

# Loyalty in External Relations Law: The Fabric of Competence, Autonomy and Institutional Balance

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## I. Introduction

The multiple ways in which the principle of loyalty has been described<sup>1</sup> show not only how multifaceted this principle is but also its significance. Loyalty underpins the most basic principles of the legal order of the European Union (EU), and to a certain extent it is the main basic principle holding EU law together. It could be seen as an elastic fabric from which EU law is woven allowing it to extend in all sorts of directions without breaking apart.

The principle of loyalty is one of the main unifying principles of the EU legal order.<sup>2</sup> Even in the realm of EU external relations law where a certain duality between the Common Foreign and Security Policy (CFSP) and other external policies continues to exist after de-pillarisation, the principle of loyalty plays a crucial role in giving a certain sense of unity to the post-Lisbon constitutional architecture.<sup>3</sup> Moreover, the Court of Justice of the European Union (CJEU)'s interpretation of the principle of loyalty has played a crucial role in bringing together the CFSP and the rest of EU ex-

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- 1 E.g. C. Hillion, "Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'", in C. Hillion, P. Koutrakos (eds), *Mixed Agreements Revisited* (Oxford: Hart Publishing, 2010), 87; A. Delgado Casteleiro, J. Larik, "The Duty to Remain Silent: Limitless Loyalty in EU External Relations?", *European Law Review* 36, no. 4 (2011), 524; E. Neframi, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations", *Common Market Law Review* 47, no. 2 (2010), 323.
  - 2 F. Casolari, "The Principle of Loyal Co-Operation: A "Master Key" for EU External Representation?", in S. Blockmans, R. Wessel (eds), *Principles and Practices of EU External Representation* (CLEER Working Paper no. 5, 2012).
  - 3 C. Hillion, *supra* note 1, 88.

ternal relations law, even when the pillars were still standing.<sup>4</sup> The Court's approach has added coherence and unity to the EU's external representation, and clarified the scope of application of the EU's constitutional principles as regards EU external policies.

This chapter analyses the role that the principle of loyalty plays in the development of the EU external relations law. More specifically, to what extent does it contribute to the conceptualization of the EU legal order as a single legal order? To put it another way, can the EU legal order be viewed as a single legal order from the perspective of the specific features which make it a distinct legal order from the international legal order, but also especially, as a single legal order from the perspective of internal unity? How has the principle of loyalty contributed to this unitary understanding? The chapter also shows how, as the principle of loyalty gains more relevance as an autonomous constitutional principle, its potential for encroachment on other constitutional principles increases, raising questions as to what role the principle of loyalty should play in the EU constitutional order.

Through the analysis of how the principle of loyalty underpins three of the most relevant principles of EU external relations law -the autonomy of the EU legal order, institutional balance, and the principle of conferral- this chapter highlights the fundamental place that that principle has as a unifying principle, as well as some of the constitutional questions that might be raised by its current application. The analysis is divided into three main parts. After a reminder of how the EU Treaties envision loyalty (II), the chapter moves to examining the ways in which loyalty has informed the autonomy of the EU legal order (III). It then turns to the impact of the principle of loyalty on the principle of institutional balance (IV). The final part of the paper analyses how loyalty underpins the development of the principle of conferral (V). The chapter also gives some conclusions at the end.

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4 R. Wessel, "The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation" *European Constitutional Law Review* 5, no. 1 (2009), 117.

## II. *I Have a Name, Not a Number: Loyalty in the EU Treaties*

The obvious starting point for an analysis of the principle of loyalty is its constitutional embedment in Article 4, paragraph 3, of the Treaty on European Union (TEU):

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

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives”.

The multifaceted nature of the principle of loyalty is present even in its name. While the Treaties remained silent for many years as to the name of the principle first enshrined in Article 5 of the Treaty establishing the European Community (TEC) -and later Article 10 TEC- it was often referred to as the principle of loyalty.<sup>5</sup> Nowadays, this principle has finally been given a name: the principle of sincere cooperation.<sup>6</sup>

Given this new name, at first sight it would appear that the drafters of the Treaty of Lisbon have decided to drop the term “loyal” in favour of the term “sincere”. The Oxford English Dictionary defines “loyal” as: “Faithful in allegiance to the sovereign or constituted government”, whilst it defines “sincere” as: “characterised by the absence of all dissimulation or pretence; honest, straightforward”.<sup>7</sup> Thus, since loyalty and sincerity are not synonyms, could it be argued that the content of the provision favours a more flexible approach to the obligations enshrined in this provision than before? The flexibility would stem from the fact that, before the entry into force of the Lisbon Treaty, Member States had an obligation of faithful allegiance to the EU, whereas after the Lisbon Treaty that allegiance no longer had to be faithful but merely honest.

However, when the English version of Article 4, paragraph 3, TEU is compared to other versions of the Treaties, the newfound flexibility of the

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5 M. Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2013), 33.

6 E. Neframi, *supra* note 1, 324.

7 Oxford English Dictionary: <http://www.oed.com/>.

principle is nowhere to be seen.<sup>8</sup> On the contrary, in the other language versions, the term “loyalty” continues to play an important role. The French version speaks of “le principe de coopération loyale”, the Spanish one refers to “el principio de cooperación leal”, the Italian one speaks of the “principio di leale cooperazione”, the Portuguese mentions the “princípio da cooperação leal”, and the German version speaks, *inter alia*, of “Grundsatz der loyalen Zusammenarbeit”.

