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## Mixity and coherence in EU external relations: The significance of the 'duty of cooperation'

Christophe Hillion

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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**MIXITY AND COHERENCE IN EU EXTERNAL RELATIONS:  
THE SIGNIFICANCE OF THE 'DUTY OF COOPERATION'\***

**CHRISTOPHE HILLION\*\***

**CLEER WORKING PAPERS 2009/1**

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- \* The final version of this article is published in C Hillion & P Koutrakos (eds), *Mixed Agreements Revisited – The European Union and its Member States in the Word* (Oxford, Hart Publishing, 2010); the present version is printed with the kind permission of Hart Publishing.
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ISSN 1878-9587 (print)  
ISSN 1878-9595 (online)

© Christophe Hillion  
Printed in The Netherlands  
T.M.C. Asser Institute  
P.O. Box 30461  
2500 GL The Hague  
The Netherlands  
[www.cleer.eu](http://www.cleer.eu)

## I. INTRODUCTION

Mixed agreements typify the polyphonic nature of the Union's external action whose audibility ultimately depends on the degree of harmony achieved among its key players: the EC, its Member States, and increasingly the EU (*qua* CFSP and PJCCM). While the Treaty contribution to such harmony is rather limited,<sup>1</sup> the European Court of Justice has done its share to limit cacophony and, further, to cultivate coordination.<sup>2</sup> Thus, alongside its traditional *competence* focused case law,<sup>3</sup> the Court has established and progressively articulated a *cooperation* jurisprudence revolving around what is usually referred to as the *duty of cooperation* whereby Member States and EU institutions are exhorted to orchestrate their joint performance on the international scene.<sup>4</sup>

This chapter unpacks that duty of cooperation.<sup>5</sup> It unearths its constitutional roots (II), decrypts its legal effects (III), and explores its still undefined scope of application (IV). It will hopefully become clear to the reader that, with the assistance of the Court, the duty of cooperation has become an increasingly significant, and indeed constraining principle governing the law of mixed agreements. This development arguably translates a growing judicial acceptance of (or resignation to) the phenomenon of mixity, as well as the plurality that it encapsulates and which is intrinsic to the functioning of the EU system of external relations.<sup>6</sup>

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<sup>1</sup> In this sense, see J H H Weiler, 'The transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

<sup>2</sup> Institutional practice has also developed in the form of practical arrangements to foster coordination, in this sense, see the respective chapters of eg Joni Heliskoski, Ivan Smyth, Ivo van der Steen, in C Hillion & P Koutrakos (eds), *Mixed Agreements Revisited – The European Union and its Member States in the Word* (Oxford, Hart Publishing, 2010).

<sup>3</sup> See Case 22/70 *Commission v Council (AETR)* [1971] ECR 263; Opinion 1/75 *Understanding on a local cost standard* [1975] ECR 1355; Opinion 1/76 *Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741; further: A Dashwood and J Heliskoski, 'The classic authorities revisited' in A Dashwood & C Hillion (eds), *The general law of EC external relations* (London, Sweet & Maxwell, 2000) 3.

<sup>4</sup> J Heliskoski, 'Joint competence of the European Community and its Member States and the dispute settlement practice of the World Trade Organization' (1999) 2 *CYELS* 61 at 64. As he points out at footnote 22, any proposal designed to incorporate the requirement of unity and duty of cooperation into the EC Treaty were rejected at the 1996-97 IGC. Further: R Torrent, 'The 'Fourth Pillar' of the European Union after the Treaty of Amsterdam' in Dashwood & Hillion, above n 3, 221 at 231ff.

<sup>5</sup> As will become evident, the phrasing of the notion has significantly evolved in the case law, being now referred to by the Court as 'obligation of close cooperation'.

<sup>6</sup> An acceptance which Rass Holdgaard suggests in Chapter 8 of his *External Relations Law of the European Community – Legal Reasoning and Legal Discourses* (Alphen aan den Rijn, Wolters Kluwer, 2008); see also Allan Rosas' chapter in Hillion and Koutrakos, above n 2.

## II. THE CONSTITUTIONAL FOUNDATION OF THE DUTY OF COOPERATION

The duty of cooperation was first flagged up by the Court of Justice in the context of the Euratom Treaty<sup>7</sup> which, in contrast to the EEC Treaty,<sup>8</sup> explicitly foresees that the EAEC and its Member States may jointly conclude external agreements.<sup>9</sup> Relying on Article 192 EAEC which, akin to Article 10 EC, encapsulates the general principle of loyal cooperation, the Court emphasised the need for ‘close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion [of such agreement], and in fulfilment of obligations entered into’,<sup>10</sup> adding that ‘once the convention has entered into force, its application... entail(s) close cooperation between the institutions of the Community and the Member States’.<sup>11</sup>

The Court subsequently opined that such ‘duty of cooperation... must also apply in the context of the EEC Treaty’,<sup>12</sup> yet remaining cryptic as regards its legal foundation in this particular context.<sup>13</sup> Hence, in contrast to Ruling 1/78, Opinion 2/91 and several subsequent pronouncements,<sup>14</sup> do not explicitly relate such a duty to the general principle of loyal cooperation enshrined in Article 10 EC. Instead, the European Court posits that:

[t]his duty of cooperation, to which attention was drawn in the context of the EAEC, must also apply in the context of the EEC Treaty *since it results from the requirement of unity in the international representation of the Community*’ (emphasis added).<sup>15</sup>

<sup>7</sup> Ruling 1/78 *IAEA* [1978] ECR 2151. It has however been suggested that the Court had already hinted at the need for the Community and the Member States to cooperate in the conduct of external relations in two previous judgments in Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263; and Joined Cases 3, 4 & 6/76 *Kramer* [1976] ECR 1279, paras 34-35. Further: P Eeckhout, *External relations of the European Union – Legal and constitutional foundations* (Oxford, OUP, 2004) 193, J Heliskoski, *Mixed agreements as a technique for organizing the international relations of the European Community and its Member States* (The Hague/London/New York, Kluwer Law International, 2001) 62, and J Temple Lang, ‘The *ERTA* judgment and the Court’s case law on competence and conflict’ (1986) 3 *YEL* 183.

<sup>8</sup> At least until the Treaty of Nice, which amended the TEC and the TEU, introduced mixity in Article 133(6) EC. In this regard, see the Opinion of Kokott AG in Case 13/07 *Commission v Council*, 26 March 2009.

<sup>9</sup> Art. 102 EAEC.

<sup>10</sup> Para 34.

<sup>11</sup> Para 36.

<sup>12</sup> Opinion 2/91 *ILO* [1993] ECR I-1061.

<sup>13</sup> J Heliskoski, ‘The ‘duty of cooperation’ between the European Community and its Member States within the World Trade Organisation’ (1996) VII *Finnish Yearbook of International Law* 59 at 126-127, Editorial comments: ‘The aftermath of Opinion 1/94 or how to ensure unity of representation for joint competences’ (1995) 32 *CMLRev* 385, N Neuwahl, ‘Shared powers or combined incompetence? More on mixity’ (1996) 33 *CMLRev* 667.

<sup>14</sup> Eg Opinion 1/94 *WTO* [1994] ECR I-5267; Opinion 2/00 *Cartagena Protocol on Biosafety* [2001] ECR I-9713.

<sup>15</sup> Para 36, Opinion 2/91 *ILO* [1993] ECR I-1061.

Despite the Court's silence, the foundation of the duty of cooperation can nevertheless be located in Article 10 EC. As indicated by the wording of the above excerpt, the Court in Opinion 2/91 *transplanted* to the EEC context the very duty it had previously envisaged in the Euratom's specifically on the basis of the principle of loyal cooperation. In doing so, the Court did not alter the nature and ultimate legal foundation of the duty. Indeed, the expression 'to which attention was drawn in the context of the EAEC' suggests that the duty of cooperation is not specific to the EAEC Treaty. Rather, 'attention was drawn' then to a principle that transcends the boundaries of the different Community Treaties. As such, the duty may be envisioned as one of the 'foundations' of the Community legal order as a whole,<sup>16</sup> if not one of 'constitutional principles of the EC Treaty' to which the Court forcefully referred in its *Kadi* ruling.<sup>17</sup>

That reading, if correct, should also help understand the phrase 'requirement of unity in the international representation of the Community', a recurrent appendage to the duty of cooperation in various Court's pronouncements. It has often been suggested that this requirement is one of the foundations of the duty,<sup>18</sup> that serves to define the latter's function and informs its application. This view can partly be corroborated by the Court's evolving formulation of the link between the duty of cooperation and the 'requirement of unity'. Thus, while Opinion 2/91 foresees that the 'duty of cooperation... must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community', Opinions 1/94 and 2/00 present the duty as an 'obligation to cooperate [that] flows from the requirement of unity in the international representation of the Community'.<sup>19</sup> Framed in this latter perspective, the duty becomes a means to fulfil the unwritten 'requirement of unity of international representation of the Community'; it aims at attenuating the plurality inherent to mixity, perceived as hampering the effectiveness of the Community external action.<sup>20</sup>

A look back at the early case law however indicates that, at least initially, the expression 'since it results from the requirement of unity in the international repre-

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<sup>16</sup> In this regard, see Opinion 1/91 *European Economic Area (I)* [1991] ECR I-6079, where it holds that the Community Treaties (plural) established a *new legal order* for the benefit of which the Member States have limited their sovereign rights; the Court also refers there to 'the very foundations of the Community'. Further: H G Schermers, 'Commentary on Opinions 1/91 and 1/92' (1992) 29 *CMLRev* 991; A Dashwood, 'The relationship between the Member States and the European Union/European Community' (2004) 41 *CMLRev* 355 at 377.

<sup>17</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (3 September 2008, nyr); Opinion 1/91 *EEA (I)* [1991] ECR I-6079.

<sup>18</sup> In this sense, see Eeckhout, above n 7 at 215; M Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance' in M Cremona and B de Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford, Hart Publishing, 2008) 125 at 157; P Koutrakos, 'The interpretation of mixed agreements under the preliminary reference procedure' (2002) 7 *EFARev* 25 at 49.

<sup>19</sup> Opinion 1/94 *WTO* [1994] ECR I-5267; Opinion 2/00 *Cartagena Protocol on Biosafety* [2001] ECR I-9713, para 18.

sentation of the Community’ had a different connotation and served a different purpose. Arguably, that phrase encapsulated the *ratio decidendi* that the duty of cooperation envisaged in the Euratom context ‘must *also*’ (emphasis added) apply in that of the EEC. The term ‘unity’ in ‘requirement of unity in the international representation of the *Community*’ (emphasis added) thus referred to the unity of the international representation of *the Community legal order* comprising various Communities but based on a unity of foundations and principles.<sup>21</sup> Thus read, the unity of the international representation of the Community did not, at least initially, relate to the requirement of unity between the Community and Member States, to be fulfilled by cooperation. It is only at a later stage that the function of the phrase ‘requirement of unity in the international representation of the Community’ has been judicially altered and presented as the normative basis of the duty of cooperation as such, as epitomised by Opinion 1/94. In other words, the requirement of unity was not originally envisioned as a foundation of the duty of cooperation, but a means to apply it to the EEC context, its foundation being the same as in the Euratom’s, namely the general principle of loyal cooperation.

That the foundation of the duty of cooperation is ultimately to be located in the general principle of loyal cooperation rather than in the ‘requirement of unity’ has indeed been confirmed by the Court of Justice in its recent *MOX Plant* verdict, involving the joint participation of the Community and the Member States in UNCLOS.<sup>22</sup> The factual details of the case will be spelled out later. At this stage, suffice to mention the passage where the Court confirms the link between the duty of cooperation and Article 10 EC:

The Court has pointed out that, in all the areas corresponding to the objectives of the EC 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... The Member States assume similar obligations under the EAEC Treaty by virtue of Article 192 EA.

