FACULTY OF LAW AND CRIMINOLOGY

The principle of conferral and the principle of sincere cooperation in the light of recent case-law of the CJEU

ARE THE MEMBER STATES (POST-LISBON) 'MASTERS OF THE TREATIES' IN THE EXTERNAL RELATIONS OF THE EU?

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"*ever since the creation of the EEC, external action has been a big legal battlefield, due to the reluctance, resistance and inhibitions of the Member States to cede sovereignty to the EU*"

Piet Eeckhout

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NEDERLANDS ABSTRACT

Deze masterproef bespreekt en onderzoekt de vraag of de lidstaten (post-Lissabon) 'Meesters der Verdragen' zijn in de externe betrekkingen van de Europese Unie en dit in het licht van de recente rechtspraak van het Europees Hof van Justitie. Zijn de lidstaten van de Europese Unie in staat de controle over de externe bevoegdheden van de Europese Unie te behouden op basis van het principe van toegekende bevoegdheden dat bepaalt dat het de lidstaten zijn die de Europese Unie haar bevoegdheden toekennen? Welke rol speelt het principe van loyale samenwerking in deze kwestie?

Het **eerste deel** van de masterproef beschrijft het algemene kader van het onderzoek. Wat houden de principes van toegekende bevoegdheden en loyale samenwerking in, zowel in het algemeen als, meer specifiek, in de externe betrekkingen van de Europese Unie? Hoe geeft het Hof deze principes mee vorm? Het **tweede deel** van de masterproef gaat in op de concrete manieren waarop de lidstaten die de autoriteit hebben om de Europese Unie haar bevoegdheden toe te kennen, hun rol als 'Meesters der Verdragen' afdwingen. Zowel op procedureel vlak als op materieel vlak kunnen dergelijke pogingen waargenomen worden via de rechtspraak van het Hof. Daarnaast zijn er ook een aantal individuele lidstaten die via het inroepen van hun 'opt-out' proberen ontsnappen aan verplichtingen tegenover derde landen die hen opgelegd worden via de Europese Unie. Het **derde deel** van de masterproef focust op de reactie van het Hof op de pogingen van de lidstaten om hun positie als 'Meesters der Verdragen' te beschermen. Eerst en vooral wordt ingegaan op de manier waarop het Hof haar eigen bevoegdheid in deze materie ziet. Vervolgens wordt de over het algemeen brede interpretatie van de bevoegdheden van de Europese Unie door het Hof bekeken. Tot slot beschrijft dit deel van de masterproef wat de invloed van het principe van loyale samenwerking is via de rechtspraak van het Hof. Het **vierde en laatste deel** bevat een aantal bedenkingen naar de toekomst toe. Heel wat situaties vragen namelijk om verdere verduidelijking.

De belangrijkste **conclusie** van het beperkte onderzoek van deze masterproef is dat de lidstaten het moeilijk hebben om hun positie als 'Meesters der Verdragen' te waarborgen. Het Hof beslist vaak tot een brede externe bevoegdheid voor de Europese Unie en haar instellingen. Dit heeft tot gevolg dat de bewegingsvrijheid van de lidstaten op het internationaal toneel beperkt wordt. De ruime interpretatie van het principe van loyale samenwerking door het Hof versterkt deze beperking nog. Dit principe kan er namelijk toe leiden dat een *de iure* gedeelde bevoegdheid van de Europese Unie en de lidstaten in de praktijk een exclusieve bevoegdheid van de Europese Unie wordt.

ABBREVIATIONS

CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EEA	European Economic Area
High Representative	High Representative of the Union for Foreign Affairs and Security Policy
ITLOS	International Tribunal for the Law of the Sea
ISDS	investor-state dispute settlement
OIV	International Organisation of Vine and Wine
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
the Council	the Council of the European Union
the Court	the Court of Justice
TRIPs Agreement	Trade-Related Aspects of Intellectual Property Rights-Agreement
WRC-15	World Radiocommunication Conference of the International Telecommunication Union 2015
WTO	World Trade Organisation

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INTRODUCTION

According to the German Constitutional Court, the EU Member States are the Masters of the EU Treaties.[1] This view implies that the Member States have the ability to broaden as well as to limit the European Union's field of action. The principle of conferral, inscribed in the Treaties, constitutes the legal basis for this presumption.[2]

The principle of conferral is the basis of the division of competences between the European Union and the Member States and therefore of fundamental importance.[3] It entails that the European Union can act only within the limits of the competences *conferred upon it by the Member States* and that competences not conferred upon the European Union *remain with the Member States*. Both Article 4(1) and Article 5(2) of the Treaty on European Union (hereafter: TEU) describe this principle, thus, the dual reference might be intended to stress its importance on the one hand and to stress the Member States' role as Masters of the Treaties on the other hand.

The division of competences between the European Union and the Member States is particularly sensitive in the European Union's external relations. As Piet Eeckhout observes, "*ever since the creation of the EEC [external action] has been a big legal battlefield, due to the reluctance, resistance and inhibitions of the Member States to cede sovereignty to the EU*".[4] Indeed, the more the European Union intervenes on the international level, the more Member States lose their spot in the international reality while the conduct of foreign policy constitutes "*the key characteristic of independent sovereign statehood*".[5]

If no (exclusive) competence is conferred upon the European Union, the Member States do have the ability to act. However, in their actions, the principle of sincere cooperation of Article 4(3) of the TEU needs to be

[1] Kloppenburg-Beschluß, BVerfGE 75, 223, http://www.servat.unibe.ch/dfr/bv075223.html, paragraph 58; Maastricht, BVerfGE 89, 155, http://www.servat.unibe.ch/dfr/bv089155.html, paragraph 135 and Lissabon, BVerfGE 123, 267, http://www.servat.unibe.ch/dfr/bv123267.html, paragraph 298.

[2] "*As a supranational organisation the European Union must comply, as before, with the principle of conferral exercised in a restricted and controlled manner. Especially after the failure of the project of a Constitution for Europe, the Treaty of Lisbon has shown sufficiently clearly that this principle remains valid. The Member States remain the masters of the Treaties. In spite of a further extension of competences, the principle of conferral is retained.*" (Lissabon, BVerfGE 123, 267, http://www.servat.unibe.ch/dfr/bv123267.html , paragraph 298, translation : http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html).

[3] Sacha Garben and Inge Govaere, 'The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, Portland – Oregon 2017) 5 (hereafter: Sacha Garben and Inge Govaere, 'The Division of Competences..').

[4] Piet Eeckhout, *EU External Relations Law* (2nd edn Oxford University Press, Oxford 2011) 5 (hereafter: Piet Eeckhout, *EU External Relations Law*).

[5] Panos Koutrakos, *EU International Relations Law* (2nd edn Hart Publishing, Oxford 2015) 419 (hereafter: Panos Koutrakos, *EU International Relations Law*).

taken into account.[6] Mainly the third part of this Article limits the margin of action for the Member States. It provides that Member States must facilitate the achievement of the European Union's tasks and refrain from any measure which could jeopardise the attainment of the European Union's objectives. This begs the following question: are the Member States really the Masters of the Treaties or are their powers limited by their duty of sincere cooperation?

The objective of this Master's dissertation is therefore to elaborate on the following main question: are the Member States (post-Lisbon) 'Masters of the Treaties' in the external relations of the European Union?

1. Overview

The Master's thesis' research consists of four parts. The **first part** concerns the general framework of the research. It will elaborate on the legislative and judicial developments that are relevant to frame the core of the research in part two and three. Therefore, it is not intended to give an exhaustive theoretical overview of the external competence of the European Union and its Member States. Firstly **(1.1)**, the principle of conferral and the principle of sincere cooperation will be addressed in general. What do they entail? Where are they inscribed in the Treaties? Secondly **(1.2)**, a short overview will be given of the implications the principle of conferral and the principle of sincere cooperation have in the external relations of the European Union. Thirdly **(1.3)**, the relevant case-law of the Court of Justice (hereafter: the Court) concerning the European Union's external relations-competence and connection to the principle of sincere cooperation will be discussed. Finally **(1.4)**, the influence of the Lisbon catalogue of competences will be addressed. How does this catalogue influence the division of external competences and which difficulties can be identified?

The **second part** deals with the concrete attempts of the Member States to be, to stay or to become Masters of the Treaties. More specifically, the attempts of the Member States to retain control of the division of competences will be discussed through the analysis of case-law of the Court. In several cases, the Council of the European Union (hereafter: the Council) will act to protect the interests of the Member States since this EU institution gathers representatives of the Member States **(2.1)**.[7] However, if no joint position can be found between the Member States in the Council or if the Council does not act in line with what a Member State expects, individual Member States can act to protect their individual interests **(2.2)**. Both situations will be analysed and compared **(2.3)**.

[6] Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials* (6th edn Oxford University Press, Oxford 2015) 377-378 (hereafter: Paul Craig and Gráinne De Búrca, *EU Law:…*).
[7] Article 16(2) of the TEU.

The **third part** describes the interpretation of the division of competences by the Court. First of all, it is necessary to examine how the Court sees its own jurisdiction in this field **(3.1)**. Furthermore, this part will address the reaction of the Court to the attempts of the Member States established in part two. In general, the Court gives a broad interpretation of the competences of the European Union. How does the Court justify this and which limitations to this broad interpretation can be observed **(3.2)**? Finally, the principle of sincere cooperation can come into play. For instance, the principle can have its influence in situations where there is no exclusive competence for the European Union and as a consequence, Member States act alone or jointly with the European Union. The principle of sincere cooperation can in a situation of joint action result in a *de iure* shared competence becoming a *de facto* exclusive competence for the European Union.[8] In which situations does this happen and how does the Court substantiate this result **(3.3)**?

Finally, the **fourth part** will include some 'Reflections on the future' concerning the principle of conferral **(4.1)** and the principle of sincere cooperation **(4.2)**.

2. Limitations

The main question of the Master's dissertation implies three limitations of the scope of the research.

Firstly, the principle of conferral and the principle of sincere cooperation will be examined *in the context of the European Union's external relations*. As described above, external action is a "*big legal battlefield*" when it comes to ceding sovereignty to the European Union.[9] Several difficulties concerning the division of competences and the choice of the correct legal basis for an act in the European Union's external relations can be thought of. For instance, the choice of the legal basis determines which procedure should be followed to issue an act. In case of the European Union's external relations, this choice can have a major impact since it can lead to the exclusion of democratic control by the European Parliament and judicial control by the Court.[10] Another example is the existence of mixed agreements with third countries which need to be signed and ratified by the European Union and each of its Member States.[11] As can be gleaned from the complications in the ratification process of the Association Agreement with Ukraine and in the signing process of CETA, mixed agreements have major practical consequences and influence the image of the

[8] Robert Schütze refers to this phenomenon as 'reversed subsidiarity'. See further and Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press, Cambridge 2014) 337 (hereafter: Robert Schütze, *Foreign Affairs and the EU Constitution:*…).
[9] Piet Eeckhout, *EU External Relations Law* 5.
[10] See further in section 1.2, A, a, ii.
[11] See further in section 1.2, A, c.

European Union on the international level.[12] Considering these difficulties and the clarifications this research can bring therein, a limitation of the research to the European Union's external relations is in my view justified.

Secondly, the principle of conferral and the principle of sincere cooperation in the European Union's external relations will be examined *from the viewpoint of the Member States*. As described above, the division of competences in the European Union's external relations has a powerful influence on the Member States' position in their relations with third countries and in international organisations. Therefore, the analysis of the case-law of the Court will be focused on the attempts of the Member States to control this division and the response of the Court to these attempts. Due to the limited scope of a Master's thesis, an exhaustive analysis of the use of the principle of conferral and the principle of sincere cooperation in the Court's case-law, is not included in the research. Furthermore, the principle of sincere cooperation between the EU institutions (Article 13(2) of the TEU) will only be addressed when useful parallels can be drawn with the principle of sincere cooperation between the European Union and the Member States (Article 4(3) of the TEU).

Thirdly, the principle of conferral and the principle of sincere cooperation in the European Union's external relations will be examined from the viewpoint of the Member States *in the post-Lisbon-era*. In the Lisbon Treaty, the principle of conferral was concretised by introducing a catalogue of competences of the European Union.[13] This catalogue was intended to bring clarity and to stress the fundamental role of the Member States as Masters of the Treaties, however, the significant quantity of cases after the introduction of the Lisbon Treaty seems to indicate that at least the purpose of clarity was not achieved.[14] Hence, the research of this thesis will be focused on the analysis of the created uncertainty after the Lisbon Treaty.

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[12] Peter Teffer, 'Netherlands ratifies EU-Ukraine treaty' (Article on euobserver) < https://euobserver.com/foreign/138060> consulted on 13 April 2018 and David Kleimann and Gesa Kübek, 'After the 'CETA drama,' toward a more democratic EU trade policy: National parliaments must debate and scrutinize trade agreements as they are negotiated, not afterwards' (Opinion article on POLITICO 2016) < https://www.politico.eu/article/opinion-after-the-ceta-drama-toward-a-more-democratic-eu-trade-policy/> consulted on 25 February 2018.

[13] Articles 2-6 of the TFEU.

[14] Inge Govaere, 'To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing, Oxford 2018) 73 (hereafter: Inge Govaere, 'To Give or To Grab:...').

3. Relevance

From a scientific perspective, this Master's thesis will have an added value in structuring the precise role that the principle of conferral and the principle of sincere cooperation play in the European Union's external relations. This can bring clarity to the difficulties relating to the division of competences in this field.

On a social level, it can be argued that it is important to understand the mechanisms Member States deploy in order to keep control of the division of competences and the role that the principle of sincere cooperation can play, according to the Court, in limiting their freedom of action. Conflicting visions of the Court and the Member States do not contribute towards the transparency of the relation between the European Union and its Member States and in this way, not to the well-functioning of the European Union in general. Moreover, internal discussions can cause difficulties in the European Union's relations with third countries and damage the international reputation of the European Union.[15]

[15] According to Peter Olsen, the European Union has the responsibility to minimise and facilitate "*the adjustments it asks its partners, and 'traditional' international law, to make in response to the novelty it has created, and is still in the process of creating*". See: Peter Olson, 'Mixity from the outside: the Perspective of a Treaty Partner' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, Oxford 2010) 346-348 (hereafter: Peter Olson, 'Mixity from the outside:...').

