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Disciplining Member States: EU Loyalty in External Relations

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Abstract

This Article argues that the cooperation obligations of the Member States under EU law are best understood as forming part of an overall duty of EU loyalty and elaborates on the consequences of framing it in this way. EU loyalty legally requires Member States to make the common EU interest their own. The Article further demonstrates that EU loyalty is more relevant and more stringently applied in EU external relations than within the EU legal order. Loyalty obligations of the Member States reach into the future, extend to hypothetical situations, and are at a comparatively high level of abstraction aimed to protect the Union's ability to act effectively on the international plane. This limits Member States' margin of manoeuvre, including when they take unilateral external action within the realm of their retained national competences. The Article explains that this may be functionally justified by the high stakes of non-concerted external action. However, and in particular with the EU's increased external powers and the ever-growing relevance of international cooperation, the stringent application of cooperation requirements should be (better) explicated and justified.

Keywords: EU loyalty, sincere cooperation, unity of international representation, external relations, mixed agreements, mixed membership

I. INTRODUCTION

The obligations flowing from the principle of sincere cooperation within the European Union (EU) legal order are best understood as amounting to a comprehensive duty of EU loyalty. The term 'loyalty' reflects and emphasises the distinctive meaning of EU membership. It emphasises the underlying understanding that the interaction between national and EU actors within the EU follows a cooperative logic and requires actors at all times to refrain from acting against the common Union interest. EU loyalty is central to imposing a quasi-federal discipline on Member States.

Formally, the encompassing cooperative logic is hung on the codified principle of sincere cooperation (Article 4(3) of the Treaty on European Union ('TEU')). Yet, the

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specific obligations arising from sincere cooperation in the Court of Justice of the European Union's ('CJEU') case law can only be fully understood through a lens of EU loyalty. In the relationship between the EU and its Member States, EU loyalty has been at the basis of other principles that are central to the functioning of the EU legal order, such as primacy and direct effect. It has also been the vehicle to open up the state and require a cooperative mindset from all national actors. In addition, and this is the focus of this Article, EU loyalty is even more relevant and has more stringent consequences externally than internally. The Union's particular struggles as a non-state actor to achieve its ambitious external objectives have, amongst other things, led the CJEU to specify EU loyalty obligations in the concept of 'unity in the international representation of the European Union'.¹ This concept, read in light of the overall duty of loyalty, can require Member States *not* to exercise powers that they retain under the EU Treaties and that they formally possess under international law. It may even require them to take specific action under international law. This testifies to the relevance and stringent application of EU loyalty in the context of EU external relations. It also triggers integrative dynamics.

While this more stringent application of EU loyalty may be functionally justified by the high stakes of non-concerted external action, the stringent application of cooperation requirements and the additional integrative dynamics flowing from this stringent application should be (better) explicated and justified. With the EU's increased external powers and with the ever-growing relevance of international cooperation, justifying the Union's external actions that limit Member States' margin of manoeuvre is a challenge of constitutional relevance.

EU external relations refers to all the EU's interactions with external actors, most notably third countries and international organisations. The EU has external relations in all different policy fields. They range from exclusive external policies, such as the common commercial policy, to internal policies that have an external dimension, such as the mutual recognition of civil judgments. In all these different substantive contexts, Member States retain the capacity under international law to act next to the Union, including in ways that could undermine the EU's position. They are international actors in their own right and maintain their own foreign policy.

The Union may potentially have a real added value as a powerful international actor but this potential can only be realised if the additional constraints on national autonomy are not met with opposition. A post-Lisbon increase in judicial challenges of Union external actions can already be demonstrated.² This opposition emphasises the need for justification of additional constraints on national autonomy.

¹ *Commission v Germany*, C-620/16, EU:C:2019:256, para 93; *Commission v Sweden*, C-246/07, EU:C:2010:203, para 73 (with more references).

² *Judicial challenges* concerning power relations in the area of external relations since the entry into force of the Lisbon Treaty: *Parliament v Council (UN Sanctions)*, C-130/10, EU:C:2012:472; *Commission v Council*, C-28/12, EU:C:2015:282; *Dai-Ichi Sankyo*, C-414/11, EU:C:2013:520; *Commission v Council*, C-114/12, EU:C:2014:2151; *Commission v Council (Services Convention)*, C-137/12, EU:C:2013:675; *Commission v Council*, C-377/12, EU:C:2014:1903; *Council v Commission*, C-660/13, EU:C:2016:616; *European Parliament v Council*, C-263/14,

Part II explains why the principle of sincere cooperation should be best understood as EU loyalty and what the consequences are of framing it in this way. Part III demonstrates that the discipline imposed on Member States by EU loyalty is stronger externally than internally (Section III.A) and explains the legal reasons for this (Section III.B). Part IV contextualises the argument in favour of a particular need to justify EU loyalty obligations. It reminds us of the ever-increasing external powers of the Union (Section IV.A), sets out the increased level of judicial and political challenges by Member States of the Union's external action (Section IV.B), and argues that constraints and obligations imposed on the Member States as a result of the Union exercising external powers must be better justified (Section IV.C).

This Article argues that externally EU loyalty is more relevant and imposes more stringent obligations. It demonstrates when and how Member States are subject to the discipline of EU loyalty, including when they act within their reserved competences. They must at all times protect the Union's credibility as an international actor and its ability to act internationally. This includes, for example, avoiding future conflict and refraining from voicing opposition to the EU's position in international organisations. Understanding Member States' cooperation obligations as a duty of loyalty reveals the deeper ordering effect they have on Member States' interests, their durable nature and transformative effect on the relationship between the Union and its Member States. The particular relevance of EU loyalty in external relations can be explained as the EU's legal means to counterbalance the EU's weakness as an international organisation under international law. It allows the EU to rein in Member States, even if under international law they remain at all times the stronger original and sovereign actor.

II. SINCERE COOPERATION AS EU LOYALTY

A. *The nature of loyalty*

Loyalty is '[t]he willing and practical and thoroughgoing devotion of a person to a cause'.³

Josiah Royce's philosophical engagement with the notion of loyalty remains the leading work in the field. 'Willing' refers in his definition to Aristotle's commander, who is not motivated by fear or trickery. The loyal person *chooses* to devote herself to the cause. 'Practical' refers to the need for the loyal person to *act* with a sense of devotion to a cause (objective element), rather than just thinking about the cause.

(Footnote continued)

EU:C:2016:435; *Commission v Council (Emission Trading System)*, C-425/13, EU:C:2015:483; *Commission v Council (Lisbon Agreement on Appellations of Origin and Geographical Indications)*, C-389/15, EU:C:2017:798; *Commission v Council (CMR-15)*, C-687/15, EU:C:2017:803; *Commission v Council (Antarctica)*, Joined Cases C-626/15 and C-659/16, EU:C:2018:925; *Commission v Council (PCA with Kazakhstan)*, C-244/17, EU:C:2018:662. See also P Cardwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions' (2015) 17 *Cambridge Yearbook of European Legal Studies* 287.