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<sup>20</sup> C W A Timmermans, ‘Organising joint participation of EC and Member States’ in Dashwood & Hillion, above n 3, 239 at 241; the author also relates the duty of cooperation to old Article 116 EEC – repealed by the Treaty of Maastricht – which provided that from the end of the transitional period onwards, Member States were, in respect of all matters of particular interest to the common market, to proceed within the framework of international organisations of an economic character only by common action. Consider also the Editorial Comments: ‘The aftermath of Opinion 1/94 or how to ensure unity of representation for joint competences’ (1995) 32 *CMLRev* 385; cp. T Tridimas, ‘The WTO and OECD Opinions’ in Dashwood & Hillion, above n 3, 48 at 59. See also P L H Van den Bossche, ‘The European Community and the Uruguay Round Agreements’ in J H Jackson and A O Sykes (eds), *Implementing the Uruguay Round* (Oxford, Clarendon Press, 1997) 62; J Heliskoski ‘Should there be a new article on external relations’ in M Koskeniemi (ed), *International law aspects of the European Union* (The Hague, Kluwer Law International, 1998) 276 at 276-277, and R Leal-Arcas, ‘Unitary character of EC external trade relations’ (2001) 7 *Columbia Journal of European Law* 355.

<sup>21</sup> An authority to support this proposition is: C-221/88 *ECSC v Faillite Acciaierie e ferriere Bussoni SpA* [1990] ECR I-495 where the Court insists on the cohesion and coherence of the Community Treaties, see paras 10-17.

<sup>22</sup> Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

The Court has also emphasised that 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 conclude a mixed agreement...

It is the first time and as such noteworthy that the Court refers to Article 10 EC when evoking the specific duty of cooperation applicable to mixed agreements, in the context of the EC Treaty. While they are mentioned in two separate paragraphs, the Court's reasoning indicates that the duty of cooperation and Article 10 EC are intimately connected, and that the latter is being envisaged as a specific application of the former as initially suggested by Ruling 1/78.<sup>23</sup> Indeed, it is striking that the Court *omits* to refer here to the almost proverbial 'requirement of unity in the international representation of the Community'. Combined with the express reference to Article 10 EC, the Court's omission thus clarifies and arguably firms up the constitutional foundation of the 'duty of cooperation' between the Member States and the Community: it stems from the principle enshrined in Article 10 EC, rather than from the unwarranted 'requirement of unity'.<sup>24</sup>

Arguably this permutation conceals a subtle change in the Court's conception of the duty, whereby the latter is deemed to ensure 'the coherence and consistency of the action [of the Community] and its international representation',<sup>25</sup> rather than the 'unity in the international representation of the Community'.<sup>26</sup> Whereas in the latter conception, the idea is to merge all voices into one and thus to obliterate plurality on the ground that it undermines the Community's international posture, in the former conception by contrast, plurality is acknowledged and addressed through constraining coordination, to ensure that all voices speak the same language.<sup>27</sup>

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<sup>23</sup> The application of the principle of loyal cooperation may take other forms, such as the *AETR* effect, as recalled in the *Open Skies* judgments (Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797; and Case C-476/98 *Commission v Germany* [2002] ECR I-9855), and at para 113 of Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

<sup>24</sup> It may be recalled that legal scholarship generally conceives of the duty of cooperation as a specific application of the principle of loyal cooperation, and at the very least that there is a connection between the two: See eg I McLeod, I D Hendry and S Hyett, *The external relations of the European Communities* (Oxford, Clarendon Press, 1996) 145; M Cremona, 'External relations and external competence: the emergence of an integrated policy' in P Craig and G de Búrca (eds), *The evolution of EU law* (Oxford, OUP, 1999) 137 at 170; Heliskoski, above n 7 at 64; R Frid, *The relations between the EC and international organisations. Legal theory and practice* (The Hague, Kluwer Law International, 1995) 149. See also E Neframi, 'L'exercice en commun des compétences illustré par le devoir de loyauté' in P-Y Monjal & E Neframi (eds.) *Le "commun" dans l'Union européenne* (Brussels, Bruylant, 2009) 179.

<sup>25</sup> C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; see further below.

<sup>26</sup> Opinion 2/91 *ILO* [1993] ECR I-1061; Opinion 1/94 *WTO* [1994] ECR I-5267.

<sup>27</sup> Further on this, see Allan Rosas' chapter in Hillion and Koutrakos, above n 2.



### III. THE CONSTRAINING EFFECTS OF THE DUTY OF COOPERATION

As the duty of cooperation stems from the general principle of loyal cooperation,<sup>28</sup> the latter's interpretation and application ought to inspire the former.<sup>29</sup> Hence in the specific context of mixed agreements, Member States shall facilitate the achievement of the Community's tasks, as well as abstain from any measure which could jeopardise the attainment of its objectives, ultimately 'to ensure the coherence and consistency of the Community's action and its international representation'.<sup>30</sup> Both the principle of loyal cooperation in general, and the duty of cooperation in particular, are expressions of Community solidarity, which, as the Court has suggested, is 'the basis... of the whole of the Community system'.<sup>31</sup>

In practical terms, several pronouncements of the Court of Justice indicate that the duty of cooperation may be invoked before the Court of Justice (A), and that its legal effects are not conditional upon the existence of a specific instrument that purports to fulfil it (B). The Court has also begun to articulate specific procedural obligations flowing directly from that duty, a trend possibly inspired by its prior jurisprudence on the application of Article 10 EC, in the context of EC external relations more generally (C)

#### A. A duty involving legal obligations

The question of whether the duty of cooperation entails legal and enforceable obligations was addressed by the Court of Justice in its *FAO* judgment.<sup>32</sup> Without

<sup>28</sup> On Art 10 EC and the duty of loyal cooperation, see eg Neframi, above n 24; K Mortelmans 'The principle of loyalty to the Community (Article 5 EC) and the obligations of the Community institutions' (1998) 5 *MJ* 67; M Blanquet, *L'article 5 du Traité CEE* (Paris, LGDJ, 1994) 417-426; O Due, 'Artikel 5 van het EEG-Verdrag. Een bepaling met een federal karakter' (1992) *SEW* 82; J Temple Lang, 'Community constitutional law: Art. 5 EEC Treaty' (1990) 27 *CMLRev* 645; V Constantinesco, 'L'article 5 EEC: de la bonne foi à la loyauté communautaire' in Capotorti, F et al. (eds), *Du droit international au droit de l'intégration: liber amicorum Pierre Pescatore* (Baden Baden, Nomos Verlag, 1987) 97; J Temple Lang, 'Article 5 of the EEC Treaty: the emergence of constitutional principles in the case-law of the Court of Justice' (1987) 10 *Fordham International Law Journal* 503.

<sup>29</sup> As summarised by Wessel, it includes more specifically: the obligation to take all appropriate measures necessary for the effective application of Community law; the obligation to ensure the protection of rights resulting from primary and secondary Community law; the obligation to act in such a way as to achieve the objectives of the Treaty, in particular when Community actions fail to appear; the obligation not to take measures which could harm the *effet utile* of Community law; the obligation not to take measures which could hamper the internal functioning of the institutions; and the obligation not to undertake actions which could hamper the development of the integration process of the Community; R A Wessel, 'The international legal status of the European Union' (1997) 2 *EFARev* 109 at 120.

<sup>30</sup> Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para 60.

<sup>31</sup> Case 6 & 11/69 *Commission v France* [1969] ECR 523, para 16: the Court refers to '[t]he solidarity which is at the basis of... the whole of the Community system in accordance with the undertaking provided for in [ex] Article 5 of the Treaty'.

<sup>32</sup> Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469.

dwelling too much on the factual details of the case,<sup>33</sup> suffice to recall that in the context of the Community's participation to the Food and Agriculture Organisation,<sup>34</sup> an Arrangement was agreed by the Commission and the Council to decide who, of the Community or the Member States, should act at FAO meetings.<sup>35</sup> The Commission challenged a Council decision granting voting rights to the Member States on an agreement on which the Community should have allegedly voted, in line with the terms of the Arrangement. The Court indeed found that the thrust of the issue was located in an area of exclusive Community competence, and held that by giving the right to vote to the Member States, the Council had breached the Arrangement and particularly Section 2.3 thereof.<sup>36</sup> The impugned Council decision was thus annulled.

Interestingly for the present discussion, the Court of Justice underlined that 'Section 2.3 represent(ed) a fulfilment of [the] duty of cooperation',<sup>37</sup> and as such constituted a *legal* instrument involving obligations for its signatories.<sup>38</sup> The Court thereby recognised that the duty of cooperation could entail legal obligations which, particularly where specified in an inter-institutional agreement, could subsequently be invoked and enforced.<sup>39</sup> Moreover, while the Arrangement was concluded by the Commission and the Council, it was found to bind the Member States as well, on the grounds that it defined clear obligations towards them. In the words of the Court, the Arrangement represents a 'fulfilment of the duty of cooperation *between the Community and the Member States* within the FAO' (emphasis added).<sup>40</sup> Indeed, in underlining that the Arrangement amounted to the fulfilment of the duty specifically 'within the FAO',<sup>41</sup> the Court suggested that it would have to be 'ful-

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<sup>33</sup> Further, see J Heliskoski, 'Internal struggle for international presence: the exercise of voting rights within the FAO' in Dashwood & Hillion, above n 3, 79.

<sup>34</sup> The Community is a Member of the FAO. Further: J Schwob, 'L'amendement à l'Acte constitutif de la FAO visant à permettre l'admission en qualité de membre d'organisations d'intégration économique régionale et la Communauté économique européenne' (1993) 29 *RTDE* 1.

<sup>35</sup> Arrangement between the Council and the Commission regarding the preparation for FAO meetings and statements and voting, reproduced in Frid, above n 24 at 398.

<sup>36</sup> Section 2.3 of the Arrangement provides that, when an agenda item deals with matters containing elements of national and of Community competence, the Commission shall express the common position achieved by consensus when the thrust of the issue lies in an area *within* the exclusive competence of the Community. The Commission should then vote in accordance with this common position. By contrast, when the thrust of the issue lies in an area *outside* the exclusive competence of the Community, the Presidency expresses the common position, and Member States vote in accordance with that position.

<sup>37</sup> Emphasis added; 'fulfilment' is translated as 'mise en oeuvre' in the French version of the Court decision.

<sup>38</sup> AG Jacobs approached this arrangement as 'pragmatic' (para 61), see his Opinion in Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469; J Sack, 'The European Community's membership of international organisation' (1995) 32 *CMLRev* 1227; T Tridimas, 'The WTO and OECD Opinions' in Dashwood & Hillion, above n 3, 48 at 59.

<sup>39</sup> Eeckhout, above n 7 at 214.

<sup>40</sup> Further: Timmermans, above n 20 at 244.

<sup>41</sup> Annex II of the Arrangement indeed contains a statement by the Council and the Commission according to which 'this arrangement reflects the special circumstances of Community partici-

filled' through other specific arrangements in the context of other mixed agreements,<sup>42</sup> unless it could apply regardless.

## B. Unconditional effects

The *Dior* judgment supports the view that the duty of cooperation is capable of having legal effects notwithstanding the absence of any specific inter-institutional arrangement.<sup>43</sup> *In casu*, the Court of Justice was asked to give a preliminary ruling on the interpretation of Article 50 of TRIPs included in the WTO agreement, which, in line with Opinion 1/94, was concluded by the Community and its Member States under joint competence.<sup>44</sup>

Although the Court had already established its jurisdiction in relation to that provision,<sup>45</sup> it was nevertheless disputed in the present case on the ground that the national court's reference concerned the application of that provision to an area (industrial design) where the Community had not yet legislated. Allegedly therefore, the national court was asking the Court of Justice to interpret a provision of a mixed agreement which, in this particular instance, was to apply to a situation falling *outside* the scope of Community law.

