the new convention, on the one hand, and the Union rules on recognition and enforcement of judgments, on the other, the Court reached the conclusion that the uniform and consistent application of the existing Union rules could only be safeguarded through exclusive Union competence to conclude the convention[387]. In that respect, Opinion 1/2003 also made it clear that the determination whether the sphere of a specific agreement fell within the exclusive competence of the Union required a "comprehensive and detailed" analysis of the relationship between the agreement envisaged and the area in which the Union has regulated[388]. The need for such a "specific analysis of the relationship between the agreement envisaged and the [Union] law in force", the Court pointed out, derived from

382 Opinion 1/2003, op. cit., para 115.
383 Opinion 1/2003, op. cit., para 117.
384 Ibid., para 131.
385 Opinion 1/2003, op. cit., para 134.
386 Opinion 1/2003, op. cit., para 134: "The request for an opinion does not concern the actual existence of competence of the [Union] to conclude the agreement envisaged, but whether that competence is exclusive or shared."
387 Opinion 1/03, op. cit., paras 172-173.
388 Opinion 1/03, op. cit., para 133.

the fact that the Union enjoyed conferred powers only[389].

Here again, we see a balancing by the Court of the two strands of its case law on implied powers[390]. On the one hand, it emphasises the principle of conferred powers and the separation of the existence of implied competence from its exclusive nature, thus highlighting the role of the Member States as Masters of the Treaty. On the other hand, it "reinvigorates" the *AETR* doctrine by acknowledging that the Union had indeed acquired exclusive powers to enter into the new Lugano Convention[391].

iii. Towards complementarity of action

Opinion 1/2003 concluded the period of clarification of the 1990s as far as the nature of implied powers was concerned. In the aftermath of the original *AETR* judgment, it had remained unclear whether implied competence meant that the Member States no longer had any authority to adopt international agreements in *all* areas in which the Union had legislated, or whether this effect applied only to those international agreements which would actually *affect* EU rules[392]. Opinion 1/2003 finally confirmed that the adoption of Union measures did not mean that entire areas of law were automatically transferred from national to Union competence.

Together with the *Open Skies* cases, Opinion 1/2003 reflects awareness on the part of the Court of Justice of the political developments on the internal EU level at the time. Not only does it take account of the Member States' wish to limit the scope of Union exclusivity expressed in the Maastricht Treaty, but it also takes inspiration from the mandate of the Laeken Declaration aimed at a simplified and more transparent division of competence between the Union and the Member States. This awareness is characterised by an emphasis on the complementarity of action by the Union and the Member States. Implied powers, the Court confirms, no longer mean that Member State action is precluded.

Furthermore, the reach of the *AETR* principle is circumscribed: the existence of internal rules is considered a purely formal trigger for external competence, in the context of which any considerations relating to *effet utile* are misplaced. As a result of the Court's post-Opinion 1/94 case law, the scope of implied external competence is "inherently (and properly) limited and cannot

[389] Opinion 1/03, op. cit., para 124.

[390] See also C. Hillion, "*ERTA*, *ECHR* and *Open Skies*: Laying the Grounds of the EU System of External Relations", 229.

[391] Ibid..

[392] See the questions raised by J. Temple Lang, "The ERTA Judgment and the Court's Case-Law on Competence and Conflict", 197.

provide the basis for developing an external policy independent of the needs and functioning of the internal regime"[393].

Instead of fostering European integration by way of an *effet utile* approach as it did in its early case law on implied competence, the Court emphasises the rationale of implied powers based on the duty of sincere cooperation under Article 4 (3) TEU. Encouraging complementary action based on mutual loyalty, the Court "may have found it more apposite to send signals to the 'Masters of the Treaties' than to pre-empt the outcome of their discussions"[394].

Thus, it appears that the Court is increasingly striving for a balance between the two strands of its case law on implied powers, i.e. preserving the Member States' integrity as Masters of the Treaty, while safeguarding the Union interest against encroachments by the Member States:

> "This is coherent in terms of the balance between the necessary flexibility of an implied powers doctrine and the need to ensure compliance with the principle of conferred powers."[395]

The Court thus "safeguards the overall balance of powers envisaged by the [Treaties], in due respect of the perceived original intent of the primary law makers"[396].

IV. The nature of implied competence – Towards a broadening of the conditions for exclusivity

In Opinion 1/2003, the Court of Justice treated all questions relating to the scope, nature and content of Union rules as relevant solely to the issue of *exclusivity*, and not to the *existence* of implied powers. Indeed, a finding of exclusivity requires a thorough examination of the rules at issue, as its effect on the Member States' freedom to act could not be any more restrictive. Despite the Court's acceptance of shared implied powers, the principle of *AETR* pre-emption is "more relevant than ever before"[397]. After all,

> "[a]s the [EU's] legislative activity grows, so does the [EU's] exclusive external competence to conclude any international agreement which contains provisions 'affecting' an instrument of [Union] law."[398]

The question under which conditions an implied competence becomes exclusive is central to the Member States' freedom to act as sovereign states on the international scene. Nevertheless, when it

[393] See M. Cremona, "Defining Competence in EU External Relations", 53.
[394] C. Hillion, "*ERTA*, *ECHR* and *Open Skies*: Laying the Grounds of the EU System of External Relations", 226.
[395] See M. Cremona, "Defining Competence in EU External Relations", 53.
[396] C. Hillion, "*ERTA*, *ECHR* and *Open Skies*: Laying the Grounds of the EU System of External Relations", 226.
[397] P. Eeckhout, "Bold Constitutionalism and Beyond", 218.
[398] Ibid.

created the *AETR* principle, the Court offered little guidance as to the precise scope of the notion of exclusivity and the conditions under which internal Union rules were affected by international agreements. It broadly stated that Member States were precluded from undertaking international commitments once "the [Union] with a view to implementing a common policy envisaged in the Treaty, adopts provisions laying down common rules, whatever form these may take"[399]. Concurrent powers were excluded so as to prevent any Member State action taken outside the framework of the Union institutions[400]. To the extent to which the Union had adopted legislation, the Member States were not able to undertake any obligations in the field. The Court thus created the presumption that all Member State commitments in matters regulated internally by the Union were capable of affecting those rules or altering their scope[401]. As a result, "the [Union] alone [was] in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the [Union] legal system"[402]. As the Court had stated in the context of express external competence, Member State activities such as entering into relations with third countries would "distort the institutional framework, call into question the mutual trust within the [Union] and prevent the latter from fulfilling its task in the defence of the common interest"[403].

This generous interpretation of exclusivity left open the question to what *extent* national action had to affect common rules in order to preclude the Member States from taking any action in the field. The term 'affect', in fact, "implies a high degree of flexibility and dynamism because it is usually debatable whether or not a certain action of a Member State already affects [Union] rules and therefore is prohibited"[404].

Against this background, the definition of the circumstances under which Union rules are affected becomes crucial for the Member States. However, the Court left unanswered the question of whether Member State action in areas occupied by EU rules continued to be allowed or whether all Member State engagement was automatically ruled out. The issue saw some significant clarification in the more recent cases, particularly in Opinion 1/2003. The Court introduced a new test for determining the nature of implied Union competence. In order for exclusive EU competence to arise, it was no longer sufficient that the area in question was covered by internal legislation. Starting with Opinion 2/91, the Court had made clear that the Member States lost their authority to take external action

[399] Case 22/70 (*AETR*), para 17.
[400] Ibid., para 31.
[401] Ibid., para 22.
[402] Ibid., para 18.
[403] Opinion 1/75 *Understanding on a Local Cost Standard* [1975] ECR 1355 at 1355.
[404] N. Lavranos, "Protecting European Law from International Law" (2010) 15 E.F.A. Rev. 265 at 275.

only if national measures were liable to affect or alter the scope of Union rules. The Union's exclusive external competence no longer flowed automatically from its power to lay down rules at internal level.

A. When are Union rules "affected"? The two different tests

In the *Open Skies* cases, the Court summarised the conditions under which Member States were pre-empted from acting. It held that EU rules could be affected

> "where the international commitments fall within the *scope of the common rules* […], or in any event within an area which is already *largely covered* by such rules […]"[405].

The first condition derives from the *AETR* judgment. The Court in this case undertook a comparison of the provisions of the envisaged agreement and the provisions of EU law adopted in the field:

> "Since the subject-matter of the AETR falls within the scope of Regulation No 543/69, the [Union] has been empowered to negotiate and conclude the agreement in question since the entry into force of the said regulation."[406]

The second condition, by which an exclusive implied competence arises when the Union exercises an internal competence, follows from Opinion 2/91. Here, the Court held that in situations in which both the envisaged international commitment and EU law set out minimum requirements only, Member State involvement could not affect the latter[407]. Other parts of the convention at issue, however, concerned areas in which the Union had adopted directives containing more than minimum requirements. Even in the absence of any direct conflict between the relevant provisions of the convention and the existing EU directives, the Member States were precluded from assuming such obligations. The Court stressed that the relevant part of the convention dealt with matters that were already covered to a "large extent" by Union legislation adopted with a view to achieving an even greater degree of harmonisation[408].

By contrast, the Court's finding regarding implied exclusive competence in Opinion 1/94 did not constitute an alternative basis for exclusivity, but merely an example of a situation in which there was a presumption that the common rules were affected by the conclusion of an international Member State agreement[409]:

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[405] Case C-476/98 (*Commission v. Germany*), para 108, emphasis added.
[406] Case 22/70 (*AETR*), para 30.
[407] Opinion 2/91, para 18.
[408] Ibid., para 25.
[409] See A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty",

> "Thus it is that, whenever the [Union] has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts […]."[410]

The *Open Skies* judgments thus clarify that exclusive competence may arise in two different ways. The original *AETR* principle focuses on the specific provisions of the Union rules at issue, while the "largely covered" principle applies where the policy area of which the Union rules form part overlaps largely with the international commitment.

It has been argued that these two circumstances in which exclusivity on the basis of internal EU rules is found to exist entail two different tests[411]. The first test is specific, while the second test is general in nature[412]. The comparison of the specific provisions falling within the scope of the common rules within the meaning of *AETR* operates like a "surgical knife with which Member State competence over a particular issue is cut out only to the extent that [Union] legislation deals with the very same issue"[413]. Focussing on the *conflict* between the specific content of the Union rules in the field and the specific content of the envisaged international agreement, this first test can be understood as an example of *rule* pre-emption. As we saw earlier, the restrictive effect of rule pre-emption is limited, affecting only the conflicting national provisions at issue and not every national measure in the field.

The second test, by contrast, undertakes a comparison of the general areas of law involved. In doing so, it "wipes out Member State competence in whole areas where the [Union] has legislated (almost) exhaustively"[414]. As Member State rules are precluded for the whole *area* in question, this test operates irrespective of whether the national measures actually conflict with Union legislation. As such, it represents an example of *field* pre-emption, the "most comprehensive"[415] and "most powerful"[416] type of pre-emption. Where the Union has occupied an entire policy area, Member States are precluded from introducing national measures "even in the absence of, or before the

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79: "Previously, [paragraph 95 of Opinion 1/94] seemed to hang in a vacuum and appeared difficult to justify with regard to the *AETR* […]. Following the *Open Skies* formulation, it can be interpreted together with paragraph 96 of *Opinion 1/94* as providing examples in which there is a presumption that the common rules would be affected were the Member States entitled to conclude an international agreement falling within the scope of those rules."

410 Case C-476/98 (*Commission v. Germany*), para 109.

411 R. Holdgaard, "The European Community's Implied External Competence after the Open Skies" (2003) 8 E.F.A. Rev. 370 at 387.

412 See R. Holdgaard, *External Relations Law of the European Community*, 111-115.

413 R. Holdgaard, "The European Community's Implied External Competence after the Open Skies", 387.

414 Ibid. at 387, note 72.

415 E. D. Cross, "Pre-emption of Member State Law in the European Economic Community", 465.

416 R. Schütze, "Supremacy without Pre-Emption?", 1040.

adoption of, a specific [Union] rule"[417]. In fact, the Court of Justice expressly stated in Opinion 2/91 and in the *Open Skies* cases that Member States were pre-empted from entering into international commitments "even if there is no contradiction between those commitments and the common rule"[418]. An example of the general test can be found in Opinion 2/91, where the Court, after comparing the scope of application of the two sets of rules at issue, came to the conclusion that the envisaged convention laid down minimum requirements only and was therefore not capable of affecting Union law. Similarly, after a lengthy analysis, the Court found in Opinion 1/2003 that the Lugano Convention provided for a "unified system of rules" which would conflict with the "unified and coherent system of rules" established by the EU Regulation in the field[419]. The specific test, on the other hand, can be found for example in the *Open Skies* cases, where the Court carried out a comparison of different specific provisions in the Open Skies agreements with the relevant articles of Regulation No. 2409/92[420].

B. A "comprehensive and detailed" analysis

Depending on the international agreement or provision of the agreement at issue, the Court decides which of the two tests to apply in the specific case. Both tests can be applied together, but a finding of exclusivity does not require that both tests are carried out successively. The distinction between the two tests is not always clear cut[421], but what is undisputed since the Court's 1990s case law is that a detailed comparison of the international rules with the Union provisions has to take place before exclusive competence can be found to exist. When an international commitment touches upon areas covered by Union legislation, there is no presumption that it automatically falls within the scope of the common rules.

Although implicit already in its previous case law, it was only in Opinion 1/2003 that the Court of Justice explicitly recognised the need for a detailed scrutiny of the scope of the internal measures before an exclusive implied competence could be found to exist. A detailed test, analysing both the relevant international and the EU rules, had to establish that the common rules were likely to be affected by an international Member State obligation in the area:

[417] S. Krislov, C. D. Ehlermann and J. Weiler, "Political Organs and the Decision-Making Process in the United States and the European Community", 90.
[418] Opinion 2/91, paras 25-26; Case C-476/98 (*Commission v. Germany*), para 108.
[419] Opinion 1/2003, para 151.
[420] See e.g. Case C-467/98, paras 97-100.
[421] See R. Holdgaard, *External Relations Law*, 115.

> "[A] *comprehensive* and *detailed* analysis must be carried out to determine whether the [Union] has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the [Union] rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the *nature* and *content* of those rules and those provisions […]."[422]

The Court placed great emphasis on the context in which the Union rules at issue were developed and their evolution over a period of several decades and particularly the aims they were meant to achieve[423]. This passage should not be understood as potentially extending the scope of the Union's external powers, as it has been argued[424], but rather as "a signal that the approach to be adopted should focus on the overall nature and effect of an agreement on the [Union] legal order"[425].

Notwithstanding the fact that the Court only stressed the need for a comprehensive comparison of the relevant rules in Opinion 1/2003, the Court has carried out either a general or a specific test or both in all cases involving an application of the *AETR* test to an envisaged agreement since Opinion 2/91[426].

C. The "largely covered" criterion – A controversial test

While the Court's finding that Union legislation is capable of being affected whenever an international commitment falls within the scope of the common rules is widely accepted by the Member States and in the legal literature, the possibility for exclusivity to arise also in situations in which the area in question is only covered by common rules to a *large extent* has sparked considerably more controversy.

In the course of the procedure leading up to Opinion 1/2003, the UK, supported by a number of other Member States, invited the Court to reconsider its reasoning in *Open Skies* concerning the extent to which an area had to be covered by Union rules, arguing that the "largely covered"-test gave rise to uncertainty and that in the light of the principle of conferred powers, it was "unacceptable when it came to limiting the competences of the Member States"[427]. The UK argued that the criterion should

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422 Opinion 1/2003, para 133, emphasis added.

423 Opinion 1/2003, para 120.

424 G. De Baere, *Constitutional Principles of EU External Relations*,50: "It is now clear that common rules could be affected or distorted 'in any event within an area which is already largely covered by [common] rules' and that this gives rise to exclusive [Union] competence."

425 M. Cremona, "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law", EUI Working Paper Law No. 2006/22 at 5.

426 This was the case for Opinions 2/91, 1/94, 2/92, 2/00, and 1/2003, as well as *Open Skies*.

427 Opinion 1/2003, para 47.

be abandoned, as that "would give greater precision in defining an *ERTA* effect whilst ensuring that the Member States fulfil their duty of loyal cooperation when acting in the international sphere"[428]. Despite the Member State's protests, the Court of Justice upheld its previous findings that areas largely covered by Union rules were capable of being affected by Member State involvement. It confirmed that the *AETR* principle "also applies where rules have been adopted in areas falling outside common policies and, in particular, in areas where there are harmonising measures"[429]. This followed from the Member States' duty to facilitate the achievement of the Union's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaties laid down in (current) Article 4 (3) TEU[430]. Yet, it appears that the Court felt compelled to explain its reasoning which provided the basis for the "largely covered" test in Opinion 2/91. It pointed out that in establishing exclusive powers over Part III of the ILO Convention,

> "the Court took account of the fact that those rules had been progressively adopted for more than 25 years with a view to achieving an ever greater degree of harmonisation designed, on the one hand, to remove barriers to trade resulting from differences in legislation from one Member State to another and, on the other hand, to provide, at the same time, protection for human health and the environment."[431]

This did not, however, stop the Court from declaring the "largely covered" criterion to be of general applicability. Although the UK government had asked the Court to abandon the general test in the interest of legal certainty and the principle of conferred powers, the Court not only upheld the "largely covered" test, but also introduced a number of modifications which can be said to achieve the opposite aim of that pursued by the UK, significantly *broadening* the scope of the *AETR* test[432]. Firstly, the specific situations which the Court previously found to give rise to exclusivity were characterised as "only *examples*" of a more general rule of exclusive implied competence[433]. Secondly, the Court stressed that "in general terms", exclusive Union competence may arise "where the conclusion of an agreement by the Member States is incompatible with the *unity* of the common market and the *uniform application* of [Union] law"[434]. By recalling this basis for exclusivity mentioned in paragraph 31 of the original *AETR* judgment, the Court "resurrected" a rationale which

[428] Ibid., para 48.
[429] Opinion 1/2003, para 118.
[430] Ibid. at para 119.
[431] Ibid. at para 120.
[432] R. Holdgaard, *External Relations Law of the European Community*, 111.
[433] Opinion 1/2003, para 121, emphasis added.
[434] Ibid. at para 122, emphasis added.

had never been mentioned in any post-*AETR* case[435]. The doctrine developed in Opinion 1/2003 is "much more general in scope" than its previous formulation of the *AETR* doctrine:

> "[I]f the unity of the Common Market and the uniform application of [Union] law as such are recognised as grounds for the [Union] to develop exclusive external competence, the reach of the reformulated implied powers doctrine is *potentially unlimited*."[436]

Thirdly, the broadening of the scope of the *AETR* principle is completed by an expansion of the temporal dimension of exclusivity. It is no longer sufficient to examine only the scope of the "current state of [Union] law in the area in question", but also its "*future development*, insofar as that is foreseeable at the time of that analysis" have to be taken into account[437].

V. Assessment – Reconciling the two strands of the Court's case law

Against the background of the three-fold expansion in Opinion 1/2003 of the conditions under which internal EU rules give rise to an exclusive implied competence, it has been argued that

> "the Court re-invents itself and offers a formulation which is potentially even more *broad* and *sovereignty-encroaching* than the original implied powers doctrine as established in the 1970s."[438]

The Court, so the argument goes, is deliberately using the "guise of unity of the Common Market and uniform application of [Union] law" in order to broaden the possibilities for the establishment of exclusive EU powers[439]. If, as this assessment suggests, the Court of Justice is returning to an *entitlements* approach to the scope of implied exclusive powers, then how can we reconcile this development with the other strand of its case law on implied competence?

As we saw in Section II, the Court has been moving away from the notion that Member States are precluded from acting once the Union has adopted measures in a given field towards accepting the complementarity of Member State and Union action, which is governed by the duty of loyalty under Article 4 (3) TEU. This strand of the Court's case law emphasises the importance of the principle of conferred powers within the context of exclusive implied competence and points out that the granting of any external power presupposes a specific analysis of the relationship between the

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435 A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty", 84.
436 Ibid. at 84, emphasis added.
437 Opinion 1/2003, para 126, emphasis added.
438 A. Antoniadis, "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty", 85, emphasis added.
439 Ibid.

agreement envisaged and the relevant Union law so as to determine whether the agreement is capable of affecting the Union rules or not[440].

After its bold assertion of implied exclusive powers in the 1970s aimed at furthering European integration, the Court of Justice began taking account of the will of the Member States as Masters of the Treaty in the 1990s. This change of perspective is not only reflected in the Court's incremental circumscription of the nature of implied powers, which culminates in Opinion 1/2003 in the express confirmation that implied competence may be shared, but also in its rejection of a broad interpretation of the "necessity" test established in Opinion 1/76. In Opinions 1/94 and 2/92 and the *Open Skies* cases, the Court made clear that the conclusion of the international agreement by the Union had to be "inextricably linked" to the attainment of a Union objective. Thus, the Court reduced the applicability of the test to situations which closely resemble that of the original context in which it was developed. Indeed, the necessity test has not been successfully applied in any subsequent cases. While the Court did confirm the necessity principle as being one of two bases for exclusive implied competence, it is of little practical relevance and leads a mere "theoretical existence"[441].

Instead, the *AETR* doctrine has become the main basis for implied powers. As a basis for the *existence* of implied powers, the *AETR* principle has always enjoyed a considerably broad scope. The Court declared in Opinion 2/91 that the test was not confined to instances in which the Union had adopted rules within the framework of a common policy, but applied to all areas corresponding to the objectives of the Treaty and tasks of the Union. The broad scope of the *AETR* principle notwithstanding, its *legal effects* have been increasingly limited since the Court, in Opinion 2/91, began to shift its focus away from determining the existence of implied powers to an analysis of the conditions under which such became exclusive. The original *AETR* judgment left open the question of whether the doctrine implied that the Member States no longer had any competence to adopt international agreements over a subject-matter on which the EU had legislated, or whether exclusive Union competence would arise only in case an envisaged Member State agreement "affected" the EU measures or "altered their scope"[442]. Three and a half decades later, Opinion 1/2003 confirms that the Court of Justice has adopted the second, more nuanced interpretation. In order for exclusive Union competence to arise, it is now no longer sufficient that the area in question is covered by internal legislation. The Court stresses in Opinion 1/2003 that the Member States lose their

[440] Opinion 1/2003, para 124.
[441] M. Cremona, "External Relations of the EU and the Member States", 3.
[442] See J. Temple Lang, "The ERTA Judgment and the Court's Case-Law on Competence and Conflict", 197.

competence for the conclusion of agreements with third countries only when such measures are liable to affect or alter the scope of Union law.

However, adopting the second interpretation then makes it important to define precisely when Union rules are "affected"[443]. The Court's re-examination in Opinion 1/2003 of the test for determining when common rules are affected and its emphasis on the "uniform and consistent application of the [Union] rules and the proper functioning of the system they establish"[444] constitutes a significant refinement of the *AETR* principle as it was previously applied. However, it is important not to understand the broadening of the conditions under which *AETR* competence becomes exclusive as an attempt to enlarge EU powers under the guise of the unity and uniformity of EU law. Opinion 1/2003 marks a shift from the "static and restrictive" test focussing on whether a given area is "largely covered" towards a "more flexible, dynamic" test[445]. The emphasis is not on expanding the scope of exclusive Union *competence*, but on preserving the "full *effectiveness* of [Union] law"[446]. Even if the 'effect on EU' test is not new, the "innovative aspect" is that it is "placed at the centre of the analysis [...] instead of being almost forgotten"[447]. A detailed test has to be carried out in order to assess whether the envisaged agreement is likely to affect the scope of the Union provisions in areas in which the EU has regulated. While the 'largely covered' test remains relevant, the new "central element" of the Court's assessment of whether an implied competence is exclusive focuses on policy considerations, such as the nature and content of the rules at issue and the future development of Union law in the field[448].

Like the Court's adoption of a distinction between the existence of implied powers and their legal nature, the introduction of a detailed "affect"-test can, therefore, be seen as a manifestation of the change in the Court's approach from pre-emption towards a more nuanced assessment. The newly elaborated conditions for exclusive implied powers in Opinion 1/2003 do not seek to counteract the increasing complementarity of Member State and Union action. Taken together, the two strands of the Court's case law simply signal that implied competence may be exclusive or shared, but where exclusivity is required "to preserve the full effectiveness of [Union] law"[449], the Court is inclined to conclude that the Union has acquired an exclusive competence over the subject-matter.

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443 Ibid.
444 Opinion 1/2003, para 128.
445 N. Lavranos, "Opinion 1/03, Lugano Convention", 1095.
446 Opinion 1/2003, para 128, emphasis added.
447 N. Lavranos, "Opinion 1/03, Lugano Convention", 1096.
448 See ibid.
449 Opinion 1/2003, para 128.

Seen from the perspective of the Member States, the case law on the *AETR* doctrine has thus not proven to be the powerful and comprehensive instrument that initial case law suggested. The remaining point of contention among the Member States appears to be the "largely covered" criterion which raises questions relating to legal certainty and the principle of conferral. Nevertheless, in Opinion 1/2003 the Court showed awareness of the Member States' concerns by incorporating respect for the attribution of powers into the *AETR* doctrine and balancing the principle with the effectiveness of Union law. The alleviated impact of the *AETR* case law is illustrated by the outcome of the specific cases. Although the doctrine has been relied on in a number of cases over the years, it led to the exclusion of Member State action in two cases only, viz. Opinion 1/2003 and the original *AETR* case[450]. Rather than a forceful articulation of a theory of pre-emption in EU external relations law, the Court's case law on the whole suggests a return to the "canvas of shared competence"[451].

VI. Implied powers within the CFSP

Within the CFSP normative order, the doctrine of implied powers does not apply in the same way as it does in relation to other EU policy areas. It is questionable whether CFSP rules are capable of giving rise to implied competence to begin with, irrespective of whether such powers would be exclusive or non-exclusive in nature.

Article 216 TFEU provides the legal base for the Union's competence to conclude international agreements. Codifying some of the Court's long-standing case law on the conditions under which a Union competence may arise in areas in which no express power has been conferred, Article 216 TFEU explicitly acknowledges the existence of implied Union powers[452]. As far as international agreements under the CFSP are concerned, the Union's treaty-making competence is further specified in Article 37 TEU, according to which "[t]he Union may conclude agreements with one or more States or international organisations" in areas covered by Chapter 2, which contains the specific provisions on the CFSP. Unlike the general legal base of Article 216 TFEU, however, the *lex specialis* rule laid down in Article 37 TEU does not provide for any treaty-making competence by implication.

The special status of the CFSP within the Union legal order does not necessarily exclude the

[450] As far as case C-45/07 *Commission v. Greece* (Greek IMO Case) is concerned, see below.
[451] R. Schütze "Dual Federalism Constitutionalised", 6.
[452] See further the Introductory Chapter.

possibility of implied powers from the outset. Even general international law recognises the existence of such powers. According to the principle of effectiveness in international law, an international organisation possesses not only the powers expressly conferred on it, but also those implied powers necessary for achieving the purposes for which it was set up[453]. Nevertheless, implied powers must remain within the boundaries of the principle of conferral and respect the internal distribution of powers within the international organisation[454].

Notwithstanding the possibility for implied powers to arise, the nature of CFSP norms leaves virtually no scope for this type of competence[455]. Under Article 24 (1) TEU, the adoption of legislative acts is excluded. In addition, the rules contained in Chapter 2 are mostly of a procedural nature. The objectives Chapter 2 refers to are

> "so broad that an unselfconscious application of the principle of implied competences implying all the competences needed to achieve the CFSP objectives would lead to an extensive grant of foreign policy competences going far beyond what the Treaty intends."[456]

As discussed above, such a creation of powers with the sole purpose of furthering EU *objectives* would be indicative of an *entitlements* view of federalism[457]. If implied Union powers are to remain within the bounds of a *liberal fidelity* approach, they must be predicated on the scope of Union *law*. The *AETR* principle was established in order to ensure that the Union's competence to conclude international agreements corresponded with the development of its internal competence. Within the CFSP, however, such a parallelism is inconceivable, not only because its provisions are procedural and broadly framed in nature, but also because they inherently relate to external action, making any parallelism unnecessary. As a result, it should be assumed that the codification of the Court's case law on implied powers in Article 216 (1) TFEU does not apply to the CFSP.

Another argument in favour of this interpretation of Article 216 (1) TFEU concerns the history of the provision. The present chapter sought to demonstrate how the acceptance of implied powers by the Member States was the outcome of a constitutional dialogue between the Court and the Member States over the course of decades. Once the Member States were satisfied that the principle of implied competence had been shaped according to their preferences, they accepted its incorporation in the Treaties. In the CFSP, by contrast, such a dialogue has been absent, due to the continued

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[453] *Reparation for Injuries Case*, 1949 I.C.J. Rep. 174 at 180-182. See also P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Edition (Routledge 1997) at 367.
[454] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 368.
[455] G. De Baere, *Constitutional Principles of EU External Relations*, 106.
[456] Ibid.
[457] D. Halberstam, "Beyond Competences", 3.

exclusion of the Court's jurisdiction in the field[458]. It can, therefore, not be assumed that the recognition of implied Union powers in CFSP matters would be compatible with the will of the Member States as Masters of the Treaties. In fact, we may find a confirmation of this assumption in Article 352 (4) TFEU. The flexibility clause, which grants the Union institutions the authority to adopt the appropriate measures "if action by the Union should prove necessary […] to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers", expressly excludes its application to the CFSP.

Should implied powers nevertheless be found to exist in relation to the CFSP, it appears unlikely that these would give rise to Union exclusivity. Although it has been argued that "it seems too early completely to rule out exclusivity in the field of CFSP", since EU agreements in the field could be deprived of any effect if Member States were allowed to conclude agreements which departed from established EU law[459], it is not evident that CFSP competences are capable of pre-empting Member State action.

The CFSP is not, as we saw in the Introductory Chapter, included in the different categories of exclusive, shared and complementary competences listed in Article 2 TFEU. Since it is instead listed separately in paragraph 4 of the provision[460], it remains "far from clear what competence CFSP constitutes under the Lisbon Treaty"[461]. Although CFSP competence does share certain characteristics of both shared and complementary competences[462], it has nevertheless been described as "a type of sui generis competence"[463]. Indeed, the fact that CFSP is listed separately from the shared competences described in Article 2 (2) TFEU indicates that the Treaty drafters intended this policy to be treated differently. While there has been "much confusion" among commentators regarding the precise nature of CFSP competence[464], it is generally accepted that this type of competence is not capable of pre-empting Member States' powers[465]. In fact, two declarations

[458] Article 24 (1) TEU provides: "The Court of Justice of the European Union shall not have jurisdiction with respect to [the provisions on the CFSP], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union."

[459] R. A. Wessel, "The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities", in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge University Press 2009) 152 at 184.

[460] Article 2 (4) TFEU reads: "The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy".

[461] J. Wouters, D. Coppens, B. De Meester, "The European Union's External Relations after the Lisbon Treaty", 161.

[462] M. Cremona, "Defining Competence in EU External Relations", 65.

[463] Ibid at 65. Similarly, J. Wouters, D. Coppens, B. De Meester, "The European Union's External Relations after the Lisbon Treaty", 169.

[464] For an overview of the different views, see M. Brkan, "Exploring EU Competence in CFSP: Logic or Contradiction?" (2006) 2 CYELP 173 at 186-89.

[465] P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between

annexed to the Treaty of Lisbon suggest that the Member States intended to exclude pre-emption in the area of the CFSP[466]. Declarations 13 and 14 emphasise that the CFSP is not to affect the Member States' responsibilities and powers in relation to the formulation and the conduct of their foreign policy. The lack of jurisdiction in CFSP matters, furthermore, makes pre-emption impracticable, since the Court of Justice would not be competent to determine the precise extent of pre-emption in a specific case[467].

Delimitation and Consistency" (2010) 47 C.M.L. Rev. 987 at 991; M. Cremona, "Defining Competence in EU External Relations", 65; M. Brkan, "Exploring EU Competence in CFSP: Logic or Contradiction?",186; G. De Baere, *Constitutional Principles of EU External Relations*, 111.

[466] G. De Baere, *Constitutional Principles of EU External Relations*, 111; M. Cremona, "Defining Competence in EU External Relations", 65.

[467] M. Cremona, "Defining Competence in EU External Relations", 65.

Chapter Two

The Impact of an Exercise of Union Competence on the Member States' Freedom to Act

I. Introduction

An exercise of Union competence, as we saw in the foregoing, may have an effect on the existence of Member State powers. The adoption of Union legislation will pre-empt the Member States' powers to the extent that the EU has regulated. In addition to affecting Member State *powers*, however, the duty of loyalty laid down in Article 4 (3) TEU may also have an effect on their *freedom to act*.

Questions as to the scope of such an effect arise in different circumstances. Firstly, if the Union is prevented from exercising its competence, do the Member States remain free to act as sovereign states on the international scene, or are they required to act on behalf of the Union? Secondly, where the Union has opted not to exercise its powers and the Member States consequently remain competent to act, may Member State action be restrained even *before* an exercise of EU competence has taken place? Thirdly, where the exercise of Union competence leads to incompatibilities with international agreements concluded by the Member States prior to the adoption of EU rules, are the Member States required to adjust all inconsistent commitments?

This chapter examines these different ways in which an exercise of Union competence may affect the Member States' freedom to act. To that end, it will first look at the restraints which apply when the Union is barred from acting (Section II.). What obligations does Article 4 (3) TEU entail in a field which has been reserved to the exclusive powers of the EU, but in which no exercise of EU competence has taken place yet? And how do these obligations change in case the Union fails to exercise its powers within a stipulated period? Once an exercise of Union competence has taken place, can the *AETR* doctrine preclude Member State action even in situations of a non-contractual kind?

In areas in which the Union has decided not to regulate (yet), its competence remains shared with the Member States. Although, by definition, the Member States remain free to act in these areas, the duty of loyalty may impose certain restraints (Section III.). The central question is to what extent the loyalty obligations differ in areas of shared powers from those in which the Union enjoys an

exclusive competence. At what point does the duty of cooperation become operative? And does it impose procedural restraints only, or can it also entail a substantive obligation of result?

Finally, the chapter looks at the effect which an exercise of Union powers may have on bilateral Member State agreements concluded before the EU decided to exercise its competence (Section IV.). If the supervening exercise of Union powers leads to incompatibilities with international commitments assumed by the Member States before Union action in the field was foreseeable, the Member States can obviously not be blamed for an ensuing conflict of rules. In these situations, does the Court of Justice strive for a solution which respects the Member States' commitments towards third countries involved, or are the Member States under a strict substantive obligation to achieve the primacy of EU law?

In the light of the broad potential of Article 4 (3) TEU to restrain Member State powers in this context, the question arises of the relationship between the duty of cooperation and the principle of pre-emption discussed in the previous chapter (Section V.). In CFSP matters, any potential pre-emptive effect based on the duty to cooperate must be excluded from the outset. This does not mean, however, that the Member States are not subject to concrete procedural restraints also in this area (Section VI.).

II. Loyalty restraints in areas in which Union action is impossible

A finding of exclusive Union *competence* in a given field does not always correlate with exclusive Union *action* in that area. In some cases, it may be either desirable or legally necessary that the EU acts through the medium of its Member States. Such a situation may occur where the exercise of Union powers cannot be completed due to factors outside the control of the EU institutions. Until the exercise of EU powers has taken place, the Member States are subject to certain procedural obligations (A.), which may transform into substantive restraints once a predetermined period for the exercise of EU competence has expired unsuccessfully (B.). Once an exercise has taken place, Member States are required to defend the Union's interests where the Union is incapable of negotiating an agreement (C.) or where the Union's participation in an international organisation is impossible (D.).

A. Loyalty obligations in transitional periods

The first time that the Court of Justice was faced with the question of what effect the exercise of an external Union competence would have on the Member States' freedom to act was in *Kramer*[468]. In this judgment, the Court laid down the guidelines for dealing with restrictions of Member State competence in an area which had been "reserved"[469] to the Union, but in which the latter had not yet fully exercised its powers. The Court declared that the Member States were free to exercise their competence to the extent that the Union had not exercised its powers. However, once the Union had exercised its competence, it was to act alone.

The preliminary reference from a Dutch court concerned criminal proceedings initiated against Dutch fishermen on grounds of a violation of Dutch rules implementing a recommendation under the North-East Atlantic Fisheries Convention. The Netherlands had signed the Convention two years after the founding of the Union, but prior to the adoption of a number of Union measures which conferred on the EU the responsibility for recommendations concerning the regulation of catch and fishing quotas. The Court of Justice acknowledged that in adopting the contested measures, the Netherlands had not exercised a right under international law, but fulfilled an obligation "arising from a *binding* recommendation of […] an international body"[470].

When addressing the question of whether the EU was exclusively competent to enter into commitments such as those undertaken by some of the Member States, the Court found Union competence to exist by implication on the basis of primary and secondary EU rules. When determining whether that competence had become exclusive, the Court pointed out that the Convention was concluded at a time when the EU had not yet made any regulations relating to fisheries, and in the meantime, the Union had still not fully exercised its functions in the matter. As a result, the Member States were free to exercise their competence and assume international commitments until the Union had made use of its own powers[471].

However, the residual Member State competence was subject to two limitations. According to Article 102 of the Act of Accession, the Council was given a six-year period in which it was required to complete the adoption of the necessary measures for the conservation of the resources of the sea foreseen in Regulation no. 2141/70. In the meantime, the Member States' power to act in the field

[468] Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1305.
[469] See Case 804/79 *Commission v. United Kingdom* [1981] ECR 1045, para 30.
[470] Ibid., para 13, emphasis added.
[471] Ibid., paras 35/38 and 39.

was of a transitional nature and would expire automatically once the Union had exercised its authority in the field[472].

Moreover, the Member States were subsequently bound in their negotiations with third countries by their obligations towards the Union under Article 4 (3) TEU[473]. These obligations included a "duty not to enter into any commitment within the framework of those Conventions which could hinder the [Union] in carrying out the tasks entrusted to it" and a "duty to proceed by common action within the Fisheries Commission"[474]. Once the Union had initiated the procedure for the exercise of its powers or, at the latest, upon the expiry of the interim period, the Member States would be under a "duty to use all the political and legal means at their disposal in order to ensure the participation of the [Union] in the Convention and in other similar agreements"[475].

B. The start of concerted Union action

When the transitional period for implementation laid down in Article 102 of the Act of Accession expired on 1st January 1979, the Union had still not been able to adopt legislation in the field. Although the Commission had submitted the required legislative proposals to the Council and the latter had laid down guidelines concerning the rules on fisheries conservation, the UK government had hindered the adoption of new measures by blocking the decision-making process in the Council. Instead, the UK had taken steps to bring into force a series of measures of its own, prompting the Commission to bring an action against the Member State.

Thus, in *Commission v. United Kingdom*[476], the Court of Justice had to assess the implications of the lapse of the transitional period for the competence of the Member States. While the UK argued that the Member States retained residual power until the EU had exercised its competence to the full extent[477], the Court held that the Union had acquired exclusive powers in the area upon the expiry of the transitional period, emphasising that the Council's failure to adopt the appropriate conservation measures in time "could not in any case restore to the Member States the power and freedom to act unilaterally in this field"[478].

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472 Ibid., para 40.
473 Ibid.
474 Ibid., paras 44/45.
475 Ibid.
476 Case 804/79 *Commission v. United Kingdom* [1981] ECR 1045.
477 Ibid., para 14.
478 Ibid., paras 27 and 20.

The Court pointed out that the area of fisheries conservation had been "reserved to the powers of the Union", and as a consequence, the Member States were henceforth allowed to "act only as *trustees of the common interest*"[479]. The Court went on to specify what obligations this finding entailed for the Member States. The adoption of legislative measures in the matter of fisheries conservation measures was from now on "a matter (...) of [Union] law", with the result that the Member States were "no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction"[480]. Instead, they were, by virtue of (current) Article 4 (3) TEU under "special duties of action and abstention" aimed at meeting urgent needs of conservation[481].

Two points are noteworthy in this context. The first concerns the extension of the temporal scope of implied exclusive competence in this case. For the first time, the Court recognised that the Union was capable of "reserving" a field to its powers even before it had fully exercised its competence in the areas. It was argued that the Court's approach

> "went far beyond what had been held to be the legal consequences of failure to introduce a common organization by the due date in other agricultural sectors, where the absence of the common organization had been held to lead to the application of the basic Treaty rules rather than the exclusion of national competence"[482].

However, while the Court left no doubt that the Union's power in the field automatically became exclusive upon the expiry of the transitional period[483], it must nevertheless be recalled that the failure on the part of the Union to exercise its competence was not the result of inaction, but followed from the UK's interference in the adoption of the necessary measures in the Council. What appeared to be decisive in the Court's reasoning, therefore, was not the mere lapse of a predetermined period of time, but the fact that the Commission had submitted to the Council proposals for the adoption of conservation measures. Irrespective of the Council's failure to adopt them, the submission of the proposal represented "the point of departure for *concerted [Union] action*"[484].

And thus, the Court had coined a new formula which, as we will see in the following, plays an important role in the temporal dimension of the duty of loyalty[485]. Where "concerted action" has been

[479] Ibid., para 30, emphasis added.
[480] Ibid., para 18.
[481] Ibid., para 28.
[482] J. A. Usher, "The Scope of Community Competence – Its Recognition and Enforcement" (1985) 23 Journal of Common Market Studies 121 at 125.
[483] See Case 804/79 *Commission v. United Kingdom*, para 17: "[S]ince the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the Common Fisheries Policy, measures relating to the conservation of the resources of the sea has belonged fully and definitely to the [Union]".
[484] Case 804/79 *Commission v. United Kingdom*, para 28, emphasis added.
[485] See also Cases C-433/03 *Commission v. Germany* [2005] ECR I-6985 and C-266/03 *Commission v. Luxembourg*

initiated at Union level, the Member States are subject to "special duties". These go beyond a mere procedural obligation to cooperate (in this case, "an obligation to undertake detailed consultations with the Commission"[486]), but also include obligations of a substantive nature ("an obligation […] to seek [the Commission's] approval in good faith" and "a duty not to lay down national conservation measures in spite of objections"[487]). Against this background, it is noteworthy that the "concerted action" referred to by the Court in the present case was not *concerted* at all. Having been rejected in the Council, the Commission proposal in question was bound to remain very much unilateral.

Such a generous interpretation of the notion of "concerted" action may be explained by the special circumstances of the case. The Member State which then proceeded to adopt the contested national measures was the same that had blocked the adoption of the Commission proposal in the Council, while no other Council members had objected to the adoption.

The second point concerns the scope of the "special duties" imposed on the Member States. The Court made clear that upon the expiry of the transitional period, the adoption of national measures had become "a *matter […] of [Union] law*"[488]. Member State action in the field was subsequently limited to "amend[ments] of the existing conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere" until the EU's own conservation measures entered into force[489]. However, the development of a new conservation policy on the part of a Member State was excluded[490]. It is interesting to note that the Court nevertheless adopted a rather lenient approach to circumscribing the limits of national action. Far from requiring an express authorisation from the Commission to act, national measures were in conformity with the duty of loyalty as long as the Commission gave its "retroactive approval […], where necessary after acceptance by the state concerned of the conditions laid down by the Commission"[491]. The UK, however, had proceeded to adopt the contested national measures without regard to the "reservations" submitted to it by the Commission[492]. It has thus failed "to undertake detailed consultations with the Commission and to seek its approval in good faith" and "to abstain from laying down national conservation measures" which had not been approved by the Commission[493].

[2005] ECR I-4805 discussed in the present chapter and Case C-246/07 *Commission v. Sweden (PFOS)* [2010] ECR I-3317 discussed in Chapter Five.

[486] Case 804/79 *Commission v. United Kingdom*, para 31.

[487] Ibid.

[488] Ibid., para 18, emphasis added.

[489] Ibid., para 22.

[490] Ibid., para 22.

[491] Ibid., para 37.

[492] See ibid., para 37.

[493] Ibid., para 31.

The Court of Justice clarified that the UK's failure to fulfil its obligations under Article 4 (3) TEU did *not* result from the adoption of national measures. Indeed, other cases in which Member States had proceeded to adopt national measures were held to be "not comparable with the disputed measures of the United Kingdom", as the UK had opted to bring incompatible rules into force despite the objections expressed by the Commission[494].

C. Negotiation and conclusion of international agreements on behalf of the Union

In the foregoing case, the Member States remained authorised to act in an area of reserved exclusivity, due to the fact that the EU had been hindered from fully exercising its powers. Nevertheless, any national measure was subsequently "a matter of Union law". Once the exercise of a Union competence has been completed, however, Member States are only allowed – or rather required – to act if the Union is not in a position to defend its interests on its own. This may be the case where the Union is incapable of negotiating an agreement or, as we will see in the following section, participating in an international organisation.

Where the Union is barred from participating in the negotiation of an international agreement, the Commission may choose to obtain a negotiating mandate from the Council and carry out the negotiations itself. Thus, for negotiations leading to conventions concluded by the International Labour Organisation (ILO), of which the Union is not a member but only enjoys observer status, a working agreement contained in a Council decision of 22 December 1986 provides that in matters of exclusive Union competence, the Council will authorise the Commission to negotiate and to speak on behalf of the Union in the Conference[495]. Prior to the adoption of the Council decision, a number of Member States had disputed the Union's right to take part in the Conference, leading the Council to agree that the Union and its Member States together would put forward the Union's position. The Council decision of 22 December 1986, however, imposed full compliance with the tripartite procedure for consultation, stipulating that the Council was required to adopt the proposals submitted to it by the Commission and grant the Commission a negotiating mandate if requested to do so.

In Opinion 2/91, the Court of Justice had to assess the refusal by several Member States to comply with this consultation procedure on the ground that the Union lacked exclusive competence to act. The Court established that parts of the Convention did indeed cover an area of exclusive EU

[494] Ibid.

[495] See Opinion 2/91 *Convention No. 170 on safety in the use of chemicals at work*, part IV.

competence and that, therefore, the Member States were pre-empted from undertaking any commitments in the field outside the framework of the Union institutions[496]. The Court went on to emphasise the role of the duty of sincere cooperation in this context. Comparing its application to situations of shared competence, the Court stressed that in the present case,

> "cooperation between the [Union] and the Member States is *all the more necessary* in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States."[497]

Instead of assuming the role of negotiator, the Union may, in certain cases, prefer to leave the Member States in charge of negotiating an agreement, notwithstanding its exclusive EU competence in the field. In the *AETR* case[498], the Commission complained that the Council's decision that the negotiations of the European Agreement on Road Transport (AETR) should be carried out by the six contracting Member States deprived it of its role as negotiator under (current) Article 218 TFEU. However, the Court of Justice accepted the Council's approach as valid. Although a shift in the allocation of powers over parts of the agreement had taken place during the course of the negotiations, it was more favourable for the Union's position to maintain in force the original negotiation arrangement. As the Court put it,

> "to have suggested to the third countries concerned that there was now a new distribution of powers within the [Union] might well have jeopardised the successful outcome of the negotiations […]".[499]

Nevertheless, the Court emphasised that by assuming the position of negotiator in an area of exclusive Union competence, the Member States did not act by way of "voluntary coordination", but instead laid down "a course of action binding on both the institutions and the Member States"[500]. Therefore, the Member States were under an obligation to "act in common" and to "constantly coordinate their positions […] in *close association* with the [Union] institutions"[501]. Under (current) Article 4 (3) TEU, the Member States were, in sum, required to act "in the interest and on behalf of [Union]" by establishing a joint negotiating position within the framework of the institutions with binding effect on all participating Member States[502].

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[496] Opinion 2/91, paras. 22-26.
[497] Ibid., para 37, emphasis added.
[498] Case 22/70 *AETR* [1971] ECR 263.
[499] Case 22/70, para 86.
[500] Ibid., para 53.
[501] Ibid., para 49, emphasis added.
[502] See ibid., para 90.

In both cases, it emerges that where the Member States act "on behalf of" the Union, they are under more than an obligation to use their best efforts. Where this is in the interest of the Union, it may be preferable that the Member States negotiate through a common position. In other cases, the Council may be required to grant a negotiation mandate to the Commission. Either way, the Member States are under an obligation of result: "[T]he obligation is to negotiate through a common position or not to conclude the agreement at all"[503].

D. Participation in international organisations

The obligations flowing from Article 4 (3) TEU are not only relevant for the negotiation and conclusion of international agreements, but also apply to the participation within the framework of those agreements. If Member States exercise their treaty-making powers by joining an international organisation, the question arises to what extent supervening exclusive Union competence may restrain them in their freedom to exercise the rights under international law. Can the *AETR* doctrine – established with a view to pre-empting the Member States of their power to *conclude* international agreements that had the potential for affecting Union law – develop the same exclusionary effect in the ambit of action within an international organisation (i.)? And if so, what implications does this have for the Member States' participation in that organisation (ii.)?

The Court of Justice dealt with these two questions in the *Greek IMO* case[504]. The Commission brought an infringement action against Greece aimed at establishing that Greece had infringed Union law when submitting to the International Maritime Organisation (IMO) a proposal for monitoring the compliance of ships and port facilities with Chapter XI-2 of the International Convention for the Safety of Life at Sea (SOLAS) Convention and the International Ship and Port Facility Security (ISPS) Code. While Greece had become a member of the IMO in 1958, the EU was barred from joining the organisation.

i. The extension of the AETR *doctrine*

Notwithstanding the fact that the Union was not a member of the IMO, it had adopted Regulation No. 725/2004 with a view to implementing both the ISPS Code and the Chapter XI-2 of the SOLAS

[503] M. Cremona, "Member States as Trustees of the Community Interest: Participating in International Agreements on Behalf of the European Community", EUI Working Paper LAW 2009/17 at 4.
[504] Case C-45/07 *Commission v. Greece* [2009] ECR I-701.

Convention into EU law. The Commission argued that the Union had acquired exclusive competence by virtue of the *AETR* principle. By acting unilaterally in an area of exclusive Union competence, the Commission continued, Greece had breached the principle of united external representation flowing from (current) Article 4 (3) TEU.

While Greece did not dispute the exclusive competence of the Union in the field covered by the Regulation, it questioned whether the effects of *AETR* exclusivity extended beyond the conclusion of an international agreement. The Member State brought forward a number of arguments in defence of its actions within the framework of the IMO. It argued, *inter alia*, that the submission of its proposal was part of its active participation in the organisation. Active participation was not tantamount to entering into international commitments and, therefore, not covered by the *AETR* doctrine. On the contrary, active participation of the Member States was necessary in cases where the Union was not a member of the international organisation, and the restriction of such participation would only lead to the devaluation and, ultimately, the loss of the status of member of the IMO.

In assessing whether the Union had acquired exclusive competence in the area covered by the two international conventions at issue, the Court largely followed the Advocate General. AG Bot had concluded:

> "By virtue of the fact that the [Union] exercises its internal competence in the area of sea transport and, more especially, on account of the fact that common rules were adopted for enhancing ship and port facility security, exclusive external competence was conferred to that extent upon it."[505]

It appears that to the Court, the case for exclusivity was rather clear, as it swiftly reached the conclusion that the provisions of the EU Regulation at issue were "[Union] rules promulgated for the attainment of the objectives of the Treaty"[506].

The assertion of exclusive competence to conclude an international agreement, however, did not reveal anything about its implications for the Member States' freedom to participate within an international organisation. Thus, the Court went to on to examine whether the submission of the Greek proposal constituted an obligation capable of affecting the EU Regulation, finding that the national action had initiated a procedure capable of leading to the adoption by the IMO of new rules within the area covered by the Regulation. As such a procedure was likely to affect the provisions of the Regulation, the Court concluded that Greece had breached (current) Article 4 (3) TEU and Articles 91 and 100 (2) TFEU, which served as the legal base for the adoption of the EU

[505] Opinion of Advocate General Bot in Case C-45/07, para 34 (emphasis added).
[506] Case C-45/07, para 18.

Regulation[507]. The Court emphasised that the fact that the Union was not a member of the international organisation did not prevent its external competence from being exercised and "in no way authorises a Member State (...) to assume obligations likely to affect [Union] rules"[508].

The Court stressed that Article 4 (3) TEU prohibited "*any* measure" capable of jeopardising the attainment of Treaty objectives[509]. Should this be taken to mean that any national non-contractual action may be deemed to have the potential of "affecting" Union rules or are there limits to the extension of the *AETR* principle to this type of situation?

Since Opinion 2/91, the Court had consistently held that any finding of implied exclusive powers in a given area presupposed a detailed analysis in order to determine whether and to what extent internal legislation was affected by international commitments, and only when the specific rules were found capable of being affected could this give rise to exclusive Union powers[510]. The conclusion that EU rules in a given area were affected or that their scope was altered by an international agreement entered into by a Member State was thus dependent on the regulatory intensity and the content of those Union measures. As the Court made clear in Opinion 1/03, by virtue of the fact that the Union enjoyed conferred powers only, any implied competence

> "must have its basis in conclusions drawn from a specific analysis of the *relationship* between the agreement envisaged and the [Union] law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the [Union] rules"[511].

Such an analysis "must be based not only on the scope of the rules in question but also on their *nature* and *content*"[512]. In other words, the pre-emptive effect of the *AETR* principle could not be assumed solely on the basis of the existence of Union rules in a given field, but depended on the nature of the rules in question. In the *Greek IMO* case, however, the national measure was not an obligation directly capable of affecting the EU Regulation, as Greece had merely initiated a procedure which could have led to the adoption of new rules by the IMO.

The Court of Justice had already declared in Opinion 1/2003 that the *AETR* principle may also apply to situations in which Union rules which could be affected have yet to come into existence:

> "It is also necessary to take into account not only the current state of [Union] law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis."[513]

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[507] Ibid., para 19 and paras 21-23.
[508] Ibid., paras 30-31.
[509] Ibid., para 16, emphasis added.
[510] See Chapter One.
[511] Opinion 1/03 [2006] ECR I-1145 at para 124, emphasis added.
[512] Ibid., para 126, emphasis added.
[513] Opinion 1/03, para 126.

The same reasoning appears to underlie the Court's construction of *AETR* pre-emption in the present case, which has led to criticism alleging a significant extension of the scope of exclusive competence. It was argued that the "totally hypothetical, possible, future effect" of Member State action on Union law was sufficient to impose an obligation on Greece to abstain from acting altogether[514]. As a result of the fact that the Court "has modified the 'effect-based' test into a 'hypothetical incompatibility' test", it is now possible

> "to determine at a much lower threshold than before that an international treaty potentially affects [Union] law and therefore must fall within the exclusive competence of the [EU]"[515].

Such a reading of the Court's approach in the *Greek IMO* would indicate a *conservative fidelity* view of federalism. While a *liberal fidelity* approach in these cases would have called for the preservation of engagement between the Union and the Member States until EU rules that could be affected by Member State action had actually come into being, the *conservative* vision seeks to *prevent* conflict between pre-existing international obligations and EU law from the outset by achieving an optimal position for the Union to freely exercise its powers[516].

The extension of the *AETR* principle in this case, however, does not seek to calm policy disputes by suppressing political dissent as the *conservative fidelity* approach would[517]. There is nothing in the *Greek IMO* case which suggests that non-contractual Member State action of any kind may automatically trigger *AETR* pre-emption, regardless of whether common rules are directly affected or not. The Court of Justice pointed out that Greece had initiated a procedure which could lead to the adoption by the IMO of new rules in respect of Chapter XI-2 and the ISPS code. Since it was apparent from the Regulation that the EU legislature had "decided to incorporate in substance both of those international instruments into [Union] law", the adoption of new IMO rules would "as a consequence have an effect on the Regulation"[518]. The Court was thus

> "careful to link the scope of the exclusivity principle to the scope of the Regulation […] and to match the national action in question to the purposes and structure of the Regulation when assessing its effects"[519].

Against this background, it may be argued that it

> "would be wrong […] to read into this judgment an extensive reinterpretation of *AETR* to cover all

[514] N. Lavranos, "Protecting European Law from International Law", 277.
[515] Ibid.
[516] See D. Halberstam, "Of Power and Responsibility", 778, see further the Introductory Chapter.
[517] Ibid at 773.
[518] Case C-45/07, para 22.
[519] M. Cremona, "Extending the Reach of the AETR Principle: Comment on Commission v Greece (C-45/07)" (2009) 34 E.L. Rev. 754 at 763.

kinds of unilateral (non-contractual) action in a vaguely identified field such as "maritime security"[520].

ii. The duty to act on behalf of the Union – An obligation of result

In practice, the Court's finding that the *AETR* formula also applied to the participation within an international organisation entailed an obligation on the Member States to either act on behalf of the Union, or to refrain from acting whatsoever. Greece had submitted the contested proposal to the Maritime Safety Committee for discussion with a view to formulating a Union position on the subject-matter. The Commission, acting through its representative chairing the Committee, however, refused to include that proposal on the agenda for that meeting. Having used its best efforts to obtain a common position, Greece considered that it did comply with its obligation of sincere cooperation under Article 4 (3) TEU. It submitted that, instead, it was the Commission which had failed to comply with this obligation by rejecting the national proposal[521].

