

UACES 45th Annual Conference

Bilbao, 7-9 September 2015

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

www.uaces.org

The duty of sincere cooperation (Art. 4 (3) TEU) and its implications for the national interest of EU Member States in the field of external relations

Peter Van Elsuwege*

Work in progress - please do not cite without permission from the author

Abstract

The duty of sincere cooperation laid down in Article 4(3) TEU includes a mutual legal obligation for the EU and its Member States “to assist each other in carrying out the tasks which flow from the Treaties”. This rather general principle has often been invoked before the European Court of Justice (ECJ) to ensure close cooperation between the EU and the Member States in the context of participation to international organisations and conventions. The aim of the paper is to analyse how this case law affects the scope for independent Member State action at the international level.

Introduction

Sincere (or loyal) co-operation between the Member States of the European Union (EU) and the EU institutions is a key constitutional principle of EU law.¹ It is of particular significance for the EU’s external relations taking into account the complex mix of exclusive, shared, parallel and *sui generis* competences in this particular area. Based upon the ECJ’s case law on mixed agreements - quite confusingly with reference to various denominations, such as “the duty of genuine cooperation”², “the obligation to cooperate in good faith”³ and “the principle of the duty to cooperate in good faith”⁴ – the duty of co-operation gradually developed into a key mechanism determining the EU’s external representation and – *mutatis mutandis* – the scope for individual Member State action.⁵

In line with the EU’s general duty of sincere co-operation, laid down in Article 4 (3) TEU, it follows that a distinction can be made between positive and negative Member State obligations. The positive obligation requires Member States “to 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.” In the sphere of EU external relations, this basically implies a duty to act as ‘trustees of the Union interest.’⁶ This is particularly

* Professor of EU law, Ghent University and Post-Doctoral Research Fellow of the Research Foundation – Flanders (FWO). Parts of this text are borrowed from: P. Van Elsuwege and H. Merket, ‘The Role of the Court of Justice in Ensuring the Unity of the EU’s External Representation’, in: S. Blockmans and R. Wessel (eds.), *Principles and Practices of EU External Representation*, CLEER Working Papers, 2012/5, 37-55.

¹ See e.g. M. Klammert, *The Principle of Loyalty in EU Law* (Oxford: OUP) 2014.

² Case C-433/03, *Commission v Germany* [2005] ECR I-7011, para. 64.

³ Case C-246/07, *Commission v Sweden* [2010] ECR I-03317, para. 77.

⁴ Case C-355/04, *Segi and Others v Council* [2007] ECR I-1662, para. 52.

⁵ See: C. Hillion, ‘Mixity and coherence in EU external relations: The significance of the duty of cooperation’, *CLEER Working Papers 2009/2*; Neframi, ‘The duty of loyalty: rethinking its scope through its application in the field of EU external relations’, *47 CML Rev.* (2010), at 331-337; F. Casolari, ‘The Principle of Loyal Cooperation: A ‘master key’ for EU external representation?’, in: S. Blockmans and R. Wessel (eds.), *Principles and Practices of EU External Representation*, CLEER Working Papers, 2012/5, 11-36.

⁶ M. Cremona, ‘Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union’, in: A. Arnulf *et al.* (eds.), *Constitutional Order of States: Essays in EU Law in*

relevant in those areas where the Union is internationally disabled from exercising its competences; for instance when international organisations only recognise states as participating members. With regard to the EU's representation in the International Labour Organisation (ILO), for instance, the Court unequivocally stated that the EU's inability to conclude an ILO Convention implies that it must act "through the medium of the Member States".⁷ Hence, the positive side of the duty of co-operation requires the Member States to operate as the mouthpiece of the Union. The negative side of the same duty requires the Member States to remain silent in order not to undermine the unity of the EU's representation. In other words, Member States are restricted in expressing their own position when this could jeopardise the attainment of the EU's objectives.⁸

The duty of sincere co-operation is "of general application" in the EU legal order. It does not depend on whether the EU's competences are exclusive or shared and equally applies with regard to the EU institutions as to its Member States. As such, it operates as a constitutional safeguard for the protection of the EU's interests.⁹ Of course, the duty of sincere co-operation is not unlimited in the sense that it cannot affect other constitutional principles such as conferral, subsidiarity and proportionality (Art. 5 TEU).¹⁰ Hence, the question arises how a balance between Union and Member State interests can be achieved in the field of external relations. As observed by Robert Schütze, a broad interpretation of the duty of co-operation "better protects the unity of external representation of the Union and its Member States [but] there is a danger for the autonomous exercise of the latter's international powers."¹¹