Furthermore, the language confusion leading to different conceptions has played a role in the literature on the principle of loyalty. In the (English) EU external relations literature, this language confusion led to discussions on the nature of the principle. Hyett argued that, since the case law of the Court of justice referred to a duty of cooperation and not to the principle of loyalty, the two should be distinguished.<sup>9</sup> The autonomous nature of the duty of cooperation posited by Hyett was contested by other authors, who saw the duty of cooperation as a specific manifestation of the principle of loyalty enshrined in ex Articles 10 TEC and 5 TEC.<sup>10</sup>

Both lines of reasoning are based on the premise that Member States have a duty to cooperate, instead of having to abide by a principle of loyalty. From a theoretical standpoint, this distinction makes the nature of the obligation envisaged in Article 4, paragraph 3, TEU vary depending on whether we consider it a duty or a principle. As Heliskoski argues, a duty does not entail legal obligations but obligations of a moral nature.<sup>11</sup> Therefore, if the obligation in Article 4, paragraph 3, TEU were to be regarded as a duty and not a principle, it would only entail an obligation of best ef-

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8 P. J. Kuijper, “Re-reading External Relations Cases in the Field of Transport: The Function of Community Loyalty”, in M. Bulterman a.o. (eds), *View of European Law from the Mountain, Liber Amicorum Piet Jan Slot* (Alpen aan den Rijn: Wolters Kluwer, 2009), 293.

9 S. Hyett, “The Duty of Cooperation: a Flexible Concept”, in A. Dashwood, C. Hillion (eds), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), 248.

10 M. Klamert, *supra* note 5, 33; E. Neframi, *supra* note 1, 325. Cf. M. Cremona, “Defending the Community Interest: the Duties of Cooperation and Compliance”, in M. Cremona, B. De Witte (eds), *EU Foreign Relations Law Constitutional Fundamentals* (Oxford: Hart Publishing, 2008), 126.

11 J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Alpen aan den Rijn: Kluwer Law International, 2001), 123.

forts or good faith.<sup>12</sup> By contrast, were it to be viewed as a principle, it would give rise to legal obligations, and would thus entail an obligation of result.<sup>13</sup>

This distinction between duties and principles is somehow absent from the Court's reasoning. When read in their original language (French), the cases only speak of obligations without further qualification. For instance, in Opinion 1/94, the Court speaks of "l'obligation de coopération entre États membres et institutions communautaires",<sup>14</sup> whereas the English version mentions "the duty of cooperation between the Member States and the Community institutions".<sup>15</sup> Since obligations can be both legal and moral, it could be argued that the Court *prima facie* has not made a clear choice in favour of one or the other. Moreover, even in those cases where the Court refers to a "devoir de coopération",<sup>16</sup> the nature of the obligation is one of result and not one of best endeavours. For instance, in *PFOS*, the Court held that such a duty ultimately meant that:

"Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action"<sup>17</sup>

The most recent case law shows how the discussions regarding the role of the principle of loyalty in EU external relations law are based on this mischaracterisation of the principle of loyalty as a duty.<sup>18</sup> If we understand Article 4, paragraph 3, TEU as a principle providing the foundation for the

12 G. De Baere, T. Roes, "EU Loyalty as Good Faith", *International & Comparative Law Quarterly* 64, no. 4 (2015), 829.

13 Hugo Flavier considers that the principle of loyalty "devient le fondement spécifique d'une obligation à la charge des États membres dont la finalité est d'assurer l'unité de représentation externe de l'Union". H. Flavier, *La contribution des relations extérieures à la construction de l'ordre constitutionnel de l'Union européenne* (Bruxelles : Bruylant, 2012), 409.

14 Opinion of 15 November 1994, 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, EU:C:1994:384 para 106.

15 Judgment of 20 April 2010, *Commission v Sweden (PFOS)*, C-246/07 EU:C:2010:203.

16 *Id.*, para 72.

17 *Id.*, para 74.

18 *Contra*: G. De Baere, T. Roes, *supra* note 12.

development of legal obligations and other principles, it will be easier to understand its place within the EU legal order.

### III. Loyalty and the Principle of Autonomy of the EU Legal Order

It is common knowledge that the principle of loyalty is at the centre of the development of the basic constitutional principles of the EU.<sup>19</sup> References to Article 4, paragraph 3, TEU in its previous wording and numbering can be found in such seminal cases as *Costa v Enel*,<sup>20</sup> *Van Colson*,<sup>21</sup> and *Brasserie de Pecheur*.<sup>22</sup> The principle of loyalty has been inextricably linked to the idea of the unity of the EU legal order, both internally (supremacy, consistent interpretation) and externally (unity of external representation, exclusivity).

Moreover, the unity of the EU legal order and its autonomous character go hand in hand. There is no doubt that the unity of the EU legal order and uniform application of its rules operate by that legal order asserting its independence from international law.<sup>23</sup> In other words, autonomy from international law is co-extensive with autonomy from domestic law.<sup>24</sup>

In Opinion 1/09,<sup>25</sup> the principle of loyalty was described as one of the elements that inform the autonomy of the EU legal order. That opinion highlighted it as one of the defining factors of the unity of the EU legal order. Thus, the Court held that the establishment of a Patent Court, that would deprive national courts of their functions as European courts of the

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19 M. Klamert, *supra* note 5, 71; J. Temple Lang, “Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institution under Article 10 EC”, *Fordham International Law Journal* 31, no. 5 (2007), 1483; B. Van Vooren, R. Wessel, *EU External Relations Law. Text, Cases and Materials* (Cambridge: Cambridge University Press, 2014), 189.

20 Judgment of 15 July 1964, *Costa v ENEL*, 6/64, EU:C:1964:66.

21 Judgment of 10 April 1984, *Van Colson*, 14/83, EU:C:1984:153, para 26.

22 Judgment of 31 March 1971, *Commission v Council (ERTA)*, 22/70, EU:C:1971:32.

23 J. W. Van Rossem, “The Autonomy of EU Law: More is Less?”, in R. Wessel, S. Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press/Springer, 2013), 19.

24 P. Eeckhout, “Human Rights and the Autonomy of EU Law: Pluralism or Integration?”, *Current Legal Problems* 66, no. 1 (2013), 169, at 171.

