The obligation of EU Member States to exercise their foreign powers in conformity with EU law

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1. Introduction

The conferral of competences from Member States to the European Union (EU) consists in a relinquishment of sovereignty. Member States have progressively renounced not only to their legislative power in certain fields, but also in their freedom\(^2\) to conclude treaties with third countries and to manage their international relations. Since originally these limits became operative with the attribution of competences to the EU, it is clear why it is usually against the background of attributed or implied external competences that the freedom of Member States on the international plane is assessed. Many categories and tools have been elaborated in order to regulate this phenomenon. Accordingly, it is now a well-established principle of EU law that States cannot conclude international agreements in fields covered by an exclusive external competence of the EU, nor in domains covered by a shared competence but in relation to which the EU has already enacted its internal legislation.

This mechanism had and still has a great impact on the capacity of the EU to conclude or to accede to international treaties and to strengthen its role as a global actor. It is now certainly true that the EU has a concrete capability of influencing the creation and the development of international norms and regimes by way of its external competences. However, this is not the whole picture.

In order to understand the potential of EU external action on the development of international law, this paper aims at presenting and analysing a peculiar obligation of Member States, arising from the recent practice and, until now, only fragmentally addressed. It is submitted that, as happened in the past for the exercise of Member States’ internal competences, even in the field of external relations there exists an obligation for Member States to act on the international plane – that is in

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\(^2\) I will use the term freedom and not capacity, since it is here assumed that member States maintain their full international capacity within the international legal order, notwithstanding the transfer of competences to the EU.
their relations with third States and international organisations – in conformity with EU law. This means, of course, not only to respect the division of competences between them and the EU institutions, but also to avoid any international action in contrast with already adopted EU legislation and, in some cases, with internal measures still to be adopted.

The first part of the paper is devoted to a brief analysis of obligations deriving from the attribution of competences to the EU and from the principle of sincere cooperation. The second paragraph will try to present an assessment of the concrete scope of the obligation concerned, while, in the last part, the paper focuses on the various consequences deriving from the obligation for Member States, in an attempt to evaluate the incidence of the phenomenon on the development of international norms.

2. The sources of the obligation: from competence to loyalty

2.1. Exclusive competence and authorised agreements

The attribution of competences to EU institutions does not necessarily precludes any kind of Member States’ action or measure. This preclusive effect is produced only in the case of exclusive competences, a category which encompasses both a priori and supervening exclusivity. The Court has in fact recognised that when a competence has been attributed “fully and definitively” to the Union, Member States are forbidden to adopt any autonomous measure.3

The same mechanism applies in the field of external relations: when the EU enjoys an exclusive external competence, Member States are precluded from taking any action on the international plane, including the conclusion of international agreements. Still, the practice of the EU institutions shows that in certain cases – mainly for practical reasons – Member States can conclude international agreements with third States but they have to obtain a prior authorisation.4

First of all, this is a practice that is usually followed in the event the agreement that the Member State is ratifying falls partly within an EU exclusive competence. Although the procedure for authorisation to the conclusion of treaties has been provided by some regulations and only in relation

to certain fields, arguably there exists a general duty of Member States to ask for a prior authorization when they are about to conclude a treaty with third States in a matter falling within the exclusive competence of the EU. This duty can be derived from the general provision of art. 2(1) of the Treaty on the functioning of the European Union (TFEU), which provides that

«When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts».

Thus, whenever Member States are willing to act on the international level in a field of EU exclusive competence, they will be able to do so only if previously empowered by the Union, that is by requesting a prior authorisation for the conclusion of the international agreement. This seems also to be confirmed by the preamble of the regulations, in which, beside the legal basis, art. 2(1) TFEU is usually mentioned.

One of the first examples is the Regulation on air service agreements between Member States and third countries. The regulation followed the Open Skies cases, decided by the European Court of Justice in 1998, in which the Court found some Member States in breach of their EU obligations, for having unilaterally re-negotiated their bilateral air service agreements with the United States. In 2004 the above-mentioned Regulation was adopted, providing for a duty upon Member States to notify to the Commission all the existing bilateral agreements on air service and to request an authorisation for the conclusion of new bilateral agreements or for the amendment of existing ones. The rationale of such a regulation is self-evident. It has the primary aim of ensuring that newly assumed international obligations of Member States are compatible with the EU legal order, and thus of avoiding any possible normative conflicts between EU law and international commitments of Member States.