Relying on the fact that TRIPs was concluded by the Community and the Member States under joint competences, the Court held that where a case is brought before it in accordance with the provisions of the Treaty, it has jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret TRIPs. The Court added:

where a provision such as Article 50 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 trademarks, the Court has jurisdiction to interpret such provision in order to forestall future differences of interpretation...

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.

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

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participation in the FAO and has no implications regarding other international organizations, including those of the United Nations system'.

<sup>42</sup> Eg Arrangement between the Council and the Commission concerning participation in international negotiations on raw materials (so-called 'Proba 20'), reproduced in E L M Völker and J Steenbergen, *Leading cases and materials on the external relations law of the EC* (The Hague, Kluwer, 1985) 48. Further: Joni Heliskoski's chapter in Hillion and Koutrakos, above n 2; also: N Neuwahl, 'Shared powers or combined incompetence? More on mixity' (1996) 33 *CMLRev* 667 at 678ff.

<sup>43</sup> Joined Cases C-300/98 *Christian Dior* and C-392/98 *Assco Gerüste* [2000] ECR I-11307.

<sup>44</sup> OJ 1994 L336/1.

<sup>45</sup> Case C-53/96 *Hermès International* [1998] ECR I-3603; further: Koutrakos' chapter in Hillion and Koutrakos, above n 2.

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 (emphasis added).

For present purposes, the *Dior* ruling is significant for at least three reasons.<sup>46</sup> First, the judgment adds further support to the proposition that the duty of cooperation does involve obligations of a legal nature. It is noticeable that the Court does not refer to 'duty' at all in its judgment, but to the notion of 'obligation', thereby strengthening its normative character.<sup>47</sup> The Court's use of the expression 'close cooperation',<sup>48</sup> rather than cooperation *tout court* adds to this normative reinforcement. More importantly, the Court's pronouncement conspicuously supports the proposition that the duty of cooperation need *not* be formalised in an inter-institutional agreement, such as the FAO Arrangement, to generate legal consequences. It binds, *in itself*, without being conditional upon further '*mise en oeuvre*'.<sup>49</sup>

Second, *Dior* makes it plain that both *judicial* and *political* authorities of the Member States and the Community, are bound by the obligation closely to cooperate.<sup>50</sup> The Court's ruling thus echoes Advocate General Tesauro's Opinion in the *Hermès* case, who suggested that the Court's interpretation represents its contribution to the fulfilment of the duty of cooperation between institutions and Member States, which is a necessary supplement to that of political institutions. In his words, 'the absence of centralised interpretation could completely undo the results achieved by the obligation to cooperate in the negotiations and conclusion of the provisions in question'.<sup>51</sup>

Third, it suggests that the duty of cooperation may be used as the basis for the Court to assert its competence to interpret the 'procedural provision' at hand, irrespective of the fact that the latter applies *outside* the scope of Community law.<sup>52</sup> For the Court, the 'obligation (of close cooperation) *requires* the judicial bodies of

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<sup>46</sup> For a comprehensive analysis of this judgment, and a reminder of the factual background, see Holdgaard, above n 6 at 213; Koutrakos, above n 18 at 25; and J Heliskoski, Annotation (2002) 39 *CMLRev* 159.

<sup>47</sup> The Court had already used the word 'obligation' before, particularly in Opinion 1/94 *WTO* [1994] ECR I-5267, para 108.

<sup>48</sup> *Ibid.*

<sup>49</sup> See the French version of the *FAO* judgment.

<sup>50</sup> See the Opinion of AG Colomer in Case C-431/05 *Merck Genériques* (23 January 2007) at para 56. On judicial cooperation, see also Joined Cases C-261/07 *VTB-VAB NV v Total Belgium NV* and C-299/07 *Galatea BVBA v Sanoma Magazines Belgium NV* (23 April 2009); the Court's *Köbler* jurisprudence (case C-224/01 *Gerhard Köbler* [2003] ECR I-10239) gives more teeth to that duty of judicial cooperation.

<sup>51</sup> Tesauro AG had already made this connection in para 21 of his Opinion in *Hermès* (Case C-53/96). See also Koutrakos, above n 18, 25 at 38-39 and 49.

<sup>52</sup> In principle, the Court's jurisdiction under Art. 234 EC is limited to questions of interpretation and validity of Community law; see eg Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585.

the Member States and the Community, for practical and legal reasons, to give ... a *uniform* interpretation' (emphasis added) to Article 50 TRIPs, on the grounds that it 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'.<sup>53</sup> Indeed, '[o]nly the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article [234] of the Treaty is in a position to ensure such uniform interpretation' (emphasis added).<sup>54</sup>

The Court's *pre-emptive* interpretation of Article 50 TRIPs, based on the duty of cooperation, circumscribes as a consequence the margin of manoeuvre of the national courts in the implementation of the mixed agreement,<sup>55</sup> also where, as in the present instance, the provision is to be applied in the context of national law and does not relate to an area where the Community has exercised its competence. The duty of cooperation thus amounts to requiring the Member States and Community authorities to ensure *unity* in the implementation of a mixed agreement's provision that falls outside the scope of Community law.<sup>56</sup> In other words, it entails an obligation of result.

Given the far-reaching implications of the Court's interpretation for the Member States' judicial authorities,<sup>57</sup> the twofold distinction between procedural and non-procedural provisions, and between those that are 'capable of applying both to situations covered by national law and to situations covered by Community law' and those that are *not*, becomes crucial,<sup>58</sup> distinction which incidentally the

<sup>53</sup> Cp. Cosmas AG opinion. The Court had already developed a similar approach in relation to preliminary references involving domestic rules which refer to, or incorporate notions of Community law, eg Case C-222/01 *British American Tobacco* [2004] ECR I-4683, Case C-300/01 *Doris Salzmann* [2003] ECR I-4899, Case C-130/95 *Giloy* [1997] ECR I-4291, Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, Case C-297/88 *Dzodzi v Belgium* [1990] ECR I-3763. For reservations on this analogy, see AG Tesouro in his Opinion in Case C-53/96 *Hermès* [1998] ECR I-3603, at 3620, footnote 29. Further: Heliskoski, above n 7 at 66.

<sup>54</sup> Para 38. Further: A Dashwood, 'Preliminary rulings on the interpretation of mixed agreements' in D O'Keefe and A Bavasso (eds), *Judicial review in EU law – Liber Amicorum in Honour of Lord Slynn of Hadley – Volume I* (The Hague/London/Boston, Kluwer Law International, 2000) 173 at 173-174.

<sup>55</sup> On the idea of pre-emptive jurisdiction, although in the context of another procedure, see eg R Plender 'The European Courts' pre-emptive jurisdiction: opinions under Article 300(6) EC' in O'Keefe and Bavasso, above n 54, 203.

<sup>56</sup> As well established, such an authoritative interpretation ought to be taken into account by other Member States' judiciary (Cases 28-30/62 *Da Costa* [1963] ECR 31, Case 283/81 *Srl CILFIT* [1982] ECR 3415) Further: A Trabucchi, 'L'effet *erga omnes* des décisions préjudicielles rendues par la Cour de justice des Communautés européennes' (1974) *RTDE* 56.

<sup>57</sup> The Court has highlighted the limits of the implicit equation –i.e. jurisdiction on mixed agreements provisions as contribution to the fulfilment of the duty of cooperation– in its judgment in Case C-431/05 *Merck Genéricos* [2007] ECR I-7001. Further, see the chapters of Panos Koutrakos and of Inge Govaere in Hillion and Koutrakos, above n 2; also: R Holdgaard's annotation (2008) 45 *CMLRev* 1233.

<sup>58</sup> In this regard, see the Opinion of Tizzano AG of 29 June 2004 in case C-245/02 *Anheuser – Bush* (paras 110-115), and judgment of the Court, [2004] ECR I-10989.

Court is, itself, in charge of articulating.<sup>59</sup> Following on this point, it may be wondered whether the *Dior* conception of the duty of cooperation as obligation of result when applied at the judicial level, could reverberate through other levels of government, equally bound by the duty of cooperation. In particular, could other national authorities and EC institutions be expected to achieve equivalent level of cooperation, here envisaged as unity, in the implementation of mixed agreements’ provisions?

### C. A duty involving specific procedural obligations

Having established that the duty of cooperation is capable of unconditional, and potentially far-reaching legal effects, the Court has also spelled out specific procedural obligations that stem directly from that duty. This was made particularly clear in the *MOX Plant* judgment.<sup>60</sup>

The case concerns a dispute between Ireland and the United Kingdom over the operation of a plant in Sellafield, in the North West of England, on the coast of the Irish Sea, which recycles plutonium from spent nuclear fuel, and converts it into mixed oxide fuel (MOX) used as an energy source in nuclear power plants. Alleging various UK breaches of the provisions of the United Nations Convention on the Law of the Sea (UNCLOS), Ireland instituted proceedings concerning that plant against the UK before an arbitral tribunal established under Annex VII of UNCLOS.

The Commission considered that the dispute concerned Community law and thus, by having instituted proceedings against the UK in the framework of UNCLOS, Ireland had breached Articles 292 EC and 193 EAEC on the exclusive jurisdiction of the Court. The Commission also contended that Ireland had violated the provisions of Article 10(2) EC and 192(2) EAEC,<sup>61</sup> notably because it instituted the proceedings before the Arbitral Tribunal without having first informed and consulted the competent Community institutions.

Having recalled the function of Article 10 EC, the Court reiterated the ‘obligation of close cooperation’ evoked in *Dior*, which binds Member States and institutions ‘in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement’. It added that

The act of submitting a dispute ... to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law.

(...)

In those circumstances, the obligation of close cooperation within the framework of a mixed agreement involved, on the part of Ireland, *a duty to inform and consult the*

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<sup>59</sup> In this respect, see the Court’s judgment in Case C-431/05 *Merck Genéricos* [2007] ECR I-7001.

<sup>60</sup> Case C-459/03 *Commission v Ireland* [2006] ECR I-4635.

<sup>61</sup> Both articles foresee that Member States ‘shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty’.

*competent Community institutions* prior to instituting dispute-settlement proceedings concerning the MOX plant within the framework of the Convention.<sup>62</sup>

The Court thus suggests that the ‘obligation of close cooperation’ coined in *Dior* entails *procedural* duties: namely the duty of prior information and consultation.<sup>63</sup> These are binding, and defaulting compliance can lead to infringement proceedings. Commenting on the Court’s ruling, Neframi writes: ‘l’obligation de coopération étroite dans le cadre d’un accord mixte est une obligation de comportement, *indépendante de la réalisation d’un risque d’infraction à une obligation communautaire*, pourvu que le risque existe’ (emphasis added).<sup>64</sup>

The Court nevertheless abstained from holding that Ireland should have refrained from instituting the UNCLOS proceedings, given the duty of cooperation. This silence could be taken as an indication that, in the Court’s view, the duty of cooperation falls short of requiring such abstention. On the other hand, this part of the judgment may have been drafted in such a way because there was no particular need for the Court to be more specific on this point, given that it had already found that instituting the proceedings under UNCLOS fell foul of the exclusive jurisdiction of the Court under Article 292 EC. The question of whether the duty of cooperation may amount to a duty to abstain would thus remain open.