PART 1. GENERAL FRAMEWORK: PRINCIPLES OF CONFERRAL AND SINCERE COOPERATION

Part one will elaborate on the legislative and judicial developments that are relevant to frame the core of the research in part two and three. Firstly **(1.1)**, the principle of conferral and the principle of sincere cooperation will be addressed in general. Secondly **(1.2)**, the concrete implementation of the principle of conferral and the principle of sincere cooperation in the field of the European Union's external relations will be examined. Thirdly **(1.3)**, the relevant case-law of the Court concerning the European Union's external relations-competence will be discussed. This section will also elaborate on the Court's pre-Lisbon interpretation of the principle of sincere cooperation in this matter. Finally **(1.4)**, the influence of the Lisbon catalogue of competences will be addressed and the problem on which part two and three focus, will be defined.

1. In general

The principles of conferral **(A)** and sincere cooperation **(B)** have two different sides: on the one hand they have implications for the EU Member States, on the other hand they imply obligations for the European Union itself.

A. Principle of conferral

Article 4(1) and 5(2) of the TEU state the principle of conferral. Competences that are not conferred upon the European Union in the Treaties, remain with the Member States. Consequently, the European Union can act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. In other words, the European Union only has attributed competences.[16]

Prior to the Lisbon Treaty, the delimitation of competence between the European Union and the Member States was not easy to specify with exactitude.[17] Therefore, the Member States decided to make the principle of conferral concrete by including a catalogue of competences in the Lisbon Treaty, more specifically, in Articles 2 to 6 of the Treaty on the Functioning of the European Union (hereafter: TFEU).[18]

[16] Paul Craig and Gráinne De Búrca, *EU Law:…* 74.
[17] Paul Craig and Gráinne De Búrca, *EU Law:…* 74.
[18] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political analysis* (Cambridge University Press, New-York 2010) 82-84.

B. Principle of sincere cooperation

Article 4(3) of the TEU determines that the European Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The principle of sincere cooperation therefore entails that the Member States must take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. Moreover, the Member States must facilitate the achievement of the European Union's tasks and refrain from any measure which could jeopardise the attainment of the European Union's objective.

Since both case-law and literature lack consistency in terminology, this research will, for reasons of clarity and following the formulation of the TEU, always refer to the *principle* of sincere cooperation, which implies a concrete *duty* of (sincere) cooperation[19], to indicate the content of Article 4(3) of the TEU.[20]

2. In the field of the European Union's external relations

The principle of conferral **(A)** and the principle of sincere cooperation **(B)** both have a concrete implementation in the field of the European Union's external relations.

A. Principle of conferral

The Lisbon catalogue of competences, as a concretisation of the principle of conferral, indicates, among others, the express competences of the European Union in relation with third countries and what the nature of these competences is, for instance, exclusive, shared or complementary **(a)**.[21] Furthermore, the Treaty of Lisbon codified the Court's case-law on implied external powers conferred upon the European Union in Articles 3(2) and 216(1) of the TFEU **(b)**.[22] The division of competences, based on the principle of conferral, and the different nature of these competences implies the phenomenon of mixed agreements. The European

[19] Judgment of 2 June 2005, *Commission v Luxembourg*, C-266/03, EU:C:2005:341, paragraphs 57-58: "*Article 10 EC [current Article 4(3) of the TEU] 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. That duty of genuine cooperation is of general application…*"; See also: Judgment of 14 July 2005, *Commission v Germany*, C-433/03, EU:C:2005:462, paragraphs 63-64 and Judgment of 10 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203, paragraphs 70-71.

[20] For an overview of the inconsistency in terminology, see: Klamert Marcus, *The principle of loyalty in EU Law* (Oxford University Press, Oxford 2014) 31 and following (hereafter: Klamert Marcus, *The principle of loyalty in EU Law*).

[21] Inge Govaere, 'To Give or To Grab:...' 71.

[22] Piet Eeckhout, *EU External Relations Law* 112-113.

Union cannot conclude alone international agreements which relate partly to Member States' competence.[23] Since the principle of sincere cooperation has a major influence on the managing of these mixed agreements, their existence and main repercussions need to be discussed briefly **(c)**.[24]

a. Express external competences

i. Which competences?

Most of the express external competences of the European Union have been listed in Part V of the TFEU ('The Union's external action'). It concerns the competence of the European Union to act externally in the context of the Common Commercial Policy (Part V, Title II TFEU), in the context of Development Cooperation (Part V, Title III, Chapter 1 TFEU), in the context of Economic, Financial and Technical Cooperation (Part V, Title III, Chapter 2 TFEU) and in the context of Humanitarian Aid (Part V, Title III, Chapter 3 TFEU). Furthermore, the European Union has the competence to adopt restrictive measures (Part V, Title IV TFEU) and to conclude international agreements in general (Part V, Title V TFEU) and association agreements specifically (Part V, Title V, Article 217 TFEU). Finally, Title VI of Part V of the TFEU provides the competence for the European Union to establish relations with international organisations and third countries.[25]

Throughout the other parts of the TFEU, other competences in external relations are also conferred upon the European Union. For instance, the European Union can act externally in the context of public health (Article 168(3) of Part III, Title XIV TFEU) and environmental policy (Article 191(1), 4th indent and 191(4) of Part III, Title XX TFEU).

Finally, Chapter 2 of Title V of the TEU comprises the provisions governing the European Union's action in its Common Foreign and Security Policy, including the Common Security and Defence Policy (hereafter: CSDP). The Common Foreign and Security Policy has a distinct status: it has an intergovernmental procedural regime while the other external competences of the European Union are supranational in character.[26]

ii. What is their nature?

Following Article 4(1) of the TFEU, shared competences are the default rule: a conferred competence is shared when it is not related to the areas in Article 3 of the TFEU (exclusive competences) or to the areas in

[23] Hugo Flavier, *La contribution des relations extérieures à la construction de l'ordre constitutionnel de l'Union européenne* (Bruylant, Brussels 2012), 420 (hereafter: Hugo Flavier, *La contribution des relations extérieures*…).
[24] Hugo Flavier, *La contribution des relations extérieures*… 419.
[25] Robert Schütze, *Foreign Affairs and the EU Constitution:*… 307-309.
[26] Panos Koutrakos, *EU International Relations Law* 417 and Robert Schütze, *Foreign Affairs and the EU Constitution:*… 311-312.

Article 6 of the TFEU (complementary competences). Consequently, all external competences which are not expressly mentioned in Articles 3 or 6 of the TFEU are shared (for instance, competence in the area of environment (Article 4(2)(e) TFEU)). Specifically for the area of Development Cooperation and Humanitarian Aid, Article 4(4) of the TFEU provides that the European Union's action cannot result in Member States being prevented from exercising their own competence.

Articles 3 and 6 of the TFEU do indicate the nature of certain external competences of the European Union. Article 3 of the TFEU stipulates that the CCP is an exclusive competence for the European Union and Article 6 of the TFEU renders the European Union's competence in the area of public health complementary.

The CFSP competence is the odd one out in the European Union's external competences. It is said to have a *sui generis* nature.[27] The decision-making in the CFSP has an intergovernmental character: the ordinary legislative procedure and the special legislative procedures do not apply. Consequently, decisions in the context of the CFSP are not subject to democratic control by the European Parliament and the role of the Commission is limited. Decisions in the CFSP are therefore dominated by the Member States themselves who act in the European Council and in the Council (Article 24(1) TEU). Judicial control of decisions in the context of the CFSP by the Court is also limited (Article 24(1) TEU and Article 275 TFEU). Moreover, Declaration 14 concerning provisions of the Treaties clarifies the nature of the CFSP competence. It lays down that the action of the European Union in the framework of the CFSP cannot "*affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations*".

b. Implied powers

i. Which competences?

Besides express external competences, the European Union has implied powers in its external relations. Article 216(1) of the TFEU points out that the European Union may conclude an agreement with one or more third countries or international organisations where the conclusion of an agreement is necessary in order to achieve, within the framework of the European Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. This provision broadens the scope of the European Union's external competence to a significant extent. As Piet Eeckhout observes: "*It effectively confirms the broad parallelism between internal and*

[27] Robert Schütze, *Foreign Affairs and the EU Constitution:*… 315-316.

external powers […]. All that is required is that the conclusion of an agreement is necessary to achieve one of the objectives of the Treaties, and can be located within the framework of the EU's policies."[28]

ii. What is their nature?

Such an implied power for the conclusion of an international agreement is exclusive when (i) its conclusion is provided for in a legislative act of the European Union or (ii) is necessary to enable the European Union to exercise its internal competence, or (iii) in so far as its conclusion may affect common rules or alter their scope (Article 3(2) of the TFEU). In other situations, such an implied power is shared with the Member States.

As mentioned above, Articles 3(2) and 216(1) of the TFEU are a codification of the case-law of the Court in the *ERTA*-case.[29] Comparison of the text of both Articles reveals that "*whereas external powers may be exercised where necessary to achieve a Treaty objective, they will only be exclusive where the external agreement is a necessary precondition for the exercise of the internal power*".[30]

c. Mixed agreements

Mixed agreements are "*agreements that are signed and concluded by the EU and (some of) its Member States on the one hand, and by one or more third parties on the other hand*".[31] They occurred in practice and their permissibility was first confirmed by the Court in Opinion 2/91 and Opinion 1/94.[32] According to Eleftheria Neframi, the competence to conclude an international agreement is divided between the European Union and its Member States "*lorsque la Communauté [l'Union Européen] ne dispose pas de compétence externe couvrant l'ensemble de l'accord envisagé et lui permettant de le conclure sans le concours étatique*".[33] By consequence, the legal justification for mixity is the fact that the European Union alone does not have the competence to conclude the entire international agreement.[34] The practical consequence of mixity is that the

[28] Piet Eeckhout, *EU External Relations Law* 123.
[29] See further in section 1.3, A, b.
[30] Marise Cremona, 'EU External Competence-Rationales for Exclusivity' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, Portland – Oregon 2017) 146 (hereafter: Marise Cremona, 'EU External Competence-Rationales for Exclusivity').
[31] Marc Maresceau, 'A typology of mixed bilateral agreements' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, Oxford 2010) 12.
[32] Opinion of 19 March 1993, *Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work*, 2/91, EU:C:1993:106, paragraph 12; Opinion of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, 1/94, EU:C:1994:384, paragraphs 98 and 105 and Eleftheria Neframi, *Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux* (Bruylant, Brussels 2007) 1 (herafter: Eleftheria Neframi, *Les accords mixtes de la Communauté européenne:…*).
[33] Eleftheria Neframi, *Les accords mixtes de la Communauté européenne:…* 15.
[34] Piet Eeckhout, *EU External Relations Law* 213.

European Union and its Member States need to act jointly in the negotiation, conclusion and ratification of the international agreement and that both actors participate in the international agreement.[35]

The conclusion of mixed agreements can also be motivated by political reasons. In that case, an agreement fully covered by competences of the European Union (exclusive or exercised shared competences) is concluded in the mixed form for political expediency.[36] Indeed, the use of mixed agreements can be seen as a way for the Member States to take control of the treaty-making process since it allows them to appear as contracting parties in order to stay visible in the international reality.[37]

The practical consequences of the negotiation and conclusion of mixed agreements cannot be underestimated. As mentioned above, there are clear effects for the other party, whether it is a third country, an international organisation or both. The division of competences is in the case of other sovereigns a wholly internal matter, in the case of the European Union, by contrast, this matter is also presented in the international sphere.[38]

B. Principle of sincere cooperation

In the field of the European Union's external relations, the principle of sincere cooperation constrains the Member States in the exercise of their own competences. The specificity in this field is that these constraints influence the Member States' relations with third states and their international status.[39] For instance, Member States cannot enter into negotiations or conclude international agreements which would deviate from the position taken by the European Union. This flows from Article 4(3) of the TEU in combination with the primacy of EU law. Whether the European Union's competence in these situations is shared or exclusive, is irrelevant.[40]

In Opinion 2/91 and Opinion 1/94, which refer to Ruling 1/78, the Court stated that "*the duty of cooperation* […] *results from the requirement of unity in the external representation of the Community*".[41] That duty of cooperation is, according to Marise Cremona, thus intended to hold together the European Union and the

[35] Panos Koutrakos, *EU International Relations Law* 170-182.
[36] Mauro Gatti and Pietro Manzini, 'External representation of the European Union in the conclusion of international agreements' (2012) 49 Common Market Law Review 1703, 1711-1712.
[37] Hugo Flavier, *La contribution des relations extérieures*… 426 and Piet Eeckhout, *EU External Relations Law* 221.
[38] Peter Olson, 'Mixity from the outside:...' 334.
[39] Eleftheria Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 Common Market Law Review 323, 359 (hereafter: Eleftheria Neframi, 'The Duty of Loyalty:…').
[40] Paul Craig and Gráinne De Búrca, *EU Law:…* 354.
[41] Ruling of 14 November 1978, *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, 1/78, EU:C:1978:202, paragraph 36; Opinion of 19 March 1993, *Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work*, 2/91, EU:C:1993:106, paragraph 36 and Opinion of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, 1/94, EU:C:1994:384, paragraph 108.

Member States in a context where competence is shared and can help to resolve externally driven difficulties in managing shared competence.[42] Such difficulties might for instance occur when the European Union itself cannot become a party to an international agreement or international organisation and therefore needs the Member States to defend its interests.[43] Christophe Hillion on the other hand argues that the foundation of the duty of cooperation is to be located in the general principle of loyal cooperation rather than in this 'requirement of unity'.[44]

The protection of unity in the external representation of the European Union can also come into play where the competence of the European Union is exclusive. This is the case in situations wherein it is in the interest of the European Union that the Member States continue to act.[45] Furthermore, the principle of sincere cooperation is even the basis of exclusive competence for the European Union when the conclusion of an international agreement may affect common rules or alter their scope (Article 3(2) of the TFEU). The principle is then "*expressed through the duty not to exercise the external competence, through the admission of the pre-emptive effect of internal common rules*" and implies an obligation of result and of conduct, namely not to take action on the international level.[46]

According to Marise Cremona, the duty of cooperation might result in a greater unity of the international presence of the European Union than exclusive competence of the European Union does. This can be explained by the fact that this duty also plays its role while the Member States exercise national competences.[47]

It should be noted that in the context of the CFSP specifically, Article 4(3) of the TEU is concretised in Article 24(3) of the TEU. This Article obliges the Member States to support the European Union's external and security policy actively in a spirit of loyalty. They need to work together to enhance and develop their mutual political solidarity.