25 Opinion of 8 March 2011, 1/09, *European Patent Court*, EU:C:2011:123.

EU legal order, would be contrary to the principle of autonomy of EU law, inasmuch as the obligation on national courts to fully apply EU Law would be undermined.<sup>26</sup>

“It is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties [...]

It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (...). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual’s rights under that law...

The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (...).<sup>27</sup>

According to the Court, the uniform interpretation of EU law by national courts as guaranteed by the principle of loyalty is part of the essential character of the powers that the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of EU law.<sup>28</sup> The principle of loyalty is an essential instrument in preserving the very foundations of EU law. Consequently, given the prominent role that the principle of loyalty seems to have in the EU legal order, to what extent has the principle of loyalty in fact protected the foundations of the EU legal order while applied in EU external relations?<sup>29</sup>

The principle of loyalty has served the principle of autonomy in two ways. On the one hand, loyalty has been used by the Court as a means of guaranteeing the principle of autonomy through the uniform interpretation

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26 B. De Witte, “A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union”, in M. Cremona, A. Thies (eds), *The European Court of Justice and External Relations Law* (Oxford: Hart Publishing, 2014), 40.

27 Opinion of 8 March 2011, 1/09, *supra* note 25, paras 67-69.

28 *Id.*, para 89.

29 Opinion of 14 December 1991, 1/91, *European Economic Area Agreement*, EU:C:1991:490, para 46.

of international law. On the other hand, the principle of loyalty preserves the autonomy of the EU legal order from actions taken by Member States outside the EU framework.

Concerning the first way in which loyalty preserves autonomy, in *Dior*<sup>30</sup> the Court was faced with the question of procedural provisions such as Article 50 of the TRIPs Agreement, an agreement that at the time fell within the sphere of shared competence.<sup>31</sup> Procedural provisions enshrined in mixed agreements constitute a challenge to the division of competences of the European Union. Since such provisions not only establish an obligation to adapt internal procedures to the safeguards and requirements of those provisions, but also fall within the scope of both EU and national law, the European Union, inasmuch as it has not laid down common rules on the issue only has competence to adapt its own procedures.<sup>32</sup> Therefore, the Member States would not be under a EU law obligation to adapt their national procedures, and the national courts would have jurisdiction under their national rules to examine the compatibility of those procedures with the obligations laid down in the international agreement. Therefore, as would be the case with any other international agreement falling within the Member States's competence, national courts could give contradicting interpretations. It is in this situation that the principle of loyalty would apply. According to the Court:

“Where a provision such as Article 50 of TRIPs can apply both to situations falling within the scope of national law and to situations falling within that of Community law, as is the case in the field of trade marks, the Court has jurisdiction to interpret it in order to forestall future differences of interpretation (see *Hermès*, paragraphs 32 and 33).

In that regard, the Member States and the Community institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they concluded the WTO Agreement, including TRIPs (see, to that effect, Opinion 1/94, cited above, paragraph 108).

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30 Judgment of 14 December 2000, *Parfums Christian Dior and Others*, C-300/98 & C-392/98 EU:C:2000:688.

31 Opinion 1/94, *supra* note 14, para 105.

32 Other examples of the Court dealing with procedural provisions contained in mixed agreements: Judgment of 16 June 1998, *Hermès International v FHT Marketing Choice BV*, C-53/96, EU:C:1998:292; Judgment of 8 March 2011, *Lesoochranské zoskupenie VĽK v Ministerstvo životného prostredia Slovenskej republiky*, C-240/09, EU:C:2011:125. For a discussion: P. Koutrakos, “Interpretation of Mixed Agreements”, in C. Hillion, P. Koutrakos (eds), *Mixed Agreements Revisited* (Oxford: Hart Publishing, 2010), 116.



Since Article 50 of TRIPS constitutes a procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law, that obligation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation.

Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation”.<sup>33</sup>

The Court’s use of the principle of loyalty allows it to extend its exclusive jurisdiction and consequently avoid possible conflicting interpretations of a provision that binds both the EU and its Member States. Hillion has described this use of Article 4, paragraph 3, TEU as having the effect of granting the Court pre-emptive jurisdiction.<sup>34</sup> In *Dior*, the Court used loyalty as a mechanism to expand its reach to places outside the scope of EU law. To put it differently, loyalty can extend the exclusive jurisdiction of the CJEU beyond the realm of EU competences. By virtue of the principle of loyalty, national courts now have an obligation even when acting outside the scope of EU law to interpret national rules in line with EU law. While procedural provisions like Article 50 of TRIPS are a special case and should be treated as such,<sup>35</sup> *Dior* shows how the principle of loyalty can be used to protect the autonomy of the EU legal order and the EU’s international commitments. The principle of loyalty seems to safeguard the autonomy of the EU legal order by ensuring the uniform interpretation of its rules regardless of the competences involved.

Moving to the second way in which loyalty informs the autonomy of EU law, in *Kadi*, the Court was clear when establishing that Member States’ international agreements may in no circumstances permit any challenge to the principles that form the very foundations of the EU legal order.<sup>36</sup> Given what was established by the Court in Opinion 1/09, it is clear

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33 Judgment of 14 December 2000, *Parfums Christian Dior and Others*, *supra* note 29, paras 35-38.

34 C. Hillion, *supra* note 1.

35 P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2015), 255; E. Nefframi, “Mixed Agreements as a Source of European Union Law”, in E. Cannizzaro, P. Palchetti, R. Wessel (eds), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff, 2012), 288.