The Court of Justice did not accept the Member State's defence. Acknowledging that the Commission might indeed have, as argued by Greece, failed to fulfil its own obligations under Article 4 (3) TEU by rejecting the national proposal for inclusion on the agenda[522], the Court stressed that

> "[n]one the less, any breach by the Commission of Article [4 (3) TEU] *cannot* entitle a Member State to take initiatives likely to affect [Union] rules promulgated for the attainment of the objectives of the Treaty, in breach of that State's obligations […]."[523]

The case illustrates that in situations in which the Member States have unsuccessfully tried to achieve the adoption of a common position at Union level, they nevertheless remain precluded from taking further unilateral action, even if the failure to reach a common position can be ascribed to the Commission alone. In the specific case, informing and consulting the Commission was not sufficient for a Member State to fulfil its duty of cooperation. Instead, Article 4 (3) TEU called for abstention from action, thus imposing more than a mere "best efforts" obligation.

As a second defence, Greece invoked a gentleman's agreement adopted by the Council, which permitted Member States to submit proposals to the IMO in the absence of a common position on a given subject-matter. The Court, however, was quick to reject this argument. A gentleman's

[520] Ibid.
[521] See Opinion of Advocate General Bot in Case C-45/07, para 16.
[522] See Case C-45/07, para 25.
[523] Case C-45/07, para 26, emphasis added.

agreement was not capable of affecting the division of powers between the Union and its Member States[524].

In sum, the Court of Justice left no doubt that the duty of loyalty was absolute: it entailed an obligation of result – Member States were precluded from acting, unless they had been authorised by the Union to do so. This general rule applied regardless of any internal shortcomings or arrangements. Whether the Commission had failed to fulfil the duty of sincere cooperation on its part, or whether the Council had adopted different procedural rules was irrelevant. Nothing was allowed to affect the division of powers between the Member States and the Union, and the task of the Member States under Article 4 (3) TEU was to ensure that this division is preserved. Therefore, it may be argued that "the Court focuses on *exclusivity* rather than on the special position of the Member States and [Union] *vis-à-vis* the IMO, on *pre-emption* rather than the duty of co-operation"[525].

Thus, although AG Bot emphasised in the *Greek IMO* case that the "duty of genuine cooperation is of general application and does not depend either on whether the [Union] competence concerned is exclusive"[526], it nevertheless becomes apparent that in areas of exclusive competence, the Member States' obligations under Article 4 (3) TEU are particularly stringent. However, it also emerges that even within areas of exclusivity, there may be different degrees of the Member States' duty to abstain from acting. As we saw in *Commission v. United Kingdom*[527], Member States may in certain circumstances be granted the right to continue adopting national measures, provided that they obtain the Commission's retroactive approval, or, where necessary, adjust the planned measures according to the Commission's reservations[528]. In the *Greek IMO* case, by contrast, no such right of initiative was accepted. In the absence of an *express* authorisation by the Commission, the Member States were bound to remain inactive. In both cases, the Member States had assumed the role of "trustees of the Union interest", but in one case, the loyalty obligation was more relaxed than in the other. The slight difference in approach may be explained by the fact that the duty on the Member States to act on behalf of the Union was all the stronger in the *Greek IMO* case due to the fact that the case did not concern the development of a given Union policy, but the adoption of *regulatory standards* at an *international* level and their enforcement[529].

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[524] Case C-45/07, para 29.
[525] M. Cremona, "Extending the Reach of the AETR Principle", 768, emphasis added.
[526] Opinion of Advocate General Bot in Case C-45/07, para 38.
[527] Case 804/79 *Commission v. United Kingdom*, see above.
[528] See ibid. at para 37.
[529] See M. Cremona, "Extending the Reach of the AETR Principle", 768.

III. The start of concerted Union action in areas in which competence remains shared

What emerges from the foregoing is that Member States are only allowed to act until the Union exercises a competence or, where it is impeded from doing so, "reserves" a field. Once an exercise of competence has taken place, Member States may only act as "trustees of the Union interest". In areas of shared competence, by contrast, Member States generally remain free to enter into international commitments, provided that no Union rules or agreements exist with which the envisaged agreement could conflict. Nevertheless, it appears that even in these areas, the Member States' freedom of action may be circumscribed by a *prospect* of the exercise of Union competence. Here, too, the start of "concerted action" at Union level can have a significant impact on the Member States' freedom to act, both as far as the conclusion of international agreements (A.), as well as national participation in international organisations (B.) is concerned.

A. The duty to cooperate – An obligation of abstention*?*

Two cases brought by the Commission against Germany and Luxembourg demonstrate how Article 4 (3) TEU may impose significant procedural restraints on the Member States in areas of shared competence. In *Commission v. Germany*[530] and *Commission v. Luxembourg*[531], the Commission sought a declaration from the Court of Justice that, by unilaterally negotiating, concluding, ratifying and bringing into force a number of bilateral agreements on inland waterway transport, Germany and Luxembourg had breached their obligations under (current) Article 4 (3) TEU and Council Regulation No. 3921/91[532].

Prior to the conclusion of the agreements, the Council had granted the Commission a negotiating mandate for the conclusion of a multilateral agreement between the Union and third countries in the field of transport by inland waterway[533]. Following the Council's authorisation, the Commission had called on the Member States to abstain from any conduct that could jeopardise the multilateral negotiations and to abandon the ratification of any agreements which had already been signed[534].

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[530] Case C-433/03 *Commission v. Germany.*

[531] Case C-266/03 *Commission v. Luxembourg*.

[532] The case is frequently cited in combination with Case C-266/03 *Commission v. Luxembourg*, delivered shortly before *Commission v. Germany*. The former case is similar on the merits and in its outcome, but the timing of the conclusion of the agreements at issue excludes issues of supervening competence from the outset, since all contested agreements were concluded after the entry into force of the EU Regulation and before the adoption of the Council Decision.

[533] Case C-433/03, paras 16-17.

[534] Ibid., para 18.

By its first submission, the Commission alleged that the two Member States had infringed the Union's exclusive competence to conclude international agreements on transport by inland waterway which it enjoyed by implication in accordance with the *AETR* doctrine[535]. It argued that the three bilateral agreements affected the common rules laid down in Regulation No. 3921/91 in a field harmonised completely by Union rules[536]. The Court, however, refused to accept the Commission's argument that Union competence in the field was exclusive, on the ground that existing EU legislation was concerned only with market access for EU carriers and would, therefore, not be "affected" by the bilateral agreements in question[537].

Secondly, the Commission submitted that by ratifying and implementing the bilateral agreements subsequently to the Council decision, Germany had jeopardised the Commission's negotiations of the envisaged multilateral agreement and thus infringed Article 4 (3) TEU[538]. In its reply, Germany argued that the principle of loyal cooperation neither obliged the Member States to denounce existing agreements by the mere fact that the Commission had initiated negotiations in the same area[539], nor could it impose a standstill obligation to refrain from action[540]. In any event, the Member State had offered the Commission "every possible form of cooperation", including consultations and timely denunciation as soon as a Union agreement would be signed[541].

The Court of Justice rejected all of the Member States' submissions. Citing AG Tizzano, it declared that the adoption of the Council decision had caused a "substantial change in the legal framework" in which the three agreements were concluded, requiring closer cooperation[542]. Indeed, the Commission's authorisation by the Council to negotiate a multilateral agreement marked the "start of a concerted [Union] action at international level"[543]. In the interest of coherence and consistency of Union action and international representation, the Member States were, therefore,

> "if not a *duty of abstention* on the part of the Member States, *at the very least* a duty of close cooperation between the latter and the [Union] institutions"[544].

This statement is ambiguous, leaving open the question of whether Member States may or may not be required to abstain from acting by virtue of the start of concerted action in an area of shared

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535 See Chapter One.
536 Case C-433/03, para 36.
537 Ibid., paras 48-51.
538 Ibid., para 55.
539 Ibid., para 57.
540 Case C-433/03, Opinion of Advocate General Tizzano, para 64.
541 Ibid.
542 See Case C-433/03, op. cit., para 67.
543 Ibid., para 66.
544 Ibid., emphasis added.

competence. Germany had, in fact, argued that the Commission's demands amounted to a "*standstill* obligation to refrain from action"[545]. Such an obligation would be "tantamount to conferring on the [Union] *exclusive* external competence", without the conditions for exclusivity being satisfied[546].

This reading of the loyalty obligations in the present case would then indicate a *conservative fidelity* approach, enforcing "harmony even where there is none"[547]. In fact,

> "[w]ere Article [4 (3)] to require a *complete halt* to negotiations that would be tantamount to finding that the Member States were no longer competent to conclude the agreements, and inconsistent with the explicit ruling that there was no exclusive competence"[548].

In order to assess Germany's argument alleging a hidden expansion of exclusive Union competence, it is important to examine to what extent the Member State would have been able to remedy its failure to fulfil obligations and under what conditions it would have remained entitled to act. Germany took the view that it "offered the Commission *every possible form of cooperation*", by consulting the Commission during the negotiations of the bilateral agreements and undertaking to denounce them as soon as a Union agreement was signed, and it had reduced the period within which they were to be denounced to six months[549].

If Germany was right in claiming that it had used its best efforts to ensure the fulfilment of its obligations towards the Union, then imposing any further restraints would have amounted to an obligation of result, in this case to abstain from acting. Advocate General Tizzano argued that the Member State should have given the Commission the opportunity to ensure that the national initiative would proceed in accordance with EU law, by allowing it to seek amendments or request changes to the agreements at issue[550]. However, he concluded, the Member State "did none of that", opting instead to proceed to ratification of the agreements[551].

In the legal literature, the restraints imposed on Germany and Luxembourg in these cases were mostly regarded "purely as *procedural* obligations without a requirement of substantive compliance"[552]. The breach of Article 4 (3) TEU "lay not so much in continuing bilateral negotiations

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[545] Case C-433/03, Opinion of Advocate General Tizzano, para 64.
[546] Opinion of Advocate General Tizzano, para 64, emphasis added.
[547] D. Halberstam, "Of Power and Responsibility", 778.
[548] M. Cremona, "Defending the Community Interest", 164, emphasis added.
[549] Case C-433/03, Opinion of Advocate General Tizzano, para 67.
[550] See Case C-433/03, Opinion of Advocate General Tizzano, para 95.
[551] Ibid., para 96.
[552] J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", in A. Arnull, C. Barnard, M. Dougan and E. Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 545 at 558 (emphasis added); see also C. Hillion, "Tous pour un, un pour tous! Coherence in the External Relaions of the Union", in M. Cremona (ed.), *Developments in EU External Relations Law* (OUP 2008) 10 at 28; M.

as in the absence of consultation and coordination with the [Union] institutions"[553].

Nevertheless, doubts remain as to the precise scope of the duty of loyalty in these cases. For example, the Advocate General's suggestion that Germany should have "deferr[ed] ratification in order to be able to coordinate with the Commission and await its instructions"[554] implies that the Member State was under an obligation to refrain from acting until the Commission had expressly *authorised* it to do so. Furthermore, his argument that the ratification of a bilateral agreement in a field covered by a negotiating mandate "constitutes *per se* a measure 'which could jeopardise the attainment of the objectives of [the] Treaty'"[555] is noteworthy. If the ratification of a bilateral agreement in such a situation is "per se" deemed incompatible with Article 4 (3) TEU, it is difficult to see how consultation and cooperation prior to ratification should be able to remedy this shortcoming.

Ambiguities of this kind have led two authors to raise the question

> "would having informed and consulted with the Commission once again after the start of concerted [Union] action really have salvaged Germany's behaviour of continuing down the road with its bilateral agreements? What constituted the real handicap to the Commission's work, Germany's lacking communication, or indeed the fact that Germany acted […] "without being requested to do so by the Commission"?"[556]

Answering their own question, they conclude that "what the Court still presents here as potentially a duty to inform and consult in reality leads to an *obligation to refrain from acting*"[557]. The Court's equivocal language does not help in this respect either. Although it has been argued that "the Court does not link the infringement to one of the provisions on the basis of [Union] competence, but establishes the obligation entirely on the basis of Article [4 (3) TEU]"[558], its repeated reference to exclusivity in the context of the duty of cooperation further adds to doubts about the procedural character of the Member States' obligations in these cases.

Firstly, the Court emphasised that the duty was "of general application and does not depend either on whether the [Union] competence concerned is exclusive"[559]. Secondly, it recalled that Member States may be subject to "special duties of action and abstention" after a Commission proposal has been

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Cremona, "Defending the Community Interest", 164; E. Neframi, "The Duty of Loyalty", 350.

553 M. Cremona, "Defending the Community Interest", 164.

554 See Case C-433/03, Opinion of Advocate General Tizzano, paras 94-96.

555 Ibid. at para 84, emphasis added.

556 A. Delgado Casteleiro and J. Larik, "The Duty to Remain Silent", 533.

557 Ibid., emphasis added.

558 E. Neframi, "The Duty of Loyalty", 350.

559 See Case C-433/03, para 64.

submitted to the Council, citing expressly Case 804/79 *Commission v. UK*, which concerned an area of exclusive EU competence[560]. Finally, the Court declared that

> "the fact that the German Government has undertaken to denounce the bilateral agreements as soon as a multilateral agreement has been concluded on behalf of the [Union] does not establish that the obligation of loyal cooperation laid down in Article [4 (3) TEU] has been complied with."[561]

If, however, the "extreme remedy"[562] of denunciation was not sufficient for the Member States to fulfil their obligations under Article 4 (3) TEU, it is questionable whether a higher degree of consultation with the Commission would have been enough for Germany and Luxembourg to comply with their duty of cooperation.

B. The start of concerted action as the end of concurrent competence

From the *Commission v. Germany* and *Commission v. Luxembourg* cases, it emerges that even *before* the Union has exercised a competence by entering into an international agreement in an area of shared powers, the Member States may be subject to strict restraints on the exercise of their competence. This is the case where "concerted action" has been initiated at Union level. If these cases are understood as imposing an obligation to *abstain* from acting, the application of Article 4 (3) TEU effectively amounts to exclusive EU competence in an area of shared powers. In her Opinion in the *Vietnam WTO Accession* case[563], Advocate General Kokott actually confirmed that the start of concerted action may entail an obligation of abstention.

In the *Vietnam WTO Accession* case, which was rendered obsolete in the wake of the entry into force of the Lisbon Treaty and was consequently withdrawn, it was not the maintenance in force of an agreement which was challenged but the exercising of voting rights within an international organisation of which both the EU and the Member States were active members. The WTO Agreements had been concluded as mixed agreements after the Court of Justice found shared competence to exist for parts of the subject matters covered[564]. However, the Treaty of Nice had subsequently added two paragraphs to the legal basis for Union action in the field, Article 133 (5) and (6) EC, which became redundant after the entry into force of the Lisbon Treaty[565].

[560] Ibid. at para 65.
[561] Ibid. at para 72.
[562] Joined Opinion of Advocate General Tizzano in the *Open Skies* Cases, para 115, emphasis added.
[563] Case C-13/07 *Commission v. Council (Vietnam WTO Accession)*, Opinion of Advocate General Kokott [2009], case withdrawn.
[564] See Chapter 1, Opinion 1/94.
[565] The Lisbon Treaty explicitly identifies the CCP as an exclusive EU competence which, according to Article 207 (1)

Article 133 (5) EC established an express competence for the Union to negotiate and conclude international agreements in the fields of trade in services and commercial aspects of intellectual property, providing that where an international agreement included provisions for which unanimity was required for the adoption of internal rules or where it related to a field in which the Union had not yet exercised its powers, the Council had to act unanimously when negotiating and concluding such an agreement.

The Commission and the Council were in dispute as to whether approval for Vietnam's accession in the appropriate WTO body fell within Union competence under Article 133 (5) EC or whether the involvement of the Member States was required in accordance with Article 133 (6) EC. The latter provision was aimed at circumscribing the Union's powers to conclude trade agreements with regard to certain service sectors. An agreement containing "provisions which would go beyond the Union's internal powers" required, according to paragraph 6, the "common accord of the Member States".

In line with the wording of this provision, the representatives of the Member States meeting within the Council adopted a common position of the Member States which included paragraph 6 as a legal basis. The Commission, however, brought proceedings against the Council, claiming that the subject-matter fell within the sole competence of the Union.

The question of what type of competence Article 133 (5) and (6) created for the EU had not yet been addressed by the Court when the Commission brought the action. Thus, Advocate General Kokott first considered the Council's claim that it was possible for the Member States to voluntarily be involved alongside the Council within the framework of Article 133 (5) EC, even if paragraph 6 was not applicable. Assessing whether the competence under paragraph 5 could be classified as non-exclusive, the AG came to the conclusion that the powers conferred by Article 133 (5) EC in respect of trade in services and the commercial aspects of intellectual property were not parallel, but concurrent. As the Court had stated in *Kramer*, the Member States could in such a situation exercise their competence only to the extent that the Union had not exercised its own powers[566].

It was, however, (current) Article 4 (3) TEU which determined the point in time from which concurrent competence under Article 133 (5) EC came to an end and the Member States were no longer capable of exercising their powers[567]. Relying on the Court's findings in *Commission v. Luxembourg* and *Commission v. Germany*, AG Kokott specified that the start of concerted Union

TFEU, now covers all trade in services and commercial aspects of intellectual property. The reservation of Member State competence in the field of trade in services has, therefore, disappeared.

[566] Case C-13/07 *Commission v. Council (Vietnam WTO Accession)*, para 75-76.

[567] Ibid., para 79.

action consisted in the adoption of a decision authorising the Commission to act externally[568]. From the moment in which the Council had established a Union position on Vietnam's accession to the WTO, the Member States were bound by their duty not to jeopardise the EU's actions on the international level, even if those actions "'only' involved acting in parallel alongside the [Union]"[569]. It was consequently the Union alone which was entitled to take measures under Article 133 (5) EC, unless paragraph 6 made additional Member State action "absolutely necessary"[570]. A lengthy analysis of that paragraph revealed that the Union was indeed not entitled on its own to approve Vietnam's accession to the WTO, but required involvement of the Member States in the form of concerted voting conduct[571].

Although, as we saw earlier, there had been doubts in the legal literature whether Article 4 (3) TEU was capable of imposing more than a procedural obligation in an area of shared competence, AG Kokott confirmed in the *Vietnam WTO Accession* case that the start of concerted Union action was indeed sufficient to impose a duty of abstention:

> "The adoption of a decision authorising the Commission to act externally on behalf of the [Union] marks the start of concerted [Union] action. Such a decision may thus *already* give rise to a duty on the Member States to *refrain* from acting […]"[572].

Article 2 (2) TFEU provides that the Member States remain entitled to act until the Union exercises its competence. Therefore, if the procedural duty of cooperation

> "is to be kept conceptually separate from pre-emption, as a restraint on but not a denial of Member State competence, this obligation is best seen as a 'best efforts' obligation rather than requiring Member States to refrain from acting until agreement is reached."[573]

Conversely, this means that where the Member States are required to refrain from acting, the duty of cooperation operates in a way tantamount to exclusive Union competence. Such an application of Article 4 (3) TEU in an area of shared competence would then be in line with a *conservative fidelity* view of federalism. The *conservative* approach, in fact, seeks to achieve an optimal position for the Union to freely exercise its powers by *preventing* conflict between pre-existing international obligations and EU law from the outset[574].

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[568] Case C-13/07 *Commission v. Council*, Opinion of Advocate General Kokott, para 80.
[569] Ibid., para 82.
[570] Ibid.
[571] Ibid., para 169.
[572] Case C-13/07 *Commission v. Council*, Opinion of Advocate General Kokott, para 80, emphasis added.
[573] M. Cremona, "Defending the Community Interest", 168.
[574] D. Halberstam, "Of Power and Responsibility", 778, see further the Introductory Chapter.

In *Commission v. Germany* and *Commission v. Luxembour*g[575], it remained debatable whether Article 4 (3) TEU was applied in order to *prevent* such a conflict, by way of a duty of abstention, or whether the aim was merely to minimise the potential for conflict by way of coordinated action. However, even if we assume that the Member States concerned were indeed under an obligation to refrain from acting, it is not apparent that the intention was to calm policy disputes by suppressing political dissent as the *conservative fidelity* approach would[576]. Indeed, the duty of cooperation was applied with a view to avoiding that Member State action jeopardised the conclusion of an envisaged Union agreement. To that end, the two Member States were required to "proceed in accordance with, or at least without prejudice to, [Union] requirements" by following the guidelines of the Council and the Commission[577].

By contrast, AG Kokott's reasoning in the *Vietnam WTO Accession* case reflects a desire to enforce "harmony even where there is none"[578]. Although, as the AG established, the situation concerned an area of shared competence, independent Member State action was only permissible if there was a "compelling need" for it[579]. The coherence and consistency of the Union's representation at international level was "endangered particularly in the field of external trade", as the Member States' involvement would "weaken the [Union's] negotiating position vis-à-vis its trading partners"[580]. In the absence of any concrete risk for the consistency and coherence of the Union's international representation, AG Kokott reasoned on the *general* assumption that any form of Member State involvement would be likely to jeopardise the effectiveness of EU action. Her approach, therefore, expresses the desire to achieve an optimal allocation of powers between the institutional actors and to maintain this hierarchy of the system permanently[581]. In the case of external trade, this optimal allocation excluded Member State participation from the outset. In the words of the Advocate General,

> "[t]he more players there are on the European side at international level, the more difficult it will be to represent effectively the interests of the [Union] and its Member States outwardly, in particular vis-à-vis significant trading partners."[582]

Like the *conservative fidelity* view, this reasoning seeks to counteract the diversity of policies and

[575] Case C-266/03 *Commission v. Luxembourg* and Case C-433/03 *Commission v. Germany.*
[576] See D. Halberstam, "Of Power and Responsibility", 773.
[577] See Case C-433/03, Opinion of Advocate General Tizzano, paras 94 and 95.
[578] D. Halberstam, "Of Power and Responsibility", 778.
[579] Case C-13/07 *Commission v. Council*, Opinion of Advocate General Kokott, para 81.
[580] Ibid.
[581] See D. Halberstam, "Of Power and Responsibility", 821.
[582] Case C-13/07 *Commission v. Council*, Opinion of Advocate General Kokott, para 72.

interests inherent in a divided power system[583].

IV. The supervening exercise of Union competence and bilateral Member State agreements

An exercise of Union competence not only triggers the duty of cooperation, but also leads to the applicability of the obligation to ensure the primacy of Union rules. If Member States conclude an international agreement, they are subject to a duty of *compliance*, which may be enforceable before the Court of Justice. As the Court of Justice established early on, in situations of conflict between national and EU law, "a *subsequent* unilateral act incompatible with the concept of the [Union] cannot prevail"[584]. How, then, does this compliance obligation change in case an incompatibility arises not as a result of a subsequent *national* act, but because of a supervening exercise of *Union* powers?

In this regard, it has been argued that

> "[o]ften the Member States concerned will not really be to blame for such a conflict arising. Because of the evolutionary of the [Union], the state of [Union] law in the future is not easy to predict. A Member State may conclude a treaty relating to a particular subject matter years before the [Union] develops a comprehensive policy in the same subject area and before the development of such a policy could have been foreseen."[585]

In order to take due account of the inconvenient situation caused by a supervening exercise of Union powers, it has sometimes been suggested in the legal literature that the Treaties ought to include a provision, similar to Article 351 TFEU[586], which respects the rights of third countries having concluded agreements with Member States on a subject-matter not yet covered by Union rules[587]. However, the Court of Justice does not accept such a limitation of the primacy of EU law. An entire

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583 See D. Halberstam, "Of Power and Responsibility", 736.

584 Case 6/64 *Costa v. ENEL* [1964] ECR 585.

585 R. R. Churchill and N. G. Foster, "European Community Law and Prior Treaty Obligations of Member States: The Spanish Fishermen's Cases" (1987) 36 Int'l & Comp. L. Q. 504 at 519.

586 Article 351 (1) TFEU provides: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."; see further Chapter Three.

587 See e.g. P. Daillier, "Le Régime de la Pêche Maritime des Ressortissants Espagnols sous Juridiction des États Membres de la CEE (1977-80)" (1982) 256 R.M.C. 187, 190-191; E. U. Petersmann and C. Spennemann, "Kommentar zu Artikel 307", in H. Von der Groeben and J. Schwarze (eds.), *Kommentar zum EU/EG Vertrag*, Vol. 4, 6th Ed. (Nomos 2004) at Rn 6; H. Krück, Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften (Springer Verlag 1977) at 136.

regime of Union law may be superimposed on prior national commitments, affecting Member States' contractual relations with third countries (A.). Where superimposition is excluded, Member States are nevertheless required to ensure the primacy of Union rules, even if this necessitates the denunciation of an international agreement (B.).

A. The "superimposition" of EU law on prior Member State obligations

The problem of the relationship between Union law and agreements concluded by individual Member States before the Union develops a comprehensive policy in a given field was first addressed *Arbelaiz-Emazabel*[588]. The case, which formed part of a series of judgments which came to be known as the "Spanish Fishermen cases"[589], concerned a preliminary ruling from the French Cour de Cassation, brought before a lower court against the master of a Spanish fishing vessel. In November 1977, he was caught fishing in French waters without the licence required by EU Regulation No. 2160/77. The Regulation laid down interim measures for the conservation and management of fishery resources in relation to vessels of non-member countries pending the conclusion of an international agreement on the matter with Spain. The regional court found that Arbelaiz-Emazabel was authorised to fish in French territorial waters by the General Agreement on Fishing concluded between France and Spain in 1967, which had been signed within the framework of the 1964 London Fisheries Convention.

As Spain had not yet acceded to the Union at the time, the situation concerned a bilateral agreement between an EU Member State and a non-member country. The question arose whether Union law would prevail over agreements of one of its Member States or whether it would yield to the rights of the third state under international law. The referring Court asked the Court of Justice whether the relevant EU Regulations were valid and, if so, whether they could be enforced against Spanish

[588] Case 181/80 *Procureur Général v. Arbelaiz-Emazabel* [1981] ECR 2961.

[589] See Case 812/79 *Attorney General v. Juan C. Burgoa* [1980] ECR 2787; Joined Cases 180 and 266/80 *Tomé v. Procureur de la République* and *Procureur de la République v. Yurrita* [1981] ECR 2997; Joined Cases 138 and 139/81 *Directeur des Affaires Maritimes du Littoral du Sud-Ouest v. Marticorena-Ortazo and Parada* [1982] ECR 3819; Case 181/80 *Procureur Général v. Arbelaiz-Emazabel* [1981] ECR 2961. The Spanish Fishermen cases centred around the prosecution in national courts of the Member States of Spanish fishermen found fishing in Union waters without the appropriate licenses. In each case, the national court submitted questions to the Court of Justice under (current) Article 267 TFEU. What sets *Arbelaiz-Emazabel* apart from the foregoing cases, however, is where the Spanish fishermen involved were found fishing. In *Burgoa*, *Tomé and Yurrita* and *Arantzamendi-Osa*, the fishermen were fishing beyond the 12-mile limit covered by the 1964 Convention and the 1967 Franco-Spanish agreement. Only *Arbelaiz-Emazabel* was fishing within the 12-mile zone before the signature of the EU-Spain agreement. Thus, in the latter case, the 1964 Convention and the 1967 bilateral agreement were relevant and posed a potential problem about their compatibility with the relevant EU regulations. See further, R. R. Churchill and N. G. Foster, "European Community Law and Prior Treaty Obligations of Member States", 518-519.

nationals.

The Court of Justice first acknowledged that the situation involved a Member State commitment undertaken before the Union had adopted any measures in the field of sea fishing. Therefore, France was able to validly conclude both the London Convention and the subsequent bilateral agreement with Spain. However, the parties to the Convention had foreseen the possibility of supervening EU legislation in the area, as they had explicitly regulated that no provision of the Convention was to prevent the establishment of a special regime in matters of fisheries as between EU Member States[590]. In addition, Spain had accepted that its rights under the London Convention and the bilateral agreement would be substituted by a new agreement with the Union[591].

Against this background, the Court had no difficulty in finding that the bilateral exchange of notes between France and Spain was valid during the interim period in which the Union had not yet legislated, but was subordinate to EU law once such rules entered into force. It came to the conclusion that the contested Regulation fell within the framework of the relations between Spain and EU concerning conservation measures, adding that those relations "replaced" the prior international obligations existing between Member States in the field[592]. It seemed to base its reasoning on the "progressive development" of the relations from the adoption of Union measures in 1976 with the concurrence of the Spanish authorities until the conclusion of the EU-Spain agreement[593]. Therefore, Spanish fishermen were not able to rely on the French-Spanish agreement in order to prevent the application of the interim regulations adopted by the Union[594].

This doctrine of "superimposition", as it was termed by the Court of Justice in *Burgoa*[595], has been described as "very significant"[596]. In *Kramer*, the Court had confirmed that the Member States' power to act unilaterally in the field of fisheries came to an end once the Union had exercised its competence in the field. In *Arbelaiz-Emazabel*, the Court went one step further:

> "It now becomes clear that the development of such a policy entails not only the loss on the part of the Member States of the power to act unilaterally vis-à-vis third states, but also the superimposition of the [Union] regime on pre-existing international commitments. [Union] law may, as it develops, have an

590 Case 181/80 *Procureur Général v. Arbelaiz-Emazabel*, paras 12-13.
591 Ibid., para 18.
592 Ibid., paras 29 and 30.
593 See Ibid., para 30; for an assessment of the compatibility of this reasoning with international law, see R. R. Churchill and N. G. Foster, "European Community Law and Prior Treaty Obligations of Member States", 514-518.
594 Case 181/80 *Procureur Général v. Arbelaiz-Emazabel*, para 31.
595 Case 812/79 *Attorney General v. Juan C. Burgoa*, para 24.
596 M. Cremona, "The Effect in Community Law of Treaty Obligations between Member and Non-Member States of the European Community" (1983) City of London Law Review 65 at 70.

effect on the treaty-relationships between the Member States and third States."[597]

Moreover, *Arbelaiz-Emazabel* confirmed that the protection of prior Member State agreements foreseen in Article 351 (1) TFEU could not be applied by analogy to post-accession agreements, contrary to what is sometimes argued[598]. Advocate General Capotorti considered the argument that

> "in the case of conventions on matters over which the [Union] did not start to exercise its powers for some time after the entry into force of the Treaty, the institutions' obligation not to obstruct observance of the commitments entered into by one or more Member States towards one or more non-member States should extend also to the commitments entered into before such powers were exercised."[599]

However, he rejected such a suggestion, on the ground that the wording of Article 351 TFEU conflicted with such an interpretation and the provision was "of an exceptional nature", in that it ensured on a *temporary* basis the observance of incompatible obligations towards non-member States[600]. It could, therefore, not serve as a basis for permanently maintaining in force any incompatible *post*-accession agreements. In any event, it is doubtful that the analogous application of Article 351 (1) TFEU to the facts of this case would have led to a different outcome. Indeed, the doctrine of superimposition was developed in *Burgoa*[601], a case in which Article 351 (1) TFEU was found to apply. It appears, therefore, that the doctrine "does not make any distinction between agreements concluded prior to the entry into force of the [EU Treaties] and those concluded subsequently"[602]. As a general rule, Union legislation may be superimposed on a Member State regime and take precedence over national rules once the Union has developed its own policy in a particular field, regardless of when the Member State regime came into being.

B. The duty to denounce incompatible agreements

It follows that bilateral relations between Member States may be replaced by the exercise of Union competence, irrespective of the fact that the Member States concerned "will not really be to blame for such a conflict arising"[603]. In fact, it may be argued that in these situations, a conflict of

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[597] Ibid.

[598] See e.g. E. U. Petersmann and C. Spennemann, "Kommentar zu Artikel 307", Rn 6; P. Daillier, "Le Régime de la Pêche Maritime", 190-191; R. R. Churchill and N. G. Foster, "European Community Law and Prior Treaty Obligations of Member States", 523.

[599] Opinion of AG Capotorti in Case 181/80 *Procureur Général v. Arbelaiz-Emazabel* [1981] ECR 2961 at 2988.

[600] Ibid.

[601] Case 812/79 *Attorney General v. Juan C. Burgoa*, para 24.

[602] M. Cremona, "The Effect in Community Law of Treaty Obligations between Member and Non-Member States of the European Community", 70.

[603] R. R. Churchill and N. G. Foster, "European Community Law and Prior Treaty Obligations of Member States", 523.

obligations does not even arise in the first place:

> "[I]n terms of competence, […] the issue of *compatibility* with [Union] law cannot arise, for the obvious reason that supervening external competence of the [Union] in matters previously regulated by agreements of the Member States does not suffice in itself to render those agreements incompatible with the rules and principles governing the division of powers."[604]

Instead, supervening exclusive competence operates irrespective of a conflict of obligations and "irrespective of any positive or negative action on the part of the Member States"[605]. It is noteworthy in this regard that *Arbelaiz-Emazabel* concerned a special situation, in which Spain was already in negotiations over accession to the Union and a process of approximation to EU law standards had already been initiated. In fact, the superimposition of EU legislation on the pre-existing Member State regime in this case must be deemed to conform to the wishes of both the Union and the *third* state involved, since under Article 58 of the Vienna Convention on the Law of the Treaties, two or more parties to an agreement may conclude a new agreement with the effect of suspending its operation *inter se*[606].

However, it appears that even where the superimposition of EU rules does *not* conform to the wishes of third states, Union law leaves the parties to the agreement no choice. As AG Tizzano argued in the *Open Skies* cases[607], in such a case, the "only possible remedy would be for the Member States' agreements to be *replaced* with an agreement concluded by the [Union] itself"[608]. If the replacement of pre-existing obligations is not possible, "there is nothing the Member States [can] do, short of resorting […] to the extreme remedy of *denouncing* the earlier agreements"[609].

The Court of Justice confirmed the existence of such a duty of denunciation in *Commission v. Belgium*[610]. When EU Regulation No. 4055/86 on the principle of freedom to provide services between Member States and between Member States and third countries came into force in 1987, a

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[604] Joined Opinion of Advocate General Tizzano in the *Open Skies* Cases [2002] ECR I-09427, para 113, emphasis added.

[605] C. N. K. Franklin, "Flexibility vs. Legal Certainty: Article 307 EC and Other Issues in the Aftermath of the Open Skies Cases", 96.

[606] See M. Cremona, "The Effect in Community Law of Treaty Obligations between Member and Non-Member States of the European Community", 71.

[607] Case C-466/98 *Commission v. UK* [2002] ECR I-9427, Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519, Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575, Case C-469-98 *Commission v. Finland* [2002] ECR I-9627, Case C-471/98 *Commission v. Belgium* [2002] ECR I-9681, Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741, Case C-475/98 *Commission v. Austria* [2002] ECR I-9797, Case C-476/98 *Commission v. Germany* [2002] ECR I-9855.

[608] Joined Opinion of Advocate General Tizzano in the *Open Skies* Cases [2002] ECR I-09427, para 115, emphasis added.

[609] Ibid., emphasis added.

[610] Case C-170/98 *Commission v. Belgium* [1999] ECR I-5493.

number of cases concerning cargo-sharing arrangements in liner shipping in bilateral agreements concluded by Member States with third countries were brought before of the Court of Justice against Belgium and Luxembourg[611]. The cases related both to the delays in the Member States' adjustment of the contested agreements and to the introduction of new agreements which were incompatible with Union law. Thus, some of the agreements concerned had been concluded before the EU had exercised its competence in the field[612].

According to Articles 3 and 4 (1) of Regulation No. 4055/86, existing cargo-sharing agreements were to be phased out or adjusted in accordance with the provisions of the Regulation. The Commission contended that if the adjustment or phasing out was not accepted by the other contracting party, "the only available means of terminating the infringement would be to *denounce* the Agreement"[613].

In its defence, Belgium sought to rely on two arguments. The first one related to the existence of such a duty to denounce. In its view, denunciation of an entire agreement was "*disproportionate*, given that it contains a series of provisions which are not contrary to [Union] law"[614]. By its second argument, Belgium sought to demonstrate that it had used its *best efforts* to achieve the elimination of all incompatibilities. Political developments in the other contracting state made it impossible to arrange re-negotiations of the contested clause, which led Belgium to postpone the finalisation of the adjustments until the political situation allowed for further negotiations. Therefore, the Member State felt that "it always showed that it was *willing* to amend the provisions at issue"[615].

In the past, the prevailing opinion in the legal literature had merely recognised "an obligation on the part of the Member States to *attempt* in good faith to release themselves from incompatible obligations"[616]. Thus, in cases of conflict between supervening Union legislation and Member State agreements, "there would seem to be an obligation on individual Member States, arising from Article [4 (3) TEU], to *seek* to eliminate such conflicts"[617].

The Court of Justice, however, left no doubt that being "willing" to eliminate incompatibilities was not sufficient to justify a failure to fulfil obligations, but that EU law imposed an obligation of *result*.

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611 Joined Cases C-176/97 and C-177/97 *Commission v. Belgium & Luxembourg* [1998] ECR I-03557, Case C-170/98 *Commission v. Belgium* [1999] ECR I-5493, Joined Cases C-171/98, C-201/98 and C-202/98 *Commission v. Belgium and Luxembourg* [1999] ECR I-5517.

612 Case C-170/98 *Commission v. Belgium*; C-201/98 and C-202/98 *Commission v. Belgium and Luxembourg*.

613 Case C-170/98 *Commission v. Belgium*, para 34, emphasis added.

614 Ibid., para 36.

615 Ibid., para 37, emphasis added.

616 See J. Klabbers, "Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States" (2001) 26 EL Rev 187 at 195, emphasis added.

617 R.R. Churchill and N.G. Foster, "European Community Law and Prior Treaty Obligations of Member States", 519, emphasis added.

In that respect, a difficult political situation in a third state was no valid excuse, as a Member State was ultimately under a duty to denounce the agreement if it encountered difficulties which made adjustment of an agreement impossible[618]. The Court, therefore, found that by failing to denounce or adjust its cargo-sharing agreements so as to provide for fair, free and non-discriminatory access by all Union nationals to the cargo operations between a third country and a Member State, Belgium had failed to fulfil its obligations under Articles 3 and 4 of the Regulation.

V. Assessment – The duty of cooperation vs. the *AETR* principle

Although, as mentioned earlier, it has sometimes been suggested in the legal literature that the Treaties ought to include a provision which protects international Member State commitments entered into prior to an exercise of Union competence, the Court of Justice does not in any of the cases discussed in this chapter acknowledge that the Member States may not always be to blame for incompatibilities with EU law which arise only *after* the Union has exercised its powers. The Court does not appear to assume that prior obligations entered into by the Member States could be entitled to any kind of protection, for example safeguards comparable to those offered by Article 351 (1) TFEU.

On the contrary, the Court displays a broad understanding of the applicability of Article 4 (3) TEU to this type of situation, both as far as the scope of the loyalty obligations and the actual restraints imposed are concerned. In comparison with the *AETR* principle discussed in the previous chapter, the scope of the loyalty obligations flowing from Article 4 (3) TEU is expanded in a temporal sense (A.), while the restraints imposed are expanded to include a pre-emptive effect even in areas of shared competence (B.). Against this background, the question arises of the relationship between the duty of cooperation and *AETR* exclusivity in this context (C.).

A. The scope of EU law – The temporal dimension of Article 4 (3) TEU

In Chapter One, we saw how the exercise of Union competence may have the effect of precluding further Member State action in a given area. In the present chapter, however, it became apparent that Article 4 (3) TEU can give rise to loyalty restraints even *before* the Union has exercised its

[618] Case C-170/98 *Commission v. Belgium*, para 42.

competence. This is the case where concerted action has been initiated at EU level.

Although *Kramer* concerned an area of law in which Union exclusivity had been envisaged, the Member States remained allowed to act – albeit subject to the duty of cooperation – until the EU had actually occupied the field by exercising its competence. In *Commission v. United Kingdom*, however, the Court made clear that once the transitional period for the exercise of Union competence had expired, EU competence automatically became exclusive, even in the absence of any actual exercise of powers. In this context, it is noteworthy that the failure on the part of the Union to exercise its competence was not due to inaction, but resulted from the fact that the UK had impeded the adoption of the necessary measures in the Council. Irrespective of the Council's failure to adopt the Commission's proposal, the submission of the proposal represented "the point of departure for *concerted [Union] action*"[619]. The start of concerted action was, under the circumstances, sufficient to impose an obligation on the Member States to refrain from acting. The Court of Justice refused to reward the UK's strategy of blocking the exercise of Union competence so it would continue to be allowed to adopt national measures, and linking exclusive EU powers to the start of concerted action was the only way not to yield to the Member State's pressure. The notion of "start of concerted action" was, therefore, born out of *necessity* in order to overcome the deadlock caused by the UK itself.

However, restraints based on the start of concerted Union action were not to remain confined to exceptional situations of necessity. Subsequent case law has shown not only that the concept can apply in areas of *shared* competence, but also that its applicability is not dependent on a finding that the exercise of Union competence is impeded. In *Commission v. Germany* and *Commission v. Luxembourg*, the start of concerted action entailed (at least) a strict procedural obligation for the Member States involved. Here, the conclusion of the envisaged EU agreement was not at risk. Instead, the rationale behind the application of the "start of concerted action" doctrine was to avoid future incompatibilities with bilateral Member State agreements once the Union decided to actually exercise its competence. Similarly, the Member State action contested in the *Vietnam WTO Accession* case would not have jeopardised the exercise of Union powers in the field, as the EU remained free to vote on the subject-matter as it wished. In both the *Commission v. Germany* and *Commission v. Luxembourg* cases and the *Vietnam WTO Accession* case, the "start of concerted action" doctrine was applied merely "in order to *facilitate* the [Union's] performance of its task"[620],

[619] Case 804/79 *Commission v. United Kingdom*, para 28, emphasis added.

[620] See Case C-13/07 *Commission v. Council (Vietnam WTO Accession)*, Opinion of Advocate General Kokott, para 80; Case C-433/03 *Commission v. Germany*, paras 65-66; Case C-266/03 *Commission v. Luxembourg*, paras 59-60.

and not with a view to remedying the fact that an exercise of EU competence was impossible.

In addition to finding that the Member States may be subject to loyalty restraints *before* the Union has exercised its competence, the Court further expanded the temporal scope of Article 4 (3) TEU so as to provide for *AETR* pre-emption also in situations which did not concern the conclusion of an agreement, but which related to action within the framework of an agreement *after* it had been concluded. In its submissions to the Court of Justice in the *Greek IMO* case, Greece had claimed that the *AETR* doctrine was intended to regulate competence issues concerning the conclusion of international agreements instead of being aimed at governing the exercise of rights and obligations arising from those commitments[621]. The Court, however, disagreed, finding that the Member State had violated its Union law obligations by initiating a procedure which could lead to the adoption of international rules with the potential of affecting EU law.

We thus see that the scope of EU law restraints in this context is determined by the *risk* of future legislative developments and their impact on the Union legal order. Where there is the prospect of the Union exercising its competence – either by negotiating an EU agreement or by adopting Union measures in a given area – the Member States' freedom of action is circumscribed by Article 4 (3) TEU[622]. To that end, it is not necessary that the prospect of an exercise of Union competence consists in an emerging exclusive EU power, as was the case in *Commission v. United Kingdom*. Indeed, the exercise of Member State competence "may also be circumscribed by a prospect of the exercise of the Union competence that is less specific, should the action to be taken by the Union be sufficiently foreseeable"[623], as evidenced by the *Commission v. Germany* and *Commission v. Luxembourg* cases, the *Vietnam WTO Accession* case and the *Greek IMO* case.

B. The obligations flowing from Article 4 (3) TEU – What difference does the nature of EU competence make?

The Court of Justice has not only adopted a generous approach to the circumstances under which loyalty restraints may arise, but also to the scope of the obligations themselves. As we saw, the exercise of a Union competence may entail a number of different restraints on existing Member commitments and on the Member States' freedom to exercise their international powers.

Emphasis added.

621 See Case C-45/07 *Commission v. Greece*, Opinion of Advocate General Bot, para 17.

622 See also J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 545.

623 Ibid. at 558.

Where the exercise of EU powers leads to incompatibilities between an existing Member State agreement and Union rules, the Member States are required to eliminate such incompatibilities and ensure the primacy of EU law. The Court of Justice leaves no doubt that the obligation on the Member States is of a substantive nature, requiring more than a Member State's best efforts to bring national commitments into line with Union rules. Where necessary, Article 4 (3) TEU may then entail an obligation to denounce an entire agreement.

In those cases in which the Union interest requires the imposition of loyalty restraints even before an EU competence has been exercised, the Member States are subject to the duty of cooperation. In a field which has been "reserved" to the powers of the Union, but no exercise of Union competence has taken place yet, the *Kramer* and *Commission v. United Kingdom* cases have shown that the Member States are under particular procedural obligations to act as "trustees" of the Union interest. This includes using "all the political and legal means at their disposal" in order to ensure the participation of the Union in international agreements in which EU action is impossible[624].

Once a Union policy has been developed in a given field, such an exercise of EU competence not only entails the loss of Member State power to act internationally, as confirmed by *Kramer* and *Commission v. United Kingdom*. In addition, *Arbelaiz-Emazabel* showed that it may under certain conditions lead to the superimposition of the Union regime on existing commitments of the Member States entered into with third states.

The most striking expansion of the scope of loyalty restraints, however, is noticeable in areas of shared competence. The *Commission v. Germany* and *Commission v. Luxembourg* cases were ambiguous as far as the precise scope of Article 4 (3) TEU was concerned, laying down that the loyalty obligation entailed "at least" a duty of coordination, *if not* of abstention[625]. By contrast, the *Vietnam WTO Accession* case was straightforward in this respect. AG Kokott had no difficulty finding that the start of concerted action at EU level necessarily led to a duty on the Member States to abstain from any action whatsoever. Although Article 133 (5) EC did not confer exclusive competence upon the Union but provided for concurrent powers, the Member States were no longer capable of exercising their remaining powers once the Council had adopted a position in the area. The duty imposed by the Council decision entailed complete abstention from action, even if the action was coordinated with the Commission. For the Member States, this effectively means that the adoption of a Council position is equivalent to a finding of *AETR* exclusivity.

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[624] Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1305, paras 44/45.

[625] See above.

In that respect, the case does not differ from the *Greek IMO* case. Here, the Member States were also restrained in the exercise of their rights of participation in an international organisation to the point of not being allowed to act without the express authorisation of the Union. The important difference between the two cases, however, concerns the nature of EU competence at issue. While the *Vietnam WTO Accession* case involved an area of shared competence, it was undisputed in the *Greek IMO* case that Greece had acted in a field in which Union competence had become exclusive by virtue of the *AETR* principle. However, in the latter case, the existence of exclusive EU competence did not automatically imply that the disputed unilateral measure could be considered to affect Union rules. In fact, as we saw earlier, the finding that the *AETR* principle extended also to the active participation of a Member State in an international organisation required a direct link between the scope of the exclusivity principle and the scope of the EU Regulation at issue. Far from suggesting that *any* non-contractual Member State action was capable of triggering *AETR* pre-emption, the Court emphasised that the national measure had set in motion a procedure which could lead to the adoption of new regulatory standards binding on the Union.

The *Vietnam WTO Accession* case, by contrast, did not concern the adoption of new rules, but merely the exercise of voting rights within an international organisation. As no *AETR* competence was found to exist, an assessment whether common rules could be affected by national action was not necessary. However, this did not stop AG Kokott from establishing that the Member States were equally precluded from acting as they would have been had the *AETR* principle been found to apply. In the *Vietnam WTO Accession* case, and perhaps also in *Commission v. Germany* and *Commission v. Luxembourg*, the Member States were thus no less restrained in their freedom to act than Greece was in the *Greek IMO* case.

It emerges that where there is the prospect of an exercise of Union competence, the Member States may be subject to a duty to refrain from acting, regardless of whether the area in question is covered by shared or by exclusive competence. Against this background, we can assume that the contested national measure at issue in the *Greek IMO* case would have constituted a breach of Article 4 (3) TEU even if Union competence had not been exclusive[626].

C. The relationship between AETR *exclusivity and the duty of cooperation*

If, as it appears, the duty of cooperation in this context operates in a way identical to that of *AETR*

[626] See also Case C-246/07 *Commission v. Sweden* [2010] ECR I-3317, discussed in Chapter Five.

pre-emption, the question arises of the relationship between the two legal instruments. On the one hand, we saw that both obligations flowing from Article 4 (3) TEU may preclude Member State action once the Union has exercised its powers or an exercise thereof is imminent. Furthermore, the Court of Justice has emphasised that the duty of cooperation is "of general application" and may consequently be invoked regardless of the nature of Union competence[627].

On the other hand, this does not mean that there may not be additional reasons to invoke the *AETR* principle over the duty of cooperation. As AG Tizzano pointed out in *Commission v. Germany*, where a competence is exclusive, it is clear that "it is above all and directly the infringement of that competence that can be challenged"[628]. Consequently, "any reference to Article [4 (3) TEU] is merely a corollary"[629]. The Commission's motivation for alleging an infringement of *AETR* exclusivity as the first head of claim when bringing an action against a Member State can be explained by the fact that the duty of cooperation does not hinder the Member States in the exercise of their treaty-making powers, provided that national action "is in accordance with the common interest and follows the line desired and decided by the [Union] bodies"[630], whereas pre-emption applies also in absence of any contradictions between the envisaged agreement and the affected EU rules[631]. Indeed, where a competence is deemed exclusive, it is "easier" to challenge the legality of the Member State conduct, regardless of "whether or not any adverse effect in relation to the exercise of that competence was actually established"[632].

In areas of exclusive Union competence, in fact, the Member States' freedom to act is confined to those situations in which the EU expressly authorises them to act on its behalf. As the Court of Justice made clear in the *Greek IMO* case and *Commission v. United Kingdom*, where the Union enjoys exclusive powers, Member States may act through the Union or not act all. This applies even in case the Union institutions themselves fail to fulfil their duty of cooperation to reach a common position, as we saw in the *Greek IMO* case. Indeed, it is in this respect that *AETR* exclusivity differs substantially from the duty of cooperation. In a field covered by exclusive EU powers, the absence of a Union position does not legitimise national action. By contrast, in areas of shared competence, the Member States remain entitled to exercise their competence freely *until* the Union decides to act. It should be assumed that once the Union has acted, the Member States are under a best efforts

[627] Case C-433/03 *Commission v. Germany*, para 64.
[628] Case C-433/03, Opinion of Advocate General Tizzano, para 79.
[629] Ibid.
[630] See Case C-433/03, Opinion of Advocate General Tizzano, para 83.
[631] See e.g. Opinion 2/91, part IV, para 25; see also Chapter One.
[632] Case C-433/03, Opinion of Advocate General Tizzano, para 71.

obligation to reach a common position[633]. However, the *Commission v. Germany* and *Commission v. Luxembourg* cases and the *Vietnam WTO Accession* case, as we saw, cast doubt on the validity of this assumption. If the start of concerted action at Union level has the effect of precluding any kind of Member State action in the field, the duty of cooperation can no longer be distinguished from the *AETR* principle. On the contrary, it even takes pre-emption one step further, since the duty of cooperation is broader both in terms of substantive and in terms of temporal scope. While the *AETR* principle becomes operative once the Union has actually exercised a competence, we saw that the duty of cooperation may circumscribe the Member States' freedom of action even where there is only a *prospect* of legislative developments. At the same time, an exclusion of Member State action does not require a detailed test assessing the extent to which common rules would be affected by a given national measure. In such cases, a *conservative* approach to fidelity is, as discussed earlier, undeniable.

VI. The Member States' freedom to act under the CFSP

The *AETR* principle, as we saw in Chapter One, does not apply to the CFSP. For the same reason, neither Article 4 (3) TEU nor the CFSP-specific loyalty obligation under Article 24 (3) TEU can have the effect of precluding any further national action once a Union initiative has been started. Substantive obligations of result are, therefore, excluded in this context. This does not mean, however, that the Member States cannot be subject to specific restraints of a procedural nature.

The key provision concerning procedural restraints in the CFSP is found in Article 32 TEU, which lays down that

> "Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach"[634].

This obligation forms part of the concept of systematic cooperation referred to in Article 25 TEU. In the CFSP area, it still serves as the key concept, in the absence of which it would be impossible for

[633] See M. Cremona, "Extending the Reach of the AETR Principle", 766: "If the duty of co-operation in cases of shared competence is ultimately a best efforts obligation, then a point may come where a Member State, having tried without success to establish a [Union] common position, is entitled to act as long as the [Union] has not yet acted.

[634] Further, paragraph 1 lays down: "Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity."

the Union to define and implement a foreign and security policy[635]. The systematic cooperation referred to in Article 25 TEU is to be established in accordance with Article 32 TEU, which contains the actual procedural obligations.

Article 32 TEU thus represents "a necessary *pre-legislative* procedure"[636]. In the same way that the duty of cooperation under Article 4 (3) TEU may restrain Member State action in other policy areas even before an exercise of Union competence has taken place, Article 32 TEU imposes certain procedural obligations prior to the adoption of a common strategy in CFSP matters. In fact, the wording of Article 32 TEU suggests that the CFSP-specific duty is even wider in its temporal scope than its counterpart discussed above. While Article 4 (3) TEU becomes operative only once concerted action has been initiated at Union level, the CFSP obligation applies independently of any expression of interest to act on the part of the Union. It is sufficient that a given matter relates to foreign and security policy and is of general interest. The obligation encapsulated in Article 32 TEU is, therefore, "not subject to any limitation regarding time or space"[637].

However, the content of the obligation under Article 32 TEU appears to differ from the duty of cooperation. While Article 4 (3) TEU entails an obligation to coordinate national action with the Union institutions, which may require the Member States to act only when authorised to do so or to refrain from acting whatsoever, in the CFSP context, the Member States are merely obliged to "consult" one another within the European Council and the Council and to "show mutual solidarity"[638]. It is only once a "common approach" has been defined at Union level that, according to the wording of Article 32 (2) TEU, an obligation to "coordinate" Member State activities arises[639].

Nevertheless, it must be assumed that the consultation obligation laid down in paragraph one establishes more than a mere duty to acknowledge other Member States' positions. Article 32 (1) TEU speaks of consultation with a view to "determin[ing] a common approach" and of "convergence" of Member States' actions. This more material obligation is in line with the scope of the consultation obligation under general international law. It is assumed that this obligation imposes at least a duty to deliberate on a given subject-matter with the aim of reaching a common stance[640]. It

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635 R. Wessel, "The Multilevel Constitution of European Foreign Relations", 179.

636 Ibid., emphasis added.

637 Ibid.

638 See Article 32 TEU, paragraph 1.

639 Article 32 TEU para 2 reads: "When the European Council or the Council has defined a common approach of the Union within the meaning of the first paragraph, the High Representative of the Union for Foreign Affairs and Security Policy and the Ministers for Foreign Affairs of the Member States shall coordinate their activities within the Council".

640 W. Möstl, *Die Konsultationsverpflichtung im Völkerrecht* (Schmitt & Meyer 1967) at 68.

may, however, also be understood to go a step further, prohibiting states from taking a position until this position has been discussed with the other partners[641].

Once a common EU position has been adopted, the Member States are under an obligation to coordinate their activities within the Council[642]. This obligation applies also in international organisations and at international conferences, particularly where the Union is not in the position to represent itself. In those circumstances, the Member States "shall uphold the Union's positions in such forums"[643]. Thus, the Member States may, similarly to their obligations under Article 4 (3) TEU, be required to act as "trustees of the Union interest" also in the context of the CFSP, even if such an obligation cannot entail a duty to act solely through a common Union position or not to act all. Compliance with the obligation to uphold a Union position in international fora is not left to the discretion of the Member States themselves. Instead, it is the High Representative for Foreign Affairs who organises this coordination[644].

The scope of the issues to which the systematic cooperation applies is not subject to any limitations, but Article 32 TEU immediately qualifies the obligation by adding the words "of general interest". The European Council has not, however, provided any further specification of what is to be understood by "general interest". This seriously limits the information and consultation obligation in the first part of the article. On the one hand, the Member States are required to consult one another, while on the other hand they are given the individual discretion to decide whether or not a matter is of general interest. Indeed, although there is an obligation to try and reach a Union position, in case of failure, the Member States remain free to pursue their own national policies[645].