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[42] Marise Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in Marise Cremona and Bruno de Witte (eds), *EU foreign relations law: Constitutional fundamentals: Essays in European Law* (Hart Publishing, Portland – Oregon 2008) 157 (hereafter: Marise Cremona, 'Defending the Community Interest:…').

[43] See for instance: Judgment of 12 February 2009, *Commission v Greece*, C-45/07, EU:C:2009:81 concerning action in the context of the International Maritime Organisation; Marise Cremona, 'Defending the Community Interest:…' 159 and Eleftheria Neframi, 'The Duty of Loyalty:…' 351-352.

[44] He refers to the *MOX Plant case* (Judgment of 30 May 2006, *Commission v Ireland (MOX Plant)*, C-459/03, EU:C:2006:345, paragraphs 174-175). See: Christophe Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the 'Duty of Cooperation'' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, Oxford 2010) 91-92 (hereafter: Christophe Hillion, 'Mixity and Coherence in EU External Relations:..').

[45] Judgment of 31 March 1971, *Commission v Council (ERTA)*, 22/70, EU:C:1971:32, paragraph 90 and Marise Cremona, 'Defending the Community Interest:…' 159.

[46] Eleftheria Neframi, 'The Duty of Loyalty:…' 339-341.

[47] Marise Cremona, 'Defending the Community Interest:…' 126 and Paul Craig and Gráinne De Búrca, *EU Law:…* 378.

3. Interpretation by the Court of Justice

This section will examine the case-law in which the Court interprets the principle of conferral **(A)** and the principle of sincere cooperation **(B)** in the field of external relations as described in section 1.2. The object of the following paragraphs is not to provide a comprehensive overview of the case-law of the Court neither to indicate all the nuances. Attention will be drawn to the cases and observations relevant for the Master's thesis' objective.

A. Principle of conferral

The case-law of the Court has had a major influence on the interpretation of the grounds of competence for external action of the European Union. Its influence on the express external competences **(a)**, the implied powers **(b)** and the Common Foreign and Security Policy **(c)** will be addressed in turn. The latter is an express external competence, however, in consideration of its intergovernmental nature, it will be addressed separately.

a. Express external competences

i. Different legal bases

The Common Commercial Policy (now: Part V, Title II TFEU; hereafter: CCP) was one of the first legal bases of the European Union's external action.[48] It was included in the Treaty of Rome in order to make it possible for the customs union and the common market to work effectively.[49] In Opinion 1/75, the Court stated that the European Union's competence in the CCP was an exclusive one because "*it cannot be accepted that, in a field such as that governed by the understanding in question, which is covered by export policy and more generally by the common commercial policy, the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere*".[50] Since the Court qualified the CCP as an exclusive competence of the European Union, the interpretation of the scope of the CCP became highly important for the Member States. Indeed, as soon as a matter is qualified as coming under the CCP, the Member States lose all their power to act in that matter. Pieter Jan Kuijper et al. indicate that "*internally, ever since the completion of first the customs union and later the internal market, epic legal battles have been fought over the question whether the common commercial policy was merely intended to*

[48] The other legal basis was the current Article 217 TFEU: association agreements are the only specific type of international agreements, other than trade, to which EU primary law has made reference since the establishment of the Communities (see: Panos Koutrakos, *EU International Relations Law* 381).
[49] Piet Eeckhout, EU External Relations Law 11-12.
[50] Opinion of 11 November 1975, *OECD Understanding on a Local Cost Standard*, 1/75, EU:C:1975:145, p. 1364.

be the external face of the customs union or of the internal market. […] The Council, often representing the view of the Member States, pushed for the rather restrictive interpretation, whereas the Commission advocated in favour of the broader interpretation of the scope of the common commercial policy".[51]

The Single European Act introduced environmental protection as a policy of the European Union.[52] As established above, this includes the competence of the European Union to act externally by cooperating with third countries and with the competent international organisations.[53] Afterwards, development cooperation was introduced as a legal basis by the Maastricht Treaty and this Treaty also added the protection of public health to the European Union's policies.[54] The European Union's capacity to engage in economical, technical and financial cooperation was established by the Nice Treaty.[55]

Finally, the Lisbon Treaty, as mentioned before, listed the European Union's competences in general in Articles 2-6 of the TFEU and added humanitarian aid as a legal basis.[56] By adding more and static legal grounds for action that need to be given useful effect, the pre-existing legal bases must be interpreted more restrictively.[57] Moreover, some competences of the European Union may have a different nature and may, therefore, not easily be combined for one action. For instance, action in the frame of the Common Foreign and Security Policy is to be conducted in an intergovernmental procedure while other external action has a supranational character.[58] Another example is the situation wherein one potential legal basis for action of the European Union implies an exclusive competence and consequently, excludes all Member States' action while the other has a shared character. This forced the Court of Justice to establish criteria to define the exact scope of the legal bases for external action in the Lisbon Treaty.[59]

The choice of the correct legal basis of an act of the European Union "*must be based on objective factors which are amenable to judicial review*". According to the Court, "*those factors include in particular the aim*

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[51] Pieter Jan Kuijper and others, *The law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (Oxford University Press, New-York 2013) 373 (hereafter: Pieter Jan Kuijper and others, *The law of EU External Relations).*

[52] Ludwig Krämer, 'The Single European Act and Environment Protection: Reflections on several new provisions in Community law' (1987) 24 Common Market Law Review 659, 663.

[53] Article 191(4) of the TFEU.

[54] Paul Craig and Gráinne De Búrca, *EU Law:…* 12.

[55] Paul Craig and Gráinne De Búrca, *EU Law:…* 341.

[56] Peter Van Elsuwege and Jan Orbie, 'The EU's Humanitarian Aid Policy after Lisbon: Implications of a New Treaty Basis' in Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies Legal Framework for Combating Threats and Crises* (Koninklijke Brill, Leiden 2014) 21.

[57] Inge Govaere, 'Setting the international scene: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13' (2015) 52 Common Market Law Review 1277, 1286 (hereafter: Inge Govaere, 'Setting the international scene:…').

[58] See further in section 1.3, A, c.

[59] Inge Govaere, 'To Give or To Grab:...' 75.

and content of the measure".[60] Irrelevant are "*the fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted*".[61] In the Court's *Opinion on the Cartagena Protocol*, the Court confirmed the fact that objective factors determine the correct legal basis and it stated that this principle also covers measures of the European Union adopted in order to conclude an international agreement. Referring to Article 31(1) of the Vienna Convention on the Law of Treaties, the Court does take into account the context of a measure in these situations, in addition to the aim and content of the EU measure.[62] If such a measure has a twofold purpose or a twofold component and the one is merely incidental to the other, that measure should be based on the predominant purpose or component as a single legal basis.[63] In essence, the Court thus applies a 'centre of gravity-test'.[64] However, if several objectives are inseparably linked without one being secondary and indirect in relation to the other, multiple legal bases are a possibility.[65] Such multiple legal bases are only impossible if the concerned procedures are incompatible with each other.[66]

ii. The Common Commercial Policy

A considerable part of the case-law on the European Union's external competences concerns the scope of the CCP since this express external competence is an exclusive competence for the European Union following Article 3(1)(e) of the TFEU. Consequently, the broader the ambit of the CCP, the less control by the Member States and the more the EU institutions can influence the area of external trade.[67]

Since the Lisbon Treaty added services and the 'commercial aspects of intellectual property' to the CCP (Article 207 TFEU), the Court was asked to clarify the scope of the CCP in the post-Lisbon context in the *Daiichi Sankyo* case, the *Conditional Access Services* case and Opinion 2/15 concerning the Free Trade

[60] Judgment of 26 March 1987, *Commission v Council*, 45/86, EU:C:1987:163, paragraph 11 and Judgment of 11 June 1991, *Commission v Council (Titanium Dioxide)*, C-300/89, EU:C:1991:244, paragraph 10.
[61] Judgment of 4 April 2000, *Commission v Council (Beef Products Regulation)*, C-269/97, EU:C:2000:183, paragraph 44 and Panos Koutrakos, *EU International Relations Law* 54.
[62] Article 31(1) of the Vienna Convention on the Law of Treaties: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*" See: Opinion of 6 December 2001, *Cartagena Protocol*, 2/00, EU:C:2001:664, paragraphs 24-25 and Panos Koutrakos, *EU International Relations Law* 56.
[63] Judgment of 23 February 1999, *Parliament v Council*, C-42/97, EU:C:1999:81, paragraphs 39-40; Judgment of 30 January 2001, *Spain v* Council, C-36/98, EU:C:2001:64, paragraph 59 and Judgment of 29 April 2004, *Commission v Council*, C-338/01, EU:C:2004:253, paragraph 55.
[64] Judgment of 23 February 1999, *Parliament v Council*, C-42/97, EU:C:1999:81, paragraph 43 and Judgment of 10 January 2006, *Commission v Parliament and Council*, C-178/03, EU:C:2006:4, paragraph 40.
[65] Judgment of 29 April 2004, *Commission v Council*, C-338/01, EU:C:2004:253, paragraph 56 and the case-law there cited.
[66] Judgment of 29 April 2004, *Commission v Council*, C-338/01, EU:C:2004:253, paragraph 57 and the case-law there cited.
[67] Panos Koutrakos, *EU International Relations Law* 30.

Agreement with Singapore. In the *Daiichi Sankyo* case, the Court established that only the rules adopted by the European Union in the field of intellectual property that have a specific link to international trade, fall within the concept of 'commercial aspects of intellectual property' and hence in the field of the CCP.[68] The context is of major importance: "*the more an agreement operates within the context of an international trade regime, the more likely it is that it will fall within the scope of the Common Commercial Policy*".[69] In the *Conditional Access Services* case, the Court elaborated on the relation between Article 114 of the TFEU (approximation of laws in the context of the Internal Market) and Article 207 of the TFEU.[70] The main conclusion that can be drawn from this case is that it is possible to conclude an international agreement on the basis of Article 207 of the TFEU even when there is similar internal legislation on the basis of Article 114 of the TFEU. The necessary condition is that the international agreement is meant to have effect beyond the borders of the European Union.[71] In conclusion, these two cases are an illustration of the Court's broad interpretation of the CCP in the post-Lisbon era.[72]

Opinion 2/15 concerning the Free Trade Agreement with Singapore, conversely, does limit the scope of the CCP. For instance, firstly, the Court established that foreign investment other than foreign direct investment does not fall within the ambit of the exclusive competence of the European Union for the CCP.[73] This exclusion from the scope of the CCP was based on a textual interpretation of Article 207(1) of the TFEU.[74] Secondly, the Court stipulated that the foreseen investor-state dispute settlement (hereafter: ISDS) does not belong to the exclusive competence of the European Union or the CCP since the regime "*removes disputes from the jurisdiction of the courts of the Member States*".[75] Consequently, both aspects of the Free Trade Agreement with Singapore fall within a shared competence between the European Union and its Member States.[76]

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[68] Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraph 52 and Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments' (2014) 41 Legal Issues of Economic Integration 193, 199 (hereafter: Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon:…') .

[69] Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon:…' 206.

[70] Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon:…' 193.

[71] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraphs 63-65 and Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon:…' 206.

[72] Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon:…' 206.

[73] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 243.

[74] Guillaume Van der Loo, 'The Court's Opinion on the EU-Singapore FTA: Throwing off the shackles of mixity?' (2017) 17 CEPS Policy Insights 1, 5 (hereafter: Guillaume Van der Loo, 'The Court's Opinion on the EU-Singapore FTA:…').

[75] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 292-293 and Guillaume Van der Loo, 'The Court's Opinion on the EU-Singapore FTA:…' 5.

[76] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 243 and 293 and Guillaume Van der Loo, 'The Court's Opinion on the EU-Singapore FTA:…' 5.

b. Implied powers

In the *ERTA*-case, the Court introduced another legal basis for external action of the European Union in addition to the express external competences. According to the Court, the European Union has the capacity to establish contractual links with third countries over the whole field of objectives that can be found in the whole scheme of the Treaty since it has legal personality.[77] Such an 'implied' power can even be exclusive.[78] The Court argues that "*to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope*".[79]

Opinion 1/76 added the parallelism approach to the ERTA-doctrine. Via the parallelism approach, the Court confirmed that there is no requirement of prior internal legislation of the European Union for the exercise of external competence. It suffices that internal and external action are adopted at the same time.[80]

Opinion 2/91 provided more clarity by adding that for an exclusive implied external power it suffices that there is 'an area already covered by a large extent by EU measures'.[81] Opinion 1/94 however, seemed to limit the European Union's possibility to have an exclusive implied external power. The Opinion quotes three concrete situations wherein the European Union can have an exclusive external competence.[82] Nonetheless, the Opinion on the Lugano Convention (Opinion 1/03) returns to the Court's vision in the *ERTA*-case by noting that the three situations in Opinion 1/94 were only examples.[83] Opinion 1/03 even broadens the scope of the ERTA-doctrine. The Court indicated that "*where the test of 'an area which is already covered to a large extent by Community rules' is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the*

[77] Judgment of 31 March 1971, *Commission v Council (ERTA)*, 22/70, EU:C:1971:32, paragraphs 13-19.
[78] Piet Eeckhout, *EU External Relations Law* 76.
[79] Judgment of 31 March 1971, *Commission v Council (ERTA)*, 22/70, EU:C:1971:32, paragraph 22.
[80] Piet Eeckhout, *EU External Relations Law* 79-80.
[81] Opinion of 19 March 1993, *Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work*, 2/91, EU:C:1993:106, paragraph 25.
[82] Opinion of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, 1/94, EU:C:1994:384, part XV: "*Whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts. The same applies in any event, even in the absence of any express provision, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity."*
[83] Opinion of 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 1/03, EU:C:2006:81, paragraph 121 and Piet Eeckhout, *EU External Relations Law* 108-112.

current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis".[84]

As indicated above, this case-law has been codified in the Lisbon Treaty by the Articles 3(2) and 216(1) of the TFEU. The Member States argued in the *Conditional Access Services* case, in the *Broadcasting Organisations* case and in Opinion 1/13 that they codified the Court's case-law in order to make clear that the scope of the exclusive European Union's implied powers was limited to the ERTA-test ('to affect internal measures and alter their scope') and not broadened by Opinion 2/91 and 1/03 ('already covered to a large extent' and 'also future foreseeable developments'). The Court however rejected this argument by indicating that the reasoning in Opinion 1/03 was nothing more than an interpretation of this ERTA-test and therefore should be applied post-Lisbon.[85]

c. The Common Foreign and Security Policy

Since the Common Foreign and Security Policy (hereafter: CFSP) is, as described above, different in nature, it needs to be distinguished from the other external action of the European Union. The former Article 47 of the TEU gave other external action priority over the CFSP. In the *ECOWAS* case, concerning small arms and light weapons, the Court indeed confirmed that the legal basis of development cooperation, which is other external action of the European Union, should be given priority over a CFSP-legal basis.[86] Following the strict interpretation of the Court, the other external action is 'affected' by the implementation of the CFSP and thus, should be given priority, as soon as a measure could be adopted under the rules governing this other external action but was adopted under the CFSP-rules.[87]

The new Article 40 of the TEU, however, puts the CFSP and non-CFSP policies on the same level.[88] This multiplies cases before the Court about the correct legal basis at the intersection between the CFSP and non-

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[84] Opinion of 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 1/03, EU:C:2006:81, paragraph 126.