The present paper aims to clarify the concrete procedural and substantive implications of the duty of sincere co-operation in order to identify the room of manoeuvre for individual Member States at the international stage. After a brief analysis of the Treaty framework, the question is addressed whether the duty of sincere co-operation involves a *duty of result* or, rather a *duty of conduct* for the Member States. It will be argued that the answer to this question essentially depends upon the particular context of the EU's involvement and, more specifically, upon the implications of a Member State's intervention upon the unity of the EU's representation and the uniform application of EU law. Finally, the paper discusses the procedural options for the protection of Member State interests against expansionist EU action at the international level.

The duty of sincere co-operation : constitutional foundations

Since the Treaty of Lisbon, a general duty of sincere co-operation can be found in Article 4 (3) TEU:

"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

Honour of Alan Dashwood (Oxford: Hart, 2011), 435; R. Schütze, *Foreign Affairs and the EU Constitution. Selected Essays* (Cambridge: CUP, 2014), 336.

⁷ Opinion 2/91, *ILO Convention* [1993] ECR I-1061, para. 37.

⁸ A. Delgado Castelleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?', *European Law Review* (2011) 36, 522-539.

⁹ Klammert, *op. cit.* p. 18.

¹⁰ Case C-370/07, *Commission v. Council* (CITES), [2009] ECR I-8917.

¹¹ Schütze, *op. cit.*, p. 339.

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".

Compared to pre-Lisbon Article 10 TEC, this provision has been significantly strengthened in a number of ways. First, it has acquired a central position at the inception of the Treaty on European Union, immediately after the articles on the EU's values and objectives. It is, therefore, a key constitutional principle of general application in the EU legal order.¹² Second, whereas a literal reading of former Article 10 TEC appeared to suggest a one-way duty incumbent on the Member States (an interpretation rejected by the Court),¹³ the principle is now explicitly reciprocal. This more balanced approach is further reinforced with a reference to the principle of conferred powers and the respect for national identities in the first and second paragraph of Article 4 TEU. Moreover, Article 13 TEU states that the "institutions shall practice mutual sincere cooperation". The similar wording as in Article 4(3) TEU suggests the equal application of the principle of sincere cooperation to inter-institutional relations. This similarly codifies and clarifies the Court's jurisprudence where it had already stated that "inter-institutional dialogue [...] is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions".¹⁴

Despite the formal depillarisation undertaken by the Treaty of Lisbon and the explicit statement that the principle of sincere cooperation applies to the Union as a whole, a separate CFSP-specific duty of cooperation is maintained in Article 24(3) TEU:

"The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council and the High Representative shall ensure compliance with these principles'.

¹² Significantly, in the pre-Lisbon context, the principle of genuine cooperation was only explicitly mentioned in Art. 10 of the EC Treaty and thus, in theory, restricted to the former first pillar of the Union. Nevertheless, the Court in *Pupino* suggested that Art. 10 TEC had a trans-pillar application, Case C- 105/03, *Pupino* [2005] ECR I-5285, para. 42. The Treaty of Lisbon logically confirms this approach taking into account the formal abolition of the pillar structure, without however abandoning the special treatment of the former second pillar (Common Foreign and Security Policy), expressed in Art. 24(3) TEU.

¹³ Case C-230/81, *Luxembourg v Parliament* [1983] ECR I-258, para. 37.

¹⁴ Case C-204/86, *Greece v Council* [1988] ECR I-5354, para. 16; Case C-65/93, *Parliament v Council* [1995] ECR I-660, para. 23.

This seems at first sight a redundant repetition, the more so since the provisions of this article to a large degree mirror those of Article 4(3) TEU.¹⁵ Hence, the question arises to what extent the duties of abstention and cooperation resulting from the loyalty principle bind the Member States and EU institutions in the field of CFSP differently in comparison to other areas of EU law. Several elements seem to indicate that, from a legal normative point of view, the importance of this distinction should not be overestimated.