Nevertheless, it must be assumed that the Member States are indeed under a general obligation to inform and consult one another. Through the information and consultation obligation in Article 32 TEU, the Member States ordered themselves to use it as one of the means to attain the CFSP objectives in Article 24 TEU. This assumption is supported by Article 24 (3) TEU which lays down a more general loyalty obligation. The CFSP-specific loyalty obligation is furthermore reinforced by the duty of sincere cooperation under Article 4 (3) TEU. Like Article 4 (3) TEU, the CFSP provision contains a *positive* obligation for the Member States to actively develop the Union's policy, including the obligation to "work together to enhance and develop their mutual political solidarity". Moreover,

641 T. Jürgens, *Die gemeinsame Europäische Aussen- und Sicherheitspolitik* (Carl Heymanns Verlag 1994) at 210.
642 Article 32 (2) TEU.
643 Article 34 (1) TEU.
644 Article 34 (1) TEU.
645 C. Hillion and R. Wessel, "Restraining External Competences of EU Member States under CFSP", in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law - Constitutional Fundamentals* (Hart Publishing, 2008) 79 at 102.

the *negative* obligation not to undertake "any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations" is also comparable to Article 4 (3) TEU.

The absence of any legal enforcement mechanisms notwithstanding, the Court of Justice has repeatedly made it clear that the duty of loyalty is of general application and reaches beyond limitations imposed by Treaty provisions and questions of competence. Thus, Member States are bound by a duty of loyalty even when operating in spheres of national competence[646]. As the Court held in *Commission v. Luxembourg*, the "duty of genuine cooperation is of general application and does not depend either on whether the [Union] competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries"[647].

The broad construction of the duty of loyalty by the Court does not, however, automatically imply the extension of the Court's findings concerning Article 4 (3) TEU to the CFSP. Yet, it has become apparent that the Court relies on its interpretation of provisions from the first pillar in order to interpret corresponding provisions from other areas of EU law. Thus, the Court suggested in the *Pupino*[648] judgment that the duty of loyalty under Article 4 (3) TEU was not limited to the first pillar:

> "It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions [...]"[649].

In the view of the Court, recourse to legal instruments with effects similar to those provided for by the former EC Treaty was necessary in order to "contribute effectively to the pursuit of the Union's objectives"[650]. The Court thus suggested that the principle of sincere cooperation had a binding effect on the Member States in relation to the Union as a whole. This broadly-framed reasoning has led commentators to deduce that the principle of sincere cooperation should also, *a fortiori*, apply in the context of the CFSP[651].

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646 See e.g. case C-124/95 *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England* [1997] ECR I-81 at paras 24-25; case C-235/87 *Annunziata Matteucci v. Communauté Française de Belgique* [1988] ECR 5589 at para 19.

647 Case C-266/03 *Commission v. Luxembourg*, at para 58.

648 Case C-105/03 *Pupino* [2005] ECR I-5285.

649 Ibid., para 42.

650 Ibid., para 36.

651 See A. Dashwood, "The Law and Practice of CFSP Joint Actions", in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing 2008) 53 at 56; C. Hillion and R. Wessel, "External Competences of EU Member States under CFSP", 93.

Another argument brought forward in support of the applicability of the Court's interpretation of Article 4 (3) TEU across all areas of EU law relates to the principle of consistency and coherence of the Union's external action laid down in Article 13 TEU. The duty of loyalty under Article 4 (3) TEU, in fact, plays a key role in ensuring such coherence[652]. A failure to comply with the requirement of consistency and coherence could thus be considered a breach of the duty of sincere cooperation.

In sum, the obligation of systematic consultation under Article 32 TEU operates as a procedural restraint on the exercise of the Member States' foreign policy powers. Its binding effect is reinforced by the CFSP loyalty obligation under Article 24 (3) TEU and the general duty under Article 4 (3) TEU. It imposes an obligation to consult with the other Member States before a national position can be adopted in a given matter. While Article 32 TEU does not entail a substantive obligation for the Member States to refrain from acting, it may nevertheless preclude them from taking a national position until this position has been discussed with the other Member States.

[652] See also C. W. Hermann, “Much Ado about Pluto? The 'Unity of the Legal Order of the European Union' revisited, EUI Working Papers, RSCAS 2007/05; C. Hillion, “Tous pour un, un pour tous! Coherence in the External Relations of the European Union”, 10.

Chapter Three

Incompatibilities with Pre-Existing Obligations – What Role for Article 351 TFEU?

I. Introduction

Chapter Two showed all three different obligations flowing from Article 4 (3) TEU – pre-emption, the duty of cooperation and the principle of primacy – at work when the Union exercises its competence. The Court's approach to primacy was particularly straightforward, leaving no doubt that Article 4 (3) TEU required more than a procedural obligation of best efforts to bring national commitments into line with Union rules. Where the exercise of EU powers led to incompatibilities between an existing Member State agreement and Union rules, the Member States were under a substantive obligation to eliminate all incompatibilities.

In contrast with the general obligation laid down in Article 4 (3) TEU, Article 351 (1) TFEU (ex Article 307 (1) EC) recognises the special nature of conflicts between the Member States' obligations towards the Union and their obligations towards third countries stemming from agreements concluded *prior* to joining the EU. Article 351 (1) TFEU provides that the rights and obligations arising from pre-accession agreements "shall not be affected by the provisions of the Treaties".

In spite of the sweeping wording of paragraph 1, the Court of Justice has repeatedly confirmed that Article 351 TFEU cannot be considered an exception to the principle of primacy of Union law. Instead, Member States are required to take all appropriate steps to eliminate incompatibilities between pre-existing international commitments and EU rules. The present chapter examines the Court's approach in its interpretation of Article 351 TFEU towards balancing the interests of the Union, the third countries and the Member States in these situations. How does the Court define the notion of "incompatibilities"? The more broadly this notion is interpreted, the more easily the duty to take the appropriate steps will be triggered. Has the Court mostly followed a *liberal fidelity* approach to pre-existing agreements by recognising incompatibilities to exist only where prior international obligations are in actual conflict with specific obligations under EU law? Or does the Court go further than that, aiming at the *avoidance* of conflicts, irrespective of whether Union powers have actually been exercised or not? A finding that a conflict between prior obligations and power-

conferring Treaty norms is enough to impose a duty to eliminate incompatibilities would then indicate a *conservative* view of fidelity. Once an incompatibility has been established, the question arises what obligations this entails. Does Article 351 TFEU merely impose an obligation of best efforts to *take* all appropriate steps, or does it require a specific *result* after all appropriate steps have been taken? Are Member States obliged to denounce entire agreements which are *not* incompatible with EU law merely because they contain a single inconsistent clause, or is it sufficient if Member States exhaust all other, less intrusive means at their disposal?

In order to shed some light on these questions, the following section will provide a brief introduction to Article 351 TFEU and the rights and obligations it seeks to protect. The remainder of the chapter then focuses on paragraph 2 of Article 351 TFEU. It first examines the Court's approach towards the scope of incompatibilities (Section III.), before looking at the appropriate steps to eliminate such incompatibilities (Section IV.). The Chapter then attempts to assess whether the Court has settled on a balanced approach between the establishment of an incompatibility and the obligations that such a finding entails (Section V.). The Chapter proceeds to transpose the findings of the present chapter to the broader context of Article 4 (3) TEU, addressing the question of whether Article 351 TFEU serves an additional purpose which could not be achieved by relying on the general duty of loyalty (Section VI.). Finally, the Chapter examines to what extent the duty to eliminate incompatibilities with pre-existing obligations may apply in the area of the CFSP (Section VII.).

II. The scope of Article 351 TFEU

A. Article 351 (1) TFEU – An expression of the respect for Member States' obligations under international law

When the founding Member States established the EU, they would have been, as Advocate General Mischo pointed out in *Commission v. Portugal*[653], in a position to "releas[e] themselves from the obligation to fulfil earlier commitments to non-member countries" without the need to resort to any other procedure by the mere act of "creating a regional international organisation – and that is what the European Union certainly is under international law [...]"[654]. Nevertheless, they chose to honour

[653] Case C-62/98 *Commission v. Portugal (merchant shipping agreement with Angola)* [2000] ECR I-5171 and Case C-84/98 *Commission v. Portugal (merchant shipping agreement with the FRY)* [2000] ECR I-5215.

[654] Joined Opinion of Advocate General Mischo in Cases C-62/98 and C-84/98 *Commission v. Portugal* [2000] ECR I-

their prior international obligations by incorporating the international law principle of *pacta sunt servanda*[655] into the Treaties.

This principle is reflected in Article 351 (1) TFEU. The provision lays down that the rights and obligations arising from agreements concluded by Member States prior to their membership of or accession to the Union "shall not be affected by the provisions of the Treaties"[656]. Article 351 (1) TFEU thus "acknowledges that the establishment of the [Union] cannot possibly run counter to one of the foundations of public international law"[657]. Therefore, it can be considered an expression of the principle of conformity of the European integration process with public international law[658].

The respect for prior Member State commitments under international law, however, is limited to the interests of *third* countries. As the Court of Justice has made clear from the outset, Member States automatically waive all rights granted by pre-existing international agreements once they become members of the EU so as not to affect compliance with their obligations towards the Union:

> "[B]y virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty a state ipso facto gives up the exercise of these rights to the extent necessary for the performance of its *new* obligations"[659].

The Court furthermore made clear that "rights" within the meaning of paragraph one referred to the rights which *non-member* countries derived from prior agreements and that the provision was by no means intended to protect the interests of the *Member States* under those agreements[660]. Indeed, the purpose of Article 351 (1) TFEU was exclusively to ensure that Union law did not have any adverse effects on the "*duty* of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder"[661]. This interpretation was consolidated in *Evans and Macfarlan Smith*[662], where the Court held that "when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Union law, the Member State must refrain from adopting such a measure"[663]. Similarly,

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5171, at para 57.

655 See H. Wehberg, "Pacta Sunt Servanda" (1959) 53 AJIL 775.

656 Article 351 (1) TFEU reads: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."

657 P. Koutrakos, *EU International Relations Law* (Hart Publishing 2006) at 301.

658 E. U. Petersmann and C. Spennemann, "Kommentar zu Artikel 307", Rn 1-3.

659 Case 10/61 *Commission v. Italy* [1962] ECR 1, emphasis added.

660 Ibid.

661 Case 812/79 *Attorney General v. Juan C. Burgoa* [1980] ECR 2787, para 8, emphasis added.

662 Case C-324/93 *The Queen v. ex parte Evans Medical Ltd and Macfarlan Smith Ltd. Secretary of State for Home Department* [1995] ECR I-563.

663 Ibid., para 32.

Article 351 (1) TFEU can only be invoked if the third country is actually in a position to rely on the contested obligation. A Member State is hence not able to justify any violations of Union law by invoking a pre-existing international obligation which does not grant rights to third countries[664].

B. Article 351 (2) TFEU – The duty to eliminate incompatibilities

The respect for international law and the rights of non-member countries expressed in Article 351 (1) TFEU, should not, however, be understood to mean that Member States are entitled to give precedence to incompatible international obligations to the detriment of EU law. As Article 351 TFEU is "of general scope" and applies to all prior international agreements[665], it has sometimes been misunderstood by Member States as "a *carte blanche* that allows them to continue to fulfil their international obligations arising out of their pre-accession treaties by disregarding conflicting [EU] law obligations"[666].

Indeed, Article 351 TFEU does not provide for an exception to the principle of primacy of EU law[667], even if it has at times been interpreted as recognising that prior Member State obligations do prevail over conflicting Union rules[668]. This is because the second paragraph "adds a [Union] law layer" to the provision[669]. It requires that Member States "take all appropriate steps to eliminate the incompatibilities established"[670]. Article 351 (2) TFEU thus reflects the *ratio* of the principle of sincere cooperation laid down in Article 4 (3) TEU. Whilst the latter provision refers to all appropriate measures necessary for the fulfilment of Member States' Treaty obligations in general, Article 351 (2) TFEU specifies that in the context of pre-accession agreements, the fulfilment of Member States' obligations consists in the elimination of all incompatibilities with EU law. Article

664 Joined Cases C-364/95 and C-365/95 *T. Port GmbH & Co. v. Hauptzollamt Hamburg-Jonas* [1998] ECR I-1023, see paras 60-64.

665 Case 812/79 *Attorney General v. Juan C. Burgoa*, para 6.

666 N. Lavranos, "Protecting European Law from International Law", 267.

667 P. Koutrakos, *EU International Relations Law*, 301; compare, however, AG Tizzano in Case C-216/01 *Budejovicku Budvar v. Rudolf Ammersin GmbH* [2003] ECR I-13617 at para 150: "Article [351 TFEU] […] recognises the supremacy of the international obligations arising from agreements concluded by a Member State before its accession to the [Union]".

668 See e.g. AG Tizzano in Case C-216/01 *Budejovicku Budvar v. Rudolf Ammersin GmbH* at para 150: "Article [351 TFEU] […] recognises the supremacy of the international obligations arising from agreements concluded by a Member State before its accession to the [Union]".

669 P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*" (2009) 46 C.M.L. Rev. 2059 at 2060.

670 Article 351 paragraph 2 TFEU provides: "To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude."

351 (2) TFEU can therefore be considered to "specifically implemen[t]" the principle of sincere cooperation[671].

The fact that paragraph 2 constitutes a *lex specialis* of the general duty of loyalty laid down in Article 4 (3) TEU is also evident in the Court's interpretation of Article 351 TFEU[672]. The Member States' duty to facilitate the achievement of the Union's tasks has been construed in such a way as to limit their freedom to honour pre-existing international obligations in a two-fold manner. The first concerns the scope of the notion of incompatibility. If the Court adopts a broad interpretation of the Union rules that can give rise to incompatibilities with prior Member State agreements, the duty to take all appropriate steps to eliminate such incompatibilities is triggered more easily (see Section III.). Once an incompatibility has been established, the central question is how the conflict with EU law is to be resolved (see Section IV.). Where the Court adopts a broad approach to both the scope and the nature of the restraint, the ensuing obligations become particularly onerous for the Member States.

III. Incompatibilities within the meaning of Article 351 (2) TFEU

The concept of incompatibilities within the meaning of Article 351 (2) TFEU "is logically composed of two conflicting elements: a Treaty obligation and an obligation arising from an agreement with a third country"[673]. The provision itself does not, however, specify what type of Union rules the notion of "Treaty obligation" refers to. It leaves open whether there has to be a direct conflict with a rule of secondary EU law, or whether Article 351 (2) TFEU is broader in scope, covering also conflicts with power-conferring provisions of the Treaties.

A. The existence of incompatibilities linked with the precision of EU rules

The Court of Justice gave a first answer to what type of Union rules may trigger the application of Article 351 (2) TFEU in *Levy*[674]. This preliminary reference sought to ascertain whether the referring Court was under a duty to give effect to the ILO Convention on night work for women in industry

671 Opinion of AG Tizzano in Case C-216/01 *Budejovicku Budvar v. Rudolf Ammersin GmbH* at para 150.
672 P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2066.
673 Joined Opinion of Advocate General Maduro in Cases C-205/06 and 249/06, para 18.
674 Case C-158/91 *Ministère public and Direction du travail et de l'emploi v. Levy* [1993] ECR I-4287.

concluded prior to the entry into force of the EU Treaties and subsequently transposed into national law, even if it was allegedly incompatible with a Council directive on equal treatment of men and women at the workplace. The Commission maintained that a prior obligation was not capable of granting a Member State the right not to observe the principle of equal treatment of men and women which formed an integral part of the general principles of EU law.[675] The Court confirmed that the principle did indeed constitute a fundamental right recognised by the Union legal order, but it pointed out that "its implementation, even at Union level, has been gradual, requiring the Council to take action by means of directives"[676]. And those directives allowed, at least temporarily, for certain derogations from the principle of equal treatment.

The Court concluded that in the absence of any precise Union rules in the area, it was "not sufficient to rely on the principle of equal treatment in order to evade performance of the obligations which are incumbent on a Member State in that field under an earlier international agreement [...]"[677]. A conflict between a pre-accession Member State agreement and a general principle of Union law, therefore, did not *per se* trigger the obligation under Article 351 (2) TFEU to eliminate all incompatibilities. The Member States were required to take all appropriate steps only if the general principle had been implemented at Union level to such an extent that it no longer allowed for any derogations.

The Court thus adopts a narrow view of the notion of incompatibilities, making the existence of conflicts within the meaning of Article 351 (2) TFEU dependent on the precision of the Union legislation promulgated with a view to implementing the general principle. It links the Union interest at stake with the protection of the fundamental *acquis* of the EU[678]. In the specific case, however, the protection of the *acquis* did not necessitate a finding of incompatibility. As long as EU law remained general in nature, the Member States were free to adopt and maintain more stringent measures.

B. Incompatibilities with power-conferring provisions – The BITs *cases*

The question of what type of rules may trigger the duty to eliminate incompatibilities arose again in the recent *BITs* cases[679]. In its first rulings concerning bilateral investment treaties (BITs), the Court was asked to assess the compatibility with Union law of certain provisions contained in BITs entered

675 Ibid., para 15.
676 Ibid., para 16.
677 Case C-158/91 *Levy*, paras 16 and 17.
678 L. Azoulai, "The Acquis of the European Union and International Organisations" (2005) 11 E.L. Rev. 196 at 213.
679 Case C-205/06 *Commission v. Austria* [2009] ECR I-1301, Case C-249/06 *Commission v. Sweden* [2009] ECR I-1335 and Case C-118/07 *Commission v. Finland* [2009] ECR I-10889.

into by a number of third countries with Austria, Sweden and Finland prior to their respective accession to the EU. The Commission brought infringement proceedings against the three Member States for a failure to take the appropriate steps to remove the alleged incompatibilities between Union and the bilateral investment agreements. Specifically, the BITs contained standard transfer clauses granting investors of either party the right to transfer freely and without delay the capital connected with their investment[680]. The Commission contended that these transfer clauses failed to reserve the possibility for the Member States to restrict the free movement of capital to and from third countries under certain circumstances as envisaged by Article 57 (2) EC (now Article 64 (2)-(3) TFEU), Article 59 EC (now Article 66 TFEU) and Article 60 EC (now Articles 75/215 TFEU)[681].

Unlike the Court's previous judgments on prior Member State agreements, where the existence of incompatibilities with EU law was undisputed, the point of contention in the *BITs cases* lay in the absence of a direct conflict between the pre-accession agreements and Union legislation. Indeed, no Union measures had yet been adopted on the basis of Articles 64, 66 and 75/215 TFEU, nor had they even been envisaged. Any alleged incompatibility with Union measures was therefore hypothetical as long as the Council had not adopted any rules. However, as Advocate General Maduro pointed out in the cases against Sweden and Austria[682], the question of whether Article 351 TFEU could be invoked in favour of the two Member States would arise only if a *conflict* between the BITs and the Treaties was found to exist[683].

The Commission contended that a hypothetical incompatibility with Union law was enough to trigger the application of Article 351 TFEU. Put differently, it argued that a conflict with Treaty articles was in itself sufficient to impose on the Member States concerned an obligation to amend the agreements. In the Commission's opinion, such a Treaty obligation could be based on secondary legislation envisaged in the Treaty articles, on the Treaty articles themselves, and on the duty of loyal cooperation[684].

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680 As AG Maduro pointed out, these clauses are "standard, and indeed central" to most BITS, see Joined Opinion of AG Maduro in Cases C-205/06 and C-249/06, para 6.

681 The Treaties allow for certain restrictions on capital movements. The Council may adopt measures on the movement of capital to or from third countries involving direct investment under Article 64 (2)-(3) TFEU, it may adopt temporary safeguard measures pursuant to Article 66 TFEU where movements of capital to or from such countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, and finally, it is empowered by Articles 75/215 TFEU to take urgent measures on the movement of capital and payments with regard to third countries on the basis of a joint action relating to the common foreign and security policy.

682 The Opinion on Case C-118/07 *Commission v. Finland* instead was delivered by AG Sharpston. Despite slight differences in their reasoning, both Advocate Generals concur in their final recommendations to the Court.

683 Joined Opinion of Advocate General Maduro in Case C-205/06 *Commission v. Austria* and Case C-249/06 *Commission v. Sweden*, para 12.

684 Ibid., paras 17 and 21.

i. Incompatibilities in the absence of legislation

Advocate General Maduro dismissed the Commission's first claim, stating that no incompatibilities were possible in the absence of any legislation on the subject-matter. Turning to the argument that Treaty articles themselves imposed an obligation on the Member States, he noted that Articles 64, 66 and 75/215 TFEU merely empowered the Union to act. Only if the three provisions conferred exclusive competence on the EU would they have the two-fold effect of empowering the Union while simultaneously imposing on the Member States the obligation to refrain from legislating[685]. The competence in this case, however, was shared[686]. As any other interpretation would turn the three provisions at issue into areas of exclusive competence, they could not by themselves lead to any incompatibility within the meaning of Article 351 TFEU[687].

The Court of Justice concurred with the Advocate General as far as the outcome of the cases was concerned, finding that Austria and Sweden had failed to fulfil their obligations under Article 351 (2) TFEU to take the appropriate steps to eliminate incompatibilities with Union law. In a concise judgment, the Court asserted the incompatibility of the transfer clauses contained in the BITs with Articles 64, 66 and 75/215 TFEU. As the agreements did not reserve the right for the Member States to fulfil their obligations as members of the Union, the three Treaty provisions were not capable of being applied immediately and were, therefore, rendered ineffective[688].

Unlike the Advocate General, however, the Court chose to base the failure to fulfil obligations on a breach of Article 351 TFEU. Interestingly, it made no mention of the fact that the incompatibility with Union law was only hypothetical. Neither did the Court explain where the conflict lay which triggered the application of Article 351 TFEU or, more generally, shed light on the question which type of Union rules were capable of imposing obligations on the Member States to rectify a conflict of rules. It made no distinction between Treaty articles which merely empower the Union to act and others which preclude all further Member State action, as AG Maduro had done. The mere fact that the effectiveness of Union legislation could be impaired if it ever came into existence was sufficient to impose on the Member States a duty to adjust the pre-accession agreements. What the Court effectively suggested was that Treaty provisions were *per se* sufficient to trigger the obligation take

685 Ibid., paras 25-28.

686 Since the entry into force of the Lisbon Treaty, this is no longer the case. Article 207 TFEU explicitly incorporates foreign direct investment into the Common Commercial Policy, granting the Union exclusive competence in the field.

687 Joined Opinion of Advocate General Maduro in Case C-205/06 *Commission v. Austria* and Case C-249/06 *Commission v. Sweden*, paras 31 and 32.

688 See Case C-205/06 *Commission v. Austria*, paras 36-39.

appropriate steps under Article 351 (2) TFEU[689].

ii. The role of Article 4 (3) TEU in establishing an incompatibility

Not satisfied with the Commission's claim that hypothetical incompatibilities could be considered incompatibilities within the meaning of Article 351 TFEU, the Advocate General went on to examine whether any further obligations on the Member States could flow from the duty of loyalty laid down in Article 4 (3) TEU. Drawing a parallel with the Member States' obligations during the period for implementing directives in the internal Union sphere, AG Maduro found that the Member States were under an obligation not to frustrate any form of Union action, even if it involved a competence that would never be exercised. However, he was quick to underline that the possibility of a future conflict with Union legislation was not in itself enough to trigger the duty of loyalty. Only where the Union competence was of such a nature that international obligations of Member States were liable to "seriously compromise[...]" the effectiveness of future Union legislation could that duty come into play[690].

By contrast, the Court dismissed the line of argument based on Article 4 (3) TEU from the outset, arguing that reliance on the the loyalty obligation was not necessary in order to resolve the case[691]. Besides considerations of a procedural nature[692], the Court may have opted to avoid any of the problems related to the application of Article 4 (3) TEU which were subsequently highlighted in the legal literature.

The first point of contention concerns the exclusion of Article 351 TFEU in favour of applying Article 4 (3) TEU. There is no apparent reason why the general obligation should be relied on when a specific obligation is available[693]. Moreover, the argument that "there is only one instance where empowerment leads to an obligation: where the [Union] has exclusive competence"[694] is not supported by the wording of Article 351 TFEU or the context of the Treaties[695]. Indeed, his reasoning

[689] See also J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 552.

[690] Case C-205/06 *Commission v. Austria*, paras 33-43.

[691] Ibid., para 15.

[692] Several Member States pointed out that the Commission's line of argument had been set out belatedly in the proceedings, which would have required the Court to reopen the oral procedure. However, the Court found that it had sufficient information to make a ruling without recourse to the contested point of law (see e.g. *Commission v. Austria*, paras 12-15).

[693] P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2066.

[694] Joined Opinion of Advocate General Maduro in Case C-205/06 *Commission v. Austria* and Case C-249/06 *Commission v. Sweden*, para 28.

[695] P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2066.

links the applicability of Article 351 TFEU to the nature of Union competence[696]. The focus on the nature of the competence at issue, however, is misleading:

> "What was in dispute was not whether it was the Member States or the [Union] which ought to exercise the power in question, but whether the former's conduct prior to their accession would undermine the effectiveness of the exceptional measures which the latter may be called upon to take"[697].

The second problem raised by the Advocate General's application of Article 4 (3) TEU is related to a possible Member State duty to facilitate the exercise of Union competence. Drawing an analogy with Member States' obligations to implement directives, AG Maduro found that the Member States' duty not to compromise any form of Union action included also an obligation "to take all appropriate steps to prevent their pre-existing international obligations from jeopardising the *exercise* of [Union] competence"[698]. Such an obligation, in fact, goes beyond the duty to eliminate incompatibilities situated in the context of conflict of rules:

> "[T]he duty to facilitate the exercise of Union competence may also consist in the obligation to abstain from any action that could jeopardize the attainment of the objectives of the Treaty, the objective at stake consisting in what the exercise of the Union competence aims at"[699].

In fact, the AG's reasoning raises questions as to the boundaries of loyalty obligations in the context of Article 351 TFEU. It is reminiscent of the Court's statement in Opinion 1/2003 on the application of the *AETR* principle, where it held that

> "[i]t is necessary to take into account not only the current state of [Union] law in the area in question but also its *future* development, insofar as that is foreseeable at the time of that analysis"[700].

A duty not to jeopardise the exercise of Union competence as advocated by AG Maduro, therefore, not only recalls restraints based on *exclusive* EU powers, but it also raises the question to what extent the Member States are required to take the possible future evolution of Union external policy into account. Furthermore, the Advocate General's analogy with directives and the ensuing obligation to facilitate the exercise of Union competence has been criticised as being "of questionable use" on the external scene[701]. As the respective Member State obligations vary significantly in nature within the two separate settings, the transposition of the duty to facilitate the exercise of Union competence to

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696 Ibid.
697 Ibid., at 2067.
698 Joined Opinion of Advocate General Maduro in Case C-205/06 *Commission v. Austria* and Case C-249/06 *Commission v. Sweden*, para 42, emphasis added.
699 E. Neframi, "The Duty of Loyalty", 348.
700 Opinion 1/2003 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145, para 126, emphasis added.
701 P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2069.

the context of pre-accession agreements is "unclear and unnecessarily broad"[702].

iii. Safeguarding the "effectiveness" of Treaty provisions

What emerges from the Court's rulings in these cases is that neither the general obligation under Article 4 (3) TEU nor the question of competence are relevant for resolving incompatibilities between EU law and pre-existing Member State obligations, even if the conflict at issue is of a hypothetical nature. What is decisive in the *BIT*s cases is the *effectiveness* of the Union rules aimed at restricting the movement of capital or payments to or from third countries. Contrary to what AG Maduro argued, Article 351 TFEU appears to be sufficient to establish a conflict between prior international Member State commitments and possible future EU measures.

However, the Court of Justice did not specify how broad the notion of protection of the "effectiveness" of Treaty provisions was to be understood, limiting itself to the finding that the possibility of a future conflict with EU rules was sufficient to impose restraints on the Member States in these cases. It established that Austria, Sweden and Finland were under an obligation to take steps "designed to eliminate the *risk* of conflict with measures liable to be adopted by the Council [...]"[703]. Suddenly, the Member States' obligations under Article 351 (2) TFEU no longer included only the duty to take all appropriate steps to remove incompatibilities with EU law, but apparently also to remove all *risks* of incompatibilities. Advocate General Maduro, by contrast, had been careful to emphasise that the mere possibility of any future conflict with Union legislation and its objectives was not enough to jeopardise the effectiveness of those provisions. As he pointed out, "[i]f every such possibility had to be eliminated there would no longer be a shared competence, but an exclusive one"[704].

There is thus a fundamental need to circumscribe the application of the effectiveness rationale underlying the Court's approach in these cases:

> To apply the logic of *effet utile* to any measure which the [Union] may choose to apply at any time in the future in order to impose a requirement on Member States to renegotiate or denounce their prior treaties produces effects *too onerous and drastic* on the basis of a criterion *too uncertain and*

[702] Ibid.

[703] Case C-205/06 *Commission v. Austria*, para 42, emphasis added; similarly, Case C-118/07 *Commission v. Finland*, para 33.

[704] Joined Opinion of Advocate General Maduro in Case C-205/06 *Commission v. Austria* and Case C-249/06 *Commission v. Sweden*, para 40.

indeterminate[705].

Such a broad reading of the duty to eliminate incompatibilities is indicative of a *conservative fidelity* approach. It expresses a desire to harmonise the regulatory interests of the Member States, enforcing "harmony even where there is none"[706]. A *liberal fidelity* approach in these cases would have called for the preservation of engagement between the Union and the Member States regarding the elimination of incompatibilities once they had actually arisen. The conservative vision, by contrast, seeks to *prevent* conflict between pre-existing international obligations and EU law from the outset by achieving an optimal position for the Union to freely exercise its powers conferred by Articles 64, 66 and 75/215 TFEU. Indiscriminately demanding that any risk of future conflict be eliminated would, as AG Maduro pointed out, be tantamount to granting the Union exclusive powers in the field. Such an understanding of the Member States' duties under Article 351 TFEU would indeed go "well beyond what can be reasonably justified by the goal of legal effectiveness"[707].

However, in the evaluation of the Court's reasoning in the *BITs* cases, it is important to take account of the specific character of the Union powers at issue. The rationale of the judgments "clearly relates to the requirement of effectiveness of measures that the Council may take in the specific circumstances provided for in Articles 64, 66 and 75/215 TFEU"[708]. Their effectiveness is determined by the speed with which they are applied. In fact, "[e]ven a minor delay would render them devoid of substantial impact and would, therefore, defeat the purpose of their adoption by the Council"[709]. Against this background, the scope of application of the Member State obligations imposed in the *BITs* judgments "should be a narrow one and confined to the specific nature of the provisions of Articles 64, 66 and 75/215 TFEU"[710]. Such a narrow reading based on the specific character of the provisions at issue can then be considered consistent with a *liberal fidelity* vision of federalism. Although it undoubtedly limits the Member States' freedom to exercise their retained competence, the duty to eliminate the risk of incompatibilities in these cases does not seek to calm policy disputes by suppressing political dissent as the *conservative fidelity* approach would[711]. Indeed, there is nothing in the *BITs* judgments which suggests that the mere possibility of a conflict with EU rules

[705] P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", emphasis added.
[706] D. Halberstam, "Of Power and Responsibility", 778.
[707] D. Halberstam, "Beyond Competences", 5.
[708] J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 553.
[709] P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2067.
[710] J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 553; in a similar vein, P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2068.
[711] See D. Halberstam, "Of Power and Responsibility", 773.

would generally render pre-existing international obligations incompatible with Union law or that the effectiveness of future EU measures should be assessed *in abstracto* when assessing the existence of incompatibilities[712]. The effective elimination of incompatibilities in these cases is simply not practicable when both the Member States and the Union may continue to act freely in the specific area, even if such action occurs in a spirit of "mutual obedience and coexistence"[713] as advocated by the *liberal fidelity* approach.

IV. Appropriate steps to eliminate incompatibilities

Contrary to what *Levy* and the *BITs* cases suggest, the point of contention in most cases before the Court of Justice involving pre-accession agreements is not the *existence* of an incompatibility, but rather the appropriate response to the incompatibility. As Article 351 (2) TFEU refers plainly to "appropriate steps", it is left to the Court of Justice to determine which obligations that provision may entail. The Court has established a number of different measures which constitute appropriate steps to eliminate incompatibilities, ranging from consistent interpretation at the less intrusive end of the scale to a duty of denunciation as the most onerous remedy.

A. Consistent interpretation

The duty of consistent interpretation was at the centre of the Court's reasoning in *Budvar*[714]. In this request for a preliminary ruling, the referring Court sought guidance on the applicability of a bilateral agreement concluded between the Czech Republic and Austria on the protection of designations of origin. The agreement was concluded prior to Austria's accession to the Union and was found to be incompatible with Union legislation implementing Article 34 TFEU (ex Article 28 EC). The agreement provided that the name "Bud" should be reserved for beer produced in the Czech Republic, while the Austrian defendant freely marketed an American beer by the same name in accordance with Union law.

With respect to Article 351 TFEU, the Court of Justice was asked whether the referring court was under a duty to apply the system of protection accorded under the pre-existing bilateral agreement,

[712] P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2069.
[713] See D. Halberstam, "Of Power and Responsibility", 822.
[714] Case C-216/01 *Budejovicku Budvar v. Rudolf Ammersin GmbH* [2003] ECR I-13617.

notwithstanding its incompatibility with Article 34 TFEU. In assessing the question of whether the Czech Republic had acquired rights which Austria was required to respect, the Court undertook a detailed analysis of the legal situation created by the break-up of the Czechoslovak Republic, but it ultimately referred the determination of whether Austria and the Czech Republic actually intended to apply the international law principle of the continuity of treaties to the bilateral agreements at issue back to the national court[715].

If the outcome of this investigation was affirmative, the court would then be under the obligation to take all appropriate steps to eliminate the incompatibilities of the bilateral agreement with the Treaty. More precisely, the referring court was to ascertain whether such incompatibilities could be avoided by interpreting the agreement "to the extent possible and in compliance with international law, in such a way that it is consistent with [Union] law"[716]. It was only if consistent interpretation proved to be impracticable that the national authorities were under an obligation to take further steps, such as adjusting the agreement or denouncing it, as a last resort. Pending the success of the outcome of one of the appropriate steps, the national court continued to be allowed to apply the bilateral agreement[717].

Two aspects of the judgment in *Budvar* are noteworthy. Firstly, the Court makes clear that the least intrusive method included in the list of appropriate steps to eliminate incompatibilities should, if possible, be the preferred option: if the prior Member State agreement can be interpreted in such a way as to make it consistent with Union law, then no further steps are required[718]. This is all the more relevant in light of the fact that the bilateral agreement did provide for a denunciation clause. In previous cases, the Court appeared to take the inclusion of such a provision into the treaty as an invitation to make use of it, as this was in accordance with the intention of the parties[719].

The second aspect that stands out in the judgment is that the Court of Justice assigns a key role to the national court as far as the determination of what constitutes the appropriate steps is concerned. It is not the Court of Justice, but the Austrian court which has to investigate the intentions of both parties to the agreement, reconcile the bilateral agreement with Union law, and interpret it in such a way that

[715] Ibid., paras 147-162.
[716] Ibid., paras 168-169.
[717] Ibid., para 169-172.
[718] Case C-216/01 *Budejovicku Budvar v. Rudolf Ammersin GmbH*, para 170: "If it proves impracticable to interpret an agreement concluded prior to a Member State's accession to the European Union in such a way that it is consistent with [Union] law *then*, within the framework of Article [351 TFEU], it is open to that State to take the appropriate steps, while, however, remaining obliged to eliminate any incompatibilities existing between the earlier agreement and the Treaty." (emphasis added).
[719] See below, e.g. the *Commission v. Portugal* cases, see also Case C-170/98 *Commission v. Belgium (re: maritime transport agreement with Zaire)* [1999] ECR I-5493.

it remains consistent with international law[720]. By encouraging national courts to resolve incompatibilities between EU law and pre-existing Member State obligations by seeking consistency between the two, the Court of Justice "places national courts right at the centre of the application of [Union] law in the area of external relations"[721].

The Court's choice to "render [...] national courts involved in the process of achieving the objectives" of Article 351 TFEU has been described as an "ingenious strategy"[722]. Indeed, the approach of fostering engagement among the Union and the Member States by attributing a central role to the national judicature in the process of resolving incompatibilities with EU law appears to be the epitome of a *liberal fidelity* vision of federalism. Instead of enforcing a strict hierarchy of norms, the Court accepts the continuation in force of conflicting international obligations, provided they are applied in a way compatible with Union rules. The emphasis is on reconciling the different interests at stake in the least onerous way possible, rather than on the uniformity of rules throughout the EU legal system. By contrast, the reinforcement of the role of Member State courts is not in itself indicative of a *liberal fidelity* approach. Indeed, a pre-accession agreement is not binding on the Union and, therefore, the Court of Justice cannot prescribe how Member States are to apply their obligations stemming from these agreements. On the contrary, the Member States courts are not only free to decide questions concerning the observance of obligations by themselves, but such questions rather "*must* be resolved by the national courts on the basis of an interpretation of the agreement and their own domestic legal order"[723]. Therefore, only the national courts are entitled to interpret international obligations assumed by Member States prior to accession. What the Court of Justice effectively does is provide the national court with a possibility of bringing a prior obligation in line with the Member States' obligations under Union law. It does not, however, absolve the Member States of their duty to eliminate all incompatibilities with EU legislation.

B. Adjustment of incompatible obligations

If consistent interpretation of a prior agreement proves to be impracticable, the Member States will

[720] It is interesting to note that after the case was remanded back to the national court, it went through another four instances within Austria before being referred, once again, to the Court of Justice (Case C-478/07 *Budvar v. Ammersin*, judgment of 8 September 2009). In the meantime, the accession of the Czech Republic to the EU had rendered all questions concerning the applicability of Article 351 TFEU obsolete.

[721] P. Koutrakos, *EU International Relations Law*, 310.

[722] See ibid. at 312.

[723] Case 812/79 *Attorney General v. Burgoa*, Opinion of Advocate General Capotorti, para 3, emphasis added.

seek to renegotiate or amend the agreement so as to make it compatible with Union law. Adjustment of an international agreement is always the preferred option over denunciation. As the majority of provisions of an agreement are most likely not in conflict with EU law, "adjustment allows the Member State to retain rights that it may enjoy pursuant to those clauses which are either compatible with [EU] law or to the application of which [EU] law is relevant"[724]. As such, adjustment is much less intrusive on the Member States' foreign policy interests than denunciation of the entire agreement.

Depending on the circumstances of a given case, adjustment of a pre-accession agreement may not always be easy to achieve, or even possible. If all attempts at re-negotiation or amendment have failed, the only conceivable solution for bringing the prior international obligation in line with EU rules is denouncing it. A duty of denunciation is, however, not undisputed in the legal literature. Before the Court of Justice pronounced itself on the duty of denunciation for the first time in *Commission v. Belgium*[725], there had even been disagreement as to whether such a duty could exist at all. It was argued that the "only one method available" in cases of incompatibility with Union rules was "negotiations with the party or parties to the agreement containing the incompatible provision"[726]. The reason why many legal scholars were reluctant to recognise a duty to denounce was that the termination of a prior agreement by a Member State is the most drastic of all measures available. Requiring that a Member State terminate "a whole agreement which only contains one or two clauses which are incompatible with [Union] law raises a problem of proportionality", as it encompasses also those parts of an agreement that are perfectly compatible with EU law[727]. Moreover, the application of such a measure is also constrained by international law[728].

C. Denunciation of agreements containing incompatible provisions

The Court resolved these uncertainties regarding the existence of a duty to terminate a pre-accession agreement in the *Commission v. Portugal* cases[729]. These infringement proceedings brought by the

[724] P. Koutrakos, *EU International Relations Law*, 305.

[725] Case C-170/98 *Commission v. Belgium*. This case did not, however, concern the application of Article 351 TFEU, since the agreement in question had been ratified after accession to the Union.

[726] P. Reuter, "Article 234", in Smit and Herzog (eds.), *The Law of the European Economic Community: A Commentary on the E.E.C. Treaty*, Vol. 6 (1993) at 296.30; see also Krück H, Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften (1977) at 132 and 133.

[727] C. Hillion, "Annotation: Case C-62/98, Commission v. Portugal, and Case C-94/98, Commission v. Portugal" (2001) 38 CML Rev 1269 at 1281.

[728] P. Koutrakos, *EU International Relations Law*, 305.

[729] Case C-62/98 *Commission v. Portugal* and Case C-84/98 *Commission v. Portugal*.

Commission under Article 258 TFEU (ex Article 226 EC) concerned two agreements on merchant shipping with Angola and the Federal Republic of Yugoslavia (FYR) respectively which had been concluded prior to Portugal's accession to the EU.

i. The duty to take all appropriate steps – an obligation of result

Portugal accepted that the disputed cargo-sharing clauses contained in the two agreements were contrary to Regulation 4055/86, as argued by the Commission. What it did not accept, however, was the Commission's contention that it had failed to fulfil its obligations under Articles 3 and 4 (1) of the Regulation and under the Treaties by neither denouncing nor adjusting the agreements with a view to providing non-discriminatory access by Union nationals to Portuguese cargo shares.

In its defence, Portugal argued that it had "spared no efforts" to remove the incompatibilities from the agreements, but the process of renegotiation had been slow due to the civil war in Angola and the break-up of the FRY into five successor states[730]. Pending the amendment of the agreements, Portugal had *de facto* waived its rights to rely on the cargo-sharing clauses contained in the bilateral agreements concluded with non-member countries and such clauses were no longer being implemented[731]. In short, it had used its "best endeavours" to remedy the conflict with EU law and that was all it was obliged to do, as there was "no absolute, unconditional obligation" to remove the incompatibilities and Article 351 (2) TFEU could not be interpreted as imposing an obligation on Member States to achieve a specified result[732]. An obligation to resort to denunciation, Portugal argued, only applied "exceptionally and in extreme cases", particularly in cases of "total incompatibility" with Union law and where it was not possible to safeguard the Union's interests by any other means[733].

Advocate General Mischo found that Portugal was indeed under an "indisputable obligation to achieve a result"[734]. However, in reaching that conclusion, the Advocate General avoided any reference to Article 351 TFEU. Instead, he relied exclusively on Article 3 and 4 (1) of the Regulation which provided for the adjustment and phasing out of existing cargo-sharing arrangements. AG Mischo was more hesitant in his formulation of the same duty under Article 351 TFEU, but he ultimately concluded that the "principle of uniform application" and the "principle of uniform

730 See Joined Opinion of Advocate General Mischo in Cases C-62/98 and C-84/98 [2000] ECR I-5171, paras 44 and 45.
731 Ibid., paras 11 and 13.
732 Ibid., para 40.
733 Ibid., para 43.
734 Ibid., para 53.

implementation" did not permit any other interpretation than that of a duty to achieve a result[735]. Denunciation was therefore one of the appropriate steps referred to in Article 351 (2) TFEU, but it was qualified to the extent that it "should be regarded as a last resort to be used after a reasonable period has elapsed and a less severe procedure has proved unsuccessful in achieving the result required by [Union] law"[736]. In light of the fact that both bilateral agreements contained explicit denunciation clauses and that the EU Regulation provided for reasonable time-limits for adjustment, the Advocate General proposed that the Court of Justice declare Portugal to be in breach of its obligations under the Regulation and under the Treaties.

The Court followed the Advocate General's proposal and confirmed that Article 351 (2) TFEU constituted an obligation of result. A duty to denounce, it held, was not a disproportionate measure, since "the balance between the foreign-policy interests of a Member State and the [Union] interest are already incorporated in Article [351] of the Treaty"[737]. The inclusion of express denunciation clauses by the two parties to the agreement meant that denunciation "would not encroach upon the rights which the Republic of Angola derive[d] from that agreement"[738]. Therefore, the Court concurred with the Advocate General that Portugal had failed to fulfil its obligations under Article 351 (2) TFEU to take all appropriate steps to eliminate the incompatibilities between the pre-accession agreement and Union legislation.

In sum, Portugal was found to be under an obligation to adjust prior agreements on the grounds of a violation of Articles 3 and 4 (1) of Regulation 4055/86 alone. However, the Court left no doubt that also in the absence of such provisions, Article 351 (2) TFEU would have imposed a more general obligation to eliminate incompatibilities with EU law. It was forceful in its rejection of the interpretation according to which Article 351 (2) TFEU was only a "best efforts" obligation. The Member States were free to choose the appropriate means at their disposal, but they were bound by the final result to be achieved.

ii. The duty to denounce – An unduly strict obligation?

The Court has been criticised for adopting an "unduly narrow" interpretation in *Commission v. Portugal* of the Member States' duty to take the appropriate steps to eliminate incompatibilities by

[735] Ibid., para 58 and 60.
[736] Ibid., para 69.
[737] See Case C-62/98 *Commission v. Portugal*, paras 48-50.
[738] Ibid., para 46.

confirming that the Member States were under an obligation to terminate prior agreements[739]. In light of the "prevailing academic opinion" at the time, the "vigour with which this interpretation is pronounced" raised some scholarly eyebrows[740].

When assessing the Court's approach in these cases, however, it is helpful to distinguish between two different aspects of the Court's reasoning. The first aspect concerns the confirmation by the Court that Article 351 (2) TFEU does indeed impose an *obligation of result* on the Member States. The second aspect relates to the fact that Portugal had waived its rights under the pre-accession agreements and was thus *de facto* in compliance with Union law. The former aspect concerns the *scope* of the obligation to achieve a certain result, while the latter aspect concerns the definition of the *result* to be achieved. It is submitted that a mixing-up of these two aspects may lead to premature criticism of the Court's confirmation of a duty to denounce.

a. The obligation to denounce

The prevailing opinion in the legal literature prior to the Court's decision in *Commission v. Portugal* recognised no more than "an obligation on the part of the Member States to attempt in good faith to release themselves from incompatible obligations"[741]. Against this background, the wording with which the Court made clear that the Member States had a choice as to the appropriate steps to be taken – but only so long as those steps led to the elimination of incompatibilities – was perceived as "fierce"[742]. The Court's approach was considered to unduly restrain the Member States in their freedom to fulfil pre-existing international obligations:

> "That does not leave the Member States a whole lot of room for manoeuvre: they can either renegotiate or denounce. The former, to make an obvious point, requires the participation of the third party concerned; the latter may not always be easy, legally or politically."[743]

While it is undeniable that the Court leaves the Member States only a limited scope for action, it is nevertheless important to take account of the specific circumstances of the cases. When establishing the duty to denounce, the Court of Justice placed great emphasis on the fact that the parties to the bilateral agreement had included a denunciation clause. In fact, the Court's first, and apparently

[739] J. Klabbers, "Moribund on the Fourth of July", 194.
[740] Ibid., at 195.
[741] See J. Klabbers, "Moribund on the Fourth of July", 195.
[742] Ibid. at 196.
[743] Ibid.

decisive point, centred around the inclusion of such a clause[744]. Only then did it declare in a more general fashion that the Member States were under an obligation of result.

This does not, of course, imply that the Court would not impose the same duty, if necessary, also in the absence of a denunciation clause agreed upon by the parties. However, it shows that the intention of the third parties to prior Member States agreements are indeed important to the Court. If the third party did not express any objections to a possible unilateral termination of the agreement in the future, then it does not go against its interests to do so. Equally, difficult political situations in the non-member country cannot serve as a justification for delays in renegotiating or amending an agreement. It is normally the third country itself that is responsible for political complications, and when it is deprived of rights under an international agreement due to such circumstances, denunciation does not present a disproportionately intrusive measure.

In sum, the Court reminds the Member States that it is only the rights of *third* parties which Article 351 TFEU seeks to protect, and not their own[745]. But once the third country's rights no longer deserve to be protected – either because it has waived them expressly or forfeited them by way of political instability – there is no valid reason to uphold the Member States' obligations towards that country to the detriment of the primacy of EU law.

b. Factual or de jure *compliance?*

What makes the judgments in *Commission v. Portugal* perhaps more problematic is the second aspect of the cases, namely the Court's interpretation of what is the actual *result* to be achieved by the obligation take all appropriate steps. The Court was free to apply two alternative standards of compliance which the Member States were required to achieve – either *de facto* or *de jure* compliance. As AG Mischo correctly observed, the issue thus came down to whether a Member State who complied with its Union obligations in actual fact was nevertheless obliged to denounce an agreement with a third country if it failed to secure adjustment of it by negotiation[746].

The Court of Justice opted for the strict interpretation: the result to be achieved by the Member States was compliance on all levels. It acknowledged that Portugal had waived its right to rely on the

[744] In a similar vein, P. Manzini, "The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law" (2001) 12 EJIL 781 at 791.

[745] See earlier judgments, such as Cases C-364/95 and C-365/95 *T. Port GmbH & Co. v. Hauptzollamt Hamburg-Jonas*, and Case C-124/95 *Centro-Com*, in which the Court affirmed that the words "rights" in Article 351 TFEU refers to the rights of non-member countries.

[746] Joined Opinion of Advocate General Mischo in Cases C-62/98 and C-84/98, para 67.

cargo-sharing clauses contained in the bilateral agreements. Although the clauses still appeared in the agreements and the latter remained in force, the incompatible provisions were *de facto* no longer being implemented, meaning that their application no longer discriminated against the shipping companies of other Member States. The factual compliance notwithstanding, the Court of Justice decided that Portugal had failed to achieve the result that it was required to achieve. Any other interpretation would have been incompatible with the uniformity of Union law. It is interesting to note that in his Opinion, AG Mischo referred both to the "principle of uniform *implementation*" and to the "principle of uniform *application*"[747]. In this context, however, the two principles may have completely different meanings. While "uniform implementation" implies that a rule has been transposed in the same way throughout the Union legal order, "uniform application" may suggest that it is sufficient if incompatible rules are simply not applied. The Court clearly chose the broader definition of uniformity and opted for an obligation that aims for the uniform implementation of Union rules.

The result to be achieved by the Member States under Article 351 (2) TFEU was further qualified by restrictions of a temporal kind. Although the process of renegotiation between Portugal, on the one hand, and Angola and the FRY, on the other, was delayed, it was nevertheless on-going. According to the Advocate General, however, that process should have been concluded within the period of six years foreseen in the Regulation[748]. After such a "reasonable period of time" had elapsed in which less severe procedures had proved unsuccessful, denunciation constituted an appropriate step for achieving the result required by Union law[749]. The Court of Justice did not make any mention of the AG's suggestion of a reasonable time-frame for renegotiations, but simply spoke of "difficulties which make adjustment of an agreement impossible"[750]. Considering that the renegotiations in the Portuguese cases had not been abandoned unsuccessfully but simply been delayed beyond the time-limit foreseen by the EU Regulation, the Court seems to adopt a strict reading of impossibility.

The Court's narrow definition of the result to be achieved seems to indicate a *conservative fidelity* approach to compliance. Requiring Portugal to repeal the inconsistent provisions even if it acts in accordance with Union law reflects a strict insistence by the Court on the division of competences and established hierarchies, instead of allowing a minimum degree of complementarity between international and EU obligations of the Member States. It is questionable, however, that the principle

[747] Ibid. at paras 58 and 60 respectively, emphasis added.
[748] Ibid., para 71.
[749] Ibid., para 69.
[750] See Case C-62/98 *Commission v. Portugal*, para 49.

of primacy, as developed by the Court of Justice, would necessarily require *de jure* instead of *de facto* compliance. As Dashwood has pointed out, there is nothing in the *Simmenthal* case[751] that indicates that incompatible provisions must automatically be considered null and void and that it is not sufficient to refrain from applying conflicting obligations[752]. In fact, in the *Budvar* case, the Court had accepted the continuation in force of incompatible national measures, provided that they were interpreted in a way that was consistent with Union law[753]. Against this background, it has been argued that "the lack of explicit justification why unilateral renunciation is insufficient is remarkable"[754].

Nevertheless, the rationale behind the Court's mandate for active compliance does not necessarily suggest a *conservative* vision of fidelity. Although it significantly limits the Member State's freedom to act, the requirement of active compliance does not seek to suppress political dissent[755]. Instead, "it attempts to ensure the effectiveness of the federal legal system by demanding clear legal rules throughout the system"[756]. In fact, the Court's approach in *Commission v. Portugal* reflects long-standing jurisprudence from the internal market context. The maintenance in force of national rules incompatible with EU law "gives rise to an ambiguous state of affairs" and a "state of uncertainty" which cannot be tolerated[757]. Hence, the strict interpretation of the result to be achieved under Article 351 (2) TFEU may be considered an expression of the "high level of uniformity in [Union] law" which the Court aims at maintaining[758].

D. A "pre-emptive" duty to denounce?

The scope of the duty to denounce an incompatible pre-accession agreement became an issue again

[751] In Case 106/77 *Simmenthal II* [1978] ECR 629, the Court imposed a duty on national courts to set aside provisions of national law which are incompatible with Union law.

[752] A. Dashwood, "The Relationship between the Member States and the European Union/European Community", 378: "I must say that I had always read the *Simmenthal* judgment as authority for the further point that the principle of the primacy of [Union] law does not render a national provision, which is in conflict with a [Union] provision, automatically null and void: it merely requires a national judge to refrain from applying the national provision and to give the [Union] provision its full intended effect".

[753] Case C-216/01 *Budejovicku Budvar v. Rudolf Ammersin GmbH*, paras 168-169.

[754] C. Hillion, "Annotation: Case C-62/98, Commission v. Portugal, and Case C-94/98, Commission v. Portugal", 1279.

[755] See D. Halberstam, "Of Power and Responsibility", 772.

[756] Ibid.

[757] Case 167/73 *Commission v. France* [1974] ECR 359, para 41. See also e.g. Case 74/86 *Commission v. Germany* [1988] ECR 2139, Case C-160/99 *Commission v. France* [2000] ECR I-6137, see further P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2070.

[758] C. Hillion, "Annotation: Case C-62/98 and Case C-94/98", 1283; similarly, J. Klabbers, "Moribund on the Fourth of July", 197.

in the *BITs* cases discussed above. Once the Court of Justice had established that incompatibilities with power-conferring provisions of EU law also came within the scope of Article 351 (2) TFEU, the question arose whether such hypothetical incompatibilities were capable of imposing a strict obligation to eliminate all incompatibilities. Were the Court to impose a duty of denunciation based on hypothetical incompatibilities, such a duty would constitute "a sort of pre-emptive denouncement"[759].

When assessing the various options at its disposal, the Court of Justice first looked at the mechanisms available under international law. However, it immediately found that both the suspension and the denunciation of the agreements at issue was "too uncertain in its effects"[760]. Neither of the two mechanisms were capable of guaranteeing that the measures adopted by the Council could be applied effectively. In order to be effective, measures adopted under Articles 64, 66 and 75/215 TFEU had to be capable of being applied immediately with regard to the third countries. The immediate effectiveness of these measures, however, could not be reconciled with the periods of time necessarily involved in international negotiations which would be required in order to reopen discussion of the agreements[761].

In its defence, Austria had argued that it intended to incorporate a clause into the contested agreements which would allow it to fulfil its obligations as a Member State of the Union and make it possible to apply any measures restricting movements of capital and payments which might be adopted by the Council[762]. Both the Commission and the Court of Justice agreed that such a clause was indeed capable of removing the established incompatibility. Nevertheless, the Court did not accept Austria's proposal as an argument mitigating its failure to fulfil obligations under Article 351 (2) TFEU, as the Member State had not taken any steps to eliminate the risk of conflict with EU law within the period prescribed by the Commission[763].

In the absence of any valid mechanism of international law capable of guaranteeing the effective exercise of EU powers under Articles 64, 66 and 75/215 TFEU, the Court came to the conclusion that Austria, Sweden and Finland had failed to take the appropriate steps to eliminate incompatibilities within the meaning of Article 351 (2) TFEU.

The Court's affirmation that a duty to denounce inconsistent pre-existing agreements could be imposed even in cases in which the conflict with EU law was merely hypothetical has been labelled

[759] N. Lavranos, "Protecting European Law from International Law", 281.
[760] See e.g. Case C-205/06 *Commission v. Austria*, para 40.
[761] Ibid., paras 36, 39 and 40.
[762] Case C-205/06 *Commission v. Austria*, para 41.
[763] Ibid., para 42.

"absurd"[764] and "misguided"[765]. From a Member State perspective, the judgments were deemed to "go too far", particularly because the Court failed to provide convincing arguments why the Member States concerned would not be able to effectively suspend their incompatible agreements[766].