[85] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraph 50; Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraphs 66-67; Opinion of 14 October 2014, *Convention on the civil aspects of international child abduction*, 1/13, EU:C:2014:2303, paragraph 73 and Inge Govaere, 'To give or to grab: …' 76-77.

[86] Judgment of 20 May 2008, *Commission v Council (ECOWAS)*, C-91/05, EU:C:2008:288, paragraph 77 and Peter Van Elsuwege, 'On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the Ecowas Judgment of the European Court of Justice' (2009) 15 Columbia Journal of European Law 531, 538.

[87] Panos Koutrakos, *EU International Relations Law* 535.

[88] Article 40 of the TEU: "*The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.*"

CFSP.[89] According to the Court in the *Financial Sanctions* case, the choice of the legal basis is crucial since the procedures for the CFSP and non-CFSP policies are incompatible and therefore cannot be combined as legal bases for an act of the European Union.[90] As Christina Eckes observes, "*implicitly, the Court hence assumed that the nature of CFSP does not stand in the way of a cross-Treaty joint legal basis. […] Explicitly however, it interpreted the general need for procedural compatibility between joint legal bases so strictly that a cross-Treaty legal basis is impossible in the vast majority of the cases*".[91] Consequently, the 'centre of gravity-test' should again be applied to determine the correct legal basis. This test applies including where a CFSP provision is the potential legal basis of an act of the European Union.[92]

B. Principle of sincere cooperation

The principle of sincere cooperation has been given effect by the Court in the context of envisaged external action by the European Union on the one hand and envisaged external action by the Member States on the other hand **(a)**. The concrete effect of the principle evolved in the case-law of the Court in three steps **(b)**.

a. Field of application

Firstly, the principle of sincere cooperation has been given effect by the Court in the context of envisaged external action by the European Union regardless whether the European Union's competence is exclusive or shared.[93] The principle is for instance crucial in managing mixed agreements. In the *FAO fisheries agreement* case, the Court established that an arrangement between the Council and the Commission for the managing of the fisheries agreement represented fulfilment of the duty of sincere cooperation and that it was intended to create a binding commitment towards each other.[94] In the *Dior* case, the Court continued by stating that the duty of cooperation can have legal effects even in the absence of such an arrangement.[95]

[89] Pieter Jan Kuijper and others, *The law of EU External Relations* 851-852.
[90] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraphs 45-48 and Pieter Jan Kuijper and others, *The law of EU External Relations* 864.
[91] Christina Eckes, 'The CFSP and Other EU Policies: A Difference in Nature?' (2015) 20 European Foreign Affairs Review 535, 546 (hereafter: Christina Eckes, 'The CFSP and Other EU Policies:…').
[92] Judgment of 20 May 2008, *Commission v Council (ECOWAS)*, C-91/05, EU:C:2008:288, paragraphs 73 and 75; Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraphs 42-45 and Christina Eckes, 'The CFSP and Other EU Policies:…' 545.
[93] Paul Craig and Gráinne De Búrca, *EU Law:…* 354.
[94] Judgment of 19 March 1996, *Commission v Council (FAO fisheries agreement case)*, C-25/94, EU:C:1996:114, paragraph 49 and Marise Cremona, 'Defending the Community Interest:…' 160.
[95] Judgment of 14 December 2000, *Christian Dior*, Joined Cases C-300/98 and C-392/98, EU:C:2000:688, paragraphs 36-37 and Christophe Hillion, 'Mixity and Coherence in EU External Relations:..' 94-95.

Secondly, the principle of sincere cooperation has been given effect by the Court in the context of Member States' negotiating, concluding, ratifying or implementing of bilateral or multilateral agreements concerned with areas of European Union's competence.[96] This was for instance the case in the negotiation of bilateral agreements with third countries by Germany and Luxembourg in the *Inland Waterways*-cases as will be discussed below.[97]

b. Evolution of the concrete effect

Following Andrés Delgado Casteleiro and Joris Larik, the duty of cooperation evaluated towards a 'duty to remain silent' under the influence of the Court. These authors identify three steps in this evolution: a duty of informing and consulting **(i)**, a duty of abstention in areas of exclusive competence **(ii)** and a duty of abstention in areas of shared competence **(iii)**. According to them, a 'duty to remain silent' will not appear as easily in the context of the CFSP **(iv)**.[98]

i. Duty of informing and consulting

As mentioned above, the duty of sincere cooperation is to be taken into account while negotiating national agreements in an area of shared competence. Germany and Luxembourg were for instance found to be in breach of their duty of sincere cooperation by concluding bilateral agreements concerning inland waterways transport with a number of third countries while the Council had adopted a mandate for the Commission to negotiate a multilateral agreement in this matter. Consequently, Germany and Luxembourg should have consulted the Commission to avoid undermining the Commission's negotiations.[99] The Court stipulated 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*".[100]

The same reasoning of the Court can be recognized in the *MOX Plant* case. Member States are also bound by the duty of cooperation in the context of dispute resolution: Ireland should have consulted the Commission

[96] Paul Craig and Gráinne De Búrca, *EU Law:…* 354.
[97] Judgment of 2 June 2005, *Commission v Luxembourg*, C-266/03, EU:C:2005:341 and Judgment of 14 July 2005, *Commission v Germany*, C-433/03, EU:C:2005:462.
[98] Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 European Law Review 522 (hereafter: Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..').
[99] Judgment of 2 June 2005, *Commission v Luxembourg*, C-266/03, EU:C:2005:341, paragraph 60; Judgment of 14 July 2005, *Commission v Germany*, C-433/03, EU:C:2005:462, paragraph 66 and Marise Cremona, 'Defending the Community Interest:…' 163.
[100] Judgment of 2 June 2005, *Commission v Luxembourg*, C-266/03, EU:C:2005:341, paragraph 58; Judgment of 14 July 2005, *Commission v Germany*, C-433/03, EU:C:2005:462, paragraph 64.

before starting dispute-settlement proceedings against the UK under UNCLOS concerning matters of EU competence.[101]

Such a duty of informing and consulting occurs from the moment that a concerted position of the European Union exists. Consequently, Member States do not have the possibility to derogate from the process in the European Union when this concerted position does not suit them.[102] In these situations, Member States have in principle a best efforts obligation to cooperate and consult with the Commission, conversely, they are not obliged to abstain from external action.[103] Nonetheless, Andrés Delgado Casteleiro and Joris Larik suggest that the Member States *de facto* do need to refrain from acting unless the Commission has authorised their action.[104]

ii. Duty of abstention in areas of exclusive competence

The *IMO* case determines the Member States' duty of abstention in the areas of exclusive competence.[105] Greece submitted proposals to the International Maritime Organisation on an individual basis after previously trying to discuss its proposals in the EU institutions. In this case, the Court established that an international agreement concerning exclusive competence of the European Union excludes any individual action of Member States even if this individual action is restrained to the stage of proposal and hence, in the case of a hypothetical effect on the common rules.[106] Consequently, Greece breached Article 4(3) of the TEU. In essence, whenever there is exclusive competence of the European Union, a Member State is prevented from acting outside the European Union's framework even when that Member State tried to set in motion the procedure within the European Union.[107]

iii. Duty of abstention in areas of shared competence

The Court goes even further in the *PFOS* case.[108] Comparable to Greece in the *IMO* case, Sweden unilaterally proposed to add the substance PFOS to the Stockholm Convention on Persistent Organic Pollutants after

[101] Judgment of 30 May 2006, *Commission v Ireland (MOX Plant)*, C-459/03, EU:C:2006:345, paragraph 179; Paul Craig and Gráinne De Búrca, *EU Law:…* 378; Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 530 and Christophe Hillion, 'Mixity and Coherence in EU External Relations:..' 97-98.
[102] Judgment of 2 June 2005, *Commission v Luxembourg*, C-266/03, EU:C:2005:341, paragraph 60; Judgment of 14 July 2005, *Commission v Germany*, C-433/03, EU:C:2005:462, paragraph 66 and Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 529.
[103] Eleftheria Neframi, 'The Duty of Loyalty:…' 350.
[104] Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 530-531.
[105] Judgment of 12 February 2009, *Commission v Greece*, C-45/07, EU:C:2009:81.
[106] Judgment of 12 February 2009, *Commission v Greece*, C-45/07, EU:C:2009:81, paragraphs 21-23 and Eleftheria Neframi, 'The Duty of Loyalty:…' 341.
[107] Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 532-533.
[108] Judgment of 10 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203 and see further in section 3.3.

consulting the EU institutions.[109] The Court established that this was a breach of the obligation to refrain from adopting a unilateral position in matters of shared competence where no EU-wide position can be reached.[110] Consequently, the duty of cooperation applies as soon as a matter is discussed within an EU institution considering that there were only a bundle of Council conclusions and minutes of meetings where references were made to this Stockholm Convention.[111] According to Marise Cremona, in a situation like this, the duty of sincere cooperation goes beyond cooperation and starts "*to encroach on competence*".[112] In any case, "*the exercise of the shared competence is not deprived of any limitation*".[113] Regardless of the involved competence's exclusive or shared character, Member States have a 'duty to remain silent' if they do not have some sort of authorisation of the European Union.[114] It is however particular in the field of the European Union's external relations that not respecting such a limitation, constitutes an infringement of Article 4(3) of the TEU alone.[115]

iv. In the context of the CFSP

Following Andrés Delgado Casteleiro and Joris Larik, Member States 'avoided' the occurrence of a 'duty to remain silent' in the area of the CFSP by limiting the role of the Court as a judicial constraint and the Commission as 'the usual watchdog'. However, since the Court does have the competence to rule on the application of Article 40 of the TEU and on the legality of restrictive measures, there is a potential impact of the principle of sincere cooperation on the Member States' action connected to the CFSP.[116]

4. The Lisbon catalogue of competences

As can be gleaned from the previous sections, the delimitation of competence between the European Union and the Member States lacks clarity. The Lisbon catalogue of competences was supposed to remedy these situations of uncertainty. However, as will be described in the subsequent sections, the principle of conferral **(A)** and the principle of sincere cooperation **(B)** still involve difficult questions and situations that call for clarification. In order to determine whether the Member States are the Masters of the Treaties, part two and

[109] Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 534.
[110] Judgment of 10 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203, paragraphs 70-74 and 103-104.
[111] Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 536.
[112] Marise Cremona, 'Defending the Community Interest:…' 160-161.
[113] Eleftheria Neframi, 'The Duty of Loyalty:…' 350-351.
[114] Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 537.
[115] Eleftheria Neframi, 'The Duty of Loyalty:…' 351.
[116] Article 275 of the TFEU and Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 537-538.

three of this dissertation will therefore analyse how the Member States attempt to deploy these situations in order to influence the conferral of competences to the European Union and how the principle of sincere cooperation comes into play.

A. Principle of conferral

The Lisbon Treaty did not bring the clarity that was hoped for **(a)**. Instead, the Lisbon Treaty begs the underlying question of the determination of the modalities of conferral of competence to the European Union **(b)**.

a. Purpose of the Lisbon catalogue

The purpose of the Lisbon catalogue was to bring clarity and transparency in the matter of the delimitation of competence between the Member States and the European Union but, conversely, raised the problem of uncertainty about the correct legal basis for an act of the European Union. As mentioned above, by adding more and static legal grounds for action that need to be given useful effect, the pre-existing legal bases must be interpreted more restrictively.[117] Consequently, in contrast with the Member States' expectations, the Lisbon catalogue of competences gave "*renewed impetus for questions of interpretation to be addressed to the Court of Justice*" and the Court "*also indicates […] that Treaty provisions, also after Lisbon, continue to be subject to its specific purposive method of interpretation, rather than being dictated by the intention of the Member States in (re-)drafting the Treaties*".[118] It may therefore be concluded that the division of competences in a multi-level legal order, lacks clarity and that Member States are having difficulties to retain control. However, the Member States' ambitions are clear from the Lisbon Treaty: they confer the competences. The second part of this research will therefore explore the attempts of the Member States to stay in control and to be the Masters of the Treaties.

b. Different modalities of conferral

As Inge Govaere indicates, "*in a post-Lisbon setting, the outspoken or underlying question has increasingly become the determination of the modalities of the conferral of competence to the Union*". In addition to

[117] Inge Govaere, 'Setting the international scene: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13' (2015) 52 Common Market Law Review 1277, 1286 (hereafter: Inge Govaere, 'Setting the international scene:…').
[118] Inge Govaere, 'Setting the international scene:…' 1294-1295 and 1306.

categorising the matters that fall under exclusive, shared and complementary competences of the European Union, the Lisbon Treaty prescribes the different modalities of the principle of conferral.[119]

Following Inge Govaere, three different modalities can be distinguished. Firstly, in the case of *full* conferral, there is conferral of competence both to the European Union and to the autonomous legal order, meaning that there is democratic control by the European Parliament and judicial control by the Court.[120] Secondly, in the case of *crippled* conferral, there is conferral of competence to the European Union but not to the autonomous legal order, meaning that there is no democratic control by the European Parliament nor judicial control by the Court. In case of *semi-crippled* conferral, the Court does exercise its judicial control, however, there is no democratic control by the European Parliament.[121] Thirdly, in the case of *split* conferral, there are one or more Member States that do not confer competence to the European Union while all the other Member States do confer a certain competence. Such a split conferral occurs when the constructive abstention procedure as regards the CFSP is used or when the opt-outs for the United Kingdom, Ireland and Denmark apply to a certain act.[122] The research in part two and three of this dissertation will be framed using these terms for the different modalities of the principle of conferral.