³ J Royce, *The Philosophy of Loyalty* (Macmillan, 1908), pp 16–17.

‘Thoroughgoing’ indicates that any such emotion and course of action must be of a certain duration and continuity and have some relevance for the person in a deeper sense, going beyond the specific action in question.

Royce further explains that ‘[s]ince loyalty is a relative term, and always implies some object, some cause, to which any given loyalty is to be shown, we must consider what are the fitting objects of loyalty’.⁴ Loyalty relates a subject (loyal person) to an object (cause). This is the *relational* aspect of loyalty, which closely relates to durability. Loyalty emerges from a relationship. It then defines that relationship. Loyalty triggers a change in interests that is *rational* and *justifiable*, not in a moral sense but by belonging to a group. It is rational and justifiable in that loyalty brings identifiable benefits for the loyal person.

Institutional loyalty, that is commitment to an institution, makes a fundamental contribution to the sustainability of that institution and the community acting within it. It ensures that members of that community remain committed, even if in individual instances the institution does not deliver the goods they expect or even acts against their individual interest. In other words, it establishes a commitment beyond one’s own immediate interest and the mutual trust in continuity, which sustains the ability to deliver the goods and allows members to invest for later returns. Institutional loyalty is part of the foundation upon which a community can be built wherein everyone contributes and benefits but not necessarily equally at every point in time. It transforms individual (national) interests to also comprise the common (EU) interest because of the overall expected better situation if everyone continues to act loyally.

B. EU loyalty: Consequences and justification

The ‘grand theories of EU integration’ have very different perspectives on loyalty.⁵ Neofunctionalism is very much at home with loyalty. It assumes that as part of political spill-overs, attitudes and behaviour changes and loyalties and expectations shift towards the centre.⁶ Intergovernmentalist theories, by contrast, do not assume that shifts in loyalty are necessary for cooperation within the EU or that they are even possible because of the limited resources and popular support of supranational institutions that limit their ability to expand their powerbase.⁷ Cooperation is based on reciprocity and this is sufficient and even desirable. Starting from a presumption of states as rational, utility-maximising actors in anarchic international surroundings, realist accounts of interstate cooperation equally question the possibility of loyalty shifts and deny that loyal behaviour can be expected, except if it is enforced by the Court.⁸

⁴ Ibid, pp 14–15.

⁵ L Hooghe and G Marks, ‘Grand Theories of European Integration in the Twenty-First Century’ (2019) 26(8) *Journal of European Public Policy* 1113.

⁶ E B Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957* (Stanford University Press, 1958), p 16.

⁷ A S Millward *The European Rescue of the Nation State* (Routledge, 1992).

⁸ See typology by M Pollack, ‘Realist, Intergovernmentalist, and Institutionalist Approaches’ in E Jones, A Menon, and S Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012).

Within the Treaty framework, a cooperative logic finds expression most apparently in the principle of sincere cooperation in its general formulation in Article 4(3) TEU, which is applicable to both the Member States and the EU institutions and in the more specific formulations applicable to the EU institutions (eg Article 13(2) TEU) and Member States (eg Article 351(2) TFEU). The reading of this cooperative logic as loyalty is inherent in the commitment to the unlimited duration of the Union,⁹ and the deontological formulation of sincere cooperation, focusing on duty rather than the actual consequences of an action or omission.

In landmark cases such as *Costa v ENEL* (*primacy*) and *Francovich* (*Member State liability*), the CJEU relied on sincere cooperation when establishing bold constitutional principles.¹⁰ In other words, sincere cooperation interpreted as justifying a general duty of EU loyalty is the very source for core characteristics of EU law that ensure its unique effectiveness and the functioning of the EU legal order.

Sincere cooperation further applies to all emanations of the Member States, that is to all national authorities: legislature, executive, and judiciary.¹¹ The national legislature for example is required to 'refrain from taking any measures liable seriously to compromise the result prescribed' by a given directive, including during the period of transposition.¹² Particularly strict cooperation duties are imposed on the national judiciaries.¹³ In settled case law, the principle of sincere cooperation requires national judges to ensure effective judicial protection of rights under EU law,¹⁴ including raising EU law of their own motion.¹⁵ It is also the origin of limits imposed on national procedural autonomy.¹⁶

⁹ Article 53 TEU.

¹⁰ In the landmark case of *Costa v ENEL*, C-6/64, EU:C:1964:66, the CJEU referred to sincere cooperation as one of a number of principles justifying primacy. In *Confédération paysanne*, C-298/12, EU:C:2013:630, para 37, the Court exclusively bases primacy on 'cooperation in good faith'.

¹¹ For notification duties of the executive, see eg *Kortas*, C-319/97 EU:C:1999:272.

¹² *Inter-Environnement Wallonie*, Case C-129/96, EU:C:1997:628, para 45 (the case concerned an order from the Walloon Council).

¹³ *Zwartveld*, C-2/88, EU:C:1990:440, para 18; *Marleasing*, C-106/89, EU:C:1990:395, para 8; *Peterbroeck*, C-312/93, EU:C:1995:437; *Dior*, Joined Cases C-300-392/98, EU:C:2000:688; *Kühne & Heitz*, C-453/00, EU:C:2004:17, paras 24–27; *Laboratoires Boiron*, C-526/04, EU:C:2006:528, paras 55, 57; *VTB-VAB and Galatea*, Joined Cases C-261-299/07, EU:C:2009:244, para 39; *Marra*, Joined Cases C-200-201/07, EU:C:2008:579, para 41; *Stergios Delimitis*, C-234/89, EU:C:1991:91 (Commission vis-à-vis national judiciary); *Commission v Austria*, C-205/06, EU:C:2009:118, para 44 (Commission must facilitate cooperation between Member States); *Confédération paysanne*, note 10 above, para 37; *Pupino*, C-105/03, EU:C:2005:386, para 42–43 (principle of loyal cooperation applicable in the former third pillar and in particular on the national courts). See also 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* (Hart Publishing, 2008), p 158.

¹⁴ *Lesoochránárske zoskupenie VLK (Slovak Bear II)*, C-243/15, EU:C:2016:838, para 50. See on the ambiguous use of effectiveness and effective judicial protection in the case law, J Bergström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty' (2011) 4 *Review of European Administrative Law* 53.

¹⁵ *Peterbroeck*, note 13 above.