Furthermore, the judgments were criticised for unduly limiting the Member States' freedom to avoid denunciation by means of renegotiation. First, with the entry into force of the Lisbon Treaty, the Member States had lost their power to renegotiate inconsistent agreements involving foreign direct investment[767]. Secondly, the requirement that all Member States renegotiate those bilateral agreements which contained no express saving clause allowing the swift adoption of Council measures under Articles 64, 66 and 75/215 TFEU would result in a "massive exercise in collective renegotiation"[768]. And thirdly, if a Member State sought to amend its BITs in a way that reserved the right to suspend treaty obligations if so required by Union law, the other contracting parties would certainly insist on reciprocity or other corresponding privileges[769]. This last point is not only detrimental to the interests of the Member States, but also "potentially damaging to the interests of the *Union*"[770], as those provisions of BITs guaranteeing free transfer of capital and returns "would lose their practical effectiveness as a bulwark for the Union's foreign investors"[771].

It is noteworthy that this criticism does not question the legitimacy of the Union interest in effective applicability of EU law as established by the Court of Justice in the *BITs* cases. On the contrary, it recognises that the contested BITs would inhibit the Union's ability to impose swift measures which must be capable of instant application if they are to operate as an effective protection[772]. Such an approach, it has been accepted, "aims at protecting the autonomy of the [EU] legal order"[773].

The point of contention, therefore, is neither the establishment by the Court of a hypothetical incompatibility on the grounds of effectiveness of EU law, nor the affirmation *per se* that such an incompatibility may lead to the imposition of a duty to denounce a pre-existing agreement. Rather, the criticism appears to relate to the combination of the two factors and the perception that the Court's findings do not take due account of the position of the Member States when assessing the

[764] E. Denza, "Bilateral Investment Treaties and EU Rules on Free Transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland" (2010) 35 E.L. Rev. 263 at 269.
[765] N. Lavranos, "Protecting European Law from International Law", 280.
[766] Ibid.
[767] E. Denza, "Bilateral Investment Treaties and EU Rules on Free Transfer", 270.
[768] Ibid. at 271.
[769] Ibid.
[770] Ibid. at 270, emphasis added.
[771] Ibid. at 271.
[772] Ibid. at 270.
[773] N. Lavranos, "Protecting European Law from International Law", 280.

Union interest at stake. Indeed, the Court has been criticised for taking "a *rigorous* view of the duty of Member States"[774] and for imposing a "disproportionate" burden on the Member States in its quest to protect the autonomy of the Union legal order[775]. This view is reinforced by the fact that the Union interest served to safeguard Council powers, the value of which was "entirely theoretical", considering that they had never been exercised by the time the Member States' failure to fulfil obligations was established[776].

V. Assessment – A proportionate relationship between Member State obligations and the Union interest

This criticism of the Court's approach in the *BITs* cases raises a more general question concerning the proportionality between the protection of the Union interest and the imposition of restraints on the Member States' freedom to exercise their powers. The reactions to the *BITs* judgments suggest that the mere existence of a legitimate Union interest at stake should not be taken to mean that the Court can automatically impose onerous obligations on the Member States in order to safeguard this interest. What, then, is the right balance between the Union interest and the Member States' interests as subjects of international law?

With regard to Article 351 TFEU, the Court had the opportunity to address this question in *Commission v. Portugal*[777]. Portugal had contested the proportionality of the obligation to denounce its inconsistent agreements:

> "Denunciation is a *disproportionate* means of achieving the objective sought by the second paragraph of Article [351] of the Treaty and involves *disproportionate* disregard of Portuguese foreign-policy interests as compared with the [Union] interest [...]"[778].

The Court, however, did not agree. It held that the balance between the foreign-policy interests of the Member States and the Union interest was already incorporated in Article 351 TFEU, in that it allowed Member States not to apply a Union provision in order to respect the rights of third countries. Furthermore, Article 351 TFEU allowed them to choose the appropriate means of

[774] E. Denza, "Bilateral Investment Treaties and EU Rules", 270, emphasis added.
[775] N. Lavranos, "Protecting European Law from International Law", 280.
[776] E. Denza, "Bilateral Investment Treaties and EU Rules", 271.
[777] Case C-62/98 *Commission v. Portugal* and Case C-84/98 *Commission v. Portugal*.
[778] See Case C-62/98, para 30, emphasis added.

rendering conflicting agreements compatible with Union law[779].

This reasoning was criticised as being "far from convincing"[780], as the Court ultimately left no doubt that the benefit of respecting a third party's right came to an end where required by Union law. Moreover, the choices left to the Member States in order to take appropriate steps were limited to two in this case. As a result, "the scales end up tilted rather heavily in favour of [Union] law"[781].

The Court of Justice had the opportunity to shed light on the question of the proportionate balance between the Union interests and Member State obligations in *Commission v. Austria*[782]. These infringement proceedings brought by the Commission against Austria concerned the legality of national legislation on the employment of women in the underground mining industry. Austria had argued, *inter alia*, that the national measure had been adopted for the purpose of implementing an ILO Convention ratified before accession to the Union. The Court established the incompatibility of the ILO Convention with the principle of equal treatment for men and women and its exceptions enshrined in Articles 2 (1) and 3 (1) of Directive 76/207, before it reaffirmed its findings from *Commission v. Portugal* that the appropriate steps to eliminate incompatibilities also included denunciation.

However, when it came to the obligation which the incompatibility imposed on the Member State, the Court found that Austria had not violated its duties under Article 351 (2) TFEU. The ILO Convention contained a clause providing that the agreement could be denounced within a year after the expiry of each period of ten years following its entry into force. But at the last point in time when Austria would have been able to denounce the convention, "the incompatibility of the prohibition laid down by that convention with the provisions of Directive 76/207 had not been sufficiently clearly established for that Member State to be bound to denounce the convention"[783].

Although the Court did not go into further details as to what constituted sufficient clarity and how such clarity could have been achieved in the specific case[784], it nevertheless sent out a clear statement that the scope of the Member States' obligation to eliminate incompatibilities was not be assessed *in abstracto*, but had to be evaluated together with the Union interest at stake. In the specific case, the Union interest was not such as to require immediate denunciation, since the precise content of the

[779] Ibid, para 50.
[780] J. Klabbers, "Moribund on the Fourth of July", 196.
[781] Ibid. at 197.
[782] Case C-203/03 *Commission v. Austria* [2005] ECR I-935.
[783] Ibid., para 62.
[784] Koutrakos points out that the Court had ruled already in 1986 (Case 222/84 *Johnston*) that the exception of Article 2 (3) of the Directive should be interpreted strictly. See P. Koutrakos, *EU International Relations Law* (2006), 315.

incompatible Union rules had not yet been sufficiently established. Indeed, the Court's approach in *Commission v. Austria* can be considered "an effort to strike a *balance* between the requirement of loyal cooperation which underpins the ratio of Article [351 (2) TFEU] and the drastic implications of denunciation of an international agreement"[785].

Notwithstanding this readiness to take account of the different interests at stake, it is important to note that the Court remains firm in its stance regarding the scope of the duty to eliminate all incompatibilities. It signals to the Member States that it is willing to make those concessions which the Union interest allows for, but it leaves no doubt that the Member States may ultimately be under a duty to denounce.

What emerges from the Court's case law on Article 351 TFEU is, therefore, a strict pursuit of the primacy of Union law. The aim of Article 351 TFEU is not to find the right balance between the Union interest and the rights of third countries under pre-existing agreements – and much less between the Union interests and the rights of *Member States* under these agreements. Instead, the goal is to bring Member States' pre-existing obligations towards third countries in line with later obligations towards the EU. As such, the Court's interpretation of Article 351 TFEU clearly reflects the rationale of the more general duty of loyalty under Article 4 (3) TEU.

The question of whether the Union interest permits any kind of concession to the Member States is assessed by balancing the incompatibility established against the obligation imposed. Or, expressed in terms of the two-tier test advocated by Halberstam for assessing which vision of federalism underlies a given approach[786], it is assessed by balancing the type of restraint imposed against the rationale behind the restraint. This assessment also helps to explain the reactions to the *BITs* cases which described the Court's judgments as disproportionate and rigorous. After all, the establishment of a hypothetical incompatibility and the imposition of a "pre-emptive" duty to denounce, taken together, present a particularly onerous obligation on the Member States. This does not, however, mean that the Court was necessarily pursuing a *conservative fidelity* approach in the *BITs* cases. The Union rules at issue were of such a specific nature that their effective application required both a broad approach to the existence of an incompatibility under Article 351 (2) TFEU and the imposition of a strict compliance obligation[787]. In the specific case, the establishment of an incompatibility was so closely intertwined with the ensuing obligation that there was no scope for a balancing of the two.

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[785] P. Koutrakos, *EU International Relations Law* (2006), 316, emphasis added.

[786] See the Introductory Chapter, Section IV.

[787] In a similar vein, J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 553.

VII. Overview – The role of Article 351 TFEU in the light of the general duty of loyalty

When the Court of Justice was first asked to rule on the validity of Member States' agreements concluded prior to their accession to the Union, all it had at its disposal was a Treaty provision stating that prior obligations were not be affected by EU law, notwithstanding the requirement that all incompatibilities were to be eliminated by the Member States. It was left to the Court to fill the provision with meaning by specifying its content and scope. While it has certainly done justice to the nature of Article 351 TFEU as a conflict rule aimed at achieving primacy of Union law, certain elements of the Court's case law nevertheless mirror its approach to other types of restraints discussed in the previous chapters.

In the *BITs* cases, AG Maduro had pleaded for a failure to fulfil obligations based on the general loyalty obligation of Article 4 (3) TEU. The Court did not follow the suggested approach, but nevertheless concurred with the Advocate General in his finding that the three Member States at issue had failed to fulfil their obligations to eliminate all incompatibilities. Although not related to the elimination of incompatibilities but to questions of competence, the argument that special circumstances may justify strict restraints on the Member States' freedom to exercise their competence even in the *absence* of any EU action in the field is reminiscent of the Court's approach in *Kramer*[788]. In this case, the Court found that in the absence of Union action the Member States retained their power to act externally until the Union decided to exercise its competence by adopting internal legislation. In the meantime, the Member States were restrained in the exercise of their rights and obligations under international law by the duty of loyalty under Article 4 (3) TEU. The Court emphasised that the Member States were under a duty to use all political and legal means at their disposal in order to ensure the participation of the Union in the international convention at issue[789]. The similarities between *Kramer* and the *BITs* cases notwithstanding, it is noteworthy that the former case concerned an area that had been "reserved" to the EU. The Union was set to obtain an exclusive competence by occupying the field, but the adoption of the final measures had been blocked in the Council[790]. The absence of Council measures in the *BITs* cases, by contrast, was not due to a Member State blocking the adoption of such measures, but the Union had simply not considered it necessary to act. More importantly though, the area of law concerned was one of shared competence in which no pre-emption had taken place yet.

[788] Joined Cases 3, 4 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279.
[789] Ibid., paras 34 and 35, see further Chapter Two.
[790] See further Chapter Two

The imposition of loyalty restraints in *Kramer* and the *BITs* cases thus shows that neither questions of competence nor the legal basis on which the restraint is based are necessarily a decisive factor in limiting the Member States' freedom to act. What matters instead is that the Union maintains the ability to fulfil its objectives. This is also evident in the similarities of the Court's respective approaches to Article 351 TFEU and the *AETR* doctrine. Like the *AETR* doctrine, the obligation to eliminate all incompatibilities under Article 351 (2) TFEU may be applied only in those areas in which the Union has promulgated legislation, unless exceptional circumstances such as those present in the *BITs* cases require otherwise. Accordingly, the Union rules in place must be sufficiently precise as far as the coverage of a given area is concerned[791] and sufficiently clear as far as their openness to different interpretations is concerned[792]. As such, the Court's construction of the duty under Article 351 (2) TFEU resembles the requirement that a given area be covered by Union rules to a "large extent" and that those rules be precise enough to exclude the adoption of more stringent measures before it can be considered to pre-empt the Member States' competence in the field[793]. The imposition of restraints, in other words, cannot occur randomly but is dependent on certain specific conditions. The difference between pre-emption and Article 351 (2) TFEU, however, is that the latter is broader it scope, as it does not require a finding of exclusive competence[794]. But at the same time, Article 351 (2) TFEU is less intrusive in its effect. A finding of exclusive competence means that the Member States are no longer allowed to be active in a given area, even if such activities would not be in contradiction with EU law[795]. By contrast, Article 351 (2) TFEU merely requires Member States to remove incompatibilities. However, a duty to remove also those parts of the agreements which are *not* incompatible with Union law, i.e. denunciation of the agreement, may apply once all other appropriate steps have been exhausted.

Another example which demonstrates that the Member States' obligations under Article 351 TFEU do not differ fundamentally from other compliance obligations, in the sense of granting the Member States special protection of prior international obligations, is the Court's judgments in a number of cases brought by the Commission against Belgium and Luxembourg[796]. These cases, decided shortly before the judgments in *Commission v. Portugal*, were identical on the merit with the situation in the

[791] See Case C-158/91 *Levy*.
[792] See Case C-203/03 *Commission v. Austria*.
[793] See Opinion 2/91.
[794] M. Cremona, "Defending the Community Interest", 134.
[795] Opinion 2/91, para 25.
[796] Joined Cases C-176/97 and C-177/97 *Commission v. Belgium and Luxembourg*; similarly, Case C-170/98 *Commission v. Belgium*, and Joined Cases C-171/98, C-201/98 and C-202/98 *Commission v. Belgium and Luxembourg*.

Portuguese cases, save for the fact that the cases did *not* involve any pre-existing obligations. *Commission v. Belgium*[797], for example, concerned an agreement on maritime transport concluded by Belgium with Zaire. Claiming that the cargo-sharing arrangements contained in the agreement infringed the subsequently concluded EU Regulation No. 4055/86, the Commission brought an action against the Member State. Belgium had put forward arguments based on the practical difficulties in adjusting the agreement due to the political situation in Zaire which made negotiations impossible. The Court was oblivious to Belgium's claims that political difficulties in a third country may justify the failure of a Member State to fulfil its obligations towards the Union. It found that Belgium had failed to fulfil its obligations under the Regulation and declared that the Member State was under a duty to denounce the agreement with Zaire.

In spite of the fact that these cases did not concern the application of Article 351 TFEU, their outcome was identical to *Commission v. Portugal*. None of the three Member States were allowed to rely on the justification that political difficulties had delayed the adjustment of the prior obligations. Instead, they were found to be under a duty to denounce the pre-accession agreements. The *Belgium and Luxembourg* cases and *Commission v. Portugal* show that the application of Article 351 TFEU may not always be necessary to resolve conflicts between prior agreements and EU law. Instead, reliance on the secondary legislation concerned or on Article 4 (3) TEU may lead to the same results. This will most certainly be the case for provisions of secondary law that prescribe the adjustment or phasing out of incompatible prior obligations, such as those contained in Regulation 4055/86.

The application of Article 351 TFEU, in these cases, does not add any additional dimension compared with post-accession agreements. Instead, Member States are under a general obligation to ensure the primacy of EU law, irrespective of whether the incompatibilities are contained in pre-existing agreements or not. The only freedom that the Member States retain is as to the *means* for ensuring compliance, and not *whether* to ensure compliance if that were detrimental to their own foreign policy interests.

The Court's identical approach in two different legal situations raises questions regarding the purpose of Article 351 TFEU. If a case can be decided on the basis of a breach of a Union Regulation alone, then what is the additional benefit of including such a provision in the Treaties? Or, where recourse to Article 4 (3) TEU would offer the same solution to a conflict of obligations, for example as suggested by AG Maduro in the *BITs* cases, what additional purpose does Article 351 TFEU serve which exceeds the scope of the general duty of loyalty?

[797] Case C-170/98.

By rejecting all claims relating to the applicability of Article 4 (3) TEU in the *BITs* cases, the Court delivered a powerful pronouncement on the scope of the Member States' obligations under Article 351 (2) TFEU. By including also hypothetical conflicts in the sphere of application of Article 351 TFEU, the Court left no doubt that no duty of loyal cooperation was required to trigger the application of Article 351 (2) TFEU, making it clear that the provision itself was the ultimate expression of Article 4 (3) TEU in this context.

Notwithstanding its close relationship with Article 4 (3) TEU, it is important not to understand Article 351 TFEU as a mere device of restraint. On the contrary, the Court's construction of Article 351 TFEU establishes firm boundaries to what may expected from the Member States in the context of pre-accession agreements. When faced with the possibility of relying on Article 4 (3) TEU instead of Article 351 TFEU, the Court rejected the use of the general obligation. As discussed above, a precedence based on Article 4 (3) TEU could have had far-reaching consequences and paved the way for "unnecessarily broad"[798] restraints in future cases. Indeed, such an approach would have raised the question of whether the general duty not to compromise any form of Union action was capable of imposing an obligation on the Member States to eliminate the risk of *any* future conflict with Union legislation if so requested by the Commission.

The potential for restraint inherent in Article 4 (3) TEU, in other words, may be considered bigger than that of Article 351 TFEU, the scope of which has been carefully circumscribed by the Court of Justice. Unlike the general obligation, Article 351 TFEU exclusively seeks to safeguard the primacy of Union law. In doing so, it furthermore aims to take account, where possible, of the Member States' interest to fulfil their obligations towards third countries, and to actively involve the Member States in the process of eliminating incompatibilities – first, by leaving the choice as to the appropriate means up to the Member States, and second, by attributing a central role to national courts within this process. And it is precisely these concessions to the Member States that the Court refers to when it stated in *Commission v. Portugal* that Article 351 TFEU already incorporates a balance of Union and Member State interests.

A different type of balance which is *not* incorporated in Article 351 TFEU, instead, is that between primacy of EU law and primacy of inconsistent international obligations. Here, there is no scope for balance, as the Court has repeatedly made clear. Where a conflict has been found to exist, the Member States are required to eliminate it. Only if the Union interest permits may the Member

[798] P. Koutrakos, "Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*", 2069.

States be granted a moratorium for taking the appropriate steps[799], but the final obligation remains.

VI. Incompatibilities with CFSP acts

Although Article 351 TFEU is a general provision applicable to all policy areas of EU law, it cannot be assumed that the Court's construction of the obligations it gives rise to apply in an equal manner to CFSP measures. While the application of the *pacta sunt servanda* principle laid down in Article 351 (1) TFEU raises no problems with regard to the CFSP, the transposition of the duty to eliminate all incompatibilities found in paragraph 2 is less straightforward. Although the scope of CFSP measures is usually limited, leaving ample space for national policies, conflicts may nevertheless arise when existing international Member State obligations directly violate subsequent CFSP decisions[800].

According to Declaration no. 17 attached to the Lisbon Treaty, "the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States". However, primacy within the meaning of the Declaration applies under the conditions laid down by "the well-settled case law of the European Court of Justice". The Court's jurisdiction over CFSP matters, however, continues to be excluded also in the Treaty of Lisbon[801]. In the absence of any case law concerning the question of primacy of CFSP acts, the Declaration does not permit any conclusions on the effect of CFSP measures within the national legal orders.

While the wording of Declaration no. 17 cannot be taken to mean "that primacy does *not* extend to CFSP"[802], it is doubtful that CFSP measures may be deemed to take precedence over national rules. Two main arguments are advanced in the legal literature to support this view. The first argument relates to the absence of jurisdiction of the Court of Justice[803]. It is argued that a general application of the principle of primacy would place national courts "in a precarious position"[804]. Member State

[799] Case C-203/03 *Commission v. Austria*.

[800] R. A. Wessel, "The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation" (2009) 5 European Constitutional Law Review 117 at 130-131.

[801] Article 24 (1) TEU.

[802] J. Wouters, D. Coppens, B. De Meester, "The European Union's External Relations after the Lisbon Treaty", 189.

[803] For an overview of the Court's position with regard to CFSP, see M. G. Garbagnati Ketvel, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy" (2006) International and Comparative Law Quarterly 77.

[804] P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency", 991; see also A. Dashwood, "The EU Constitution – What Will Really Change?" (2004-2005) 7 Cambridge Yearbook of European Legal Studies 33 at 37.

courts would be required to refrain from applying incompatible provisions of national law without any guidance from the Court of Justice[805], thus jeopardising the uniform application of Union law[806]. The mere fact that the jurisdiction of the Court of Justice is excluded in the field of the CFSP highlights "the political rather than the legal character of the CFSP"[807]. This view links in with the second argument brought forward in favour of rejecting the notion of primacy in the CFSP context, which centres around the purpose and context of the policy area[808]. The CFSP plays a "special and unique role" in the structure of the Treaties[809]. Even with the entry into force of the Lisbon Treaty, the CFSP continues to be dealt with in a separate part (Title V TEU) of the Treaties from other fields of external competence, and according to Article 24 (1) TEU, the CFSP remains "subject to specific rules and procedures"[810]. It has been argued that "[b]y thus preserving the particularity of the Union's competence with respect to the CFSP, […] the Treaty prevents the principle of primacy from applying in this area, though it nowhere says so"[811].

In the absence of primacy, the Member States are, at the very least, bound by international law. A conflict of obligations would have to be examined in light of Article 30 of the 1969 Vienna Convention on the Law of Treaties, which generally favours application of the *lex posterior* principle[812]. In cases of incompatibilities with pre-accession agreements, therefore, the conflicting CFSP measure would prevail. However, the Member States would remain free to circumvent Union acts simply by concluding agreements derogating from their obligations under the CFSP[813].

Against this background, the binding nature of CFSP measures on the Member States becomes "critically important"[814]. Article 24 (3) TEU requires the Member States to support the Union's external and security policy "actively and unreservedly in a spirit of loyalty and mutual solidarity" and to "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness". The Lisbon Treaty reinforces this obligation by adding a Member State duty to

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805 A. Dashwood, "The EU Constitution – What Will Really Change?", 37.

806 P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure", 991; see also A. Dashwood, "The EU Constitution – What Will Really Change?", 38 and M. Cremona, "A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty", EUI Working Papers Law No. 2006/30, p. 18.

807 C. Tietje, "The Concept of Coherence in the TEU and the CFSP" (1997) 2 E.F.A. Rev. 211 at 229.

808 See A. Dashwood, "The EU Constitution – What Will Really Change?", 38.

809 W. Wessels and F. Bopp, "The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional Breakthrough or Challenges Ahead?" (2008) Challenge Liberty & Security Research Paper No. 10 at 4.

810 See further M. Cremona, "Defining Competence in EU External Relations", 63.

811 See A. Dashwood, "The EU Constitution – What Will Really Change?", 38.

812 See further J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law", 168.

813 Ibid.

814 M. Cremona, "Defining Competence in EU External Relations", 66.

"*comply* with the Union's action in this area"[815]. Since the entry of force of the Lisbon Treaty, the task of monitoring compliance in this area has been assigned not only to the Council, but also to the High Representative[816]. In light of the absence of the Court's jurisdiction in CFSP matters, however, the emphasis is on giving effect to CFSP measures and implementation by the Member States themselves[817]. In practice, therefore, the primacy of CFSP acts can only be guaranteed by way of a "tacit recognition of the supremacy of obligations arising out of [the CFSP] over obligations arising under other agreements"[818].

The duty to ensure the primacy of CFSP measures is reinforced by the general duty of loyalty. In addition to Article 24 (3) TEU, the loyalty clause contained in Article 4 (3) TEU "may be used to resolve conflicts in favour of Union law"[819] and "force Member States to *comply* with their CFSP obligations"[820]. In its 2007 judgment in *Segi*[821], the Court of Justice confirmed for the first time the binding nature of common positions, making an express connection between compliance and the duty of sincere cooperation:

> "A common position requires the *compliance* of the Member States *by virtue of the principle of the duty to cooperate in good faith*, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law[822]."

The *Segi* case concerned a Common Position (2001/931/CFSP) which had its legal basis both in the former second and third pillars, and could therefore be considered a CFSP decision[823]. While the Court's findings in *Segi* do not change the fact that the Court of Justice has no legal remedies at its disposal in relation to acts with a single CFSP legal basis, the Court's reasoning is nevertheless useful in defining the scope of the Member States' obligations to ensure compliance with CFSP measures. As AG Kokott argued in *Pupino*[824] with regard to the former third pillar, the duty of loyalty is not limited to the former first pillar. The principles of consistency and solidarity which form the basis for

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[815] Article 24 (3) TEU, emphasis added.
[816] See Article 24 (3) TEU.
[817] M. Cremona, "Defining Competence in EU External Relations", 66.
[818] J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law", 168.
[819] M. Cremona "Coherence through Law: What Difference Will the Treaty of Lisbon Make?" (2008) 3 Hamburg Review of Social Sciences 11 at 28.
[820] C. Hillion and R. Wessel, "Restraining External Competences of EU Member States under CFSP", 93, emphasis added.
[821] Case C-355/04 *P. Segi and Others v. Council* [2007] ECR I-1657.
[822] Ibid. at para 52, emphasis added.
[823] See C. Hillion and R. Wessel, "Restraining External Competences of EU Member States under CFSP", 90.
[824] Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

the "ever closer union" foreseen in Article 1 TEU require that the Member States and institutions of the Union cooperate sincerely and in *compliance* with the law"[825]. Hence, the Court's approach in other areas of law, together with the development of the relevant primary law, may be used as guidance for circumscribing the Member States' obligations in CFSP matters. As Wessel has argued,

> "the development of the Union legal order has an impact on the latent primacy and direct effect of CFSP norms, in the sense that their connection to other Union norms may force national Courts and legislators to take them into account[826]."

Although, at present, CFSP measures are not directly applicable within the *Simmenthal*[827] understanding of primacy, it may nevertheless be argued that CFSP acts enjoy primacy in the sense of *Costa v. Enel*[828]. It appears from the latter case that the Court's main concern is consistency: "The only thing that matters is that [EU law] puts forward an identifiable result which cannot be thwarted by incompatible national measures"[829]. From this, Lenaerts and Corthaut derive that the reasons which led the Court to recognise the primacy of EU law in other areas may easily be transposed to the entire EU legal order: even before the entry into force of the Lisbon Treaty, the Union – in the shape of the former second and third pillars – were established for an indefinite period, possessed its own institutions and had legal personality; furthermore, the Member States had transferred practical competences to the Union, to the extent of which they can be said to have limited their sovereignty[830]. Lenaerts and Corthaut come to the conclusion that "the Member States have thus created a legal order which is binding upon them, even if no enforcement mechanism similar to Arts [258 to 260 TFEU] is available"[831].

Against this background, the principle of loyalty in CFSP matters cannot be conceived as a mere expression of the general international law principle of *pacta sunt servanda*[832]. Article 24 (3) TEU and the general clause of Article 4 (3) TEU, instead, impose a more specific obligation. In cases of

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[825] Opinion of AG Kokott in Case C-105/03 *Pupino*, para 26, emphasis added.
[826] R. A. Wessel, "The Dynamics of the European Union Legal Order", 132.
[827] In case 106/77 *Simmenthal II* [1978] ECR 629, the Court imposed a duty on national courts to set aside provisions of national law which are incompatible with Union law.
[828] In case 6/64 *Costa v. ENEL* [1964] ECR 585 at 593, the Court held: "[T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called into question".
[829] K. Lenaerts and T. Corthaut, "Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law" (2006) 31 E.L. Rev. 287 at 290-291.
[830] Ibid. at 289-290.
[831] Ibid. at 290.
[832] C. Hillion and R. Wessel, "Restraining External Competences of EU Member States under CFSP", 91.

conflict, the Member States are bound by a positive obligation to ensure the primacy of CFSP measures over incompatible prior obligations towards third countries.

Chapter Four

Restraints In Areas of Member State Competence – The Duty of Consistent Exercise

I. Introduction

The preceding chapters have illustrated how also in areas outside of exclusive *a priori* Union competence, the Member States are subject to significant restraints on the exercise of their external powers. Even in fields in which no pre-emption has taken place, the Member States may be required to abstain from acting or to denounce inconsistent international agreements. What these restraints have in common is that they result from Union action in the field – either the exercise of a legislative competence or the start of a concerted action on the part of the EU. If, by contrast, Union action in a given area is non-existent or limited, it should be assumed that the Member States are generally free to exercise their treaty-making powers by entering into international agreements with third countries, unaffected by restraints deriving from EU law. Such agreements do not bind the Union, but only the contracting Member State and the non-member country involved. Not forming part of EU law, these agreements are then deemed to be outside the interpretative jurisdiction of the Court of Justice[833].

The fact that EU action in a given area is either non-existent or limited may be due to different circumstances. Firstly, the area in question may be the exclusive purview of the Member States[834]. Secondly, the Union may only enjoy limited powers to act because harmonisation of the area is prohibited[835], or thirdly, the exercise of EU powers has taken place in a piecemeal fashion only[836]. In these situations, the Member States continue to enjoy "retained powers"[837]. A particular characteristic of retained powers is that they represent areas which safeguard "a certain idea of what the State can and should do in Europe" and what may be understood as the "essential State

[833] See e.g. Case 130/73 *Magdalena Vandeweghe and others v. Berufsgenossenschaft für die chemische Industrie* [1973] ECR 1329 at para 2: "The Court has no jurisdiction under Article [267 TFEU] to give a ruling on the interpretation of provisions of international law which bind Member States outside the framework of [Union] law."

[834] See e.g. Cases C-146/89 *Commission v. United Kingdom* [1991] ECR I-3533 and C-246/89 *Commission v. United Kingdom* [1991] ECR I-4585, discussed below, which involved the determination of territorial baselines and the granting of nationality to ships, respectively. See also Case C-307/97 *Saint-Gobain* concerning double taxation.

[835] See e.g. See Case C-55/00 *Gottardo* concerning a social security agreement.

[836] See the *Open Skies* cases, discussed below, where in the fields of access to intra-Union routes and the granting of operating licenses on such routes, treaty-making power continued to be a prerogative of the Member States.

[837] See also L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?" (2011) 4 EJLS 192 at 206.

functions" referred to in Article 4 (2) TEU[838]. Since retained powers are "the collective goods the State is supposed to protect so as to ensure the social cohesion of its own population in its territory", Member States enjoy a unilateral right of action without interference from Union institutions[839].

In areas where the Member States retain powers to act, international obligations may nevertheless collide with the requirements imposed by Union law. In fact, the relationship between Union law and international agreements concluded within areas of Member State competence has given rise to conflicts on a number of occasions. Differently from the previous chapters, these situations do not concern a conflict between international agreements and Union *secondary* law, but incompatibilities with the *Treaties* themselves. The question which arises in this context is whether the Treaties may impose compliance obligations on the Member States in fields coming within their own competence, or whether the Member States can invoke international obligations against Union law. International lawyers might be tempted to argue that

> "since the [Union] is bound by international law, [Union] law cannot compel Member States to violate this law if they act within their own sphere of competences. Where the Member States alone bear international responsibility, obligations imposed by public international law should take precedence over [Union] law."[840]

From the perspective of EU law, however, the situation is entirely different. In case of a conflict, EU law prevails:

> "This would follow from such considerations as the *ERTA case-law* (disavowing the possibility that [EU] law be affected by an agreement concluded with a third party), as well as the notion of Gemeinschaftstreue of *article [4 (3) TEU]*, and seems perfectly in line with the ambitions of the [EU] to have a *uniform system of EU law*, where the EU's citizens are subject to the same rules no matter where they are or reside within the EU."[841]

In fact, it emerges from the Court's case law that the Member States are under an obligation to exercise their international powers consistently with their primary Treaty obligations under Union law. As in the previous chapters, the Court of Justice distinguishes between the existence of Member State powers and the exercise thereof, with the result that the scope of application of Union law extends beyond the subject areas over which the EU enjoys jurisdiction. Member States are required to ensure that EU law prevails in situations of conflict between international law and Member State agreements also in areas of retained competence.

This chapter will first look at the scope for restraint of EU Treaty articles, tracing the development

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838 Ibid., at 207.
839 Ibid.
840 B. Brandtner and H.P. Folz, "The International Practice of the European Communities: Current Survey" (1993) 4 EJIL 430 at 434.
841 J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2009) at 211, emphasis added.

of the duty of consistent exercise in different areas of law (section II.), before it goes on to assess the nature of the compliance obligations, which differs according to the degree to which third countries are involved in remedying the contested incompatibility (section III.). Section IV. provides an assessment of the impact of both the scope for restraint of the Treaties and the ensuing obligations on the Member States' freedom to act. Section VI. gives an overview of the duty of consistent exercise in the broader context of loyalty restraints under Article 4 (3) TEU, before Section V. transposes the findings of the present chapter to the CFSP context.

II. The scope of Treaty obligations – The duty of consistent exercise

In its case law on the internal market, the Court of Justice has often stated that Member States must comply with their obligations towards the Union, even when exercising their own competence[842]. The question of whether such compliance obligations also apply where Member States have exercised a competence on the international stage was first addressed in Case C-146/89 *Commission v. United Kingdom*[843] concerning a violation of EU secondary law. This case caused some uncertainty as to what rules of Union law were capable of triggering compliance obligations in areas of Member State competence (Section A.). In subsequent cases, however, the Court of Justice has clarified what type of Union rules may give rise to compliance obligations in these areas (Section B.).

A. Incompatibilities with secondary Union law?

In Case C-146/89 *Commission v. United Kingdom*[844], the Commission brought an action against the United Kingdom seeking a declaration that the UK had violated its Treaty obligations by applying new baselines for the purpose of determining which parts of the waters around the coast of the UK were subject to certain fishery arrangements laid down in EU law. Contrary to the objective of equal access to territorial waters, the UK's newly adopted Territorial Sea Act had the effect of restricting the fishing rights of Member States which had traditionally fished in its waters. Although the UK

[842] For a thorough discussion of this case law and its impact on Member State powers, see K. Lenaerts, "Federalism and the Rule of Law: Perspectives from the European Court of Justice" (2010) 33 Fordham Int'l L.J. 1338, and L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice".
[843] Case C-146/89 *Commission v. United Kingdom*.
[844] Ibid.

had simply exercised its rights under the London Fisheries Convention of 1964, it had nevertheless restricted the rights of other Member State nationals under Union law.

The dispute that arose between the Commission and the UK essentially concerned the interpretation of the rules relating to the determination of fishing limits laid down by EU Regulation No. 170/83. As the Commission argued, Member States were not entitled to "unilaterally alter the scope of protection which [Union] law confers on certain fishing activities" by shifting their territorial baselines[845]. The Court of Justice agreed with the Commission and confirmed that the UK had failed to fulfil its obligations under Union law. Interestingly, however, the failure to fulfil obligations did not consist in a violation of a Treaty provision or a breach of a provision of Regulation No. 170/83. Instead, the UK had failed to fulfil its obligations under Union law by jeopardising the *objective* of the Regulation[846].

The Court did not, however, specify what rules of primary Union law this objective corresponded to. It is noteworthy in this context that Regulation No. 170/83 is not based on the principle of equal treatment laid down in Article 18 TFEU, but only lists (current) Article 43 TFEU as a legal basis[847]. On the contrary, the objective of Regulation No. 170/83 is to achieve a *balance* between the "system of exclusive access to coastal waters for national fishermen", on the one hand, and "the protection of certain activities of fishermen from other Member States"[848] on the other. Hence, the aim of the Regulation was, if not quite juxtaposed, at least not entirely compatible with the Union principle of equal treatment, as it sought to balance the freedom of equal access with the national interests in sovereignty over a Member States' territorial waters. The Court itself acknowledged the need to reconcile the opposing interests at stake and accepted that it was to that very end that Regulation No. 170/83 established a system "in *derogation* from the principle of equal access"[849]. Against this background, it is noteworthy that the Court relied on the "general structure"[850] and the "objective" of Regulation No. 170/73 in order to establish a breach of the UK's failure to fulfil its obligations under Union law.

What appears from the foregoing then is that in areas of their own competence, the Member States

[845] Ibid., para 21.
[846] Ibid., paras 21-25.
[847] While Regulation No. 170/83 does make reference to the Regulation on equal access to territorial waters (Council Regulation (EEC) No. 2141/70, subsequently replaced by *Council Regulation (EEC) No. 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976 L 20, p. 19)*), it does *not* adopt the latter's objectives according to which "[...] Union fishermen must have equal access to and use of fishing grounds in maritime waters coming under the sovereignty or within the jurisdiction of Member States" (see the preamble of Council Regulation No. 101/76).
[848] Case C-146/89, para 22.
[849] Ibid., emphasis added.
[850] The expression used by the Commission in its submissions to the Court, see Case C-146/89, para 20.

are under an obligation not to obstruct the objectives of secondary Union legislation. Instead of simply asserting a plain breach of (current) Article 18 TFEU, the Court followed the Commission's proposal and found that the national legislation was incompatible with the "objective" of Regulation No. 170/83. However, the judgment should not be understood as laying down a general duty for the Member States to exercise their rights under international law in accordance with broadly-framed aims pursued by acts of the Union legislator. It was perhaps the fact that the Regulation provided for a derogation from the principle of equal treatment or the fact that the Commission's claim against the UK made no reference to primary EU law that led the Court to adopt this approach.

B. Compliance with the principle of non-discrimination

Case C-146/89 illustrates the Court's initial difficulty in finding a suitable approach to the imposition of compliance obligations in areas of Member State competence. The Court subsequently took Case C-246/89[851] as an opportunity to establish a straightforward formula for compliance in areas of Member State competence. Ruling that the Member States were under a duty to exercise their international powers consistently with their obligations under Union law, the Court laid the groundwork for the application of the duty of consistent exercise which would be subsequently extended to other areas of law.

i. Fisheries

Only a few months after its judgment in Case C-146/89, the Court of Justice was asked again to rule on the compatibility with Union law of an autonomous Member State action in a field of national competence. The area of law concerned as well as the parties involved in the proceedings in Case C-246/89 *Commission v. United Kingdom*[852] were the same as in the previous case. The Commission brought infringement proceedings under Article 258 TFEU against the United Kingdom, seeking a declaration from the Court that the Member State had violated the principle of non-discrimination on grounds of nationality. The UK Merchant Shipping Act 1988 had established a new register of British fishing vessels in which could be registered only those fishing vessels which were British-owned, managed and controlled from within the United Kingdom. According to the Commission,

[851] Case C-246/89 *Commission v. United Kingdom* [1991] ECR I-4585.
[852] Ibid.

these requirements constituted discrimination on grounds of nationality as prohibited by the general rule contained in Article 18 TFEU, as well as by the more specific provisions of Articles 49 and 55 TFEU.

The Court of Justice first recalled its previous findings that competence to determine the conditions for the registration of vessels was vested in the Member States. That competence was not affected by the existence of Council Regulation No. 101/76, which made express reference to the registration and the flags flown by fishing vessels, as it left those terms to be defined in the legislation of the Member States[853]. Indeed, it acknowledged that

> "it is for the *Member States* to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag […]"[854].

The Member States' competence over the subject-matter notwithstanding, the Court was quick to emphasise that such Member State competence could not be exercised without restrictions. In what was to become the determining formula regulating Member States' external action in the sphere of their own competence, the Court held that "powers retained by the Member States must be exercised *consistently* with [Union] law"[855].

The Court of Justice had already stated in earlier case law concerning the internal market that retained powers could not be exercised in violation of EU Treaty provisions[856]. In this judgment, however, the international dimension was of particular relevance. The UK did not question the Court's approach to the exercise of retained powers in its internal market case law. However, referring to the Geneva Convention on the High Seas[857], the Member State argued that where a competence is granted under *international* law, "the position is different"[858]. Similar concerns regarding the impact of the international dimension on the Member States' duty of consistent exercise had also been raised by the referring national court in the 'sister case' of *Factortame*,

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853 Ibid., paras 9-11.

854 Ibid., para 12, emphasis added.

855 Ibid., para 12, emphasis added.

856 See e.g. the two cases quoted in this judgment, in which the Court had applied a similar reasoning concerned national measures taken in the monetary field amounting to state aids within the meaning of (current) Article 107 TFEU (Case 57/86 *Hellenic Republic v. Commission of the European Communities* [1988] ECR 2855), and national measures setting maximum prices on imports of certain meats and livestock contrary to (current) Articles 34 and 207 TFEU (Case 127/87 *Commission v. Hellenic Republic* [1988] ECR 3333).

857 Geneva Convention of 29 April 1958 on the High Seas, United Nations Treaty Series 450, No 6465. Article 5 (1) reads: "Each State shall fix the conditions for the grant of nationality to ships, for the registration of ships in its territory and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

858 Case C-246/89 *Commission v. United Kingdom*, para 13.

decided only two months earlier[859]. The High Court of Justice of England and Wales had asked the Court of Justice whether Union law could "affect" the conditions under which a Member State was able to regulate the granting of nationality to ships[860].

The two instances of national objection are no coincidence, considering that

> "[t]he flag flown on the high seas is one of the rare spheres in which international law lays down a principle of *exclusivity for the state*. The power to determine the conditions for attributing nationality to ships flying its flag is a power that belongs to a state and to one state alone."[861]

The Court of Justice, however, was unimpressed by the particular nature of the international competence at issue. For the first time, it made an explicit distinction between the *existence* and the *exercise* of competence under *international* law. Recognising the existence of the Member States' competence in the field, it specified that "in *exercising* that power, the Member States must comply with the rules of [Union] law"[862]. It has been argued that this approach has the effect of "including this competence in the framework of a *division of powers* between the Member State and the EU"[863]. As a result, the notion of exclusive Member State competence under international law is constructed to mean that "the Member State is legitimately in a position to act wherever the EU fails to do so"[864].

ii. Double tax agreements

In *Saint-Gobain*[865], a preliminary reference concerning advantages granted under two bilateral agreements concluded between Germany and two non-Member countries, the Court of Justice extended the duty of consistent exercise to double tax agreements. The *Saint-Gobain* case raised questions concerning the interpretation of (current) Articles 49 and 54 TFEU referred by a German court in relation to proceedings between the German branch of Saint-Gobain and the Tax Office Aachen. Saint-Gobain challenged the Tax Office's refusal to grant it certain tax concessions provided under two treaties for the avoidance of double taxation concluded between Germany, on

[859] Case C-221/89 *Factortame* [1991] ECR I-03905.
[860] Ibid., para 11.
[861] L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice", 202, emphasis added.
[862] Case C-246/89 *Commission v. United Kingdom*, para 15, emphasis added.
[863] L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice", 202, emphasis added.
[864] Ibid.
[865] Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt* [1999] ECR I-6161.

the one hand, and Switzerland and the United States, on the other. The agreements provided for an exemption from German corporation tax for the dividends received from the two non-member countries, restricting these concessions, however, to German companies and companies subject in Germany to unlimited tax liability. Saint-Gobain submitted that the exclusion of a German subsidiary of a company established in France from such tax concessions was contrary to the freedom of establishment of nationals of EU Member States and of companies and firms established in accordance with the laws of a Member State.

The Court of Justice had no difficulty finding that the refusal to grant capital tax exemption for international groups to the permanent establishments of French companies put them in a situation "less favourable" than that of German subsidiaries of French companies, which constituted a "single composite infringement of Articles [49] and [54 TFEU]"[866].

The Court subsequently considered Germany's submission that "the conclusion of bilateral treaties with a non-member country does not come within the sphere of [Union] competence"[867]. The Member State had argued that no secondary EU law existed in the field and that, therefore, the Union did not possess any competence over taxation matters. The Union would violate the allocation of competences between the EU and the Member States if it were to become active in a field which was outside the scope of its powers by extending the rights under a bilateral Member State agreement to companies and individuals of other Member States. A requirement according to which all inequalities between Member States had to be removed would be tantamount to the Union exercising a competence of its own[868]. The Court's response to Germany's argument was brief. It stated simply that in spite of national competence in the field, the "Member States nevertheless may not disregard [Union] rules" and therefore "must nevertheless exercise their taxation powers consistently with [Union] law"[869]. In the specific case, national competence was exercised consistently with EU law if the Member State adhered to the national treatment principle, granting to permanent establishments of non-resident companies the advantages provided for under the treaty on the same conditions as those which apply to resident companies[870].

[866] Ibid., paras 41-43.
[867] Ibid., para 54.
[868] Ibid., para 54.
[869] Ibid., para 56.
[870] Ibid., para 58.

iii. Social security agreements

For a long time, the Court of Justice seemed hesitant to apply the principle of consistent exercise to international Member State commitments concerning social security. In previous cases, in which the Court had the opportunity to pronounce itself on the scope of the compliance obligations imposed by EU Treaty provisions, it chose to circumvent the issue. In three cases concerning old-age pensions, the Court avoided dealing with the extension of the principle of consistent exercise by declaring that the respective requests for a preliminary ruling submitted by national courts were drafted in such a way as not to require an answer to that question[871]. All three cases brought before the Court on this matter prior to its change of approach in *Gottardo*[872] had been resolved by resorting to secondary Union legislation providing for the principle of equal treatment in the sphere of social security of migrant workers. Over the course of decades, the Court of Justice displayed a remarkable reluctance to apply principles flowing directly from the provisions of the Treaty in order to restrict the Member States' international powers within the sphere of their own competence.

After *Saint-Gobain* finally confirmed that Treaty provisions were capable of imposing compliance obligations on the Member States in the implementation of their international commitments, AG Colomer advocated a "radical change" in the Court's case law on social security agreements in order to accord the same favourable treatment to the prohibition against discrimination of workers as the prohibition against discrimination concerning establishment and services[873]. When *Gottardo*, a preliminary reference concerning benefits under a Swiss-Italian agreement on social security, was brought before the Court, the Advocate General urged the Court to "give Article [45 (2) TFEU] the scope required by the fundamental principle of non-discrimination it enshrines"[874], even if the facts of the case were "strikingly similar"[875] to those in *Grana-Novoa,* where the Court had refused to apply that Treaty provision to an international agreement.

Mrs Gottardo, an Italian national by birth, had to renounce her nationality in favour of French nationality following her marriage to a French national. She successively worked in Italy, Switzerland, and France, receiving Swiss and French old-age pensions which were granted to her

[871] See Case C-23/92 *Maria Grana-Novoa v. Landesversicherungsanstalt Hessen* [1993] ECR I-4505, where the bilateral convention at issue concluded between a Member State and a third State, although incorporated as a statute into the domestic legal order, did not constitute legislation within the meaning of the relevant Regulation; see also Cases 75/76 *Kaucic* [1977] ECR 495 and Case 16/72 *Ortskrankenkasse Hamburg* v *Landesversicherungsanstalt Schleswig-Holstein* [1972] ECR 1141.

[872] Case C-55/00 *Elide Gottardo v. Istituto nazionale della previdenza sociale (INP)* [2002] ECR I-413.

[873] Case C-55/00 *Gottardo*, Opinion of Advocate General Colomer [2002] ECR I-413, para 29.

[874] Case C-55/00, Opinion of Advocate General Colomer, para 29.

[875] D. Martin, "Comments on Gottardo, Finalarte, Portugaia Construcoes" (2002) 4 Eur. J. Migration & L. 369 at 370.

without any need for aggregation of periods of insurance. When applying for Italian old-age pension, the authorities refused her request on the grounds that the aggregation of the Italian and French periods would not enable her to achieve the minimum period of contributions required under Italian legislation for entitlement to an Italian pension. They argued that she would only be entitled to an Italian old-age pension if account were also taken of the periods of insurance completed in Switzerland pursuant to a social security convention concluded between Italy and Switzerland in 1962. As a French national, however, she did not fall within the scope of application of the bilateral agreement.

The Court of Justice was hence called upon to decide whether the Member States' Union obligations under (current) Article 18 or Article 45 TFEU required the national authorities to take into account periods of insurance completed in a non-member country by a national of a second Member State. It had no difficulty establishing that the dispute concerned a difference in treatment on the sole ground of nationality, but the situation was more complicated, as it involved benefits stemming from a bilateral international convention which did not come within the scope of Union competence[876]. The Court then recalled its findings in *Matteucci*[877], a case decided in the context of intra-Member State agreements. It held that even outside the scope of application of the Treaty, "every Member State is under a duty to facilitate application of that provision and, to that end, to assist every other Member State which is under an obligation under [Union] law" when "application of a provision of [Union] law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement"[878].

Repeating its findings in *Saint-Gobain* that the Member States "may not disregard [Union] rules but must exercise their powers in a manner consistent with [Union] law" also in matters falling within their own competence, the Court came to the conclusion that the principle of equal treatment required Italy to grant nationals of other Member States the same advantages as those which its own nationals enjoyed under the bilateral international convention on social security[879].

iv. International aviation

The Court of Justice subsequently applied the principle of non-discrimination to international

[876] Case C-55/00, Opinion of Advocate General Colomer, paras 24-25.
[877] Case 235/87 *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium* [1988] ECR 5589.
[878] Ibid.
[879] Ibid., paras 32-34.

Member State agreements in the field of aviation in the *Open Skies* cases[880], an enforcement action brought by the Commission against eight Member States challenging their bilateral air service agreements with the United States. According to the Commission's main contention, these agreements violated the Union's exclusive external competence in the area of air transport[881]. The Court agreed partly with the Commission, finding that the Member States had infringed exclusive Union competence in the areas of establishment of fares and rates on intra-Union routes and the use of computerised reservation systems. As far as two other areas were concerned, however, the Court rejected the assertion of exclusive Union competence. In the fields of access to intra-Union routes and the granting of operating licenses on such routes, treaty-making power continued to be a prerogative of the Member States[882].

It is with regard to those two latter areas that the Open Skies cases become relevant for the present chapter. As a secondary argument brought forward in the proceedings, the Commission claimed that certain provisions contained in the bilateral agreements were incompatible with Union law. More specifically, the so-called "ownership and control" provisions violated the right of establishment guaranteed by (current) Article 49 TFEU because

> "an airline owned or controlled by a non-contracting Member State (or by nationals of a non-contracting Member State) and established in one of the defendant Member States would not, as a result of the nationality clause, receive the same treatment as that accorded to national companies and would thereby suffer discrimination contrary to [Union] law"[883].

Indeed, the "ownership and control" provisions allowed the contracting parties to decline the recognition of the other party's designation of a carrier where the carrier was not substantially owned and effectively controlled by the second contracting party or its nationals[884]. The Court of Justice had little difficulty asserting the discriminatory nature of those clauses by finding that airlines established in one Member State and of which a substantial part of the ownership and effective control was vested in another Member State could be affected by that clause[885].

By their second argument, the defendant Member States argued that the economic activities regulated by the bilateral agreements were outside the scope of Article 49 TFEU *ratione loci*, since

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[880] Case C-466/98 *Commission v. UK* [2002] ECR I-9427, Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519, Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575, Case C-469-98 *Commission v. Finland* [2002] ECR I-9627, Case C-471/98 *Commission v. Belgium* [2002] ECR I-9681, Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741, Case C-475/98 *Commission v. Austria* [2002] ECR I-9797, Case C-476/98 *Commission v. Germany* [2002] ECR I-9855.

[881] See Chapters One and Two.

[882] See, for example, Case C-467/98 *Commission v. Denmark*, paras 91-92.

[883] Joined Opinion of Advocate General Tizzano in the *Open Skies* Cases [2002] ECR I-9427, para 120.

[884] See further L. Heffernan and C. McAuliffe, "External Relations in the Air Transport Sector: the Court of Justice and the Open Skies Agreements" (2003) 28 EL Rev. 601 at 604.

[885] See, e.g., Case C-476/98 *Commission v. Germany*, para 151.

they formed "part of the relationship between the [Union] and a non-member country"[886]. Basing themselves on the previous argument, they claimed that the fact that the advantages under the bilateral agreements were granted by a third country was sufficient to exclude the application of the principle of non-discrimination to the agreements[887]. The Court of Justice left no doubt in its reply that the freedom of establishment was no less applicable in circumstances of an international nature than it was within the internal market, emphasising that "all companies established in a Member State within the meaning of Article [49 TFEU] are covered by that provision, even if their business in that State consists of services directed to non-member countries"[888].

Thus, the Court made clear that the protection of the freedom of establishment very much had an international dimension and was not limited to cross-border activities within the Union. Regardless of whether an economic activity concerns a purely *international* dimension or not, the Member States are under a duty to exercise all remaining Member State powers consistently with Union law.

v. The freedom to export

In *Saint-Gobain, Gottardo*, and the *Open Skies* cases, the Court of Justice delivered a powerful confirmation of the primacy of the EU Treaties in areas outside of Union competence. It declared the principle of non-discrimination to be of universal applicability, irrespective of the field of law involved. As a consequence of the ruling in *Gottardo*, Member State nationals are equally protected against discriminatory treatment when exercising their right of free movement of *workers* as they are when exercising the freedom of *establishment* or the free movement of *services*.

These Treaty freedoms protected by the principle of non-discrimination are not the only Treaty rules capable of imposing compliance obligations on the Member States in areas of their own competence. In *Centro-Com*[889], the Court applied the duty of consistent exercise within the context of Article 207 TFEU, in a preliminary reference from the English High Court dealing with the extent to which a Member State could legally deviate from Union law regulating sanctions against third countries. In implementation of a UN Security Council Resolution imposing sanctions against the Federal Republic of Yugoslavia, Council Regulation 1432/92[890] was amended so as to prohibit the export of all commodities and products originating in or coming from the Union, providing for

[886] Ibid. at para 142.
[887] Ibid. at para 142.
[888] Ibid at para 146, emphasis added.
[889] Case C-124/95 *Centro-Com* [1997] ECR I-81.
[890] Council Regulation 1432/92 prohibiting trade between the EEC and the Republics of Serbia and Montenegro [1992] OJ L 151/4.

an exception in relation to commodities and products intended for strictly medical purposes.

Centro-Com exported pharmaceutical products from Italy to two wholesalers in Montenegro. Following a newly adopted policy aimed at enabling the UK authorities to exercise effective control over goods exported so as to ensure that the goods matched their description, Centro-Com was refused authorisation to transfer sums needed to pay for medical products exported from Italy to Montenegro. The referring court asked whether the Common Commercial Policy precluded Member States from adopting, in accordance with international law, measures restricting payments for exports by nationals of another Member State.

The United Kingdom argued that the change of national policy was undertaken by virtue of its national competence in the field of foreign and security policy:

> "The validity of those measures cannot be affected by the exclusive competence of the [Union] in relation to the common commercial policy or by the Sanctions Regulation, which does no more than implement at [Union] level the exercise of Member States' national competence in the field of foreign and security policy."[891]

The Court of Justice acknowledged that the "Member States have indeed retained their competence in the field of foreign and security policy", but it nevertheless emphasised that "the powers retained by the Member States must be exercised in a manner consistent with [Union] law"[892]. Consequently, Member States were not allowed to adopt national measures whose effect was to restrict the export of certain products on the basis that they fell outside the scope of the CCP[893]. This finding was reinforced by the fact that in the specific case, it was precisely "in the exercise of their national competence in matters of foreign and security policy that the Member States expressly decided to have recourse to a [Union] measure, which became the Sanctions Regulation, based on Article [207 TFEU]"[894].

III. The scope of compliance obligations in areas of Member State competence

Once an incompatibility with the Treaties has been established, the question arises of what obligations such a finding entails and how the respect for international law impacts on the scope of these obligations. To this end, the Court of Justice has adopted an approach based on the notion of "conflict". In this context, the absence of a conflict of obligations does not mean the absence of an

[891] Case C-124/95 *Centro-Com*, para 23.
[892] Ibid., paras 24-25.
[893] Ibid., paras 26-27.
[894] Ibid., para 28.

incompatibility with Union law, but implies that all inconsistencies between the Member States' international obligations and their obligations towards the EU can be resolved without compromising the rights of non-member countries. This is the case where international rules allow for certain national measures, but do not require them, or where inconsistencies can be removed by the Member State itself, without the consent of the third country involved.

The Court of Justice developed its compliance mechanisms in areas of Member State competence in an incremental fashion. In the late 1980s, it dealt with two cases involving autonomous Member State action (A.). It subsequently extended the duty of consistent exercise to international agreements involving *rights* of third countries which remained unaffected due to the unilateral extension of benefits provided for in those agreements (B.), before applying the same principles to agreements actually *affecting* third countries' rights (C.).

A. Autonomous action

In Cases C-146/89 and C-246/89, the Commission brought two enforcement actions against the United Kingdom, challenging national legislation adopted on the basis of international law. The international rules in question set forth only minimum requirements, leaving a large margin of discretion to the contracting states concerning the adoption of more stringent measures. The fact that the Member State involved was not *require*d by international law to adopt national rules incompatible with the EU Treaties meant that compliance obligations imposed by EU law did not conflict with international rules, with the consequence that the contested national legislation had to be repealed.

In Case C-146/89 *Commission v. United Kingdom*, the UK government sought to rely on its "sovereignty [...] in matters relating to fishing in the zone situated within the twelve-mile limit"[895]. Since Union law contained no rules for determining the location of baselines or the extent of waters under national sovereignty, it was for each Member State to determine, in accordance with international law, the location of its baselines. Such national sovereignty derived, in particular, from a 1976 Resolution[896] by which the EU Member States, by means of concerted action, extended their fishing limits to 200 nautical miles along their coasts. However, as the Union provisions did not contradict those of the Resolution passed by the Member States, there was "*no possibility of*

[895] Case C-146/89 *Commission v. United Kingdom*, para 39.