In this respect, the earlier case law on the effects of Article 10 EC, and notably two infringement cases against Luxembourg and Germany may provide some insight into the Court’s approach.<sup>65</sup> The two Member States had negotiated and/or concluded bilateral agreements on inland waterways transport with central European states – eg Poland, Romania, Slovakia, before their accession to the Union – while the Commission had been mandated by decision of the Council to negotiate a Community agreement precisely on that subject, with the same third countries. The Court found that, while they were still competent to act in the field, the two defendants were nevertheless bound by obligations flowing from Article 10 EC, which in the event they were found to have breached. The Court thereby conceived the duty of cooperation based on Article 10 EC, as generating, of itself, specific procedural obligations binding Member States in the exercise of their competence, and which may successfully be invoked before it, in case of non-compliance.

In particular, the Court opined that the Member States’ failure to cooperate or consult with the Commission ‘*compromised* the achievement of the Community’s task’ in the case of Luxembourg, ‘jeopardised the implementation of the Council Decision [mandating the Commission] and, consequently, the accomplishment of

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<sup>62</sup> The Court found that the same duty of prior information and consultation was also imposed on Ireland by virtue of the EAEC Treaty.

<sup>63</sup> They are reiterated at para 181.

<sup>64</sup> E Neframi, ‘La mixité éclairée dans l’affaire *Commission contre Irlande* du 30 mai 2006 (Affaire *MOX*): une double infraction, un triple apport’ (2007) *Revue du Droit de l’Union européenne* 687.

<sup>65</sup> Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, and Case C-433/03 *Commission v Germany* [2005] ECR I-6985.

the Community's task and the attainment of the objectives of the Treaty', in the case of Germany.

The Court further pointed out that the Commission's mandate to negotiate an agreement on behalf of the Community, based on a Council decision, and 'marking the beginning of a concerted Community action at international level', did *not* involve a duty of abstention on the part of those Member States. This came after a reminder of earlier jurisprudence seemingly suggesting otherwise:

... the 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 (see Case 804/79 *Commission v United Kingdom* [1981] ECR I-1045, paragraph 28).

The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and *requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions* in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation (emphasis added).

Behind an apparent tension between the two paragraphs may lay the suggestion that the effect of the duty of cooperation in general, and its ability to include a duty of abstention in particular, is a function of the nature of the Community competence at hand. The *Commission v UK* case referred to by the Court concerned the protection of the biological resources of the sea, which is an area of *a priori* exclusive Community competence,<sup>66</sup> thus leaving no space for Member States' autonomous initiative. It is thus unsurprising that the Court should evoke Member States' 'special duties of action and *abstention*' (emphasis added), particularly where the Commission has submitted proposals to the Council in the field. By contrast, the infringement proceedings against Luxembourg and Germany concerned an area, *viz.* inland waterways transport, in which the Court found that the Community had *not* acquired exclusive powers pursuant to the *AETR* jurisprudence, in view of the incomplete EC harmonisation.<sup>67</sup> Although the Council had formally endowed the Commission with a negotiating mandate, the duty of cooperation could not involve the Member States' duty of abstention to negotiate and conclude bilateral agreements, for it would in effect amount to an *AETR* effect by anticipation.

At the same time, all 'duties of action and abstention' do not seem to be ruled out. The Court held that 'the fact that the Luxembourg Government ha[d] declared its willingness to terminate all the contested bilateral agreements on the entry into force of a multilateral agreement binding the Community [did] not demonstrate compliance with the obligation of genuine cooperation laid down in Article 10

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<sup>66</sup> On this terminology, see Dashwood and Heliskoski, above n 3.

<sup>67</sup> Eg Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para 53.



EC.’ In the same vein, it was found in *Commission v Germany*, that ‘As it was to take place after the negotiation and conclusion of that agreement, such a denunciation would have had no practical effect since it would not have facilitated the multilateral negotiations conducted by the Commission’. The Court thus indicates that even if the Member States had taken measures to prevent a legal conflict between their international commitments and the eventual Community agreement, their bilateral undertakings in themselves still fell foul of Community law, namely the duty of cooperation, because they would not facilitate the Community negotiations. The Court thereby implicitly points to duties other than those of information and consultation. These additional duties, flowing from the duty of cooperation, come close to ‘duties of action and abstention’ which purport to prevent the Community negotiations and more generally the exercise of its powers being compromised by Member States’ conduct.

In practice, those duties could take the form of, for instance, a requirement to include/refrain from including specific provisions in the bilateral agreement,<sup>68</sup> possibly under the supervision of one of the EU institutions (eg the Commission), to guarantee that the bilateral commitments would not compromise the Community action.<sup>69</sup> A fortiori, the duty of cooperation could entail an obligation for Member States to take early steps to eliminate the risk of conflict with the action liable to be undertaken by the Community, and to adjust the bilateral agreement while the Community process of decision-making is advancing. Indeed, it could be posited that the more advanced the process of establishing a Community position, the more specific and constraining the obligations flowing from the duty of cooperation. For instance, once the external agreement is signed by the Commu-

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<sup>68</sup> In this regard, see Case C-205/06 *Commission v Austria* and Case C-249/06 *Commission v Sweden* (3 March 2009), and AG Maduro’s Opinion delivered on 10 May 2008. The Court held that Member States are expected to take appropriate steps to adjust bilateral agreements to ensure that EC powers can be effectively exercised. See also the Opinion of AG Sharpston in Case C-118/07 *Commission v Finland* (10 September 2009).

<sup>69</sup> Regulation 847/2004 (OJ 2004 L157) attests that the duty of cooperation may amount to a Community monitoring of Member States’ bilateral negotiations in areas where they have powers. It establishes a procedure of notification and authorization of Member States’ bilateral negotiations in the field of Air Transport following the *Open Skies* judgments. Further: Cremona above n 18 at 141 and 167; C Hillion, ‘A Look Back at the *Open Skies*’ in M Bulterman, L Hancher, A McDonnell and A Sevenster (eds) *Views of European Law from the Mountain* (Alphen aan den Rijn, Wolters Kluwer, 2009) 257; also: ‘ERTA, ECHR and *Open Skies* – Laying the grounds of the EU system of external relations’ in M Poirares Maduro and L Azoulay (eds), *The Past and Future of EU Law* (Oxford, Hart Publishing, 2009). An equivalent system is envisaged in other EC domains: eg Proposal for a Regulation, based on Articles 61(c) and 65 EC, establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations (COM(2008) 893, 23.12.2008); Proposal for a Regulation, also based on on Articles 61(c) and 65 EC, establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations (COM(2008)894, 19.12.2008).

nity and the Member States, they may be subject to 'special duties of action and abstention', and in particular the duty to refrain from taking 'any measures liable seriously to compromise the result prescribed' by the agreement in the context of the ratification process.<sup>70</sup> This could imply that Member States and the EC refrain from acting in a way that would make the ratification of the agreement more difficult.<sup>71</sup>

Arguably, this jurisprudence on the effects of Article 10 EC in the context of external relations inspires the way in which the Court conceives the duty of cooperation in the specific context of mixed agreements. Hence, in the light of the above, the Court's silence in the *MOX Plant* case, on a possible Ireland's duty to abstain from instituting proceedings should not necessarily be read as a denial.<sup>72</sup> The Court may shed further light on this point in the pending infringement proceedings against Sweden (the so-called '*PFOS* case').<sup>73</sup>

#### IV. THE DIFFERENTIATED APPLICATION OF THE DUTY OF COOPERATION

In various pronouncements, the Court has held that the duty to cooperate is triggered 'where it is apparent that the subject matter of an agreement or convention falls in part within the competence of the Community and in part within that of the

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<sup>70</sup> The *Inter-Environnement Wallonie* jurisprudence (Case C-129/96, [1997] ECR I-7411) established in relation to the implementation of adopted directives, could thus be applied *mutatis mutandi* to signed external agreements. AG Maduro has also made the suggestion that that jurisprudence be applied wherever the EC Treaty endows the Community with a power to act, to ensure that Member States' actions do not compromise the fulfilment of the Community objective see his Opinion of 10 May 2008 in Case C-205/06 *Commission v Austria* and Case C-249/06 *Commission v Sweden*; the Court ruled on a different basis in its rulings of 3 March 2009. See also in this sense: 'Re-admission agreements – consequences of the entry into force of the Amsterdam Treaty'; JHA Council conclusions of 27-28 May 1999, doc. 8654/99, p 8.

<sup>71</sup> See the chapters of Jenő Czuczai, Frank Hoffmeister and Ivan Smyth in Hillion and Koutrakos, above n 2. See also G de Baere, *Constitutional Principles of EU External Relations* (Oxford, OUP, 2008) 256.

<sup>72</sup> It is noteworthy that in its reasoning, the Court referred to an early letter of the Commission's services which contended that the dispute was a matter falling within the exclusive jurisdiction of the Court, eventually to hold that Ireland should be informed and consulted with the Commission, as if the Commission's view should have then led Ireland to refrain from instituting the proceedings.

<sup>73</sup> Sweden proposed unilaterally that a substance, PFOS (perfluorooctane sulphate), be added to Annex A to the Stockholm Convention on Persistent Organic Pollutants, Annex which foresees mandatory elimination of pollutants included therein. Both the Community and its Member States are party to this Convention. The Commission claims that as a consequence of Sweden's unilateral proposal, the EC's international representation was divided; it also points out that Sweden acted unilaterally with regard to PFOS despite of its awareness that the Community was engaged in drafting legislation on the issue. The Commission thus contends that Sweden's action meant that the Community and Member States could not jointly present proposals for additions to the Stockholm Convention, and that Sweden has therefore failed to fulfil its obligations under Articles 10 EC and 300(1) EC; OJ 2007 C 183/19.

Member States.’<sup>74</sup> It operates ‘between the Member States and the Community institutions, both in the process of negotiation and conclusion, and in the fulfilment of the commitments entered into’,<sup>75</sup> and it is ‘for the Member States and the Community institutions to take all the measures necessary so as best to ensure such cooperation’.<sup>76</sup>

These three general propositions point to a potentially wide scope of application of the duty of cooperation. But how wide? In particular, does the duty also involve legal effects in relation to Member States acting, either individually, collectively or possibly qua Council of the EU, in areas where the Community has no competence, including on the basis of Titles V and/or VI TEU? Given that the duty of cooperation works both ways, it may also be wondered whether the institutions are bound by the duty of cooperation in relation to Member States, in areas where the Community is exclusively competent.

This section focuses on the application of the duty at the level of implementation of mixed agreements, where it seems to be the most tangible.<sup>77</sup> It argues that while it has legal effects in virtually all the above mentioned configurations, the duty’s application is in practice a function of the legal context in which it is set to operate, and in particular on the type, nature, if not degree of mixity encapsulated in the agreement. Hence, agreements containing provisions involving interlinked exercise of Member States and Community competences (i.e. covering areas where the Community has competence albeit non-exclusive) warrant a more imperative duty of cooperation (A). While applying also to mixed agreements involving independent exercise of Member States and Community’s respective competences (i.e. covering Member States and/or Community exclusive powers), the duty appears to be less imperative (B). It is also contended that the duty of cooperation binds Member States acting in the framework of the Union, and to the Council of the EU acting on the basis of the TEU – though its application here has to be envisaged in connection with other provisions of the TEU (eg Articles 3 and 47 TEU) (C).

### **A. The duty of cooperation and interlinked exercise of Member States and Community competences**

The duty of cooperation has been held to be ‘more imperative’ when the mixed agreement is constituted by sub-agreements which are ‘inextricably interlinked’, as for example in the WTO Agreement.<sup>78</sup> The Court also considered that Member

<sup>74</sup> Eg Opinion 1/94 *WTO* [1994] ECR I-5267, para 108, Opinion 2/00 *Cartagena Protocol on Biosafety* [2001] ECR I-9713, para 18.

<sup>75</sup> Eg Opinion 1/94 *WTO* [1994] ECR I-5267, para 108; Opinion 2/91 *ILO* [1993] ECR I-1061, para 36.