¹⁶ *Rewe-Zentralfinanz*, C-33/76, EU:C:1976:188, para 5 ('impossible in practice'); *Surgicare*, C-662/13, EU:C:2015:89 ('impossible in practice or excessively difficult').

The potential extent of EU loyalty in determining obligations of specific national authorities, including vis-à-vis each other became apparent in the case of *Costanzo*. In this case, EU loyalty was interpreted as prevailing over the relations of loyalty *within the state*.¹⁷ The CJEU explicitly referred to primacy and loyal cooperation to hold that national administrators must set aside national legislation that is contrary to EU law.¹⁸ This triggered a stream of protests from administrative lawyers, especially those from Germany. They argued that this obligation flowing from EU loyalty would erode the principle of administrative legality, and with it the loyalty of the executive to the legislative branch.

Interestingly, the CJEU also construes institutions typically associated with loyalty to the (nation) state—as for example (certain) oaths by public officials—in the light of EU law as being open to nationals of other Member States.¹⁹ The Court found Belgium, for example, in breach of EU law for imposing a nationality condition for access to the profession of civil-law notary. In other words, the CJEU's reading of EU loyalty, first, Europeanises the concept of loyalty within the (nation) state in a way that widens it to expect loyal relations also between EU citizens and their host state. Second, it may oblige national authorities to give priority to their loyal obligations towards the EU (institutions) over their loyal relations towards their fellow national authorities. Loyalty here opens up the Member State and is a means to make other principles of EU law effective, such as non-discrimination on the basis of nationality.

While loyalty is deeply reflected in the EU Treaty framework and in the case law of the CJEU, it is, nonetheless, not trite to call the mutual commitment of Member States and EU institutions towards each other and towards the overarching cause of a functioning Union by what it is: loyalty. It emphasises a neofunctional reading of EU integration by placing emphasis on the devotion of all actors at all times to the overarching cause of the unlimited existence, functioning, and unity (in international representation) of the Union, as well as a commitment to changing their interests by seeing the common interest as part of their national interest.

While the CJEU seems to have never used the term *fidelity*, its understanding of EU loyalty is similar to a thick concept of federal fidelity in some federal states, such as Germany or Austria.²⁰ *Loyalty* however pays more tribute to the emotional imaginative dimension of the relationship. Loyalty is different from comity as a poorly defined concept in US law, from which much less far-reaching obligations flow,²¹ or from comity used in the context of international law. The latter requires

¹⁷ *Costanzo*, C-103/88, EU:C:1989:256. See also *Lucchini*, C-119/05, EU:C:2007:434, in which the Court, drawing on loyal cooperation, held that the duty of the Member States, eg national governments, to recover illegal state aid could justify ignoring the principle of *res judicata*. This could be read as an erosion of the power of national courts over the other branches of government.

¹⁸ The Court uses loyal and sincere cooperation interchangeably. This is also what this Article does.

¹⁹ *Commission v Belgium*, C-47/08, EU:C:2011:334, para 141 et seq.

²⁰ M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014), pp 32, 55 et seq.

²¹ M Tushnet, 'What Then Is the American?' (1996) 38 *Arizona Law Review* 873, 879–81, emphasising the adversarial nature of interaction between the federate and federal level within the United States.

cooperation and consideration of the interest of the other; yet, it is usually limited to enforcement of foreign decisions, based on a *reciprocal* logic, and does not presuppose a relationship of duration.

Loyalty, as explained above, is *also rational*, in that it has benefits for the loyal actor. Part of why Member States agree to EU loyalty and why specific far-reaching obligations can be imposed on them in practice is because European integration may also be rational from a purely consequentialist perspective, with advantages for economic welfare, effectiveness of regulation and economies of scale. In other words, membership of the Union could be seen as rational to the extent that the Union's problem-solving capacity in a globalised world exceeds in certain areas that of the Member States. In addition, continuous loyalty within the EU is rational because all actors involved have interlocking stakes resulting from ongoing integration and cooperation and face high costs if they decide to leave or let fail the European integration project. However, any deep and ordering loyalty commitment requires explicit justification because it may require an adaptation of purely national interests to also consider the common interest in way that must also be justified by the commitment and benefits of loyal membership. In other words, instrumentalist considerations support loyalty as a rational choice as far as it is overall beneficial to the Member State. Yet, the Court's reading of loyalty requires that Member States act loyally even if the benefit is not immediately apparent, but only vaguely connected to serving the common objective and the expectation that the others act overall loyally.

III. THE EFFECTS OF LOYALTY IN EU EXTERNAL RELATIONS

EU loyalty is both more relevant and applied more stringently by the CJEU in the context of external relations than within a purely internal context. EU external relations law historically developed from the CJEU's case law. With initially only very few codified external competences of the Union, the Court established the principles pursuant to which the Union could take external actions. While the Union's external competences and objectives are more extensively codified at present, it continues to face particular struggles as a derivative rather than primary actor under international law. The Union's legally weaker position under international law stands at times in the way of exercising effective international influence.

The case law discussed in this Part demonstrates that the Court interprets the codified principle of sincere cooperation in external relations as a duty of EU loyalty of Member States. The Court interprets this duty as 'thoroughgoing', that is durable, by extending it to hypothetical or future clashes—such as the *Bilateral Investment Treaty* ('BIT') cases and *Opinion 1/13*, discussed further below. The Court rejects the argument of reciprocity—the *International Maritime Organisation* ('IMO') case, discussed further below—and so assumes mutual trust in continuity and mutual benefit in the long run beyond one's immediate interest. This assumption reflects the Court's understanding that the relationships between the Union and its Member States are characterised by loyalty rather than reciprocity as the relationships between States under international law. Finally, the Court requires Member States to act on

‘the Union’s behalf’ and hence represent the Union’s position and interest even when it is not present—*OIV* case).

A. *Sincere cooperation as a foundational principle of EU external actions*

The principle of sincere cooperation has played a central role in the development of obligations of Member States in the context of EU external relations. This section discusses a number of cases that illustrate how it is interpreted as EU loyalty and so creates far-reaching obligations that do not directly flow from a *prima facie* reading of the letter of the Treaties, but that are essentially inherent in the nature of a Union of unlimited duration and with ambitious external objectives as it was agreed in the Treaties.

1. *Protecting the Union’s capacity to act*

In the landmark case of *ERTA* (1971),²² for example, which is most known for establishing the doctrine of implied powers, EU loyalty played a central role. The dispute raised the issue of who—the EU or the Member States—had the competence to negotiate and conclude an international agreement with Switzerland regarding transport on inland waterways and whether the possible EU competence pre-empted Member States from taking national action. The CJEU explicitly based the obligation of Member States to abstain from national action when the Union has adopted a common position on the codified principle of sincere cooperation.²³ At the time of *ERTA* (1970), sincere cooperation was ‘the only appropriate Treaty provision’ to impose such far-reaching limitations on the treaty-making authority of the Member States.²⁴ Since the entry into force of the Lisbon Treaty, the *ERTA* doctrine of pre-emption is codified in Article 3(2) TFEU. Ever since *ERTA*, sincere cooperation has played an important role in determining the scope of manoeuvre of the Member States. It continues to do so in the post-Lisbon era.