First, the Union's action on the international scene - including the CFSP - is guided by a single set of principles and objectives¹⁶ and is based on a single institutional framework.¹⁷ Second, whereas "mutual (political) solidarity" is not a traditional normative legal concept,¹⁸ Article 28(2) TEU specifies that CFSP decisions "commit the Member States in the positions they adopt and in the conduct of their activity". As a corollary, it can thus be argued that also in the field of CFSP the sovereignty of the Member States has been limited.¹⁹ Third, the CFSP loyalty principle laid down in Article 24(3) is drafted in a rather straightforward and mandatory manner. The Member States "shall support" the Union's external and security policy, they "shall comply" with the Union's action in this area and "shall refrain" from any action that is contrary to the Union's interests or is likely to impair the effectiveness of its international action as a cohesive external actor. Moreover, the text leaves little scope for exceptions as suggested by the expressions "actively" and "unreservedly".²⁰ In his interpretation of former Article 11(2) TEU (current Article 24(3)) Advocate General Mazák already concluded that there is "a strengthened obligation to act in good faith", similar to that contained in (ex) Article 10 TEC.²¹ Fourth, the Court's pre-Lisbon case law regarding the former third pillar suggests a holistic application of general Union principles.²² It is tempting to transpose this approach to the post-Lisbon context, which leaves the Union with "a dual pillar structure in all but name."²³

Taken to its logical conclusion, the unity of the EU legal order implies that the Union's constitutional principles, including the requirements of consistency and sincere cooperation,

¹⁵ G. De Baere, 'Constitutional Principles of EU External Relations' *Oxford University Press, Oxford*, 2008, at 262.

¹⁶ Art. 23 TEU.

¹⁷ Art. 13 TEU.

¹⁸ P. Koutrakos, 'Primary Law and Policy in EU External Relations – Moving Away from the Big Picture', 33 *EL Rev.* (2008), at 670.

¹⁹ K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', 31 *EL Rev.* (2006), at 289-290.

²⁰ C. Hillion and R. Wessel, 'Restraining external competences of the Member States under CFSP' in M. Cremona and B. De Witte (eds.), 'EU Foreign Relations Law. Constitutional Fundamentals' *Oxford*, 2008, at 91.

²¹ Opinion of Advocate General Ján Mazák delivered in Case C-203/07 P, *Greece v Commission* [2008] ECR I-08161, para. 83.

²² See e.g. Case C- 105/03, *Pupino* [2005] ECR I-5285; Case C-355/04, *Segi and Others v Council* [2007] ECR I-1657. On this trend, see further: R. A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation', 5 *European Constitutional Law Review* (2009), at 117-142.

²³ P. Koutrakos, *op. cit.*, at 669.

equally apply throughout the Union with the Court of Justice as its ultimate arbiter.²⁴ However, the question is how such interpretation can be reconciled with the different formulation of loyal cooperation as far as action in the field of CFSP is concerned. Is Article 24(3) only a relic of the past which cannot affect the horizontal application of the EU's basic principles, or, should the inclusion of a specific CFSP principle of loyalty, alongside the general principle of Article 4(3) TEU, be regarded as an indication that the Member States, as Masters of the Treaties, intend to be less constrained in their actions in this particular field? The answer to this question has far-reaching consequences, particularly as far as the potential for judicial review is concerned. Whereas Article 24 TEU precludes the Commission to bring a Member State before the Court of Justice for breaching its duties under the CFSP, Member State actions jeopardising the attainment of the Union's external action objectives arguably fall within the Court's jurisdiction in the light of Article 4(3) TEU.²⁵

Implications for Member State action: an obligation of result or an obligation of conduct?

The duty of loyal cooperation significantly affects the scope for Member State action at the international level. Already in the famous *AETR* judgment of 1971, the ECJ derived from ex Article 5 EEC Treaty (now Article 4(3) TEU) a prohibition for the Member States to exercise their external competences when this would risk to affect internal Union rules or alter their scope.²⁶ Each time the Union institutions adopt common rules with a view to implement a common policy envisaged by the Treaties, the Member States no longer have a right to undertake obligations with third countries which affect those rules. Under such circumstances, only the Union is in a position to assume and carry out contractual obligations towards third countries.²⁷