<sup>76</sup> Para 38, Opinion 2/91 *ILO* [1993] ECR I-1061.

<sup>77</sup> On the application of the duty at the levels of negotiations and conclusion, see eg Holdgaard, above n 6 at 160.

<sup>78</sup> Opinion 1/94 *WTO* [1994] ECR I-5267, para 109. The Court has also that the duty is ‘all the more necessary’ when Member States have to act on behalf of the Community when the latter cannot be represented in an international organisation; Opinion 2/91 *ILO* [1993] ECR I-1061, para 37.

States and Community institutions have an 'obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement' and that this '*is in particular the position in the case of a dispute which... relates essentially to undertakings resulting from a mixed agreement which relates to an area... in which the respective areas of competence of the Community and the Member States are liable to be closely interrelated*' (emphasis added).<sup>79</sup>

The notion that the duty is more constraining if the mixed agreements involve interlinked Member States and Community competences has led to two opposite conceptions of the application of the duty of cooperation. On one view, this particular configuration of mixity entails a duty of cooperation amounting to an *obligation of result*, to the effect that Member States and Community institutions must always act jointly, on a basis of a co-ordinated position, particularly when implementing the agreement. Absent such coordinated position, there can be no action at all. This conception is based on the proposition that the duty of cooperation is 'directly linked by the Court to the requirement of unity in the international representation of the Community'.<sup>80</sup> On another view, the duty of cooperation remains, in any event, an obligation of *conduct*. Member States are only bound by *an obligation to use their best endeavours to reach a common position* with the Community.<sup>81</sup> If no such common position is reachable, it is for each Member State to defend its own interests as seems best to it.<sup>82</sup> It is only in matters falling under the exclusive competence of the Community that failure to agree a position within the Council entails no action at all, because by definition, there is no position taken.<sup>83</sup>

That the duty of cooperation is more imperative in some mixed agreements is not in itself tantamount to involving an obligation of result. In Opinion 2/91, the Court held that the Community institutions and the Member States have to take 'all the necessary measures *so as best to ensure* cooperation' (emphasis added). Member States are thus under an obligation to do their best to ensure cooperation, that is an obligation of conduct. Indeed only a duty to strive to reach a common position can be 'more imperative' in some cases than in others, whereas a duty to *reach* a common position is always equally 'imperative'.<sup>84</sup> In addition, since the duty of cooperation involves *mutual* obligations, Community institutions should

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<sup>79</sup> C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635, para 176.

<sup>80</sup> Timmermans, above n 20 at 241-243, see also Editorial comments: 'The aftermath of Opinion 1/94 or how to ensure unity of representation for joint competences' (1995) 32 *CMLRev* 385.

<sup>81</sup> See Ivan Smyth's chapter in Hillion and Koutrakos, above n 2. See also Opinion of AG Tesaura in Case C-53/96 *Hermès* [1998] ECR I-3603, para 21, and footnote 33.

<sup>82</sup> McLeod, Hendry, and Hyett, above n 24 at 149.

<sup>83</sup> This principle applies both in case of *a priori* exclusivity, and exclusivity resulting from the *ERTA* effect. For an illustration of Member States prevented to act internationally on their own in an area covered by internal rules, see the *Hushkits* dispute between the EU and the USA in the context of the International Civil Aviation Organisation, cited in A Rosas, 'International disputes settlement: EU practices and procedures' (2003) 46 *German Yearbook of International Law* 284 at 312-313.

<sup>84</sup> McLeod, Hendry, and Hyett, above n 24 at 149.

also take account of and give full force to the competence of the Member States when competence is shared.<sup>85</sup>

Moreover, the reference to the requirement of unity in the international representation of the Community cannot of itself turn the duty of cooperation into an obligation of result. While the Court has linked the duty of cooperation and the requirement of unity in the international representation of the Community, it has never explicitly required that Member States and Community institutions take all measures to ensure such 'unity'. The requirement of unity of representation of the Community and the duty of cooperation are two distinct notions, with the former amounting to a guiding principle for the interpretation of the duty, rather than a legal obligation. Only the *cooperation*, object of the duty, entails an obligation between the institutions and the Member States.<sup>86</sup> Indeed, as suggested earlier, the function assigned to the phrase 'requirement of unity' is disputable, and the recent case law of the Court, and notably the *MOX Plant* pronouncement, omits to refer to that phrase, evoking instead Article 10 EC as the foundation of the duty.<sup>87</sup>

That the duty of cooperation can only entail an obligation of conduct, in the sense of 'best endeavours', may nevertheless be qualified, particularly in the context of mixed agreements involving interrelated areas of Member States and Community competence. As evoked in the previous section of this paper, the Court has articulated procedural obligations deriving from the duty of cooperation, notably obligations of information and consultation in the *MOX Plant* case, which bind Member States and institutions in the context of a mixed agreement. While such procedural obligations constrain the conduct of the parties, they also appear to entail more than an obligation of conduct, in the sense that they require a particular action, if not, as suggested above, a particular abstention. Member States and institutions are not only expected to do their best efforts to inform/consult, they must *comply* with these procedural obligations.

Furthermore, in view of the Court's *Dior* judgment, it appears that in certain circumstances, the duty of cooperation amounts to an obligation of result in the sense of Member States and institutions having to ensure the uniform implementation of provisions of a mixed agreement, even if these do not relate to Community law. As recalled earlier, the Court held that where a 'procedural provision' of a mixed agreement is 'capable of applying both to situations covered by national law and to situations covered by Community law', the obligation of cooperation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation. More than acting so as best to ensure cooperation, national courts are here 'required' to apply the interpretation given by the Court, on the basis of the duty of cooperation. The *cooperation* at hand does not involve any margin of manoeuvre for the national judicial

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<sup>85</sup> I Hyett, 'The duty of cooperation: a flexible concept' in Dashwood & Hillion, above n 3, 248. To substantiate his views, he relies on Case C-230/81 *Luxembourg v European Parliament* [1983] ECR 255, para 37, Case C-65/93 *European Parliament v Council* [1995] ECR I-643, para 23.

<sup>86</sup> Hyett, above n 85 at 250.

<sup>87</sup> C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635. See above, Section II.

authorities in the application of the provision concerned, regardless of the fact that the latter does not relate to the exclusive competence of the Community, but only to an area of EC competence that may be exercised. One could thereby speak of an obligation of result, although perhaps only in the specific *Dior* set of circumstances, when the autonomy of the EC legal order is at stake.

The foregoing shed light on the more imperative application of the duty of cooperation in agreements characterised by interlinked Member States and Community competence. What remains to be examined is whether and if so how the duty of cooperation possibly entails obligations in the context of a mixed agreement where Member States and Community may exercise their powers independently from one another, viz. where the agreement covers areas where the Member States and/or the EC enjoy exclusive competence.

## **B. The application of the duty of cooperation where Member States and Community exercise their respective competences independently**

It is well established that Member States cannot intervene in areas falling under the exclusive competence of the Community,<sup>88</sup> unless specifically authorised.<sup>89</sup> Conversely, in areas pertaining to their reserved competence, Member States are in principle free to act,<sup>90</sup> though it is also well settled that the exercise of their powers is affected by the application of Community law.<sup>91</sup> The question this section seeks to address is that of whether such application of EC law, beyond the scope of Community competence, also concerns the duty of cooperation (i). It will then envisage the possible application of the duty of cooperation to EU institutions in areas of exclusive community competence (ii).

### **(i) Member States' duty to cooperate when exercising their retained powers**

Various arguments appear to support the proposition that, while exercising their competences (reserved or transitional) within the context of a mixed agreement, Member States are indeed bound by EC law obligations and in particular by the duty of cooperation.<sup>92</sup>

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<sup>88</sup> Case 22/70 *Commission v Council (AETR)* [1971] ECR 263.

<sup>89</sup> Case 41/76 *Donckerwolcke and Schou* [1976] ECR 1921; Case 174/84 *Bulk Oil* [1986] ECR 559; Case C-70/94 *Werner* [1995] ECR I-3189 and Case C-83/94 *Leifer and Others* [1995] ECR I-3231.

<sup>90</sup> McLeod, Hendry, and Hyett, above n 24 at 149.

<sup>91</sup> A Barav, 'The division of external relations power between the European Economic Community and the Member States in the case law of the Court of Justice' in C W A Timmermans and E L M Völker (eds), *Division of powers between the European Communities and their Member States in the field of external relations* (Deventer, Kluwer, 1981) 29 at 90.

<sup>92</sup> On the application of Art. 10 EC beyond the scope of Community competence, see Blanquet, above n 28 at 306.

To begin with, the case law of the Court of Justice does not seem to preclude this possibility. As evoked earlier, the element which the Court generally identifies as triggering the application of the duty of cooperation is broadly formulated, namely ‘where it is apparent that the subject matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States’.<sup>93</sup> While in those verdicts, the mixed agreements at hand cover areas where the Community does not have exclusive powers (eg WTO and ILO), the Court does not seem to condition and reserve the possible application of the duty to the specific type of mixed agreements involved in those cases. Instead, the Court’s formula is devised in general terms to the effect that the duty of cooperation applies, albeit in a differentiated fashion in view of the configuration of mixity, regardless of whether the respective competences of the Community and of the Member States are ‘co-existent’ (the mixed agreement contains provisions on both trade and defence, for example) or ‘concurrent’ (such as agreements in the field of trade in services).<sup>94</sup>

Indeed, the Court’s verdicts in the infringement cases evoked earlier, which have arguably informed the recent jurisprudence on the legal effects of the duty of cooperation in the context of mixed agreements, make clear that 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’ (emphasis added).<sup>95</sup> This latter phrase thus points to an application of the duty of cooperation across the board, irrespective of whether the Member States have a shared or exclusive right to enter into obligations towards third countries.

Moreover, the Court subsequently pointed out in *MOX Plant*, by reference to *Dior*, that ‘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 conclude a mixed agreement’ (emphasis added).<sup>96</sup> Seemingly, the phrase ‘under joint competence’ relates to the *conclusion* of the mixed agreement, rather than to ‘the commitments’ which have been ‘undertaken’ by Member States or the Community, but not necessarily by both jointly. That understanding is confirmed by the French version of the Court’s ruling, which reads:

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<sup>93</sup> See eg Ruling 1/78 *IAEA* [1978] ECR 2151, paras 34-36, Opinion 2/91 *ILO* [1993] ECR I-1061, para 36, Opinion 1/94 *WTO* [1994] ECR I-5267, para 108 and Opinion 2/00 *Cartagena Protocol on Biosafety* [2001] ECR I-9713, para 18.

<sup>94</sup> On different forms of mixed agreements: see the chapters of Marc Maresceau, and of Ramses Wessel in Hillion and Koutrakos, above n 2; A Rosas, ‘The European Union and mixed agreements’ in Dashwood & Hillion, above n 3, 200 at 206; M J F M Dolmans, *Problems of mixed agreements: division of powers within the EEC and the rights of third States* (The Hague, Asser Institute, 1985) 39-42, H G Schermers, ‘A typology of mixed agreements’, and P Allott, ‘Adherence to and withdrawal from mixed agreements’ in D O’Keeffe and H G Schermers (eds), *Mixed agreements* (Deventer, Kluwer, 1983) 97 at 118-119.

<sup>95</sup> See also in this sense, Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, paragraph 58; Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 64.

<sup>96</sup> Para 175.

'les États membres et les institutions communautaires sont tenus à une obligation de coopération étroite dans l'exécution des engagements qu'ils ont assumés en vertu d'une *compétence partagée pour conclure un accord mixte*. While the expression 'en vertu d'une compétence partagée' (emphasis added), singular, may suggest that the commitments derive from that joined competence, the italicised phrase and particularly the words 'pour conclure' nevertheless indicate that the joined competence relates to the *conclusion* of the mixed agreement: the expression thus tells that the competence is joint for the purpose of concluding the overall agreement, but says nothing on the nature of the various 'engagements' the latter includes, which may have been entered into by the Member States and/or by the Community institutions, under their respective competence.