B. Principle of sincere cooperation

In case of crippled or split conferral of an external competence upon the European Union or if such an external competence conferred upon the European Union is shared, the Member States still have the power to act on the external level. However, the principle of sincere cooperation can still limit their field of action. Despite the listing of competences in the Lisbon Treaty, the Member States thus struggle to retain their external power, not least because of the broad interpretation of the principle of sincere cooperation in the *PFOS* case. As stated above, in part two of this Master's dissertation, the attempts of control by the Member States will therefore be discussed. Part three will address the reaction of the Court to these attempts in general and through the principle of sincere cooperation in the post-Lisbon era.

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[119] Inge Govaere, 'To give or to grab: …' 73-74 and the example given: Article 2 of the TFEU stipulates: "*1. 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. 2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.*"

[120] Inge Govaere, 'To give or to grab: …' 75.

[121] Inge Govaere, 'To give or to grab: …' 79.

[122] Inge Govaere, 'To give or to grab: …' 85.

PART 2. ATTEMPTS OF THE MEMBER STATES TO RETAIN CONTROL OF THE DIVISION OF COMPETENCES

The subsequent sections will elaborate on the specific attempts of the Member States to limit the extent of the competences conferred upon the European Union observed in the case-law of the Court. Firstly, the arguments of the Council will be analysed since this EU institution is composed of representatives of the Member States and consequently, looks after their interests **(2.1)**.[123] Since a majority of the Member States is needed in the Council to start a procedure, it can be said that these arguments are supported by a broad range of Member States. However, if no joint position can be found between the Member States in the Council or if the Council does not act in line with what a Member State expects, individual Member States will start a procedure to avoid the restraint of their external field of action **(2.2)**. Both situations will be analysed and compared **(2.3)**.

Before going into these specific attempts, it is useful to give a short overview of what follows. Three different 'kinds' of attempts can namely be identified. Firstly, on the substance, it can be observed that the Member States seek to limit the ambit of the legal bases provided for in the Lisbon Treaty **(A in section 2.1 and 2.2)**. Secondly, on the procedure, it can be observed that the Member States seek to influence the negotiation and conclusion of international agreements on the basis of Article 218 of the TFEU. This provision confers on the EU institutions separate roles in this procedure. Consequently, the Member States for instance attempt to limit the role of the Commission in the conclusion of international agreements in order to limit the scope of EU competence indirectly **(B in section 2.1 and 2.2)**. Thirdly, the United Kingdom, Ireland and Denmark are individual Member States that have the political mechanism of 'opt-outs' at their disposal on the basis of Protocol No 21 and Protocol No 22 to the Treaties. They cannot be forced to participate in EU measures which concern the area of freedom, security and justice. Consequently, these Member States try to invoke this opt-out in order to restrict the European Union's influence on their external policy **(C in section 2.2)**.

My overview below presents the several discussed attempts of the Member States in a schematic way.

[123] Article 16(2) of the TEU.

THROUGH THE COUNCIL	INDIVIDUAL MEMBER STATES
On the substance: limitations to the ambit of the legal bases in the Lisbon Treaty	
the ambit of the CCP the ambit of the ERTA-doctrine the ambit of the other external action than CFSP the ambit of other legal bases	the ambit of the CCP the ambit of the ERTA-doctrine
On the procedure: the negotiation and conclusion of international agreements following Article 218 of the TFEU	
limit the role of the European Parliament limit the role of the European Commission avoid qualified majority voting 'hybrid decisions'	 avoid qualified majority voting avoid guidance of the European Union
	The use of opt-outs

It should be noted that Member States do not always and necessarily try to restrict the European Union's competence. For instance, the Lisbon Treaty provides in Article 6(2) of the TEU that the European Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) and thus, this provision foresees the necessary legal basis for this accession.[124] However, from the Member States' observations submitted to the Court in the advisory procedure of Opinion 2/13, it can be deduced that there is no unanimity about the extent of the European Union's accession to the protocols of the ECHR.[125] The Danish Government, for example, argues that the European Union cannot accede to the existing protocols of the ECHR to which the Member States are not already parties.[126] According to the Polish Government, under those circumstances, Member States could within the Council accept to be bound by such a protocol if the European Union would accede to it. However, these Member States would only be bound in

[124] Inge Govaere, 'To give or to grab: …' 74.
[125] Opinion of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 2/13, EU:C:2014:2454.
[126] Opinion of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 2/13, EU:C:2014:2454, paragraph 126.

the field of the competence of the European Union. Therefore, doubts would raise regarding to matters of shared competence preventing the application of the law "*in a consistent, transparent and uniform manner*".[127]

In essence, it can be observed that the Member States did confer the general competence of accession to the ECHR on the European Union, however, their view on the extent of this accession is uncertain. This could for instance give rise to difficulties in the context of the co-respondent mechanism. The co-respondent mechanism entails that the European Union and its Member States will take part in procedures before the European Court of Human Rights together whenever such a procedure is brought against any of them. In these situations, the duty of cooperation might imply a prohibition to argue differently from what is agreed within the European Union. Since the Member States and the European Union can hold opposing views, this can become problematic.[128] Such opposing views in general are the foundations of the discussed attempts of the Member States in the subsequent sections.

1. Through the Council

As explained above, a distinction will be made between attempts of the Member States through the Council on the substance **(A)** and attempts of the Member States through the Council on the procedure **(B)**.

A. On the substance: limitations to the ambit of the legal bases in the Lisbon Treaty

In cases that revolve around the correct legal basis for the adoption of an act of the European Union, a tendency of the Member States to challenge the scope of certain legal bases for EU external competence can be observed. The attempts to limit the ambit of the CCP **(a)**, the ambit of ERTA-doctrine **(b)**, the ambit of the other external action than CFSP **(c)** and the ambit of other legal bases **(d)** will be addressed in turn.

a. Attempts to limit the ambit of the CCP

Article 207 of the TFEU foresees the European Union's competence for the CCP. In order to build out such a common commercial policy, there need to be "*uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the*

[127] Opinion of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 2/13, EU:C:2014:2454, paragraph 142.
[128] Andrés Delgado Casteleiro, 'United We Stand: The EU and its Member States in the Strasbourg Court' in Vasiliki Kosta, Nikos Skoutaris and Vassilis P Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing, Oxford 2014) 109 and 119.

commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies".[129] In accordance with Article 3(1)(e) of the TFEU, the European Union's competence in this context is exclusive. There is no room for action of the Member States left.

Following Angelos Dimopoulos, the Lisbon Treaty gave a strong impetus to the non-trade objectives of the CCP. Article 21(1) of the TEU namely entails that the European Union's external action needs to advance several principles in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. This implies, for instance, that there is a possibility to insert positive and negative conditionality clauses in trade agreements since they intend to pursue the European Union's security, human rights and democracy policy. Furthermore, Article 21(2)(d) and (f) of the TFEU allow for the inclusion of development cooperation and environmental protection as non-trade objectives of the CCP. Lastly, Article 21(2)(h) of the TFEU implies that the European Union should commit to multilateral trade negotiations and contribute to the effective operation of, for example, the World Trade Organisation (hereafter: WTO).[130]

Regarding the role of the institutions, Angelos Dimopoulos notes that the Lisbon Treaty significantly changed the institutional balance in the context of the CCP. Firstly, the European Parliament became the co-legislator in the CCP following Article 207(2) of the TFEU. Secondly, the High Representative of the Union for Foreign Affairs and Security Policy (hereafter: High Representative), who is responsible for the conduct of the CFSP and is a Vice President of the Commission, has the duty to ensure the coherence of the CCP with the CFSP on the basis of Article 18 of the TEU. Finally, it can be expected that only a marginal control will be exercised by the Court on the policy options of the other institutions in their external action.[131] This is in line with what the Court, the intervening Member States and the Council argued in the *Swiss International Air Lines* case: "*The institutions and agencies of the Union have available to them, in the conduct of external relations, a broad discretion in policy decisions. As the United Kingdom, the Parliament and the Council have stated in the procedure before the Court, the conduct of external relations necessarily implies policy choices.*"[132]

The subsequent paragraphs will elaborate on how the Member States react to these predicted post-Lisbon tendencies through the Council.

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[129] Article 207(1) of the TFEU.
[130] Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 European Foreign Affairs Review 153, 164-165 (hereafter: Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on…').
[131] Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on…' 168-169.
[132] Judgment of 21 December 2016, *Swiss International Air Lines*, C-272/15, EU:C:2016:993, paragraph 24.

i. Conditional Access Services case

In the *Conditional Access Services* case, the scope of the CCP was at stake.[133] More specifically, the question of the correct legal basis at the intersection between the CCP (Article 207 of the TFEU) and the internal market (Article 114 of the TFEU) was addressed. The Commission and the European Parliament challenged a Council Decision concerning the signing, on behalf of the European Union of the European Convention on the legal protection of services based on, or consisting of, conditional access.[134] Following these institutions, "*the primary aim of this Convention was not to improve the functioning of the internal market but to promote and facilitate trade between the [contracting] parties*" since the supply of conditional access services between the European Union and other European countries is central to the Convention.[135] The Council, France, the Netherlands, Poland, Sweden and the United Kingdom, conversely, contended that the Convention was intended to eliminate or prevent any obstacles to trade in the services arising due to differences in national laws. The risk of non-member countries being used as a base for exporting illicit devices to the European Union should be eliminated.[136] Two more arguments were invoked by the Council and the supporting Member States. Firstly, it could not be argued that the fact that the Convention also addresses the supply of conditional access services between the European Union and third countries means that it applies 'more' to those services than to those supplied within the European Union. Secondly, the potential influence on trade in services between the European Union and third countries is only indirect and secondary.[137]

The aforementioned shows that the Member States in this situation intended to convince the Court of a broader scope of the legal basis of the internal market at the expense of the scope of the CCP. The motivation of the Member States behind this reasoning is clear: the internal market-competence of the European Union is a shared one following Article 4(2)(a) of the TFEU, while the CCP, as stressed above, excludes any influence of the Member States on the international level. As described in part one, the Court did not follow the Member States' view on the Convention *in casu*. This might have been the explanation for the fact that several Member States gave up their seats and left the Conditional Access Convention after the judgment. However, this does not mean that these Member States do not have any influence on what happens in relation

[133] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675.
[134] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraph 1.
[135] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraph 40 and 42.
[136] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraph 46.
[137] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraph 49-50.

to this Convention. They still have the possibility to influence the European Union's policy by making their voice heard in the Council.[138]

The *Conditional Access Services* case is often connected to the *Daiichi Sankyo* case of a couple of months earlier.[139] However, the latter was a preliminary reference procedure in which the Council did not intervene. In contrast, Greece, Germany, France, Italy, the Netherlands, Portugal, Finland, Sweden and the United Kingdom did submit their observations to the Court. Therefore, this case will be discussed below in section 1.2.

ii. Opinion 3/15 and Opinion 2/15

In 2017, a second phase of case-law concerning the scope of the CCP developed in the context of international agreements concluded by the European Union. In accordance with Article 218(11) of the TFEU, the Court successively gave its opinion on the Marrakesh Treaty and on the Free Trade Agreement with Singapore.

In the Court's Opinion regarding the Marrakesh Treaty, the Commission expressed the view that this Treaty, concerning the facilitation of access to published works for persons who are blind, visually impaired or otherwise print disabled, has its legal bases in Articles 114 and 207 of the TFEU.[140] More concretely, according to the Commission, the Marrakesh Treaty should be based on Article 114 of the TFEU because of its harmonising effect on the laws of the Member States and on Article 207 of the TFEU because it covers the exchange of accessible format copies with third countries. Consequently, the competence of the European Union to conclude the Treaty would be exclusive on the basis of Article 3(1) of the TFEU as regards the CCP-part and Article 3(2) of the TFEU as regards the internal market-part.[141] Regarding the scope of the CCP, liberalisation of international trade would the objective of the Marrakesh Treaty and it therefore shows a specific link to international trade as the concept of 'commercial aspects of intellectual property' in Article 207 of the TFEU implies.[142] Furthermore, the Commission contended that "*the common commercial policy may not be the subject of a restrictive interpretation that excludes measures having specific objectives*".[143]

The Council and several Member States on the other hand stressed the specific character of the concept of 'commercial aspects of intellectual property' in Article 207 of the TFEU.[144] There should be a specific link

[138] Joris Larik, 'No mixed feelings: The post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)' (2015) 52 Common Market Law Review 779, 795 (hereafter: Joris Larik, 'No mixed feelings:…').
[139] Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520.
[140] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114.
[141] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 23.
[142] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraphs 27 and 29.
[143] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 31.
[144] The intervening Member States in this advisory opinion procedure were the Czech Republic, France, Italy, Lithuania, Hungary, Romania, Finland and the United Kingdom.

to international trade and this link requires that the subject matter and objectives of the agreement must correspond to the CCP. Mere implications for international trade do not suffice.[145] In the case of the Marrakesh Treaty, the Council and the Member States maintain that it does not pursue the liberalisation of international trade, for instance, since the exchanges of accessible format copies covered by the Marrakesh Treaty are non-commercial.[146]