5 The regulation followed the Open Skies cases, decided by the European Court of Justice in 1998, in which the Court found some Member States in breach of their EU obligations, for having unilaterally re-negotiated their bilateral air service agreements with the United States. See Regulation No. 847/2004/EC of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries. See e.g. CJEU, C-471/98, Commission v. Belgium [2002], ECR I-9681; CJEU, C-467/98, Commission v. Denmark [2002], ECR I-9519; CJEU, C-468/98, Commission v. Sweden [2002], ECR I-9575.
After the air service agreements Regulation, two other Regulations have been adopted in the field of cooperation in civil matters.⁶ These Regulations set forth a more sophisticated mechanism, according to which the authorisation is to be requested by Member States before the opening of the negotiations. Member States will be authorised to enter into bilateral agreements under strict conditions.⁷ Before the signing of the agreement they have to notify to the Commission the outcome of the negotiation, so that the Commission will assess its compatibility with EU law. Moreover, negotiated text must provide for special clauses, regarding the possibility of full or partial denunciation in the event of the conclusion of a subsequent agreement of the EU - or of the EU and its Member States – with the same third country, and the direct replacement of the relevant provisions of the agreement with the provisions of the subsequent agreement concluded by the EU with the same third country.⁸ In the event of a refusal, the Commission will adopt an opinion that will be discussed with the Member State concerned.

In 2012 the new Regulation on Member States BITs has been adopted. It was justified by the extension of the EU exclusive competence in the field of common commercial policy, which today, according to art. 207 of the TFEU, also covers foreign direct investments.⁹ The EU, however, has preferred not to oblige its Member States to terminate all their BITs and to renegotiate them by itself, but instead has decided to set up a procedure to assess the compatibility of already existing and of newly concluded BITs with EU law and with EU external policy. The Regulation is indeed

⁶ See e.g. Regulation No. 664/2009/EC of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and the law applicable to maintenance obligations; Regulation No. 662/2009/EC of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations.

⁷ In particular, that the EU does not have an agreement on the same subject matter nor an agreement of this kind is likely to be concluded by the EU in the next 24 months; that Member States have demonstrated that they have a specific interest in concluding the agreement due to economic, geographical, cultural, historical, social or political ties with the third country concerned; that the envisaged agreement will not render EU law ineffective and will not undermine the proper functioning of that law; that the agreement will not undermine the object and purpose of EU’s external relations policy.


⁹ See L. PANTALEO, Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment, in European Foreign Affairs Review 19, 2014, pp. 312-315, arguing that the Regulation could be considered as an application by analogy of the priority rule of anterior treaties provided by art. 351(1) TFEU. See also J. P. TERHECHTE, Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States’ Bilateral Investment Treaties, in European Yearbook of International Economic Law, 2011, pp. 79 ff.
very similar to those on civil cooperation matters, although conditions under which the authorisation is to be issued are different.\textsuperscript{10} It is moreover remarkable that not necessarily the entire content of Member States’ BITs falls within an exclusive competence of the EU, given that art. 207 only refers to foreign direct investment.\textsuperscript{11}

In all these cases, it is upon the Commission to verify the compatibility of the foreseen agreement with EU law and then to issue the authorisation, which is usually to be sought before the signature of the treaty, once the text has been adopted. In fact, according to art. 18 of the Vienna Convention on the Law of Treaties (VCLT), the signature is the moment in which, after having adopted the official text of the treaty, the parties undertake a general good faith obligation not to behave contrary to the object and purpose of the treaty, although this will only enter into force with the ratification. This procedure is aimed at facilitating the work of the Commission, which can conduct its verification on a fixed and definitive text, but before the assumption of any kind of international obligation by its Member State.

All the mentioned regulations provide, as a criterion to grant the authorisation, that the agreement must be compatible with obligations deriving from EU law and that they do not jeopardise the effectiveness of EU legislation. However, this is not an autonomous obligation from the one requesting Member States to abstain from any action in fields covered by EU exclusive competence. It is instead a corollary of this main obligation, codified in art. 2(1) of the TFEU.