The *BIT* cases (1999–2009)²⁵ focused on Member States’ obligations under Article 351(2) TFEU. This provision is a specific expression of sincere cooperation and obliges Member States to take all appropriate steps to eliminate incompatibilities with Union law which have been established in agreements concluded prior to their accession. The cases concerned several Member States that had concluded a series of BITs.

²² *Commission v Council*, C-22/70, EU:C:1971:32.

²³ *Ibid.*, paras 20–22.

²⁴ Klamert, note 20 above, p 75.

²⁵ Bilateral Investment Treaty cases (*Commission v Austria*, note 13 above, paras 1–3, 16–45; *Commission v Sweden*, C-249/06, EU:C:2009:119; *Commission v Finland*, C-118/07, EU:C:2009:715; see also eg *Commission v Belgium*, C-170/98, EU:C:1999:411; *Commission v Portugal*, C-84/98, EU:C:2000:359; *Commission v Portugal*, C-62/98, EU:C:2000:358. See for more details, J Kokott and C Sobotta, ‘Investment Arbitration and EU Law’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 3.

The Court held that it was sufficient that there was *a possibility* that restrictive measures (sanctions) adopted by the Union in the *future* might conflict with the national BITs for Member States to have to renounce or renegotiate them. In one case, the Advocate General discussed explicitly that there was *no actual conflict* with the Union's competence to adopt restrictive measures or any other specific Treaty provision but that it, nonetheless, breached the principle of sincere cooperation.²⁶ In other words, the Court interpreted the Member States' specific obligation to eliminate incompatible prior treaty obligations as reaching into the future and requiring Member States to rule out even hypothetical conflicts. This testifies to the Court's encompassing understanding that Member States should act loyally towards the common interest, including taking action now to protect it from potential interference in the future. The *BIT* cases raised considerable scholarly criticism for unduly restricting Member States as autonomous international actors.²⁷

The particular point that even *future conflicts* must be avoided by acting in the present was confirmed in *Opinion 1/13* (2014).²⁸ In this Opinion, the Court was asked to address the accession of third countries to the Hague Convention on the Civil Aspects of International Child Abduction. The CJEU interpreted the third option in Article 3(2) TFEU—namely that the EU has exclusive competence for the conclusion of an international agreement insofar as its conclusion 'may affect common rules or alter their scope'—as extending to potential future effects on the implementation of EU law. It concluded that it is not necessary that the full scope of the international agreement corresponds to internal rules, but that it is sufficient that this is largely the case.²⁹ It further held that allowing Member States to act unilaterally would create 'a risk of undermining the uniform and consistent application' of EU rules and, in particular, 'the rules concerning cooperation between the authorities of the Member States, whenever a situation involving international child abduction involved a third State and two Member States, one of which had accepted the accession of that third State to the Convention whilst the other had not'.³⁰ Again, a reasonably likely future conflict sufficed to establish exclusive Union competence.

The extension of cooperation obligations to cover potential future conflicts and protect the Union's ability to take action into the future, including on issues that have not yet found expression in any specific instrument or common position, confirms the Court's reading that the relationships between the Member States and the Union are based on loyalty and carry meaning beyond the present. The cases also confirm the particularly stringent nature of EU loyalty in external relations. One

²⁶ *Commission v Finland*, C-118/07, EU:C:2009:525, Opinion of AG Maduro, paras 23 et seq.

²⁷ See E Denza, 'Bilateral Investment Treaties and EU Rules on Free Transfer: Comment on *Commission v Austria*, *Commission v Sweden* and *Commission v Finland*' (2010) 35(2) *European Law Review* 263, 269 et seq.; N Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law' 9(3) (2010) *The Law and Practice of International Courts and Tribunals* 409, 421 et seq.

²⁸ *Opinion 1/13*, EU:C:2014:2303.

²⁹ *Ibid.*, para 72.

³⁰ *Ibid.*, para 89.

difference between external relations and purely internal situations was discussed by AG Maduro. He compared the tensions between the BITs of the Member States and the Union's potential future sanctions policies with the transposition period of a directive during which Member States are prohibited from taking action that would jeopardise the objectives of the directive.³¹ Internally, a common position must have formally been adopted for Member States to be subject to loyalty obligations. A directive, for example, triggers loyalty obligations of the Member States once it has been adopted and before it has entered into force.³² However, it is not sufficient that the Commission has made a proposal for a legal instrument. In the *BIT* cases, no common position of the Union had been established (yet), not even an internal discussion on any specific position or potential conflict that might lead to the imposition of sanctions had taken place. This made the future conflict almost hypothetical. In other words, shared competences can internally be exercised by Member States as long as the Union has not (yet) exercised them, and while the Union's exercise of internal competences is subject to the principle of subsidiarity. Externally, by contrast, shared competences cannot be exercised at national will even before the European Union has acted (the *PFOS* case, discussed further below). Subsidiarity considerations do not play a role as long as the Union does not act.

2. *Protecting a common position*

Another example of where EU loyalty deploys its integrative forces is when Member States have to take a common position within an international organisation on behalf of the Union. A case in point is the *International Maritime Organisation (IMO)* case (2009),³³ in which the CJEU ruled that Greece breached the principle of sincere cooperation and that—different from the principle of good faith under international law—sincere cooperation is mutual but not subject to considerations of *reciprocity*. The Court held that the Member State attempting to initiate the internal decision-making process would have to continue acting loyally irrespective of whether the Commission had infringed its own duty to cooperate sincerely, for example, by failing to put the proposal up for discussion.³⁴ This argument on the lack of reciprocity can be contrasted with the CJEU's case law on Union obligations under international law. In the Union's relations with third countries, the CJEU argued that lack of reciprocity justified not giving direct effect to international obligations of the Union (eg World Trade Organization ('WTO') law).³⁵ The lack of reciprocity was also used by AG Bot in *Opinion I/17* (2019) as an argument to support the need for an additional enforcement mechanism—investor state dispute settlement ('ISDS') mechanisms—

³¹ *Commission v Finland*, note 26 above, Opinion of AG Maduro, paras 23 et seq.

³² *Inter-Environnement Wallonie*, note 12 above.

³³ *Commission v Greece*, C-45/07, EU:C:2009:81 (hereinafter 'IMO case').