36 Judgment of 3 September 2008, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, C- 402/05 P & C-415/05 P EU:C:2008:461, para 304.

that, when conducting their international relations, Member States must not affect the very foundations of EU law. Whilst the issue of the autonomy of the EU legal order has become a hotly-debated issue after Opinion 2/13, it should nevertheless be noted that the link between the autonomy of EU law and loyalty remains underexplored. In Opinion 2/13, the Court drew a clear line between the principle of loyalty, the autonomy of the EU legal order and the exclusive jurisdiction of the European Union:

“the obligation of Member States to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be understood as a specific expression of Member States’ more general duty of loyalty resulting from Article 4 (3) TEU, it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU”.<sup>37</sup>

As in *Dior*, where the Court used the principle of loyalty to extend its exclusive jurisdiction vis-à-vis national courts and reinforce the autonomous nature of the EU legal order, in Opinion 2/13 the Court referred to the principle of loyalty to further anchor its reading of the scope of its exclusive jurisdiction. Whereas in *MOX Plant*, loyalty was not fully deployed as Article 344 of the Treaty on the functioning of the European Union (TFEU)<sup>38</sup> was regarded as a specific manifestation of the principle of loyalty,<sup>39</sup> in Opinion 2/13, the Court used loyalty to expand the scope of Article 344 TFEU. Thus, its exclusive jurisdiction would cover not only disputes between Member States but also claims between the EU and its Member States.

Opinion 2/13 shows that loyalty is not only a fundamental feature of the autonomy of the EU legal order, it is also a fundamental means of safeguarding that autonomy. The Court’s application of the principle of loyalty reinforces the autonomous nature of the EU legal order by expanding and clarifying the scope of the EU’s exclusive jurisdiction.

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37 Opinion of 18 December 2014, 2/13, *Accession of the European Union to the ECHR* EU:C:2014:2454, para 202.

38 Article 344 TFEU: “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”.

39 Judgment of 30 May 2006, *Commission v Ireland (MOX Plant)*, C-459/03, EU:C:2006:345, para 169.

#### IV. Institutional Balance as a Specific Manifestation of the Principle of Loyalty

Although Article 4, paragraph 3, TEU lays down obligations of a vertical nature (that is between the Member States and the EU), the Court has not hesitated in extending it to horizontal situations. More interestingly, the principle of loyalty when applied to issues of institutional balance seems to further advance a unified vision of the EU legal order.

The starting point would be Article 13, paragraph 2, TEU. This provision provides that:

“Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation”.

The reference to sincere cooperation in Article 13, paragraph 2, TEU characterises this provision as an expression of the principle of loyalty that applies to the horizontal division of powers. The principle of institutional balance means that the practice of one institution cannot deprive the other institutions of a prerogative granted to them by the Treaties.<sup>40</sup> Given that the principle of institutional balance is a specific manifestation of the principle of loyalty, what is the relationship between this provision and Article 4, paragraph 3, TEU?

In principle it could be argued that the relation between these two provisions is one of *lex specialis derogat lex generalis*. Thus, the principle of loyalty would apply whenever the principle of institutional balance does not. However, the special nature of the principle of institutional balance should not be understood as establishing a hierarchical relation. The CJEU has, rightly, been quite clear in establishing that the principle of loyalty does not trump the principle of institutional balance and the procedural implications that the latter entails. In *EU-US Air Transport Agreement*, the Council put forward the argument that the necessity to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into within mixed agreements allowed for a greater flexibility when considering the scope of the principle of institutional balance.<sup>41</sup>

40 Judgment of 10 July 1985, *Wybot*, 149/85, EU:C:1986:310, para 23.

41 Judgment of 28 April 2015, *Commission v Council (Hybrid decisions)*, C-28/12, EU:C:2015:282, para 54.

Nevertheless, the Court understood that the principle of loyalty can not justify a flexible reading of the principle of institutional balance.<sup>42</sup> In other words, inasmuch as the principle of loyalty is an underpinning structural principle informing the principle of institutional balance, the latter cannot be derogated from so as to comply with the former. The Court has also expressed this view in relation to the voting arrangements within the Council. In *Portugal v Council*,<sup>43</sup> the Portuguese Government put forward the argument that the principle of loyalty would allow a derogation from the qualified majority voting required by Article 207 TFEU (then Article 113, paragraph 4, TEC). The Court was quite clear in that regard and held that:

“the principle of cooperation in good faith between the Community institutions and the Member States has no effect on [...]the legislative procedure to be followed”.<sup>44</sup>

Moreover, in *Pupino*, the absence of a specific manifestation of the principle of loyalty triggered the application of the general rule. The Court understood that “it would be difficult for the Union to carry out its tasks effectively if the principle of loyal cooperation”, which requires in particular that Member States take all appropriate measures, did not apply outside the realm of what used to be the first pillar.<sup>45</sup> With *Pupino*, the CJEU showed the trans-pillar nature of the principle of loyalty. More importantly, *Pupino* showed that the principle of loyalty would be accompanied by all its constitutional baggage.<sup>46</sup> The principle of loyalty brought the different pillars of the EU together.

Even after the de-pillarisation of EU law, some of the divisions between the pillars have remained within the EU legal order.<sup>47</sup> On the institutional side, the role of the European Parliament in forming the Common Foreign

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42 *Id.*, para 55.

43 Judgment of 23 November 1999, *Portugal v Council*, C-149/96, EU:C:1999:574, para 62.

44 *Id.*, para 67.

45 Judgment of 16 June 2005, *Maria Pupino*, C-105/03, EU:C:2005:386, para 42.

46 *Id.*, para 43. The Court applied the principle of consistent interpretation to the former third pillar in the same way it had applied in the first pillar. See E. Spaventa, “Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*”, *European Constitutional Law Review* 3, no. 1 (2007), 5, at 14.