\textsuperscript{10} See Regulation No. 1219/2012/EU of 12 December 2012 establishing transitional arrangements for bilateral investments agreements between Member States and third countries. Art. 9 provides conditions for the authorisation to open the negotiation: that the agreement is not in conflict with Union law, apart from the incompatibilities arising from the allocation of competences between the EU and its Member States; that it is not superfluous, because the Commission has submitted a proposal to open negotiations for the same agreement under art. 218(3) TFEU; that is consistent with Union’s principles and objective for external action; that it does not constitute an obstacle for the conclusion of BITs with third countries by the EU. The Commission may also require Member States to include or remove from such agreements any clause where necessary to ensure consistency with the Union’s investment policy or compatibility with EU law.

\textsuperscript{11} The question on the nature of the EU competence in relation to foreign investment is under the scrutiny of the CJEU in the advisory procedure A-2/15, which is related to conclusion by the Union of a free-trade agreement with Singapore.
2.2. Shared competences and retained powers of Member States

Shared competences constitute the default rule in the division of competences within the EU legal order. According to art. 2(2) of the TFEU, in areas falling within a shared competences, Member States can exercise their competence to the extent that that the Union has not exercised its competence. Generally, the adoption of common rules by EU institutions in a field of shared competence constitutes a preclusion for Member States to act unilaterally within the scope of those rules. Two clarifications are nonetheless needed.

First of all, the provision of art. 2(2) of the TFEU must be read in conjunction with Protocol 25, according to which

“with reference to Article 2(2) of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area”.

Protocol 25 have been adopted in order to clarify that the pre-emptive effect does not occur automatically for the mere exercise of a shared competence by the Union.

Secondly, not all kind of competence exercise produce a preclusive effect: even if the Court has not clarify the point in a detailed manner, it is usually deemed that the notion of “common rules” entails only the adoption of legislative acts in a certain policy field. This would also be confirmed by the provision of art. 4(4) of the TFEU, which states that, in the areas of development cooperation and humanitarian aid, the exercise of that competence by the Union shall not result in Member States being prevented from exercising theirs. Moreover, the same preclusion seems to operate also in cases where the Union has not adopted legislative acts, but common rules are provided by international agreements concluded by the Union itself.

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14 This lack of preclusive effects for member States is connected to the impossibility for the Union to adopt legislative acts in these fields. See P. EECKHOUT, EU External Relations Law, Oxford, 2012, p. 139.
Shared competences have always played a great role in the functioning of EU external relations, in particular with the development of the pre-emption doctrine, and they have a relevant impact in determining the scope of Member States’ retained powers.\textsuperscript{16} Retained powers imply the possibility for Member States to conclude international agreements with third countries or, more generally, to manage their international relations without the interference of EU institutions. Nonetheless, they are not without limits.\textsuperscript{17} In fact, it is usually assumed that their exercise is subjected to substantive and procedural obligations imposed by the primacy of EU law and the duty of loyal cooperation.\textsuperscript{18} However, the scope of these two principles should be distinguished.

In fact, while the principle of primacy of EU law becomes relevant in case of a conflict with a Member State measure, the principle of loyalty implies different obligations, essentially of a preventive nature. This difference holds its relevance also in the field of external relations, with specific reference to Member States’ autonomy.

As it will be explained, the principle of primacy regulates the consequences of a conflict between an EU law obligation and an international commitment assumed by the State with a third country.\textsuperscript{19} The duty of loyal cooperation, instead, operates in a preliminary phase and aims at preventing the creation of normative conflicts between EU law and Member States’ international obligations.

The source of the obligation to comply with EU law when acting on the international plane does necessarily stems from the principle of loyal cooperation. Art. 4(3) of the Treaty on the European Union (TEU) codified the principle and it provides for certain duties, which are particularly relevant for our analysis. Where the norm provides that Member States shall take any action to ensure the fulfilment of obligations deriving from EU law and that they shall not act in a manner that could


\textsuperscript{17} See J. KLABBERS, \textit{Restrainst on the Treaty-Making Power of Member States Deriving from EU Law: Towards a Framework for Analysis}, in E. CANNIZZARO (ed.), \textit{The European Union as an Actor in International Relations}, The Hague, 2002, p. 175: «[…] even where the formal power still remains with the Member States, they cannot use their power in any which way they please».