[896] Resolution on Fishing Adopted by the EEC Council at the Hague on 30 October 1976 and Formally Approved on 3 November 1976.

conflict" between the EU Regulation and the rules of international law[897].

According to Advocate General Lenz, the absence of a conflict between Union law and international law was significant, since the fishing rights established in the six to twelve-mile zone were not affected, even if public international law required the contracting states to alter the outer limits of their fisheries jurisdiction to reflect a change in baselines. The "crucial point here" was that "[Union] law can take precedence without difficulty in this sphere because there is no possibility of conflict with public international law"[898]. The finding that international law did not oblige the UK to adopt the contested legislation, but merely contained such an option, was of utmost importance to the Court and the Advocate General, because it confirmed that the UK was capable of complying with EU law without having to violate international rules.

The UK sought to rely on a similar argument in Case C-246/89 *Commission v. United Kingdom*. Emphasising "the competence of each State under public international law to define as it thinks fit the conditions upon which it grants to a vessel the right to fly its flag"[899], as laid down in Article 5 (1) of the Geneva Convention of 29 April 1958 on the High Seas[900], the UK argued that the principle of consistent exercise developed in internal market case law could not be transposed to the international context[901].

The Court of Justice emphasised that "in exercising [a] power, the Member States must comply with the rules of [Union] law"[902]. According to the Court, there were no Union provisions in place which could conflict with international law in this field. Although it did not explain any further its findings, the absence of a conflict between the international rules at stake and the EU Treaties appears to have resulted, in the specific case, from the fact that the Geneva Convention on the High Seas left it up to the Member States to lay down the conditions for the registration of ships. Since the international rules in question, thus, only laid down minimum requirements, which did not violate any Treaty provisions, the United Kingdom was not able to rely on its international obligations in order to justify non-compliance with Union law. After a lengthy analysis of the national provisions, the Court concluded that they were incompatible with (current) Articles 18, 49, and 55 TFEU and the UK had, therefore, failed to fulfil its obligations under the EU Treaties[903].

In the view of the UK government, such restrictions were tantamount to pre-emption of Member

[897] Case C-146/89 *Commission v. United Kingdom*, para 44, emphasis added.
[898] Case C-146/89, Opinion of Advocate General Lenz, [1991] ECR I-3555, at para 48.
[899] Case C-246/89 *Commission v. United Kingdom*, para 13.
[900] United Nations Treaty Series 450, No. 6465.
[901] See also case C-221/89 *Factortame* [1991] ECR I-03905. In this preliminary reference concerning the same context as that of C-246/89, the referring national court specifically raised the relevance of international law, see para. 11.
[902] Case C-246/89 *Commission v. United Kingdom*, para 15.
[903] Ibid., paras 17-39.

State powers within the sphere of national competence[904]. However, in both cases, the crux of the Court's reasoning appears to be the minimum requirements laid down by international law. Where international rules leave a certain margin of discretion to the Member States, the latter are free to lay down rules of their own. To that extent, the Member States do not act in *implementation* of their international commitments when adopting legislation, but instead, such legislation is introduced by way of autonomous action. Unlike implementation obligations, however, minimum requirements do not impose on the Member States any duty to take autonomous action. In other words, compliance with international commitments in these cases does not *require* the Member States to adopt any legislation. A conflict of compliance obligations on the part of the Member States was therefore excluded.

The principle governing autonomous Member State action in accordance with their commitments under international law can therefore be summed up as follows: where international rules grant rights to the Member States without imposing a corresponding obligation, the Member States are under a duty to renounce to such rights if found to be incompatible with the fundamental freedoms provided for by the EU Treaties. Indeed, in subsequent case law, the Court established this reasoning as a general rule:

> "[W]hen an international agreement *allows*, but does not *require*, a Member State to adopt a measure which appears to be contrary to [Union] law, the Member State must refrain from adopting such a measure"[905].

The Court thus adopts a strict view of the obligations imposed on the Member States in such cases. As emerges from the pre-litigation procedure, the Commission had urged the UK government not to *apply* the contested legislation to vessels from Member States fishing in areas where they were authorised to do so by Union law[906]. The Commission's request indicates that the breach of Union law could have been remedied if the rights stemming from the London Convention which the UK granted to its own nationals had been extended also to nationals of other Member States[907]. Contrary to the Commission's plea, however, the Court makes clear that the extension of rights is not sufficient for a Member State to fulfil its obligations towards the Union. Instead, the Member States are required to "*refrain* from *adopting* such a measure" in the first place[908].

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[904] See Case C-246/89, para 10: "The UK contends in the first place that the EEC Treaty cannot be interpreted so as to deprive the Member States of their competence to determine the nationality of their vessels, including conditions relating to the nationality of owners."

[905] See Cases C-324/93 *The Queen v. Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd.* [1995] ECR I-563 at para 32 and C-124/95 *Centro-Com*, op. cit., at para 60, emphasis added.

[906] Ibid., para 15.

[907] Case C-146/89 *Commission v. United Kingdom*.

[908] See Cases C-324/93 *Macfarlan Smith Ltd.*, para 32 and C-124/95 *Centro-Com*, op. cit., at para 60, emphasis added.

B. Unilateral extension of benefits

International agreements concluded by the Member States usually lay down specific obligations which, unlike mere minimum requirements, not only grant rights but also impose certain obligations towards non-member countries. As we saw above, the Court of Justice for a long time seemed hesitant in applying the principle of consistent exercise to international Member State commitments involving rights of *third* countries. In *Saint-Gobain*[909], the Court finally confirmed that primary Treaty law may impose compliance obligations on the Member States when exercising rights stemming from an international agreement. While the Court limited itself to a mere statement of the principle of consistent exercise, the Advocate General provided also the legal foundations for this reasoning. Implementation of a Member State commitment under international law was to be considered no different from implementation of a domestic legal act and did therefore not merit any protection against incompatible rules of Union law[910]. This did not, however, say anything about the Member States' obligations towards third countries. The case was easily resolved, since fulfilment of these obligations involved benefits granted by the Member State itself and not by the third country. Hence, Germany was able to remedy the inconsistency on its own by unilaterally extending the tax advantages under the bilateral agreements to nationals and companies of other Member States. In the words of the Court, the Member State was required to "grant to permanent establishments of non-resident companies the advantages provided for by that treaty on the same conditions as those which apply to resident companies"[911].

When examining the scope of the compliance obligations to be imposed in *Gottardo*, the Court considered as a final point the existence of an objective justification for Italy's refusal to extend to a French national the advantages which its own nationals derived from the bilateral convention with Switzerland. Although similar considerations had already been discussed in *Saint-Gobain*, the Court for the first time conceded expressly that disturbances in the balance and reciprocity of a bilateral Member State agreement

> "may, it is true, constitute an objective justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from that convention"[912].

[909] Case C-307/97 *Saint-Gobain*.

[910] Case C-307/97 *Saint-Gobain*, Opinion of Advocate General Mischo [1999] ECR I-6161, para 77: "[T]here is no need to distinguish between a Member State's provisions on direct taxation which are purely domestic in origin and those which derive from a double-taxation agreement with another Member State or a non-member country. Once these agreements have been ratified by the national parliament, they form part of the national law on direct taxation, in the same way as purely domestic provisions."

[911] Ibid., para 58.

[912] Case C-55/00 *Gottardo*, Opinion of Advocate General Colomer, para 36.

In the specific case, however, the Court of Justice reached the conclusion that Italy had failed to establish the existence of such an objective justification. In the view of the Court, a valid justification would have been if the obligations which Union law imposes on Italy were to "compromise those resulting from the *commitments* which the Italian Republic has entered into vis-à-vis the Swiss Confederation"[913]. However, this was not the case, as the unilateral extension of benefits to nationals of other Member States "would in no way compromise the *rights* which the Swiss Confederation derives from the Italo-Swiss Convention and would not impose any new *obligations* on that country"[914]. A possible increase in the Member State's financial burden and administrative difficulties in cooperating with the competent Swiss authorities, in contrast, could not justify Italy's failure to comply with its Treaty obligations[915]. Neither was Italy able to defend itself by relying on Switzerland's refusal to provide the Italian authorities with the information it required to award the contested benefits[916].

In these two cases, the Court of Justice left no doubt that the principle of consistent exercise may impose concrete compliance obligations where international Member State commitments towards third countries conflict with their commitments towards the Union. As a rule, the Member States are under a duty to ensure full compliance with primary Union law. If compliance implies renouncing to rights provided for under an international agreement, then the Member States are required to do so. Thus, the Court transposed the same reasoning developed in the area of autonomous Member State action to cases involving third countries. While the two situations differ substantially, they both have in common that the relevant international rules which conflict with the EU Treaties do not grant *rights* to third countries.

In the case of autonomous action, the absence of a conflict is easily explained, for the international rules in question did not prescribe discriminatory action on the part of the Member State, but merely permitted it. The bilateral agreements at issue in *Saint-Gobain* and *Gottardo*, by contrast, did impose specific implementation obligations on the Member States. Nevertheless, as the Advocate General explained in *Saint-Gobain*, "there is no potential conflict between the obligations" which Union law places on the Member States and those which follow from their commitments to non-Member States[917]. What was decisive for the absence of a conflict in these cases was that the international agreements at issue did not prevent the Member States from extending the advantages to nationals of or companies established in other Member States. Extending the advantages in such a

[913] Case C-55/00 *Gottardo*, para 37, emphasis added.
[914] Ibid., emphasis added.
[915] Ibid., para 38.
[916] Case C-55/00, Opinion of Advocate General Colomer, para 41.
[917] Case C-307/97 *Saint-Gobain*, Opinion of Advocate General Mischo, para 81.

way "does not compromise the rights of the non-member States which are parties to the agreements and does not place them under any fresh obligation"[918]. This, in the view of both the Court and the Advocate General, constituted a balanced state of reciprocity of obligations, even if the Member States were still bound by their commitments without being able to profit from the rights thereunder.

Thus, as long as the implementation of an international Member State commitment leaves the rights of a third country unaffected, Member States are under a duty of full compliance with their Treaty obligations. The duty is not, however, unconditional. The Court leaves room for objective justifications, but only gives hints as to what could potentially constitute such a justification. It is more explicit when it comes to categorically excluding certain defences from the outset – arguments related to budgetary concerns or practical difficulties are not a valid defence.

C. Advantages granted by non-member countries

Where compliance constraints under EU law do not compromise the rights of the non-member States involved or place them under any new obligations, there is thus no potential conflict between the Member States' obligations towards the third states and their obligations towards the Union. However, it may not always be possible to achieve this "balance and reciprocity"[919] by removing the incompatibilities on the part of the Member States. Where an international agreement involves incompatible rights granted by the other contracting party, the incompatibility with Union law cannot be remedied in the same way.

The Court of Justice first dealt with such a constellation in *Matteucci*[920], a preliminary ruling concerning an *intra*-Member State agreement. Germany and Belgium had concluded a Cultural Agreement which provided for scholarships for professional training to be granted by each Member State to nationals of the other Member State. Miss Matteucci, an Italian national born in Belgium, brought proceedings against the Belgian grant-awarding authority after it refused her application for financial support during her stay in Germany on the grounds that scholarships awarded pursuant to the Cultural Agreement were reserved exclusively for candidates of Belgian nationality. While the scholarships to Belgian nationals were granted by the German authority, the candidates were selected on the basis of a list drawn up by their Belgian counterpart. The latter, hence, sought to defend itself by relying on the fact that the disputed benefits were granted by the other Member

[918] Ibid., para 82.
[919] Case C-307/97 *Saint-Gobain*, para 59.
[920] Case 235/87 *Matteucci*.

State. As the German authorities were in any event bound by the provisions of the bilateral agreement, under which only nationals of the two countries were eligible for scholarships, "to impose obligations on [Belgium] would therefore be otiose"[921].

In the view of the Court of Justice, however, this argument was not compatible with the Member States' duties under (current) Article 4 (3) TEU, as Member States were not allowed to prevent other Member States from fulfilling the obligations imposed on them by Union law:

> "If, therefore, the application of a provision of [Union] law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under [Union] law".[922]

Relying on EU legislation relating to the free movement of workers, the Court concluded that the conduct of the Belgian authorities violated the principle of equal treatment of Union workers[923]. In *Matteucci,* both contracting states were subject to compliance constraints imposed by Union law and the case was easily resolved. Belgium was therefore not able to rely on the justification that the inconsistent benefits were granted by the other contracting party.

Where such benefits are granted by a non-member state, however, the situation is decisively different, since the Court of Justice cannot impose on them the obligation to comply with Union law. The Court was confronted with precisely such a constellation in the *Open Skies* cases[924]. In their submissions, the defendant Member States sought to rely on essentially two arguments. By the first one, they claimed that the discriminatory benefits were granted by the third country and were thus not subject to control by the Member States. The defendant Member States argued that the discrimination alleged by the Commission was not a consequence of the bilateral agreements themselves, but resulted directly from the conduct of the United States which consisted in limiting the permissions in respect of those Member States that had not concluded an open skies agreement.

Advocate General Tizzano rejected this argument, pointing out that only the contracting Member States themselves had the right to obtain from the US authorities the required permissions to operate

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[921] Ibid., para 17.
[922] Ibid., para 19.
[923] Ibid., para 23.
[924] Case C-466/98 *Commission v. UK* [2002] ECR I-9427, Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519, Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575, Case C-469-98 *Commission v. Finland* [2002] ECR I-9627, Case C-471/98 *Commission v. Belgium* [2002] ECR I-9681, Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741, Case C-475/98 *Commission v. Austria* [2002] ECR I-9797, Case C-476/98 *Commission v. Germany* [2002] ECR I-9855.

the services provided for under the Open Skies agreements[925]. Hence, the Member States party to the bilateral agreements would be actively involved in the discrimination on the part of the US authorities and were not able to rely on their defence based on benefits granted by a non-member country.

The Court of Justice expressed this concept in more precise terms: the formulation of the clauses not only permitted the US authorities to discriminate, but even put them "in principle under an *obligation* to grant the appropriate operating authorisations and required technical permissions to airlines of which a substantial part of the ownership and effective control is vested in [one of the contracting states]"[926]. As a result of the fact that the benefits were granted by a third country, Union airlines established in non-contracting Member States "may *always* be excluded from the benefit of the air transport agreement" and consequently "suffer discrimination which prevents them from benefiting from the treatment which the host Member State [...] accords to its own nationals"[927].

Thus, the Court of Justice clarified two important points. Firstly, Member States cannot validly defend themselves by arguing that a given benefit is granted by a third country, since it is their decision to conclude the agreement which imposes on the third country a *duty* to grant the benefit. Secondly, the crux of benefits granted by third countries is that the discriminatory conduct is beyond the control of the Union legal order and can consequently not be remedied by means of compliance obligations under EU law.

Several of the defendant Member States had, as a secondary claim, presented the Court with an objective justification for the differential treatment created by the Open Skies treaties based on (current) Article 52 TFEU, according to which the rules on the right of establishment are not to prejudice national provisions justified on grounds of public policy, public security or public health. Arguing on the basis of reciprocity, the Member States objected that they would be required to grant the US the same rights they enjoyed, meaning that they would no longer be able to withhold or revoke airlines designated by the US but owned or controlled by non-US nationals[928]. After recalling its internal market case law concerning justification on grounds of public policy, the Court quickly concluded that the bilateral agreements did not limit the application of the discriminatory clauses to circumstances involving a threat to public policy. Consequently, no objective justification existed that could have remedied the Member States' failure to fulfil their obligations under Article 49 TFEU[929].

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925 Joined Opinion of Advocate General Tizzano in the *Open Skies* cases, para 123.
926 See, e.g., Case C-476/98 *Commission v. Germany*, para 152, emphasis added.
927 Ibid., para 153, emphasis added.
928 Ibid., para 127.
929 Ibid., paras 157-161.

IV. The duty of consistent exercise and Member State competence – An assessment

When exercising an external competence, the Member States are not only under a duty under international law to comply with their commitments towards third countries, but they are also required by Union law not to jeopardise certain objectives of EU law. Even in the absence of Union powers and, therefore, Union rules in a given field, the Member States are thus subject to compliance obligations.

By distinguishing between the *existence* and the *exercise* of Member State powers also in areas of retained competence, the Court of Justice expands the scope of Union law beyond the areas in which the EU has been given the right to act. To that end, the Court has developed a recurring formula, according to which "powers retained by the Member States must be exercised consistently" with Union law[930]. As emerges from Section II., the Court has continuously applied this formula in different subject areas, irrespective of whether or not the matter at issue comes within those areas which are traditionally considered the exclusive purview of the Member States.

Not only does this approach illustrate that the applicability of particular provisions of EU primary law "is largely indifferent to the delineation of competences between the EU and its Member States"[931], but it also suggests that the concept of 'exclusive' Member State competence is reduced to "meaning that the Member State is legitimately in a position to act wherever the EU fails to do so"[932]. This interpretation of the Court's construction of the duty of consistent exercise would then be diametrically opposed to the notion of Member State exclusivity. Indeed, it strongly resembles the definition of *concurrent* competence[933], described in Article 2 (2) TFEU as meaning that "[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence".

Against this background, "one might think that national powers have been abolished"[934]. It appears that "there are no enclaves of national sovereignty precluding EU law from displaying its pervasive effects"[935]. The Treaty freedoms which give rise to the duty of consistent exercise are capable of applying in any field, as long as the functioning of the internal market may be affected. It thus seems that "there is an EU framework that percolates through *all* areas of national law, limiting the

[930] See e.g. Case C-246/89 *Commission v. United Kingdom*, para 12.
[931] L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice", 203.
[932] Ibid., p. 202.
[933] See e.g. Opinion of Advocate General Kokott in Case C-13/07 *Commission v. Council*, para 76: "A characteristic of *concurrent competence* (also referred to as *shared competence*) is that the Member States exercise their competence in so far as the [Union] has not exercised its competence", emphasis in the original.
[934] L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice", 204.
[935] K. Lenaerts, "Federalism and the Rule of Law", 1386.

discretion of national legislators and administrative authorities"[936]. As a result, the Court's approach amounts to a denial of the Member States' position as 'Masters of the Treaties': "[f]ar from containing the scope of EU law, it serves as a vehicle for the *totalization* of the process of integration"[937].

In order to address these concerns that Member State competence is being restricted beyond what they have agreed to in their role as Masters of the Treaties, it is useful to examine different aspects of the duty of consistent exercise. In the following, we will first seek to assess the Court's approach to the scope of EU primary law (A.), before turning to the obligations which follow from a finding that a given situation falls within the scope of EU Treaty provisions (B.). In assessing the scope of the compliance obligations, it is helpful to consider the possibility of objective justification, allowing for an exception to the duty of consistent exercise (i.), as well as the limits to the compliance obligations (ii.).

A. The scope of primary EU law

In the light of the extensive reach of the duty of consistent exercise into areas of Member State competence, it may be tempting to compare the Court's approach to notions such as competence creep, pre-emption, or an *entitlements* view of federalism. In this respect, however, it is important to take account of the limits to the substantive scope of the duty. First, it must be acknowledged that the applicability of the duty of consistent exercise requires a link with the substantive law of the Union. It is, therefore, "the existence (or absence) of this link that is decisive in the vertical allocation of powers"[938].

By contrast, the field of law in which the conflict between international Member State obligations and Union law arises is not relevant in this context. As we saw earlier, compliance obligations are capable of applying in any area, irrespective of questions of competence. While the area of law is not decisive, the *nature* of the Treaty provisions which conflict with national rules determines whether the Member States are under an obligation to remove incompatibilities or not. Compliance with fundamental EU law is necessary to guarantee the *effectiveness* of the Treaties and the functioning of the entire Union legal order. If Member States were free to use their retained powers as they wished by impeding free movement and non-discrimination, the very project of a single European market would be at risk[939].

[936] Ibid., emphasis added.
[937] L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice", 196.
[938] K. Lenaerts, "Federalism and the Rule of Law", 1386.
[939] L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice", 211.

Furthermore, compliance restraints based on fundamental Treaty norms can be distinguished from other types of compliance obligations in that they "have typically been applied by the ECJ with the individual interest in mind, rather than on the basis of any dogma about treaty conflict"[940]. The Court's objective is not to expand the scope of Union law into areas of retained powers, but it seeks to protect *isolated interests* in the Union. These include the interests of those circulating within the Union, coming from or being established in other Member States – interests "that are naturally underrepresented in the legislation of Member States constitute the 'European' situations *par excellence*"[941]. National rules have the potential of jeopardising the common interest of the Member States and their citizens. Union law, however, "forces the State authorities to rethink the way they act", so as to compel national authorities to take account of transnational and European interests[942]. Instead of seeking an extension of Union powers, the Court recognises that what is required is a reorganisation of the internal forum:

> "The Court relies on Treaty provisions precisely because it does not want to replace the powers of the Member States by those of the Union. [The duty of consistent exercise] is not a matter of *preempting* the sphere occupied by national regulations but of adapting the way in which they are *applied*"[943].

Concerns over a possible creeping expansion of EU competence are, therefore, unnecessary. Member State power is not denied, but "it exists only with respect to a 'global system' in which it is bound up"[944].

B. The nature of compliance obligations in areas of retained competence

Compliance obligations are liable to arise in all areas of Member State competence, provided that there is a substantive link with the Treaties and certain sensitive interests are at stake. But does this also mean that the safeguarding of the European project can require unlimited restraints on the Member States' international competence where this would further the Union's interests?

In order to determine the scope of the obligations which flow from a finding that a certain Member State act comes within the reach of EU law, it is useful to examine to what extent the Court allows for derogations from the duty of consistent exercise and how far the compliance obligation extends in cases where no objective justification is applicable.

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940 J. Klabbers, *Treaty Conflict and the European Union*, 213.
941 L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice", 213.
942 Ibid.
943 Ibid., p. 215 and p. 218, emphasis added.
944 Ibid., p. 212.

i. Objective justifications and reciprocity

The only instances in which the failure to remove an incompatibility with the Treaties does not amount to a failure to fulfil obligations under EU law is where the Member States can rely on an objective justification. The Court's standards for what constitutes an objective justification are strict, however. Practical[945] or administrative[946] difficulties cannot serve as an objective justification any more than arguments of a budgetary nature[947]. Neither is a breach of Article 4 (3) TEU on the part of the other Member State involved a valid excuse[948]. Similarly, a breach of the principle of non-discrimination on grounds of public policy, public security or public health have been found to be justified – in line with the Court's internal market case law in the field – only in cases of a "genuine and sufficiently serious threat affecting one of the fundamental interests of society"[949]. The argument brought forward in the *Open Skies* cases that the reciprocity inherent in international negotiations would require the Member States to grant the United States the same rights they enjoyed, meaning that they would no longer be able to withhold or revoke airlines designated by the US but owned or controlled by non-US nationals, was not a sufficient justification[950].

More generally, the political reality of international negotiations cannot serve as a valid defence for *a* Member State's failure to fulfil its obligations. Several Member States indicated in the *Open Skies* cases that they had tried to secure conformity with the EU Treaties by inserting a clause to that effect in the agreement, but received a "flat refusal" from the US authorities[951]. The Member States were not able to show that they did "everything necessary" in order to secure amendment of the discriminatory clause and that the same result pursued by the contested clause could not have been achieved by any less restrictive means[952]. The *Open Skies* cases thus illustrate the difficulty of applying traditional standards of objective justification and proportionality in areas of Member State competence. In particular, "it may be problematic to ascertain whether Member States could have attained the same objective with less restrictive means when the restrictive measure is the result of negotiations with third parties"[953].

In *Gottardo* and *Saint-Gobain*, on the other hand, the Court acknowledged that disturbances in the balance and reciprocity of a bilateral Member State agreement could indeed constitute an objective

[945] See Case C-146/89 *Commission v. United Kingdom*.
[946] See Case C-55/00 *Gottardo*.
[947] See Cases C-307/97 *Saint-Gobain* and C-55/00 *Gottardo*.
[948] See Case C-307/97 *Saint-Gobain*.
[949] *Open Skies* cases, see e.g. Case C-467/89 *Commission v. Denmark*, para 121.
[950] Ibid., paras 157-161.
[951] Joined Opinion of Advocate General Tizzano in the *Open Skies* cases, para 130.
[952] Ibid., paras 129-131.
[953] R. Holdgaard, *External Relations Law of the European Community*, 134-135.

justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derived from that convention. In *Saint-Gobain,* for example, the intervening Swedish government objected that the balance inherent in double taxation treaties would be disturbed if the benefits thereunder were extended to companies in other Member States[954]. The Court held that "the balance and the reciprocity" of the tax treaties with Switzerland and the USA "would not be called into question by a unilateral extension, on the part of the Federal Republic of Germany, of the category of recipients in Germany of the tax advantage provided for by those treaties"[955]. However, the Court of Justice displays a different understanding of the notion of reciprocity than that relied upon by the Swedish government. While Sweden's submission sought to safeguard *national* interests by preventing the extension of benefits by one Member State to companies of other Member States to the detriment of the former, the Court's interpretation of reciprocity in this case only takes into account the interests of *third* states. According to the Court, the reciprocity and balance under the bilateral agreements would not be jeopardised, "since such an extension would not in any way affect the *rights of the non-member countries* which are parties to the treaties and would not impose any new obligation on them"[956].
In the *Open Skies* cases, however, where Member State action did affect the rights of third countries, the argument related to "balance and reciprocity" proved to be no objective justification after all. In fact, the Court applied the same reasoning developed in its previous case law which did not concern any conflict with third countries' rights to a situation where the advantage under an international agreement was granted by a non-member country. By confirming that the Member States must use their foreign relations powers consistently with Union law, "the Court simply presumed the primacy of EU law" and "[a]t no point did [it] consider the possibility that international law might have something else to say"[957].

ii. The limits of compliance

The *Open Skies* cases thus demonstrate that the difficulties inherent in unilaterally remedying a discriminatory effect are not in themselves a sufficient excuse. Does this then imply that Member States may be required to denounce entire agreements concluded in areas of national competence, if there is no other means to remove the contested incompatibility available? And the obligation to remove incompatibilities aside, does the duty of consistent exercise give rise to further constraints

[954] Case C-307/97 *Saint-Gobain*, para 55.
[955] Ibid., para 59.
[956] Ibid., emphasis added.
[957] J. Klabbers, *Treaty Conflict and the European Union*, 212.

on the exercise of Member State powers which go beyond the requirement to achieve primacy of EU law?

a. The duty to denounce

What emerges from the Court's case law in areas of Member State competence is a strict pursuit of the primacy of Union law. Where a conflict arises between Member States' international commitments and their obligations towards the Union, the Member States are required to resolve it. The Court's aim is not to find the right balance between the Union interest and the rights of *Member States* under conflicting international agreements. This is illustrated, as we saw above, also by the Court's understanding of "balance and reciprocity". Instead, the goal is to bring Member States' obligations towards third countries in line with EU law.

However, where an inconsistent conduct takes place on the part of third countries, Member States are not in a position to unilaterally remedy a contested incompatibility. In those cases, Member States may not be left with a lot of scope for action, as evidenced by the *Open Skies* judgments. In the specific cases, the Court of Justice did not sanction a duty of denunciation, and uncertainty arose concerning how to enforce the judgments. In fact, the Commission claimed in its communication on the effect of the cases that the Member States were not only to refrain from entering into other bilateral air service agreements, but also to denounce all existing agreements with the United States, but the Member States strongly opposed[958].

Although the Court stopped short of imposing a duty to denounce on the Member States involved, its bold assertion that the Member States are required to remove incompatibilities with EU law at all costs seems to confirm the existence of a duty to denounce international agreements, regardless of whether they fall within Member State, shared or exclusive Union competence. Citing the *Commission v. Portugal*[959] cases discussed in Chapter Three, the Court held that

> "the Member States are *prevented* not only from contracting new international commitments but also from *maintaining such commitments in force* if they infringe [Union] law"[960].

The Court's construction, in *Gottardo*, of a compliance obligation stemming directly from Article 351 TFEU, seems to confirm this reading:

> "[W]hen giving effect to commitments assumed under international agreements, […] Member States are required, subject to the provisions of Article [351 TFEU], to comply with the obligations that

[958] See C. N. K. Franklin, "Flexibility vs. Legal Certainty", 95. The Commission subsequently retracted its pleas for denunciation, only to be later granted by the Council a negotiating mandate for the entire air transport sector.
[959] Case C-62/98 *Commission v. Portugal* and Case C-84/98 *Commission v. Portugal*.
[960] See e.g. Case C-467/98 *Commission v. Denmark*, para 39, emphasis added.

[Union] law imposes on them."[961]

In two different cases involving questions of Member State competence[962], the Court thus relied on Article 351 TFEU and the related case law, in which, as we saw in Chapter Three, the Court left no doubt that the Member States are ultimately under a duty to denounce inconsistent agreements. It can, therefore, be assumed that also in areas of retained competence, the Member States are under an obligation of result, i.e. they must achieve compliance with their Union obligations, even if that implies a duty to denounce the international agreement concerned. Denunciation of an entire agreement invalidates all provisions included therein, regardless of whether they actually conflict with or impede the objectives of Union legislation. In other words, the existence of one inconsistency is sufficient to exclude Member State involvement in a wider area, irrespective of material normative tensions with EU law. Of course, Member States would be free to conclude the same international agreement again without the inconsistent clause. However, where a third country has demonstrated its unwillingness to re-negotiate parts of an agreement, it is unlikely to accept negotiations for an entirely new agreement. In fact, the *Open Skies* cases illustrate the difficulties encountered by the Member States in this respect. Several Member States had tried to secure conformity with the EU rules by inserting a clause to that extent in the agreement, but received a flat refusal from the US authorities[963]. In the aftermath of the judgments, the question therefore arose of "[w]hat chance do the Member States have to effectively renegotiate the ownership clauses with the US?"[964]. As a result of the Court's judgments, in fact, the Council was forced to grant the Commission a negotiating mandate for the whole air transport sector, including those areas falling within Member State competence[965]. In such cases, then, the compliance obligation in fields of *Member State* powers does not differ in its outcome from the exclusion of all Member action in fields of exclusive *Union* competence.

The Court's ruling in the *Open Skies* cases not only significantly limits the Member States' freedom to exercise a retained competence, but the outcome of the judgments is also strongly reminiscent of a *conservative fidelity* view of political morality. The comprehensive negotiating mandate granted to the Commission as a consequence of the *Open Skies* judgments counteracts the diversity of policies and interests present in the air transport sector, effectively harmonising the interests of the various actors throughout the system[966]. Nevertheless, the duty imposed on the Member States in these cases cannot be deemed to seek to calm policy disputes by suppressing political dissent, as the

[961] Case C-55/00 *Gottardo*, para 33.
[962] It must be pointed out, however, that the *Open Skies* cases also involved areas of exclusive Union competence.
[963] Joint Opinion of Advocate General Tizzano in the *Open Skies* cases, para 135.
[964] P. Slot and J. Dutheil de la Rochère, "Case Law. *Open skies* judgments of the Full Court of 5 November 2002" (2003) 40 CML Rev. 697 at 712.
[965] See Franklin, "Flexibility vs. Legal Certainty", 103 et seq.
[966] Ibid.

conservative fidelity approach would[967]. The Court's main objective was to abolish the discriminatory effect of the contested provisions, either by extending the incompatible benefits to airlines established in other Member States or by requiring the Member States involved to renegotiate the relevant clauses. In practice, neither of the two solutions proved feasible and the Member States opted for a different route. The Union, however, cannot be held accountable for practical difficulties which make the renegotiation of international agreements impossible.

b. The limits to compliance – The duty of consistent exercise and its relationship with Article 4 (3) TEU

This interpretation of the Court's ruling in the *Open Skies* cases is in line with its more general approach to compliance obligations in areas of Member State competence. It appears that the Court is careful to resolve the incompatibilities in these cases on the basis of primacy alone, signalling that the level of intrusiveness of EU rules in areas of Member State competence is to be kept to a minimum.

Firstly, the Court adopts a lenient approach to the concept of primacy. While Member States are not allowed to maintain in force any conflicting national legislation adopted by way of autonomous action, the situation is very different where third countries' rights are affected. Here, Member States are able to act in conformity with EU law simply by applying the advantages granted to them under international law also to nationals of other Member States. Consequently, there is no obligation on the Member States to achieve *de jure* compliance by removing all incompatibilities with Union law. Incompatible clauses may remain in force, as long as the discriminatory benefits are extended to other Member States. As we saw in the previous chapter, the Court does not always adopt this interpretation of primacy. In the *Commission v. Portugal* cases, the Member State at issue had *de facto* waived its rights stemming from an inconsistent bilateral agreement and the conflicting clauses were no longer being implemented[968]. However, the Court did not deem it sufficient that the Member State had renounced to its international rights, but insisted that the inconsistency with Union law be remedied also on paper[969]. In areas of Member State competence, however, it suffices if Member States fulfil their obligations towards the EU by way of *de facto* compliance, provided that the rights of third states are not affected by an inconsistent provision.

Secondly, the Court emphasises the role of primacy in resolving conflicts in areas of Member State competence by making clear that no further, potentially unlimited, compliance constraints may arise

[967] See D. Halberstam, "Of Power and Responsibility", 773.
[968] Case C-62/98 *Commission v. Portugal*, para 11 and Case C-84/98 *Commission v. Portugal*, para 13.
[969] See Chapter Three.

on the basis of the general duty under Article 4 (3) TEU. As we saw earlier, the Court had some initial difficulties in formulating the substantive scope of the duty of consistent exercise. In Case C-146/89 *Commission v. United Kingdom*[970], the Court seemed to suggest that the "objectives" of EU secondary law were sufficient to impose compliance constraints. In this case, the restrictive effect of Union rules is not based on a conflict between Member State law and a specific provision of Union law, but merely requires a finding that the national measure interferes with the proper functioning of the Union legal order or impedes the objectives of Union legislation[971]. In light of its potential for restraint based solely on a vaguely defined conflict, this phenomenon has been termed "obstacle pre-emption"[972]. The wording of Article 4 (3) TEU with its objective to "facilitate the achievement of the Union's tasks" would, in fact, leave ample space for obstacle pre-emption. As mentioned in Chapter Three, compliance obligations based on the general loyalty obligation may have far-reaching consequences and pave the way for unnecessarily broad restraints, such as an obligation to abstain from any action that could jeopardise the attainment of Treaty objectives[973]. Member States could have, for example, been found to be under an obligation not to enter into international agreements if there was the risk of conflicting commitments or a strict procedural obligation of consultation with the Commission before concluding any agreements which had the potential of jeopardising the application EU primary law. However, the Court has rejected the use of the general obligation, basing the Member States' duties in areas of national competence strictly on the specific obligation to ensure primacy.

V. Overview – The duty of consistent exercise in the context of the general duty of loyalty

In its construction of the duty of consistent exercise, the Court of Justice has thus developed a precisely circumscribed formula for achieving Member States' compliance with their obligations towards the Union in areas of national competence. The approach it has developed does not rely on the general duty of loyalty under Article 4 (3) TEU, neither is it based on the obligation to eliminate incompatibilities laid down in Article 351 TFEU. Nevertheless, when assessing the obligations

[970] Case C-146/89 *Commission v. United Kingdom*, paras 21-25.

[971] E. D. Cross "Pre-emption of Member State Law in the European Economic Community", 463, R. Schütze "Supremacy without Pre-Emption", 1041.

[972] See e.g. A. G. Soares "Pre-emption, Conflicts of Powers and Subsidiarity", 133, R. Schütze "Supremacy without Pre-Emption", E. D. Cross, "Pre-emption of Member State Law in the European Economic Community".

[973] See Joined Opinion of Advocate General Maduro in Case C-205/06 *Commission v. Austria* and Case C-249/06 *Commission v. Sweden*, para 42, where the AG argued that Member States were required "to take all appropriate steps to prevent their pre-existing international obligations from *jeopardising* the exercise of [Union] competence", emphasis added.

incumbent on the Member State in *Gottardo*, the Court introduced a new line of argument based on Article 351 TFEU. Although none of the parties to the dispute nor the intervening Member States or the Commission sought to rely on the provision, and neither had AG Colomer brought it forward in support of his line of argument[974], the Court deemed it necessary to point out that "Member States are required, subject to the provisions of *Article [351 TFEU]*, to comply with the obligations that [Union] law imposes on them"[975]. However, if Article 351 TFEU applies equally in areas of *national* competence and in relation to *post*-accession agreements, then questions arise concerning the relationship between Article 351 TFEU and Article 4 (3) TEU. In fact, these questions were already addressed in Chapter Three, where it emerged that in the *Commission v. Portugal* cases, which concerned pre-existing commitments, the Court imposed the same obligations as in *Commission v. Belgium*[976] involving a post-accession agreement. The fact that the inconsistent agreements concluded by Portugal came within the scope of Article 351 TFEU did not impact in any way on the Member States' obligation to ensure the primacy of Union law.

The *Open Skies* cases confirmed that Article 351 TFEU does not constitute an exception to primacy, emphasising that the obligation to ensure primacy applies regardless of whether the inconsistent commitments are assumed before or after accession to the EU, and regardless of whether they fall within an area of Member State or of Union competence. AG Tizzano argued that the bilateral agreements concluded with the United States did not fall within the scope of Article 351 TFEU, but even if they did, the Member States were nonetheless in breach of Article 351 (2) TFEU for their failure to eliminate the contested clauses[977]. The Court of Justice, by contrast, found that there was no need to rule on the applicability of Article 351 TFEU in the first place[978]. Notwithstanding its rejection of the claim based on Article 351 TFEU, however, the Court drew a parallel between *post*-accession agreements in areas of Member State competence and obligations arising under *pre*-accession commitments. Citing the *Commission v. Portugal*[979] cases, the Court held that the same obligations applied also in the context of post-accession agreements. In both cases, the Member States were prevented from maintaining in force international commitments which infringed Union

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974 The absence of arguments based on Article 351 TFEU is easily explained by the fact that the bilateral convention on social security concluded between Italy and Switzerland was signed in 1962 and later amended in 1980, long after Italy's accession to the Union in 1957, which excludes the application of an article regulating pre-membership agreements from the outset. While the AG did make mention of Article 351 TFEU, he referred to it in an entirely different context when discussing "the effect of the wording of the question referred for a preliminary ruling" and the differences between the *Gottardo* and *Grana-Novoa* cases in this respect, see Case C-55/00 *Gottardo*, Opinion of Advocate General Ruiz-Jarabo Colomer, para 34.

975 Case C-55/00 *Gottardo*, para 33, emphasis added.

976 Case C-170/98 *Commission v. Belgium* [1999] ECR I-5493.

977 Joint Opinion of Advocate General Tizzano in the *Open Skies* cases, paras 141-145.

978 See e.g. Case C-467/98 *Commission v. Denmark*, paras 38-43.

979 Case C-62/98 *Commission v. Portugal* and Case C-84/98 *Commission v. Portugal*.

law[980].

It thus appears that regardless of whether an international agreement is concluded before accession or afterwards, and regardless of whether it falls within the scope of Union law or outside, the Member States are always under the same obligation to achieve full compliance with EU law. The difference is, however, that where agreements falling entirely outside Union competence contain incompatible clauses, the Member States may, if possible, remove such inconsistencies by unilaterally remedying the discriminatory effect of these provisions. The international agreements, along with the rights of third countries, thus remain unaffected. In the *Portugal* cases, by contrast, the Court did not accept the Member State's unilateral renunciation of its rights under the contested agreements. Although Portugal was "prepared to guarantee the shipowners of third countries engaged in maritime transport *all* the rights deriving from the application of Regulation 4055/86"[981], it was nevertheless found to have failed to fulfil its obligations towards the EU. In *Saint-Gobain* and *Gottardo*, by contrast, the Court considered it a sufficient remedy of incompatibilities with Union law that the Member States continued to grant rights to third countries without restricting the principle of non-discrimination. If the Court had applied its reasoning from *Saint-Gobain* and *Gottardo* in the *Portugal* cases, the question of whether Portugal was under a duty to denounce its pre-accession agreements would have never arisen. Against this background, the Court's interpretation of the duty to remove incompatibilities in the *Portugal* cases appears overly strict and certainly "formalistic"[982] in comparison with its approach in *Saint-Gobain* and *Gottardo*.

VI. Incompatibilities with CFSP acts

The doctrine of primacy, which forms the basis for the duty of consistent exercise, is sometimes argued to be capable of being applied to CSFP measures as well[983]. As we saw in Chapter Three, however, it is doubtful that CFSP measures may be deemed to take precedence over national rules. In addition to the Court's limited jurisdiction in the area, the special nature of CFSP competence is

[980] See e.g. Case C-467/98 *Commission v. Denmark*, para 39: "In such a case, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe [Union] law (see, to that effect, Case C-62/98 Commission v Portugal [2000] ECR I-5171 and Case C-84/98 Commission v Portugal [2000] ECR I-5215)."

[981] See C-62/98 *Commission v. Portugal*, para 13, emphasis added.

[982] C. Hillion, "Case C-62/98 *Commission v. Portugal*, and Case C-84/98 *Commission v. Portugal*, judgments of the Full Court of 4 July 2000", 1283.

[983] See e.g. G. De Baere, *Constitutional Principles of EU External Relations*, 202, R. A. Wessel, "The Dynamics of the European Union Legal Order", 131, R. Gosalbo Bono, "Some Reflections on the CFSP Legal Order" (2006) 43 C.M.L. Rev. 337 at 378.

often assumed to prevent a transposition of the primacy principle to CFSP matters[984].

In a strictly CFSP context, therefore, a conflict of obligations between Member States' international commitments and their obligations within the area of the CFSP would not be capable of being resolved on the basis of primacy alone. As in the previous chapter, the binding nature of CFSP then becomes all the more important. By virtue of Article 24 (3) TEU, the Member States are under an obligation not only to actively and unreservedly support the Union's external and security policy, but also to comply with the Union's action in this area. This duty of compliance is reinforced by the general duty of loyalty under Article 4 (3) TEU. In its 2007 judgment in *Segi*[985], the Court of Justice, in fact, confirmed that the Member States may be required by the "principle of the duty to cooperate in good faith" to comply with measures falling outside the former first pillar[986].

Against this background, it may be argued that CFSP measures may indeed give rise to restraints on Member States' foreign policy competence. In particular, Article 28 (2) TEU specifies that CFSP decisions "commit the Member States in the positions they adopt and in the conduct of their activity". The language used in Article 28 (2) TEU suggests that CFSP decisions do indeed limit the freedom of the Member States to pursue their individual policies as they wish, requiring them to act in conformity with these decisions[987].

Notwithstanding the loyalty obligation and the wording of Article 28 (2) TEU, however, it cannot be assumed that the duty of consistent exercise as developed by the Court of Justice applies equally to the CFSP. While secondary CFSP measures may impose on the Member States an obligation of compliance, the same cannot be said of the CFSP Treaty provisions.

Unlike the Treaty freedoms discussed in the present chapter, CFSP Treaty provisions are "largely *procedural* in nature"[988]. In addition, CFSP objectives "are wide and abstract and cover practically all aspects of external relations", and neither are they operational *per se*, as the objectives pursued by other EU policies are[989]. While it has been inferred from the binding nature of secondary CFSP measures that the sovereignty of the Member States has been limited in the field of CFSP[990], the CFSP objectives, on their own, "do not carry with them a permanent limitation of the sovereign rights of the Member States"[991].

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984 See Chapter Three, Section VI.

985 C-355/04 *P. Segi and Others v. Council* [2007] ECR I-1657.

986 Case C-355/04 *Segi*, para 52: "A common position requires the *compliance* of the Member States *by virtue of the principle of the duty to cooperate in good faith*, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law.", emphasis added.

987 R. A. Wessel, "The Dynamics of the European Union Legal Order", 131.

988 Ibid. at 130.

989 R. Gosalbo Bono, "Some Reflections on the CFSP Legal Order", 359.

990 See P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure", 991, K. Lenaerts and T. Corthaut, "Of Birds and Hedges", 290, R. A. Wessel, "The Dynamics of the European Union Legal Order", 130.

991 R. Gosalbo Bono, "Some Reflections on the CFSP Legal Order", 359.

In a strictly CFSP context, it is therefore difficult to see how a similar duty of consistency as developed by the Court in other policy areas may apply. The obligation imposed on the Member States to comply with the fundamental Treaty freedoms operates on the basis that EU Treaty provisions take precedence over national provisions in cases of conflict. Due to the general and abstract nature of CFSP Treaty provisions, however, it is not conceivable how a conflict between such broadly formulated objectives and specific provisions contained in bilateral Member State agreements may arise in the first place.

Chapter Five

Loyalty Restraints under Mixed Agreements

I. Introduction

Chapters One to Three considered how *Union* action may restrain the Member States in the exercise of their competence – by pre-empting Member State powers, imposing procedural obligations to cooperate or substantive obligations to remove incompatibilities with EU law, while Chapter Four examined how the duty of loyalty operates in areas in which only the *Member States* have acted. Restraints do not, however, arise only when either the Member States or the Union act, but also – and perhaps in particular – when both exercise their competence together. This is the case where the Union and the Member States conclude a mixed agreement.

Article 216 (2) TFEU provides that international agreements concluded by the Union shall be binding on the EU institutions as well as the Member States. As a consequence, the Member States are under a duty to ensure compliance with the obligations arising from international Union agreements. Compliance obligations thus do not only derive from international law, but are also the expression of an obligation towards the *Union* to perform the commitments under the agreement:

> "In ensuring respect for commitments arising from an agreement concluded by the [Union] institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the [Union] which has assumed responsibility for the due performance of the agreement"[992].

However, the role of Article 216 (2) TFEU is less straightforward where mixed agreements are concerned. If parts of a given agreement fall within the competence of the Union, while other parts cover areas that remain within Member States powers, it could be assumed that only those parts coming within EU competence give rise to compliance obligations. Article 216 (2) TFEU must be read in combination with Article 216 (1) TFEU, which provides that the conclusion of an international agreement by the Union depends on the extent of its competence[993]. Therefore, Article 216 (2) TFEU "should not in itself concern parts of a mixed agreement falling outside the Union competence"[994]. Accordingly, those parts of a mixed agreement falling within Member State competence should not give rise to compliance obligations under Union law. Some authors even argue

[992] Case 104/81 *Hauptzollamt Mainz v. C. A. Kupferberg & Cie KG* [1982] ECR 3641, para 13.
[993] E. Neframi, "The Duty of Loyalty", 336.
[994] Ibid.

that in areas of concurrent competence, Member State powers cannot be restrained, as the Union is engaged in a mixed agreement only to the extent of its exclusive competence:

> "[T]he [Union's] participation is legally only relevant insofar as the [Union's] exclusive competence is concerned; the rest of the commitments are assumed by the Member States in their individual capacity"[995].

In the light of the limited scope of Article 216 (2) TFEU, Article 4 (3) TEU assumes a central role in the interpretation and implementation of mixed agreements. If the Member States are required by the duty of sincere cooperation to take all necessary measures in order to fulfil the obligations deriving from a mixed agreement, it becomes irrelevant whether a given provision falls within an area of Union competence or not. The question of whether a mixed agreement as a whole may constitute a source for Union law obligations is thus directly linked to the division of competences[996]. Indeed, the acceptance of the Court's jurisdiction to interpret provisions coming within Member State competence raises a

> "complex question in which the general problem of the interrelationship of international, [Union] and national legal orders meets the regulation of institutional relations between the Court and the other [Union] institutions and national authorities"[997].

Constructing the whole of a mixed agreement as a source of EU law obligations implies restraints on Member State competence relating to the infringement procedure and the interpretative competence of the Court of Justice. In areas in which no Union competence has been exercised whatsoever and the Member States continue to be able to introduce their own rules, a binding interpretation provided by the Court of Justice determining the way in which a given provision is applied would constitute a "manifest breach" of the division of powers between Union and national authorities[998].

Problems relating to the division of competences not only exist in relation to the interpretation and implementation of mixed agreements, but may also arise when Member States act within the framework of such an agreement. Article 4 (3) TEU imposes a number of procedural obligations on the Member States when they act under a mixed agreement. In this respect, the question arises of where the boundaries of the loyalty obligation are to be located in this context. If Article 4 (3) TEU imposes an obligation to refrain from acting until a common position has been reached, then this may amount to a denial of Member State competence.

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995 J. Heliskoski, *Mixed agreements as a technique for organizing the international relations of the European Community and its member states*, 46-47, emphasis added.

996 E. Neframi, "The Duty of Loyalty", 335.

997 Opinion of Advocate General Cosmas in Joined Cases C-300/98 and 392/98 *Parfums Christian Dior SA v. Tuk Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV* [2000] ECR I-11307 at para 31.

998 Ibid., para 42.

This chapter investigates the Court's construction of the obligations flowing from Article 4 (3) TEU in the context of mixity. It seeks to assess whether the Court has been able to find an appropriate balance between the Union's interest in unity of action and the need to preserve the institutional balance of powers. To that end, the chapter first looks at the *scope* for restraint by examining how the Court of Justice construes a Union obligation to implement a mixed agreement in its entirety (Section II.), before focussing on the *nature* of the restraints by looking at the types of obligations which arise in this context (Section III.). In assessing what approach to federalism the Court of Justice has been pursuing with regard to mixity, the Chapter then considers both the scope and the nature of the restraints under mixed agreements together (Section IV.). It concludes by examining to what extent these restraints may apply with respect to the CFSP (Section V.).

II. Mixed agreements as a source for Union obligations

Under Article 267 TFEU, the Court of Justice has jurisdiction to give preliminary rulings where a question has been referred to it by a court or tribunal of a Member State concerning the validity and interpretation of acts of the Union institutions. It is settled case law that the term "acts of institutions" covers international agreements concluded by the Council on behalf of the Union under Article 216 TFEU. From the coming into force of an international agreement, its provisions form part of the Union legal order and, as a consequence, the Court of Justice has jurisdiction to give preliminary rulings on its interpretation and validity[999]. Similarly, the Court is competent, under Article 258 TFEU, to adjudicate on a Member State's failure to comply with obligations arising out of an international agreement concluded by the Union.

This does not, however, mean that the Court's jurisdiction to interpret and implement Union agreements extends also to those provisions of a mixed agreement concluded under *Member State* powers. The present section first looks at the Court's approach to bringing provisions covered by national competence within the scope of its interpretative jurisdiction (A.), before examining under which conditions it accepts its competence to resolve disputes concerning the implementation of such provisions (B.).

A. The Court's interpretative jurisdiction under mixed agreements

The first time that the question of jurisdiction was raised before the Court of Justice with respect to

[999] Case 181/73 *Haegeman v. Belgian State* [1974] ECR 449, paras 4-6.

mixed agreements was in *Demirel*[1000], a preliminary reference concerning the interpretation of a number of articles of the Association Agreement concluded between the EU and the Member States, on the one side, and Turkey on the other. Germany and the UK questioned the Court's jurisdiction to interpret the provisions on the free movement of workers, which had been concluded under Member State powers. According to the two Member States, in the case of mixed agreements, the Court's interpretative jurisdiction did not extend to provisions whereby Member States had entered into international commitments in the exercise of their own competence[1001].

The Court disagreed, noting that commitments concerning the freedom of movement came within the powers conferred upon the Union by (current) Article 217 TFEU. The empowerment of the Union in this case was closely linked to the fact that the agreement in question was an association agreement. Since the agreement created "special, privileged links" with a non-member country which take part in the EU system, the Union, in the view of the Court, necessarily had to be empowered to guarantee commitments in all fields covered by the Treaty. One such field was the free movement of workers, covered by the Treaty by virtue of (current) Article 45 TFEU. In the context of association agreements, therefore, Article 217 TFEU conferred special powers on the EU in the area of free movement of workers[1002]. As a consequence of its finding that powers had been conferred on the Union by virtue of Article 217 TFEU, the Court had jurisdiction to interpret the contested provisions on freedom of movement for workers.

The Court's answer to the question of the extent of its jurisdiction to interpret provisions of mixed agreements has been described as "notoriously vague"[1003]. Indeed, it prompted a multitude of differing interpretations, ranging from the assumption that the Court of Justice had jurisdiction over any agreement in its entirety if it was an act adopted by the Union institutions[1004] to the more cautious interpretation that the Court's construction of a Union competence based on Article 217 TFEU was merely intended to dismiss Germany's and the UK's claim that the EU had no competence whatsoever in the field in question[1005]. A number of commentators, however, appeared to infer from the Court's reasoning that the Union had actually exercised its competence in the entire sphere covered by the agreement, thus creating an implied exclusive competence[1006].

[1000] Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.
[1001] Ibid., para 8.
[1002] Ibid., para 9.
[1003] R. Holdgaard, *External Relations Law of the European Community*, 207.
[1004] A. F. Gagliardi, "The right of individuals to invoke the provisions of mixed agreements before the national courts: a new message from Luxembourg?" (1999) 24 E.L. Rev. 276 at 286. In a similar vein, the Opinion of AG Tesauro in Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603 at para 18.
[1005] R. Holdgaard, *External Relations Law of the European Community*, 207. See also A. Dashwood, "Preliminary Rulings on the Interpretation of Mixed Agreements", in D. O'Keeffe and A. Bavasso (eds.), *Liber amicorum in honour of Lord Slynn of Hadley: Judicial Review in European Union Law* (Kluwer 2000) 167 at 170.
[1006] See P. Koutrakos, "The Interpretation of Mixed Agreements under the Preliminary Reference Procedure" (2002) 7 EFARev. 25 at 32 et seq.; J. H. H. Weiler, "Thou Shalt not Oppress a Stranger: On the Judicial Protection of the

According to yet another reading of the *Demirel* judgment, the Court, irrespective of questions of actual competence, adopted an approach whereby the "internal *objectives* of the Treaty are used to justify [Union] competence over external affairs normally subject to Member State competence", resulting in a "significantly greater scope for a 'mixed' agreement to be characterised as being part of [Union] law"[1007].

Due to the multitude of possible interpretations of the Court's approach, it remained unclear whether the Court had an all-encompassing competence to interpret any provision of any mixed agreement, or whether such jurisdiction, instead, extended to areas of exclusive Union competence only, or included also areas of non-exclusive competence. It has been argued that none of these interpretations hold true, since the Court did not sufficiently address any of these issues[1008]. In fact, it has been widely accepted in the literature that the judgment leaves open the question of the Court's jurisdiction to interpret those provisions of a mixed agreement falling within national powers[1009].

i. Hermès – *Provisions falling within the scope of both national and Union law*

The first case in which the Court was asked to rule on its jurisdiction over a mixed agreement which was not an association agreement was *Hermès*[1010], the first judgment in a line of preliminary rulings concerning the TRIPs Agreement concluded under the auspices of the WTO. The referring court sought guidance on the interpretation of Article 50 (6) TRIPs, a provision which requires that a decision imposing provisional measures for the protection of intellectual property rights be revoked if proceedings on the merits are not initiated within a reasonable time. Specifically, the Court of Justice was asked whether an interim measure such as the Dutch provision in question constituted a provisional measure within the meaning of Article 50 TRIPs.

The Court's interpretative jurisdiction in the case was challenged by France, the Netherlands and the UK which argued that the Union's competence to conclude the TRIPs Agreement was non-exclusive in accordance with Opinion 1/94[1011]. In the view of the three Member States, Article 50 TRIPs fell

Human Rights of Non-EC Nationals – A Critique" (1992) 3 EJIL 65 at 75 et seq.; J. Heliskoski, "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements" (2000) 69 Nordic Journal of International Law 395 at 399.

[1007] P. Gasparon, "The Transposition of the Principle of Member State Liability into the Context of External Relations" (1999) 10 EJIL 605 at 612, emphasis added.

[1008] R. Holdgaard, *External Relations Law of the European Community*, 207.

[1009] See A. Rosas, "Mixed Union – Mixed Agreements", in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Kluwer 1998) 125 at 140-141. See also J. Heliskoski, "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements", 400, and the literature cited there.

[1010] Case C-53/96 *Hermès v. FHT* [1998] ECR I-3603.

[1011] Opinion 1/94 [1994] ECR I-5267, para 104. For a discussion of the Opinion see Chapter One.

outside the scope of EU law on the ground that the Union had not exercised its internal competence in the area[1012].