In *Commission v. Greece*, the Court clarified that this so-called *AETR*-effect not only applies with regard to the conclusion of international agreements but also regarding the adoption of positions within international organisations.²⁸ The case concerned a Greek proposal made within the International Maritime Organisation (IMO) for monitoring compliance of ships and port facilities with the requirements of the International Convention for the Safety of Life at Sea ('SOLAS Convention') and International Ship and Port Facility Security Code ('ISPS Code'). Significantly, the EU is not a member of the IMO since, by virtue of the IMO Convention, membership is only open to states. Likewise, the Union cannot accede to Conventions agreed within the framework of the IMO. This does not prevent that many of the

²⁴ C. Hillion, 'Cohérence et action extérieure de l'Union', in E. Neframi, (red.), 'Objectifs et compétences de l'Union européenne' éditions Bruylant/Larcier, 2012, pp. 229-261. See also: C. Hillion, "A powerless court? The European Court of Justice and the Common Foreign and Security Policy" in Cremona and Thies (Eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, 2014), pp. 47-70.

²⁵ *Ibid.*

²⁶ Case 22/70, *Commission v Council* [1971] ECR 263, para. 22.

²⁷ *Ibid.* para. 17-18.

²⁸ Case C-45/07, *Commission v Greece* [2009] ECR I-701; M. Cremona, 'Extending the reach of the AETR principle: Comment on Commission v Greece (C45/07)', *ELRev.* (2009), at 754-768.

issues dealt with by the IMO have been incorporated in the EU legal order. For instance, Regulation 725/2004/EC on enhancing ship and port facility security essentially implements the SOLAS Convention and the ISPS Code. The Regulation *inter alia* provides for regular consultations between the Member States and the Commission in order to define common positions to be adopted in the competent international fora.²⁹ After the issue of compliance with the SOLAS Convention and the ISPS Code was not discussed in the relevant internal comitology structures, notwithstanding a Greek request to do so, Greece decided to autonomously bring the matter to the IMO. According to the Commission, this was in breach of the Member States' obligations under the duty of loyal cooperation.

The ECJ essentially followed the Commission's reasoning that the Greek initiative was likely to affect the provisions of Regulation 725/2004/EC. In line with its findings in *AETR*, the Court significantly curtailed the option for individual Member State action:

“The mere fact that the Community is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty”.³⁰

Whereas Member States can take part in international organisations of which the Union is not a member, they have to take into account their obligations under EU law. All positions adopted by the Member States within such organisations are to be the result of prior coordination within the Union.³¹ If no Union position on a matter of exclusive competence can be adopted, the Member States can simply not act at all. This is, with so many words, expressed in the voluntary procedural framework for the adoption of positions within the IMO.³² When the Council does not succeed in adopting a Union position, the Member States can only contribute to the debate with information or factual comments but without expressing a position of their own. This basic rule applies even when the Commission failed to take the necessary measures for instituting the internal coordination process. Member States are not entitled to unilaterally adopt corrective or protective measures to compensate a breach of the duty of cooperation on the part of the EU institutions.³³

²⁹ Art. 10(4) of Regulation 725/2004, *OJ* 2004 L 129/6.

³⁰ Case C-45/07, *Commission v Greece* [2009] ECR I-701, para. 30.

³¹ This rule was already expressed in Opinion 2/91, where the Court observed that in situations where the EU cannot accede to an international agreement but its Member States can, ‘cooperation between the Community and the Member States is all the more necessary’ where the Union must act ‘through the medium of the Member States’. See Opinion 2/91, *ILO* [1993] ECR I-1061, para. 36.

³² ‘Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO’, SEC (2005) 449, as amended after discussions in the Shipping Working Party of the Council, doc. 11851/05. Whereas the procedural framework has not been formally approved, it is voluntary used in practice. See: N. Liu and F. Maes, ‘The European Union and the International Maritime Organization: EU’s External Influence on the Prevention of Vessel-Source Pollution’, *Journal of Maritime Law and Commerce* (2010), at 581.

³³ Case C-45/07, *Commission v Greece* [2009] ECR I-701, para. 26.