\textsuperscript{18} M. CREMONA, \textit{EU External Relations: Unity and Conferral of Powers}, op. cit., p. 691

\textsuperscript{19} See next section below.
jeopardise the attainment of Union’s objectives, it is clear that the principle is requiring Member States to comply with EU law even when acting within the scope of their retained external powers.\footnote{A. THIES, \textit{Le devoir de coopération loyale}, op. cit., p. 329.}

This principle had been already recognised by the Court in a number of cases, even if not in a very detailed manner. In the \textit{Kramer} case, for instance, the Court recognised the competence of Member States to conclude international agreements in the absence of EU internal legislation, but this exercise of competences should comply with the duties deriving from the principle of loyal cooperation (enshrined in the then art. 10 of the EC Treaty). The Court confirmed that States should refrain from entering into international obligations capable of affecting the fulfilment of Community’s tasks, posing the basis for what will be later defined as a duty of abstention.\footnote{CJEU, C-307/97, \textit{Saint-Gobain v. Finanzamt Aachen-Innerstadt}, paras. 56-57.}

More clarity on the concrete effects of the obligation to comply with EU law in the exercise of foreign powers where addressed in a case concerning taxation. In the \textit{Saint-Gobain} judgment, the Court expressly confirmed that, when concluding bilateral agreement on double taxation, Member States «may not disregard Community rules» and that they have to «exercise their taxation powers consistently with Community law».\footnote{CJEU, C-55/00, \textit{Gottardo v. INPS}, paras. 33-34, where the Court also affirms that the fact that third countries are not bound by EU law is of no relevance for the obligations of member States.} Even if the judgment was related to \textit{inter-se} agreements, the Court reiterated this position in the \textit{Gottardo} case,\footnote{See E. NEFRAMI, \textit{The Duty of Loyalty: Rethinking its Application in the field of EU External Relations}, in \textit{Common Market Law Review}, 2010, p. 323.} where an agreement between Italy and Switzerland was at stake, thus confirming the applicability of the obligation also to agreements concluded with third countries.

The well-known subsequent case-law of the Court on the duty of loyalty in external relations confirmed this construction by identifying the duty of abstention and the duty of consultation even in fields falling within Member States retained power.\footnote{See E. NEFRAMI, \textit{The Duty of Loyalty: Rethinking its Application in the field of EU External Relations}, in \textit{Common Market Law Review}, 2010, p. 323.} The distinction between the two has not been definitively addressed by the Court and the uncertainty regarding their application still need to be settled. Interestingly, though, it has been suggested that the duty of consultation – which essentially consists in evaluating whether a Member State’s action is consistent with EU law and pursues a Union’s interest – can lead to the inclusion of specific clauses that will guarantee the
compatibility of the international agreement with EU law. This mechanism has been recently applied by the Commission in the decision 994/2012, related to member States bilateral agreements with third countries in the energy sector. The field is covered only by a shared competence and there are matters still falling within the competence of Member States. Thus, the Commission has established a process of information sharing whereby State are required to notify the intention to conclude the agreement and its content. The Commission will evaluate the compatibility of the agreement with EU law and will give its indications on necessary amendments. The question on the legal basis of these obligations is solved by the preamble of the decision, which – besides art. 194 of the TFEU – expressly mentions art. 4(3) of the TEU on the principle of sincere cooperation.

The rationale of these duties is evidently related to the need of protecting the Union's attainment of its objectives through the exercise of its competence. This shows that the duty of cooperation, in this particular field, has an essentially preventive nature, as it has been clearly confirmed by Advocate general Maduro, according to whom the obligations provided by art. 351(2) and by the duty of loyal cooperation require Member States «to exercise their powers and responsibilities in an international organisation such as the United Nations in a manner that is compatible with the conditions set by the primary rules and the general principles of Community law. As Members of the United Nations, the Member States, and particularly – in the context of the present case – those belonging to the Security Council, have to act in such a way as to prevent, as far as possible, the adoption of decisions by organs of the United Nations that are liable to enter into conflict with the core principles of the Community legal order. The Member States themselves, therefore, carry a responsibility to minimise the risk of conflicts between the Community legal order and international law».

While the Court’s case law is useful in identifying the source of the obligation at stake, the question on the extent of this obligation is complex one.

