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# The Duty to Remain Silent: Limitless Loyalty in EU External Relations?

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☞ Keywords

## Abstract

*This article expresses a note of caution regarding the general enthusiasm surrounding the duty of sincere co-operation in the external relations of the European Union. It argues that according to the recent case law of the European Court of Justice, the duty is in practice not only first and foremost incumbent upon the Member States, but manifests itself as a strict duty to refrain from acting—a duty to remain silent—rather than a duty of best endeavours. Tracing the Court’s key judgments in this regard (Inland Waterways, IMO and PFOS), the authors conclude that in the presence of Union competence, but in the absence of a (quasi)-authorisation by the Union institutions to act, the Member States are to remain idle. While arguably necessary to safeguard the Union’s unity of international representation, this development is prone to legally favour inaction and hinder the Union’s ambitions for actual “external action”.*

## Introduction

The duty of co-operation between the Member States of the European Union and the Union institutions in external relations has become something of a mantra: it is often evoked by political leaders, has served as a powerful argument before the Court of Justice (ECJ), and has been extensively discussed by scholars. In all these different settings, the duty of co-operation is heralded rather enthusiastically as an important goal in itself.

Among the most prominent examples, one could recall the President of the European, Council Herman van Rompuy, in a speech delivered in Bruges shortly after his appointment, dwelling on the tension that exists between the “whole” and the “parts” of the European Union on the international scene.<sup>1</sup> He asked metaphorically: “Are we all in the same ship, faring under the one European flag? Or are we 27 boats, all steering their own national course?” According to the President, neither was the case, and that the “‘génie européen’ is to invent ever new ways to deal with this tension”. The image he used to express this relationship was that of a convoy of 27 ships connected under the waterline, making it impossible for them to “sail away from the others just like that”.<sup>2</sup>

In the legal sphere, the ECJ stresses that the duty of co-operation,

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<sup>1</sup>Reproduced in H. van Rompuy, “The Challenges for Europe in a Changing World” [2010] *College of Europe EU Diplomacy Papers* 3.

<sup>2</sup>Van Rompuy, “The Challenges for Europe” [2010] *College of Europe EU Diplomacy Papers* 3, 13.

“is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries.”<sup>3</sup>

Its rationale is nothing less than “to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation”.<sup>4</sup>

Eminent scholars of European Union in turn revert to rather lofty imagery to grasp the duty of co-operation. For von Bogdandy, for instance, given that the Union’s legal order,

“ultimately rests on the voluntary obedience of its Member States ... the principle 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.”<sup>5</sup>

This is all the more true in the realm of external relations, where the call for a “single voice” (and the hackneyed metaphor of Kissinger’s single European “phone number”) have long been pervasive features of the debate. Picking up the acoustic imagery, Hillion’s references to “the polyphonic nature of the Union’s external action whose audibility ultimately depends on the degree of harmony achieved among its key players”<sup>6</sup> makes one think of the European Union as a choir singing with (at least) 27 voices. Moreover, Cremona describes the Member States as “trustees of the Community interest”,<sup>7</sup> while Neframi even goes as far as proclaiming the transformation from the status “of sovereign States into that of Member States of the European Union”.<sup>8</sup>

In this article, we would like to issue a note of caution. In tracing the interpretation of the duty of co-operation in external relations by the Court in its recent case law, we detect two elements which might curb the general enthusiasm vis-à-vis this principle. First, the judgments of the Court are directed in the first place against the Member States, condemning them for a variety of acts conducted on the international scene. In these cases, instead of speaking up, the Court tells them that they should have remained silent. This is why it appears to us that the duty of co-operation, as interpreted by the Court, means first and foremost a “duty to remain silent” (as opposed to the proverbial “right to remain silent” in criminal law). Secondly, we wonder to which extent this creates a tension with the ambitious foreign policy programme of the Union, captured by the Lisbon Treaty term of “external *action*”. How active can you be, if you cannot speak up, or can just act as backing vocals of the European Commission’s solo performance? Those considerations also lead to reconsidering the international role of the Member States, which then appears a lot less illustrious. Telling here is the expression the Advocate General used in *PFOS*, comparing Member States with “lemmings heading towards the edge of a cliff”.<sup>9</sup> Even if this image was used to express understanding for the frustration that compliance with the duty of co-operation can cause Member States,

<sup>3</sup> *Commission v Germany (Inland Waterways)* (C-433/03) [2005] E.C.R. I-6985 at [58].

<sup>4</sup> *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [60]; on “the requirement of unity in the international representation of the Community” see already Opinion 1/94 on Competence of the Community to conclude international agreements concerning services and the protection of intellectual property [1994] E.C.R. I-5267 at [108].

<sup>5</sup> A. von Bogdandy, “Founding Principles” in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law*, 2nd edn (Oxford: Hart/Munich: C.H. Beck, 2010), p.42; see also extensively A. Hatje, *Loyalität als Rechtsprinzip der Europäischen Union* (Baden-Baden: Nomos, 2001).

<sup>6</sup> 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* (Oxford: Hart, 2010), p.87; see also C. Hillion, “Tous pour un, Un pour tous! Coherence in the External relations of the European Union” in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford: Oxford University Press, 2008), p.27.

<sup>7</sup> M. Cremona, “Member States as trustees of the Community interest: participating in international agreements on behalf of the European Community” [2009] *EUI Working Paper (Law)* 17.

<sup>8</sup> E. Neframi, “The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations” (2010) 47 *C.M.L.R.* 323, 323.

<sup>9</sup> *Commission v Sweden (PFOS)* (C-246/07) April 4, 2010, Opinion of A.G. Maduro at [58].

the contrast between the harmonious choir and the trustees of the Union interest, on the one hand, and a flock of animals not known for their intelligence and gracefulness, on the other hand, is undeniable.

In order to elaborate our argument, after a look at the duty as it is set out in earlier case law and as it now stands under the post-Lisbon Treaty on European Union (TEU), the main part of this article examines recent developments in the ECJ's case law, followed by a number of observations concerning the "special" Common Foreign and Security Policy (CFSP) in this context. Moving towards a "duty to remain silent", these cases of the last few years reveal the extent of the Court's interpretation of the duty of co-operation, an interpretation through which the EU Member States' co-operation with the EU institutions has come to mean refraining from acting virtually regardless of competence questions and regardless of whether the EU institutions have decided to act at all.

### The duty of sincere co-operation in the Treaty and previous case law

Before we examine the specific key cases concerning the duty of sincere co-operation, it is necessary to recall first the provision itself, and its different manifestations. Article 4(3) of the TEU reads as follows:

"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. The Member States shall take any appropriate measure, general or particular, to ensure fulfillment 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."

Its predecessor, before the entry into force of the Lisbon Treaty, was the "duty of cooperation", which could be found in art.10 of the Treaty Establishing the European Community (TEC). The wording before and after Lisbon differs in two important respects.<sup>10</sup> First, while old art.10 TEC was just addressed at the Member States, art.4(3) TEU, at least in the first sentence, turns this duty into a two-way street, obliging in principle both the Union and the Member States, thereby codifying the Court's previous case law.<sup>11</sup> Secondly, with the absorption of the Community into the Union, now the more comprehensive "Union objectives" are to be furthered, and not only those of what used to be the "first pillar".<sup>12</sup>

This provision has been characterised in many ways. According to scholarship, it represents a qualified expression of the *pacta sunt servanda* principle,<sup>13</sup> a federal principle<sup>14</sup> or a multi-faceted legal principle

<sup>10</sup> See A. von Bogdandy and S. Schill, "Artikel 4 EUV" in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union*, looseleaf version of the 41st supplement, July 2010 (Munich: C.H. Beck 2010), paras 48–49; and von Bogdandy, "Founding Principles" in *Principles of European Constitutional Law*, 2010, pp.41–42.