The Court of Justice rejected this argument and declared that it did have jurisdiction to interpret Article 50 of the TRIPs Agreement. In its response to the arguments submitted by the three Member States, the Court recalled that the WTO Agreement was concluded by the Union and ratified by the Member States without any allocation of competences between them, before pointing out that Council Regulation No. 40/94 on the Union trade mark had already been in force when the WTO Agreement was signed[1013]. The TRIPs Agreement was found to be relevant for the application of national rules aimed at the protection of rights arising under a Union trade mark. As the Court explained, the EU was a party to the TRIPs Agreement and that agreement applied to the EU trade mark. Therefore, national provisional measures within the meaning of Regulation No. 40/94 had to be applied in the light of the wording and purpose of Article 50 of the TRIPs[1014].

In the specific case, however, the application of these general principles of reception of the TRIPs into Union law was less straightforward. The case did *not* concern an EU trade mark, but national trade marks registered in the Benelux under *national* trade mark law. According to the Court, however, this was "immaterial", because

> "where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of [Union] law, it is clearly in the [Union] interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply"[1015].

Noting that Article 50 TRIPs applied to EU trade marks as well as to national ones, the Court concluded that it did have jurisdiction to rule on the questions submitted by the national court.

The implications of the *Hermès* judgment for the Court's competence to interpret mixed agreements were disputed in the literature. It remained unclear whether the Court's reasoning was applicable only to provisions falling within the scope of both national and Union law, or whether it covered *all* provisions within EU competence, both exclusive and non-exclusive. According to one reading of the *Hermès* judgment, the Court's approach was "extremely far-reaching" in that it could equally be applied to any provision of a mixed agreement concluded under shared competence, since it was likely that a minimum of internal legislation had been enacted in every such field, and it could be applied even to fields in which Union competence remained purely hypothetical[1016]. Such an

[1012] Case C-53/96 *Hermès v. FHT*, para 23.
[1013] Ibid., paras 24-25.
[1014] Ibid., paras 26-29.
[1015] Ibid., para 32.
[1016] A. Dashwood, "Preliminary Rulings on the Interpretation of Mixed Agreements", 173.

interpretation of the Court's reasoning was subsequently criticised as being "too broad"[1017]. It was submitted that the rationale of the *Hermès* judgment was not the adoption of legislation in a given field, but the fact that Article 50 TRIPs "affected, in the meaning of the AETR judgment, Article 99 of Regulation No. 40/94" and there was, therefore, a Union interest in uniform interpretation of both provisions[1018]. Jurisdiction to interpret provisions of a mixed agreement thus required a "substantive link" between EU and national competence[1019], which in the specific case consisted in the fact that the provision at issue was applicable both to situations falling within the scope of national law and to situations falling within the scope of Union law. Nevertheless, it was considered that certain ambiguities in the Court's reasoning allowed for the interpretation that the Court based its jurisdiction on a Union competence over Article 50 TRIPs and, therefore, the *Hermès* judgment provided little guidance on the question of the Court's jurisdiction over mixed agreements more generally[1020].

ii. Dior/Assco – *Procedural provisions applicable to both national and Union law*

The Court of Justice shed more light on this question in *Dior/Assco*[1021], two references from Dutch courts concerning the interpretation of Article 50 TRIPs. While the first case[1022] concerned national trade marks for perfumery products, the second case[1023] related to industrial design rights for a scaffolding system. In both cases, the national courts referred questions regarding the interpretation and the legal effect in domestic law of Article 50 (6) TRIPs. In the *Assco* case, in addition, the Dutch Supreme Court wanted to know whether the jurisdiction of the Court of Justice extended specifically to those provisions of Article 50 TRIPs which did *not* involve trade mark rights, such as industrial design rights[1024]. The fact that *Assco* concerned national design rights was highly relevant because, unlike trade mark rights, there was no Union design right in place and no further legislation aimed at the protection of such rights had been adopted.

In his Opinion, Advocate General Cosmas held that the reasoning adopted in *Hermès*, where the Court had relied on Regulation No. 40/94 on the Union trade mark, could not readily be applied to the case at hand, since the latter concerned an area in which no Union competence had been

[1017] J. Heliskoski, "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements", 404.
[1018] Ibid., p. 405.
[1019] Ibid., p. 406.
[1020] P. Gasparon, "The Transposition of the Principle of Member State Liability into the Context of External Relations", 613.
[1021] Joined Cases C-300/98 and 392/98 *Dior* and *Assco*.
[1022] Case C-300/98 *Dior.*
[1023] Case C-392/98 *Assco*.
[1024] Joined Cases C-300/98 and 392/98 *Dior* and *Assco*, para 27.

exercised[1025]. Accepting the jurisdiction to interpret Article 50 TRIPs in areas in which Union competence had not yet been exercised would "constitute pursuit of a policy of judge-made law in conflict with the constitutional logic of the Treaty and would be difficult to justify on grounds of expediency"[1026].

The Court of Justice did not share the Advocate General's concerns and ruled that it did have interpretative jurisdiction where it was called upon to assess provisional measures for the protection of *all* intellectual property rights falling within the scope of TRIPs and was, therefore, not restricted solely to situations covered by trade-mark law[1027]. The Court began its analysis with a statement that was "as forceful in its tone as it [was] broad in its scope"[1028], by declaring that as a result of TRIPs having been concluded under joint competence, the Court had jurisdiction to define the obligations which the Union had thereby assumed and therefore to interpret the agreement[1029]. It appeared to suggest that it had an exclusive competence to handle all types of judicial procedures by which mixed agreements may be brought before it, including the question of interpretation. The Court went on to reiterate some of the arguments developed in *Hermès*[1030], even if these had been based on the adoption of EU legislation in the field and could therefore not be transposed to the case at hand.

Two new elements were introduced, however, to demonstrate that the Court did not only have jurisdiction to interpret those parts of Article 50 TRIPs relating to trade marks, but that it also had jurisdiction to give a preliminary ruling concerning industrial designs. Citing Opinion 1/94, the Court argued that the Member States and the EU institutions were under an "*obligation of close cooperation* in fulfilling the commitments undertaken by them under joint competence"[1031]. It went on to find that Article 50 TRIPs constituted a "procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by [Union] law"[1032].

The Court of Justice thus rejected AG Cosmas' restrictive reading of *Hermès*. According to the Advocate General, in *Hermès* the Court had established two conditions which needed to be fulfilled in order for the Court to have jurisdiction to interpret a provision of a mixed agreement: firstly, the Union had to have exercised its competence in the relevant field, and secondly, the provision in question had to apply both to situations falling within the scope of national law and to situations

[1025] Opinion of Advocate General Cosmas in Joined Cases C-300/98 and C-292/98 *Dior* and *Assco*, para 40.
[1026] Ibid., para 51.
[1027] Joined Cases C-300/98 and 392/98 *Dior* and *Assco*, paras 39 and 40.
[1028] P. Koutrakos, *EU International Relations Law*, 200.
[1029] Joined Cases C-300/98 and 392/98 *Dior* and *Assco*, para 33.
[1030] Ibid., paras 34 and 35.
[1031] Ibid., para 36, emphasis added.
[1032] Ibid., para 37.

falling within the scope of EU law[1033]. In the *Assco* case, such a substantive EU law link between the national provisions and the TRIPs Agreement was absent, since no EU measures had been adopted in the field of industrial design rights. Nevertheless, the Court found that Article 50 TRIPs could very well affect the scope of EU law, simply because it was a procedural provision applicable to both national and Union law. A substantive link between the respective spheres of national and Union competence was not necessary in order to establish the Court's interpretative jurisdiction. At the same time, the Court made it clear that the Union interest in uniform interpretation was not *per se* sufficient to justify the Court's exclusive jurisdiction. Rather, an additional link between the national and EU spheres of competence was required, even if only of a procedural nature. The general principle, therefore, appears to be that the Court of Justice has jurisdiction to interpret a mixed agreement under Article 267 TFEU if the agreement contains provisions that apply both to situations falling within Union and within national competence, irrespective of whether the dispute concerns Member State or Union competence[1034].

This approach was confirmed in *Schieving-Nijstad*[1035], another preliminary reference from the Dutch Supreme Court requesting guidance on the interpretation of Article 50 (6) of the TRIPs Agreement. The dispute concerned the protection of a trade mark registered in the Netherlands. As there was no objection to the Court's jurisdiction to give a preliminary ruling in this case, the Court limited itself to a brief affirmation of its previous case law in the field of trade marks. Citing *Hermès* and *Dior/Assco*, the Court held that "[i]n the field of trade marks, to which TRIPs is applicable and in respect of which the [EU] has already legislated, the Court has jurisdiction to interpret Article 50 of TRIPs"[1036]. It is noteworthy here that the Court apparently felt the need to refer to the existence of EU legislation when asserting its jurisdiction. It has been pointed out that this reading of its previous case law suggests that it would not have had jurisdiction to interpret Article 50 TRIPs in the *absence* of EU rules[1037].

B. The Court's jurisdiction to implement mixed agreements

The Court of Justice not only recognises its jurisdiction to interpret provisions of mixed agreements falling within Member State competence, but it also accepts its competence to resolve disputes concerning the implementation of such provisions.

[1033] Opinion of Advocate General Cosmas in Joined Cases C-300/98 and C-292/98 *Dior* and *Assco*, para 40.
[1034] See also J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, 59-61.
[1035] Case C-89/99 *Schieving-Nijstad vof and Others v. Robert Groeneveld* [2001] ECR I-5851.
[1036] Ibid., para 30.
[1037] P. Koutrakos, "The Interpretation of Mixed Agreements under the Preliminary Reference Procedure", 47.

i. The Berne Convention *case – Indivisible compliance obligations*

This first became apparent in the *Berne Convention* case[1038]. The Commission had brought infringement proceedings against Ireland, alleging a failure of the Member State's obligations to fulfil its obligations under (current) Article 216 (2) TFEU in conjunction with Article 5 of Protocol 28 to the EEA Agreement. Under the latter provision, the Contracting Parties undertook to adhere to several multilateral conventions including the Berne Convention for the Protection of Literary and Artistic Works. Ireland had failed to become a signatory to the Berne Convention within the time frame foreseen in the EEA Agreement. The Commission argued that Ireland had not complied with its obligation to adhere to the Convention.

As the Convention itself was not a mixed agreement, the Ireland's alleged non-compliance consisted in its failure to exercise its *own* competence. While Ireland accepted the Commission's contention, the alleged failure to fulfil obligations was challenged by the UK government intervening in support of Ireland. According to the United Kingdom, the action was not admissible to begin with, as the Court lacked competence to determine the matter. The obligation to adhere to the Berne Convention did not fall within the scope of Union law. The Berne Convention was not covered by EU competence in its entirety and, as a consequence, neither did the obligation to adhere to it[1039].

The Commission sought to argue on the basis of competence, putting forward an analysis aimed at demonstrating that the Union had occupied the field within the meaning of the *AETR* principle[1040]. Advocate General Mischo, however, pointed out that the issue before the Court did not focus on the division of *competence*. Instead, the Advocate General argued that the decisive point in this context was *indivisibility* of the agreement:

> "A State cannot therefore adhere to [the Berne Convention] in part. Its adherence assumes, on the contrary, the acceptance of all of the obligations laid down by that Convention. It follows that if [Union] law requires that the Member States adhere, that can only be adherence to the Convention as a whole[1041]."

The Member States were thus under an indivisible obligation to accede to a mixed agreement, irrespective of the extent to which the Union had exercised its competence in the areas covered by the agreement. As a consequence, the Berne Convention as a whole either did create obligations for the Member States, or it did not. The *extent* to which the EU had exercised its competence in the field in question was irrelevant, as it was the mere *existence* of Union rules which established a

[1038] Case C-13/00 *Commission v. Ireland (Berne Convention)* [2002] ECR I-2943.
[1039] See ibid., Opinion of Advocate General Mischo, paras 7-8.
[1040] See case C-13/00, Opinion of Advocate General Mischo, paras 36-39.
[1041] Ibid., para 48, emphasis added.

Union interest in compliance with the entire mixed agreement. The Court of Justice, by contrast, adopted an approach based precisely on the scope of the exercise of EU powers. The Court held that "there can be no doubt that the provisions of the Berne Convention cover an area which comes in *large measure* within the scope of [Union] competence"[1042]. It proceeded to compare the content of the Berne Convention with the relevant EU legislation in place, coming to the conclusion that not only had Union rules been adopted in areas covered by the Convention, but these areas, furthermore, were "to a very great extent governed by [EU] legislation"[1043].

The Union interest in compliance was, therefore, based on the exercise of an EU competence in the field covered by the Berne Convention. This reasoning resembles the Court's assertion of its interpretative jurisdiction in *Dior/Assco*, where the Court had held that provisions of a mixed agreement only came within the scope of EU law if the Union had already legislated in the field at issue. In the *Berne Convention* case, however, the Court appears to add a qualification to this condition, according to which a certain amount of legislation needs to have been adopted, i.e. the field must be covered to a "great extent" or "in large measure". This criterion is more restricted in its application and makes it more difficult to establish a Union interest in compliance with a given provision of a mixed agreement. In the specific case, the Court had no difficulty finding that the subject matter of the Berne Convention was indeed covered in large measure by EU law. As a result, the Commission was competent to assess compliance with Article 5 of Protocol 28 to the EEA Agreement[1044].

The Court's approach in this case brings to mind the *AETR* principle[1045] as developed in Opinion 2/91[1046]. However, the Court's approach should not be misunderstood as asserting an exclusive Union competence over the provisions at issue. In fact, as the Advocate General pointed out, questions about competence are misplaced in this context. Rather than examining whether the EU had exclusive powers in relation to the Berne Convention, the Court determined whether the agreement came within the scope of EU law. What seemed to be the cause for disagreement between the Advocate General and the Court, however, was the question of the criterion for determining whether the agreement came within the scope of Union law. Whilst the Advocate General examined whether the EU had legislated in the field, the Court asked specifically to what extent it had done so. The Advocate General essentially applied the Court's principles on the

[1042] Case C-13/00, para 16, emphasis added.
[1043] Ibid., para 17.
[1044] Ibid., para 20.
[1045] Similarly, R. Holdgaard, *External Relations Law of the European Community*, 221; P. J. Kuijper, "Case C-239/03, Commission v. French Republic, judgment of the Court of 7 October 2004" (2005) 42 CMLRev. 1491 at 1495.
[1046] Opinion 2/91, *Convention No. 170 of the ILO* [1993] ECR I-1061, paras 22-26.

justification of its jurisdiction as formulated in *Schieving-Nijstad*, but the Court chose to base the imposition of a compliance obligation in this case on a stricter criterion.

This divergence from the Court's case law on its interpretative jurisdiction may perhaps be explained on the grounds of the indivisibility of obligations under the Berne Convention. When the Court is called upon to give a preliminary ruling under Article 267 TFEU, it assesses the Union interest in the uniform interpretation of single provisions of a mixed agreement. When assessing the Union interest in compliance with Article 5 of Protocol 28 of the EEA Agreement, by contrast, the Court's assertion that it fell within the scope of EU law affected a multitude of provisions contained in the Berne Convention which did *not* otherwise fall within the scope of EU law. A Union interest existed only in relation to parts of the Berne Convention, but, for practical and legal reasons, it was not possible to impose an obligation on the Member States which corresponded to the degree of the Union interest involved. Accession was possible either to the whole of the agreement, or not at all. The difference between the *Berne Convention* case and the case law on the Court's interpretative jurisdiction is, therefore, that in the latter cases, the Court accepts its jurisdiction to the extent to which the provision at issue falls within the scope of EU law, while in the *Berne Convention* case, the compliance restraints go way beyond the scope of EU law within the interest of the Union. Consequently, the criterion for establishing whether there is a sufficient Union interest in compliance has to be stricter than the basis for jurisdiction.

ii. Étang de Berre – *Compliance obligations in the absence of Union legislation*

The question of whether compliance with a mixed agreement could be enforced as a Union law obligation arose again in the *Étang de Berre*[1047] case. However, while the *Berne Convention* case concerned an area of law partly covered by Union legislation, the alleged breach of obligations at issue in *Étang de Berre* related to parts of a mixed agreement which were *not* covered by EU rules.

The Commission brought an action under Article 258 TFEU, alleging that France had failed to fulfil its obligations under the Barcelona Convention for the protection of the Mediterranean Sea against pollution, a mixed agreement concluded by the Union and the Member States. The Étang de Berre, a salt-water marsh in the South of France directly linked with the Mediterranean Sea, had suffered considerable environmental damage as a result of fresh water being artificially discharged into it by a French electricity supplier. The Commission took the view that France had failed to take all

[1047] Case C-239/03 *Commission v. France (Étang de Berre)* [2004] ECR I-9325.

appropriate measures to prevent and reduce the pollution. France, on the other hand, disputed from the outset that the obligations which it had allegedly infringed fell within the scope of Union law, arguing that no EU directive regulated the discharges of fresh water and alluvia into a salt-water marsh and that, as a consequence, the Barcelona Convention did not fall within EU competence.

The Court acknowledged that discharges of fresh water and alluvia into the marine environment had not yet been regulated by the EU[1048]. However, this did not mean that the Convention and the Protocol did not fall within the *scope* of Union law. Citing a number of directives adopted in the field of environmental protection, the Court found that in the Convention and the Protocol "without doubt cover a field which falls in *large measure* within [Union] competence"[1049].

As in the *Berne Convention* case, this reasoning is not to be confused with the occupation of the field within the meaning of the *AETR* principle. In fact, rather than holding that there was an exclusive competence because the mixed agreement in question covered a field that came within large measure within EU *competence*, the Court created an express link between the amount of EU legislation in place with the existence of a Union *interest*:

> "Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by [Union] legislation, there is a [Union] interest in compliance by both the [Union] and its Member States with the commitments entered into under those instruments"[1050].

The Court thus confirms that the legal nature of the obligation is irrelevant in determining the extent of the Member States' compliance obligations under a mixed agreement. By way of conclusion, it held that it was competent to assess France's compliance with the Convention in the present case. The Court hence adopted the same approach as it did in the *Berne Convention* case: provisions of a mixed agreement creating obligations in a field largely covered by EU law come within the scope of Union law and, therefore, give rise to compliance obligations imposed on the Member States.

However, the factual situations in the *Berne Convention* case and in the present case differ in one important point. While the former case concerned an obligation to adhere to a mixed agreement in its entirety, *Étang de Berre* is about the obligations created by certain provisions of a mixed agreement[1051]. The *Berne Convention* case concerned a situation in which the Union interest necessarily had to go beyond the scope of EU law, while there is no such necessity in the *Étang de Berre* case. Nevertheless, the Court found that the entire mixed agreement fell within the scope of EU competence, thus imposing compliance obligations on the Member States in areas outside of actual EU competence.

[1048] Ibid., para 30.
[1049] Ibid., para 27 and 28. Citation is from para 28, emphasis added.
[1050] Ibid., para 29.
[1051] The same distinction is adopted by Advocate General Maduro in his Opinion in Case C-459/03 *Commission v. Ireland* (MOX Plant) [2006] ECR I-4635, para 31.

A number of commentators have argued that the Court of Justice in *Étang de Berre* did, in fact, establish a Union competence over the field in question[1052]. Advocate General Maduro held in his Opinion in the subsequent *MOX Plant* case that the Union had exercised its non-exclusive competence in the field by concluding the Barcelona Convention. He based his claim on the argument that the act of conclusion of that agreement itself was "a form of exercising a non-exclusive competence of the [Union], independently of the previous adoption of [Union] internal legislation"[1053]. As a result of an exercise of EU competence, the field of discharges of fresh water and sediments into the marine environment came within the Court's jurisdiction.

Rather than reading the Court's reasoning in the *Étang de Berre* case as establishing a Union competence, the alternative interpretation would be that the Court ruled on infringement proceedings in respect of obligations arising *outside* the scope of Union law. AG Maduro commented on such a reading of the *Étang de Berre* judgment that "[o]f course, this *cannot* be the case"[1054]. However, the wording of the Court's judgment suggests that it did indeed create obligations in an area outside of Union rules. As mentioned above, the Court makes a causal link between the adoption of EU rules in a given field and the Union *interest* at stake, rather than *competence*: the mixed agreement at issue is covered in large measure by EU legislation and, as a consequence, there is a Union interest in compliance also with those provisions concluded under Member State powers[1055].

iii. The MOX Plant Case – *Disputes between two Member States arising out of a mixed agreement*

Although both the *Berne Convention* and the *Étang de Berre* cases concerned provisions covered by non-exclusive Union competence, the Court of Justice did not consider it necessary to establish who had actually exercised a competence over those matters. It was only in the *MOX Plant* case[1056] that the Court examined the question of whether it had been the Union or the Member States to exercise the non-exclusive external competence in question. In this case, the Commission brought an

[1052] See P. J. Kuijper, "Case C-239/03, Commission v. French Republic, judgment of the Court of 7 October 2004"; P. Koutrakos, *EU International Relations Law*, 205.

[1053] Opinion of Advocate General Maduro in Case C-459/03 *Commission v. Ireland*, para 33.

[1054] Ibid. at para 33, emphasis added. His reasoning, however, is not so much based on a substantive objection to the expansion of the Union interest beyond the scope of EU law, but on an objection of a procedural nature (see his footnote 37): If the Commission had intended to bring proceedings for the failure to fulfil obligations *outside* the scope of EU competence, it was mistaken in bringing them directly on account of a failure to fulfil the obligations arising from the mixed agreement. Instead, proceedings would have had to be brought on account of a failure to fulfil the EU obligation arising from (current) Article 4 (3) TEU.

[1055] See Case C-239/03 *Commission v. France*, para 29: "Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by [Union] legislation, there is a [Union] interest in compliance by both the [Union] and its Member States with the commitments entered into under those instruments".

[1056] Case C-459/03 *Commission v. Ireland*.

infringement action against Ireland alleging a breach of the Member States' obligations under Articles 4 (3) TEU and 344 TFEU (formerly Articles 10 EC and 292 EC) and the corresponding provisions of the Euratom Treaty after it had initiated dispute-settlement proceedings against the United Kingdom outside the framework of EU law. By the time that the case reached the Court of Justice, it had already gone through multiple rounds of dispute settlement in other international tribunals[1057].

In 2001, the British Government had authorised the construction and operation of a mixed oxide fuels (MOX) plant near Sellafield in north-west England, which Ireland had consistently been opposing for half a decade, expressing concerns that by perpetuating the nuclear fuel processing industry in the United Kingdom it would cause additional radioactive discharges into the Irish Sea. Ireland subsequently brought proceedings against the UK under the UN Convention on the Law of the Seas[1058] (UNCLOS), arguing that the operation of the MOX plant was or would be in violation of various provisions of UNCLOS relating to the prevention of marine pollution, cooperation in the protection of the marine environment and environmental impact assessment. Earlier in the year, the Irish Government had already instituted proceedings under the Convention for the Protection of the Marine Environment of the North-East Atlantic[1059] (the OSPAR Convention), alleging a breach on the part of the UK of the Convention by having refused to disclose certain information during their joint consultations on authorisation.

After repeatedly calling on Ireland to suspend the proceedings before the OSPAR Tribunal and the ITLOS on the grounds that the dispute came within the exclusive jurisdiction of the Court of Justice, the Commission initiated infringement proceedings. More specifically, the Commission claimed that Ireland had failed to respect the exclusive jurisdiction of the Court under Article 344 TFEU to rule on any dispute concerning the interpretation and application of Union law and that it had failed to comply with its duties under Article 4 (3) TEU by exercising a competence which belonged to the Union and by failing to inform or consult with the competent Union institutions[1060].

In relation to the first claim, the Commission submitted that the dispute fell within the exclusive jurisdiction of the Court of Justice on the ground that the UNCLOS was a mixed agreement and its provisions consequently came within the scope of the Union's external competence in matters relating to environmental protection[1061]. Nevertheless, it emphasised that it was "*not* necessary to

[1057] For a more detailed account of the proceedings see e.g. R. Churchill and J. Scott, "The MOX Plant Litigation: The First Half-Life" (2004) 53 ICLQ 643, and Y. Shany, "The First *MOX Plant* Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures" (2004) 17 Leiden Journal of International Law 815.

[1058] 1833 UNTS 396.

[1059] (1993) 32 ILM 1069.

[1060] Case C-459/03 *Commission v. Ireland*, para 59.

[1061] Ibid., para 61.

establish exclusive competence of the Union within the areas concerned by the dispute"[1062]. After all, it followed from cases such as *Hermès*, *Dior*, and the *Berne Convention* case that the Court had jurisdiction to interpret the provisions of mixed agreements not only where the provisions fell within the exclusive competence of the Union but also where they fell within shared powers[1063]. The Commission's emphasis on shared competence notwithstanding, it went on to point out that all of the issues raised before the Tribunal were "*largely covered* by an almost complete legislative framework of internal [Union] measures"[1064], indicating the existence of an *exclusiv*e Union competence in the field. Ireland, by contrast, contested the Commission's claim that a transfer to the Union of competence in relation to the subject-matter covered by the dispute had taken place. In order to establish such a competence, the Member State argued, it was necessary to prove that measures of Union law were affected by the provisions of the Convention in issue. In the present case, Ireland claimed, the EU rules on protection of the environment laid down only minimum rules, which allowed the Member States to seek greater protection at international level. An exercise of non-exclusive EU competence had, therefore, not taken place in the field at issue, with the result that the relevant parts of UNCLOS did not fall within the scope of EU law and were not subject to the Court's exclusive jurisdiction.

As far as the question to what extent a transfer of competence to the EU had taken place was concerned, Ireland submitted that under the UNCLOS no transfer of shared competence was possible and only those areas capable of being affected could have been transferred to the Union. As there was no transfer of exclusive competence, the competence over the dispute at issue remained with the Member States. The Commission, by contrast, argued that the areas of shared competence in question were transferred to the Union even in the absence of Union rules.

As a premise to its analysis whether the Union had in fact exercised its non-exclusive competence in the field of protection of the marine environment, the Court delivered an important clarification regarding the conditions for determining the scope of Union competence in a given case:

> "[T]he question as to whether a provision of a mixed agreement comes within the competence of the [Union] is one which relates to the attribution and, thus, the very *existence* of that competence, and not to its exclusive or shared *nature*[1065]."

This is a highly significant confirmation of the rationale underlying all previous case law on both interpretation and application of mixed agreements that should put to rest all speculation over

[1062] Ibid., para 62, emphasis added.
[1063] Ibid., para 63, emphasis added.
[1064] Ibid., para 64, emphasis added.
[1065] Case C-459/03 *Commission v. Ireland*, para 93, emphasis added.

whether the Court applied the *AETR* principle in the context of mixed agreements[1066]. The existence of Union competence for the purpose of enforcing compliance with the Member States' obligations under a mixed agreement is

> "*not*, in principle, contingent on the adoption of measures of secondary law covering the area in question and liable to be affected if Member States were to take part in the procedure for concluding the agreement in question, within the terms of the principle formulated by the Court in paragraph 17 of the *AETR* judgment"[1067].

In the specific field, the Court found that Union competence was shared and could be exercised "even if the specific matters covered by those agreements are not yet, or are only very partially, the subject of rules at [Union] level, which, by reason of that fact, are not likely to be affected"[1068]. The Court proceeded to examine whether the Union had actually exercised its non-exclusive competence by concluding the UNCLOS. To that end, it relied on the legal base for the concluding Council decision and on the declaration of competence made by the EU under Annex IX of UNCLOS, according to which Union competence was exercised only to the extent that the field was covered by Union rules[1069].

It has been argued that the Court's focus on the exercise of Union competence was misplaced[1070]. In fact, notwithstanding its focus on competence, the Court ultimately followed its reasoning adopted in the *Berne Convention* and *Étang de Berre* cases where the Union interest in compliance was based on the existence of Union *law*, rather than on the scope of Union *competence*[1071]. Thus, when summarising the conditions under which the dispute between the two Member States came within its jurisdiction, the Court of Justice stressed that "a significant part of the dispute […] relates to the interpretation or application of [Union] *law*"[1072]. The provisions relied on by Ireland in the proceedings initiated against the UK formed part of the Union *legal order*[1073]. Submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein was capable of jeopardising the "autonomy of the [Union] legal system"[1074]. The Court's jurisdiction, therefore, necessarily had to be exclusive.

[1066] See e.g. P. J. Kuijper, "Case C-239/03, Commission v. French Republic, judgment of the Court of 7 October 2004".
[1067] Case C-459/03 *Commission v. Ireland*, para 94, emphasis added.
[1068] Ibid., para 95.
[1069] Ibid., paras 106-108.
[1070] M. Cremona, "Defending the Community Interest", 150.
[1071] Ibid.
[1072] Case C-459/03 *Commission v. Ireland*, para 135, emphasis added.
[1073] Case C-459/03 *Commission v. Ireland*, para 121.
[1074] Ibid., para 123.

C. Assessment – The Union interest in uniformity

The autonomy of the Union legal order also lies at the heart of the Court's more general approach to the interpretation and enforcement of those provisions contained in mixed agreements which fall outside the scope of Union competence. In all the cases examined, the Court asks whether the disputed provisions have become part of the Union legal order. To that end, it focuses on the scope of Union law instead of the scope of Union competence. If a given provision contained in a mixed agreement is found to fall within the scope of Union law, there is a Union interest in uniform interpretation and enforcement of the mixed agreement, irrespective of whether there is a Union competence in the field.

Thus, a provision of a mixed agreement must be interpreted uniformly if it forms part of a field in which the EU has legislated. Conversely, where the Union has not legislated, the provision does not generally come within the scope of EU law and, consequently, does not require uniform application. However, this is not the case where a provision of a mixed agreement can apply both to a situation governed by EU legislation and by national law. In such a case, there is a Union interest in uniform interpretation even if is applied in a field where the Union has not exercised its competence. This was illustrated in the *Dior/Assco* case. While there was no EU legislation in place in the field of industrial design rights, the provision at issue was of a procedural nature and could therefore hypothetically apply also to EU rules. Nevertheless, where such an additional link between the national and EU spheres of competence is absent, no Union interest in uniform interpretation can be found to exist.

Contrary to initial assumptions that the Court of Justice had intended a broad interpretative jurisdiction covering not only the TRIPs Agreement in its entirety[1075], but also all provisions of any type of mixed agreement falling within exclusive and non-exclusive EU competence more generally[1076], subsequent case law has revealed a more nuanced approach. It was suggested by some commentators that the fact that in every field of non-exclusive competence at least a minimum amount of legislation had been adopted would bring the corresponding provisions of mixed agreements within the scope of the Court's interpretative jurisdiction[1077]. However, the Court of Justice has never held that its interpretative jurisdiction extended to those parts of a mixed agreement that fall within Member State competence or which concern a field in which the EU has

[1075] See A. Rosas, "The European Union and Mixed Agreements", in A. Dashwood and C. Hillion (eds.), *The General Law of E.C. External Relations* (Sweet & Maxwell 2001) 200 at 214; in a similar vein, A.F. Gagliardi, "The right of individuals to invoke the provisions of mixed agreements before the national courts", 286.

[1076] A. Dashwood, "Preliminary Rulings on the Interpretation of Mixed Agreements", 173.

[1077] See A. Rosas, "The European Union and Mixed Agreements", 214 and A. Dashwood, "Preliminary Rulings on the Interpretation of Mixed Agreements", 173.

not exercised its competence yet. What emerges from the Court's case law on the TRIPs Agreement, instead, is that the Court of Justice does not consider itself competent to interpret the provisions of a mixed agreement merely because it falls within the non-exclusive powers of the EU. The guiding principle is that the Court has jurisdiction where there is a Union interest in uniform interpretation, regardless of whether a given provision falls within the sphere of Member State competence or within that of the EU.

The Court has adopted a similar approach predicated on the scope of Union rules also in relation to the implementation of mixed agreements. Thus, as we saw in the *Berne Convention* case, the enforcement of a mixed agreement may entail an obligation on the Member States to exercise their own competence by concluding an international agreement. The finding that the Member State in question was under a Union obligation to comply with the mixed agreement required a link with Union legislation. In the specific case, parts of the Berne Convention were covered by Union rules.

The *Étang de Berre* case, however, concerned a mixed agreement which was not actually covered by EU legislation. Instead, the Court found it sufficient for the recognition of its jurisdiction that the agreement formed part of a *field* in general which was covered to a large extent by Union rules.

The Court of Justice, in sum, makes clear that the Union has a strong interest in the fulfilment of the Member States' obligations under mixed agreements, even if those obligations do not fall within EU competence. The obligations incumbent on the Member States in the context of mixity thus flow from Article 4 (3) TEU, rather than from 216 (2) TEU alone. Article 216 (2) TFEU is not *per se* a sufficient basis for the integration of a mixed agreement in its entirety into the Union legal order. By virtue of the duty of sincere cooperation, however, the Member States become bound *under EU law* by parts of a mixed agreement falling under their own national competence.

II. Restraints on the Member States' freedom to act under mixed agreements

The Court of Justice readily accepts its jurisdiction for the interpretation and application of, as well as compliance with, provisions of mixed agreements falling within Member State competence, provided such provisions fall within the scope of Union law. But also as far as the Member States' freedom to exercise their own powers under a given mixed agreement are concerned, the Court imposes restraints deriving from the duty of sincere cooperation. It has made clear that Article 4 (3) TEU entails legal and enforceable obligations that may be particularly stringent where Member State and Union competence is interlinked (A.). The duty of cooperation, furthermore, imposes specific obligations of a procedural nature at the level of participation under a mixed agreement

(B.), but it may also go so far as to entail a substantive obligation of result (C.).

A. The duty of cooperation – A legal and enforceable obligation

Initially, the obligations deriving from Article 4 (3) TEU were phrased in general terms. The Court's first indications as to the applicability of the duty of loyalty in the context of mixity were given in Ruling 1/78[1078] concerning the conclusion of a mixed agreement in the context of the Euratom Treaty. The envisaged agreement fell partly within exclusive EU competence and partly outside EU competence. Finding that there was a "close interrelationship between the powers of the [Union] and those of the Member States" with regard to certain parts of the agreement, the Court held the participation of both the Member States and the Union was required[1079]. The Court placed special emphasis on Article 192 EAEC, the Euratom Treaty's equivalent of Article 4 (3) TEU, and concluded that

> "the Draft Convention put forward by the international agency can be implemented as regards the [Union] only by means of a *close association* between the institutions of the [Union] and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligation entered into[1080]."

This obligation of "close co-operation"[1081] was thus aimed at ensuring the implementation of the mixed agreement. To that end, the Member States were required to work closely together with the Union institutions in the various stages of a mixed agreement, from its negotiation to substantive compliance with the adopted provisions.

In Opinion 2/91[1082], the Court held that this "duty of cooperation" also applied in the context of the EC Treaty, since "it results from the requirement of unity in the international representation of the [Union]"[1083]. The Court declared that the duty of cooperation could vary in its intensity, depending on the circumstances of the specific case. In the case at hand, the Union was unable, under international law, to conclude an agreement and had to rely on the Member States to act on its behalf. The duty of cooperation was, therefore, "all the more necessary" in this case[1084]. As a result,

[1078] Ruling 1/78 *re Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 2151.
[1079] Ibid., paras 31 and 32.
[1080] Ibid., para 34, emphasis added.
[1081] Ibid., para 36.
[1082] Opinion 2/91, *Convention No. 170 of the ILO* [1993] ECR I-1061.
[1083] Ibid., para 36.
[1084] Ibid., para 37.

both the Union institutions and the Member States were required to "take *all* the measures *necessary* so as best to ensure such cooperation"[1085]. However, the question of what specific obligations these necessary measures entailed was left unanswered.

In the *FAO case*[1086] concerning the exercise of voting rights by the EU and the Member States within the UN Fisheries and Agriculture Organization (FAO), the Court confirmed that the duty of cooperation had legal effects. In order to facilitate the joint participation of the Union and the Member States within the FAO, the Council and the Commission adopted an arrangement setting up a coordination procedure between the Commission and the Member States. The Commission brought proceedings asking to annul a Council decision which granted voting rights to the Member States on a subject-matter on which the Union should have voted, in line with the terms of the Arrangement. The Council questioned the very admissibility of the case brought by the Commission, arguing that

> "any decision that may have been taken was a matter purely of procedure or protocol and was incapable of affecting the rights of the Commission or the allocation of competence as between the [Union] and the Member States."[1087]

Advocate General Jacobs agreed with the Council. As the action did not concern any genuine dispute on the *substance* of the mixed agreement in question, it was not evident that any of the Member States had acted to the detriment of the Union's interest[1088]. The Court of Justice, however, firmly rejected this reasoning, declaring that there was indeed a Union interest at stake. The Council vote was not a simple procedural mishap, as it was capable of having legal effects on the Union's position on the international scene[1089]. In the specific case, the duty flowed directly from the arrangement concluded between the Council and the Commission:

> "In the present case, section 2.3 of the Arrangement between the Council and the Commission represents fulfilment of that duty of cooperation between the [Union] and its Member States within the FAO[1090]."

In other words, as Heliskoski notes, "it was through the concept of the duty of co-operation that the Arrangement […] was vested with normative content"[1091]. As a result, the Council decision to conclude the draft agreement was annulled.

[1085] Ibid., para 38, emphasis added.
[1086] Case C-25/94 *Commission v. Council* (FAO) [1996] ECR I-1469.
[1087] Ibid., para 30.
[1088] Opinion of Advocate General Jacobs in Case C-25/94 *Commission v. Council* (FAO), paras 50-59.
[1089] Ibid., para 37.
[1090] Ibid., para 49.
[1091] J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, 65.

Opinion 1/94[1092] did not add to the clarification of the specific obligations under the duty of cooperation, but it provided some useful indications as to the limits of the requirement of unity as in the context of mixed agreements. The Commission argued that the participation of the Member States in the administration of the WTO Agreements would undermine the EU's unity of action vis-à-vis the rest of the world. The Court held instead that the Member States and the EU institutions were under a duty of close cooperation. This duty was of particular relevance in the present case, since the WTO Agreements were "inextricably interlinked", which made cooperation in matters of retaliation all the more imperative[1093].

B. Procedural obligations in the context of mixed agreements – The MOX Plant *case*

Having established that the restraints under mixed agreements stemming from Article 4 (3) TEU entailed enforceable obligations, the Court specified in the *MOX Plant* case what precise obligations the duty of cooperation gave rise to. Once it was established that Ireland had violated the exclusive jurisdiction of the Court of Justice under Article 344 TFEU by initiating international dispute settlement proceedings on matters that fell within the scope of Union competence, the Court considered the Commission's claim that Ireland had failed in its duty of cooperation under Article 4 (3) TEU by bringing those proceedings unilaterally without having first informed and consulted the competent Union institutions. In fact, Ireland had not informed the Commission of its intention to bring a dispute before a tribunal of international arbitration, since all consultation occurred only after Ireland had brought dispute-settlement proceedings within the framework of the international agreement at issue.

The Court of Justice first recalled that the Member States and the Union institutions were under a particular obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence where a mixed agreement related to an area in which Member State and Union competence was closely interrelated[1094]. In the specific case, it went on,

> "[t]he act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to [Union] law."[1095]

Against this background, Ireland was under a "duty to inform and consult the competent [Union]

[1092] Opinion 1/94 *re WTO Agreement* [1994] ECR I-5267.
[1093] Ibid., para 109.
[1094] Case C-459/03 *Commission v. Ireland (MOX Plant)*, paras 175 and 176.
[1095] Ibid., para 177.

institutions prior to instituting dispute-settlement proceedings […]"[1096]. As it had failed to fulfil this obligation, Ireland was found to have acted in violation of Article 4 (3) TEU.

The Court thus confirms that the duty of loyalty imposes binding and enforceable obligations in the context of mixity. Indeed, under mixed agreements, these obligations may be particularly stringent if the joint exercise of competence concerns an area in which Union and Member State powers are intertwined. More importantly in this case, the Court makes clear that Article 4 (3) TEU may entail specific procedural duties, such as the obligation of information and consultation.

The wording of the judgment suggests that these procedural duties are obligations of best efforts. However, in its submissions, Ireland had raised doubts whether such best efforts would have been sufficient to satisfy the Commission's request of a specific conduct:

> "Ireland adds that, in the circumstances of this case, prior consultation would not have made it possible to reconcile the respective views as the Commission was clearly of the opinion that Ireland could not have recourse to the dispute-settlement procedure under the Convention."[1097]

In other words, Ireland objected that the Commission would have rejected the route of international arbitration in any event, regardless of whether or not consultation between the two had taken place on the matter. The legal literature seems undecided on whether the obligation incumbent on Ireland in the *MOX Plant* case was one of best endeavours or one of result. It was argued that in the context of mixity, "the obligation incumbent on Member States is a best efforts obligation"[1098]. Thus, consultation is necessary to reduce the risk of divergence, but ultimately, the requirement may be fulfilled "even if consultation ends with the decision that Member States may express their own position"[1099]. In the specific case, the duty of consultation would therefore "not necessarily imply refraining from having recourse to an Arbitral Tribunal"[1100].

Indeed, two Member States were able to circumvent the jurisdiction of the Court of Justice in a similar dispute without any infringement proceedings being brought by the Commission[1101]. In the *Ijzeren Rijn* dispute, an arbitral tribunal had to decide on a dispute between the Netherlands and Belgium concerning the costs for the reopening of an old railway line. The parties requested the tribunal to take EU law into consideration, as they recognised from the outset that Article 4 (3) TEU and Article 344 TFEU concerning the exclusive jurisdiction of the Court of Justice could be relevant. The arbitral tribunal, however, came to the conclusion that it was able to render its award

[1096] Ibid., para 179.
[1097] Ibid., para 165.
[1098] E. Neframi, "The Duty of Loyalty", 355.
[1099] Ibid. at 356.
[1100] Ibid.
[1101] Ibid. at 356, footnote 106.

without having to apply or interpret Union rules. In the aftermath of the *MOX Plant* judgment, it was argued that there was no difference between the *MOX Plant* and *Ijzeren Rijn* cases concerning the potential violation of Articles 4 (3) TEU and 344 TFEU[1102]. In the latter case, the two Member States involved were able to persuade the tribunal that Article 344 TFEU was not applicable, although both were aware of the fact that this was most likely in breach of the exclusive jurisdiction of the Court of Justice[1103]. If the Commission had decided to bring proceedings against Belgium and the Netherlands for violating EU law, the Court of Justice would have been able to render a conflicting judgment[1104]. Under those circumstances, it is questionable whether it can be derived from the *Ijzeren Rijn* dispute that Member States are generally free to circumvent the Court's exclusive jurisdiction, provided that they have consulted and informed the Commission.

The *MOX Plant* case does not answer the question of whether the obligations incumbent on Member States under mixed agreements go beyond strictly procedural duties of best efforts. The judgment suggests that "a 'best endeavours' obligation based on the duty of co-operation could also entail the obligation to reach a certain *result*"[1105]. However, the Court remains silent on whether the duty of cooperation may entail an obligation to refrain from acting altogether. It has been pointed out that there was "no particular need for the Court to be more specific on this point", given that it had already found that instituting dispute settlement proceedings violated its exclusive jurisdiction[1106].

C. A duty of abstention? The Swedish PFOs *case*

The question of whether the duty of cooperation may amount to a duty to abstain was answered in the *Swedish PFOS* case[1107] concerning the Member States' and the Union's participation in the Stockholm Convention on Persistent Organic Pollutants, a mixed agreement regulating substances which are harmful to the environment. The Court was asked to rule on the extent of the Member States' obligations under Article 4 (3) TEU in an area of shared competence and, specifically, the question of whether this duty was capable of imposing an obligation to abstain from acting altogether.

[1102] N. Lavranos, "The *MOX Plant* and *Ijzeren Rijn* Disputes: Which Court is the Supreme Arbiter?" (2006) 19 Leiden Journal of International Law 223 at 241.
[1103] Ibid.
[1104] Ibid.
[1105] G. De Baere, "'O, Where is Faith? O, Where is Loyalty?' Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the Light of the PFOS Case", 417, emphasis added.
[1106] C. Hillion, "Mixity and Coherence in EU External Relations", 99.
[1107] Case C-246/07 *Commission v. Sweden* [2010] ECR I-3317.

In August 2004, the Commission had presented a proposal for a Council decision requesting authorisation to submit to the Stockholm Convention and the Aarhus Protocol a certain number of chemicals (POPs) to be included in their annexes. This proposal did not, initially, cover a specific type of POP named perfluoroctane sulfonate (PFO), which Sweden proposed to include in the common proposal. Although the Union and the Member States subsequently agreed on two POPs that would be put forward for inclusion in the Aarhus Protocol, no decision was taken regarding the inclusion of PFOs. This was because work was ongoing on the identification of control measures at EU level and a proposal for inclusion in the Aarhus Protocol was not to be submitted until the Commission had reached a decision on those measures. A decisive factor in the decision to propose PFOs for inclusion in the annexes were also the economic consequences of such a proposal, which could have resulted in calls for financial aid by developing countries. Before such a decision was taken, however, Sweden unilaterally submitted a proposal to include PFOs in the annex of the Stockholm Convention. A few months later, the Commission submitted a proposal for a Directive regulating the marketing and use of PFOs which entered into force a year later. After an unsuccessful attempt at encouraging Sweden to comply with the formal notice alleging a breach of (current) Article 4 (3) TEU, the Commission decided to start infringement proceedings before the Court of Justice.

Sweden argued in its submissions that the duty of cooperation was "limited in scope" in areas of shared competence[1108]. The Court accepted that competence over the matter was indeed shared and proceeded to reiterate the standard formula concerning the duty of cooperation in mixed agreements. Where it was apparent that the subject-matter of an agreement fell partly within Union competence and partly within that of its Member States, it was essential to ensure close cooperation between the Member States and the Union institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. This obligation flowed from the requirement of unity in the international representation of the Union[1109]. With regard to Sweden's submission that the duty of cooperation was limited in scope in areas of shared competence, the Court recalled its findings in previous cases, *Commission v. Luxembourg*[1110] and *Commission v. Germany*[1111], where it had held that the duty of cooperation was of general application and did not depend on the nature of the Union competence concerned. In these cases[1112], the Court had held that the Member States were subject to special duties in a situation in which the Council had adopted a

[1108] Ibid., para 70.
[1109] Ibid., paras 72 and 73.
[1110] Case C-266/03 *Commission v. Luxembourg*, para 58.
[1111] Case C-433/03 *Commission v. Germany*, para 64.
[1112] See Chapter Two for the factual background of these cases.

decision authorising the Commission to negotiate a multilateral agreement on behalf of the EU. The adoption of such a decision marked the start of a concerted Union action at international level and triggered "if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation"[1113]. In an earlier case cited by the Court, *Commission v. United Kingdom*[1114], the Member States had even been found to be under a duty of abstention in a situation in which the Commission had submitted to the Council proposals which, although not yet adopted by the Council, represented the point of departure for concerted Union action[1115].

In the present case, however, there was no formal decision regarding a proposal to include PFOs in the annex of the Stockholm Convention. Nevertheless, this did not mean that no concerted Union action had been initiated. In the view of the Court, the mere existence of a Union *strategy* not to propose the listing of the substance in the context of the Convention was sufficient to impose such duties of action and abstention[1116]. Indeed, it was not "indispensable that a common position take a specific form for it to exist and to be taken into consideration in an action for failure to fulfil the obligation of cooperation in good faith"[1117]. Examining whether such a strategy had already been adopted at the time when Sweden submitted its unilateral proposal, the Court found that there was "no 'decision-making vacuum' or even a waiting period equivalent to the absence of a decision", because it had been intended *not* to reach a decision not to add PFOs to the list of proposed substances[1118]. There was, therefore, a "concerted common strategy" within the Council not to propose the addition of PFOs to the Stockholm Convention, which Sweden "dissociated" itself from by unilaterally submitting such a proposal[1119].

In the second strand of its reasoning, the Court of Justice argued that Sweden's unilateral proposal had legal consequences for the Union[1120]. Since the Union was also a party to the mixed agreement, it could be bound by the resulting amendment to the annex. In that regard, Sweden sought to rely on (current) Article 193 TFEU which allowed Member States to introduce more stringent national measures in environmental matters. The Swedish Government submitted that its unilateral proposal was equivalent to a national measure which was more stringent than minimum Union measures. However, the Court had no difficulty in refuting this argument, by pointing out that the Union could be bound by an amendment to an annex to the Stockholm Convention, whilst it would not be bound

[1113] Case C-246/07 *Commission v. Sweden*, para 75; see also Case C-266/03 *Commission v. Luxembourg*, para 60 and Case C-433/03 *Commission* v *Germany*, para 66.
[1114] Case 804/79 *Commission* v *United Kingdom*, see Chapter Two.
[1115] Case C-246/07 *Commission v. Sweden*, para 74.
[1116] Ibid., para 76.
[1117] Ibid., para 77.
[1118] Ibid., para 87.
[1119] Ibid., para 91.
[1120] Ibid., paras 92-101.

by national measures[1121]. Bringing the two strands of its reasoning together, the Court concluded that the Commission's complaint alleging a breach of Article 4 (3) TEU was well founded.

In its previous case law on the duty of sincere cooperation in the context of mixed agreements, the Court of Justice had not pronounced itself on the potential scope of Article 4 (3) TFEU and the question of whether that provision was capable of imposing a duty of abstention on the Member States. Abstention is a concept commonly associated with exclusive Union competence, while in areas of shared competence, Member States are generally free to act within the realms of their powers. Nevertheless, the Court in this case came to the conclusion that the Member States were required to abstain from acting altogether.

It is noteworthy how the Court constructs its line of argument on the basis of similar earlier cases, applying their rationales to this case which differs from the cited case law in important aspects. Relying on Case 804/79 *Commission v. United Kingdom*, the Court pointed out that it had already held in the past that the Member States were subject to a duty of abstention where the Commission had submitted proposals which represented the point of departure for concerted Union action. What the Court did not mention in that regard, however, is that *Commission v. United Kingdom* concerned a case of supervening *exclusive* Union competence. The situation in *Commission v. United Kingdom* thus differs from the *Swedish PFOS* case in an important point. While the latter concerned an area of shared competence, the situation in *Commission v. United Kingdom* was characterised by the fact that the field of law at issue was "reserved to the powers of the [Union]" and the Member States were, as a result, only allowed to act "as trustees of the common interest"[1122].

Similarly, the Court applied its reasoning from the *Commission v. Luxembourg* and *Commission v. Germany* judgments[1123] to the present case. Here again, the factual and legal situation differs from the *Swedish PFOS* case. In the *Commission v. Luxembourg* and *Commission v. Germany* cases, the Court stopped short of imposing a duty of abstention, holding that once a concerted Union action has been initiated, the Member States are "if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation"[1124]. Moreover, in the *Commission v. Luxembourg* and *Commission v. Germany* cases, the Council had adopted a decision granting the Commission the corresponding negotiating mandate. Such a formal decision, however, was absent in this case. The Court, therefore, considered whether this kind of formality was absolutely necessary in order to trigger a duty of abstention. Interestingly, the Court relied on the *FAO* case[1125] in order to reinforce its argument that it was not "indispensable that a common position take a

[1121] Ibid., para 102.
[1122] Case 804/79 *Commission v. United Kingdom* [1981] ECR I-1045, para 30.
[1123] Cases C-266/03 *Commission v. Luxembourg*, and C-433/03 *Commission v. Germany.*
[1124] Cases C-266/03 *Commission v. Luxembourg*, para. 60 and C-433/03 *Commission v. Germany*, para 66.
[1125] Case C-25/94 *Commission v. Council* (FAO).

specific form for it to exist and to be taken into consideration in an action for failure to fulfil the obligation of cooperation"[1126]. In the relevant paragraph of the *FAO* case, the Court explains how the arrangement between the Council and the Commission represents fulfilment of the duty of cooperation. In the words of the Court, it is "clear […] that the two institutions *intended* to enter into a *binding* commitment towards each other"[1127]. In the present case, by contrast, there is neither a codification of the respective commitments nor is there any formal act from which Sweden's *intention* to be *bound* by a certain strategy may be deduced. It is, therefore, questionable whether the analogy with the *FAO* judgment is applicable to the *Swedish PFOS* case. Thus, it remains doubtful whether there was a basis, in earlier case law, for the finding that a formal decision taken in the Council may be replaced by informal and vague concepts such as the adoption of a "common strategy".

What emerges from the *Swedish PFOS* case then is an expansion of the scope of the duty of sincere cooperation in the context of participation in mixed agreements in a two-fold manner. Firstly, the normative scope of the duty has been extended so as to include an obligation of abstention in areas of non-exclusive competence. In reaching this conclusion, the Court relied on its findings from earlier case law that concerned areas of *exclusive* Union competence. In fact, the restraints imposed by the Court's ruling in the *Swedish PFOS* case do not differ in any way from those that were found to exist in the *Greek IMO*[1128] case concerning an area of exclusive EU powers. Like Sweden in the present case, the Greek Government had submitted legislative proposals within the framework of its participation in an international organisation. The Court found that the subject-matter was covered by exclusive competence, giving rise to a duty on the Member States to abstain from unilateral action. Although the Court of Justice itself acknowledged that the present case had to be "distinguished from the situation at issue in Case C-45/07 *Commission v Greece* [...], which concerned exclusive competence"[1129], its reasoning nevertheless gives rise to the same type of restraints. In other words, Sweden was *de facto* pre-empted from acting within the meaning of the *AETR* principle.

In addition to an expansion of the normative scope of the duty of sincere cooperation, the Court extended its temporal scope. It is no longer necessary that a formal decision be taken within the ambit of the decision-making process governing the relations between the Union institutions, but the existence of a "common strategy" is sufficient to prevent the Member States from acting on their own. It remains unclear where the temporal limits of this approach are to be located, i.e. at

[1126] Case C-246/07 *Commission v. Sweden*, para 77.
[1127] Ibid., emphasis added.
[1128] Case C-45/07 *Commission v. Greece* [2009] ECR I-701, see Chapter Two.
[1129] Case C-246/07 *Commission v. Sweden*, para 72.

what point in time a sufficiently precise concerted strategy can be found to have been adopted and who must have consented to the adoption of such a strategy. Against this background, it has been argued that the requirements for a concerted strategy to exist are "not very high":

> "[C]onclusions of the Council (which are political to their nature), minutes of a Council working party (ie a preparatory body with no decision-making powers) and events subsequent to the action of a Member State the legality of which is to be reviewed, taken together, may be conducive to the existence of a 'common strategy'."[1130]

In the absence of any formal decision, the application of the reasoning underlying *Commission v. Luxembourg* and *Commission v. Germany* according to which the Member States were under a "duty of, if not of abstention, at least of close cooperation" would have then been a generous approach to the principle of unity. Nevertheless, the Court took this reasoning even one step further, finding that the existence of a common strategy was sufficient to require abstention from acting. In this sense, the adoption of a "concerted strategy" is attributed the same legal effects as the pre-emption of an entire field of law within the meaning of the *AETR* principle. Since the *Swedish PFOS* case only differed from these previous cases in as far as its context of mixity was concerned, it appears that, in the view of the Court of Justice, the "principle of unity in the international representation of the Union and its Member States"[1131] is so stringent when the Union and the Member States act together under a mixed agreement that it warrants a two-fold expansion of the scope of the duty of sincere cooperation.

IV. Assessment: The requirement of unity and mixed agreements – A *conservative fidelity* approach?

The Court's judgment in the *Swedish PFOS* case illustrates that "the line between cooperation and competence may be thin"[1132]. In fact, the obligation imposed on the Member States to abstain from acting and comply with a concerted Union strategy "comes close to an obligation of *result*"[1133]. The imposition of such strict substantive duties in areas of shared powers risks "blurring the essential

[1130] J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 561.
[1131] See the Court's conclusions in Case C-246/07 *Commission v. Sweden*, para 104.
[1132] P. Van Elsuwege, "Commission v. Sweden. Case C-246/07" (2011) 105 American Journal of International Law 307 at 311.
[1133] Ibid, emphasis added.

distinction between exclusive and shared Union competence"[1134].

If the Court of Justice seeks to restrain the exercise of Member State competence to the point of rendering national powers obsolete, does this mean that it is pursuing a *conservative fidelity* approach in this case? As we saw earlier, the *conservative* vision of federalism aims at obtaining a unitary alignment of interests between the Union and the Member States. Among the instances of *conservative fidelity* identified by Halberstam, the Court's judgment in the *Swedish PFOs* case most closely resembles that of the duty of "political support"[1135]. According to proponents of such a duty, the Member States should be required to advance Union integration when meeting in the Council. The Member States may then be under an obligation to facilitate the formation of Union policies[1136]. Halberstam argues that such an obligation of political support would be "a naked attempt to force an alignment of interests upon the diverse actors within the system"[1137]. As a result, "[n]ot only would acceptance of this duty spell the end of federalism, it would spell the end of democracy as well"[1138].