24 See in this regard the considerations expressed by the Advocate general in C-433/03, Commission v. Germany, 10 March 2005, EU:C:2005:153, paras. 94-95. A similar mechanism has been provided in the Commission decision 994/2012 in the field of energy bilateral agreements of Member States with third countries.
3. The scope of the obligation

A different question relates to the scope of the obligation for Member States to comply with EU law when acting on the international level. This is not only due to the difficulty of identifying the situations that triggers duties deriving from the principle of sincere cooperation, but also to the extensive way in which EU law obligations can enter into conflict with international agreements of Member States.

As for the first aspect, Member States are usually required to respect the duty of abstention or the duty of consultation when the Union has started a concerted action. The notion of concerted action is a rather vague one, even because the Court has recognised the possibility that also a strategic lack of action on the part of EU institution could trigger the mentioned duties.

The second aspect, instead, presupposes the assessment of the precise scope of EU law as different from the scope of EU competences. It is in fact clear that EU legislation can conflict with Member States’ international commitments even if it is adopted in a field different from that of the international agreement. This is more likely to happen in relation to the freedoms of movement and the principle of non-discrimination, but other cases of conflict cannot be excluded.

3.1. The scope of EU law

In order to understand the relevance of the obligation under analysis, one has to assess the boundaries of the scope of EU law that can affect the autonomy of Member States in the management of their international relations. The doctrine has observed that the scope of Union competences is not the same as the scope of application of the Treaties and that is the scope of EU law that determines the extent of loyalty obligations binding Member States. In this sense, when Member States are acting on the international plane – both individually and collectively – they must do so by paying due regard to the Union’s interest, which is linked to the objectives and the

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tasks pursued by the EU, but whose content is concretely to be defined by the scope of EU law obligations.\footnote{Ibid., p. 153.}

This construction presents the advantage of a better definition of Member States’ obligations, since they would be able to assess the precise scope of already enacted EU legislation and evaluate the compatibility of a subsequent international agreement. Nonetheless, it is not always easy to conduct this evaluation, since the scope of EU law could be greater than the scope of competences and normative conflicts often reveal themselves during the execution of the agreement and not in the phase of its negotiation or conclusion. Moreover, the Court has made clear that Member States are bound to take into account not only EU legislative measures, but also EU international agreements.\footnote{See CJEU, C-241/14, Roman Bukoransky v. Finanzamt Lörrach, 19 November 2015, EU:C:2015:766, para. 39.}

The disconnection between EU powers and EU law obligations also entails further consequences, related to the fact that Member States should take into consideration also potential conflicts. The question arose with reference to certain Member States’ bilateral investment treaties with third countries. Those BITs included a transfer clause that, according to the Commission, was in contrast with free movement of capitals rules. Those clauses constituted a potential obstacle to the adoption, by the Council, of restrictive measures under arts. 64(2), 66, 75 and 215 of the TFEU.\footnote{These norms provide for the different grounds under which a restrictive measure can be adopted: art. 64(2) relates to general restrictions in relation to third countries; art. 66 relates to restrictions in exceptional circumstances while arts. 75 and 215 apply to sanctions against third countries or individuals.}

The conflict here was only of a potential nature, but the Court confirmed that Member States have failed to comply with their duty under art. 351(2) if the TFEU by not amending the BITs’ clauses. The case suggest two main considerations: firstly, Member States should take into account the possibility of future measures adopted by the EU when deciding to conclude an international agreement;\footnote{See J. HEISKOSKI, The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, eventual future measures of the European Union, in A. ARNOLL, C. BARNARD, M. DOUGAN, E. SPAVENTA (eds.), A Constitutional Order of States? Essays in Honour of Alan Dashwood, Oxford, 2011, p. 545.} secondly, they have to be aware of the fact that, when conflicting EU measures will be adopted, they will not enjoy any protection, not even in the case of pre-accession agreements under art. 351 of the TFEU.\footnote{Given the fact that the protection accorded by art. 351(1) of the TFEU is only of a temporary character In this sense see CJEU, C-216/01, Budvar, par. 172: « Pending the success of one of the methods referred to in the second
States freedom, by imposing on them the duty to amend an international agreement – concluded before the accession to the EU – in order to avoid future normative conflicts.