<sup>11</sup> The Court had already recognised that art.10 TEC imposed on both the Member States and the Union institutions mutual duties of co-operation. See already *Luxembourg v Parliament* (230/81) [1983] E.C.R. 255 at [38]; *Zwartveld, Re* (C-2/88) [1990] E.C.R. I-4405; [1990] 3 C.M.L.R. 457 at [10]; *Stergios Delimitis v Henninger Bräu* (C-234/89) [1991] E.C.R. I-935 at [53]; [1992] 5 C.M.L.R. 210; and more recently *Staat der Nederlanden (Ministerie van Landbouw, Natuurbeheer en Visserij) v Ten Kate Holding Musselkanaal BV* (C-511/03) [2005] E.C.R. I-8979; [2006] 1 C.M.L.R. 50 at [28].

<sup>12</sup> This, too, can be seen as a codification of the Court's case law, as it had already applied a similar duty of co-operation within the former "third pillar" (police and judicial co-operation in criminal matters). See, e.g. *Criminal Proceedings against Pupino* (C-105/03) [2005] E.C.R. I-5285; [2005] 2 C.M.L.R. 63 at [42]; and *Gestoras Pro Amnistía v Council of the European Union* (C-354/04) [2007] E.C.R. I-1579; [2007] 2 C.M.L.R. 22 at [52].

<sup>13</sup> P. Koutrakos, *EU International Relations Law* (Oxford: Hart 2006), pp.184–185.

<sup>14</sup> G. De Baere, *Constitutional Principles of EU External Relations* (Oxford: Oxford University Press 2008), p.253; similarly, using the term "federative principle", M. Zuleeg, "The Advantages of the European Constitution" in *Principles of European Constitutional Law*, 2010, pp.774–775; and, employing the term "principle of 'federal good faith'", H. Schermers and D. Waelbroeck, *Judicial Protection in the European Union*, 6th edn (The Hague: Kluwer 2001), pp.625–627. See also Schermers and Waelbroeck, *Judicial Protection in the European Union*, 2001, p.112.

in the service of coherence<sup>15</sup> and effectiveness,<sup>16</sup> which externally culminates in the requirement of unity in the international representation of the Union. Scholars have derived these classifications of the duty from its different manifestations as laid down by the Court in its case law. They include both obligations to act and obligations to refrain from acting.<sup>17</sup> Prominent examples for duties incumbent on the Member States would be, for the former case, the obligation to inform and consult,<sup>18</sup> and for the latter an obligation to desist from ratifying certain international agreements with third countries.<sup>19</sup>

The two kinds of obligations dovetail with more fundamental understandings of the duty of co-operation either as general obligation of “best efforts” regarding the conduct of the Member States and the EU Institutions, or as a clear-cut result, that is for the Member States not to act. The former represents the inter-institutional decorum aimed at minimising the “continuous squabbling between the different subjects of EU external action”.<sup>20</sup> From this perspective it might even be possible, as Kuijper put it,

“that the breach of procedural rules in the field of external relations ... could be excused in the light of Member State behaviour that in the circumstances was correct from the point of view of Community loyalty.”<sup>21</sup>

We argue here that if this “best endeavours” understanding was not altogether prevalent in the case law of the Court, prior to the string of cases starting with *Inland Waterways*, it was at least the most probable interpretation, as the Court until then had desisted from pointing to any clear obligations of result flowing from the duty of co-operation, let alone a “duty to remain silent”.

The “best endeavours” view was captured well by Advocate General Tesauro in the *Hermès* case:

“To fulfil the obligation of cooperation and the requirement of unity in the international representation of the Community ... it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion of the agreements on the subject and, even more important, in the fulfilment of the commitments entered into. In short, they must *endeavour* to adopt a common position.”<sup>22</sup>

<sup>15</sup> B. Van Vooren, “A Paradigm for Coherence in EU External Relations Law: The European Neighbourhood Policy”, PhD Thesis, European University Institute (2010), pp.105–106.

<sup>16</sup> Neframi, “The Duty of Loyalty” (2010) 47 C.M.L. Rev. 323, 359; also S. Hyett, “The duty of cooperation: a flexible concept” in A. Dashwood and C. Hillion (eds), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000).

<sup>17</sup> Von Bogdandy and Schill, “Artikel 4 EUV” in *Das Recht der Europäischen Union*, loose-leaf, 2010, marginal no.59; and Schermers and Waelbroeck, *Judicial Protection in the European Union*, 2001, pp.113–115.

<sup>18</sup> *France v United Kingdom* (141/78) [1979] E.C.R. 2923; [1980] 1 C.M.L.R. 6 at [9] in the area of fisheries; see also later *MOX Plant* (C-459/03) [2006] E.C.R. I-4635; [2006] 2 C.M.L.R. 59 at [179]. This case, however, is already more ambiguous, as also the exclusive jurisdiction of the ECJ (i.e. the prohibition to seek adjudication elsewhere) was at stake.

<sup>19</sup> *Commission v Luxembourg (Inland Waterways)* (C-266/03) [2005] E.C.R. I-4805 at [66]; and *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [73]. Whether informing and consulting could have salvaged the breach is not entirely clear from the wording of the judgment (see next section).

<sup>20</sup> C. Timmermans, “Organising Joint Participation of E.C. and Member States” in *The General Law of E.C. External Relations*, 2000, p.243.

<sup>21</sup> P.J. Kuijper, “Re-Reading External Relations Cases in the Field of Transport: The Function of Community Loyalty” in M. Bulterman et al. (eds), *Views of European Law from the Mountain* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2009), p.295; similarly von Bogdandy and Schill, “Artikel 4 EUV” in *Das Recht der Europäischen Union*, 2010, margin No.96. These interpretations also bolster the idea that informing and consulting as such should not be understood as “results”. They constitute ongoing efforts, not a one-time exercise that can be achieved through simple notification or an exchange of letters.

<sup>22</sup> *Hermès International v FHT Marketing Choice BV* (C-53/96) [1998] E.C.R. I-3603, Opinion of A.G. Tesauro at [21] (emphasis added). The Court, however, did not pick up the co-operation argument in its judgment.

As to the position of the Court, it routinely characterised the duty of co-operation through general statements in favour of inter-institutional co-operation without specifying the concrete results required to achieve that co-operation. In its first pronouncement on the external face of the duty of co-operation, the Court used it as a means of managing the division of competences between the European Union and its Member States when concluding the Convention on the Physical protection of Nuclear Material within the EURATOM Treaty. In Ruling 1/78, the Court acknowledged that the implementation of that convention entailed close co-operation between the institutions and the Member States.<sup>23</sup> However, it did not lay down the shape the co-operation ought to take. Instead, the ECJ clearly defined the areas of the international agreement which should be implemented by the European Union and those parts which should be implemented by the Member States according to the division of competences.<sup>24</sup> In Ruling 1/78 the Court appeared to consider the duty of co-operation fulfilled when both the EU and its Member States implemented their respective parts of the international agreement they had concluded.

In its case law following Ruling 1/78, the Court continued to refer to the duty of co-operation in terms of the management of EU external relations, without laying down how exactly this should play out. For instance, in Opinion 2/91 the Court continued to acknowledge that in those areas in which the European Union and its Member States share competences,

“it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into.”<sup>25</sup>

In Opinion 2/91, in contrast with Ruling 1/78 in which both the European Union and its Member States concluded the agreement, the international agreement at stake (Convention No.170 of the International Labour Organization concerning safety in the use of chemicals at work) could not be concluded by the European Union as it was only open to states, even though it had competence to do so.<sup>26</sup> The Court took notice of this fact and declared that in such situations where the European Union 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”.<sup>27</sup> However, as was the case in Ruling 1/78, the ECJ did not explicitly mention how to achieve that co-operation in practice. The Court left it to the EU institutions and the Member States to take all the measures necessary so as best to ensure such co-operation regarding the ratification as well as in the implementation of the international agreement.<sup>28</sup> It refrained from indicating any specific measures required to ensure that co-operation.