47 On the de-pillarization of EU Law see: A. Cebada Romero, “Análisis Reciente de la Práctica Convencional de la UE: Cambios Introducidos en el Procedimiento Convencional por el Proyecto de Tratado Constitución de la UE”, *Revista General*

and Security Policy (CFSP) continues to be minimal when compared with its role in the areas previously covered by the first pillar.<sup>48</sup> However, the principle of loyalty has allowed it to further increase its role, albeit to a limited extent, within the realm of the CFSP. The *Pirates* cases point in this direction. In the first of those cases, the issue of the extent to which the same degree of cooperation was owed to the Parliament during the negotiation and conclusion of international agreements within the CFSP was interpreted differently by the Advocate General and the Court. For Advocate General Bot, the obligations laid down in Article 218, paragraph 10, TFEU allowed for a graduation in the degree of cooperation owed to the Parliament. Inasmuch as the prerogatives of the Parliament in the field of the CFSP were not the same as in other fields of EU external relations, a reading allowing for relaxation of the obligation laid down in Article 218, paragraph 10, TFEU to fully and immediately inform the Parliament would make sense.<sup>49</sup> For Advocate General Bot the specific nature of the CFSP might also entail a different reading of the same obligation of cooperation and institutional balance.

The Court disagreed with the Advocate General and understood that the same obligation of cooperation applied independently of the nature of the agreement:

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*de Derecho Europeo* 4, no. 7 (2004), 23; M. Cremona, "Defining Competence in EU External Relations: Lessons from the Treaty Reform Process", in A. Dashwood, M. Maresceau (eds), *Law and Practice of EU External Relations Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2011), 34; P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In search of a New Balance between Delimitation and Consistency", *Common Market Law Review* 47, no. 4 (2010), 987; R. Gosalbo Bono, "Some Reflections on the CFSP Legal Order", *Common Market Law Review* 43, no. 2 (2006), 337; C. Herrmann, "Much Ado About Pluto? The 'Unity of the Legal Order of the European Union'", in M. Cremona, B. De Witte (eds), *EU Foreign Relations Law Constitutional Fundamentals* (Oxford: Hart 2008) 19; R. Wessel, *supra* note 4.

48 D. Thym, "Beyond Parliament's Reach? The Role of the European Parliament in the CFSP", *European Foreign Affairs Review* 11, no. 1 (2006), 109; E. Wisniewski, "The Influence of the European Parliament on the European External Action Service", *European Foreign Affairs Review* 18, no. 1 (2013), 81.

49 Judgment of 14 June 2016, *Parliament v Council (Tanzania Agreement)*, C-263/14, EU:C: 2016:435, para 156.

“It cannot be inferred from that fact that despite its exclusion from the procedure for negotiating and concluding an agreement relating exclusively to the CFSP, the Parliament has no right of scrutiny in respect of that EU policy.

On the contrary, it is precisely for that purpose that the information requirement laid down in Article 218(10) TFEU applies to any procedure for concluding an international agreement, including agreements relating exclusively to the CFSP”.<sup>50</sup>

Inasmuch as there is no specific manifestation of the principle of horizontal loyalty in the field of CFSP, the same kind of obligations of loyalty applicable outside the CFSP should apply within the CFSP as well.<sup>51</sup>

What does the Court’s interpretation of the principle of loyalty in the CFSP tell us about the internal unity of the EU legal order? Loyalty can be seen as a *passerelle* provision like Article 215 TFEU. In the absence of a specific manifestation it will apply, bringing together most its substance regardless of the specific nature of the policy area. As Article 215 TFEU provides for a bridge between the CFSP and the rest of EU law,<sup>52</sup> the principle of loyalty would also be another bridge connecting different legal regimes within the EU legal order. Loyalty would bring further internal cohesion and coherence to the EU legal order through the principle of institutional balance.

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50 Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, para 84. For a more in-depth commentary of the case see: A. Delgado Casteleiro, “Los últimos restos del dodo. La elección de bases jurídicas y su influencia en el papel del Parlamento Europeo en la nueva PESC a la luz del asunto Acuerdo sobre piratería con Mauricio (C-658/2011)”, *Revista Española de Derecho Europeo* 53, no. 1 (2015), 177.

51 Judgment of 14 June 2016, *Parliament v Council (Tanzania Agreement)*, *supra* note 49, para 68. See also the chapters by Cremona, Kuijper and Gatti in this volume.

52 P. Koutrakos, *EU International Relations Law*, *supra* note 35, 431. See as the leading example: Judgment of 3 September 2008, *Kadi*, *supra* note 36. Cf. P. Van El-suwege, *supra* note 47, 1000.

## V. The Principle of Loyalty and ERTA

### A. Loyalty as the Constitutional Foundation of the ERTA Principle

In the *ERTA* judgment the Court understood that:

“Under Article 3 (e), the adoption of a common policy in the sphere of transport is specially mentioned amongst the objectives of the Community.

Under Article 5, the Member States are required on the one hand to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty”.<sup>53</sup>

The Court’s recourse to the principle of loyalty in *ERTA* continues to be hotly debated.<sup>54</sup> In addition, the confusion in that judgment between the existence and the nature of a competence does not help to shed light on the role that loyalty plays in developing the principle of conferral. For Klamert, “the Principle of Loyalty in *ERTA* should be seen as the central legal basis for pre-empting the Member States because of the passing of common rules”.<sup>55</sup> By contrast, for Kuijper, the principle of loyalty was not indispensable for the inception of the implied powers doctrine, or for the establishment of exclusivity in that matter.<sup>56</sup> Instead, he considers that the EU’s international legal personality is the main element of the judgment informing the formulation of the implied powers doctrine, and regards the primacy of the internal common rules as the crucial factor determining the exclusivity of the external competence.<sup>57</sup> However, he seems to disregard the fact that the principle of loyalty is also at the heart of the principle of primacy.<sup>58</sup>

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53 Judgment of 31 March 1971, *Commission v Council (ERTA)*, *supra* note 22, paras 20-21.

54 These are just an example of three recent publications in which the topic plays a central role: R. Schütze, *Foreign Affairs and the EU Constitution* (Cambridge: Cambridge University Press, 2014); B. Van Vooren, R. Wessel, *supra* note 19; P. J. Kuijper a.o., *The Law of EU External Relations. Case, Materials and Commentary on the EU as an International Legal Actor* (Oxford: Oxford University Press, 2013).