³⁴ *Ibid.*, paras 24–26.

³⁵ *Portuguese Republic v Council of the European Union*, C-149/96, EU:C:1999:574, paras 34–46. See also *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, C-21/72, EU:C:1972:115, para 21.

in trade agreements.³⁶ Hence, while the relations between the Member States and the EU institutions are not subject to a logic of reciprocity because they are characterised by loyalty, the relations between the Union and third countries are subject to the logic of reciprocity because they are not characterised by loyalty.

Another post-Lisbon case concerning a common position of the Union in an international organisation that has attracted considerable criticism is the *OIV* case (2014).³⁷ Germany, supported by seven other Member States, challenged a Council Decision establishing the position to be adopted on behalf of the European Union in the framework of the International Organisation of Vine and Wine ('OIV').³⁸ The decision was based on a new provision introduced under the Lisbon Treaty, that allowed the Council to adopt positions 'on the Union's behalf'. The Court did not, by contrast to Germany, refer to sincere cooperation in *OIV*. However, while the case concerned *the Council* taking a position on behalf of the Union based on Article 218(9) TFEU, *the Member States* had to take the Union's position in the OIV, and fully support and act in conformity with this position. This latter obligation flows from EU loyalty.

Germany's argument was quite straightforward: if the Union is not a party to an international agreement, the Treaty does not allow the Council to establish positions to be adopted in bodies set up by that agreement. The Court rejected this argument and upheld the Council decision. In other words, Member States must at all times keep the interest and position of the Union in mind and even act on its behalf, where it is prevented from doing so, for example because the founding treaties of an international organisation only admit states as contracting parties. The *OIV* case confirms that this remains the case even where the Union is not present at the negotiations of an international agreement or in the international bodies established under that agreement. Hence, even where Member States have concluded the agreement alone, they may be prevented from submitting their own proposals within the international body—and ultimately, be obliged to defend a Union position—even if they previously internally opposed it in the Council.

3. *Protecting the Union's unity in international relations*

The *PFOS* case (2010)³⁹ is a further, often criticised⁴⁰ example of loyalty obligations of the Member States in the context of external relations, which illustrates in

³⁶ Opinion 1/17, EU:C:2019:72, Opinion of AG Bot, para 72 et seq.

³⁷ *OIV*, C-399/12, EU:2014:2258 (hereinafter '*OIV* case'). Examples of critical voices are, I Govaere, 'Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The *OIV* Case' in I Govaere, E Lannon, P Elsuwege, and S Adam (eds) *The European Union in the World* (Brill Nijhoff 2014); T Konstadinides, 'In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the Field of External Representation: Case C-399/12 *Germany v. Council*, Judgment of the Court of Justice of 7 October 2014, nyr' (2015) 21(4) *European Public Law* 679.

³⁸ *OIV* case, note 37 above.

³⁹ *Commission v Sweden (PFOS)*, C-246/07 EU:C:2010:203 (hereinafter *PFOS*, C-246/07).

⁴⁰ See A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *European Law Review* 522, 534 et seq.; F Casolari 'The Principle of Loyal Co-operation: A "Master Key" for EU External Representation?' in S Blockmans and R

particular the difference between internal and external obligations. The case concerned the question of whether Sweden breached the principle of sincere cooperation by unilaterally making a proposal under the Stockholm Convention on Persistent Organic Pollutants. Environmental matters are a shared competence. *PFOS* is particularly interesting because it highlights the different treatment of internal and external actions by the Member States and because it explicitly discusses the pressure that external actions by the Member States may have on the internal decision-making procedure.

PFOS hinged on the concept of ‘unity in international representation’. The unity in international relations of the Union is one expression of sincere cooperation in external relations.⁴¹ The CJEU often uses this concept to justify specific cooperation obligations of the Member States.⁴² In fact, at times, the CJEU appears to use unity as a rationale for the *existence* of the duty of cooperation rather than *as its objective*.⁴³ When the EU and the Member States conclude a mixed agreement, that is, when they act together as one party to the agreement, the duty of loyalty and the specific obligations not to jeopardise Union action may even extend to non-participating Member States.⁴⁴ Furthermore, the unity of international representation also comes into play, when the Union is not a member of the international regime.⁴⁵

The case demonstrates how loyalty obligations can restrict Member States from exercising powers externally that they would have been able to exercise internally. Internally, Sweden could have adopted a prohibition of the substance they proposed to the other parties under the Stockholm Convention (*PFOS*) because Article 193 TFEU specifically allows for more stringent national measures. Externally, the Court concluded that this was not the case because of the crucial difference that internal national actions, such as the introduction of more stringent standards, do not have an impact on the Union, while when they are taken externally they could very well have consequences for the Union. Hence, the problem was that Sweden submitted its proposal to the ‘institutional and procedural framework’ of the Stockholm Convention and that this directly limited the Union’s margin of manoeuvre.⁴⁶ The Court concluded that it was unclear whether the rule disallowing concurrent exercise of rights by the EU and its Member States allowed the EU to opt out

(*F*note continued)

Wessel (eds), *Principles and Practices of EU External Representation* (CLEER Working Papers 2012/5), p 20.

⁴¹ *Green Network SpA*, C-66/13, EU:C:2014:156, Opinion of AG Bot, para 103.

⁴² Opinion 2/13, EU:C:2014:2454; Opinion 2/91, EU:C:1993:106, para 36; see also *PFOS*, EU:C:2009:589, Opinion AG Maduro, para 37.

⁴³ Opinion 2/91, note 42 above, para 36.

⁴⁴ M Cremona, ‘External Relations of the EU and the Member States: Competences, Mixed Agreements, International Responsibility, and Effects of International Law’ (EUI, 2006) Working Paper 22/2006, p 5 (on the position of Denmark in the context of the Lugano II Convention).

⁴⁵ *OIV* case, note 37 above.

⁴⁶ *PFOS*, C-246/07, note 39 above, para 103.

from a proposal that was suggested by one of its Member States.⁴⁷ It concluded that the proposal would give rise to ‘legal uncertainty’ and, therefore, ‘has consequences for the Union’.⁴⁸ The Court concluded that ‘[t]he Union could be bound by an amendment to an Annex to the Stockholm Convention whereas it is not bound by national measure’.⁴⁹

The *PFOS* ruling is further interesting as regards the consequences of Sweden’s action on the EU internal decision-making process. Advocate General Maduro in particular was concerned that a Member State might use external competences, or at least the threat of using them, to influence internal decision making. He argued that this might disturb ‘the internal balance of power of the Community decision-making process’.⁵⁰ This is in line with the Commission’s argument that Sweden’s action unilaterally pre-empted further discussion in the Council. Disloyal external actions of the Member States may result in, or at least contribute to, legal commitments of the Union or the Member State, for example through decisions of bodies of international organisations to which the Union or the Member States are parties. These legal commitments usually cannot be unilaterally revoked. It is the objective of the duty of loyalty to prevent this from happening. It requires that all influences on the internal decision-making process must follow the internal rules and does not make use of pressures by third parties or the argument of international legal obligations that cannot be unilaterally renounced. In the end, this may even establish a duty to act in a concerted fashion only, which applies in principle to both the Member States and the Union institutions.