3.2. The applicability of the Charter

The extent to which EU law is applicable to a certain situation also determines the applicability of the Charter of fundamental rights. According to art. 51, Charter provisions are binding for Member States only when they are implementing Union law. More recently, however, the Court seems to have adopted an extensive approach, that aims at identifying situations in which Member States are bound by the Charter even when they are not strictly “implementing” EU law. The focus has thus shifted to the scope of EU law obligations, which implies that every Member States’ action capable of affecting substantial EU norms must comply with the fundamental rights enshrined in the Charter. In the recent Fransson case, the Court confirmed that the applicability of the Charter is not limited to national measures implementing EU law, but must be extended to every situations in which EU law is likely to be applicable. The prerequisite for the application of the Charter will thus be the applicability of a concrete norm of EU law. This construction could in future play an important role in the field of external relation and is capable of limiting the exercise of Member States’ retained external powers.

Hints of this consequence come from a recent case, not yet decided by the Court, related to an extradition request issued by the Russian Federation to the Republic of Latvia in relation to an Estonian national who had been arrested on the territory of the Republic of Latvia. The referring paragraph of Article 307 EC in eliminating any incompatibilities between an agreement predating the accession of the Member State concerned to the European Union and the Treaty, the first paragraph of that article permits that State to continue to apply such an agreement in so far as it contains obligations which remain binding on that State under international law. See also the Commission’s position in CJEU, T-2/99, T. Port GmbH & Co. v. Council, par. 69, where it was held that art. 351 «does not establish that public international law obligations prevail over Community law, but rather the reverse. It points out that the second paragraph of that article provides that the Member States concerned are to take all appropriate steps to eliminate the incompatibilities established, which may include repudiating the public international law obligation at issue».

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judge has asked the Court whether the protection against extradition to a third country could be extended to citizens of a different EU Member State. The question originated from the fact that the Estonian national, Mr. Petruhhin, feared to be subjected to torture or unhuman treatment in Russia and thus claimed protection against extradition under art. 19(2) of the Charter. The case seems to fall outside the scope of the Charter as it relates to an international agreement on extradition between a Member State and a third country. Interestingly, Advocate general Bot has argued that, having Mr. Petruhhin exercised his freedom to move and reside in another Member State, his situation falls within the scope of EU law and thus he should enjoy the protection deriving from the Charter.38

The case shows the incidence of EU law on the execution of international obligations binding on Member States. According to the Court’s construction on the relationship between EU law and the Charter, any time EU obligations can be considered relevant to a specific situation – contextually regulated by an international norm – this would impose on the Member State the duty to take into account the Charter’s provision. The extent of this duty will depend on the future development of the Charter’s rights through the Court’s case law.

4. The impact of the obligation on the role of the EU in the development of international law

The paper has tried to analyse the source and the scope of the obligation for Member States to act on the international level in a manner consistent with EU law. Assessing the impact that the obligation could have on the creation and the application of international law is a rather hard task. A number of factor must be taken into account, since they help in appreciating the extent of the obligation concerned.

First of all, as it is clear from the observed practice, the obligation does not apply strictly to the sole treaty-making power of Member States, but it extends to all stages of external relations with third countries, namely negotiation, conclusion and execution of treaties.39 Accordingly, Member States are required not just to conclude international agreements compatible with EU law, but also to execute international obligations towards third States without jeopardising the effectiveness of

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38 C-182/15, Conclusions of Advocate general Bot, 10 May 2016, Aleksei Petruhhin, EU:C:2016:330, paras. 75-78.
EU law obligations. This is the context in which the principle of primacy is likely to become concretely relevant. In fact, when a conflict arises between international commitments of Member States and EU law obligations, Member States will be required to abide EU law and disregard the international obligations, with the risk of incurring in international responsibility. This construction could be questionable as far as legitimate expectations of third States are concerned, but the Court has recently confirmed it in a case related to the Marpol 73/78 Convention.\textsuperscript{40}

Moreover, the Court has recently recognised that States’ action within international organisation to which the EU is not a party can be constrained by the adoption of an EU position, established under art. 218 (9) of the TFEU, that Member States will have to uphold.\textsuperscript{41} This creates another basis for EU interference within international relations of Member States, not necessarily linked to the existence of an exclusive competence of the EU in the field in which the international organisation is conducting its activities.