55 M. Klamert, *supra* note 5, 75.

56 P.J. Kuijper, *supra* note 8, 294.

57 *Ibidem*.

58 B. Van Vooren, R. Wessel, *supra* note 19, 130. See R. Schütze, *supra* note 54, 258.

Unlike Kuijper, Koutrakos understands that the principle of loyalty clearly relates to the nature of the competence and not its implied existence.<sup>59</sup> However, he finds the reference puzzling insofar as it “puts forwards a construction of exclusivity which differs from that already laid down in paragraph 17”.<sup>60</sup> This reference to the principle of loyalty can only be understood as a way of cementing the constitutional foundation of principle of exclusivity.<sup>61</sup> Thus, the principle of loyalty seems to transfer its constitutional gravitas to the principle of pre-emption. In other words, this reference to now Article 4, paragraph 3, TEU emphasizes the constitutional place that this new principle has in the EU legal order.<sup>62</sup>

### *B. The Two Thin Lines Dividing Loyalty and Exclusivity*

That loyalty is the constitutional anchor of the doctrine of pre-emption can be seen as the logical consequence of the absence of specific provisions on the nature and effects of the EU competences pre-Lisbon. However, the case law especially after Lisbon has blurred the lines dividing, first, the effects of loyalty and *ERTA*, and, second, albeit to a lesser degree the methodology used to establish a breach of loyalty and whether pre-emption has taken place. This is especially clear in the light of a series of decisions, starting with the *Open Skies* saga,<sup>63</sup> passing through the *Internation-*

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59 See P. Eeckhout, *EU External Relations Law* (Oxford: Oxford University Press, 2011) 74.

60 “In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules”. Judgment of 31 March 1971, *Commission v Council (ERTA)*, *supra* note 22, para 17; P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2006), 82.

61 *Ibidem*.

62 J. Temple Lang, *supra* note 19, 1515.

63 Judgments of 5 November 2002, (*Open Skies*): *Commission v United Kingdom*, C-466/98 EU:C:2002:624; *Commission v Luxembourg*, C-472/98, EU:C:2002:629; *Commission v Denmark*, C-467/98 EU:C:2002:625; *Commission v Germany*, C-476/98 EU:C:2002:631; *Commission v Austria*, C-475/98 EU:C:2002:630. For an overview of the broader constitutional implications see: C. Hillion, “A Look Back at the Open Skies Judgments”, in M. Bulterman a.o. (eds),



al *Organization of Vine and Wine (OIV)* <sup>64</sup> judgment and finishing (for now) with Opinions 2/15 and 3/15. These cases show how nowadays there is a challenge in drawing the lines separating conferral and cooperation.<sup>65</sup>

### 1. *What Difference does it Make? ERTA and Loyalty from the Perspective of their Effects*

As Klamert's analysis shows,<sup>66</sup> the current conceptualisation of the principle of conferral based on the principle of loyalty also works in the opposite direction. The Court's recourse to the principle of loyalty to the detriment of the principle of conferral has had the consequence of transferring the effects of the latter (pre-emption, supremacy) to the former.

In the *Open Skies* cases, the Court recalled that the principle of loyalty was at the heart of the *ERTA* principle. After a long and detailed analysis of the relevant internal rules to determine whether the EU Member States' Open Skies Agreements could affect them, the Court concluded that :

"Article 5 of the Treaty requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

In the area of external relations, the Court has held that the Community's tasks and the objectives of the Treaty would be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules adopted by the Community or of altering their scope".<sup>67</sup>

From this extract, it is perhaps difficult to grasp the dividing line between the principle of loyalty and the *ERTA* principle in these cases. Was it really necessary to establish a breach of what is now Article 4, paragraph 3, TEU? Does this mean that any breach of the *ERTA* principle logically entails a breach of the principle of loyalty?<sup>68</sup>

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*Views of European Law from the Mountain Liber Amicorum Piet Jan Slot* (Alpen aan den Rijn: Wolters Kluwer 2009), 257.

64 Judgment of 7 October 2014, *Germany v Council (OIV)*, C-399/12, EU:C:2014:2258.

65 B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy. A Paradigm for Coherence* (Oxford: Routledge 2012), 77.

66 M. Klamert, *supra* note 5, 75.

67 Judgments of 5 November 2002, (*Open Skies*), *supra* note 63, paras 135-136.

68 P. J. Kuijper, *supra* note 8, 298.

In Opinion 1/03, the Court followed the line of reasoning established in *Open Skies* and reaffirmed that the principle of loyalty informed the *ERTA* principle:

“The Court noted in that regard that, in all the areas corresponding to the objectives of the Treaty, Article 10 EC requires Member States to facilitate the achievement of the Community’s tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty”.<sup>69</sup>

For some authors like Van Vooren, the Courts pronouncement in Opinion 1/03 shows how the principle of loyalty can operate as *de facto* pre-emption.<sup>70</sup> Following this reasoning, judgments such as *IMO*,<sup>71</sup> or those in the *Inland Waterways* cases<sup>72</sup>, further blur the application of the principle of loyalty as it would establish specific duties of abstention for those Member States daring to act in the international sphere alone because otherwise the EU’s (internal) action would be put at risk.<sup>73</sup> In other words, the obligations and effects enshrined in the principle of loyalty would be the same as those stemming from the exercise of an EU competence: the primacy of EU law, and an obligation for the EU Member States to refrain from acting insofar as their actions conflict with EU law.<sup>74</sup>

This argument would also be supported by the *OIV* judgment. The Court had to decide on whether the Council could adopt a decision establishing the position to be adopted on behalf of the European Union with regard to certain recommendations to be adopted in the framework of the *OIV* by virtue of Article 218, paragraph 9, TFEU. According to the Court:

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69 Opinion of 14 October 2014, 1/13, *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, EU:C:2014:2303, para 119.