The Council's argumentation in the context of Opinion 2/15 of the Court concerning the Free Trade Agreement with Singapore also reveals this EU institution's attempt to limit the scope of the exclusive competence of the European Union under the CCP.[147] The Council did not agree with the view of the Commission and the European Parliament that the whole agreement, except for cross-border transport services and non-direct foreign investment, comes under the CCP and is therefore an exclusive competence of the European Union in accordance with Article 3(1)(e) of the TFEU.[148] The Council and all the Member States that submitted observations, conversely, contended that the Free Trade Agreement with Singapore should be a mixed agreement.[149] Regarding the ambit of the CCP in the Free Trade Agreement, the Council and the Member States argued that the provisions concerning environmental protection, social protection and intellectual property do not show the required specific link with international trade. According to them, this can be deduced from the fact that the chapters of these provisions refer to international agreements which are not directly linked to trade. Consequently, the competence to conclude these provisions is shared between the Member States and the European Union.[150] Furthermore, as regards the provisions concerning (non-) direct foreign investment, the Council and some of the Member States claimed that there should be made a distinction between investment protection and the admission of investments. In their view, the Free Trade Agreement only comprises provisions relating to investment protection. Since investment protection does not have a specific link to international trade, these provisions do not belong to the CCP and cannot be approved by the European Union alone.[151]

The central thread in the observations of the Member States and the Council in these procedures is that they contest 'the specific link with international trade'. This criterion was established by the Court in the *Daiichi Sankyo* case as described in part one of this dissertation.[152] In the context of Opinion 3/15, the Member States contest the specific link of the exchanges of accessible format copies with international trade, while in the

[145] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 41 referring to Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraph 52.
[146] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraphs 42 and 45.
[147] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376.
[148] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 13.
[149] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 19.
[150] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 22.
[151] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 27.
[152] Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraph 52.

context of Opinion 2/15, it is according to the Member States not clear that the provisions regarding environmental protection, social protection, intellectual property and (non-)direct foreign investment show a specific link with international trade. The motivation of the Member States can be presumed: if the Court would come to the conclusion that these agreements only cover exclusive competences of the European Union, the agreements would be concluded by the European Union alone. If the Court would however conclude that parts of the agreements are covered by shared competences, the Council, and therefore, the Member States, can decide to conclude the agreements in a mixed manner. This implies that the Member States act themselves to exercise their own competences.[153] As can be expected following the aforementioned strong impetus to the non-trade objectives of the CCP, the Court might not easily be convinced of this argumentation.

iii. Lisbon Appellations case and conclusion

It can be deduced from the previous sections that the Member States try to limit the ambit of the CCP through the Council by, firstly, challenging the dividing line between the European Union's shared competence for the internal market and the European Union's exclusive external competence for the CCP. Secondly, the Member States attempt to influence the Court's understanding of the 'specific link with international trade'-criterion. In the most recent case of this series of case-law, the *Lisbon Appellations* case, the Member States combined these two techniques. The Council argued that the Lisbon Agreement on Appellations of Origin and Geographical Indications should be adopted on the basis of Article 114 of the TFEU since no 'specific link with international trade' can be observed.[154]

b. Attempts to limit the ambit of the ERTA-doctrine

As explained in the first part of this dissertation, the by the Court developed ERTA-doctrine was codified in the Lisbon Treaty by Article 216 of the TFEU and Article 3(2) of the TFEU. It is useful to recall the content of these Articles before going into the case-law concerning their implications. Article 216(1) of the TFEU stipulates that "*the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope*".

[153] Thomas Verellen, 'Opinion 3/15 on the Marrakesh Treaty: ECJ reaffirms narrow 'minimum harmonisation' exception to ERTA principle', European Law Blog, 1 March 2017, available at http://europeanlawblog.eu/2017/03/01/opinion-315-on-the-marrakesh-treaty-ecj-reaffirms-narrow-minimum-harmonisation-exception-to-erta-principle/.
[154] Judgment of 25 October 2017, *Commission v Council (Lisbon Appellations)*, C-389/15, EU:C:2017:798, paragraph 43.

Such a competence to conclude an international agreement is exclusive in accordance with Article 3(2) of the TFEU whenever "*its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope*". Since these Articles and their interpretation by the Court create a rather broad competence for the European Union which is open for interpretation, it could be expected that the Member States would contest its limits as will be shown below.

i. Broadcasting Organisations case and Opinion 1/13

In the *Broadcasting Organisations* case, the Commission and the European Parliament sought the annulment of a Decision of the Council and the Representatives of the Member States meeting within the Council on the participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations.[155] According to the Commission and the European Parliament, the neighbouring rights of broadcasting organisations, which are the subject of this Convention, "*form part of a consistent and balanced body of intellectual property rules intended to ensure the unity of the legal order of the European Union in that area*". Therefore, the competence of the European Union to conclude this Convention should have been exclusive on the basis of Article 3(2) of the TFEU.[156]

The Council on the other hand, supported by the Czech Republic, Germany, the Netherlands, Poland and the United Kingdom, maintained that the Convention belongs to the matter of the internal market, which encompasses the protection of intellectual property and is a shared competence. As a consequence, the Member States should be involved in the negotiations thereof. According to the Council and these Member States, "*the fact that a part, even a significant one, of the envisaged international agreement falls within an area covered by common EU rules is not sufficient to conclude that the competence of the European Union to negotiate that agreement is exclusive*". In other words, they contested the limits of the ERTA-doctrine by stating that the observation that a significant part of an international agreement falls within an area covered by common EU rules does not suffice to come under the "*may affect common rules or alter their scope*"-criterion of Article 3(2) of the TFEU. Instead, there should be a "*precise and specific analysis of the nature and content of the EU rules concerned and of the relationship between those rules and the envisaged agreement*".[157] The Council and the Member States also added that there can be no exclusive competence of

[155] Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151.
[156] Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraphs 44 and 48.
[157] Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraphs 49-50.

the European Union solely because an international agreement would only marginally extend the already established EU rules. This would unlawfully expand the scope of Article 3(2) of the TFEU.[158]

As mentioned in the first part of this dissertation, the Member States even referred to the drafting of the Lisbon Treaty in this case by stating that they refused to insert the test of "*an area already largely covered by EU rules*" applied by the Court as a test for the general ERTA-doctrine in, for instance, Opinion 2/91.[159] This could be seen as a "*deliberately forceful statement, meant to enforce compliance by the [Court] with the Member States' interpretation of the Treaties*".[160]

Furthermore, the Council and the Member States claimed that the last clause of Article 3(2) of the TFEU, "*may affect common rules or alter their scope*", needs to be read in conjunction with Protocol No 25 of the TEU and the TFEU on the exercise of shared competence.[161] This Protocol refers to Article 2(2) of the TFEU and stipulates that when the European Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the European Union act in question and therefore does not cover the whole area.[162] This should according to the Member States be taken into account when verifying whether there is "*an area largely covered by EU rules"*. In other words, in the view of the Council, Protocol No 25 to the Lisbon Treaty reduced to some extent the competence of the European Union to conclude international agreements. According to Fernando Castillo de la Torre, this argument does not take into account that Article 3(2) of the TFEU is specifically intended to assert the exclusive nature of the EU competence of concluding international agreements, while Article 2(2) of the TFEU governs the adoption of legislation by the Member States.[163]

In Opinion 1/13, the Council and the majority of the Member States developed a similar argumentation. They opposed the view of the Commission, the European Parliament and Italy that the ability to accept the

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[158] Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraph 60.
[159] Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraph 52 referring to Opinion of 19 March 1993, *Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work*, 2/91, EU:C:1993:106, paragraph 25.
[160] Inge Govaere, 'Setting the international scene:…' 1292.
[161] Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraph 51.
[162] Article 2(2) of the TFEU stipulates: "*When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.*"
[163] Fernando Castillo de la Torre, 'The Court of Justice and External Competences After Lisbon: Some Reflections on the Latest Case Law' in Piet Eeckhout and Manuel Lopez-Escudero (eds*), The European Union's External Action in Times of Crisis* (Hart Publishing, Portland – Oregon 2016) 160 and 162 (hereafter: Fernando Castillo de la Torre, 'The Court of Justice and External Competences After Lisbon:…').

accession of third countries to the Convention on the civil aspects of international child abduction is an exclusive external competence of the European Union.[164] In this case, they argued again that the criterion of "*an area already largely covered by EU rules*" is not included in Article 3(2) of the TFEU.[165] It can be said that the stakes of the Member States in Opinion 1/13 were quite high. If the Court would follow the view of the Commission, they would lose their competence in "*setting the international scene*", meaning that they would be deprived of the possibility to decide on membership status of third countries to international fora in matters of EU exclusive competence.[166]

It can be observed that in this first line of case-law regarding the ERTA-doctrine, the Member States referred to their codification of this doctrine in the Lisbon Treaty. According to them, the doctrine should be given a more restrictive interpretation in the post-Lisbon era than the scope the Court conferred upon it before its codification. They namely contest the "*an area already largely covered by EU rules"*-test to verify whether the "*may affect common rules or alter their scope*"-criterion of Article 3(2) of the TFEU is met to conclude to exclusive competence for the European Union. Moreover, Protocol No 25 of the TEU and the TFEU on the exercise of shared competence is supposed to limit this EU competence.

ii. Opinion 3/15 and Opinion 2/15

Since, as will be discussed in part three of this dissertation, the Court did not follow the Member States' view in the previous cases and kept on interpreting the ERTA-doctrine in the original sense, a more recent line of case-law shows the Member States' new attempts to limit the influence of the doctrine.

In addition to the scope of the CCP, Opinion 3/15 about the Marrakesh Treaty addressed the scope of the ERTA-doctrine. According to the Commission, the conclusion of the Marrakesh Treaty would namely affect common EU rules or alter their scope. Therefore, if the Court would consider that the Marrakesh Treaty does not come under the ambit of the CCP, the European Union would have an exclusive external competence to enter into the agreement on the basis of Article 3(2) of the TFEU.[167] The Member States and the Council to the contrary did not support the idea that the Marrakesh Treaty would affect common rules or alter their scope.[168] In their view, Directive 2001/29 concerning certain aspects of copyright and related rights only implies minimum harmonisation and, more specifically, the exceptions and limitations to these rights are not harmonised by the Directive. The Member States did not accept that the European Union, through the conclusion of an international agreement, could render mandatory the adoption of measures relating to these

[164] Opinion of 14 October 2014, *Convention on the civil aspects of international child abduction*, 1/13, EU:C:2014:2303.
[165] Opinion of 14 October 2014, *Convention on the civil aspects of international child abduction*, 1/13, EU:C:2014:2303, paragraph 63.
[166] Inge Govaere, 'Setting the international scene:…' 1277.
[167] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 32.
[168] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 50.

exceptions and limitations. Consequently, they argued that they retained a certain degree of discretion to adopt such measures internally and they invoked this discretion to state that the requirement of "*affect common rules or alter their scope*" of the ERTA-doctrine is not met.[169] The importance of this Opinion for the Member States cannot be underestimated: if the Court would decide that the Marrakesh Treaty comes under the exclusive competence of the European Union, it would render the European Union's competence regarding intellectual property very broad. There would be exclusivity in the CCP for intellectual property agreements that are trade-related and on the basis of the ERTA-doctrine, only the European Union would be able to act internationally in the areas where it has already legislated.[170]

The Council also challenged the application of the ERTA-doctrine in the Commission's view regarding the Free Trade Agreement with Singapore in Opinion 2/15. The Commission namely applied the ERTA-doctrine, through Article 3(2) of the TFEU, on the provisions of the agreement concerning cross-border transport services and non-direct foreign investment.[171] As regards the field of transport, the Council contended that these provisions in the agreement come under the ambit of the common transport policy which is a shared competence in accordance with Article 4(2)(g) of the TFEU. Following the Council, the provisions in the field of transport cannot "*affect common rules or alter their scope*".[172] As regards the provisions concerning transparency and non-direct foreign investment, the Council claimed that they fall within the competence of the Member States alone. The TFEU does not confer any competence for investment which is not direct and 'common rules' in the sense of Article 3(2) of the TFEU cannot consist of rules of primary EU law, such as, *in casu*, Article 63 of the TFEU.[173] Advocate General Sharpston submitted in this context that "*the text of Article 3(2) TFEU itself does not offer decisive guidance*". According to her, the proceedings regarding the Free Trade Agreement with Singapore offered an opportunity for the Court to provide the necessary clarification.[174]

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[169] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraphs 52-54 referring to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* L 167, 22 June 2001, p. 10.

[170] Daniel Acquah, 'CJEU invokes ERTA principle to assert EU competence to ratify Marrakesh Treaty' (2017) 12 Journal of Intellectual Property Law & Practice 548, 550.

[171] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 14 and 16.

[172] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 20.

[173] Article 63 of the TFEU stipulates: "*1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.*" See: Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 23-25.

[174] Opinion of Advocate General Sharpston delivered on 21 December 2016, *EU-Singapore Free Trade Agreement*, Opinion 2/15, EU:C:2016:992, paragraphs 127 and 351. See: David Kleimann, 'Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General' (2017) 23 EUI Working Papers, Robert Schuman Centre for Advanced Studies 1, 33.

iii. Conclusion

It can be concluded that the Member States, through the Council, still attempt to diminish the scope of the by the Court developed ERTA-doctrine. In a first line of case-law, these attempts took the form of a reference to the drafting of the Lisbon Treaty. According to the Member States, Article 3(2) of the TFEU did not mention the "*an area already covered to a large extent*"-test and therefore it could not be taken into account to determine whether there is an exclusive competence conferred upon the European Union on the basis of this provision.