Although the restraints imposed in the *Swedish PFOs* case have the effect of preventing Member State participation under a mixed agreement, it is not evident that they were imposed with a view to furthering political harmony as the *conservative fidelity* approach would. The rationale behind the restraints imposed in the *Swedish PFOS* case was not to prevent the adoption of international rules liable to affect Union law. In fact, if the Council had decided *not* to take any action regarding the inclusion of PFOS into the annex of the mixed agreement at hand, Sweden would have been free to act. However, such a decision was still pending.

The Court's analysis is "fundamentally geared towards the specific facts of the case and the international context in which the Union and the Member States operate together"[1139]. In previous cases concerning the Member States' freedom to act under an international agreement, duties of abstention and cooperation were triggered by the adoption of a Council decision authorising the Commission to negotiate a multilateral agreement on behalf of the EU[1140]. The adoption of such a decision marked the start of a concerted Union action at international level. In the *Swedish PFOS* case, however, there was no formal decision regarding a proposal to include PFOs in the annex of the Stockholm Convention. Nevertheless, this did not mean that no concerted Union action had been initiated. In the view of the Court, the mere existence of a Union "strategy" not to propose the listing of the substance in the

[1134] J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 561.
[1135] See D. Halberstam, "Beyond Competences", 11.
[1136] Ibid.
[1137] Ibid.
[1138] Ibid.
[1139] G. De Baere, "'O, Where is Faith? O, Where is Loyalty?'", 410.
[1140] Case C-266/03 *Commission v. Luxembourg*, at para 58 and Case C-433/03 *Commission v. Germany*, at para 64. See also the Opinion of Advocate General Kokott in Case C-13/07 *Commission v. Council*, case withdrawn.

context of the Convention, was sufficient to impose such duties of action and abstention[1141]. The common strategy in this case consisted in the decision reached in the Council's "international environment group" that a common proposal would be made regarding the inclusion of PFOs into the mixed agreement.

The decisive criterion in the Court's construction of the duty of abstention is "whether independent Member State action is likely to impede the Union's action"[1142]. If Sweden had been free to unilaterally propose the listing of PFOs, the adoption of a possible common proposal by the Union and the Member States would have been impossible. The adoption of international measures would have then been binding on the EU. Thus, it has been argued that the "consequences for the Union" constitute the main standard for assessing the obligations incumbent on Member States in the context of mixed agreements[1143]. By contrast, AG Maduro had held that the foundation of the restraints in this context should be located in the duty to facilitate the *effective exercise of Union competence*[1144]. He concluded that Sweden's proposal did not necessarily affect Union powers, as the EU retained the possibility to influence the technical review of PFOs and submit proposals concerning their treatment. The criterion based on the consequences for the Union is "more flexible" than the Advocate General's approach:

> "Whereas Maduro's approach leads to the conclusion that Sweden's proposal to add PFOS to the Convention does not necessarily jeopardize the EU's competence, […] the ECJ points at the implications for the unity of the EU's representation and the ensuing legal uncertainty for the member states and third parties."[1145]

The Court's reasoning in the *Swedish PFOs* judgment thus appears to be linked with the nature of the agreement at issue having been concluded as *mixed*[1146]. The duty of cooperation is particularly stringent where international Member State action is likely to affect the autonomy of the Union legal order. That is the case if national measures lead to the adoption of international rules binding on the EU, impeding the Union's decision-making process.

A similar rationale emerges from the *MOX Plant* case, where the Court held that the act of submitting to an international tribunal a dispute relating to an area of closely interrelated competences involved the risk that a tribunal other than the Court itself would rule on the scope of obligations imposed by EU law[1147]. The rationale underlying the Court's approach thus appears to be refraining Member States from unilateral action where such action is liable to lead to the promulgation of norms at international level which entail

[1141] Case C-246/07 *Commission v. Sweden*, para 76.
[1142] G. De Baere, "'O, Where is Faith? O, Where is Loyalty?'", 410.
[1143] P. Van Elsuwege, "Commission v. Sweden. Case C-246/07", 312.
[1144] Opinion of Advocate General Maduro in case C-246/07 *Commission v. Sweden* (PFOS), para 38.
[1145] P. Van Elsuwege, "Commission v. Sweden. Case C-246/07", 312.
[1146] J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 561.
[1147] Case C-459/03 *Commission v. Ireland* (MOX Plant), paras 176-177.

consequences for the Union, be they treaty rules or rulings of an international tribunal.

As we saw in Section I., the Court of Justice adopts a similarly generous approach to its jurisdiction to interpret and enforce provisions contained in mixed agreements. It accepts its own competence to give a preliminary ruling where there is a Union interest in uniform interpretation, regardless of whether a given provision falls within the sphere of Member State competence or within that of the EU. Where there is EU legislation in a given field, provisions of a mixed agreement falling within this field come within the scope of Union law. In matters of shared competence, therefore, there is a Union interest in the performance by the Member States of a mixed agreement in its entirety. This broad criterion suggest that only in areas clearly falling within Member State competence, provisions of mixed agreements would not be covered by the Court's jurisdiction. The fact that it is often difficult to establish whether a given provision falls within EU or national competence, in combination with the possible consequences for the EU as regards international responsibility for the infringement of a mixed agreement, requires that the Court is competent to interpret also those provisions that fall within the competence of the Member States[1148]. Therefore, the requirement of uniformity, it was argued by Advocate General Tesauro in the *Hermès* case, has to be regarded as "fundamental" in the context of the interpretation and application of mixed agreements[1149].

The need for uniform application of international agreements within the EU, however, is "not an *absolute* requirement", as Advocate General Cosmas pointed out in *Dior/Assco*[1150]. In fact, as Heliskoski has put it,

> "the requirement of uniformity in the interpretation and application of all the provisions of a mixed agreement […] fails to explain why the interpretation of a mixed agreement should always be uniform, given that part of the subject-matter of the agreement as a rule falls within national competence and may touch upon interests of the Member States which no concept of [Union] unity is capable of accommodating".[1151]

Against this background, it has been argued that the concern to ensure the unity of action in the international representation of the Union cannot justify departing from the *division of powers* between the Union and the Member States[1152]. As the Court's approach of considering a mixed agreement in its entirety a source of EU law obligations on the Member States constrains national competences to implement and interpret the national provisions of mixed agreements through the infringement procedure and the recognition of full interpretative competence for the Court of Justice, an overly broad approach to recognising its jurisdiction may, in fact, create the effect of exclusive Union

[1148] Ibid.
[1149] Opinion of Advocate General Tesauro in Case C-53/96 *Hermès*, para 20.
[1150] Opinion of Advocate General Cosmas in Joined Cases C-300/98 and C-292/98, para 61, emphasis added.
[1151] J. Heliskoski, "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements", 409.
[1152] Opinion of Advocate General Cosmas in Joined Cases C-300/98 and C-292/98, para 69.

competence in areas in which competence is shared.

The closest that the Court of Justice has come to blurring the division of competences was in the *Étang de Berre* judgment. While the preceding *Berne Convention* case concerned an area of law partly covered by Union legislation, the alleged breach of obligations at issue in *Étang de Berre* related to parts of a mixed agreement which were *not* covered by EU rules. The Court nevertheless found that there was a Union interest in compliance, since the mixed agreement created rights and obligations in a *field* covered in large measure by EU legislation. The Court thus reasoned along the same lines of its *AETR* judgment, where the occupation of a given field of law had the effect of turning a shared competence into an exclusive Union competence. Notwithstanding the absence of any Union rules in the field, the Court restrained the Member States' competence to implement the mixed agreement as it would in an area of exclusive EU powers. The judgment effectively harmonised the interests of the Member States and the Union in the subject-matter at issue. As the Court acknowledged, the Union had not adopted any rules concerning discharges of water into a saltwater marsh, but nevertheless, the judgment "mimics the existence of a unitary system" in line with a *conservative fidelity* view to federalism[1153]. In fact, the Court adopted such a broad approach to the scope of compliance obligations under EU law that a number of commentators assumed that the Union had actually exercised a non-exclusive competence by concluding the mixed agreement in question[1154].

The Court's reasoning in this case should not, however, be understood as a strategy of enforcing political harmony between the Union and the Member States where the division of competences says otherwise. In fact, the Court is careful to link the recognition of its jurisdiction with the nature of the agreement at issue being mixed. Discharges of fresh water and alluvia into a saltwater marsh fell within the Union framework because "those articles are in mixed agreements […] *and* concern a field in large measures covered by [Union] law"[1155]. The wording chosen by the Court thus suggests that the mere fact that the provisions in question created obligations in a field largely covered by EU rules was not sufficient to impose compliance restraints on the Member States. It was only in combination with the *mixed* nature of the agreement in which they were contained that the provisions were capable of being enforced by the Court of Justice.

Here again, we see that the duty of sincere cooperation is all the more imperative where it operates in the context of mixity. Nevertheless, if the restraints flowing from Article 4 (3) TEU are to remain in

[1153] For the characteristics of this type of fidelity, see D. Halberstam, "Of Power and Responsibility", 736-737.

[1154] See P. J. Kuijper, "Case C-239/03, Commission v. French Republic, judgment of the Court of 7 October 2004"; P. Koutrakos, *EU International Relations Law*, 205; A. Rosas, "International Dispute Settlement: EU Practices and Procedures" (2003) 46 German Yearbook of International Law 284; see also the Opinion of Advocate General Maduro in Case C-459/03 *Commission v. Ireland*, para 33.

[1155] Case C-239/03 *Commission v. France*, para 31, emphasis added.

the realms of a *liberal fidelity* approach, they cannot have the effect of depriving the Member States of their powers. Indeed, the Court of Justice itself has held that considerations concerning the unity of action are not capable of modifying the allocation of competences between the EU and the Member States[1156]. In the Court's attempts to balance the effectiveness of external Union action with the respect for the Member States' competence, we may find, it was argued above, a few instances of *conservative fidelity*. The broad construction of the loyalty obligations in these cases notwithstanding, the restraints flowing from Article 4 (3) TEU have nevertheless been predicated on the scope of Union law. Thus, the Court has jurisdiction to enforce provisions of a mixed agreement falling within Member State competence even in the absence of Union rules relating to the subject-matter, provided that the *field* of law is covered to a large extent by EU legislation. Furthermore, it also has jurisdiction to interpret provisions of a mixed agreement even if they fall outside Union competence, if these are of a procedural nature and could therefore hypothetically apply also to EU rules. Finally, the duty of cooperation may require the Member States to abstain from acting altogether even in the absence of a *common* position on the subject-matter. In that case, however, an identifiable *Union* position must be found to exist "which can be established to the requisite legal standard"[1157]. It thus emerges that however broad the Court's understanding of the "scope of Union law" may be, a specific link with Union rules is nevertheless required before the Member States' freedom to act under a mixed agreement may be restrained. Where the Union and the Member States jointly exercise a competence by concluding a mixed agreement, therefore, the Member States are neither free to act as sovereign states, nor reduced to a position of trustees of the Union interest. Rather, the Court's generous construction of its jurisdiction to interpret and apply mixed agreements and the restraints flowing from the duty of cooperation in this respect are "the price the Member States are expected to pay for the prevailing position of mixity"[1158].

V. Loyalty restraints in the context of mixed agreements concluded under the CFSP

In stark contrast with the dynamic role played by Article 4 (3) TEU in governing the interpretation, implementation and management of mixed EU-Member State agreements, the CFSP-specific loyalty obligation contained in Article 24 (3) TEU has received little attention in relation to mixed

[1156] Ibid., para 107.
[1157] See Case C-246/07 *Commission v. Sweden*, para 77.
[1158] P. Koutrakos, "The Elusive Quest for Uniformity in EC External Relations" (2002) 4 Cambridge Yearbook of European Legal Studies 243 at 256.

agreements. This is due to the fact that no mixed Union-Member States agreements covering the CFSP have been concluded to date. The absence of mixed agreements in the field does not, however, mean that no such agreements are possible. The Amsterdam Treaty introduced an express legal basis for the conclusion of international agreements by the Union as a whole. Although the EU has made active use of its treaty-making competence by becoming a party to a multitude of international agreements, these agreements have all "perhaps ironically" been concluded by the Union on an exclusive basis[1159].

Prior to the entry into force of the Lisbon Treaty, the treaty-making capacity of the Union was disputed. It was unclear whether the Council acted on behalf of the EU when concluding an international agreement or whether it acted in the collective interest of the Member States becoming the contracting parties[1160]. Most Member States had doubts regarding the legal status of the Union and did not consider agreements concluded by the EU appropriate to be subjected to their regular parliamentary procedure[1161].

The Treaty of Lisbon put an end to this debate by confirming the international legal personality of the Union in Article 47 TEU. Furthermore, the Union's capacity to conclude international agreements covering the CFSP is explicitly provided in Article 37 TEU. Thus, both the EU and the Member States are competent to conclude (mixed) agreements in the area of the CFSP. In other policy areas, the Union generally concludes mixed agreements where the scope of Union competences is limited or the nature of its competences is non-exclusive. The nature of the Union's competence under the CFSP, too, is non-exclusive and could, therefore, give rise to mixity. As we saw in Chapter One, Union competence in CFSP-matters could best be described as non-preemptive, meaning that the Member States remain entitled to enter into international commitments themselves.

The Lisbon Treaty, thus, opens the door for mixed agreements within the CFSP. In fact, the creation of a single legal personality for the Union in Article 47 TEU may increase the Member States' interest in becoming a party to EU agreements in the field, as ratifications of such agreements at the domestic level are no longer necessary from an institutional point of view[1162]. Whenever an agreement covered by the CFSP touches on areas of Member State competence, the latter "may wish to give their national parliaments a chance to approve an agreement by becoming a party

[1159] C. Hillion and R. Wessel, "Restraining External Competences of EU Member States under CFSP", 103.
[1160] For more on this debate see R. Gosalbo Bono, "Some Reflections on the CFSP Legal Order", 354-55.
[1161] R. A. Wessel, "Cross-Pillar Mixity: Combining Competences in the Conclusion of EU International Agreements", in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 30 at 40.
[1162] R. A. Wessel, "Cross-Pillar Mixity", 52.

themselves"[1163].

While former Article 24 (6) TEU provided that Union agreements were binding on the EU institutions, without any reference to the Member States, it is now explicitly stated in Article 216 (2) TFEU that "[a]greements concluded by the Union are binding upon the institutions of the Union *and* on its Member States"[1164]. Thus, no distinction is made any longer between agreements based on the CFSP and other agreements as far as their binding nature are concerned. However, this does not mean that also those parts of a mixed agreement falling within national competence can be enforced as a *Union law* obligation, as in other policy areas. Most importantly in this respect, the jurisdiction of the Court of Justice in CFSP matters continues to be excluded also after the entry into force of the Lisbon Treaty[1165]. As a result, the Court is incapable of interpreting national provisions in conformity with a mixed CFSP agreement and of enforcing their compliance. But even if the Court were competent to rule on these questions, it is doubtful whether it could be argued that there is a Union interest in the uniform interpretation and application of those provisions of a mixed CFSP agreement falling within national competence.

Firstly, as far as the interpretation of mixed agreements is concerned, we saw above that the requirement of uniform interpretation is applied with a view to forestalling future differences in the interpretation of a provision of a mixed agreement[1166]. This reasoning cannot be applied to the CFSP. The non-pre-emptive nature of Union competence in the area means that both the Union and the Member States remain competent to conclude international agreements under the CFSP. Accordingly, the Member States continue to be competent to interpret provisions of a mixed CFSP agreement, even if this may lead to inconsistencies with EU law in the future.

Secondly, the Court has recognised its jurisdiction to enforce compliance also with those provision contained in mixed agreement which fall within national competence where the EU incurs international responsibility for the infringement of a mixed agreement. As the Court held in *Étang de Berre* and the *MOX Plant* case, "the Member States fulfil, within the [Union] system, an obligation in relation to the [Union], which has assumed responsibility for the due performance of that agreement"[1167]. With regard to the CFSP, however, it is not evident that the Union would incur international responsibility for the performance of a mixed agreement in its entirety. While there is nothing in the Treaties which provides for the conclusion that the Member States alone bear international responsibility within the CFSP, it is not

[1163] Ibid. at 53.
[1164] Emphasis added.
[1165] See further M. G. Garbagnati Ketvel, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy".
[1166] See e.g. Case C-53/96 *Hermès v. FHT*, para 32.
[1167] Case C-239/03 *Commission v. France* at para 15; C-459/03 *Commission v. Ireland* at para 85.

evident either that the EU itself would be primarily responsible for any international wrongful acts in the area[1168].

However, this does not mean that provisions of mixed agreements falling within Member State competence do not have to be interpreted and applied in conformity with CFSP rules. The requirement of uniform interpretation may, in fact, be relevant for the interpretation of provisions contained in mixed CFSP agreements by *national* courts. In the *Pupino* judgment, the Court of Justice held that "[w]hen applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision" at issue[1169]. The case concerned a framework decision taken under the former third pillar, but it has been argued that the duty of consistent interpretation established in this case applies also to the CFSP[1170]. More generally, this would imply "that all national legislation should be interpreted as far as possible so as to comply with relevant CFSP acts"[1171].

Furthermore, while it appears problematic to transpose the Court's reasoning from its case law on the implementation of mixed agreements to the CFSP, the Member States are under an obligation to secure compliance with provisions of a mixed agreement which flows from Article 4 (3) TEU, rather than from the agreement itself. The Council is under an obligation under Article 4 (3) TEU "to ensure that the Member States comply with their CFSP obligations so as not to make the achievement of the [Union's] tasks more difficult"[1172]. Therefore, the Member States are under an obligation to comply not only with the CFSP-specific duty of loyalty aid down in Article 24 (3) TEU, but also with the more general loyalty obligation incorporated in Article 4 (3) TEU when acting under the CFSP. The same reasoning applies to Member States' participation within an international agreement. As we saw in Chapter Two, the Member States are subject to specific restraints of a procedural nature also when acting under the CFSP. Article 32 TEU, which provides that the Member States shall consult each other within the European Council and the Council on any CFSP matter in order to determine a common approach, imposes procedural obligations prior to the adoption of a common strategy in CFSP matters. In its role as a "necessary pre-legislative procedure"[1173], Article 32 TEU may restrain Member State action in other policy areas even before an exercise of Union competence has occurred. The obligation of information and consultation in Article 32 TFEU, however, is limited by the qualification that it applies to all matters "of general interest".

[1168] See further L. den Hertog and R. A. Wessel, "EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?", in M. Evans and P. Koutrakos (eds.), *International Responsibility: EU and International Perspectives* (Hart Publishing 2013) 339.
[1169] C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285, para 43.
[1170] G. De Baere, *Constitutional Principles of EU External Relations*, 209.
[1171] Ibid.
[1172] C. Hillion and R. Wessel, "Restraining External Competences of EU Member States under CFSP", 111.
[1173] R. Wessel, "The Multilevel Constitution of European Foreign Relations", 179.

The Member States, therefore, remain free to decide whether or not a matter is of general interest. The information and consultation obligation is, however, reinforced by the CFSP loyalty obligation laid down in Article 24 (3) TEU. This obligation becomes more substantive once the Union has acted[1174], for example, by concluding a (mixed) agreement. Procedural restraints could, furthermore, derive directly from the general loyalty obligation contained in Article 4 (3) TEU. On the basis of that provision, the Member States could be required to comply in good faith with their CFSP obligations. Firstly, given the proximity between Article 4 (3) TEU and Article 24 (3) TEU, there are reasons to interpret the former in the light of the latter[1175]. Secondly, Member States' compliance with their CFSP obligations is a means to fulfil the overall objective of the EU of asserting its international identity and to ensure the consistency and coherence of the Union's external activities[1176].

Against this background, it appears that when acting under a mixed CFSP agreement, the Member States would be under procedural obligations similar to those discussed above. Thus, like in the *Swedish PFOS* case, they would be required to inform and consult the other Member States and the relevant Union institutions before taking unilateral action once a Union position has emerged on a CFSP topic. As in other policy areas, it can be assumed that the duty of cooperation is particularly stringent when the Union and the Member States jointly exercise their competence by concluding a mixed agreement. An obligation of result, such as the duty to refrain from acting imposed by the Court of Justice in the *Swedish PFOS* case, would not, however, be compatible with the nature of CFSP competence. Neither Article 4 (3) TEU nor the CFSP-specific loyalty obligation under Article 24 (3) TEU can have the effect of precluding any further national action once a Union initiative has been started. Substantive obligations are, therefore, excluded in the context of mixed CFSP agreements.

[1174] R. A. Wessel, "The EU as a Party to International Agreements", 183.
[1175] Ibid.
[1176] C. Hillion and R. Wessel, "Restraining External Competences of EU Member States under CFSP", 111.

Concluding Chapter

The EU Loyalty Obligation – From Exclusion to Complementarity

I. Introduction

Looking at some of the developments examined in the foregoing chapters in isolation, the impression may arise that the exercise of the Member States' retained competence has increasingly and systematically been restrained by the Court of Justice to such an extent that the duty of sincere cooperation leaves them no more freedom of action than that of "doomed […] lemmings heading towards the edge of a cliff"[1177]. Court decisions impinging on national competence or the exercise thereof often result in national criticism that Member States' "sovereignty has been taken away by the European Court of Justice […] to the dismay of all"[1178]. Against this background, the present chapter will attempt to assess the Member States' position in respect of both the duty of sincere cooperation and the CFSP loyalty obligation. Are the restraints imposed on the exercise of Member State competence really to be understood as restraints on national sovereignty, or is the Court actually furthering the Member States' own interests?

In order to assess this question, the chapter first summarises the Court's case law on Article 4 (3) TEU (Section II.), on the basis of which a number of trends in the development of the loyalty obligation can be formulated (Section III.). The main part of the chapter is dedicated to assessing the impact of Article 4 (3) TEU on the Member States' status of sovereign states under international law (Section IV.). It concludes by examining to what extent the findings of the present thesis differ with regard to the CFSP (Section V.).

II. Chapter summary – The scope of the loyalty obligation

A. From the exclusion to the retention of Member State competence

The Court of Justice, as became apparent in Chapter One, has moved away over the years from the

[1177] Opinion of AG Maduro in case C-246/07 *Commission v. Sweden* (PFOS), para 58, describing Sweden's position of being compelled to await the outcome of the Union decision-making process after unsuccessfully trying to achieve a common proposal on the matter.

[1178] Lord Denning, Introduction to *The European Court of Justice: Judges or Policy Makers?* (The Bruges Group 1990).

classic pre-emption doctrine in *AETR* to the confirmation in Opinion 1/2003 that implied powers can be shared. Its emphasis has shifted from the exclusionary effect of EU legislation to a focus on increased participation of the Union alongside the Member States. The scope of implied EU powers has been extended, while the legal impact of such powers has been reduced.

In the 1970s and 1980s, the Court rendered a number of potentially far-reaching judgments which saw the creation of EU powers even in the absence of any express authorisation in the Treaty. In *AETR*, the Court established the principle that the Union had corresponding external powers in all areas covered by the Treaty. Once Union powers had been exercised, a given field was considered occupied, with the result that the Member States were no longer able to act alongside the EU. At the same time, it linked the existence of such implied powers with their exclusive nature. Internal legislation was automatically assumed to be affected or its scope altered by international Member State measures. This type of exclusivity was subsequently found to arise also if the conclusion by the EU of an international agreement was necessary to reach a Union objective[1179]. The scope of implied powers was then expanded so as to include the whole scheme of the Treaty[1180], before it was established that exclusive implied competence could also exist in areas which were only covered to a *large extent* by Union rules[1181]. The dynamic nature of implied powers was confirmed in Opinion 1/2003, where the Court found that the assessment of whether a given area was largely covered had to take into account also the future development of Union law.

On the other hand, the two strands of scope and nature of EU powers were increasingly separated, significantly restricting the *AETR* doctrine in its effect. In the 1990s, the Court began to accept that implied powers need not necessarily be exclusive in nature. Where the rules at issue lay down minimum requirements only, the Member States remain competent to act[1182]. In Opinion 1/2003, finally, the questions of existence and nature of implied competence were explicitly separated. A finding of exclusivity is now dependent on a detailed analysis of the relevant Union rules and the envisaged agreement, as well as on the nature and content of those provisions. At the same time, the Court leaves no doubt in Opinion 1/2003 that where the uniformity and "full effectiveness"[1183] of Union law are at risk, Member State action remains precluded.

After the wide-ranging implications of the Court's approach to implied powers in its early case law, the Member States sought to regain control over their foreign relations powers in the SEA and the Maastricht Treaty. The expansion of the scope of the Treaties in the meantime, which provided express attribution of external relations powers to the Union, indicates that the transfer of

[1179] Opinion 1/76.
[1180] Joined Cases 3, 4 and 6/76 *Kramer*.
[1181] Opinion 2/91.
[1182] Ibid.
[1183] Opinion 1/2003.

competence to the Union was not *per se* against the interest of the Member States. Rather, it was the growing scope of implied Union powers paired with its exclusive effect which led the Member States to limit the potential for further expansion of EU competence. When amending the Treaty, they decided to explicitly categorise the newly enacted express powers as non-exclusive. The Court of Justice subsequently adjusted its approach accordingly by recognising both exclusive and non-exclusive implied powers. As a result, we find an increasing number of fields in which complementary Member State and Union action is accepted.

As a general trend, it is thus possible to trace a development on two levels. On the one hand, the scope for implied powers to *exist* is expanded, while on the other hand, the restraining *effect* of such powers has been diminished and Member State participation alongside the Union is increasingly accepted. Powers are no longer either exclusive or concurrent. The aim is instead to ensure a uniform and consistent application of EU rules and the proper functioning of the system they establish, with an overarching objective of *effet utile*, as most recently confirmed in Opinion 1/2003. As long as Member States' international obligations do not encroach on these objectives, their presence alongside the Union remains allowed, while a full parallelism between internal and external powers of the Union is no longer the prime objective.

B. Restraints on the exercise *of Member State competence*

While Chapter One revealed an increased emphasis by the Court on the retention of the Member States' external relations powers, the remainder of the study has revealed that the exercise of those powers is increasingly restrained by the duty of sincere cooperation.

In contrast to the principle of pre-emption discussed in Chapter One, it emerged in Chapter Two that Article 4 (3) TEU can give rise to loyalty restraints even *before* the Union has exercised its competence. The scope of loyalty restraints in this context is determined by a risk of future legislative developments and their impact on the Union legal order. Where there is the prospect of the Union exercising its competence, the Member States' freedom of action is circumscribed by Article 4 (3) TEU. In this respect, the Court has established strict loyalty restraints on the ground that concerted action has been initiated at EU level. These restraints may not only impose an obligation on the Member States to refrain from acting, but this pre-emptive effect can equally apply also in areas of shared competence[1184]. The temporal reach of *AETR*-type pre-emption has been extended to situations in which no exercise of Union competence has taken place. The

[1184] Case C-13/07 *Commission v. Council (Vietnam WTO Accession)*, Opinion of Advocate General Kokott; Case C-433/03 *Commission v. Germany* and Case C-266/03 *Commission v. Luxembourg*.

temporal scope of Article 4 (3) TEU has been further expanded to provide for *AETR* pre-emption also in situations which do not concern the conclusion of an agreement, but which relate to action within the framework of an agreement *after* it has been concluded[1185].

We thus see an expansion of the *AETR* doctrine, not only in terms of its normative scope, but also in the temporal sense. The *AETR* doctrine also operates to constrain national action of a non-contractual kind, provided that such action may lead to the adoption of new international standards. It emerges that where there is the prospect of an exercise of Union competence, the Member States may be subject to a duty to refrain from acting, regardless of whether the area in question is covered by shared or by exclusive competence.

In addition to loyalty restraints aimed at avoiding the *risk* of conflict between EU law and international Member State obligations, like those discussed in Chapters One and Two, Article 4 (3) TEU also gives rise to obligations intended to *resolve* such conflicts. Chapter Three showed how these compliance obligations apply also to those situations which come within the scope of the protection afforded by Article 351 TFEU for international agreements concluded by the Member States before joining the EU. The Member States are required to take all appropriate measures to eliminate any incompatibilities between their pre-accession obligations and EU law. Initially, the Court emphasised the link between the Member States' obligation to eliminate incompatibilities and the scope of EU law, as the obligation on Member States existed only where the Union had promulgated legislation[1186], and Union rules had to be sufficiently precise and clear[1187]. Recent case law, however, has seen a substantial loosening of this principle. Where an objective of EU law is jeopardised, the mere possibility of legislative EU action in the future prevents the Member States from maintaining in force an international pre-accession agreement[1188]. As such, the Court's reasoning mirrors the rationale of the *AETR* doctrine: pre-emption logically precedes primacy by precluding Member State action, not because rules of Union law apply which prevail in cases of conflict, but simply because national action in a given area would affect the attainment of a Union objective, even if no Union norm exists with which national rules can come into conflict. Furthermore, compliance is construed in a formalistic manner, in the sense that unilateral, i.e. *de facto*, compliance by the Member States is not sufficient[1189]. Ultimately, the Member States are under a duty to denounce any incompatible pre-accession agreement in its entirety. This obligation is remarkably wide in scope, as it applies irrespective of whether the agreement concerned falls

[1185] Case C-45/07 *Commission v. Greece*.
[1186] Case C-158/91 *Levy*.
[1187] Case C-203/03 *Commission v. Austria*.
[1188] Case C-205/06 *Commission v. Austria*, Case C-249/06 *Commission v. Sweden* and Case C-118/07 *Commission v. Finland*.
[1189] Case C-62/98 *Commission v. Portugal* and Case C-84/98 *Commission v. Portugal*.

within exclusive or shared competence.

Compliance obligations, as we saw in Chapter Four, apply even in the absence of Union powers in a given field. By distinguishing between the *existence* and the *exercise* of Member State powers also in areas of retained competence, the Court of Justice expands the scope of Union law beyond those areas in which the EU has been given the right to act. To that end, the Court has developed a recurring formula, according to which powers retained by the Member States must be exercised consistently with Union law. In the same way that Article 351 TFEU does not release the Member States from their obligation to achieve compliance between pre-existing obligations and EU rules, the fact that a given commitment falls within national competence does not absolve the Member States of their duty to achieve the primacy of Union law over conflicting international obligations. Where it is not possible for a Member State to unilaterally remedy the discriminatory application of rules because the advantages in question are granted by a third country, the Member States are under a duty to renegotiate the relevant provisions. Ultimately, this duty also entails an obligation to denounce an entire agreement containing a single inconsistent clause. In practice, Member States may sometimes not be left any other choice but to re-enter into a commitment over the same subject-matter by way of concerted action at Union level. *De facto*, then, the competence is transferred to the Union and the Member States are pre-empted from acting.

Chapter Five looked at how the duty of loyalty crystallises into concrete legal obligations where the Union and the Member States conclude international agreements together. In order to establish its exclusive jurisdiction for the interpretation of mixed agreements, the Court found that a sufficient justification was given where a provision contained in a mixed agreement was applicable both to situations falling within the scope of national law and to situations falling within the scope of Union law[1190]. The Court's approach to establishing its exclusive jurisdiction to interpret provisions of mixed agreements was initially predicated on the scope of EU law. However, it was incrementally expanded so as to establish interpretative jurisdiction where no EU rules exist, but only substantive links of a merely procedural nature. Based on a "largely covered" test, the Court has found compliance obligations to exist even if they fall within the competence of the Member States[1191]. The criteria applied for determining the scope of the Court's jurisdiction, however, are no *AETR* criteria, as their rationales differ in important respects. Nevertheless, the compliance obligations imposed by the Court do not differ in any way from obligations contained in provisions falling within exclusive Union competence. As far as the procedural obligations which apply in a context of mixity are concerned, the Member States are under strict obligations to inform and consult the

[1190] Case C-53/96 *Hermès*.
[1191] Case C-13/00 *Commission v. Ireland*.

Commission where unilateral action may lead to the adoption of international rules[1192]. Most recently, this duty has been expanded so as to include a duty to abstain from acting altogether[1193]. Thus, the Member States' freedom to act under a mixed agreement has been restricted to such an extent that national action is only possible where a Union position has been formulated.

III. The application of the duty of sincere cooperation – Trends in the Court's case law

On the basis of the foregoing, a number of trends in the Court's case law may be formulated.

A. Increasing emphasis on the retention of Member State powers

Looking at the question of *competence*, we can see a development of the concept of implied powers in two opposite directions. On the one hand, the Court has become reluctant to deprive Member States of their powers. Implied powers have evolved from strictly exclusive to non-exclusive powers, causing the restraining effect of implied competence to diminish significantly. On the other hand, the scope for implied powers to exist has gradually been expanded so as to provide for EU competence in circumstances which previously did not give rise to corresponding external powers. Thus, while the exclusion of Member State action has been limited, the participation of the EU has simultaneously been promoted. As a result of these two opposite developments, we see a trend towards increased participation of the Member States alongside the Union.

B. Article 4 (3) TEU turning into an obligation of result

The growing acceptance of non-exclusive powers, however, does not imply that the exclusion of Member State action no longer takes place. On the contrary, a second trend in the Court's case law suggests that the duty of sincere cooperation laid down in Article 4 (3) TEU has developed over time into an instrument for limiting the exercise of Member State powers to such an extent that its restraining effect can be tantamount to pre-emption where required by the Union interest. As such, the duty of sincere cooperation in external relations emphasises *substantive* compliance as opposed to restrictions of a procedural nature.

As an example of the Member States' freedom to exercise their retained powers from the early case

[1192] Case C-459/03 *Commission v. Ireland*, Case C-246/07 *Commission v. Sweden*.
[1193] Case C-246/07 *Commission v. Sweden*.

law, the Court of Justice found in *Kramer* that the Member States remained free to exercise their competence even in areas that had already been "reserved" by the Union[1194]. A legislative process at Union level had, in other words, almost been completed and yet, the Member States were merely bound by procedural Union obligations when negotiating within the framework of the agreement concerned.

In recent cases, by contrast, we see a transformation of the duty of sincere cooperation into an obligation of result. Where concerted action has been initiated at Union level, the Member States are under an obligation not to hinder the outcome of the process. Recent cases suggest that this obligation goes beyond a procedural duty to cooperate closely with the Union institutions involved, ultimately including – even in areas of shared competence – a duty to refrain from acting altogether, if not with the consent of the Union[1195]. Similarly, the concept of concerted action has been expanded over time. While concerted action initially required a discourse between institutions, such as the granting of a negotiating mandate by the Council to the Commission[1196], it may now include situations in which mere internal deliberations have been started at the level of one of the institutions[1197].

Substantive compliance obligations apply also where the Member States have already exercised their competence by entering into an international agreement with a third country, either prior to accession to the EU or within the ambit of their own retained powers. In order to protect the third countries' interests, the preferred solution to a conflict with EU rules is generally amendment or re-negotiation of the contested parts of an international agreement. However, the political reality often does not allow for such modifications, leaving the Member States no choice but to allow the EU to craft a common external policy and to replace the bilateral agreements with Union agreements.

C. Moving away from the scope of EU competence *towards the scope of EU* law

These substantive compliance obligations have in common that they can be applied in such a way as to reproduce the effect of exclusive Union powers, albeit in areas of shared or national competence. This observation then leads to a third trend that can be discerned in the Court's case law, according to which the precise content of the loyalty obligation under Article 4 (3) TEU is less and less predicated on questions of competence. Put differently, the question of who is competent in a given

[1194] Joined Cases 3, 4 and 6/76 *Kramer*.

[1195] Case C-246/07 *Commission v. Sweden* (PFOS); Case C-13/07 *Commission v. Council (Vietnam WTO Accession)*; Case C-459/03 *Commission v. Ireland* (MOX Plant); Case C-433/03 *Commission v. Germany* and Case C-266/03 *Commission v. Luxembourg*.

[1196] See Case 804/79 *Commission v. United Kingdom*.

[1197] Case C-246/07 *Commission v. Sweden* (PFOS).

area no longer determines the extent to which national action may be restrained.

As argued above, we see a *de facto* pre-emptive effect in a number of legal circumstances, irrespective of who is actually competent over the matter at issue. Where Member States are subject to substantive compliance obligations, the duty of sincere cooperation may yield the same results as the *AETR* doctrine, with the difference that the obligation applies even where no occupation of the field has taken place, thus circumventing the strict requirements for implied exclusive competence.

A look at the Court's approach to the concept of "start of concerted action" illustrates this point. Where concerted action has been initiated at EU level, Member States' freedom to act is restricted to such an extent that national action is only possible where a Union position has been formulated. Concerted action thus can be likened to a loss of Member State powers[1198], regardless of who is actually competent over the matter. In the *Swedish PFOS* case[1199], for example, the Member States were just as much prevented from acting in an area of shared competence as they were in the *FAO* case[1200] concerning provisions falling within exclusive Union competence[1201]. In fact, the restraints imposed on the Member States in the *Swedish PFOS* case were identical to those applied in *Commission v. UK*[1202] concerning exclusive Union powers, and the *Greek IMO* judgment[1203], where Member States had become trustees of the Union interest.

This trend away from questions of competence is also reflected in the Court's construction of its exclusive jurisdiction over those parts of mixed agreements coming within Member State competence. The Court is concerned with the question of whether there is a Union interest in accepting jurisdiction for the implementation of a given provision, rather than establishing the risk that the exercise of national competence might affect existing Union legislation. Also the Court's exclusive interpretative jurisdiction has been established in the absence of a close link between a given provision contained in a mixed agreement and the scope of EU law. Loosely framed links of a procedural nature can serve as a sufficient substantive link[1204]. As we saw in Chapter Five, questions about competence are misplaced in this context. Instead of examining the extent to which the EU has exclusive powers in relation to a given mixed agreement, the Court's jurisdiction concerns the extent to which the agreement comes within the scope of EU law.

The interim conclusion reached in Chapter Three, in fact, already noted a convergence of compliance obligations differing significantly in nature. Article 351 TFEU, although conceived as conflict rule,

[1198] See in a similar vein, AG Kokott in Case C-13/07 (Vietnam WTO Accession Case), para 79.
[1199] Case C-246/07 *Commission v. Sweden* (PFOS).
[1200] Case C-25/94 *Commission v. Council* (FAO).
[1201] See Chapter Five.
[1202] Case 804/79 *Commission v. United Kingdom*.
[1203] Case C-45/07 *Commission v. Greece*.
[1204] Joined Cases C-300/98 and 392/98 *Dior and Assco*.

can now have the effect of *precluding* incompatibilities between EU rules and international Member State obligations, similar in its effect to *AETR*-type pre-emption. The duties imposed by Article 351 TFEU, moreover, resemble the compliance obligations discussed in Chapters Two and Four which do not come within the scope of protection foreseen for pre-accession agreements[1205]. It appears, therefore, that regardless of the nature of EU competence involved, compliance obligations imposed on the Member States are increasingly construed so as to lead to the same outcome.

A further indication that compliance restraints based on the duty of sincere cooperation are moving away from being predicated on the scope of EU competence is the Court's recent confirmation in the *Swedish PFOS* case that the duty under Article 4 (3) TEU is not merely complementary in nature, but may function as an independent obligation[1206]. Article 4 (3) TEU has traditionally been viewed by academics[1207] and practitioners[1208] as an auxiliary tool aimed at supporting the enforcement of Member States' Treaty obligations. According to this long-standing conviction, the provision

> "by itself never creates duties, but only *together* with some other rule of [Union] law, or some principle or objective of [Union] policy which is to be facilitated or, at least, not jeopardized. Legal consequences cannot be deduced from the general words of Article [4 (3)] alone, but only in combination with other specific rules. The content of the obligation results from the other rule or objective"[1209].

The need for the residual obligation under Article 4 (3) TEU was deemed to arise where "a particular situation lacks sufficient effect to compel a Member State [...] to behave in conformity with it"[1210]. The application of the duty of sincere cooperation, in other words, was closely linked to Union competence and the extent to which it had been exercised. Article 4 (3) TEU, in fact, was "not a device for filling in or developing the content of a policy which has not been agreed in detail, and which needs to be dealt with by general [Union] measures"[1211].

While significantly expanding the scope of Article 4 (3) TEU, the Court's reasoning in the *Swedish PFOS* case should not, however, be understood as an extensive reinterpretation of the duty of sincere

[1205] See Case C-170/98 *Commission v. Belgium*.

[1206] Case C-246/07 *Commission v. Sweden* (PFOS). The action brought by the Commission against Sweden alleged a breach of (current) Articles 4 (3) TEU and 218 (1) TFEU. The complaint alleging a breach of Article 218 (1) TFEU was deemed unfounded by the Court (para 110), leaving Article 4 (3) TEU as the sole basis for the finding that Sweden had failed to fulfil its Treaty obligations. The latter complaint was not brought in conjunction with any other Treaty provision or other rules of EU law.

[1207] See, for example, P. J. Kuijper, "Re-reading External Relations Cases in the Field of Transport", 291; J. Temple Lang, "The Development by the Court of Justice of the Duties of Cooperation of National Authorities under Article 10 EC" (2008) 31 Fordham International Law Journal 1483 at 1517.

[1208] See the conclusions of the FIDE Congress, *General Report: The Duties of Cooperation of National Authorities and Courts and the Community Institutions under Article 10 EC Treaty,* in Vol. 1, IXI F.I.D.E. Congress (2000, Helsinki).

[1209] J. Temple Lang, "The Development by the Court of Justice of the Duties of Cooperation of National Authorities under Article 10 EC", 1517, emphasis added.

[1210] P. J. Kuijper, "Re-reading External Relations Cases in the Field of Transport", 293.

[1211] J. Temple Lang, "The Development by the Court of Justice of the Duties of Cooperation of National Authorities under Article 10 EC", 1517.

cooperation. The Court has not created "any wholly *new* duties, not related to those which are already binding on Member States or to which they have agreed as [Union] objectives or policies"[1212]. Rather, the judgment merely confirms the recent trend of moving away from the scope of EU competence towards the scope of EU law. Instead of creating a general duty of abstention from unilateral action under mixed agreements in areas of shared competence on the basis of Article 4 (3) TEU, the Court links the application of the duty in this case to a common strategy by which it has been agreed not to interfere with the legislative process initiated in respect of the subject matter at issue[1213].

In light of the foregoing, the assumption that Article 4 (3) TEU is a supplementary provision which only applies in combination with other specific rules no longer holds true. However, despite no longer being predicated on the scope of EU competence, Article 4 (3) TEU is still very much connected to the scope of Union *law*. This recent development, then, appears to confirm the assumption that in its construction of the duty of sincere cooperation, the Court is moving away from questions of competence towards an assessment based more broadly on the scope of EU law.

D. Expanding the temporal dimension of the scope of EU competence

The fact that the application of the duty of sincere cooperation is increasingly separated from Union competence and the extent to which it has been exercised is also reflected in another recent trend. The Court's case law shows that Article 4 (3) TEU not only expands the substantive reach of EU law – by creating a pre-emptive effect where Member States retain competence – but it may also have the result of enlarging the temporal scope of Union law.

As we saw in Chapter Two, Article 4 (3) TEU was already used early on to preclude Member State action in the absence of any exercise of Union competence which would have justified such a pre-emptive effect. In *Commission v. UK*[1214], the Member States were found to be under an obligation to abstain from acting once concerted action had been initiated at Union level. The Union's failure to exercise its competence notwithstanding, an exclusive competence was found to exist in the specific case.

Over the last decade, by contrast, the Court has consistently expanded the temporal scope of Article 4 (3) TEU so as to create similar restraints even in the absence of a corresponding Union competence. The "start of concerted Union action" was found to entail an obligation of

[1212] Ibid.
[1213] Case C-246/07 *Commission v. Sweden* (PFOS), paras 85-89.
[1214] See Case 804/79 *Commission v. United Kingdom*.

close cooperation, "if not a duty of abstention"[1215]. It was subsequently even suggested that the start of concerted action represented the very point in time in which a concurrent competence became exclusive[1216]. In the *Swedish PFOS* case[1217], the Court confirmed that the duty of loyalty may indeed entail an obligation of abstention from acting even in areas of shared competence.

Another example of the expansion of the temporal scope of Article 4 (3) TEU can be found in the incremental relaxation of the *AETR* criteria for determining whether a given field has been occupied by the Union. Whereas the *AETR* doctrine initially applied only in cases in which a field had been *fully* occupied, it was later extended so as to include fields that were "largely covered"[1218]. After the most recent Opinion 1/2003, even the "*future* development" of EU legislation has to be taken into account[1219].

In the *Greek IMO* case[1220], the *AETR*-effect based on future rules was applied to a non-contractual situation. The Court found that Greece had violated its Union obligations by initiating a procedure which could lead to the adoption by the IMO of new rules which would "affect" EU law[1221]. The Member State had merely submitted a legislative proposal and it was far from certain that this proposal would have been adopted. Nevertheless, this "totally hypothetical, possible, future effect on [Union] law" was sufficient to entail a failure on the part of Greece to fulfil its obligations under EU law[1222].

The notion of the future development of EU rules forming part of the scope of Union law can also be found outside the context of pre-emption. As we saw in the *BITs* cases, pre-accession agreements concluded by the Member States can be subject to compliance obligations on the ground that conflicting EU rules may be adopted in the future[1223].

It thus becomes apparent that future legislative developments increasingly play a decisive role in defining the notion of "scope of EU law". However, in this context it is important to recall the observations made in the foregoing chapters in respect of the specific circumstances under which the Court has expanded the temporal reach of Article 4 (3) TEU. We saw in each case that the imposition of loyalty restraints requires a concrete link between the scope of EU law and the scope of EU competence. The exercise of Member State competence, in fact, is not circumscribed by the future

[1215] See Case C-433/03 *Commission v. Germany*, para 66.
[1216] AG Kokott in Case C-13/07 (Vietnam WTO Accession Case).
[1217] Case C-246/07 *Commission v. Sweden* (PFOS).
[1218] Opinion 2/91.
[1219] Opinion 1/2003, para 126, emphasis added.
[1220] Case C-45/07 *Commission v. Greece*.
[1221] See Chapter Two.
[1222] N. Lavranos, "Protecting European Law from International Law", 277.
[1223] Case C-205/06 *Commission v. Austria*, Case C-249/06 *Commission v. Sweden* and Case C-118/07 *Commission v. Finland*.

state of Union law generally, but "specifically by a *prospect* of the Union exercising its competence"[1224]. Restraints based on a mere "*hypothetical* impact"[1225] of Member State action on Union law are, therefore, excluded.

E. Result: The convergence of the Member States and the EU into a unit

Having traced these trends in the Court's case law, we are left with the question of how these seemingly unrelated developments relate to each other. One the one hand, we can witness an increasing emphasis on the retention of competence on the part of the Member States and an extension of the scope of implied powers. On the other hand, emphasis is shifting *away* from the notion of powers towards the scope of EU law, in that questions of competence no longer determine the extent to which national action may be restrained. The scope of EU law, in turn, has been expanded so as to offer a greater potential for restraint. By linking loyalty restraints to the scope of EU law as opposed to EU competence, the duty of sincere cooperation is expanded in a two-fold manner, both substantively and temporally. At the same time, the function of the duty has shifted from focussing on procedural restraints to an increasing emphasis on substantive compliance.

Bringing these different themes together, we see a picture emerge of Article 4 (3) TEU operating as a tool for the convergence of the EU and its Member States into a unified entity on the international scene. This process takes place on two levels. On the one hand, a shift towards the acceptance of complementary Member State and Union action has occurred as far as competences are concerned. As we saw above, implied powers are increasingly construed as non-exclusive, while at the same time expanding the scope for implied EU competence to arise in the first place. The emphasis is therefore on common action.

On the other hand, the exercise of the powers retained by the Member States is subject to significant compliance restraints. These restraints are characterised by two key features. Firstly, the scope of the restraints is no longer circumscribed by the limits of Union competence. Rather, the notably broader notion of "scope of EU law" increasingly forms the basis for determining whether and to what extent Member States' freedom of action should be constrained in a given case. Put differently, the scope for restraints to apply has been significantly expanded. Secondly, the Member States are increasingly subject to obligations of result. Such restraints range from the obligation to eliminate existing incompatibilities with EU law to the avoidance of future conflicts by precluding Member State action altogether through the imposition of a duty to abstain from acting unilaterally. Even the

[1224] J. Heliskoski, "The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union", 545, emphasis added.
[1225] N. Lavranos, "Protecting European Law from International Law", 277, emphasis added.

less intrusive obligation to eliminate incompatibilities may have the effect of forcing the Member States into allowing the Union to replace the contested agreements with EU agreements. Here we see once again that Member State participation in external matters is encouraged, but only within the tightly formulated boundaries laid down by the Court of Justice.

IV. The duty of sincere cooperation and Member State sovereignty

Seen from the perspective of the Member States, it should be assumed that the creeping transformation of the duty of sincere cooperation into an instrument for the convergence of Member State and Union action into a single unit in international relations is a cause for concern. As discussed in the Introductory Chapter, the creation of a European "super-state" has long been feared by national politicians warning of "creeping federalism", according to which "[t]he powers have all been going towards Brussels and away from nation states"[1226].

Indeed, the previous chapters have demonstrated that the duty of sincere cooperation can be applied in such a way as to restrain Member State autonomy in ways tantamount to an actual transfer of competence. In other words, it appears that the Member States may fall victim to competence creep, notwithstanding the formal retention of powers. What, then, does this transformation of the duty of loyalty mean for the Member States? Did they seek to counteract the Court's expansion of the doctrine of implied in the early case law by amending the Treaty accordingly, as we saw in Chapter One, just to be *de facto* deprived of their scope for manoeuvre through the back door? This section will attempt to evaluate the position of the Member States vis-à-vis their obligations towards the Union under Article 4 (3) TEU. Have they become the victim of a monster they themselves created by inserting a broadly framed duty of loyalty into the Treaty with a view to ensuring its effectiveness, or could the broad application of Article 4 (3) TEU instead be in their own national interest?

This section will first look at the problem of creeping competence via Article 4 (3) TEU (A.), before coming to some brief conclusions on the vision of political morality which dominates the exercise of Member State powers in EU external relations (B.). It will then give some more consideration to the argument introduced in Chapter One, according to which the development of implied powers can be considered a result of a process of action and reaction between the Member States and the Court of Justice (C.). Next, this section will seek to shed light on the possible reasons why it could

[1226] See, for example, A. Grice, "Hain warns of 'creeping federalism' in EU", The Independent, 22 July 2002, citing Peter Hain, the British minister for Europe at the time.

be in the Member States' own interest to act together with the Union (D.) and considers why Member States are traditionally reluctant to empower the EU institutions to act (E.). The section will proceed to discuss why the duty of sincere cooperation is particularly suited to balance these two competing interests (F.) and (G.), before concluding with an assessment of the impact of Article 4 (3) TEU on Member State sovereignty (H.).

A. Competence creep via Article 4 (3) TEU?

The notion of competence creep is traditionally associated with a generous application by the Court of Justice of legal basis provisions. The discussion of the notion of competence creep in the Introductory Chapter, however, revealed that according to a more recent broader understanding of competence creep[1227] also the limits imposed on the Member States' freedom to act within the scope of EU law can constitute significant inroads into national procedural autonomy which are "often perceived as a loss of sovereign powers and for that matter creeping competences"[1228].

If competence creep is conceived in this broader sense, then the Court's case law offers ample instances to suggest that the loyalty obligation laid down in Article 4 (3) TEU has indeed developed into an instrument for the loss of competence at national level, leaving the Member States' remaining freedom to act strictly circumscribed by Union law. As we saw in the foregoing, the Member States' scope for unilateral action is often significantly restricted, even in areas of national competence.

The concerns raised by creeping competence through the means of the duty of sincere cooperation are obvious. For one, the Court's approach to Article 4 (3) TEU leaves a lot to be desired in terms of legal certainty. Restraints imposed on the basis of the remarkably broad notion of "scope of Union law" in combination with a vaguely defined Union interest do not allow for the formulation of a clear and predictable doctrine which determines under what circumstances and to what extent the loyalty obligation limits the Member States' freedom of action. In fact, the scope of such restraints has continuously been expanding, further reducing any possibility of predicting the outcome of a given case. In particular, the recent upgrade of Article 4 (3) TEU to an independent obligation in the *Swedish PFOS* case[1229] increases the uncertainty regarding the basis for the duty of sincere cooperation to apply, while simultaneously creating the potential for virtually limitless obligations.

In addition to the ambiguous application of Article 4 (3) TEU, competence creep via the duty of sincere cooperation is constitutionally questionable, since it circumvents the strict requirements for

[1227] As advocated by S. Prechal, "Competence Creep and General Principles of Law".
[1228] S. Prechal, "Competence Creep and General Principles of Law", 19.
[1229] Case C-246/07 *Commission v. Sweden*.

AETR-type competence discussed in Chapter One. Where Article 4 (3) TEU reproduces the effects of pre-emption, which presupposes that the EU has occupied a given field to a significant extent by adopting legislation, the question arises whether the imposition of such restraints should not be a matter to be addressed by the legislature[1230].

The Court's interpretation of the duty of sincere cooperation, it could therefore be assumed, circumvents a cornerstone of the constitutional structure of the Union – the principle of attributed powers. As conceived by the Founding Treaties, providing for the functional and substantial limits of the EU, all limitations of Member State sovereignty were made subject to the relevant constitutional authorisations by the Member States themselves. The scope of the powers conferred was to be determined by the extent to which the Member States had consented to renouncing to their sovereign powers in favour of Union competence. The duty of sincere cooperation, however, no longer seems to operate within the limits of attributed powers. Without their prior consent, the Court of Justice *de facto* allocates competences to the Union which previously belonged to the Member States.

B. Article 4 (3) TEU and the three visions of political morality – Towards a liberal fidelity *approach*

If we draw a conclusion at this point, it appears that the Member States are left in a highly unsatisfactory position. While officially retaining competence in certain fields, they are factually deprived of, or at least significantly restrained in, their freedom to act, on the basis of a constitutionally questionable mechanism. But, against the background of the previous findings, can we really conclude that the specific obligations deriving from the Court's interpretation of Article 4 (3) TEU upset the balance of power between the Union and the Member States and between the Court and the Union legislator? Or can the limitations imposed on the exercise of Member State competence, instead, be deemed to form part of a broader strategy, aimed at furthering both Union and Member State interests?

In order to be able to assess these questions, the thesis sought to evaluate the restraints imposed on the exercise of the Member States' external competence on the basis of Halberstam's model of the political morality of federalism. As we saw in the beginning, if Article 4 (3) TEU is applied in such a way as to ensure exclusive Union action in as many instances as possible, the underlying rationale of federalism differs significantly from a simple increase in restrictions on the exercise of Member State powers where the strengthening of existing EU powers vis-à-vis parallel powers of the

[1230] In a similar vein, but with regard to restraints stemming from principles of EU law more generally, see S. Prechal, "Competence Creep and General Principles of Law", 15.

Member States is required to ensure unified action for the common interest.

In dealing with implied Union competence, the Court of Justice has broadly shifted from an *entitlements* to a *liberal fidelity* approach. While the *creation* of implied powers, as was argued in Chapter One, was in line with the principle of conferred powers and presented an example of *conservative fidelity*, the initial finding by the Court that these newly created powers were automatically *exclusive* in nature was not. The combination of the broad power potential and the prohibitory nature of the implied powers effectively created an "absolute entitlement" for the Union to regulate the external aspect of internal Union legislation[1231]. A decisive step in moving away from an *entitlements* approach came with the limiting of the conditions under which implied powers pre-empted Member State competence in the Court's 1990s case law. The final step in moving towards a *liberal fidelity* approach in this area came in Opinion 1/2003, where the Court explicitly stated that implied powers can be shared. *Liberal fidelity*, in fact,

> "counsels against *automatic exclusivity* of central government powers as well as inviolability of specific substantive areas of constituent state authority, in favor of preserving constructive democratic policy engagement between the different levels of government"[1232].

While the Court has slowly shifted away from an *entitlements* towards a *liberal fidelity* approach as far as the *existence* of Member State competence is concerned, the opposite is true in relation to the *exercise* thereof. In recent years, the Court has in a number of judgments come close to displaying a *conservative* view of federalism. It was argued that such an approach was evident in the *BITs* cases[1233], the *Swedish PFOS* case[1234], *Commission v. Luxembourg* and *Commission v. Germany*[1235], the *Vietnam WTO Accession* case[1236], the *Greek IMO* case[1237], the *Open Skies* cases[1238] and *Commission v. Portugal*[1239]. The *conservative* approach, as discussed in the Introductory Chapter, seeks to achieve an optimal position for the Union to freely exercise its powers by *preventing* conflict between pre-existing international obligations and EU law from the outset[1240].