In 2019, Germany was found to infringe the principle of sincere cooperation and more specifically the requirement of the unity in international representation of the Union by voting against, and publically voicing opposition to, a Council decision adopted in the context of the Intergovernmental Organisation for International Carriage by Rail (‘OTIF’).⁵¹ The Court relied on *PFOS*, confirmed its stringent application of this requirement, and emphasised that the ‘detrimental effects’ of the infringement ‘call into question the unity and consistency of the EU’s external action, beyond the specific decision-making process concerned’⁵² and ‘harm the effectiveness of the international action of the European Union, as well as the latter’s credibility and reputation on the international stage’.⁵³ The Court’s wide framing of the potential detrimental effects highlights the relevance of the stringent reading of sincere cooperation as loyalty for the Union’s ability to act effectively and credibly despite its comparatively weaker position as a derivative actor under international law. The Court’s loyalty framing also explains its position that it is about the

⁴⁷ Ibid, paras 98–99.

⁴⁸ Ibid, para 101.

⁴⁹ Ibid, para 102.

⁵⁰ *PFOS*, Opinion AG Maduro, note 42 above, para 56.

⁵¹ *Commission v Germany*, C-620/16, EU:C:2019:256.

⁵² Ibid, paras 45–47.

⁵³ Ibid, para 98.

Union's credibility and reputation in the long run, rather than about the concrete effects in the specific instance.

The Court hangs its considerations on the specific obligations of the Member States on sincere cooperation; yet, its interpretation of the Member States' duty vis-à-vis the Union goes far beyond the wording of the provision on sincere cooperation. It also covers hypothetical or future conflicts with Union interests, assuming a lasting relationship in which the Union's capacity to act is a common objective.

The duty of loyalty also binds Member States when they exercise retained national competences. In other words, it carries meaning beyond the Union's competences, whether exclusive or shared and exercised. It serves the broad purpose to protect Union *interests*. Actions of the Member States, either individually or collectively, are affected by their duty of loyal cooperation whenever such actions have a bearing on the Union's ability to pursue its objectives, interests, or on existing or future EU law.

PFOS in particular also gives a first glimpse of *why* loyalty obligations in external relations are more stringently interpreted than for purely internal national action. It related closely to the effect of Sweden's unilateral action to bind the Union's hands in the decision-making procedure of the Stockholm Convention and the potential effect of influencing internal decision making within the Union unduly by creating irreversible facts, that is the prohibition of a substance under the Stockholm Convention. In the next section, more structural underlying reasons for this more stringent application are discussed.

Finally, in particular the recent cases (*OIV* case, *Opinion 1/13*) are also an illustrative demonstration of Member States' *regret* when the Union exercises the powers newly given to it under the Lisbon Treaty. Section IV.B expands on the post-Lisbon pushback by Member States against Union external actions.

B. The Union as a non-state actor depends on the loyalty of its Member States

The Union is a peculiar external actor. It has an explicit and detailed agenda for its external actions;⁵⁴ yet as a non-state actor, it is not a primary subject of international law and as such possesses more limited rights and obligations under international law. In addition, it is not a unitary actor, nor is it treated as such under international law. This makes it additionally difficult for the Union to attain its ambitious external objectives. The Union's nature as a non-state actor makes it depend on the loyal cooperation of its Member States.

1. Necessary reduction of complexity

Both the Member States and the Union are subjects of international law. Not only do they have the formal ability to enter unilaterally into internationally binding obligations, they also actively pursue their own foreign policy. Within the EU, every action

⁵⁴ Article 21 TEU.

is preceded by the question of who is competent: the EU or its Member States. Often, competence is divided along lines that are internally and idiosyncratically motivated rather than driven by the content of policy choices. As a result, rather artificial construction must at times be found to make the EU as a whole capable of acting (effectively). Many of these constructions result in a formal mismatch between competences and actions that blurs and obscures responsibilities. Illustrative examples are mixed agreements and constructions where the Member States act on behalf of the Union in an international organisation.

Where relations with non-EU actors, such as the conclusion of international agreements, do not align with the internal competence division, they often require the Union and the Member States to agree, present, pursue or at least refrain from jeopardising a concerted position at the negotiation stage, including when facing new information, negotiation tactics, or political pressure of non-EU actors.⁵⁵ Furthermore, in certain contexts, for example when the Union and its Member States jointly conclude a mixed agreement, the actions of both the Union and the Member States that are required to implement an international agreement are often inextricably interlinked and interdependent. This means that, after the agreement is concluded, the Union and the Member States must continue to cooperate closely in order to avoid international responsibility for non-compliance with the obligations under the agreement. Such international responsibility would moreover, on many occasions, be borne jointly by the Union and the Member States, even if only one of the actors breached their international law obligations.⁵⁶ Internally, by contrast, each institutional actor and representative of the Member States may in principle at all times voice their position and even change their mind in the course of the decision-making process.⁵⁷ Furthermore, each actor is directly and separately responsible for breaching procedural or substantive obligations under EU law.

Additionally, international agreements are more difficult to amend than internal legal acts. While the law-making process within the Union is often perceived as slow and cumbersome, the conclusion of comprehensive international agreements requires even more resources in terms of time and effort.⁵⁸ Once legal facts, such

⁵⁵ *PFOS*, note 39 above.

⁵⁶ *Hermès International*, C-53/96, EU:C:1997:539, Opinion of AG Tesauro, para 21. See also PJ Kuijper, 'International Responsibility for EU Mixed Agreements' in C Hillion and P Koutrakos (eds), *Mixed Agreement Revisited – The EU and its Member States and the World* (Hart Publishing, 2010).

⁵⁷ *Italy v Council (premium for potato starch)*, C-166/78, EU:C:1979:195, para 6. Reaffirmed in *Commission v Parliament and Council (Comitology)*, C-378/00, EU:C:2003:42, para 28; *Parliament v Council (Schengen Borders Code)*, C-355/10, EU:C:2012:516, paras 37–40.