The procedural rules on participation in the IMO also reveal that the Member States have, in principle, more flexibility in areas of shared competence. Here as well, there is a duty of prior coordination but the option of individual Member State action is not totally excluded. If the Council does not succeed in adopting a common position of the Union and its Member States, the representatives of the Member States retain their freedom to express their position on the matter concerned, as long as this does not conflict with the Union *acquis*.³⁴ Hence, there appears to be a conceptual difference in the application of the duty of cooperation depending on the nature of the EU's competence. When the Union is exclusively competent, the Member States are under *an obligation of result*. They either follow an established Union position or do not act at all. With regard to shared competences, the duty of cooperation merely implies an *obligation of conduct*. A Member State must try to find common ground within the Council but if this is not successful, it is entitled to act alone. Any other interpretation appears to disrespect the division of competences and the principle of conferred powers.³⁵

The Court's decision in *Commission v. Sweden* reveals that the line between cooperation and competence may be thin.³⁶ In this case, Sweden failed to fulfil its obligations under the duty of sincere cooperation by unilaterally proposing an addition to the list of dangerous substances in Annex A to the Stockholm Convention on Persistent Organic Pollutants (POPs). Under the Convention rules, any party may propose that a substance be considered a POP and added to the annexes of the Convention. Since both the EU and the Member States are parties to the Stockholm Convention they, in principle, all have the right to propose such an addition. However, the Court found that the independent Swedish proposal to add perfluorooctane sulfonate (PFOS) to the list went against a concerted common strategy within the Council, which was not to propose the listing of PFOS immediately, *inter alia* for economic reasons. Moreover, the decision-making process provided for by the Stockholm Convention implied that the unilateral Swedish initiative had significant consequences for the Union. Pursuant to Article 25 (2) of the Convention, the Member States and the EU are not entitled to exercise their voting rights under the Convention concurrently. Accordingly, either the Member State(s) supporting the proposal or the Union opposing the addition of PFOS are deprived of their right to vote. Even though the Union has the possibility to submit a declaration of non-acceptance of an amendment proposed and voted for by several Member States, the precise implications of such an action are unclear and could give rise to legal uncertainty, not only within the EU but also for non-member countries that are party to the Convention. Under those circumstances, the ECJ concluded that Sweden's unilateral initiative compromised the principle of unity in the international representation of the Union and its Member States.³⁷

³⁴ Council doc. 11851/05, at 12.

³⁵ In this respect, Cremona observed that '[i]f it [the 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'. M. Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance', in: M. Cremona and B. De Witte, (eds.) 'EU Foreign Relations Law. Constitutional Fundamentals' *Oxford: Hart*, 2008, at 168.

³⁶ Case C-246/07, *Commission v Sweden* [2010] ECR I-3317. P. Van Elsuwege, annotation of Case C-246/07, *American Journal of International Law* (2011), at 307-313.

³⁷ Case C-246/07, *Commission v Sweden* [2010] ECR I-3317, para. 104.

The Court's judgment reveals that Member States are subject to special duties of action and abstention as soon as a "concerted common strategy" exists at the level of the EU. The form of this strategy is irrelevant and does not require the adoption of a legally binding document. In this respect, the Court extends its previous case law, where it already held that the adoption of a decision authorising the Commission to negotiate a multilateral (mixed) agreement on behalf of the Community (now Union) marks the start of a concerted EU action at the international level,³⁸ to situations where the Council has not adopted any formal decision. As soon as a matter is discussed within the EU institutions, and even before the formal EU decision-making process enters into force, Member States are thus obliged to refrain from acting individually.

The duty of cooperation implies that Member States' actions at the international level may not affect the EU's decision-making process. By unilaterally proposing an amendment to Annex A of the Stockholm Convention only one week after the Council working group meeting decided to postpone the adoption of an EU position on the subject, Sweden bypassed the internal decision-making process. The question is, of course, how long Member States must refrain from acting individually? Whereas a one week interval between a Council meeting and the unilateral action is obviously unreasonable, Advocate General Maduro hinted that "Member States must not be caught in a never-ending process, in which a final decision by the [Union] is postponed to the point of inaction. If that proves to be the case, a decision should be deemed to have been taken and Member States should be allowed to act".³⁹ Whereas the starting point of the duty of cooperation is clearly established, i.e. the existence of a "concerted common strategy", the point where the Member States are allowed to act unilaterally in the absence of a final EU decision remains undefined.