In subsequent instances, the Court continued to give a great degree of flexibility and scope of manoeuvre to the EU institutions and its Member States on how to ensure close co-operation in their external relations. In Opinion 1/94 the Court once again stressed the importance of the duty of co-operation in the implementation of an international agreement. Opinion 1/94 concerned the competences involved in the conclusion of the Uruguay Round agreements (on the occasion of the setting-up of the World Trade Organization), more specifically the GATS and TRIPS Agreements. At the hearing, the Commission drew

<sup>23</sup> Ruling 1/78 on Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports [1978] E.C.R. 2151 at [36].

<sup>24</sup> Ruling 1/78 on Draft Convention on the Physical Protection of Nuclear Materials [1978] E.C.R. 2151 at [36].

<sup>25</sup> Opinion 2/91 on Convention No.170 of the International Labour Organization concerning safety in the use of chemicals at work [1993] E.C.R. I-1061 at [36].

<sup>26</sup> Opinion 2/91 on Convention No. 170 of the International Labour Organization [1993] E.C.R. I-1061 at [39]. See generally on this problem I. Govaere, J. Capiau and A. Vermeersch, “In-Between Seats: the Participation of the European Union in International Organizations” (2004) 9 *European Foreign Affairs Review* 155.

<sup>27</sup> Opinion 2/91 on Convention No. 170 of the International Labour Organization [1993] E.C.R. I-1061 at [37].

<sup>28</sup> Opinion 2/91 on Convention No.170 of the International Labour Organization [1993] E.C.R. I-1061 at [38].

the attention of the Court to the problems that would arise as regards the implementation and management of the agreements if the Court (as it later did) recognised shared competence in the conclusion of these agreements.<sup>29</sup> Following its previous case law, the Court noted that the duty of co-operation played a central role in the administration of international agreements and in ensuring the unity of international representation of the European Union.<sup>30</sup> In particular, the ECJ acknowledged the “imperative” importance of co-operation in the concrete case of the adoption of suspension of concessions (retaliatory trade measures) by the European Union and its Member States towards third states in the framework of WTO dispute settlement system.<sup>31</sup> However, it continued to refrain from indicating concrete means through which the co-operation would be achieved.

The great degree of flexibility that Opinion 2/91 and Opinion 1/94 accorded the EU and its Member States in achieving their mutual duties of co-operation had as their main consequence the proliferation of codes of conduct, inter-institutional agreements and other soft-law mechanisms aimed at establishing *modus vivendi* (or rather: *modus co-operandi*) between them.<sup>32</sup> One of these mechanisms was the Arrangement concluded between the Council and the Commission regarding the preparation for Food and Agricultural Organization meetings, statements and voting (FAO Arrangement). In relation to the FAO Arrangement, the Commission brought an action against a Council decision to give the Member States the right to vote in the FAO for the adoption of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels.<sup>33</sup> The Commission and the Council had diverging interpretations regarding the rules of the FAO Arrangement in terms of voting rights on the particular subject covered by the Agreement. The FAO Arrangement provided detailed rules on who is to vote on a particular subject by looking at the competence involved. If the subject areas covered fell under the European Union’s exclusive competence, the European Union would enjoy the right to vote. On the contrary, if the subject of the FAO measure fell within Member States’ competence, they would have the right to vote. On issues falling within shared competence, depending on whether the main “thrust” of the issue lies in an area outside the European Union’s exclusive competence it would be for the Member States or the European Union to vote.<sup>34</sup> According to the ECJ, by establishing rules on who is to vote, speak or attend to meetings in the FAO, the European Union and its Member States met their respective duties of co-operation and ensured that the unity of international representation was achieved.<sup>35</sup> However, the Court still remained silent on how to attain co-operation in the context of those agreements in which there is no inter-institutional agreement provided or whether the absence of an explicit arrangement establishing a framework for that co-operation would constitute *a contrario* a breach of the duty of co-operation.

These previous cases show how until recently the Court’s position on the duty of co-operation was based on a rather abstract understanding of it. The Court did not establish any kind of concrete obligations of result. It just mentioned the relevance of co-operation in achieving both the effectiveness of EU law and the unity of international representation, pointing out that inter-institutional arrangements like the FAO Arrangement were an expression of that duty. The vagueness on how the duty operates in practice appears as a common thread running through all the case law until then. Consequently, this silence regarding

<sup>29</sup> Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property [1994] E.C.R. I-5267 at [106].

<sup>30</sup> Opinion 1/94 Competence of the Community to conclude international agreements [1994] E.C.R. I-5267 at [108].

<sup>31</sup> Opinion 1/94 Competence of the Community to conclude international agreements [1994] E.C.R. I-5267 at [109].

<sup>32</sup> I. MacLeod, I.D. Henry, and S. Hyett, *The External Relations of the European Communities* (Oxford: Clarendon, 1996), p.150.

<sup>33</sup> *Commission v Council* (C-25/94) [1996] E.C.R. I-1469 at [1].

<sup>34</sup> *Commission v Council* (C-25/94) [1996] E.C.R. I-1469 at [7].

<sup>35</sup> *Commission v Council* (C-25/94) [1996] E.C.R. I-1469 at [49].

the concrete obligations which the duty of co-operation entailed led some authors to argue that these would not be obligations of result but indeed of “best endeavours”, especially in areas of shared competence.<sup>36</sup>

Against this backdrop, the more recent case law to which we will turn in the next section, which clearly outlines the manifestations of the duty of co-operation as unambiguous obligations of result, i.e. of instances where Member States should have refrained from acting, is to be seen as a rather drastic evolution of the duty of co-operation—more drastic than this previous case law might have suggested. Starting with *Inlands Waterways*, the Court issued judgments turning from general statements on the necessity of co-operating externally to proclaiming as inconsistent with the duty an increasing range of Member State acts. Whatever prevailing narratives of “best efforts” may have been entertained previously, loyalty to the Union on the international scene is now revealed as being largely a duty of negative results—a “duty to remain silent”.

### Limitless loyalty?—the way towards the “duty to remain silent”

In view of a number of recent judgments of the ECJ, this article argues that we are witnessing a growing tendency towards legally prohibiting a growing category of Member State actions in the external sphere. The Court is now more clearly providing an interpretation in which the duty of co-operation represents an obligation of negative results. This imposes a stricter duty on the Member States, going beyond “trying hard” in order to co-operate with each other and the EU institutions, notably the Commission. The scope of such an obligation of result appears to be surprisingly wide. This section examines how the ECJ has broadened the duty of co-operation in the course of three milestone cases: *Inland Waterways*, *IMO* and *PFOS*.

#### *The Inland Waterways cases: can informing and consulting be enough?*

The *Inland Waterways* judgments of mid-2005<sup>37</sup> arguably mark the starting-point in the way towards the “duty to remain silent”. They are important in two respects. First, they clarified the point in time from when there exists a Union position that Member States are prohibited from compromising. In that respect, they go further than the ground-breaking *ERTA* judgment,<sup>38</sup> which concerned affecting common rules by actually concluding an international agreement with third countries. Here, the Court scrutinises acts *preceding* conclusion. Secondly, however, in terms of the concrete legal obligations ensuing from the duty of co-operation, the Court still shows some flexibility at this stage.