⁵⁸ The difficulty of agreeing multilateral treaties is illustrated by the Arms Trade Treaty which was registered in December 2014, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVI-8&chapter=26&clang=_en, for which the General Assembly started seeking views of the UN Member States on a legally binding instrument establishing common international standards for the import, export, and transfer of conventional arms in 2008. See GA Resolution 61/89 and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980, which arose from the conclusions of a working group which was established in 1969.

as for example the conclusion of an international agreement, are created, they are more difficult to reverse than internally. In addition, international norms agreed to in an international treaty or produced by a body established as part of multilateral cooperation are at the same time difficult to change and difficult to ignore. They are often very influential within the legal and political discourse, including the domestic discourse.⁵⁹ While at the same time, these international norms are largely removed from domestic politics and can often only be rejected categorically, rather than made subject to debate and amendment. The same is true for the division of competences between the Union and its Member States. This legal and political entrenchment is precisely what makes constructions such as mixed agreements necessary to avoid freezing the division of powers between the Union and its Member States under an international agreement.

2. *The Union's weakness under international law*

The Union is in a comparatively weaker position under international law than the Member States. This is inherent in its position as a derivative rather than primary subject of international law. The Union's own existence derives from a Treaty between the Member States.

Within the logic of international law, the Union is not an autonomous and domestic legal order, its territory is that of the Member States, and it does not have the protected ability to determine the legal position of its citizens. International law is steeped in the concept of state sovereignty. It sees the Union as an international organisation, or at best as a regional economic integration organisation ('REIO') which, while it enjoys additional rights in certain contexts, is still an international organisation. While it can legally bind itself, in principle on eye level with states, the Union is 'neither sovereign nor equal'.⁶⁰ It remains, from the perspective of international law at least, partially penetrable, in that behind the organisation there are still the Member States. The Member States remain the sovereign actors that retain the legal capacity and formal powers to conclude binding agreements with regard to their territory, to an extent irrespective of the Union's actions and EU law.

3. *Externally, the stakes are different*

While internally unranked and irreconcilable claims of autonomy and authority exist side by side, externally the stakes and constraints are different. Firstly, national actors

⁵⁹ For example, recommendations and opinions of several international bodies feature prominently in the discourse around Ireland's recent repeal of its abortion ban. Eg the UN Human Rights Committee ('UNHRC') in *Mellet v Ireland*, Human Rights Committee, Communication No. 2324/2013, UN Doc. CCPR/C/116/D/2324/2013 (2016) and *Whelan v Ireland*, Communication No. 2425/2014 CCPR/C/119/D/2425/2014 (2017); and the ECtHR in *A, B and C v Ireland* (2011) 53 EHRR 13, but also the World Health Organization ('WHO') guidelines (see WHO (2012) Safe Abortion: Technical and Policy Guidance for Health Systems, http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf).

⁶⁰ C Brölmann, 'A Flat Earth? International Organizations in the System of International Law' (2001) 70 *Nordic Journal of International Law* 319.

and law interlock with European actors and law in a tight embrace. This is illustrated by the formalised judicial cooperation between the Court of Justice and national courts, in particular in the preliminary ruling procedure. Secondly, all actors involved have a clear and multifaceted stake in a well-functioning and effective Union. Indeed, within the EU legal order, any structural non-compliance or fundamental challenge comes at great cost. A complete collapse would come at unimaginable cost. Externally, by contrast, the stakes are very different. Non-EU actors are game changers for the cooperative relations of the Union and its Member States. External actors are not part of the interlocking embrace. They are not subject to the jurisdiction of the Court of Justice. They do not share the same interest in the functioning of the European project. They are not only able but also much more likely to reject requests of adaptation of international law to accommodate the particularities of the Union and challenge the Union's (international) position.⁶¹

Most importantly, external actors are not subject to the primacy of EU law. The primacy of EU law requires national actors to disapply a rule of national law that infringes EU law. This allows national courts to hold national administrations, as well as governments, in check. Non-EU actors are under no general obligation to disapply an international rule that is contrary to EU law. On the contrary, they may legally be on safe and sturdy ground to ignore EU law.

4. *Institutional control in external relations*

Moreover, on a scale between the rule of law and state power politics, international law gives considerably more room to the latter than EU law. EU law proceduralises joint decision making and submits state action within the scope of EU law to the control of (largely) autonomous, supranational institutions—that is the Court and the Commission. Hence, when law-making takes place in external relations rather than within the EU legal order this strengthens the executive.

Additionally, judicial review of foreign affairs is traditionally subject to constraints, both under formal law and judicial practice. Courts demonstrate a higher level of deference to foreign relations than to internal policymaking.⁶² This in turn vests national executives under international law with additional leeway as compared to their leeway with regard to 'internal' actions. Furthermore, individuals often cannot directly rely on, or challenge international agreements in court.⁶³ This makes the specific judicial cooperation mechanism of the preliminary ruling procedure less effective in the context of external relations and institutionally weakens the

⁶¹ Eg when the EU sought to become an observer in the UN General Assembly in 2010 and other states in the General Assembly voted against this. See L Phillips, 'EU Wins New Powers at Global Body, Transforming Global Body', *EU Observer*, 3 May 2011, <https://euobserver.com/foreign/32262>.

⁶² See eg Thomas Franck, *Political Questions Judicial Answers – Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press, 1992); PJ Kuijper et al, *The Law of EU External Relations*, 2nd ed (Oxford University Press, 2015), p 655. For recent developments in this area, see also S Poli, 'The Common Foreign Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law' (2017) 54 *Common Market Law Review* 1799.

⁶³ See the CJEU's case law denying direct effect of WTO law.

Union's ability to ensure the effectiveness of EU law via national courts within the national legal orders.

By way of conclusion, Member States remain able to enter into binding agreements that may have an entrenched and powerful normative force on, and within, the Union. They can create rights for non-EU actors that are not legally obliged to comply with EU law, are not subject to the primacy of EU law, and do not share the same interest in avoiding conflict and cooperation failure. They hence possess formally legally different means under international law than they possess under national law, where national courts hold them to respect the primacy of EU law.

To allow the Union to act as an autonomous and effective international actor, despite all these potential challenges to its position, the Court stringently interprets and applies the agreed legal framework for cooperation under the European Treaties, in particular EU loyalty obligations. This stringent interpretation triggers hidden integrative effects in the context of EU external actions, which become more relevant and controversial with the EU's increased powers.

IV. EXPANDING POWERS, PUSHBACK, AND NEED FOR JUSTIFICATION

The tensions from the EU's extended external powers, the integrative effects of the CJEU's case law in external relations and the constraints on Member States' autonomy have become more apparent since the entry into force of the Lisbon Treaty. With the EU exercising its extended external powers it is likely that national pushback increases.