Hence, despite the conceptual differences between the application of the duty of cooperation in areas of shared or exclusive competence, a comparison of the IMO and PFOS cases seems to indicate that the practical effects are the same. Unilateral external action by the Member States is precluded in order to preserve the unity of the EU's external representation in both cases. In other words, it appears that the proverbial 'single voice' of the Union is imposed by the Court of Justice. The question is, of course, how such a far-reaching interpretation can be reconciled with the fundamental constitutional principle of conferral (Article 5 TEU). In this respect, it is noteworthy to recall the Court's conclusions in *Opinion 1/94*. In response to the Commission's argument that the joint participation of both the Community and the Member States in the World Trade Organisation (WTO) would risk to undermine the unity of action *vis-à-vis* the rest of the world and weaken its negotiating power, the Court unequivocally stated that, even though legitimate, such concerns cannot modify the division of

³⁸ Case C-266/03, *Commission v Luxembourg* [2005] ECR I-4805, para. 60; Case C-433/03, *Commission v Germany* [2005] ECR I-6985, para. 66.

³⁹ Opinion of Advocate General Poiares Maduro delivered in Case C-246/07 *Commission v Sweden* [2010] ECR I-3317, para. 57.

competences.⁴⁰ Rather than being a competence conferring rule, the principle of loyalty entails a number of practical legal obligations to ensure the *effet utile* of the EU's (external) action.

Accordingly, the decisive criterion to decide on the concrete implications of the loyalty principle for the scope of autonomous Member States action is not so much the nature of the EU competence at stake⁴¹ but, rather, the impact of Member State action on the consistency and coherence of the EU's external action.⁴² Reflecting the wording of Article 4(3) TEU, Member States cannot adopt individual positions in international organisations when this would impede or hinder the attainment of the Union's tasks and objectives. Such a harmful effect is presumed as soon as Member States act in an area covered by common EU rules. This follows from the AETR-rule as confirmed in the IMO case. When no common EU rules exist, such as in the PFOS case, independent Member State action is only excluded under two conditions. First, there has to be a "concerted Union strategy". Significantly, Member States always have a duty to inform the Union institutions so that a Union strategy can be adopted. Moreover, the postponement of international action can qualify as a Union strategy. Second, individual Member State action is excluded when it is liable to have negative consequences for the Union. This was obviously the case in *Commission v. Sweden*, taking into account the possible adoption of a rule of international law that would be binding on the Union.⁴³ This also explains why the Court could not accept the argument that Article 193 TFEU (ex Article 176 TEC) allows Member States to take more stringent national measures to protect the environment.⁴⁴ Contrary to a national measure, Sweden's action could impose an internationally binding rule upon the EU and would thus compromise the exercise of Union competences.⁴⁵

Hence, the duty of loyalty can be regarded as a multifaceted legal instrument ensuring the unity of the EU's international representation while respecting the internal division of competences. In a first step, it entails an obligation for the Member States to inform the EU institutions so that a concerted Union strategy can be contemplated. Such a duty of prior consultation has a preventive objective, i.e. to avoid future inconsistencies between Member State action and EU rules. For this reason, Member States also have to inform and consult the relevant institutions prior to instituting dispute-settlement proceedings.⁴⁶ In a further step,

⁴⁰ Opinion 1/94, *WTO* [1994] ECR I-5267, paras. 106-107.

⁴¹ In this respect, it is noteworthy that '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'. See: Case C-246/07, *Commission v Sweden* [2010] ECR I-3317, para. 71; Case C-266/03, *Commission v Luxembourg* [2005] ECR I-4805, para. 58; Case C-433/03, *Commission v Germany* [2005] ECR I-6985, para. 64.

⁴² G. De Baere, 'O, Where is Faith? O, Where is Loyalty? Some Reflections on the Duty of Loyal Cooperation and the Union's External Environmental Competences in the Light of the *PFOS* Case', *ELRev.* (2011), at 417-18.

⁴³ Cf. *supra* note 37.

⁴⁴ Case C-246/07, *Commission v. Sweden* [2010] ECR I-3317, para. 102.

⁴⁵ Van Elsuwege, *op. cit.* note 36, p. 312.