In these cases, the Commission brought two separate infringement proceedings against Germany and Luxembourg in the context of the negotiation of a multilateral agreement concerning transport on inland waterways by the Community. Germany and Luxembourg did not interrupt their own respective bilateral treaty-making processes with third countries after the Commission had received a mandate to negotiate a

<sup>36</sup> See MacLeod, Henry and Hyett, *The External Relations of the European Communities*, 1996, p.150. Interestingly, Söllner, writing in 1985, even rejected a duty of consultation in cases other than exclusive competence: R. Söllner, *Art. 5 EWG-Vertrag in der Rechtsprechung des Europäischen Gerichtshofes* (Munich: V. Florentz, 1985), pp.59–61. Dauses, writing in 1980, acknowledges a general duty of consultation, but does not see Member States as being barred from continuing negotiations with third countries in areas where the Union (then Community) has not exercised its competence yet. A duty to refrain from concluding such an agreement, according to Dauses, might only exist in very particular cases. M. Dauses, “*Rechtliche Probleme der Abgrenzung der Vertragsschlussbefugnis der EG und der Mitgliedstaaten und die Auswirkung der verschiedenen Abgrenzungsmodelle*” in G. Ress (ed.), *Souveränitätsverständnis in den Europäischen Gemeinschaften* (Baden-Baden: Nomos, 1980), pp.179–180.

<sup>37</sup> *Commission v Luxembourg* (C-266/03) [2005] E.C.R. I-4805; and *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985.

<sup>38</sup> *Commission v Council (ERTA)* (22/70) [1971] E.C.R. 263; [1971] C.M.L.R. 335.

multilateral inland waterways transport agreement including the same third countries.<sup>39</sup> Even though no Community agreement had been concluded yet, the ECJ ruled that Germany and Luxembourg had breached the duty of co-operation insofar as they did not abstain from any initiative likely to compromise the proper conduct of the negotiations initiated at Community level. In particular, they had not abandoned the ratification of agreements with third countries already initialled or signed, and had not forgone the opening of further negotiations with certain countries of Central and Eastern Europe (which at the time were not yet EU members) relating to inland waterway transport.

The ECJ thus established that the application of the duty of co-operation already applies from the moment the Council gives a mandate to the Commission to negotiate. In the Court's words:

“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.”<sup>40</sup>

The ECJ underlines the importance of the existence of a concerted Community position as the rationale which triggers the application of the duty of co-operation. Since the Council (as the body in which the Member States are represented) has agreed to set in motion the Union procedure, the fact that some of its members decide to undermine a decision taken there denotes a lack of co-operating spirit, not only towards the EU institutions, but also to the other Member States. A Member State which has participated in the decision-making process for setting a particular common course of action cannot disregard that process and go on to act independently. In other words, the duty of co-operation entails that Member States cannot deviate from the Union process when the decision which sets it in motion does not suit them.

However, as to the precise content of the duties that are imposed on the Member States from that moment, the Court still shows a certain degree of flexibility. It ruled that for the purpose of the concerted Community action:

“The adoption of a decision authorising the Commission to negotiate ... requires ... 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.”<sup>41</sup>

In this situation it would have seemed possible to apply straight away to the Member States a strict duty to refrain from acting, i.e. halt (or reverse) the treaty-making process. However, the Court did not yet go as far as to state that this manifestation of the duty would apply in this particular case. Importantly, the Court concluded that “having negotiated, concluded, ratified and brought into force the contested bilateral agreements *without having cooperated or consulted with the Commission*”<sup>42</sup> led to the failure to comply with the duty. This shows us first of all the paramount importance that the Commission assumes as the Union (then Community) negotiator, once the Council has established a common course of action. Nevertheless, this formulation could also be interpreted as meaning that the acts *as such* of negotiating, concluding and ratifying the agreement were not the problem. Arguably, the two Member States were held responsible essentially for breaching the duty to inform and consult.<sup>43</sup> The logic behind it is, *a contrario*, that had Luxembourg duly informed and consulted the Commission about its intention of negotiating,

<sup>39</sup> For a summary of the facts of the case see *Commission v Luxembourg* (C-266/03) [2005] E.C.R. I-4805 at [16]-[24]; *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [16]-[24].

<sup>40</sup> *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [66]; *Commission v Luxembourg* (C-266/03) [2005] E.C.R. I-4805 at [60].

<sup>41</sup> *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [66]; *Commission v Luxembourg* (C-266/03) [2005] E.C.R. I-4805 at [60].

<sup>42</sup> *Commission v Luxembourg* (C-266/03) [2005] E.C.R. I-4805 at [66] (emphasis added); see also [61].

<sup>43</sup> See De Baere, *Constitutional Principles of EU External Relations* (Oxford: Oxford University Press, 2008), p.256.

concluding, ratifying and implementing those bilateral agreements, the Commission would have warned that Member State on the possible breach of the duty of co-operation that those actions would entail. Hence one could still say that the ECJ meant that the content of the duty of co-operation, once a Union position on the issue has been taken, encompasses a duty of striving for close co-operation, and not necessarily a duty to abstain from acting altogether.<sup>44</sup>

In this context, it should be mentioned that the ECJ followed a similar approach regarding the duty of co-operation in the 2006 *MOX Plant* judgment. Ireland had not consulted the Commission of its intention to bring a dispute before international arbitration concerning an area falling within the scope of EU law. The ECJ ruled that Ireland had violated, in addition to the exclusive jurisdiction of the ECJ, its duty to inform and consult the Commission in such a situation.<sup>45</sup>

Therefore we argue that at that time there was—in theory—still scope for the Member States to comply with the duty of co-operation if they had informed and consulted with the EU institutions prior to acting externally. However, a closer look at the details of the *Inland Waterways* judgment concerning Germany reveals a certain ambiguity as regards actual practice. Importantly, as the Court acknowledged, in contrast to Luxembourg, Germany had indeed consulted with the Commission at the time of the negotiation and conclusion of its bilateral agreements with the third countries. But these consultations took place before the adoption of the decision authorising the Commission to negotiate an agreement on the topic.<sup>46</sup> Germany was formally complying with its duty of co-operation before its application was actually triggered, but was breaching it later on since it did not consult the Commission before the ratification of the agreements. As the Court put it:

“It is common ground that after that date the Federal Republic of Germany proceeded to ratify and implement those agreements without cooperating or consulting with the Commission.”<sup>47</sup>

As a consequence:

“By acting in that manner, that Member State jeopardised the implementation of the Council Decision of 7 December 1992 and, consequently, the accomplishment of the Community’s task and the attainment of the objectives of the Treaty.”<sup>48</sup>

It appears that—theoretical considerations aside—in reality when the ECJ speaks here about the duty to inform and consult it means that Member States must refrain from acting unless the Commission has authorised it. The Court’s reference to the gentleman’s agreement between the Commission and the Council concerning these negotiations bolster this interpretation. The agreement provides,

“that ‘the Commission shall be the spokesman during the negotiations, and the representatives of the Member States shall speak only if requested to do so by the Commission’ and that ‘the representatives of the Member States must take no action which is likely to handicap the Commission in its work’.”<sup>49</sup>

<sup>44</sup> See 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 Publishing, 2008), p.163; as well as Hillion, “Mixity and coherence in EU External Relations” in *Mixed Agreements Revisited*, 2010, pp.99–100.

<sup>45</sup> *MOX Plant* (439/03) [2006] E.C.R. I-4635 at [179]–[181]. Note that breaching the exclusive jurisdiction of the ECJ stipulated in then art.292 TEC (now art. 344 TFEU) was described by the Court as “a specific expression of Member States’ more general duty of loyalty resulting from Article 10 EC” at [169]. Whether any particular efforts could have “justified” bypassing the Court’s exclusive jurisdiction, however, is highly doubtful.

<sup>46</sup> *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [68].

<sup>47</sup> *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [68].

<sup>48</sup> *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [69].

<sup>49</sup> *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [70], quoting Title II, para.3(d), of the Gentleman’s Agreement.