In a second line of case-law, the Member States first of all drew attention to the fact that some common rules confer a certain degree of discretion to the Member States. According to them, this should be considered while determining whether the "*affect common rules or alter their scope*"-criterion of Article 3(2) of the TFEU is met. Secondly, the Member States argue in this context that these 'common rules' cannot consist of rules of primary law. These rules of primary law cannot be seen as concrete 'common rules' implemented by the Member States through the European Union since the Treaties constitute the framework agreements of the legal order of the European Union. Furthermore, they have supremacy over rules adopted on their basis.[175]

c. Attempts to limit the ambit of the other external action than CFSP

As indicated in part one of this dissertation, the new Article 40 of the TEU puts the CFSP and non-CFSP policies on the same level. As could be expected, this multiplied cases before the Court about the correct legal basis at the intersection between the CFSP and non-CFSP.[176] It can be observed, as will be shown below, that these cases are all introduced by the European Parliament. The role of the European Parliament is namely restricted in the CFSP. Article 36 of the TEU only provides a limited, non-automatic right for consultation on all CFSP measures adopted by the Council.[177] In other words, there is crippled conferral to the European Union. Indeed, the role of the Court itself is also limited in these situations. Following Article 275 of the TFEU, the Court does not have jurisdiction with respect to the provisions relating to the CFSP or to acts

[175] Guillaume Van der Loo, 'The Court's Opinion on the EU-Singapore FTA:…' 5.
[176] Pieter Jan Kuijper and others, *The law of EU External Relations* 851-852.
[177] Article 36 of the TEU stipulates: "*The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament. The European Parliament may ask questions of the Council or make recommendations to it and to the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy*." See: Panos Koutrakos, *EU International Relations Law* 436-437.

adopted on the basis of those provisions.[178] Nonetheless, two exceptions are provided: the Court can verify compliance with Article 40 of the TEU and it can review the legality of restrictive measures adopted against individuals. As a consequence, in cases about restrictive measures, such as the *Financial Sanctions* case, there is only semi-crippled conferral. In addition, the Court has the capacity to decide on the correct legal basis of an act at the intersection between the CFSP and the other external action of the European Union in accordance with Article 40 of the TEU.[179]

Regarding the role of the Commission, it should be noted, as explained above, that the High Representative has a double-hatted character since he or she combines the responsibility for the conduct of the CFSP and is a Vice President of the Commission. Furthermore, Article 215 of the TFEU provides that restrictive measures are to be adopted "*on a joint proposal from the High Representative […] and the Commission*". Hence, it is less likely that the Commission would introduce a procedure against the Council in this context.[180] As will be shown below, in the *Financial Sanctions* case, the Commission even intervened in support of the Council. In contrast, in the cases regarding the Mauritius and Tanzania agreement, the Commission intervened in support of the European Parliament defending its role in the procedure for concluding international agreements following Article 218 of the TFEU.

The choice of the legal basis does receive a lot of attention of the European Parliament aspiring to safeguard its prerogatives. Its Rules of Procedure even foresee a specific internal procedure to make sure an act of the European Union is adopted on the correct legal basis.[181] The subsequent sections will discuss how the Council in its defence argues that the limitation of the European Parliament's influence is justified because of the fact that certain actions come under the scope of the CFSP and not under the scope of other external action of the European Union.

i. Financial Sanctions case

In the aforementioned *Financial Sanctions* case, the European Parliament started a procedure against the Council. The Czech Republic, France, Sweden and the Commission intervened in support of the latter.

[178] This is foreseen in Article 24(1) of the TEU: " *[…] The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.*"

[179] Panos Koutrakos, *EU International Relations Law* 444.

[180] Peter Van Elsuwege, 'The Potential For Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: constitutional challenges* (Hart Publishing, Oxford 2014) 119 (hereafter: Peter Van Elsuwege, 'The Potential For Inter-Institutional Conflicts…').

[181] María José Martínez Iglesias, 'The Lisbon Treaty's Competence Arrangement Viewed by the European Parliament' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, Portland – Oregon 2017) 199.

According to the European Parliament, a Council Regulation concerning restrictive measures adopted against certain persons and entities associated with the Al-Qaeda network and the Taliban was wrongly based upon Article 215 of the TFEU.[182] Indeed, the purpose of the regulation was to combat terrorism and the financing of terrorism, consequently, Article 75 of the TFEU constitutes the correct legal basis. Article 215 of the TFEU, in contrast, can only serve as a legal basis whenever CFSP objectives are pursued. *In casu*, it cannot be argued that a distinction should be made between 'internal terrorism', implying that measures should be adopted on the basis of Article 75 of the TFEU, and 'international or external terrorism', implying that measures should be adopted on the CFSP-basis of Article 215 of the TFEU.[183] In addition, the Parliament argued that "*measures having a direct impact on the fundamental rights of individuals and groups, on the internal market and on the fight against crime*", such as the restrictive measures *in casu*, cannot be approved without participation of the European Parliament when the ordinary legislative procedure applies for the adoption of measures in those areas. Choosing Article 215 of the TFEU as a legal basis would not respond "*to an urgent need to provide for parliamentary scrutiny of listing practices*".[184]

The Council, the Czech Republic, France, Sweden and the Commission contended that Article 215 of the TFEU is the correct legal basis since the restrictive measures fall within the CFSP. They are namely intended to combat international terrorism and its financing "*in order to maintain international peace and security*".[185] According to the Council, the structure and the wording of the Treaties imply that the location of a threat and the political objectives thereof need to be taken into account in the choice of the correct legal basis. Article 75 of the TFEU concerns the area of freedom, security and justice within the European Union while Article 215 of the TFEU relates to threats to one or more third countries or the international community in general.[186] Besides, the choice of the legal basis determines the procedures and not the other way around. This legal

[182] Article 215 of the TFEU stipulates: "*1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. […]*." See: Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraphs 1 and 10.

[183] Article 75 of the TFEU stipulates: "*Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities*." See: Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraphs 14-16.

[184] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraph 34.

[185] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraphs 17-18.

[186] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraph 22.

basis should in turn be based upon objective factors.[187] Finally, it should according to the Council be noted that the Lisbon Treaty did not affect the distinction between the CFSP and the area of freedom, security and justice. A clear delimitation of those two fields is of major importance following Article 40 of the TEU which entails that the CFSP shall not affect the implementation of the European Union's other external action and vice versa.[188]

This case clearly illustrates the aforementioned: the European Parliament acts to safeguard its prerogatives while the Council, supported by the Commission and the Member States, defends itself by referring to the aim of the contested act. The 'centre of gravity-test' should be applied and the procedure should not influence the choice of the legal basis. The Commission intervenes in support of the Council and it even expressly states that it came to the conclusion, "*endorsed by the High Representative*", that Article 215 of the TFEU constituted the correct legal basis.[189] In my view, it is in accordance with the Court's routine to apply the 'centre of gravity-test'. However, a distinction between internal and external terrorism might come across as artificial in some cases and illustrates the difficulties in establishing criteria to define the exact scope of the legal bases for external action in the Lisbon Treaty.[190]

In terms of modalities of conferral, only the democratic control by the European Parliament was at stake. Since the case concerned the adoption of restrictive measures against individuals, the Court could exercise its judicial control on the basis of Article 275 of the TFEU. Consequently, this case is an illustration of semi-crippled conferral to the European Union.[191] Furthermore, the Commission invoked the possibility of a split conferral when Article 75 of the TFEU would be added as a legal basis for the contested act. Adding Article 75 of the TFEU would according to the Commission result in incompatible procedures since the United Kingdom, Ireland and Denmark would have the possibility to opt-out.[192] Nevertheless, none of these Member States intervened in this case. This can in my view be explained by the fact that the United Kingdom and Ireland decided to participate in the European Union's action on the basis of Article 75 of the TFEU following Declaration 65 to the Treaties.[193] As a consequence, the choice of the legal basis in this case did not have a particular practical relevance for the United Kingdom and Ireland.

[187] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraphs 36-37.
[188] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraph 41.
[189] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraph 25.
[190] Inge Govaere, 'To Give or To Grab:...' 75.
[191] Inge Govaere, 'To Give or To Grab:...' 80.
[192] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraph 27.
[193] Inge Govaere, 'To Give or To Grab:...' 85.

ii. Mauritius and Tanzania Agreement cases

The *Mauritius Agreement* case and the *Tanzania Agreement* case were also cases between the European Parliament and the Council in the context of the CFSP.[194] Since these two agreements were to be concluded in the framework of the CFSP, there was again crippled conferral to the European Union. The Court and the European Parliament could thus not exercise their judicial and democratic control regarding these agreements. However, the European Parliament challenged the lack of involvement and information when concluding these agreements. According to the European Parliament, these agreements do not relate exclusively to the CFSP, therefore, it should have been involved in the conclusion of the agreements in accordance with Article 218(6) of the TFEU.[195] Furthermore, even if the Court would consider that the agreements do relate exclusively to the CFSP, the European Parliament should have been immediately and fully informed at all stages of the procedure following Article 218(10) of the TFEU.[196] Since these cases relate to the attempts of the Council and the Member States to limit the role of the European Parliament in the procedure of the conclusion of international agreements, they will be further elaborated on below in section B, a.

iii. Conclusion

It can be deduced from the previous sections that regarding the intersection between the CFSP and non-CFSP, the Member States and the Council merely act in defence against the European Parliament's attempts to expand its powers in the CFSP. The European Parliament pushes the boundaries of its powers by invoking the importance of its democratic scrutiny.[197] In their defence, the Member States, through the Council, stress the specific objectives of the CFSP. However, they should also take into account the role of the European Parliament in accordance with Article 218 of the TFEU as will be shown below.

d. Attempts to limit the ambit of other legal bases

As can be deduced from the previous sections, the ambit of the CCP, ERTA and the CFSP have often been the subject of bickering between the Member States, through the Council, on the one hand and the

[194] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025 and Judgment of 14 June 2016, *Parliament v Council (Tanzania Agreement)*, C-263/14, EU:C:2016:435.
[195] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraph 23 and Judgment of 14 June 2016, *Parliament v Council (Tanzania Agreement)*, C-263/14, EU:C:2016:435, paragraph 26.
[196] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraph 64 and Judgment of 14 June 2016, *Parliament v Council (Tanzania Agreement)*, C-263/14, EU:C:2016:435, paragraph 57.
[197] Joris Larik, 'Democratic scrutiny of EU Foreign Policy: from pirates to the power of the people (case C-658/11 Parliament v. Council)', European Law Blog, 14 August 2014, available at https://europeanlawblog.eu/2014/08/14/democratic-scrutiny-of-eu-foreign-policy-from-pirates-to-the-power-of-the-people-case-c-65811-parliament-v-council/.

Commission and the European Parliament on the other hand. However, as can be expected, the other grounds of (exclusive) competence for the European Union also remain under strain.

i. Development cooperation

In the *Philippines Agreement* case, the ambit of the legal basis of development cooperation – a shared competence on the basis of Article 4(4) of the TFEU – was at stake. According to the Commission, who initiated the procedure, the Partnership and Cooperation Agreement with the Philippines could be based on the combined legal bases of development cooperation, which is Article 209 of the TFEU and of the CCP, which is Article 207 of the TFEU, since "*the trade part […] cannot be seen as being merely incidental to the part concerning development cooperation*". The Council however added several additional legal bases to Articles 207 and 209 of the TFEU: readmission of third-country nationals (Article 79(3) of the TFEU), transport (Articles 91 and 100 of the TFEU) and the environment (Article 191(4) of the TFEU). The Commission contended that all these legal bases are covered by the European Union's competence for development cooperation.[198] As a justification, it referred to the broad concept of 'development cooperation' covering "*a wide range of policy objectives which pursue the development of the third country concerned, so that development cooperation agreements necessarily encompass a wide range of specific areas of cooperation without the character of such agreements as development cooperation agreements being affected*".[199]

The argumentation of the Council and the supporting Member States entailed that recent partnership and cooperation agreements with third countries cover many different areas of cooperation of which none can be designated as predominant. Consequently, it cannot be required, as the Commission proposes, that there is an extensive obligation in order to identify an objective distinct from development cooperation. The most limited obligation could namely lead to "*a wide development of the external relations with the third country*". Once the manner of implementation of the cooperation in a certain area is stipulated in concrete terms, the corresponding legal basis should be taken into account.[200] The Council did for instance not agree with the idea that the provisions on transport in the Philippines Agreement belong to the European Union's policy in development cooperation merely because they are in line with the purposes of this policy.[201] In the context

[198] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraphs 1 and 16-17.
[199] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraph 18 referring to Article 21 of the TEU, Articles 208-209 of the TFEU and Judgment of 3 December 1996, *Portugal v Council*, C-268/94, EU:C:1996:461, paragraphs 37-38.
[200] The supporting Member States in this case were the Czech Republic, Germany, Ireland, Greece, Austria and the United Kingdom. See: Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraphs 24-26.
[201] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraph 28.

of readmission, the Council and the Member States submitted that the provisions of the Philippines Agreement contain clear legal commitments for the Member States. Furthermore, they quoted that the fact that the conclusion of an agreement of admission and readmission is foreseen in the Philippines Agreement, gives leverage on the Philippines to obtain such an agreement. According to the Council and the Member States, this would not have been possible in separate negotiations.[202]

The Commission also drew attention to potential unwarranted legal effects as a consequence of Protocol No 21 and Protocol No 22 in the *Philippines Agreement* case. The United Kingdom, Ireland and Denmark namely have an opt-out concerning the readmission of third-country nationals, the legal basis of Article 79(3) of the TFEU. In other words, there would be a split conferral to the European Union. Examples of these unwarranted legal effects would be that it could be difficult to determine which provisions of the agreement come under Article 79(3) of the TFEU, that it gives rise to the alteration of the territorial scope of the Philippines Agreement and that there would be a limitation of the institutional rights of the European Parliament and the Court.[203] The Council refers in its reaction to the Court's clear statement "*that it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure*". As a consequence, the United Kingdom, Ireland and Denmark can choose whether they want to be bound as Member States of the European Union or whether they consider to enter into relations with the Philippines bilaterally.[204]

Whilst it is true that the European Union's competence in development cooperation is only shared, the Member States' distrust can be noticed in the following aforementioned extract: "*the most limited obligation could lead to a wide development of the external relations with the third country party to the framework agreement*".[205] It seems that the Member States want to avoid that the European Union's competence in development cooperation 'gets out of hand'. The broader the room for action granted to the European Union on the basis of a certain legal basis, the more freedom the European Union gains. On the other hand, according to Morten Broberg and Rass Holdgaard, this case shows the "*need to ensure that no legal basis in the Treaties becomes nugatory*".[206]

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[202] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraph 29.
[203] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraph 22.
[204] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraph 31.
[205] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraph 25.
[206] Morten Broberg and Rass Holdgaard, 'Demarcating the Union's Development Cooperation Policy after Lisbon: Commission V. Council (Philippines PCFA)' (2015) 52 Common Market Law Review 547, 560.