⁴⁶ Case C-459/03, *Commission v Ireland* [2006] ECR -14635, para. 179.

when individual Member State action would indeed negatively affect the Union's tasks and objectives, the duty of loyalty effectively turns into an obligation of result. This *de facto* limitation of the Member States' sovereign powers may be regarded as a natural consequence in a constitutional order where they accepted to "facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".⁴⁷

From this perspective, the, at first sight, rather ambiguous conclusion of the Court in the *Inland Waterways* cases is more comprehensible. In those cases, the ECJ left some flexibility regarding the concrete duties for the Member States flowing from the principle of loyalty:

"The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires for that purpose, *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 Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation."⁴⁸

This crucial paragraph illustrates very clearly the flexible legal nature of the loyalty principle, which implies a best efforts obligation – a duty of information and consultation – that may turn into an obligation of result – a duty of abstention – if required to ensure the coherence and consistency of the EU's international action and representation.

The protection of Member State interests: procedural options

Despite the reciprocal application of the loyalty principle, it appears that the obligations imposed on the EU institutions are less imperative in comparison to the more straightforward duties of cooperation and abstention for the Member States.⁴⁹ Notably, in *Greece v. Commission* the ECJ acknowledged that the Commission is expected to cooperate with the Member States but only cautiously formulated the institution's obligations:

"in order to fulfil its duty of genuine cooperation under Article 10 EC, *the Commission could have endeavoured to submit that proposal to the Maritime Safety Committee* and allowed a debate on the subject. As is apparent from Article 2(2)(b) of the Standard rules of procedure, such a committee is also a forum enabling exchanges of views between the Commission and the Member

⁴⁷ Art. 4(3) TEU.

⁴⁸ Case C-266/03, *Commission v Luxembourg* [2005] ECR I-4805, para. 60 and Case C-433/03, *Commission v Germany* [2005] ECR I-6985, para. 66.

⁴⁹ C. Hillion *op. cit.*, at 28.

States. The Commission, in chairing that committee, *may not prevent such an exchange of views on the sole ground that a proposal is of a national nature*”.⁵⁰

This vigilant formulation raises the question whether the duty of cooperation is equally constraining the institutions and the Member States when they are exercising their powers. Apart from the different nature of the obligations resulting from the duty of loyalty, there is also a significant difference in terms of judicial review. Member States are subject to the scrutiny on the part of the European Commission under Article 258 TFEU. On the other hand, it seems more difficult for the Member States to bring a successful case against EU institutions for a failure to observe the duty of sincere cooperation. From the conclusions in the IMO case, where the Court excluded the adoption of compensation measures,⁵¹ it follows that Member States first have to bring proceedings for failure to act to the Court under Article 265 TFEU. Under those circumstances, it is questionable whether the political inaction of the institutions to implement a concerted strategy within a reasonable period would be a sufficient argument.

Of course, EU Member States may protect their interests by other procedural means. A good example is the action for annulment, launched by Germany, against the Council whereby it challenged the adoption of a Council position establishing the position to be adopted on behalf of the EU with regard to certain resolutions to be voted in the framework of the International Organisation for Vine and Wine (OIV).⁵² The latter is a technical organisation which adopts non-binding recommendations on technical standards for producing and marketing wine and vine products. The EU itself is not a member of the OIV but 21 EU Member States are. Significantly, some OIV recommendations are included in the EU’s Regulation establishing a common organisation of the markets in agricultural products (Single CMO Regulation).⁵³ Until June 2010, the EU Member States and the Commission coordinated their position in an informal manner prior to the OIV General Assembly meetings. In 2010, the procedure has been formalised in the sense that the Council adopts a common position upon a proposal of the Commission, on the basis of Article 218 (9) TFEU. Germany challenged this practice on the grounds that this legal basis can only be used when the EU is a member of the international organisation concerned and when the organisation adopts internationally legally binding acts. Since both elements were not fulfilled with respect to the OIV, Germany claimed the annulment of the Council decision establishing the position to be adopted on behalf of the EU in the OIV.

Arguably, Germany’s action may be regarded as an attempt to counter the far-reaching implications of the ECJ’s case law on the duty of sincere cooperation. Whereas the latter essentially focuses on the Member States’ duties of action and abstention (cf. *supra*), this time

⁵⁰ Case C-45/07, *Commission v Greece* [2009] ECR I-701, para. 25 [emphasis added].

⁵¹ *Ibid.* para. 26.