Thus, would having informed and consulted with the Commission once again after the start of concerted Community action really have salvaged Germany's behaviour of continuing down the road with its bilateral agreements? What in fact constituted the real handicap to the Commission's work: Germany's lacking communication, or indeed the fact that Germany acted—spoke, if you will—“without being requested to do so by the Commission”? In the authors' view, the German branch of the *Inland Waterways* cases shows that it is for all practical purposes not enough for Member States to inform and consult with the Commission. In fact, what the Court still presents here as potentially a duty to inform and consult in reality leads to an obligation to refrain from acting.

In sum, while in theory the ECJ in these two cases ruled that Member States have, “if not a duty of abstention”, a duty to inform and consult the EU institutions (*in concreto* the Commission) before acting externally when the latter have adopted a position on a certain issue, in practice, the Court interpreted the duty to inform and consult in such a way that in reality Member States at the end must provide a clear result. In this case, the result would have been to halt the ongoing bilateral negotiations and/or undo commitments already entered into, in addition to the continuous duty to abstain from approaching any new commitments.

### *The IMO case: abstention in areas of exclusive competence*

The next milestone on the way to the “duty to remain silent” is the *IMO* judgment of February 2009. The importance of the judgment lies in two aspects. First, it expands further the notion of the “start of a concerted Community action”. Consequently, it has become very hard to tell when there is definitely no Union position at all, and therefore when Member States would still be free to act. Secondly, it removes the ambiguity on the nature of the duty of co-operation that still existed in *Inland Waterways*. It made clear that, in order to comply with the duty, at least in the area of exclusive Union competence, what is required is unequivocal abstention—or silence—on the part of the Member States. No information and consultation efforts could suffice to justify breaking this silence here.

In the *IMO* case, the Commission brought an infringement procedure against Greece for having submitted a non-binding proposal for consideration to a committee of the International Maritime Organisation (IMO) regarding maritime safety, an issue falling within European Union's exclusive competence.<sup>50</sup> The action was successful, as the ECJ found that Greece had violated its duty of co-operation by acting in this way. The special feature of the case is that the IMO is an international organisation to which the European Union is not a party, but all EU Member States are.<sup>51</sup> Therefore the European Union (most likely through the Commission) could not have made that proposal itself. If the European Union wants to act within the IMO it has to do it through its Member States “acting jointly in the Community's interest”.<sup>52</sup> The European Union's exclusive competence, on the one hand, and the lack of membership in the IMO, on the other hand, create thus a situation in which Member States are the “trustees”<sup>53</sup> of the Union interest in that international organisation. If Member States want to act within the IMO, logically, they should inform and consult the EU institutions since their actions could jeopardise the European Union's objectives. As in Opinion 2/91, the duty of co-operation enters the picture as the structuring principle for overcoming the problems derived from the European Union's lack of membership of certain international organisations. While the EU institutions need to co-operate with Member States so the latter are not put in a difficult

<sup>50</sup> For the background see *Commission v Greece (IMO)* (C-45/07) [2009] E.C.R. I-701; [2009] 2 C.M.L.R. 38 at [1]–[10].

<sup>51</sup> See M. Cremona, “Extending the reach of the AETR principle: Comment on *Commission v Greece (C-45/07)*” (2009) 34 E.L.R. 754, 754.

<sup>52</sup> *IMO (C-45/07)* [2009] E.C.R. I-701 at [31]; see also Opinion 2/91 on Convention No.170 of the International Labour Organization concerning safety in the use of chemicals at work [1993] E.C.R. I-1061 at [5].

<sup>53</sup> See Cremona, “Member States as trustees of the Community interest” [2009] *EUI Working Paper (Law)* 17.

position within the IMO, Member States need to co-operate with the European Union so as to allow the European Union to be heard in the IMO regardless of its formal absence there.

In this particular case, Greece had in fact previously tried to discuss its non-binding proposal in the appropriate EU forum. Greece had submitted it to the “Marsec” (Maritime Safety) Committee so a Union position on the issue could emerge there.<sup>54</sup> In other words, Greece tried to initiate a concerted Union action to be pursued at the international level. The Commission, as the agenda-setter in the committee, refused to put the proposal on the agenda and so prevented it from being discussed within the committee. After the Commission’s refusal, Greece considered that it had complied with its duty of co-operation. It had done everything in its hands to forge a Union position on the issue, and certainly had complied in terms of information and consultation. Greece perceived that it had shown its “best endeavours”, and thus had complied with the duty of co-operation in this situation.<sup>55</sup>

The ECJ did not share Greece’s view. According to the Court, in a situation in which the Greek proposal concerned issues falling under EU’s exclusive competence, the duty of co-operation entails a duty to refrain from acting, not just a Member State’s best efforts, and applies regardless of what had occurred internally in the EU bodies. According to the Court, the crucial point is that Greece “initiate[d] a procedure which could lead to the adoption by the IMO of new rules”.<sup>56</sup> Consequently, Greece “took an initiative likely to affect the provisions of the Regulation [on enhancing ship and port facility security], which is an infringement of the obligations under Article 10 EC [now 4.3 TEU] ...”.<sup>57</sup>

The ECJ thus links EU’s exclusive competence in this area to the duty to refrain from acting: whenever there is exclusive competence on an issue, Member States cannot act independently anymore.<sup>58</sup> The Court’s view would be consistent with what it had argued formally in the *Inland Waterways* cases. In those cases, it did not accept that the agreements fell under the European Union’s exclusive competence.<sup>59</sup> Thus the application of the less strict duty to inform and consult was still conceivable there instead of the duty to refrain from acting (at least in principle).

Leaving aside the question whether non-legal or pre-legal items can be subject to the *ERTA* effect,<sup>60</sup> the case establishes that Member States, even in situations in which they unsuccessfully tried to set in motion the Union procedure, are precluded from making a proposal internationally on their own motion. This is even the case where the European Union, acting through its institutions, did not respond or did not wish to respond to a Member State’s initiative. Here, the duty to refrain from acting is applied in absolute terms by the Court. Greece has to comply with its duty of abstention even if the EU institutions have failed to comply with their duty of co-operation:

<sup>54</sup> *IMO* (C-45/07) [2009] E.C.R. I-701, Opinion of A.G. Bot at [16].

<sup>55</sup> See Cremona, “Extending the reach of the AETR principle” (2009) 34 E.L.R. 754, 757.

<sup>56</sup> *IMO* (C-45/07) [2009] E.C.R. I-701 at [21].

<sup>57</sup> *IMO* (C-45/07) [2009] E.C.R. I-701 at [23].

<sup>58</sup> Cremona, “Extending the reach of the AETR principle” (2009) 34 E.L.R. 754, 764; see also Hillion, “Mixture and coherence in EU External Relations” in *Mixed Agreements Revisited*, 2010, p.112; and Neframi, “The Duty of Loyalty” (2010) 47 C.M.L.R. 323, 341.

<sup>59</sup> *Commission v Luxembourg* (C-266/03) [2005] E.C.R. I-4805 at [40]–[51]; *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [41]–[54].

<sup>60</sup> For an analysis of that issue see Cremona, “Extending the reach of the AETR principle” (2009) 34 E.L.R. 754, 762–763. Even though this case dealt with a non-binding proposal by Greece, she cautions about the over-interpretation of the judgment since the ECJ was “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” (at 763). However, in the later *PFOS* judgment, the Court could not rely on such a strict link to exclusivity anymore.

“Any breach by the Commission of Article 10 [TEC, now 4(3) TEU] cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty.”<sup>61</sup>

The Court reiterated thus that the duty of co-operation also binds the EU institutions and not just the Member State. However, as Hillion notes, it does so with circumspection.<sup>62</sup> In this specific case, the Court considered that the Commission could have had an obligation of “best endeavours” by allowing the Greek proposal to be discussed in the committee.<sup>63</sup> In any case, there was in no event a clear result required from the Commission.