70 B. Van Vooren, *supra* note 65, 87.

71 Judgment of 12 February 2009, *Commission v Greece (IMO)*, C-45/07 EU:C:2009:81.

72 Judgment of 2 June 2005, *Commission v Luxembourg (Inland Waterways)*, C-266/03, EU:C:2005:341; Judgment of 14 July 2005, *Commission v Germany (Inland Waterways)*, C-433/03, EU:C:2005:462.

73 On how in any case, especially the *IMO* judgement entails a considerable extension of the *ERTA* Principle: A. Delgado Casteleiro, B. Larik, *supra* note 1; M. Cremona, “Extending the Reach of the *AETR* Principle: Comment on *Commission v Greece (C-45/07)*”, *European Law Review* 34, no. 5 (2009) 754.

74 R. Schütze, “Supremacy Without Pre-Emption? The Very Slowly Emergent Doctrine Of Community Pre-Emption”, *Common Market Law Review* 43, no. 4 (2006) 1023.

“Where an area of law falls within a competence of the European Union, such as the one mentioned in the preceding paragraph, the fact that the European Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest”.<sup>75</sup>

Pre-emption and primacy entail an obligation for the EU Member States not to act externally inasmuch as their actions may potentially externally influence the EU decision-making process. In this regard, Wessel and Van Vooren have tried to draw a dividing line between pre-emption and the principle of loyalty: “pre-emption is connected with protecting the principle of conferral from encroachment, whereas cooperation exists to ensure that the objectives laid down in Union Law are attained”.<sup>76</sup> Thus the difference will reside in the type of obligation where the principle of loyalty triggers an obligation of best efforts whereas pre-emption entails an obligation of result.

However, in this picture in which the principle of loyalty does not entail the same kind of obligations as the *ERTA* principle, how does the *PFOS* judgment fit in? The Court seem to support the view, at least when conducting an analysis in relation to unilateral proposals to include certain environmentally harmful substances, more precisely *perfluorooctane sulfonate* (PFOS), in the Annex to the Stockholm Convention on Persistent Organic Pollutants,<sup>77</sup> that the principle of loyalty would establish the same de-facto obligations as the *ERTA* principle.<sup>78</sup> The EU Member States would be barred from acting even when the EU has not exercised its competence on a certain subject. The Court is quite clear in explaining that the distinction between shared and exclusive competence does not operate in relation to the application of the principle of loyalty and consequently that

75 Judgment of 7 October 2014, *Germany v Council (OIV)*, *supra* note 63, para 52.

76 B. Van Vooren, R. Wessel, *supra* note 19, 191.

77 Both Cremona and De Baere contextualize the decision: M. Cremona, “Case C-246/07, *Commission v. Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 of April 2010”, *Common Market Law Review* 48, no. 5 (2011), 1639; G. De Baere, “‘O, Where is Faith? O, Where is Loyalty?’ Some Thoughts on the Duty of Loyal Co-operation and the Union’s External Environmental Competences in the Light of the PFOS Case”, *European Law Review* 36, no. 3 (2011), 405.

78 B. Van Vooren, R. Wessel, *supra* note 19, 206.

obligations of result and abstention might also apply in those areas in which no primacy or pre-emption would apply.<sup>79</sup>

“[...] the duty of genuine cooperation 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>80</sup>

Consequently, if the principle of loyalty is of general application, its scope must be the same regardless of the competence involved and the specific legal duties for the Member States will remain the same: an obligation to refrain from acting. As it has been argued elsewhere, “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”.<sup>81</sup>

Interestingly, Opinion 2/15 seems to give some kind of clarification as regards the blurring of the principle of loyalty and the *ERTA* principle in terms of effects. As mentioned before, in the *BITs* cases the Court gave a broad reading of paragraph 2 of Article 351 TFEU, arguing that, even in the absence of an actual incompatibility, Member States were under an obligation to terminate their *BITs* inasmuch as the free capital transfer clauses contained therein were incompatible with an unexercised shared competence: the free movement of capitals. A joint reading of the *BITs* cases and Opinion 2/15 gives an interesting result: the transfers of capitals contained in the Singapore agreement inasmuch as they relate to free movement of capitals fall under shared competence, yet by virtue of the *BITs* judgment it is unclear to what extent Member States could really conclude an agreement on the free transfer of capitals without it being incompatible with the free movement of capitals. The only solution to this conundrum would be to accept that, contrary to common understanding, a mixed agreement would be legally compulsory not only when both an EU competence and a Member States exclusive competence are needed for the conclusion of the agreement but also whenever there is a shared competence. Thus, inasmuch as an EU external shared competence would always

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79 Contra: E. Neframi, “The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations”, *supra* note 1, 350; C. Hillion, *supra* note 1; S. Hyett, *supra* note 9.

80 Judgment of 20 April 2010, *Commission v Sweden (PFOS)*, *supra* note 15, para 71.

81 A. Delgado Casteleiro, J. Larik, *supra* note 1, 539.

entail a certain degree of EU exclusivity a certain type of pre-emption will always be triggered through the principle of loyalty.

## 2. *The Court's Methodology as the Only Line Separating Loyalty and ERTA*

The alignment in terms of effects between *ERTA* and loyalty does not necessarily mean that pre-emption and implied powers have no role to play in the case law of the Court of Justice<sup>82</sup>, but merely opens the door to a further blurring of the effects of EU competences. Since the principle of loyalty entails an obligation of result, which means that in certain situations the EU Member States must refrain from acting regardless of the competence involved, does it make any sense to continue to speak about areas of external shared competences in EU external relations law?