⁵² Case 399/12, *Germany v. Council (OIV)*, EU:C:2014:2258.

⁵³ Regulation 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, OJ (2013) L 347/671.

the question concerned the EU's scope of action.⁵⁴ However, in contravention to the Opinion of Advocate General Cruz Villalon, the CJEU used the opportunity to further strengthen the EU's external role.⁵⁵ The Court found that the Council can adopt positions "on the Union's behalf" in a body set up by an international agreement, even when the EU is not a party to the agreement which set up the international body in question. The only criterion is that the adopted position concerns an area of law which falls within the EU's competence.⁵⁶ It further pointed out that the OIV recommendations, despite their non-binding nature, are "acts having legal effects" by virtue of their incorporation in the Single CMO Regulation. Hence, the direct link between the activities at the international level – in this case the OIV – and the development of the EU *acquis* – in this case the Single CMO Regulation – curtails the scope for individual Member State action. Whereas this logic is consistent with the Court's case law on the duty of sincere cooperation, its far-reaching – and to certain extent paradoxical – implications cannot be underestimated. It basically rules out the scope of individual action for the EU Member States that are members of the OIV. Their role is reduced to defenders of the EU's joint position, which is partly determined by EU Member States that non-OIV members. However, from the perspective of public international law, they remain responsible, in their own name, for contracting the rights and obligations in the organisation concerned.⁵⁷ The ruling also has implications for the functioning of the international organisation itself. When EU Member States are prevented from expressing their position unless there is a formally adopted EU common position adopted prior to the debates, this may undermine the influence of the Union, or, even lead to situations where the international organisation is held hostage as a result of internal EU struggles.⁵⁸ This is particularly relevant in organisations such as the OIV, where 21 out of the 46 members are EU Member States.

Conclusions

It follows from the Court's established case law that the rather abstract duty of cooperation implies concrete legal and procedural obligations for the Member States. Arguably, the duties imposed are more imperative when the Member States' action within the institutional and procedural framework of an international organisation (or agreement) has direct consequences for the Union⁵⁹ and when the areas of competence of the Union and the Member States are closely interrelated.⁶⁰ The underlying motivation is obviously to protect the unity of the EU's

⁵⁴ I. Govaere, 'Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case', in: I. Govaere, E. Lannon, P. Van Elsuwege and S. Adam (eds.), *The European Union in the World. Essays in Honour of Marc Maresceau* (Leiden-Boston: Brill-Nijhoff, 2015), 225.

⁵⁵ S. Peers, 'In Vino Veritas: The CJEU again strengthens the EU's external role', at: <http://eulawanalysis.blogspot.be/2014/10/in-vino-veritas-cjeu-again-strengthens.html>.

⁵⁶ Case 399/12, *Germany v. Council* (OIV), para. 52.

⁵⁷ Govaere, o.c., 239.

⁵⁸ Ibid., 240; C. Tournaye, 'International organisations soon blocked by EU's external powers?', <http://voelkerrechtsblog.com/2014/10/21/international-organizations-soon-blocked-by-eus-external-powers/>.

⁵⁹ The impossibility for the Union to exercise its voting rights under the Stockholm Convention if any of the Member States exercises its right to vote is a clear example of such a situation.

⁶⁰ Case C-459/03, *Commission v Ireland (Mox Plant)* [2006] ECR I-4635, para. 176.

international representation, which is in itself instrumental to achieve the objectives of the EU's external action as expressed in Article 21 TEU.

Following the AETR logic, any international action with (potential) implications for the EU's internal legislation requires the involvement of the EU's institutions. This, of course, has far-reaching implications for the scope of autonomous Member State action. As observed by Delgado Casteleiro and Larik, "the duty of sincere co-operation in external relations manifests itself indeed rather often as a duty for the Member States to keep silent, unless told to speak by the EU institutions".⁶¹ Whereas the underlying motivations, i.e. ensuring the unity of the EU's international representation and the uniform application of EU legislation, are quite understandable, the consequences may be rather paradoxical. Without a clear EU mandate, Member States are severely restricted in their possibilities to intervene internationally whereas they remain responsible under public international law. Moreover, the decision-making at the international level may be paralysed as a result of the EU's inaction.

⁶¹ Delgado Casteleiro and Larik, *o.c.*, 540.