The familiar *Centro-Com* ruling further substantiates that the duty of cooperation applies to Member states exercising their reserved competence. It may be worthwhile recalling the Court's emphasis that:

the powers retained by the Member States must be exercised in a manner *consistent* with Community law... [W]hile it is for the Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless *respect* the provisions adopted by the Community in the field of the common commercial policy (emphasis added).<sup>97</sup>

While the Court employs the term 'consistent' in the first sentence to emphasise the Member States' duty to comply with EC substantive rules when they exercise their 'retained powers',<sup>98</sup> the italicised term 'respect' could be understood as more than avoiding legal contradictions. Beyond substantive compliance, it supposes, in fulfilment of the duty of cooperation based on the principle of loyal cooperation, that the Member States, while exercising their 'national competence', refrain from taking actions which would *compromise* the effectiveness of Community provisions.<sup>99</sup> The Court's pronouncement reflects the general loyalty obligation enshrined in Article 10 EC, an obligation to facilitate the achievement of the Community's tasks and abstain from measures that could jeopardize the attain-

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<sup>97</sup> Case C-124/95 *Centro-Com* [1997] ECR I-81, paras 25 and 27. Further: P Koutrakos, *Trade, foreign policy & defence in EU constitutional law* (Oxford, Hart Publishing, 2001) at 138-139; and annotation of C Vedder and H P Folz, 'Case C-124/95, *The Queen v. H.M. Treasury and the Bank of England ex parte Centro-Com Srl*, Judgment of 14 January 1997, [1997] ECR I-81. Case C-177/95, *Ebony Maritime SA, Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and Others*, Judgment of 27 February 1997, [1997] ECR I-1111' (1998) 35 *CMLRev* 209.

<sup>98</sup> The Court also said that '[e]ven if a matter falls within the power of the Member States, the fact remains that the latter must exercise that power consistently with Community law' in Case C-466/98 *Commission v UK* [2002] ECR I-9427, para 41; also in Case C-221/89 *Factortame and Others* [1991] ECR I-3905, para 14 and Case C-264/96 *ICI v Colmer* [1998] ECR I-4695, para 19.

<sup>99</sup> Case C-205/06 *Commission v Austria*, and Case C-249/06 *Commission v Sweden* (3 March 2009, nyr).



ment of the Community's objectives.<sup>100</sup> That the duty of cooperation applies beyond the sphere of Community competence to Member States exercising theirs is also warranted by a functional argument. Member States' actions or inactions, in their domain of competence, may compromise the implementation of a mixed agreement in general, and affect as a result the rights and obligations of the Community in particular. Indeed, Member States' interference with Community rights and obligations under the agreement could occur even where their action (or inaction) does not breach substantive Community rules; the principle of supremacy thus being of no help to rectify the situation.

Such interference could notably occur in the context of a mixed agreement which, as it often happens, contains no express declaration of competence between the Community and the Member States. The absence of a clear distribution of powers, which has some advantages from a Community viewpoint<sup>101</sup> and which has been blessed by the Court of Justice,<sup>102</sup> makes it difficult, particularly for third parties, to establish in a particular instance who on the EU side ought to be held responsible for non-compliance with specific provisions of a mixed agreement.<sup>103</sup> In such a situation, the Court has suggested albeit obliquely,<sup>104</sup> that the principle should be that Community and Member States are jointly liable.<sup>105</sup> That potential joint liability in turn points to an interest the Community and the Member States share in ensuring that the agreement is fully complied with, and in this sense the duty of cooperation plays particular role. As summarised by Holdgaard, 'the Community institutions and the Member States are under a duty of close cooperation *because* the Community area must be capable of fully complying with international obligations flowing from mixed agreements' (emphasis added).<sup>106</sup>

<sup>100</sup> Cremona, above n 24, 137 at 170, see also Cremona, above n 18. One may equally look at the Opinion of AG Jacobs in the *Centro-Com* case, paras 40-44.

<sup>101</sup> Mixity has been used precisely to avoid having to establish scrupulously the distribution of competences between the Community and the Member States in the context of a particular agreement; see Heliskoski, above n 7 at 11 and 69; Holdgaard, above n 6 at 160. See also Schermers 'The internal effect of Community treaty-making' in D O'Keefe & H G Schermers (eds), *Essays in European Law and Integration* (Deventer, Kluwer, 1982) 167 at 170, who points out that 'mixity is a problem shifter'. Cf Opinion of AG Tesauero in Case C-53/96 *Hermès* [1998] ECR I-3603, para 14, footnote 13.

<sup>102</sup> Ruling 1/78 *IAEA* [1978] ECR 2151, paras 112-113.

<sup>103</sup> As Christian Tomuschat pointed out, if the Community and its Member States wilfully and purportedly refrain from formally publicising their demarcation line between their respective areas of jurisdiction, their partners cannot be expected to make the necessary inquiries themselves: C Tomuschat, 'Liability for mixed agreements' in O'Keefe & Schermers, above n 94, 125 at 130. Further on this point, see Peter Olson's chapter in Hillion and Koutrakos, above n 2.

<sup>104</sup> See Pieter Jan Kuijper's chapter in Hillion and Koutrakos, above n 2.

<sup>105</sup> Case C-316/91 *European Parliament v Council (EDF)* [1994] ECR I-625, and Opinion Jacobs AG, para 69; Case C-53/96 *Hermès* [1998] ECR I-3603, para 24. Further on international responsibility for mixed agreements: C Tomuschat, 'Liability for mixed agreements' in O'Keefe & Schermers, above n 94, 125; G Gaja, 'The European Community's rights and obligations under mixed agreements' in O'Keefe & Schermers, above n 94, 133 at 137ff, and R Kovar, 'La participation des Communautés européennes aux conventions multilatérales' (1975) 20 *AFDI* 903 at 916-917.

<sup>106</sup> Holdgaard, above n 6 at 163.

In principle, a clear division of competence, known in advance by the partner concerned, could help determine who, of the Community or the Member State(s), is to be blamed and sanctioned for the deficient fulfilment of obligations set out in a particular mixed agreement. In particular, only those parts of the agreement that relate to EC competence would be binding on the Community (Article 300(7) EC),<sup>107</sup> and thus engage its responsibility in case of non-compliance; the remainder of the provisions being binding only on the Member States which would thus be held liable in case of defaulting implementation.<sup>108</sup>

Yet, even if some specific obligations of a mixed agreement bind Member States only on the ground that internally the subject matter falls clearly within the purview of their competence, a Member State's non-compliance with those obligations may still affect the Community, notwithstanding the latter's lack of competence in the field(s) where the breach arises.<sup>109</sup> The violation of one particular provision under a mixed agreement may impinge on the performance of some, if not all other obligations set forth by the instruments. As compellingly argued by Heliskoski, the disputed conduct on the one hand and the consequences or implications thereof, on the other hand, might well fall within *distinct spheres of legal authorities*.<sup>110</sup> For instance, a Member State's breach of foreign and defence policies' obligations flowing from a mixed agreement could trigger the other party's cross-retaliation in the form of a reduction or suspension of trade in goods manufactured in the defaulting state, thereby affecting the Community's commercial policy.

It thus becomes apparent that as a result of the joined character of the relationship they establish with a third party, the Community and the Member States' actions are consequentially more interrelated than they would have been, had the agreement not been concluded jointly. As a consequence, areas of EC and Member States' competence which de jure are distinct and which can be exercised autonomously, may nevertheless be interconnected in effect particularly, but not only, if a declaration of competence is not included in the agreement. In this light,

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<sup>107</sup> Article 300(7) EC states that Agreements concluded under the conditions set out in Article 300 EC, shall be binding on the institutions of the Community and on Member States. As settled in the case law, both Member States and Community are thus expected to implement the agreement and observe their obligations, as a matter of Community law (Case 104/81 *Kupferberg* [1982] ECR 3641). The Court held that, in ensuring respect for commitments arising from an agreement concluded by the Community, Member States fulfil an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Case 12/86 *Demirel* [1987] ECR 3719), para 11).

<sup>108</sup> A Rosas, 'Mixed Union – Mixed Agreements' in Koskenniemi, above n 20, 125 at 142, C Kaddous, *Le droit des relations extérieures dans la jurisprudence de la Cour de justice des Communautés européennes* (Bâle, Helbing & Lichtenhahn – Brussels, Bruylant, 1998) 173-174; J Groux and P Manin, *Les Communautés européennes dans l'ordre international* (Luxembourg, Office des publications officielles des Communautés européennes, 1984) 150.

<sup>109</sup> Opinion of AG Tesouro in Case C-53/96 *Hermès* [1998] ECR I-3603, para 20.

<sup>110</sup> Heliskoski, above n 7 at 211. Gaja also points out that matters can be interlinked, even if apparently relating to clearly different legal authorities; see Gaja, above n 105 at 140. For a practical example see, C Hillion, *The European Union and its East-European Neighbours – A Laboratory for the Organisation of EU External Relations* (Hart Publishing, 2010, forthcoming).

it may be contended that Member States' choice to turn a Community agreement into a mixed agreement by including provisions relating to their own powers involving obligations which they alone can fulfil, entails as a corollary a responsibility *vis-à-vis the Community*. In particular, they commit themselves not only to perform all their obligations in *bona fide vis-à-vis* the third party as a matter of international law, they also commit themselves *vis-à-vis* the Community, jointly liable for ensuring full compliance with the Agreements obligations, to fulfil all obligations they have undertaken so as to not to compromise the Community's position and the achievement of its objectives under the agreement, and if need be to cooperate with it to address possible compliance deficiencies. This proposition builds on the principle established by the Court in its *Kupferberg* decision that in implementing the provisions of a Community Agreement, Member States fulfil an obligation of Community law as well.<sup>111</sup> Such a Member States' responsibility towards the Community flows more generally from the requirement of solidarity embodied in the principle of loyal cooperation which, as suggested earlier, is the constitutional basis of the duty of cooperation.<sup>112</sup>

Seen in this perspective, the duty to cooperate supplements the principle of supremacy, based on Article 10 EC, whereby Member State have to comply with their EC obligations thereunder (Article 300(7) EC). It equally complements the '*AETR effect*' crafted by the Court, also on the basis of Article 10 EC, to forestall future conflict between Member States and Community international commitments.<sup>113</sup> Not only should Member States refrain from acting inconsistently with the Community law aspects of the agreement, more generally they should abstain from a conduct in exercising their own powers that could impinge on the rights and obligations of the Community under the agreement.

In practical terms, it is legally implausible to envisage infringement proceedings against a Member State for failure to comply with substantive obligations flowing from non-EC provisions of the mixed agreement.<sup>114</sup> The case law seems

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<sup>111</sup> Case 104/81 *Kupferberg* [1982] ECR 3641, where the Court held in para 13 that '[i]n ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement.' Further: C Kaddous, 'Effects of international agreements in the EU legal order' in Cremona & de Witte above n 18, 292; I Cheyne, '*Haegeman, Demirel* and their progeny' in Dashwood & Hillion, above n 3, 20.

<sup>112</sup> See above, section II.A.

<sup>113</sup> See in this respect Opinion 1/03 *Lugano Convention* [1982] ECR 3641, Case C-45/87 *Commission v Greece (IMO)* (12 February 2009).