However, the Commission’s (potential) wrong of course does not make Greece’s subsequent action right, as the Court correctly observed. The Court has generally refused to accept any notion of obligations under Union law operating on a reciprocal basis, including in the relationship between the Member States and the institutions.<sup>64</sup> But as Cremona rightly points out, this might lead to an unequal situation in terms of the ability to seek remedies for a breach of the duty of co-operation. While the cases discussed in this article show the wide range of Member State acts than can be successfully challenged before the ECJ by the Commission, in *IMO* there was no legally reviewable act of the Commission that a Member State could have brought before the Court under art.263 TFEU (ex art.230 TEC). In terms of a challenge for failure to act under art.265 TFEU (ex art.232 TEC), the Commission (and other EU institutions) have “broad discretion”<sup>65</sup> and in any case the Member States must call upon it to act within a two-month period (art.265(2) TFEU). Therefore, “both in legal and practical terms”,<sup>66</sup> it is unlikely that Greece could have enforced the Commission’s part of the duty before the Courts.

In sum, the ECJ considers that even when a Member State has complied with the duty of co-operation in the sense of informing and consulting with the EU institutions, a lack of express authorisation by them (in this case by the Commission) entails an obligation to refrain from acting. Although the ECJ recognises that the Commission might have breached its own obligation under the duty of co-operation by refusing Greece’s request to discuss the issue internally, it underlined that this fact does not authorise Member States to breach it as well. While it is true that EU law does not favour countermeasures and reciprocity in the relation between its different actors, it is also true that the ECJ legally cements the stronger pull that the Commission wields owing to its agenda-setting powers vis-à-vis the Member States in the area at hand.

In terms of the limits of the duty of co-operation, after *IMO* it might still have been said that such a strict obligation for Member States not to speak up within international organisations was appropriate for an issue falling within exclusive Union competence. The underlying logic of exclusivity necessarily prevents Member States from acting outside the Union’s framework. Where the Union itself cannot act, the Member States indeed act as “trustees” of the Union,<sup>67</sup> and nothing more. Therefore any position they wish to assume has to go through the Union’s internal procedures. If the European Union refuses to pick up and voice the proposal externally, Member States have no longer the power to utter it individually. Importantly, “acting” on the international scene does not only mean directly affecting common rules by

<sup>61</sup> *Commission v Greece* not yet reported at [26].

<sup>62</sup> Hillion, “Mixity and coherence in EU External Relations” in Hillion and Koutrakos, *Mixed Agreements Revisited* (Oxford: Hart, 2010), p.113.

<sup>63</sup> *IMO* (C-45/07) [2009] E.C.R. I-701 at [25]: “the Commission could have *endeavoured* to submit that proposal to the Maritime Safety Committee and allowed a debate on the subject” (emphasis added).

<sup>64</sup> See as the seminal judgment *Commission v Luxembourg and Belgium (Dairy products)* (90/63 and 91/63) [1964] E.C.R. 631 at [2]. See also Schermers and Waelbroeck, *Judicial Protection in the European Union*, 6th edn (The Hague: Kluwer, 2001), pp.625–627.

<sup>65</sup> Cremona, “Extending the reach of the AETR principle” (2009) 34 E.L.R. 754, 766.

<sup>66</sup> Cremona, “Extending the reach of the AETR principle” (2009) 34 E.L.R. 754, 765.

<sup>67</sup> Cremona, “Member States as trustees of the Community interest” [2009] *EUI Working Paper (Law)* 17.

actually assuming legal obligations (the classic *ERTA* effect), but also by setting “in motion such a procedure” which is “likely”,<sup>68</sup> somewhere down the road, to affect such rules.

### *The PFOS case: abstention also in areas of shared competence*

In the *Inland Waterways* cases, by not consulting the EU institutions before ratifying and implementing bilateral agreements, as well as by those acts themselves, Germany and Luxembourg breached their obligations under what is now art.4(3) TEU. In the *IMO* case, Greece had indeed “endeavoured” to comply with its duty of co-operation by consulting with the EU institutions before submitting a non-binding proposal. However, since the issue fell within the European Union’s exclusive competence, Greece, too, had violated the duty of co-operation as in those circumstances the duty was one of abstention—a duty that could not be disposed of through information and consultation efforts.

For issues not falling under exclusive Union competence, however, until recently it seemed that such a strict “duty to remain silent” would not apply. According to Cremona, commenting in the wake of the *IMO* judgment,

“the position should be different in a case of shared competence, where the Member State remains entitled to act as long as the Community has not acted.”<sup>69</sup>

Is shared competence therefore the “final frontier” for the “duty to remain silent”? In the *PFOS* case, the Court’s answer to this question was a resounding “no”. As the Court’s judgment from April 2010 established, this does not represent a valid limitation either. This raises the question of where the scope of the “duty to remain silent” actually ends.

This case concerned an infringement procedure launched by the Commission for a unilateral proposal by Sweden to include certain environmentally harmful substances, more precisely *perfluorooctane sulfonate* (PFOS), in the Annex of the Stockholm Convention on Persistent Organic Pollutants against a backdrop of what seemed to be the absence of a clear Union position on the matter. The Stockholm Convention is a mixed agreement (i.e. both the European Union and its Member States are parties) covering an area which falls under the European Union’s shared competence.<sup>70</sup> That means that in principle the Member States also remain competent to act. Similar to Greece in the *IMO* case, Sweden consulted the EU institutions on the possibility of a common proposal to list PFOS in the relevant Annex of the Stockholm Convention. However, no agreement was reached within the Council. This was in September 2004. In March 2005, the Council recommended that the European Union and its Member States propose up to three substances before the first meeting of the Conference of the Parties to the Convention. The European Union and its Member States ended up proposing two substances to the Stockholm Convention in May 2005, none of them PFOS. In July 2005, the listing of PFOS in the Annex of the Stockholm Convention was once again brought up by Sweden within the Council. However, no agreement was reached once again on this point.<sup>71</sup> Eleven months after its initial proposal and after the European Union had already proposed the two other substances to be included in the Annex of the Stockholm Convention, Sweden submitted “in its name and

<sup>68</sup> *IMO* (C-45/07) [2009] E.C.R. I-701 at [25]; note also in this context that according to the Court’s Opinion in *Lugano*: “[i]t is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis” to establish the scope of Union rules; Opinion 1/03 on 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] E.C.R. I-1145 at [126].

<sup>69</sup> Cremona, “Extending the reach of the AETR principle” (2009) 34 E.L.R. 754, 766.

<sup>70</sup> See *Commission v Sweden* Opinion of A.G. Maduro at [28].

<sup>71</sup> For the background of the case see *Commission v Sweden* at [29]–[49]. At the same time, negotiations went on as to which substances to propose to the related, but distinct, Aarhus Protocol on Persistent Organic Pollutants, to which the Union and some of its Member States are parties. For a subsequent meeting of the parties to the Stockholm Convention, the Council approved a proposal to add another three substances, again none of them PFOS, at [43].

on its own behalf a proposal to list PFOS in Annex A of the Stockholm Convention to the Secretariat of that convention”.<sup>72</sup>

The Advocate General still made a theoretical distinction in his opinion between the language of exclusive competence of *IMO* and the facts and issues of *PFOS*.<sup>73</sup> The Advocate General stressed first that also the EU institutions were bound by art.4(3) of the TEU. Furthermore, Sweden was indeed entitled to propose the inclusion of PFOS in an Annex of the Stockholm Convention. However, A.G. Maduro argued that the mixed character of the Convention qualifies the possibility for EU Member States to make proposals under the Convention. In this regard, the Advocate General considered that Sweden’s actions, even though they might not undermine the exercise of EU competence altogether, they might affect the European Union’s internal decision-making process.<sup>74</sup> According to the Advocate General:

“The implications of the duty of loyal cooperation are therefore twofold: first, that Member States cooperate with the Community decision-making process; and, second, that they refrain from taking individual action, at least for a reasonable period of time, until a conclusion to that process has been reached.”<sup>75</sup>

A.G. Maduro thus makes a clear distinction between the duty of best efforts (i.e. for him the obligation to co-operate within the EU decision-making process) and the duty to refrain from acting, and argues that even though Sweden has complied with the first obligation it has not complied with the second. The Advocate General opines that as long as the European Union’s internal processes are at work, Member States should refrain from acting “for a reasonable period of time”. On the one hand, the Advocate General is following what the ECJ argued in *Inland Waterways* as regards the establishment of a Union position as the point of departure for triggering the duty of co-operation. On the other hand, he introduces for areas of shared competence the idea of a limit to the obligation to refrain from acting whenever there is a decision-making process going on. Otherwise put, there is a theoretical point in time when the “duty to remain silent” ends, and the Member State would be allowed to speak up again. Accordingly, Sweden should simply have waited. *In casu*, the Advocate General considered that waiting for 11 months since the initial EU-internal proposal to include PFOS to the Annex of the Stockholm Convention was not a reasonable period of time.