However, with the exception of Advocate General Kokott's Opinion[1241] in the *Vietnam WTO*

[1231] This reasoning is adopted by analogy from Halberstam's assessment of the Court's approach to the internal market in Dassonville, see D. Halberstam, "Beyond Competences", 12.
[1232] D. Halberstam, "Beyond Competences", 26, emphasis added.
[1233] Case C-205/06 *Commission v. Austria*, Case C-249/06 *Commission v. Sweden* and Case C-118/07 *Commission v. Finland*, see Chapter Three.
[1234] Case C-246/07 *Commission v. Sweden* (PFOS), see Chapter Five.
[1235] Case C-266/03 *Commission v. Luxembourg* and Case C-433/03 *Commission v. Germany*, see Chapter Two.
[1236] Case C-13/07 *Commission v. Council (Vietnam WTO Accession)*, Opinion of Advocate General Kokott, see Chapter Two.
[1237] Case C-45/07 *Commission v. Greece*, see Chapter Two.
[1238] Case C-466/98 *Commission v. UK*, Case C-467/98 *Commission v. Denmark*, Case C-468/98 *Commission v. Sweden*, Case C-469-98 *Commission v. Finland*, Case C-471/98 *Commission v. Belgium*, Case C-472/98 *Commission v. Luxembourg*, Case C-475/98 *Commission v. Austria*, Case C-476/98 *Commission v. Germany*, see Chapter Two.
[1239] Case C-62/98 *Commission v. Portugal* and Case C-84/98 *Commission v. Portugal*, see Chapter Three.
[1240] D. Halberstam, "Of Power and Responsibility", 778, see further the Introductory Chapter.
[1241] See Case C-13/07 *Commission v. Council*, Opinion of Advocate General Kokott, para 72. AG Kokott argued that

Accession case, which was withdrawn before the Court itself was able to issue further guidance on the matter, a closer look at all of the aforementioned cases revealed that despite the severely restrictive effect of these judgments, the Court was not actively seeking to counteract the diversity of policies and interests inherent in the EU system, as a *conservative fidelity* approach would suggest. Rather, the aim was in all cases to safeguard the effectiveness of Union law, which could not be guaranteed if the Member States continued to be allowed to act freely. Thus, Member State participation was excluded where there was a concrete risk of adoption of international rules binding on the Union[1242], the effective application of specific Treaty norms could not be guaranteed[1243], the outcome of international negotiations that had already been initiated would have been jeopardised[1244], or the clarity of rules throughout the system was at stake[1245].

Despite these instances of restraint which seemingly suggest a *conservative fidelity* approach, therefore, it is not apparent that the Court of Justice is moving away from what otherwise can only be characterised as a *liberal fidelity* approach.

C. Loyalty restraints as the product of a constitutional dialogue between the Court and the Member States

If the Court of Justice is broadly pursuing a *liberal fidelity* approach in external relations, both in relation to the *existence* of Member State competence and to the *exercise* thereof, then we must assume that the duty of sincere cooperation as it stands today does not violate the principle of conferred powers and that it, hence, does not encroach on national sovereignty more generally. In fact, we can see this theoretical assumption reflected in the political reality of EU external relations. The duty of sincere cooperation may indeed be understood as the outcome of a constitutional process actively shaped by the Member States themselves.

There are two complementary processes governing the expansion of Union powers[1246]. On the one hand, the Court of Justice can stretch its own jurisdictional limits and take away powers from the Member States without any formal Treaty amendment by relying on different legal instruments and

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Member State participation had to be excluded for the entire field from the outset, on the ground that "[t]he more players there are on the European side at international level, the more difficult it will be to represent effectively the interests of the [Union] and its Member States outwardly, in particular vis-à-vis significant trading partners."

[1242] See Case C-246/07 *Commission v. Sweden* (PFOS) and Case C-45/07 *Commission v. Greece*.

[1243] See the *BITs* cases, Case C-205/06 *Commission v. Austria*, Case C-249/06 *Commission v. Sweden* and Case C-118/07 *Commission v. Finland*.

[1244] See Case C-266/03 *Commission v. Luxembourg* and Case C-433/03 *Commission v. Germany.*

[1245] See Case C-62/98 *Commission v. Portugal* and Case C-84/98 *Commission v. Portugal*.

[1246] These two processes have been termed "exogenous expansion" and "endogenous development" respectively, see M. M. Martin Martinez**,** *National Sovereignty and International Organizations* (Kluwer Law International 1996) at 105.

principles[1247]. This type of process takes place within the framework of the EU Treaty without affecting the constitutional set-up of the Union.

It should be assumed that the expansion of Union powers by means of judicial activism is *a priori* contrary to the Member States' interests. This is where the second type of expansion comes into play. Where the *de facto* changes in the allocation of powers between the EU and the Member States have obtained such a momentum that the Member States deem it necessary to adapt the current constitutional structures to the new areas absorbed by the Union in order to strengthen the process of European integration, the Member States are free to legalise the EU's acquisition of powers by amending the EU Treaty. It can be argued that the fact that the Member States have not reversed the legal doctrines created by the Court of Justice indicates that the Court has not deviated significantly from their interests. As Garrett put it,

> "[i]f member governments have neither changed nor evaded the European legal system, then from a 'rational government' perspective, it must be the case that the existing legal order *furthers* the interests of national governments"[1248].

Although an absence of opposition by the Member States against decisions of the Court of Justice is not necessarily a simple reflection of political support[1249], the Member States' consent to incorporating the changes introduced by the Court into the Treaty is a clear indication that such a transfer of powers is be in the national interest. After all, any amendment to the Treaty requires unanimous agreement and ratification of the changes by all Member State parliaments.

As mentioned in Chapter One, the Member States reacted to the Court's bold assertion of implied powers in the early case law by seeking to regain control over their foreign relations powers in the SEA and the Maastricht Treaty. When amending the Treaty, the Member States decided to explicitly categorise the newly enacted express powers as non-exclusive. The Court of Justice subsequently adjusted its approach accordingly by recognising that implied powers could be non-exclusive in nature. The acceptance of this judicial development by the Member States was subsequently confirmed in the Lisbon Treaty. By stipulating, in Article 4 TFEU, that in certain areas the exercise of Union competence is not to pre-empt them from acting, the Member States have incorporated into the Treaties a safeguard of their national interests.

[1247] Such as the principle of *effet utile*, recourse to Article 352 TFEU (ex Article 308 EC), see M. Martin Martinez, *National Sovereignty and International Organizations* (Kluwer Law International 1996).

[1248] G. Garrett, "The Politics of Legal Integration in the European Union" (1995) 49 International Organization 171, emphasis added.

[1249] See K. Alter, "Who Are the 'Masters of the Treaty': European Governments and the European Court of Justice" (1998) 52 International Organization 121, arguing that the possible responses of national governments to decisions of the Court of Justice within the domestic political realm are limited where there is a lack of political consensus to attack the Court, due to important differences between the legal and the political dynamics in European legal integration.

If Member States retain powers, they are more willing to transfer competences to the EU[1250]. This is reflected in the Member States' readiness to confirm in the Treaty of Lisbon the cornerstones of the doctrine of implied exclusive competence as developed by the Court of Justice. By incorporating Article 3 (2) TFEU into the Treaties, the Member States expressly consented to the very basis for depriving the Member States of their concurrent powers developed over the years by the Court of Justice. For the first time ever, the provision lays down the conditions for implied exclusive Union powers in primary Union law. To that end, it reiterates the *AETR* doctrine, the requirement of necessity created in Opinion 1/76 and the principle established in Opinion 1/94 that exclusive implied powers arise when the conclusion of a given agreement is provided for in a legislative act of the Union[1251]. In sum, it appears that since the beginning of the Treaty reforms initiated by the SEA, there has been a "kind of dialogue between the [Court of Justice] and the Member States acting as 'constituante' on the powers of the [Union] in the field of foreign relations"[1252].

Treaty amendments are, however, not the only means the Member States have at their disposal to rectify unwelcome developments in the case law of the Court of Justice. Starting from the 1970s, the Member States have increasingly insisted on the conclusion of mixed agreements. The mixed nature of an international agreement, in fact, is not necessarily a reflection of the allocation of powers at the time of conclusion[1253]. For example, as Kuijper has pointed out, mixed association agreements "became the norm in spite of the fact that it was clear that this was unnecessary as the Association Agreements with Cyprus and Malta were concluded as exclusive [Union] agreements"[1254]. In addition to a growing number of expressly shared competences, this process was made possible by the "daily reality of external relations, where time is short and questions of competence have to be decided quickly"[1255]. In such a setting, the Member States in the Council did not have much difficulty obliging the Union to conclude a given agreement as mixed, as it required a constant willingness from the Commission to bring a claim before the Court of Justice alleging exclusive Union competence.

What emerges from the foregoing is that the profound constitutional changes brought about by judicial activism on the part of the Court of Justice have not only been met with hardly any

[1250] L. and R. Holdgaard, "The External Powers of the European Community", 174.

[1251] Article 3 (2) TFEU provides: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

[1252] P. J. Kuijper, "Fifty Years of EC/EU External Relations: Continuity and the Dialogue between Judges and Member States as Constitutional Legislators" (2007-2008) 31 Fordham International Law Journal 1571 at 1572.

[1253] See P. Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundations* (OUP 2004) at 198-199.

[1254] P. J. Kuijper, "Fifty Years of EC/EU External Relations", 1579.

[1255] Ibid. at 1581.

opposition from the Member States, but on the contrary, they have even been incorporated in part into the Treaties by the Member States themselves. As was already touched upon in Chapter One, this willingness to accept the constitutional evolution of the Union legal order is conditioned by the establishment of a "legal-political equilibrium" between the radical process of constitutional integration on the one hand and a transfer of political and decision-making power to the Member States on the other[1256]. A number of changes in EU decision-making in favour of intergovernmentalism, such as the creation of intergovernmental bodies, increased the Member States' veto power. This, in turn, increased the Member States' willingness to accept the proactive development of Union law through the Court of Justice: "[t]hey could accept the constitutionalization because they took real control of the decisionmaking process, thus minimizing its threatening features"[1257]. Combined with their political leverage which allowed them to insist on the conclusion of mixed agreements in practice, the Member States thus had two powerful mechanisms of correction and recuperation at their disposal which contributed significantly to their readiness to pursue European integration in the area of external relations.

D. The Member States' interest in common action

From this process of action and reaction between the Member States and the EU institutions we can conclude that the vision of federalism governing the exercise of competences in EU external relations is not based on hierarchical subjugation, but the "result of *repeated, voluntary acceptance* of the necessary discipline that holds the [Union] system together"[1258]. The Member States, in other words, very much remain the "Masters of the Treaty". But, if they retain a certain measure of control over the process of European integration, then why have they not only accepted the progressive development of the obligation of loyalty by the Court of Justice but, in part, actually pursued this strategy? The establishment of the legal-political equilibrium described above may help explain the Member States' acceptance of the Court's judicial activism, but it does not, however, explain their *interest* in doing so. As an obligation which is increasingly aimed at the convergence of Member State and Union action into a single unit in international relations even in areas of Member State competence, it is not immediately evident why the Member States should prefer the application of the duty of sincere cooperation as developed by the Court of Justice to full-

[1256] See J. H. H. Weiler, "The transformation of Europe", 2426-29.
[1257] Ibid. at 2429.
[1258] See D. Halberstam, "Of Power and Responsibility", 822, summarising the principle of "constitutional tolerance" developed by J. H. H. Weiler, "Federalism Without Constitutionalism: Europe's *Sonderweg*", in K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 54 at 62–70, emphasis added.

fledged freedom to act as sovereign states. What this boils down to is the question of what interest the Member States may have in common external action of the Member States together with the EU, even in areas where no corresponding powers exist for the Union.

The relationship between the EU and its Member States has often been conceptualised as a "zero-sum game", meaning that the strengthening of the Union happens to the detriment of the Member States, and the strengthening of the Member States' position is at the expense of the Union[1259]. However, as the present thesis has attempted to show, the impact of Union law goes beyond the scope of attributed Union powers. As a consequence, "the distribution in the [Union] system of external competence between the [Union] and the Member States cannot be understood as a zero-sum matrix – where competence belongs to either one or the other (or both at the same time)"[1260].

In the same way that the distribution of competence between the EU and the Member States cannot be conceived of as a zero-sum game, it should not be assumed that the strengthening of the Union's position in international relations happens at the expense of the Member States. On the contrary, comparative studies of international regimes have shown that states establish this type of framework for joint action where unilateral national action is likely to be insufficient or unproductive[1261]. Particularly in "areas of high 'issue density', marked by interdependence and linkages among the issues", common actions "produce better results, for each member, than 'uncoordinated individual calculations of self-interest'"[1262].

With specific regard to EU external action, it is commonly known that EU membership leads to greater power and influence on the world stage[1263]. Showing a united front on a given foreign policy issue increases the political clout of each Member State beyond what any individual state would be able to accomplish on its own, making those issues considered important by Europe harder to ignore by other countries. The same reasoning holds true in terms of economic influence. Over the past decades, the EU has grown into the world's biggest trading bloc, giving it the power to define the terms of trade relations with third countries. In addition to an increase of political influence on the international scene, delegating negotiating powers to the EU is appealing to the Member States with regard to the effectiveness of regulation in certain fields. The Member States have therefore joined in a more general "worldwide trend to want to regulate matters with a global impact (trade, world

[1259] See further J. Klabbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law", 156.
[1260] R. Holdgaard, *External Relations Law of the European Community*, 125.
[1261] See S. Hoffman, "Reflections on the Nation-State in Western Europe Today" (1982) 21 Journal of Common Market Studies 21 at 33.
[1262] Ibid.
[1263] For an overview of the different International Relations seeking to explain the nature of the Member States' interest in strengthening the European integration process, including references to further literature see M. Pollack, "International Relations Theory and European Integration"(2001) 39 Journal of Common Market Studies 221.

finance, environmental problems, health problems, etc.) at a supra-regional level"[1264]. In sum, the constraints imposed on the Member States' freedom to act internationally are "easily outweighed by the increased opportunities for external influence that [EU] membership offers them"[1265].

E. The fundamental tension underlying the Member States' position in EU external relations

In line with this reasoning, it could be assumed that the Member States would have attributed exclusive powers to the Union in all policy areas in order to maximise the benefits resulting from joint EU-Member State action. As a consequence, they would have lost the competence autonomously to conclude international agreements in the fields concerned, with the result that Member State action could take place only after prior authorisation by the Union. However, as we saw, the Member States have been setting boundaries to exclusive Union powers from the Maastricht Treaty onwards by introducing and subsequently expanding areas of non-exclusive competence.

The Member States' resistance against an all-encompassing Union competence is illustrative of the fundamental tension underlying EU external relations. On the one hand, the Member States seek to increase the efficiency of their international relations through unified action, but on the other hand, they remain intent on preserving a maximum level of national sovereignty. Domestic politics are traditionally biased against the interference of legal principles with foreign policy[1266]. According to this inside-looking rationale, "the executive must have its hands free to react to international developments quickly and effectively, without interference from the legislature or the judiciary"[1267]. In addition, Member States are concerned about maintaining an international profile: "Member States wish to continue to appear as contracting parties in order to remain visible and identifiable actors on the international scene"[1268].

As we saw earlier, the Member States have different mechanisms available in order to resolve the fundamental tension and establish an equilibrium between the two opposing interests. Treaty amendments or recourse to practical solutions, such as mixity, illustrate the extent to which the Member States are willing to accept inroads into national sovereignty by way of Union law.

As the core component of EU external relations, the field of international trade can serve as a

[1264] P. J. Kuijper, "Fifty Years of EC/EU External Relations", 1593.

[1265] B. De Witte, "The Emergence of a European System of Public International Law: The EU and its Member States as Strange Subjects", in J. Wouters, P. A. Nollkaemper and E. de Wet (eds.), The Europeanisation of International Law (TMC Asser Press 2008) 39 at 49.

[1266] See further G. de Baere, *Constitutional Principles of EU External Relations*, 1.

[1267] Ibid.

[1268] C. D. Ehlermann, "Mixed Agreements – A List of Problems", in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements* (Kluwer 1983) 3 at 6.

"barometer of acceptable […] transfers of sovereignty"[1269] in this respect. Despite frequent disagreement among the Member States concerning the transfer of negotiating powers to the Union, the basic principle of speaking with a single voice in international trade negotiations was not seriously questioned until the emergence on the agenda of new trade sectors in the context of the Uruguay Round. Since a number of Member States were reluctant to give up their powers over new trade sectors, the Commission asked the Court of Justice for an advisory opinion, which was subsequently delivered in the form of Opinion 1/94[1270]. Eight Member States, together with the Council, opposed the Commission's arguments before the Court. Taking account of the Member States' concerns, the Court made it clear that the Union did not have exclusive competence over all matters covered by the WTO Agreements. Finding instead that competence in the areas concerned was shared, the Court emphasised the duty imposed on the Commission and the Member States to cooperate closely when acting within the ambit of the newly created organisation[1271].

The Member States' opposition against further transfers of competence was part of a more general trend of objection among Member State governments against the expansion of EU powers following the Maastricht ratification debate which saw an increased wariness on the part of national public opinion[1272]. In the aftermath of the Court's decision in Opinion 1/94, however, the number of Member States actively opposing further limits to national sovereignty decreased from a majority to a minority[1273].

F. The duty of cooperation – A balancing principle

The example of Opinion 1/94 illustrates the role and the importance of the duty of sincere cooperation in establishing an equilibrium between the competing interests underlying the fundamental tension which shapes the Member States' position in EU external relations – the interest in a strengthened EU and the interest in preserving a maximum level of national sovereignty.

In the past two decades, the Member States have displayed reluctance against further transfers of external relations powers to the Union. Indeed, new boundaries were put into place limiting the scope of those powers which the EU had already acquired, such as the introduction of non-exclusive competences and the toning-down of the doctrine of implied powers. On the international scene, the

[1269] S. Meunier, *Trading Voices: the European Union in International Commercial Negotiations* (Princeton University Press 2007) at 21.
[1270] Opinion 1/94.
[1271] Ibid., para 108.
[1272] See S. Meunier, *Trading Voices*, 27.
[1273] Ibid. at 28.

Member States wanted to remain present and visible alongside the Union. But if the Member States wanted to avoid bringing the process of European integration – the pursuit of which is very much in their own interest – to a standstill, they had to encourage and accept alternative mechanisms for ensuring the Union's continued freedom to act where necessary. Thus, in return for remaining entitled to act together with the EU, the Member States had to make concessions in the form of constraints on the exercise of their competence.

These constraints flow from the duty of sincere cooperation under Article 4 (3) TEU. As we saw in the previous chapters, the duty of sincere cooperation manifests itself in different obligations. All of these obligations have in common that in recent years they have been construed by the Court of Justice in such a way as to impose a substantive duty of *compliance*.

In areas in which the Member States have not transferred competence to the Union, because they have not considered it in their interest to do so, the only rules which have to be complied with are the fundamental Treaty freedoms. Having consented to the introduction of these basic freedoms for the benefit of a well-functioning internal market early on, it is in every Member State's interest that all other Member States comply with these rules also in their external relations.

The more a given Union policy has been shaped and defined, however, the more specific and comprehensive the compliance obligations become. In this respect, questions of competence are increasingly irrelevant. Instead, the Member States are subject to the same compliance obligations, irrespective of whether the field of action is one of shared or exclusive competence. These obligations can even go so far as to impose a duty to refrain from acting altogether. What matters in this regard is the scope of EU *law*, as opposed to the scope of EU *competence*. As a result, the scope of compliance obligations expands commensurately with the process of European integration.

At the same time, the increasing use of compliance obligations allows the Member States to remain present and active in most areas falling within the scope of EU law. Despite the ever-expanding scope of EU law, the Member States increasingly act together with the Union on the international scene. In fact, the closer the Member States work together with the EU, the more easily they are able to shape the rules to their advantage and prevent the imposition of unfavourable international obligations.

The most effective instrument in this respect is of course the conclusion of mixed agreements, since "mixity de facto brings about, if not formal unanimity, at least a kind of veto in relation to international agreements"[1274]. In addition to ensuring Member State participation alongside the Union in international matters, mixity represents a potent mechanism of control over EU external action. In the "post-Maastricht climate where the principles of enumerated powers, subsidiarity and

[1274] P. J. Kuijper, "Fifty Years of EC/EU External Relations", 1594.

protection of national identity are the order of the day", mixed agreements may offer "the only way out" of the dilemma between safeguarding the Member States' sovereignty and ensuring the effective participation of the EU in international relations[1275]. Indeed, the conclusion of international agreements by the Union together with the Member States has been heralded a "real alternative to the working out of the federal principle"[1276]. Instead of weakening the strength inherent in united action, mixity "is a way which is particularly sensitive to the one interest which is difficult to square with the alternative federal *state* approach: the preservation, so far as possible, of the international personality and capacity of the Member States"[1277]. This formula, moreover, is not only in the interest of Member State autonomy, but also increasingly appears to be accepted by the Union institutions themselves. It was noted already early on that recourse to mixity was not always necessary and could often be avoided by limiting the subject matter of an agreement or by adopting a broader interpretation of Union powers[1278].

Together with the possibility to conclude mixed agreements, the Member States have retained a direct influence on EU policy-making through their participation in the Council of Ministers and its working groups[1279]. Thus, in the quest for establishing an equilibrium between unity in the international representation of the EU and the respect for national interests, the formula that has slowly emerged is that of common action of the Member States together with the Union. The Member States have not entirely relinquished their sovereignty by allowing the Union to take over their role as subjects of international law, but instead they have "'pooled' these fragments of sovereignty within the institutional structure of the European Union, so as to enhance their *joint* capacity for effective international action"[1280]. In this context, a central role is played by the duty of sincere cooperation. It allows the Member States to remain present on the international scene as sovereign states, while at the same time imposing strict obligations on them to comply with the substantive law of the EU. As such, the duty of sincere cooperation can rightfully be described as "the panacea for situations where the [Union] risk[s] being debilitated by the presence of the individual Member States, or the Member States by the existence of the [Union]"[1281].

[1275] N. Emiliou, "The death of exclusive competence?" (1996) 21 E.L. Rev. 294 at 310-311.
[1276] J. H. H. Weiler, "The External Legal Relations of Non-Unitary Actors", 82.
[1277] Ibid., emphasis in the original.
[1278] See C. D. Ehlermann, "Mixed Agreements – A List of Problems", 3, also P. Eeckhout, *External Relations of the European Union*, 198.
[1279] B. De Witte, "The Emergence of a European System of Public International Law", 49.
[1280] Ibid., emphasis added.
[1281] N. A. Neuwahl, "Shared Powers or Combined Incompetence? More on Mixity" (1996) 33 CML Rev. 667 at 668.

It thus emerges that with the help of various control mechanisms, the Member States have generally been able to shape the progress of European integration in their favour, slowly establishing an equilibrium between safeguarding national sovereignty and ensuring effective external action through a unified approach at EU level. Only two decades earlier, the debate about European integration was much more one-sided. Instead of focussing on mechanisms designed to achieve a balance between the Member States' competing interests, the Member States insisted on the respect for conferred powers and the protection of national autonomy more than ever before. Salvation came in the form of the principle of subsidiarity, "the great limiting principle that will defend national sovereignty against incursion by the ever-expanding Brussels bureaucracy"[1282], subsequently incorporated into the final version of the Maastricht Treaty as a general principle of EU law[1283]. As a constitutional principle of "potentially enormous significance"[1284], the principle was proclaimed a guideline for further European integration[1285]. It was predicted that subsidiarity "will prove to be one of the most important modifications to the [Union's] constitution since 1957"[1286].

In stark contrast with these predictions, however, the management of EU external relations is increasingly governed by a different rationale, a rationale based on centralised action of the Member States and the EU as a *unit*. Where required by the Union interest, this rationale even allows for the pre-emption of Member State action in specific circumstances. The introduction of the principle of subsidiarity in the Maastricht Treaty is considered to have been a critical reaction also to the Court of Justice's "expansive interpretation of [Union] powers against the apparent interest of the Member States"[1287]. Against this background, it is noteworthy that the most intrusive restraints on the exercise of Member State competence were developed only recently, long after the entry into force of the Maastricht Treaty. Instead of focussing on the limits of the exercise of *Union*

[1282] See P. D. Marquardt, "Subsidiarity and Sovereignty in the European Union" (1994-1995) 18 Fordham Int'l L. J. 616 at 617, citing G. A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States (1994) 94 Colum. L. Rev. 331 at 334.

[1283] The Single European Act (1986) had already introduced the principle of subsidiarity into the Treaty, but it was limited to the field of environment. Article 130r (4) of the EEC Treaty provided: "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States".

[1284] E. T. Swaine, "Subsidiarity and Self-Interest: Federalism at the European Court of Justice", 5.

[1285] See R. K. Vischer, "Subsidiarity as a Principle of Governance: Beyond Devolution" (2001-2002) 35 Ind. L. Rev. 103 at 121.

[1286] Speech given by Sir Leon Brittan, at the time Vice-President of the EC, on 11 June 1992 at the EUI in Florence. An extract is available at http://europa.eu/rapid/pressReleasesAction.doreference=IP/92/477&format=HTML&aged=1&language=EN&guiLanguage=en.

[1287] G. A. Bermann, "Subsidiarity and the European Community" (1993) 17 Hastings Int'l & Comp. L. Rev. 97 at 101-103.

competence, the emphasis has shifted towards a focus on the limits of the exercise of *Member State* competence. The Member States appear to have accepted certain inroads into national sovereignty in favour of concerted action at Union level.

In light of the Member States' insistence on the inclusion of the principle of subsidiarity in the Treaty with a view to establishing an effective safeguard against excessive centralisation by the EU, how can we explain the attractiveness of the duty of sincere cooperation in its present form as the preferred tool for the management of the exercise of external relations power, favoured not just by the EU institutions, but apparently by the Member States themselves?

In essence, the answer to this question lies in in the simple reality that just because subsidiarity provides a check on the expansionary ambitions of the EU does not mean that it is necessarily the best instrument for the protection of national interests[1288]. For one, the principle may be "fundamentally corrosive to rather than supportive of the sovereignty of the nation-state"[1289]. The basic problem boils down to the fact that

> "there are few functions for which a mid-sized actor is most efficient. The logic of the market, broadly construed, is that bigger is better. A larger market, more fully integrated, is better for economic growth than a smaller, segmented economy. Many other public functions benefit from economies of scale as well. A united Europe has a greater voice in foreign affairs and a better ability to defend itself than a collection of squabbling countries"[1290].

In the field of external relations, in particular, this means that a majority of objectives will be deemed to be achieved more efficiently at the supranational level, which is also reflected in the growing trend to regulate matters of a global nature within the framework of international fora.

Integration of external relations matters in the EU can take place and yield fruitful results both for the Member States and the Union without the need for a complete centralisation of powers at Union level. Rather, it is in the interests of the EU and the Member States to use their *combined* weight to the best effect. Their external affairs power is not necessarily stronger if all activity is concentrated into a single voice. In many cases, the Member States acting individually or collectively along with the Union can be more effective[1291]. Therefore, the Member States and the EU institutions need to consider in the specific case what arrangements will most effectively enable them to achieve their objectives and how to defend their individual and common interests. Capable of operating in different ways in various international settings, the duty of sincere cooperation, as developed by the Court of Justice to date, is "a flexible concept which allows the [Union] and the Member States to

[1288] In a similar vein, P. D. Marquardt, "Subsidiarity and Sovereignty in the European Union", 639.
[1289] Ibid. at 617.
[1290] P. D. Marquardt, "Subsidiarity and Sovereignty in the European Union", 637.
[1291] See S. Hyett, "The Duty of Co-operation: A Flexible Concept", 252.

reach a practical solution tailored to the particular case"[1292].

Thanks to its flexibility, the duty of sincere cooperation only imposes restraints where necessary. If a particular case requires the preclusion of Member State action for the sake of the achievement of common goals, then the pre-emptive effect covers only the specific situation, while the actual competence remains intact. Therefore, the duty of sincere cooperation is significantly less intrusive in nature than a management of EU external relations based on a transfer of competences.

Another reason why the management of EU-Member State external relations on the basis of the duty of sincere cooperation could be considered in the very interest of the Member States is that it may offer national politicians facing Euro-sceptical criticism in their home countries a means to reassure those suspicious of the growth of EU power. As no power is actually transferred from the Union to the EU, public opinion is less likely to be affected. At a time in which the process of European integration is increasingly politicised in national elections and referendums[1293], any mechanism which allows the Member States to pursue their interests abroad without having to worry about negative reactions at home may be welcomed. In the run-up to the national referendums on the Treaty establishing a Constitution for Europe, for example, the image was created in some Member States that the EU was morphing into a European superstate, an "uncontrolled colossus, encroaching upon the identities of proud nation states"[1294], which played an important role in the final outcome of the referendums. A different approach, emphasising the limits to EU powers in the Treaty, while at the same timing limiting the exercise of Member State powers by the means of a less visible mechanism, such as the duty of sincere cooperation, would have certainly been received much less negatively by the general public.

Perhaps this tentative theory may also help explain why the expansion of the scope of Article 4 (3) TEU into the powerful mechanism that it is today has occurred only rather recently. After the highly publicised debate surrounding the Constitutional Treaty and the unsuccessful outcomes of some referendums over the ratification thereof, the phenomenon of achieving substantive compliance by means of restraining the exercise of competences instead of power-conferring provisions appears to have taken off. Some of the most radical judgments – such as the *Swedish PFOS* case and the *BITs* cases, which saw an upgrade of Article 4 (3) TEU to an independent provision capable of precluding Member State action even in areas of Member State competence, have been decided in the aftermath of this controversy. Taking into account that the preferences of the general public and

[1292] S. Hyett, "The Duty of Co-operation: A Flexible Concept", 252-253.

[1293] See L. Hooghe and G. Marks, "A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus" (2008) 39 B. J. Pol. S. 1.

[1294] L. J. Brinkhorst, "National Sovereignty in the EU: An Outdated Concept", M. Bulterman, L. Hancher, A. McDonnell and H. Sevenster (eds.), *Views of European Law from the Mountain – Liber Amicorum Piet Jan Slot* (Kluwer Law International 2009) 327 at 332.

of national political parties have become decisive for jurisdictional outcomes[1295], it appears possible that the Court of Justice has engaged in a doctrinal shift that favours less visible instruments for achieving Union objectives and forcing Member State compliance with EU law.

The effect of blurring the political reality of EU-Member State external relations may also be beneficial for the Member States for warding off pressure from national politics and domestic interest groups. Where the duty of sincere cooperation imposes a certain way of action on the Member States which is ultimately in their own interest, they may value the ability to hide their support for the relevant measure within the dynamic of loyalty restraints[1296]. The politics of international negotiations have been described as a "two-level game[1297]": while at the national level, domestic groups pressure the government to adopt favourable policies, at the international level, governments "seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments"[1298]. Particularly in matters of CFSP, where both the European Parliament and the jurisdiction of the Court of Justice are largely excluded, Member States could find the loss of transparency, democratic control and judicial review which comes with Union action advantageous to their national interests[1299].

With a view to this tension, the Member States may prefer the apparent loss of control as a means of relieving themselves from domestic pressures in order to be able to focus on the effectiveness of external action. To that end, they may accept significant limitations of the exercise of their powers without, however, having to face any modifications in the actual allocation of competences between themselves and the Union.

H. Assessment – The duty of sincere cooperation and Member State sovereignty

Joint Member State and Union action is, it thus appears, often more attractive for both the Member States and the EU itself. The duty of sincere cooperation under Article 4 (3) TEU has proved to be an effective tool for managing the international relations of this emerging unit. Unlike mechanisms aimed at limiting the centralisation of Union action, such as subsidiarity, the duty of sincere cooperation works in two different directions. Instead of seeking to reinforce individual Member State action as a general rule, the duty of sincere cooperation limits both Union prerogatives *and*

[1295] See L. Hooghe and G. Marks, "A Postfunctionalist Theory of European Integration".

[1296] For a similar phenomenon in the context of joint decision-making concerning internal legislation see B. Kohler-Koch, "Organized Interests in European Integration: The Evolution of a New Type of Governance", in H. Wallace and A. R. Young (eds.), *Participation and Policy-Making in the European Union* (OUP 1997) 42 at 61.

[1297] See R. D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games" (1988) 42 Int'l Org. 427.

[1298] Ibid. at 434.

[1299] See B. De Witte, "The Emergence of a European System of Public International Law", 50.

Member State rights where necessary for the attainment of a common objective. Differently from subsidiarity, the duty of sincere cooperation is not intended as a safeguard of Member State interests. Its prime objective is the effective application of all norms falling within the scope of EU competence by filling gaps of power in the European legal system. But it goes beyond the effectiveness of EU rules in that it also operates in the interest of the Member States. Such an emphasis on the management of external relations "might appear less inspiring than the endless discussions about which grand construct should shape European integration", but "it is what the current development of the [Union] legal order requires"[1300]. Against this background, what can we conclude concerning the impact of the duty of sincere cooperation as developed to date on the Member States' national sovereignty?

In the same way that the allocation of competence between the EU and the Member States cannot be conceived of as a "zero-sum game", neither the concept of sovereignty should be understood in "a 'winner-takes-all' manner to mean that either the Member States or the European Union retain original sovereignty"[1301]. This classical conception of the indivisibility of sovereignty no longer fits the political and legal reality of the relationship between the Union and its Member States[1302].

Among the newer conceptions of sovereignty which have emerged from the shift in paradigms of sovereignty, the management of EU-Member State external relations could be said to be governed by a "cooperative model of sovereignty"[1303]. According to this understanding, sovereignty is a reflective and dynamic concept[1304]. It is reflective in that it creates a constant questioning of the allocation of power, requiring a centralisation or even a decentralisation of competence depending on the circumstances. Instead of diminishing it, this dimension makes sovereignty stronger due to its concerted exercise[1305]. This model of sovereignty is also dynamic, as it implies a search for the most effective allocation of power in each case.

Applied to the exercise of powers, these two characteristics are present also in the Court's application of the duty of sincere cooperation. As we saw earlier, Article 4 (3) TEU serves as a tool for empowering the Union to act and restraining the Member States' freedom of action where necessary, irrespective of prior decisions over who should have the power to act or not. But far from operating only in favour of the Union, the duty of sincere cooperation also works in the interest of

[1300] P. Koutrakos, "The Elusive Quest for Uniformity in EC External Relations", 270.
[1301] S. Besson, "From European Integration to European Integrity: Should European Law Speak with Just One Voice?" (2004) 10 European Law Journal 257 at 270.
[1302] See also L. J. Brinkhorst, "National Sovereignty in the EU", 331.
[1303] See further, for example, N. Walker, "Constitutionalism and Late Sovereignty in the European Union", in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003) 3; M. P. Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003) 501.
[1304] S. Besson, "From European Integration to European Integrity", 271.
[1305] Ibid.

the Member States. On the one hand, it allows the Member State to retain competence in fields that were previously considered to require exclusive Union action. On the other hand, it ensures a more effective management of EU external relations. And since the Member States remain Masters of the Treaty and actively shape Union rules according to their preferences, the effective functioning of Union rules in this field is in their own interest.

If we go back and revisit the German Federal Constitutional Court's conception of sovereignty discussed in the beginning, according to which the Member States retain their status as a sovereign countries as long as no transfer of *Kompetenz-Kompetenz* to the Union has taken place, we may conclude at this point that the duty of sincere cooperation in EU external relations is compatible with this understanding of sovereignty. The fact that the Member States are subject to an increasing number of restraints on the exercise of their external competence is not the result of having empowered the Union to grant itself new powers against the wishes of the Member States, but it follows from the need to ensure effective external action for their own benefit.

At the same time, the duty of sincere cooperation as developed to date contradicts the BVerfG's "legally outdated and politically deplorable"[1306] understanding of the EU as a mere "compound" of sovereign states[1307]. Article 4 (3) TEU makes clear that the Member States are also subjects of the European legal order and, as a consequence, are subject to the rules to which they have bound themselves and have to fulfil the obligations to which they have committed[1308]. What they have accepted is that some of their sovereign powers will not be exercised or that they will be exercised in a certain way. They have agreed that in specific fields, EU external action has replaced bilateral Member State activities, and that in other areas, they have to work together with the EU institutions as a unit. The Member States have realised that in those fields, they cannot achieve the desired results through unilateral action. Rather, certain national objectives can only be attained by the Member States acting together within the framework of the EU. The notion that the Member States delegate powers to the Union for their own benefit is incorporated in Article 1 TEU, which speaks of a Union "on which the Member States confer competences to attain objectives they have in common".

The Member States have thus given up their formal right to exercise their external competence as they wish, but they have compensated for this loss by increasing their presence on the international scene alongside the EU. By expanding the scope for the *exercise* of their international powers with the help of the duty of sincere cooperation, on the one hand, and controlling the decision-making

[1306] R. Bieber, "An Association of Sovereign States", 399.
[1307] See the Introductory Chapter. See further D. Doukas, "The Verdict of the German Federal Constitutional Court on the Lisbon Treaty", 871.
[1308] L. J. Brinkhorst, "National Sovereignty in the EU", 330.

process in a way that the *allocation* of those powers does not prejudice their interests, on the other hand, the Member States have been able to reduce the threatening features of constitutionalisation[1309], making such a process more acceptable both to national governments and to the general public. In this respect, the duty of sincere cooperation can be considered a "constructive approach to dealing with the growing pressure for European solutions under conditions of increasing politically salient diversity"[1310].

The common exercise of sovereignty by the Member States and the Union is then reflected in the structure of the relationship between the national and the EU legal orders: no legal order is entirely subordinate or superior to the others[1311]. A rigid division of competences between the Union and its Member States is not sufficient for governing a fruitful relationship between the two. The system of EU external relations cannot function effectively if their relationship is understood in "a confrontational either/or manner"[1312]. The Union and the Member States are not alternatives, but complement each other. They "need each other as the famous yin and yang symbols of Chinese antiquity"[1313].

The *liberal fidelity* approach underlying the application of Article 4 (3) TEU recognises this by "protect[ing] both the central government and the constituent states"[1314]. The duty of sincere cooperation promotes the creation of a unified entity consisting of equal players which both cooperate with the ultimate aim of furthering their own interests. As such, the duty of loyalty as it stands today also features an element of the *entitlements* approach, which emphasises the actors' self-interested political calculus. In this latter understanding of political morality, "federalism is all about arms' length relations among competing political institutions"[1315], with the important difference that in EU external relations, neither the Union nor the Member States can afford to *compete* against each other. On the contrary, political self-interest dictates that both work together as a system.

Confining the relationship between the Union and the Member States to an agenda which can be reliably identified in advance in an attempt to counteract the problem of competence creep, as the Laeken Declaration set out to do, will "diminish the EU's capacity to act effectively in order to address [the] objectives assigned to it by its Treaties"[1316]. Rather than a focus on the division of competence, "modes of interaction and institutional design […] between levels are the key to the

[1309] Similarly, J. H. H. Weiler, "The transformation of Europe", 2429.
[1310] See S. Besson, "From European Integration to European Integrity", 281, who expresses this concept with regard to the principle of integrity, according to which the Member States should be bound to act, in all areas, in a way that is representative of the legal views of the entire Union.
[1311] Similarly, ibid. at 271.
[1312] S. Weatherill, "Competence creep and competence control", 18.
[1313] L. J. Brinkhorst, "National Sovereignty in the EU", 333.
[1314] D. Halberstam, "Of Power and Responsibility", 765.
[1315] D. Halberstam, "Beyond Competences", 3.
[1316] S. Weatherill, "The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*", 851.

legitimisation of the power exercised"[1317]. The salient issue pertaining to sovereignty is, therefore, no longer whether a transfer of sovereignty from the Member States to the EU has taken place or not, "but how to *organise* the division and sharing of sovereignty rights between the various levels of government"[1318]. In the field of external relations, therefore, "the focus should be on the elaboration of legal mechanisms which would be both *flexible* enough to accommodate diversity and rigorous enough to ensure the *effectiveness* of those policies for which the [Union] is competent to act"[1319]. In this respect, the duty of sincere cooperation as developed by the Court of Justice to date is "brimming with potential for the future"[1320]. With its emphasis on flexible and efficient action in all areas that come within the scope of EU law, Article 4 (3) TEU may constitute the ideal instrument for a pluralist future of constitutionalism in the European Union.

V. Member State sovereignty and the CFSP loyalty obligation

In contrast to the increasing convergence of EU and Member State action in other policy areas, the Union's external action in foreign-policy matters continues to be characterised by the "intrinsic dualism" which derives from the special status of the CFSP. The unique role of the CFSP manifests itself in the placement of this policy field between the other categories of EU competences, which can be interpreted as a "continuing 'pillarisation' within the treaties"[1321]. The CFSP, as we saw, does not recognise the principle of conferred powers which is characteristic of the former first pillar. Neither does it have the same working methods and procedures, as reinforced by the explicit statement in Article 24 (1) TEU that the CFSP is subject to specific rules and procedures. Parliamentary control is weak, as the CFSP is dominated by the institutions which are assimilated with the executive power. The CFSP does not have a single system of judicial control and its instruments, although binding legally, are not legislative acts comparable to other EU policies. Taken together, these factors deprive the CFSP legal order of the supranational character which has been responsible for the dynamic development of the duty of sincere cooperation in other policy areas.

[1317] K. Nicolaidis, "The Federal Vision beyond the Federal State", in K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 451.
[1318] T. A. Börzel and T. Risse, "Who is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System", in C. Joerges, Y. Mény, J. H. H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (EUI Florence/Harvard Law School 2000) 45, emphasis added.
[1319] P. Koutrakos, "The Elusive Quest for Uniformity in EC External Relations", 270, emphasis added.
[1320] S. Weatherill, "Beyond Pre-emption", 31.
[1321] W. Wessels and F. Bopp, "The Institutional Architecture of CFSP after the Lisbon Treaty", 10.

As a result of these fundamental differences between the CFSP and the other areas of EU policy, the loyalty obligations which apply are fundamentally different too. The Treaty does not provide much guidance on the binding nature of decisions taken within the CFSP context, and neither is the Court of Justice in a position to take it upon itself to develop any guiding principles, due to its limited jurisdiction. Nevertheless, the Treaty language suggests that the adoption of CFSP decisions does indeed limit the Member States' freedom to pursue their foreign policy-making as they wish[1322]. As discussed earlier, the Member States are not allowed to adopt national positions or act in violation of CFSP decisions in any other way.

There is no doubt that CFSP provisions do not exist in a legal vacuum, but have to be considered in the light of the Court's interpretations rendered in similar contexts and against the background of the constitutional principles underpinning the Union legal order as a whole. Nevertheless, when assessing the potential impact of the duty of sincere cooperation on the CFSP legal order, it is essential to define the obligations flowing from Article 4 (3) TEU in the light of the constitutional specificities of the CFSP. The Court's jurisprudence cannot be applied *mutatis mutandis* to the relationship between the EU and the Member States in the area of the CFSP. A *complete* transposition of the interpretation of Article 4 (3) TEU to the CFSP would not take due account of the constitutional specificities of the CFSP legal order. What, then, are the boundaries within which the interpretation given to Article 4 (3) TEU may be used to define the CFSP loyalty obligation?

It was argued above that the restraints flowing from the duty of sincere cooperation do not encroach on national sovereignty, as they are ultimately conducive to the Member States' own interests. If we apply the same criterion to the CFSP, however, we get a different result, as the national interests at stake are of an entirely different nature (A.). Nevertheless, it is important to understand national action under the CFSP as constituting more than a mere expression of the collective interest of the Member States (B.). Therefore, it is argued that the CFSP loyalty obligation imposes concrete norms of conduct which go well beyond obligations of international law (C.).

A. National interests in CFSP matters

Foreign policy is traditionally seen as a core area of national sovereignty and many European states have long histories of conflicting interests in foreign affairs. Thus, when establishing the CFSP, the Member States could not agree on any form of cooperation in foreign policy as easily as they did in

[1322] See further, A. Dashwood, "The Law and Practice of CFSP Joint Actions", 53; C. Hillion and R. Wessel, "External Competences of EU Member States under CFSP", 83.

other areas of external relations, such as economic integration, development cooperation or emergency aid. In fact, in the constitutional traditions of many Member States and other countries more generally, foreign affairs take up a special status among the states' dealings in external relations. Matters of "high politics", which include diplomatic activity as well as security and defence issues, are often separated from issues concerning "low politics", which comprise external economic relations *sensu lato*, such as trade, development cooperation and emergency aid[1323]. Questions relating to high politics, indeed, are traditionally characterised by a dominance of the executive power. According to a long-standing conviction, foreign affairs require a wide margin of flexibility for the political branches to respond to all challenges that might pose a threat to national security:

> "The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[1324]

The distinct features and resources of the executive branch imply an institutional advantage over the courts and parliaments in policing and interpreting foreign affairs powers[1325]. Thus, in international disputes or conflicts, it is often more advantageous for the states involved to employ power-based diplomacy and negotiation than rule-based adjudication[1326]. In this respect, the situation regarding the CFSP is not fundamentally different from the national context of many Member States, where the same arguments are used to justify limited involvement of parliaments and courts in foreign affairs[1327]. Therefore, it is possible to read the CFSP provisions as an expression of the executive dominance over matters of foreign policy, rather than considering it as an example of the traditional approach which contrasts intergovernmentalism and supranationalism and explains the special nature of the CFSP on the grounds of concerns over national sovereignty[1328]. Against this background, the absence of full jurisdiction for the Court of Justice and the limited role of the European Parliament in CFSP decision-making are "not an aberration but, rather, a logical consequence of the specific features of foreign affairs"[1329].

For Article 24 (3) TEU, the special status of the CFSP means that Member States can breach the inherent loyalty obligations without facing any sanctions. If it is in the national interest, states tend to bypass non-enforceable duties. It is, therefore, unlikely that Article 24 (3) TEU will serve as the basis for a "regime of cooperation within which the Member States – orchestrated by the High

[1323] G. De Baere, *Constitutional Principles of EU External Relations* , 219.
[1324] Alexander Hamilton, The Federalist NO. 23 (Clinton Rossiter ed. 1961) at 122.
[1325] See further J. Nzelibe, "The Uniqueness of Foreign Affairs Powers" (2004) 89 Iowa Law Review 941.
[1326] See further M. Morris, "High Crimes and Misconceptions" (2001) 64 Law & Contemp. Probs. 13 at 18.
[1327] See P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure", 999.
[1328] P. Eeckhout, *External Relations of the European Union*, 143.
[1329] P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure", 999.

Representative – will transform the Treaty principles into common norms of behaviour in the living architecture"[1330]. Rather, it must be assumed that in crises involving matters considered to be "high politics", Member States will act exclusively in their own national interest, regardless of the obligation laid down in Article 32 TEU to "show mutual solidarity"[1331].

In the light of the fundamental role played by the Member States' willingness to further integration in the field of the CFSP, it appears that the potential scope of the CFSP loyalty obligation has to be defined against the background of the Member States' interest in cooperating within the framework of the CFSP. Due to the constitutional limitations dominating the CFSP normative order, the loyalty obligation can only restrain the Member States to such an extent as they deem beneficial to the attainment of a common objective.

Although the innovations introduced by the Lisbon Treaty, such as the granting of legal personality to the Union or the reinforcement of the role of the High Representative, sent out a strong affirmative message regarding the Union's external capability to act, the Member States have remained vocal about their apprehension of losing influence in CFSP matters. Consensus and unanimity continue to dominate decision-making in this policy area. In addition, the declarations concerning the CFSP annexed to the Lisbon Treaty are illustrative of a continuously strong "sovereignty reflex". Declaration 13 states that the provisions on the CFSP will not "affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy". Neither are they allowed to "prejudice the specific character of the security and defence policy of the Member States". Similarly, Declaration 14 provides that the CFSP is not to "affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy [...]". In addition, Declaration 18 stresses that "competences not conferred upon the Union in the Treaties will remain with the Member States", while Declaration 24 is intended to guarantee that the Union's legal personality does not authorise it to act beyond its competences.

This cautious approach to the CFSP stands in stark contrast to the Member States' willingness to accept limitations on the exercise of their powers with regard to other EU policies. As was discussed above, Article 4 (3) TEU appears to have been wilfully created by the Member States as an instrument to further integration. The Member States began to understand the Union as a useful instrument for achieving common purposes, instead of an "enemy" usurping their sovereign powers. A substantial role in this development was played by the Court of Justice which continuously

[1330] W. Wessels and F. Bopp, "The Institutional Architecture of CFSP after the Lisbon Treaty", 12.
[1331] Ibid.

pushed the limits of the duty of sincere cooperation further and further, in the knowledge that the Member States were able to contrast its dynamic development by way of Treaty amendment once it was perceived as too deep of an inroad into national sovereignty.

In the case of the CFSP, by contrast, both the dynamic of a constitutional dialogue between the Member States and the Court of Justice and the motivation behind the Member States willingness to be restrained in their freedom to act have largely been absent. Due to the fundamentally different interests at stake in areas of "high" politics, the Member States are much less likely to renounce to their freedom of action in favour of more efficient action at Union level. Moreover, the CFSP does not offer the additional benefit of increased participation that the Member States are awarded when they accept restraints based on Article 4 (3) TEU. As the CFSP is conceived as a non-pre-emptive shared competence from the outset, the Member States are present and participate alongside the EU in this policy field in any event.

B. The CFSP – an autonomous system

The fundamental differences between the CFSP and other policy areas should not, however, be taken to mean that the Member States are merely "using" CFSP provisions to pursue their own national goals. It would be misleading to portray Member State action under the CFSP as a mere expression of the collective interest of the Member States. In the same way that the Union interest that shapes the duty of sincere cooperation in other areas of external action goes beyond national interests and "represents an aspect of the autonomy of the [Union] system"[1332], also in the CFSP, Union action is more than only shorthand for the collective foreign policy of the Member States.

With regard to Article 4 (3) TEU, the autonomy of the Union system from the will of the Member States is reflected in the fact that the duty of sincere cooperation operates across the entire scope of EU law, irrespective of whether the Union has competence in a given field. In fact, it was argued above that the question of who is competent in a given area no longer determines the extent to which national action may be restrained. Applied to the CFSP, this would mean that even in the absence of a transfer of competence to the Union, the Member States are limited in their scope of action where required for the effectiveness of CFSP measures.

Indeed, the CFSP cannot be considered simply an "agent" of the Member States[1333], seeking to pursue national interests and strengthen their position in the international system via the Union's

[1332] M. Cremona, "Defending the Community Interest", 127.

[1333] See M. Pollack, "Rational Choice and EU Politics", in K. E. Jørgensen, M. A. Pollack and B. Rosamond (eds.), *Handbook of European Union Politics* (Sage Publishers 2006) 31.

institutional set-up. It is no longer accurate to describe the CFSP as a purely intergovernmental system of cooperation radically opposed to the supranational nature of other areas of EU law[1334]. By granting legal personality to the EU as a whole, the Lisbon Treaty has included the CFSP in the unitary legal order of the Union. In addition, it has introduced a number of institutional innovations which "transcend the traditional dichotomy between "high" and "low" politics in EU external relations", such as the broadening of the function of the High Representative, whose tasks now include various aspects of the EU's external action which go beyond matters exclusively related to the CFSP[1335]. The Treaty of Lisbon can, therefore, be considered a further step in the evolution of the CFSP

> "from a purely intergovernmental system based on consensus and international law into a fully-fledged system based on treaty law which includes institutions that operate under the rule of law and which have been given law-making powers"[1336].

The traditional distinction between "high" and "low" politics no longer accurately reflects the reality of EU external relations, since

> "trade and foreign policy can neither be pursued nor implemented in isolation. They are intrinsically linked and their effectiveness relies, in practical terms, to a great extent upon their consistency and coherence[1337]".

Furthermore, in light of the overarching aim to ensure the coherence and consistency of the Union's external action and international representation, the Court's case law regarding vertical cooperation between the Union and the Member States must be considered a source of inspiration for interpreting the scope of the CFSP loyalty obligation[1338]. The requirement of consistency and coherence of the Union's external activities is closely linked to Article 4 (3) TEU. It may therefore be argued that a Member State's failure to comply with this requirement could in certain cases be considered a breach of Article 4 (3) TEU, giving rise to the justiciability of consistency and coherence[1339]. Aside from Article 4 (3) TEU, also the potential scope of the CFSP-specific loyalty obligation under Article 24 (3) TEU should be considered in the light of the Member States' commitment to enhancing coherence. The underlying rationale of coherence, indeed, is that the Union must present itself to the outside world as a unified system in order to ensure effective cooperation with third countries[1340].

[1334] P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure", 994.
[1335] Ibid. at 992.
[1336] R. Gosalbo Bono, "Some Reflections on the CFSP Legal Order", 393.
[1337] P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Hart Publishing 2001) 44.
[1338] P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure", 1015.
[1339] C. Hillion and R. Wessel, "External Competences of EU Member States under CFSP", 111.
[1340] P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure", 1015.

C. Conclusion: The CFSP loyalty obligation – more than an international law obligation

It is against this background that we have to define the limits of the loyalty obligation within the CFSP normative order. In line with the Member States' collective interest in coherence and consistency, it must be assumed that the duty of loyalty under Article 24 (3) TEU entails specific procedural obligations to inform and consult with the EU institutions prior to taking action in a given case. Such an obligation "cannot be ignored by Member States without a complete denial of the rationale behind CFSP"[1341]. In view of its proximity to Article 4 (3) TEU, the obligation contained in Article 24 (3) TEU may also be interpreted in the light of the former, although such an interpretation should be limited by the rationale underlying the duty of sincere cooperation, which aims at achieving complementarity of action in the mutual interest of both the EU and the Member States. Despite the obvious differences in the operation of legal restraints in relation to the CFSP, both Article 4 (3) TEU and Article 24 (3) TEU pursue the same goal of coherent external action through the means of complementarity.

The CFSP obligation cannot be considered a mechanism for achieving the primacy of CFSP instruments over national rules, nor can it be understood as an instrument for enhancing the effectiveness of CFSP measures. Member State competences in the field of foreign policy are not affected by CFSP action, which means that neither pre-emption of Member State competence can take place, nor may the CFSP loyalty obligation be construed so as to preclude the Member States from exercising their competence altogether. Therefore, Article 24 (3) TEU cannot turn a procedural obligation into an obligation of result. However, by reinforcing the binding effect of CFSP measures, the duty of loyalty imposes an obligation on the Member States to comply with the strategy they have committed themselves to.

Although related, the CFSP loyalty obligation clearly goes beyond the international law principle of *pacta sunt servanda*[1342] governing the exercise of sovereign powers at intergovernmental level and the general international law obligation of cooperation which flows from it. Both the Court's case law and the evolution of the Treaties indicate that the CFSP includes a set of rules that are "clearly distinct from traditional international law and restrain the external competences of the Member States"[1343]. The CFSP-specific loyalty obligation, as was argued throughout this thesis, gives rise to specific procedural obligations. The international law principle of cooperation, by contrast, is considered to be merely a general principle of law. Unlike the more precise rules of law, principles

[1341] R. Wessel, "The Multilevel Constitution of European Foreign Relations", 183.
[1342] See H. Wehberg, "Pacta Sunt Servanda".
[1343] P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure", 994.

of law are characterised by a general nature which makes them inapt for solving specific legal problems in individual cases[1344]. The Member States, in conclusion, have not retained an absolute freedom to enter into international agreements concerning CFSP matters already covered by EU agreements:

> "While the creation of CFSP norms depends on the political will of the Member States, once these norms have been established, their very purpose is to restrict the freedom Member States traditionally enjoy in their external relations."[1345]

All divergences between the Member States and the Union notwithstanding, it is "questionable whether one can still maintain the view that under CFSP […] no sovereign rights were transferred to the Union"[1346]. Whether or not the CFSP loyalty obligation has the potential for achieving the convergence of the EU and the Member States into a unit similarly to Article 4 (3) TEU remains to be seen. The dynamic development of Article 24 (3) TEU depends on the Member States' willingness to accept limitations on the exercise of their retained powers under the CFSP. Only when they begin to view unilateral action as more than simply being contrary to the efficiency of Union action, but as being detrimental to the assertion of their *own* role as a relevant player in the world, will the CFSP loyalty obligation be able to unfold its potential as a tool for maximising both Member State and Union interests.

[1344] C. Tietje, "Die völkerrechtliche Kooperationspflicht im Spannungsverhältnis Welthandel/Umweltschutz und ihre Bedeutung für die europäische Umweltblume" (2000) 35 Europarecht 285.
[1345] C. Hillion and R. Wessel, "External Competences of EU Member States under CFSP", 105.
[1346] R. Wessel, "The Multilevel Constitution of European Foreign Relations", 183.

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