It has been already observed that all these limits to Member States’ external powers are traditionally justified by purely internal interest of the EU legal order. For instance, exclusive external competence and the pre-emptive effect of EU legislation are generally seen as tools to protect the effectiveness and the uniform application of EU law. This is a concern which is also at the basis of the existence itself of EU external competences, as shown by art. 216, according to which the EU has competence to conclude an international agreement – \textit{inter alia} – when the agreement could affect common rules or alter their scope. Even in the case of retained powers, constraints on Member States deriving from the principle of sincere cooperation are justified under the need to preserve the

\textsuperscript{40} CJEU, C-537/11, \textit{Manzi v. Capitaneria di Porto di Genova}, 23 January 2014, EU:C:2014:19, par. 41, in which the Court acknowledged that the application of EU directive 1999/32/EC «may lead to an infringement of Annex VI and thereby oblige the Member States party to the 1997 Protocol to infringe their obligations with respect to the other contracting parties thereto».

\textsuperscript{41} See CJEU, C-399/12, \textit{Germany v. Council}, EU:C:2014:2258. In 2012 Germany brought an action for annulment of a Council decision establishing under art. 218(9) TFEU a common position to be adopted by Member States on behalf of the EU with regard to the voting of some resolutions in the context of the International Organisations for Wine and Vine (OIV), in which the Union does not enjoy neither the member nor the observer status. The dispute involved two questions of law that have a great impact on the duties imposed on Member States in their international affairs. Germany, in fact, contested the Council’s decision on two different grounds, namely that art. 218(9) TFUE would not be applicable to agreements to which the EU is not a party and that a common position could not be established in relation to acts not having a binding force under international law, as was the case with OIV resolutions. On the judgment see I. GOVAERE, \textit{Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case}, in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE, S. ADAM (eds.), \textit{The European Union in the World. Essays in Honour of Marc Maresceau}, Leiden, 2014, p. 125.
unity of the external representation of the Union\(^{42}\) or to guarantee the capability of the EU to fulfil its tasks.

These are all internal aspects of the interaction between EU law and Member States’ international obligations, since they are related to the correct functioning of EU institutions and to the effective pursuit of internal objectives. However, beside the internal rationale of the obligation concerned, there is a broader objective that this kind of constraints on Member States can pursue, linked to the role of EU law in the development of international law. In fact, the extensive scope of the limits that Member States encounters in managing their international relations – both in the conclusion and in the execution of international agreements – is likely to have a strong influence on the content of international norms.

This is certainly true for the creation of international norms: the extent of the obligation for Member States to comply with EU law in the exercise of their foreign powers is construed in a manner that can potentially encroach upon any kind of agreement in any field. Moreover, being the obligation related to behaviour Member States should hold within international organisations, EU law could potentially influence also the content of international obligations deriving from unilateral acts of international bodies.\(^{43}\)

Moreover, the duty also has an influence on how international norms are applied and interpreted. First of all, Member States will be induced to apply international rules in a manner consistent with EU law and this will be done essentially by means of interpretation.\(^{44}\) This replies a sort of duty of “consistent interpretation” with EU law, but in relation to the content of international norms. When interpretation is not suitable to solve the discrepancies between EU law and international obligations, the principle of primacy applies, obliging the State to amend or terminate the treaty.


\(^{43}\) This would be a more onerous constraint than that already provided in art. 34 of TEU, according to which «Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination».

\(^{44}\) Something that has already been recognised in relation to mixed agreements, which have to be implement in a uniform and coherent way within each member State legal order. See in this regard E. Neframi, *The Duty of Loyalty*, op. cit., pp. 334-335. According to the Author, this would also imply for member States a duty of uniform interpretation of the mixed agreement.
In conclusion, it seems that the constraints on Member States in the exercise of their foreign powers are capable of influencing the development of international law in a wide range of situations. However, it would not be always easy for third States to accept these kind of constraints (to which of course they are not bound), in particular when this could affect the execution of already assumed obligations by Member States. Consequently, the extent to which EU legislation will impair the autonomy of Member States is to be assessed carefully and on a case by case basis, not only to avoid situations of legal uncertainty, but also for reasons of legitimacy of the action of EU institutions.