The Court, however, did not enter into the analysis of what would be a reasonable period of time for Sweden to wait before being set free to act unilaterally. Instead, akin to the *Inland Waterways* cases, it focused solely on whether a “Community strategy” on the issue had emerged. In this regard, the Commission claimed that PFOS was not “a priority issue as regards the Stockholm Convention”, and that not to include it was the result of a deliberate choice enshrined in a common position within the Council.<sup>76</sup> Agreeing with the Commission, the ECJ ruled that:

“It does not appear to be 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.”<sup>77</sup>

<sup>72</sup> *Commission v Sweden* (C-246/07) April 4, 2010 at [40].

<sup>73</sup> *Commission v Sweden* (C-246/07) Opinion of A.G. Maduro at [26]–[31].

<sup>74</sup> *Commission v Sweden* (C-246/07) Opinion of A.G. Maduro at [43]–[47].

<sup>75</sup> *Commission v Sweden* (C-246/07) Opinion of A.G. Maduro at [49]. Similarly von Bogdandy and Schill, “Artikel 4 EUV” in *Das Recht der Europäischen Union*, margin No.99, arguing that any standstill effect of the duty of co-operation can only be limited in time in areas of shared competence.

<sup>76</sup> *Commission v Sweden* (C-246/07) at [52].

<sup>77</sup> *Commission v Sweden* (C-246/07) at [77].

Importantly, the Court deemed the common position to be that there was “no agreement on the substances to be proposed and discussion of that issue was postponed”.<sup>78</sup> Therefore one could not speak of a “decision-making vacuum”,<sup>79</sup> but that instead a “common strategy not to propose” indeed existed.<sup>80</sup>

With *PFOS* the ECJ continues to broaden the starting-point of the Union’s course of action which triggers the application of the duty of co-operation both from a temporal and material perspective. From a temporal perspective, the duty is not only triggered when it has been decided that the Union *will* act externally on a certain issue (as was the case in *Inland Waterways*), it is triggered at even earlier stages of the decision-making process (like in *IMO*). Arguably, according to *PFOS* the duty of co-operation applies from the moment an issue is discussed within an EU institution. This entails also a broader understanding of what a Union position is. Before, i.e. according to *Inland Waterways*, the ECJ seemed to view as the point of departure for Union action the moment the Commission makes a proposal to the Council, even though the latter has not (yet) accepted it.<sup>81</sup>

In *PFOS* the ECJ identified the departure of Union action not in the adoption of an authorising decision, or in a Commission proposal. Instead, the ECJ identified the departure of Union action from a bundle of Council conclusions and minutes of meetings where references to the Stockholm Convention were made or the issue of PFOS was discussed, without in fact reaching an agreement on whether to propose the inclusion of that substance in the Annex of the Convention.<sup>82</sup> The Court concludes that this lack of agreement at that point in time is proof that the European Union in fact had a strategy on PFOS, i.e. “a common strategy not to propose” it for inclusion. Moreover, while showing how soon in time the duty can be triggered, the Court refused to pick up the Advocate General’s point of establishing a (however distant) point in time when it would cease to apply.

In terms of the material scope of the duty of co-operation, given that the issue was one of shared competence, it could be expected that the Court would have followed its previous judgments (and the Advocate General) on the interplay between shared competence and the duty of co-operation, in which an obligation to inform and consult was still conceivable. Against such a standard, Sweden could have been deemed to have informed and consulted with the EU institutions about its intentions of proposing to include PFOS in the Annex of the Stockholm Convention in a satisfactory way, therefore not breaching the duty of co-operation under art.4(3) TEU. At most, it could have ruled that Sweden did not wait long enough before going it alone.

However, the ECJ here clearly refutes this less strict manifestation of the duty. The Court started its reasoning with a statement on the general application of the duty as it had done before, and continued with a reference to the *IMO* case on the different nature of the competence involved in *PFOS*, i.e. shared instead of exclusive.<sup>83</sup> But then, contrary to the *Inland Waterways* cases where it had remained ambivalent about whether Member States had an obligation either “just” to inform and consult or abstain altogether from acting, the ECJ ruled here that the duty of co-operation once it is triggered entails clearly an obligation to refrain from acting.<sup>84</sup>

The ECJ’s reasoning makes it hard to see how *PFOS* differs from *IMO* in terms of the material extent of the duty of co-operation. Member States are barred from acting even in such situations concerning shared competence. This makes one wonder about situations in which Member States in matters of shared

<sup>78</sup> *Commission v Sweden* (C-246/07) at [86].

<sup>79</sup> *Commission v Sweden* (C-246/07) at [87].

<sup>80</sup> *Commission v Sweden* (C-246/07) at [89].

<sup>81</sup> *Commission v Germany* (C-433/03) [2005] E.C.R. I-6985 at [65]; *Commission v Luxembourg* (C-266/03) [2005] E.C.R. I-4805 at [59]; *Commission v Sweden* at [74]. Also seeing such proposals as the point of departure, von Bogdandy and Schill, “Artikel 4 EUV” in *Das Recht der Europäischen Union*, 2010, marginal No.98.

<sup>82</sup> *Commission v Sweden* (C-246/07) at [78]–[89].

<sup>83</sup> *Commission v Sweden* (C-246/07) at [71]–[72].

<sup>84</sup> *Commission v Sweden* (C-246/07) at [74] and [103].

competence actually would be allowed to act. If the lack of a clear Union position bars Member States here from acting independently, then *a contrario*, in order to act it appears that they would need some sort of Union authorisation to do so notwithstanding intra-Union dissension. Even if the ECJ uses different words, at the end it seems that it continues to speak the language of exclusive competence with regard to the duty of co-operation. How different is in fact this need for a quasi-authorisation from formal authorisations like the ones that followed the *Open Skies* cases?<sup>85</sup> How can one make a distinction between the need to ask for authorisation to make a proposal in matters of shared competence and an authorisation to renegotiate a bilateral investment treaty falling under the Common Commercial Policy, i.e. an area of exclusive competence?<sup>86</sup> In both cases, regardless of the competence involved, in the absence of an express authorisation, Member States have to remain silent.