<sup>114</sup> Cp C-D Ehlermann, 'Mixed agreements – A list of problems' in O'Keefe & Schermers, above n 94, 3 at 21, who goes as far as to suggest that the Community should thus have the right to take preventive steps against the Member State whose action risks engaging the Community's responsibility. In particular, he considers that 'it would be unavoidable to allow the Community to use the infringement procedure in spite of the fact that the Member State acts within its sphere of competence.' See also C Hillion and R A Wessel, 'Restraining External Competences of EU Member States under CFSP' in Cremona & de Witte, above n 18, 79.

to prevent such course of action.<sup>115</sup> One could nonetheless moot enforcement proceedings against defaulting Member States for failure to comply with their obligation of 'close cooperation [with the Community institutions] in fulfilling commitments undertaken by them under joint competence when they conclude a mixed agreement', irrespective of the fact that their contentious action or inaction relates to their domain of competence.<sup>116</sup> More specifically and following earlier case law on the procedural obligations flowing from the duty of cooperation (eg *MOX Plant*), the Commission could start infringement proceedings against a Member State if after having failed to comply with its obligations under the agreement, it did not cooperate actively with the Community institutions to try and reach a settlement to the dispute with the third party concerned,<sup>117</sup> so as to bring an end to the damage suffered by the Community.

(ii) ***EU institutions' duty to cooperate when exercising EC exclusive competence***

Having established that Member States are bound by the duty of cooperation when exercising their retained competence, the Court has also made it clear that the institutions, too, are compelled by the duty to cooperate with Member States, including when acting in areas where the Community is exclusively competent.

At one level, the application of the duty to the institutions in relation to the Member States is based on the rationale of compliance that was exposed earlier; Member States should not suffer damage as a result of a Community deficient fulfilment of its obligations under the agreement.<sup>118</sup>

At another level, the Court has also suggested that certain conducts may be expected from the institutions in relation to the Member States on the basis of the duty of cooperation. This is particularly apparent in the recent *Commission v Greece (IMO)* pronouncement.<sup>119</sup> The Commission sued Greece on the ground that 'by submitting to the International Maritime Organisation (IMO) a proposal for monitoring the compliance of ships and port facilities with the requirements of Chapter XI-2 of the International Convention for the Safety of Life at Sea ('the SOLAS Convention') and the International Ship and Port Facility Security Code ('the ISPS Code')', the Hellenic Republic had failed to fulfil its obligations under Articles 10 EC, 71 EC and 80(2) EC. The Commission notably argued that by acting on an

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<sup>115</sup> Enforcement proceedings are in principle available only in relation to the application of EC law, see the broad interpretation of the Court in Case C-13/00 *Commission v Ireland* [2001] ECR I-2943; Case C-239/03 *Commission v France (Etang de Berre)* [2001] ECR I-2943; Case C-431/05 *Merck Genéricos* [2007] ECR I-7001.

<sup>116</sup> Further: Timmermans, above n 20 at 239.

<sup>117</sup> Further on dispute settlement, see Inge Govaere's chapter in Hillion and Koutrakos, above n 2.

<sup>118</sup> In that, the application of the duty of cooperation to the institutions is particularly important in the WTO context. See in this respect, the contribution of Pieter Jan Kuijper in Hillion and Koutrakos, above n 2.

<sup>119</sup> Case C-45/07 *Commission v Greece* (12 February 2009, nyr); see also Case 22/70 *Commission v Council (AETR)* [1971] ECR 263.

individual basis in an area in which the European Community enjoys exclusive external competence, Greece undermined the ‘principle of a united external representation for the Community’, and thus acted in breach of Community law. In its defence, Greece contended that the Commission infringed Article 10 EC by refusing to include its proposal on the agenda for a meeting of the Maritime Safety Committee (Marsec committee), chaired by the Commission’s representative.

Relying on the *AETR* doctrine, the Court first held that as a result of the adoption of an EC Regulation on enhancing ship and port facility security,<sup>120</sup> Greece could not, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope. By submitting the contested proposal, it however took an initiative likely to affect the provisions of the Regulation, and thus infringed its obligations under Articles 10 EC, 71 EC and 80(2) EC. The Court then turned to Greece’s contention that the Commission had failed to observe its duty of cooperation, and found that:

in order to fulfil its duty of genuine cooperation under Article 10 EC, the Commission could have endeavoured to submit that proposal to the Maritime Safety Committee and allowed a debate on the subject. As is apparent from Article 2(2)(b) of the Standard rules of procedure, such a committee is also a forum enabling exchanges of views between the Commission and the Member States. The Commission, in chairing that committee, may not prevent such an exchange of views on the sole ground that a proposal is of a national nature.

The Court thus acknowledges that the Commission is expected to cooperate with the Member States, including in areas of Community exclusive powers. However, it does it with circumspection. In particular, the Court makes it clear that the Commission is subject only to a ‘best endeavour’ duty which, in addition, appears not to be particularly imperative. In the words of the Court, it ‘*could* have endeavoured to’ submit the proposal to the committee and allow a discussion’ (i.e. positive duty), while it ‘*may* not prevent’ (emphasis added) an exchange of views ‘on the sole ground that a proposal is of a national nature’ (i.e. a negative duty). This cautious, if not restrained formulation of the Commission’s responsibilities flowing from the duty of cooperation raises the question of whether, in effect, the duty is equally constraining whether it concerns the institutions, or the Member States, while exercising their own powers.

The *IMO* ruling also suggests that even if the Commission’s failure to comply with the duty was established, the Member States would not be allowed to take autonomous measures in reaction to, and to get round it:

any breach by the Commission of Article 10 EC cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, in breach of that State’s obligations, which, in a case

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<sup>120</sup> Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security; OJ 2004 L 129/6.

such as the present, arise under Articles 10 EC, 71 EC and 80(2) EC. Indeed, a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of Community law (see, by analogy, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 20 and case-law cited)

In referring to *Hedley Lomas*, the Court indicates that the Member State's allegation that the Commission fails to fulfil its duty to cooperate has to be established and addressed in accordance with relevant procedures set out by the Treaty. Thus the Member State would possibly have to bring an action for failure to act under Article 232 EC to the Court. If so, it would then have to establish the specific action the Commission would be expected to undertake, for the action to stand any chance of success. A failure to cooperate would arguably be too vague,<sup>121</sup> so that a clear procedural obligation would most likely need to be invoked.<sup>122</sup> The Court's lax formulation of Commission's duties, evoked above, suggests that this may be a difficult case to make; again raising the question of a possible imbalance in the application of the mutual duty of cooperation.

### C. The application of the duty of cooperation in the context of the TEU

It has been argued that the duty of cooperation binds both Community and Member States whatever the type of mixity characterising an agreement, and whatever the nature of EC and Member States' respective competence involved. It may be wondered whether this application also extends to possible novel types of mixed agreements, and in particular to agreements that involve both the EC and EU acting on the basis of Title V and/or VI TEU, and which may incidentally engage Member States, notably at the level of implementation.<sup>123</sup>

The Court's case law on the EC-EU interactions, and most recently in the *ECOWAS* judgment, indicates that 'cross-pillar' legal bases combining EC and EU provisions are inconceivable in view of the principle encapsulated in Article 47 TEU.<sup>124</sup> The Court thereby appears to rule out the conclusion of cross-pillar (mixed)

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<sup>121</sup> Eg Case 48/65 *Lütticke* [1966] ECR 19.

<sup>122</sup> See in this respect, see Case C-205/06 *Commission v Austria* (3 March 2009), at para 44, and Case C-249/06 *Commission v Sweden* (3 March 2009), at para 44. Many thanks to Joni Heliskoski for drawing my attention to this point.

<sup>123</sup> In the pre-Amsterdam era, Member States have sometimes acted like 'trustees of the EU' which at the time was deprived of tools to conclude agreements itself. Hence, the Partnership and Cooperation Agreement with Russia was concluded by the EC and its Member States 'acting in the framework of the European Union'; See C Hillion (2009), above n 110.

<sup>124</sup> Further: C Hillion and R A Wessel, 'Competence Distribution in EU External Relations after *ECOWAS*: Clarification or Continued Fuzziness?' (2009) 46 *CMLRev* 551; B van Vooren, 'EU-EC External Competences after the Small Arms Judgment' (2009) 14 *EFARev* 7; A Dashwood, 'Article 47 TEU and the relationship between the first and second pillars competences' in A Dashwood and M Maresceau (eds), *Recent Developments in the Law of EU External Relations: Salient Features of a Changing Landscape* (Cambridge, CUP, 2008) 70; J Heliskoski,

agreements at least in the present EU constitutional configuration.<sup>125</sup> Yet, as made clear by Wessel's chapter in this book, the EU and EC are, although hitherto on an exceptional basis, jointly parties to external agreements. That is the case of the Schengen agreement concluded with Switzerland.<sup>126</sup> The question can thus still be raised of whether, and if so how, the duty of cooperation applies in the context of this specific form of mixed agreement. In particular, does the duty of cooperation have any effect in the EC-EU interactions (i.e. a 'horizontal duty of cooperation'), and second, between the EC and EU on the one hand, and, the Member States on the other, where the implementation of the agreement's EU provisions falls on the latter (i.e. an extended 'vertical duty of cooperation'). And if so, how? These questions would deserve a far more detailed analysis than this Chapter, devoted to the duty of cooperation in the context of classical mixed agreements, can afford. This section thus only flags up a few and admittedly fairly speculative suggestions.

It has been argued earlier that, in the context of a mixed agreement, Member States and institutions are bound by the duty of cooperation also when exercising their respective exclusive powers. By extension, it could be contended that institutions and particularly the Council, as well as Member States, acting in the context of the EU are equally bound to cooperate with the Community, eg when negotiating, concluding and implementing the provisions of the agreement that relate to titles V and/or VI TEU.

At a basic level, Member States are obliged to comply with Community law when exercising their own competences by virtue of the supremacy principle. Arguably, this holds true also when they act in the framework of title V and/or VI TUE, Member States should not be able to rely on EU obligations flowing from an EC-EU agreement to disengage themselves from their Community obligations derived therefrom. Indeed, institutions exercising EU competence, and more particularly the Council of the EU, are bound not to encroach upon the powers of the Community, in accordance with Article 47 TEU.<sup>127</sup> This suggests that, in prin-

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'Small Arms and Light Weapons within the Union's pillar structure: An Analysis of Article 47 of the EU Treaty' (2008) 33 *ELRev* 898; R van Ooik, *Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences* (2008) 4 *EuConst* 399.

<sup>125</sup> In *Kadi*, the Court has indeed insisted on 'the coexistence of the Union and the Community as integrated but separate legal orders', and on the 'the constitutional architecture of the pillars, as intended by the framers of the Treaties'; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* (3 September 2008) at para 202.

<sup>126</sup> Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis; OJ 2008 L53.

<sup>127</sup> Article 47 TEU stipulates that: 'nothing in [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them'. See in this regard: Case C-170/96 *Commission v. Council (Airport transit visa)* [1998] ECR I-2763, paras 15-16; Case C-176/03 *Commission v Council (Environmental penalties)* [2005] ECR I-7879; Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] ECR I-1657; Case C-91/05, *Commission v. Council (ECOWAS)*, Judgment of 20 May 2008, n.y.r. See also: Hillion & Wessel, above n 124.

principle, non-EC provisions of an EC-EU mixed agreement, cannot be set out and implemented in violation of Community law.