A. Extended EU external competences

Member States have given the European Union more external powers with every Treaty amendment. Many of these amendments codified existing practices and case law of the Court of Justice. However, Member States have also strengthened the constitutional framework of EU external relations above and beyond existing practices because they want to increase their capacity through the European Union jointly to control their fate in an interconnected and interdependent world. The Lisbon Treaty prominently extended the Union's competence for common commercial policy to include services, commercial aspects of intellectual property rights and foreign direct investment.⁶⁴ It also aimed to improve the formal logic and coherence of EU external actions by vesting the Union with legal personality and making it the entity behind all external actions.

B. Judicial pushback

Judicial pushback is often a rejection of a particular external action of the Union but it is often driven by a more fundamental discontent about a (perceived) marginalisation

⁶⁴ Article 207 TFEU.

of the Member States. An unprecedented number of inter-institutional disputes have been brought to the Court of Justice since the entry into force of the Lisbon Treaty, challenging the exercise of external powers by the Union in particular on competence and legal basis grounds.⁶⁵

Disputes between the institutions also have direct consequences for the power relations between the Union and its Member States.⁶⁶ When the Council challenges an action of the Commission or the Parliament, Member States also challenge Union action. When the Commission or the Parliament challenge a Council action, they challenge the decision of (the majority of) the representatives of the Member States coming together as Council.

Legal disputes concerning the choice of legal basis remain frequent and are also always a political strategy to extend influence over decision making. The high number of legal bases disputes also reflects the relatively immature condition of the EU legal order.⁶⁷ This is particularly apparent in areas, in which the Union's competences are subject to a dynamic development, which is—as mentioned above—the case in external relations. This dynamic development and relative immaturity also explain the high relevance of loyalty as an understanding of a durable, objective-oriented cooperative logic. In other words, loyalty as a tool of the Court to discipline Member States gains relevance in a context, in which specific rules and principles have not yet been codified.

At the same time, frequent legal disputes lead to an emerging conflictual environment that puts to a test not only the specific exercise of Union competences but also the CJEU's understanding that the relationship between the Member States and the Union should be characterised by a cooperative rather than adversarial logic. Individual Member States have brought cases against the EU institutions challenging EU external actions,⁶⁸ and the Court has been called upon to review envisaged EU international agreements for their compatibility with EU law.⁶⁹ Large numbers of Member States intervene in many of these cases, vocalising concerns about the limitations of their autonomy.⁷⁰ In the words of Advocate-General Kokott: these legal

⁶⁵ See case law in note 2 above.

⁶⁶ K Lenaerts, 'EU Federalism in 3-D' in E Cloots, G de Baere, and S Scottiaux (eds), *Federalism in the European Union* (Hart Publishing, 2012).

⁶⁷ Cf comprehensively already H Cullen and A Charlesworth, 'Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36(6) *Common Market Law Review* 1243.

⁶⁸ *OIV* case, note 37 above; *Germany v Council*, C-600/14, EU:C:2017:935; *United Kingdom v Council*, C -656/11, EU:C:2014:97.

⁶⁹ Eg Opinion 1/13, note 28 above; *EU Singapore Free Trade Agreement*, Opinion 2/15, EU:C:2017:376; pending Opinion 1/17, AG Bot's Opinion, note 36 above.

⁷⁰ *Commission v Council*, note 2 above: twelve intervening Member States; *Commission v Council*, note 2 above: five intervening Member States; *Tanzania Pirates Agreement*, note 2 above: three intervening Member States; *Commission v Council*, note 2 above: eight intervening Member States; *Commission v Council*, note 2 above: twelve intervening Member States; *Commission v Council*, note 2 above: four intervening Member States; *OIV* case, note 37 above: seven intervening Member States.

actions are fought with ‘astonishing passion’ and ‘allegation[s are made] that the Commission wished to do everything possible to prevent international action by the Member States’, as well as that ‘the Council [was] compulsively looking for legal bases that always permit participation by the Member States’.⁷¹

C. Practical need for justification

Union power, as the exercise of any other public power, must be justified. In the context of the polycentric and multilevel legal order of the Union, where Union powers are subject to the principles of conferral and subsidiarity, external actions of the Union that constrain Member States’ autonomy require particular justification. The entrenched judicial positions of Member States and the EU institutions, when arguing cases before the CJEU, the sheer number of cases relating to external relations is a reminder of the *pragmatic* need for justification.

Because of the far-reaching and stringent constraints that loyalty imposes on Member States, the fact that these constraints result from the interpretation of an open-textured norm that requires judicial interpretation, and also because of its emotional and imaginative dimension, loyalty is a particular illustrative example of the need for justification. The constitutional challenge is to justify EU external actions and the restraining consequences they have for Member States. Without such continuous justification of Member States’ commitment to the common cause, EU external relations and their constraining effects on Member States may become a powerful argument against European integration.

V. CONCLUSIONS

Loyalty is inherent in the EU legal order. It is reflected in the commitments and obligations of the Member States and the EU institutions under the European Treaties, as interpreted by the CJEU. One could say it is a defining characteristic of EU membership.

The CJEU in principle requires voluntary acceptance of the cooperative, not reciprocal reading of the relations between the EU and the Member States and amongst Member States. The cooperative logic and non-reciprocal reading are two of the elements that distinguish EU law as a new legal order from international law. However as is apparent in its case law, the Court is fully willing to discipline Member States and enforce the duty of loyalty and the specific obligations flowing from it, in particular in the context of external relations.

Externally, EU loyalty is the organisational principle that ensures that the Union and its Member States, together 29 international actors, are able to speak, act, and influence as one. It is essential to the Union’s ability to realise its ambitious external relations objectives. It avoids that Member States can use their own legal relations with non-EU actors in order to put pressure on the Union.

⁷¹ *Commission v Council (Antarctica)*, note 2 above, para 75.

The centrality of loyalty to allow the Union to act externally in a uniform and effective manner also explains the demonstrated asymmetry between the external and internal sphere. EU loyalty is more relevant and imposes more stringent constraints on the Member States externally. These constraints are triggered earlier, that is before a formal legal instrument is adopted. They reach further into the future, that is beyond any actual conflict, but also covering potential future conflicts. They govern retained competences of the Member States, that is they go beyond the actual competences of the Union or even the scope of EU law.

The reason for loyalty's stronger bite in external relations is that the stakes are higher when Member States act externally in contradiction of the Union's interest and position. As original actors under international law, they are in a position to create obligations that limit the Union's autonomy as an external actor and are difficult to reverse.

The comprehensive and stringent constraints of EU loyalty on national autonomy in the context of EU external relations make specific justification of EU external actions necessary, not only in terms of the Union's substantive position but also specifically in terms of these far-reaching constraints. Justification in this regard is necessary for reasons of legitimacy and for the purely pragmatic reason that the failure to justify constraints on national autonomy may prove explosive in a climate of popular discontent with European integration.