### The duty of co-operation and the “special-nature” CFSP

When discussing the limits of the duty co-operation, the special nature of the Common Foreign and Security Policy (CFSP) should not remain unaddressed.<sup>87</sup> Is it here perhaps that the “duty to remain silent” ends and “best efforts” suffice to do justice to the obligations flowing from loyalty to the Union? The EU Treaties point rather in the other direction. The formulation in art.24(1) TEU is strikingly comprehensive in this regard, stating that EU “competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security ...”<sup>88</sup> As we argued earlier, where there is Union competence, there is a duty to co-operate. Furthermore, the Treaties contain numerous specific emanations of loyal co-operation in the area of the CFSP. As an example, one should note the first two indents of art.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.”<sup>89</sup>

The duty of co-operation therefore does not seem to stop “at water’s edge”.<sup>90</sup> However, even though it applies as legally binding normative guidance for the European Union and its Member States, the crucial distinguishing feature from the cases discussed earlier (all situated in the former “Community” sphere) is the strictly limited jurisdiction of the ECJ to adjudicate in the realm of the CFSP.<sup>91</sup> In addition, art.24(3) TEU states that “[t]he Council and the High Representative shall ensure compliance” with the principles of co-operation in the CFSP, leaving aside the Commission as the usual watchdog of the duty of co-operation. In view of these restrictions, it is understandable that a case law as extensive as in the former

<sup>85</sup> These cases were launched by the Commission against the United Kingdom, Denmark, Sweden, Belgium, Luxembourg, Austria and Germany. By way of example, see *Commission v United Kingdom (Open Skies)* (C-466/98) [2002] E.C.R. I-9427; [2003] 1 C.M.L.R. 6; see in detail C. Hillion, “A look back at Open Skies” in Bulterman et al. (eds), *Views of European Law from the Mountain* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2009) pp.257–265.

<sup>86</sup> Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries COM(2010) 344 final.

<sup>87</sup> On the “particularity of foreign affairs” in the EU context see D. Thym, “Foreign Affairs” *Principles of European Constitutional Law*, 2010, pp.311–314, and the CFSP in particular, pp.330–338.

<sup>88</sup> See also art.2(4) TFEU.

<sup>89</sup> See also arts 28(3)–(5), 29, 32, 34 and 35 TEU.

<sup>90</sup> To use the expression by P. Eeckhout, *Does Europe’s Constitution Stop at the Water’s Edge? Law and Policy in the EU’s External Relations* (Groningen: Europa Law Publishing, 2005).

<sup>91</sup> Article 24(1) TEU.

“first pillar” on the nature and scope of the duty of co-operation in this area has not developed. Instead, the deliberate restriction of jurisdiction by the “Masters of the Treaties” in the CFSP can be seen as an indication of their will to be less constrained in their actions in this particular field. In other words, the Member States aimed to thwart the emergence of any sort of “duty to remain silent” in the area of foreign and security policy through constitutional design, in particular judicial restraint.

Two important exceptions qualify this restricted jurisdiction though, i.e. ensuring that the CFSP will not affect the application of other areas of Union competence (and vice versa) (art.40 TEU), and reviewing the legality of restrictive measures (art.275 TEU).<sup>92</sup> Hence matters pertaining to the CFSP do not a priori bar future Court rulings applying the “duty to remain silent” also to the CFSP. Against this backdrop, the conclusion drawn by Hillion and Wessel already in the pre-Lisbon era, namely that “[t]he potential impact of the loyalty principle ... on Member States’ freedom under the CFSP should not be underestimated”,<sup>93</sup> remains all the more valid today.

### **Concluding observations: masters of two treaties, and two treaties only**

Stepping back and contemplating the picture the Court has painted in its recent case law concerning the duty of co-operation in external relations, we conclude that contrary to earlier ambivalence, it now has revealed the wideness of the scope of the duty of co-operation in three directions. First, on the intra-EU level, whereas previously the duty seemed to be triggered from the moment a concerted Union position had been launched by a positive legal act (giving the Commission a mandate or at least an official Commission proposal), now, after these cases, it has become unclear until which point Member States would still be free to act. They must now be silent even before the Union has made up its own mind about whether and when it is going to speak. The concept of a Union position has been broadened by the Court so as to include situations in which the EU institutions have not reached a decision or choose not to discuss an issue like in *IMO*. One might even say that, according to the ECJ, indecisiveness constitutes a valid Union position or strategy.

Secondly, on the international level, merely submitting for consideration a non-legal proposal to a technical committee already constitutes setting in motion a procedure that compromises both the division of competences and the unity of international representation of the European Union. Even if the Member State’s proposal pursues and respects Union interests (or admittedly what Member States consider to be the Union’s interest), the fact that the Member State acted independently breaches the duty of co-operation, regardless of whether it has informed and consulted with the Union and regardless of whether the Union had a clear substantive position on the issue at the time of the proposal. Reticence on the international plane therefore seems to be inherent in the task of being a good “trustee of the Union interest”.

Thirdly, the scope of the “duty to remain silent” seems to make the distinction between exclusive and shared competence virtually irrelevant. Simply because a Member State still is competent about a matter, it does not mean that it can speak up about it outside the European Union. As the recent case law shows, it seems that Member States need a kind of EU authorisation in order to exercise “their share” of shared competence.

Therefore, what is left for Member States to do on the world stage? Is there any situation in which a Member State could open its mouth in the presence of Union competence (and ECH jurisdiction) but in the absence of Union authorisation? According to the recent ECJ case law, we have doubts about that.

<sup>92</sup>Earlier on, the Court had already famously established in the *Centro Com* case that even when exercising competence in the area of foreign and security policy, Member States have to respect (then) Community rules, *R. v HM Treasury Ex p. Centro-Com Srl* (C-124/95) [1997] E.C.R. I-81; [1997] 1 C.M.L.R. 555 at [27].

<sup>93</sup>C. Hillion and R. Wessel, “Restraining External Competences of EU Member States under CFSP” in *EU Foreign Relations Law*, 2008, pp.119–121.

Hence 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.

Stepping back further and taking into account the larger picture, two additional observations can be made. First, the duty of co-operation has not only transformed formerly sovereign countries into EU Member States which occasionally act as the Union's trustees, but it has also turned these EU Member States into "strange" subjects of international law,<sup>94</sup> whose external relations are considerably restrained by EU law obligations. Consequently, despite nominally remaining "sovereign" and "original" subjects of international law, their behaviour is meticulously monitored by the Commission, and where necessary (and possible) judged by the Court whenever they open their mouth when it is in the Union's interest that they remain silent. From a political point of view, this legal requirement reveals a great potential for frustration when it leads to lock both the Union and the Member States into a state of inaction. How, one is left to wonder, is the Union to attain its external objectives, apart from idle unity in representation, when no one speaks up?

Secondly, this "strange" character not only of the Union but also of its Member States on the international scene as well as the seeming boundless nature of the loyalty the Member States need to show towards the Union prompts a more general reflection of an old criticism of the Union's "autonomous", "constitutional" legal order. This concerns the argument that this "constitution" remains after all a duo of international treaties, and that ultimately the Member States remain the sovereign masters over them. The Treaty reform process and the various ratification problems the Lisbon Treaty encountered pointedly reminded us of this.<sup>95</sup> However, given the wide-ranging restrictions the duty of co-operation imposes on the Member States internationally, it fosters the impression that they are no longer the true masters of many of the other international agreements they concluded to the extent that the subject-matter of these agreements has come to be covered by EU competence (either exclusive or shared) and ECJ jurisdiction. Here it is the Union and its institutions that determine and monitor what the members can and cannot do. With the unfolding of the wide scope of the duty of co-operation and the strict duties that ensue from it, the Member States might well end up remaining masters of the EU Treaties, but of those only.

<sup>94</sup> B. De Witte, "The Emergence of European System of Public International Law: The EU and its Member States as Strange Subjects" in J. Wouters et al. (eds), *The Europeanisation of International Law* (The Hague: T.M.C. Asser Press, 2009), pp.39–54.

<sup>95</sup> See, e.g. M. Wendel, M. Belov and M. Angelov, "The Constitutional Paradigm revisited. Looking at the Lisbon Treaty with the eyes of Magritte" in I. Pernice and E. Tanchev (eds), *Ceci n'est pas une Constitution — Constitutionalisation without a Constitution?* (Baden-Baden: Nomos, 2009), pp.226–242.