It could be argued that the difference between loyalty and *ERTA* is to be found in the methodology deployed by the Court in ascertaining whether pre-emption has taken place and a competence has become exclusive. For instance in the *Open Skies* cases, the application of the *ERTA* principle to the specific circumstances of those cases was a narrow one, based on the existence of an identical overlap between the international and the European rule (rule of pre-emption).<sup>83</sup> The *Open Skies* cases showed that it was not enough to have common rules on a certain area, it was necessary either to have achieved complete harmonization or “in the absence of complete harmonisation, the Court seemed to be searching for some substantive conflict between the ... agreements and the European legislation before it would admit that the former ‘affected’ the latter”.<sup>84</sup> The narrow application of the *ERTA* principle in *Open Skies* seemed to support the idea that the principle of loyalty continued to be the constitutional basis of the principle of pre-emption inasmuch as the methodology deployed by the Court

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82 Judgment of 24 November 2013, *Green Network*, C-66/13, EU:C:2014:2399; Judgment of 4 September 2014, *Commission v Council (Broadcasting Rights Convention)*, C-114/12 EU:C:2014:2151; Judgment of 22 October 2013, *Commission v Council (Conditional Access Convention)*, C-137/12 EU:C:2013:675; Opinion of 14 October 2014, 1/13, *supra* note 69; Opinion of 16 May 2017, 2/15, *EU-Singapore Free Trade Agreement* EU:C:2017.

83 R. Schütze, *supra* note 54, 288.

84 *Id.*, 293.

was based on the existence of an actual normative conflict and not just the mere jeopardising of the EU's external action.

However, the Court has slightly retreated from its previous narrow application of the principle of pre-emption and has raised the possibility that in the absence of complete harmonisation or a substantive conflict, an implied exclusive power would nevertheless arise. In Opinion 1/03, instead of overruling its previous precedent the Court contextualised its previous pronouncements on the *ERTA* effect. It first clarified that the requirement to have achieved complete harmonisation was just an example, and was not a prerequisite for the *ERTA* effect to be triggered. Second and more importantly, it began to distance itself from the idea that the "affectation" part of the test entailed the presence of some sort of substantive conflict between the international obligations and the EU common rules.

Opinion 1/13 concerning the Hague Convention on Child Abduction continued to build on the shift of the logic of the "affectation" test rendering the idea of risk or jeopardy more prominent in the Court's analysis. The idea that complete harmonisation was needed was completely dropped. Now it was enough for the international agreement to be covered to a large extent by the common rules. Moreover, there was no need for a substantial conflict to take place, only a risk that the common rules might be affected. In the Court's view, EU rules may be affected by international commitments even if there is no possible contradiction between those commitments and the EU rules.<sup>85</sup> Opinion 3/15 on the Marrakesh Agreement continued to automatise the "affectation" test. That opinion drew a comparison between the agreement and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society<sup>86</sup>. The Court observed that even though there was not complete harmonisation there was an overlap between the two legal rules:

"Accordingly, the body of obligations laid down by the Marrakesh Treaty falls within an area that is already covered to a large extent by common EU

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85 Opinion of 14 October 2014, 1/13 *supra* note 69, para 86. See: A. Delgado Casteleiro, "Opinion 1/13: on the Scope of the EU's Exclusive Competence after the Lisbon Treaty", *Revista de Derecho Comunitario Europeo* 51 (2015), 669.

86 OJ L 167, 22.6.2001, p. 10.

rules and the conclusion of that treaty may thus affect those rules or alter their scope”.<sup>87</sup>

Moving to the most recent example, Opinion 2/15, when addressing the question of implied powers, the way the Court approaches the question whether transport services are covered by an implied exclusive power, focuses first and foremost on the comparison and overlap between the common rules and the EU-Singapore free trade agreement. The affectation test is applied in a rather automatic way:

“where an agreement between the European Union and a third State provides for the application, to the international relations covered by that agreement, of rules that will overlap to a large extent with the common EU rules applicable to intra-Community situations, that agreement must be regarded as capable of affecting or altering the scope of those common rules”.<sup>88</sup>

It should be noted that the Court changed the modal verbs in the description of the *ERTA* effect. From a possibility (“may” in Opinion 3/15) the affectation has now become an inevitable consequence (“must”) stemming from the existence of an overlap. The mere overlap between internal European rules and Member States’ external competence seems to jeopardise the former, and therefore pre-emption seems the logical means of protecting the EU *acquis*.

How to evaluate this broad interpretation of the *ERTA* effect based on field pre-emption and automatic affectation? The methodology employed by the Court is becoming much clearer adding legal certainty to its case law. However, it also further blurs the line, methodologically speaking, between loyalty and exclusivity.

## VI. Conclusions

This chapter shows that regardless of the original aim of the loyalty principle,<sup>89</sup> its development further entrenches the idea that, in EU external relations law, the duty of sincere cooperation should be better regarded as a

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87 Opinion of 14 February 2017, 3/15, *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, EU:C:2017, para 129.

88 Opinion of 16 May 2017, 2/15, *supra* note 79, para 201.

89 G. De Baere, T. Roes, *supra* note 12.

principle of loyal cooperation, which entails legal obligations, and not merely moral obligations leading to an obligation of best efforts.

The principle of loyalty can be seen as a major driving factor in the development of the EU legal order because of its versatility. This chapter has shown not only that the principle of loyalty underpins some of the basic structural principles informing the external aspect of the EU legal order but also how it gears its development towards a more cohesive, coherent and unified legal order. This is the logical consequence of its conceptualisation as a principle entailing an obligation of result. The obligation of result that loyalty gives rise to means that Member States are precluded from concluding agreements that would jeopardise the autonomy of the EU legal order. Likewise, even in those situations where it is unclear whether the other EU constitutional principles would apply (such as the CFSP), the Court has recognised that loyalty would apply nevertheless and that the special nature of the CFSP does not affect the scope and effects of the principle. Lastly, the normative pull of loyalty also unifies the understanding of the different external competences, fostering the unity not only of the EU's external representation but also the unity of the external effects of those competences.