At another level, it has also been suggested that beyond the obligation of consistency (in the sense of absence of legal contradiction), Member States acting in their own right are compelled by the duty of cooperation. Arguably, this again holds true when they implement any non-EC provisions of a mixed agreement. In the same vein, the institutions are bound by a duty to cooperate not only vis-à-vis the Member States, in the sense of not compromising the latter's fulfilment of their EC obligations, they are also obliged under EU law, to cooperate among themselves. Hence, according to Article 3 TEU, the Council and the Commission are expected to ensure the consistency of the Union's external activities, and to cooperate to this end.<sup>128</sup>

Indeed, the rights and obligations of the Community under an EC/EU mixed agreement may be affected, and its objectives be compromised, by an action or inaction of the EU *qua* CFSP and/or PJCCM, or by an action or inaction of Member States acting in the framework thereof, to the same extent that its rights and obligations could be altered, and its action compromised, by Member States acting in their own rights, individually or collectively, as argued in the previous section. In particular, an EU (or indeed Member States') failure to comply with the EU part of the agreement may lead the other party to adopt 'appropriate measures' against the EC-EU as one party, to retaliate against the latter's defaulting compliance. As suggested earlier, the third party is not necessarily deprived, in this context, of the possibility to cross-retaliate particularly if the agreement does not include a declaration of competence, as for instance the EC-EU/Switzerland agreement on Schengen.<sup>129</sup> The Community could thereby be indirectly affected by a failure attributable to the EU.

As also submitted in the previous section, the duty of cooperation developed by the Court in the Community context thus entails that Member States and institutions should take all measures necessary to ensure compliance with their respective obligations.<sup>130</sup> In particular, while Member States have an obligation vis-à-vis the Community to comply with their EC obligations under the agreement, they also have a responsibility vis-à-vis the Community to ensure that they fulfil the obligations they have undertaken under their own competence. It implies that

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<sup>128</sup> C Hillion, 'Tous pour un, un pour tous! Coherence in the External relations of the European Union' in M. Cremona (ed.), *Developments in EU External Relations Law*, Collected Courses of the Academy of European Law (Oxford, OUP, 2008) 10. Further on the inter-institutional dimension of the duty of cooperation, see Cremona, above n 18 at 157-8.

<sup>129</sup> Further on this point: see Ramses Wessel's chapter in Hillion and Koutrakos, above n 2.

<sup>130</sup> As per Opinion 2/91 *ILO* [1993] ECR I-1061. Von Bogdandy and Nettesheim suggest that this cooperation might indeed involve that when examining national implementation acts of Title V or Title VI decisions, the national courts can ask the ECJ – following the procedure of Article 234 EC – whether the national measure, issued to implement a Council decision under a competence of Title V or VI TEU, violates Article 10 EC; A von Bogdandy and M Nettesheim, 'Ex pluribus unum: fusion of the European Communities into the European Union' (1996) 2 *ELJ* 267 at 283.



Member States should in particular refrain from action or inactions that would frustrate the fulfilment of Community objectives. Since failure to comply with the EU related provisions of the mixed agreement, either by the EU qua CFSP or PJCCM, or by the Member States,<sup>131</sup> may similarly engender negative consequences for the Community, it may be contended that the EU (as well as the Member States acting in the context thereof) is bound by a duty to ensure compliance with its obligations, so as to forestall the risk of joint-liability. In the same vein, the duty of cooperation would also govern the settlement of a possible dispute.

On the whole, the propositions formulated in the previous section as regards the application of the duty of cooperation to Member States and Community acting autonomously, could be applied by analogy to Member States and institutions when acting within the EU domain of a mixed agreement. The duty of cooperation would thus govern the EC-EU interactions, as well as the Member States-EC/U interface so as to ensure the consistency and coherence of the EU/C action and international representation, in line with Article 3 TEU.

This application *mutatis mutandis* may however have to be qualified. While in principle institutions and Member States may be bound by the requirements of compliance with EC law and of cooperation with the Community when acting in the context of an EC-EU mixed agreement, they are also bound by EU obligations. In the case of an EC-EU agreement, these may derive from the agreement itself, but also from the non-EC provisions of the TEU, such as the general objectives of the Union, and the specific aims, provisions and instruments of Titles V and/or VI TEU.<sup>132</sup>

Indeed, Article 11(2) TEU stipulates that:

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

These provisions establish a broad requirement of loyalty in relation to the Union's foreign and security policy as a whole.<sup>133</sup> Such a CFSP principle of loyalty in-

<sup>131</sup> In the case of cross-pillar mixed agreements such as the EU-EC-Switzerland agreement, Member States are not formally part of the agreement. While Article 300(7) EC foresees that they are bound by the EC part of agreement, it says nothing about the exercise of their competence when implementing the EU part of the agreement.

<sup>132</sup> On the legal effects of CFSP acts, see eg A Dashwood, 'The law and practice of CFSP Joint Action' in Cremona & de Witte, above n 18, 53; Hillion & Wessel, above n 114 at 81ff, Eeckhout, above n 7 at 138ff, E Denza, *The Intergovernmental pillars of the European Union* (OUP, 2002) esp. chaps. 2, 4 and 9; P Koutrakos, above n 97 at 44; R A Wessel, *The European Union's foreign and security policy – A legal institutional perspective* (Leiden/Boston, Martinus Nijhoff, 1999) 150ff.

<sup>133</sup> See Opinion of AG Mazák in C-203/07 *Greece v Commission* (8 May 2008).

volves both negative ('refrain from') and positive ('shall support') obligations<sup>134</sup> that remind of the provisions of Article 10 EC.<sup>135</sup> Similarly, the Member States are bound by a duty of cooperation in the context of Title VI of the TEU as made clear by the Court in its *Pupino* judgment.<sup>136</sup> The presence of those multifarious requirements of compliance and cooperation derived from EC and EU law raises the question of how potential tensions or incompatibilities may be resolved.

It may be recalled that the TEU foresees in its Article 2 that the EU aims at asserting its identity on the international scene. Arguably, the achievement of this general objective would be compromised if the EU external action was in any event to remain determined by, if not subject to existing Community commitments and objectives, eg in the field of trade. Adapting the EU external action, which also relies on a CFSP conceived as covering all aspects of foreign policy,<sup>137</sup> to EC external commitments could make that action's objectives nugatory.

In this sense, the Court's *Centro-Com* jurisprudence whereby Member States' national foreign policy measures must 'respect the provisions adopted by the Community in the field of the common commercial policy'<sup>138</sup> may have to be nuanced where Member States act in the framework of, or qua Council of the EU, on the basis of Title V and/or VI TEU. Indeed, Title V of TEU foresees the possibility for the EU to establish sanctions against a third state or individuals with subsequent obligations for the Community institutions to take measures in the context of the EC Treaty.<sup>139</sup> In the same vein, conditionality clauses inserted in mixed agree-

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<sup>134</sup> Loyalty is also formulated in Article 14(7) TEU (ex J.3(7)) concerning Joint Actions: 'Should there be any major difficulties in implementing a joint action, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the joint action or impair its effectiveness.' For a critical assessment of this obligation of loyalty, see M Koskenniemi, 'International law aspects of the Common Foreign and Security Policy' in Koskenniemi, above n 20 at 27; Hillion & Wessel, above n 114 at 91.

<sup>135</sup> F Fink-Hooijer, 'The Common Foreign and Security Policy of the European Union' (1994) 5 *EJIL* 173 at 177.

<sup>136</sup> Case C-105/03 *Pupino* [2005] ECR I-5285, where the Court pointed out at para 42 that: 'It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions'.

<sup>137</sup> According to an 'Avis du Service Juridique' of the Council: 'Une position commune définie par le Conseil sur la base de l'Article J.2 du Traité sur l'Union européenne et qui est destinée à établir une approche globale de la politique à mener par l'Union européenne à l'égard d'un pays tiers peut-elle tenir compte et mentionner les aspects (notamment économiques) des relations avec le pays tiers en cause à propos desquels la Communauté serait compétente pour adopter des mesures concrètes' (Doc. 9939/94). Indeed, the Court appears in its *ECOWAS* judgment to accept that not all comprehensive CFSP instruments would fall foul of Article 47 TEU; see Hillion & Wessel, above n 124.

<sup>138</sup> Case C-124/95 *Centro-Com Srl* [1997] ECR I-81.

<sup>139</sup> Articles 60 and 301 EC, see in this regard Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (3 September 2008), particularly paras 295-296. Further: eg Koutrakos, above n 97 at 67ff.

ments, imply the possibility for the EU to review Community commitments therein in consideration of a change in the political situation of the third country involved. CFSP actions can thus influence if not affect EC law, and the exercise of Community competence, without being considered to be violating EC law, nor the provisions of Article 47 TEU.<sup>140</sup>

In this perspective, it may be contended that in the context of an EC-EU mixed agreement, compliance with the EU part of agreement should not be jeopardized by the Community, unless such compliance amounts to a violation of Article 47 TEU. Indeed, as suggested above, the duty of cooperation also binds the Community institutions vis-à-vis the Member States. The same could apply towards the Union. After all, Article 3 TEU does not seem to limit the obligation of cooperation to the Council, but on the contrary appears to foresee a *mutual* duty to cooperate compelling both the Council and the Commission. In that, the EC might be expected to cooperate with the EU, notably to ensure the consistency of its external action and facilitate the achievement of its general foreign policy objectives.

## V. CONCLUSION

On the basis on the general principle of loyal cooperation, the Court of Justice has articulated a specific duty of cooperation to foster harmony between the Community and the Member States when acting jointly on the international scene. In so doing, the Court is contributing to enhance the coherence and consistency of the external action and representation of the Community, and incidentally of the Union.

It has been argued that the duty of cooperation plays an increasingly significant role in the law of mixed agreements. Its increased significance stems from its progressive *legalisation* and the elaboration of its normative content by the Court. While it has mostly entailed an obligation of conduct, whose normative strength may vary depending on the specific form of mixity of the agreement at hand, the duty of cooperation may also involve, albeit exceptionally, an obligation of result. Hence, Member States and Community judicial authorities may be called upon to ensure uniformity in the application of provisions of the agreement, where those have a procedural nature and are capable of applying at national and Community levels. The Court has also articulated enforceable procedural obligations (eg of consultation and information) that bind Member States and EC institutions, including where they exercise their powers. Such procedural obligations, which are still being elaborated, entail that while exercising their recognised powers, Member States and institutions should be aware and respectful of each other's undertakings, if not responsible for facilitating each other's tasks ultimately to promote

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<sup>140</sup> See also the provisions of Article 20 TEU which provide that '[t]he diplomatic and consular missions of the Member States and the Commission Delegations in third countries and international conferences, and their representations to international organisations, shall cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented.'

the common good. The Court thus fosters an attitude of mutual support, rather than instinctive territoriality reflex, at least in the EC/U-Member States interactions.<sup>141</sup>

That apparent increasing jurisprudential emphasis on cooperation as a contribution to consistency and coherence in the organisation of the EU external relations counter-balance the traditional competence-distribution case law. It may signal lesser judicial apprehension, and perhaps more acceptance of the plurality that characterises the EU system of external relations. The Court's changing views on the *function* of the duty of cooperation attest this. While often conceived as a vehicle to achieve 'unity' – otherwise limited in view of the constitutional limitations to EC exclusive competence – the duty of cooperation is being reoriented to pursue consistency and coherence in the intrinsically multifarious action and international representation of the Community, and ultimately of the Union. In this author's view, such a development is more in line with, and certainly more apposite to the inherent features of the Union's system of external relations. The latter's functioning and ultimate efficiency depends less on its successful obliteration of plurality through exclusivity, than on its aptitude to live with and exploit the fortune of diversity.<sup>142</sup>

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<sup>141</sup> This is less evident in the EC-EU interactions, as testified by the Court's *ECOWAS* judgment. Further: Hillion & Wessel, above n 124.

<sup>142</sup> The acceptance of plurality and the increasing focus on coordination rather than centralisation is seemingly at work also in the American federalism; see eg R B Ahdieh, 'Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination', Columbia University Law School, *Public Law & Legal Theory Research Paper* No. 08-184 (available at: <http://ssrn.com/abstract=1272967>).