Regarding the possibility of a split conferral, the Council's reference to the idea that it is the legal basis that determines the procedure and not vice versa is in my view justified. However, it cannot be denied that the unwarranted effects referred to by the Commission are difficult to resolve. Even if Denmark, Ireland and the United Kingdom would conclude similar obligations with the Philippines bilaterally, "*they would only be bound by virtue of international law and not by virtue of EU law*".[207]

ii. Conservation of marine biological resources under the common fisheries policy

In two pending cases, the ambit of the exclusive competence of Article 3(1)(d) of the TFEU, the conservation of marine biological resources under the common fisheries policy, is at stake.[208] In both cases, the Commission asks for the partial annulment of a decision of the Council regarding the establishment of the European Union's position on meetings of the Commission for the Conservation of Antarctic Marine Living Resources. The Council required that these positions would be supported on behalf of the European Union and its Member States, rather than being supported on behalf of the European Union alone. According to the Commission, this would be "*in breach of the European Union's exclusive competence in the matter and of the Commission's prerogatives to represent the European Union*". Article 3(1)(d) of the TFEU provides the exclusive external competence of the European Union to conserve marine biological resources and in any event, the European Union has an exclusive competence on the basis of the ERTA-doctrine. The measures envisaged by the positions may affect common rules of the European Union or alter their scope (Article 3(2) of the TFEU).

According to Karen Banks, Member States often try to argue that a certain international agreement belongs to the European Union's competence in environmental protection rather than to the competence regarding the conservation of marine biological resources. Considering the shared character of the competence for environmental protection, this allows them to take initiatives within the framework of such agreements.[209]

B. <u>On the procedure: the negotiation and conclusion of international agreements following Article 218 of the TFEU</u>

According to the Court, Article 218 of the TFEU forms in the context of the conclusion of international agreements "*an autonomous and general provision of constitutional scope, in that it confers specific powers*

[207] Inge Govaere, 'To give or to grab: …' 88.
[208] Action brought on 23 November 2015, *Commission v Council*, C-626/15 and Action brought on 20 December 2016, *Commission v Council*, C-659/16.
[209] Karen Banks, 'The Lisbon Treaty's Competence Arrangement viewed from European Commission Practice' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, Portland – Oregon 2017) 191.

on the EU institutions".[210] Indeed, as can be gleaned from its eleven paragraphs, this provision determines the procedural rules governing the European Union's treaty-making activities "*in relation to almost all the strands of its external action*".[211]

It is useful to shortly summarise the functions conferred upon the institutions of the European Union following Article 218 of the TFEU.[212] Firstly, the Council is responsible for the authorisations regarding negotiations and signature of international agreements.[213] Furthermore, the Council is the competent EU institution for the conclusion of such an agreement which is equivalent to national ratification or accession.[214] Regarding the decision-making, Article 218(8) of the TFEU stipulates that the Council should act by qualified majority voting except for the exceptions, such as the conclusion of association agreement, provided for in the second part of this paragraph. The Council can also determine positions to be adopted on behalf of the European Union in a body set up by an agreement on the basis of Article 218(9) of the TFEU. Secondly, there are three degrees in the involvement of the European Parliament. In any case, the European Parliament must be immediately and fully informed at all stages of the procedure.[215] In addition, the European Parliament must give its consent in the situations provided for in Article 218(6)(a) of the TFEU. Outside these situations, there should be consultation of the European Parliament on the basis of Article 218(6)(b) of the TFEU. Only where agreements relate exclusively to the CFSP, no consultation or consent is needed. Thirdly, the Commission has on the basis of Article 218(3) of the TFEU the ability to formulate recommendations to the Council in the context of this procedure. However, this role is taken over by the High Representative whenever the agreement envisaged relates exclusively or principally to the CFSP. Finally, the Court can be asked to give its opinion as to whether an agreement envisaged is compatible with the Treaties in accordance with Article 218(11) of the TFEU.

If the Member States want to influence the external action of the European Union as far as possible, the logical method would be to expand their own role in the procedure of Article 218 of the TFEU while diminishing the influence of the European Parliament and the Commission. The exposition of the case-law below will show whether and how the Member States employ the procedure of Article 218 of the TFEU as such. In any case, according to Stanislas Adam *et al*, "*la négociation et la conclusion des accords*

[210] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraph 62. See: Inge Govaere, 'To give or to grab: …' 84.
[211] Article 219 of the TFEU applies by way of derogation in the context of the CCP and agreements on the monetary policy. See: Panos Koutrakos, *EU International Relations Law* 137.
[212] For a broader overview of the application of Article 218 of the TFEU, see Panos Koutrakos, *EU International Relations Law* 137 and following.
[213] Article 218(2) of the TFEU.
[214] Article 218(2) of the TFEU and Panos Koutrakos, *EU International Relations Law* 147.
[215] Article 218(10) of the TFEU.

internationaux sont singulièrement compliquées par le manque de clarté et les disputes quant à l'étendue exacte de la compétence de l'Union pour négocier et conclure des accords".[216]

The following attempts of the Member States will be addressed in turn: attempts to limit the role of the European Parliament **(a)**, attempts to limit the role of the European Commission **(b)**, attempts to avoid qualified majority voting **(c)** and the use of 'hybrid decisions' **(d)**.

a. Attempts to limit the role of the European Parliament

As stated above, the European Parliament can be informed, consulted or called upon to give its consent in the conclusion of international agreements in accordance with Article 218 of the TFEU. It can be expected that the Member States, through the Council, will try to limit the European Parliament's involvement. Since Article 218 of the TFEU foresees that the European Parliament does not need to be consulted where agreements relate exclusively to the CFSP, avoiding its influence should be easier in this context.

i. In the framework of the CFSP

In the case concerning the Mauritius Agreement, the European Parliament, supported by the Commission, sought the annulment of the decision of the Council on the signing and conclusion of an agreement with Mauritius relating to the transfer of suspected pirates.[217] Since this agreement can be situated in the framework of the CFSP, there is a crippled conferral of competence to the European Union, meaning that there is in principle no democratic control by the European Parliament. The European Parliament however considered that the agreement did not relate 'exclusively' to the CFSP and therefore, its right to involvement on the basis of Article 218(6) of the TFEU should have been guaranteed. The exception to this involvement of the European Parliament – "*where agreements relate exclusively to the [CFSP]*" – should be interpreted narrowly and *in casu*, the agreement also relates to judicial cooperation in criminal matters, police cooperation and development cooperation.[218] In these fields of action, the European Union intervenes following the ordinary legislative procedure. Consequently, the European Parliament should have given its consent on the basis of Article 218(6)(a)(v) of the TFEU.[219] From a textual point of view, the European Parliament referred to the difference between relating 'principally', as in Article 218(3) of the TFEU, or 'exclusively', as in Article 218(6) of the TFEU, to the CFSP. If an agreement comprises some incidental

[216] Stanislas Adam, Said Hammamoun, Erwan Lannon, Jean-Victor Louis, Nanette Neuwahl and Eric White, *L'Union européenne comme acteur international* (Editions de l'Université de Bruxelles, Bruxelles 2015) 156.
[217] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraph 1.
[218] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraphs 23-25.
[219] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraph 29.

measures relating to other policies, it would only relate 'principally' to the CFSP and the European Parliament should have been involved in its conclusion.[220]

The Council on the other hand, supported by the Czech Republic, France, Italy, Sweden and the United Kingdom, claimed that, following its aim and content, the Mauritius Agreement relates exclusively to the CFSP.[221] For instance, according to the Council, the Court already acknowledged that even if a measure with as a main purpose the implementation of the CFSP, contributes to the economic and social development of a developing country, it does not fall within the ambit of development cooperation.[222] Regarding the distinction between agreements relating 'principally' and 'exclusively' to the CFSP, the Council and the intervening Member States contended that this distinction does not influence the fact that "*the question whether an agreement relates 'exclusively' to the CFSP within the meaning of the second subparagraph of Article 218(6) TFEU must be determined solely in the light of the substantive legal basis of that agreement*".[223] In the view of Sweden and the United Kingdom, the interpretation of Article 218(6) of the TFEU by the European Parliament would even upset the institutional balance. In the CFSP, the European Parliament only has a strictly limited role and it cannot be granted a veto in this matter. Furthermore, according to these Member States, Article 40 of the TEU, which provides an equal level of the CFSP in relation to other external action, should be respected. Finally, the Czech Republic added that the parallelism between the European Parliament's internal and external power should be taken into account: this EU institution should have the same role in the conclusion of an international agreement as in the adoption of an internal act.[224]

A second aspect of the *Mauritius Agreement* case was the duty to inform the European Parliament immediately and fully at all stages of the conclusion of the international agreement on the basis of Article 218(10) of the TFEU. In this regard, the Council first of all rejected the jurisdiction of the Court in this context. Since the agreement concerns the CFSP, the Court lacks jurisdiction following Article 24(1) of the TEU and Article 275 of the TFEU. With respect to the substance, the European Parliament was properly informed according to the Council. Although the period within which this happened was a little bit longer, it was still reasonable due to the fact that this period included the summer break.[225]

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[220] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraph 37.
[221] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraph 30.
[222] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraph 36 referring to Judgment of 20 May 2008, *Commission v Council (ECOWAS)*, C-91/05, EU:C:2008:288, paragraph 72.
[223] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraphs 39-40.
[224] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraphs 41-42.
[225] Article 24(1) of the TEU stipulates: "*[…] The Court of Justice of the European Union shall not have jurisdiction with respect to these [CFSP-]provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union*" and Article 275 of the TFEU provides that: "*The Court of Justice of*

Advocate General Bot predominantly followed the reasoning of the Council and the Member States in this case. He argued that the question of the applicable procedure for the conclusion of an international agreement cannot be examined in isolation from the preliminary question of determining the substantive legal basis of the act *in casu*.[226] According to Advocate General Bot, the presence of incidental aspects relating to other European Union policies "*does not permit the inference that the centre of gravity of the measure does not relate to the CFSP*". Nearly all international agreements would require the consultation or consent of the European Parliament if this institution's interpretation of Article 218(6) of the TFEU would be applied. This would be contrary to the wish of the authors of the Treaties to confer a limited role on the European Parliament in matters relating to the CFSP.[227] However, Advocate General Bot did not agree with the Council's view on the jurisdiction of the Court in the context of Article 218 of the TFEU. This provision stipulates the rules relating to the negotiation and conclusion of international agreements in general. Consequently, it cannot be said to be a provision relating to the CFSP within the meaning of Article 24(1) of the TEU and Article 275 of the TFEU.[228] Notwithstanding this conclusion, the Advocate General did agree with the Council that it informed the European Parliament as it should have. The period in question did not endanger the European Parliament's prerogatives and it can be accepted that the European Parliament is not informed as detailed in respect of international agreements in the CFSP than it is when there needs to be consultation or consent.[229]

In essence, it can be said that the main argument of the Member States, through the Council, is the reference to the CFSP-character of the agreement. Since this agreement comes under the scope of the CFSP, a limited role of the European Parliament and the Court can be justified. Advocate General Bot does follow the Member States to a certain extent. He namely recognises the semi-crippled character of the conferral to the European Union in these situations: a limited role in CFSP for the European Parliament is in accordance with the Treaties, however, the Court does have the power to control the compliance with the procedure of Article

the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union." See: Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraphs 64 and 66-67.

[226] Opinion of Advocate General Bot delivered on 30 January 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:41, paragraph 19.

[227] Opinion of Advocate General Bot delivered on 30 January 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:41, paragraphs 22-24.

[228] Opinion of Advocate General Bot delivered on 30 January 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:41, paragraph 137.

[229] Opinion of Advocate General Bot delivered on 30 January 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:41, paragraphs 156-157.

218 of the TFEU. Following Peter Van Elsuwege, the CFSP would no longer be regarded as "*a purely intergovernmental construction escaping judicial and parliamentary control*" if the Court would not fully follow the view of the Member States by recognising the right to information of the European Parliament on the basis of Article 218(10) of the TFEU.[230]

Besides, the European Union did conclude a similar agreement with Tanzania. In the more recent case concerning the *Tanzania Agreement*, the European Parliament and the Commission on the one hand and the Council and the supporting Member States on the other hand developed a similar argumentation as to the role of the European Parliament in the conclusion of such an international agreement related to the CFSP.[231] According to Soledad R. Sánchez-Tabernero, there is a "*constant tension between the Commission and the Parliament, on the one side, and the Council and the Member States, on the other, caused as a result of the new system of international representation of the EU introduced with the Treaty of Lisbon*".[232]

ii. Outside the framework of the CFSP

Outside the framework of the CFSP, the Council and the European Parliament were also opposed to each other concerning the application of Article 218(6) of the TFEU. In a case concerning the 'Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana', the European Parliament and the Commission demanded the Court to annul the decision of the Council for the approval of this Declaration.[233] In the view of the European Parliament and the Commission, the European Parliament should have been called upon to consent on the basis of Article 218(6)(a)(v) of the TFEU instead of being consulted following Article 218(6)(b) of the TFEU. The European Parliament and the Commission thus contended that the ordinary legislative procedure should have been applied (Article 43(2) of the TFEU) and not the special procedure of Article 43(3) of the TFEU implying that the Council could act alone on a proposal of the Commission in the area of fixing and allocation of fishing opportunities. The access conditions granted in the Declaration at issue were intended to pursue the objectives of the common fisheries policy and go beyond the mere fixing and allocation of fishing opportunities. More specifically, there should be made a distinction

[230] Peter Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius)' (2015) 52 Common Market Law Review 1379, 1388 (hereafter: Peter Van Elsuwege, 'Securing the Institutional Balance…').
[231] Judgment of 14 June 2016, *Parliament v Council (Tanzania Agreement)*, C-263/14, EU:C:2016:435. The supporting Member States were the Czech Republic, Sweden and the United Kingdom.
[232] Soledad R. Sánchez-Tabernero, 'The choice of legal basis and the principle of consistency in the procedure for conclusion of international agreements in CFSP contexts: Parliament v. Council (Pirate-Transfer Agreement with Tanzania)' (2017) 54 Common Market Law Review 899, 912 (hereafter: Soledad R. Sánchez-Tabernero, 'The choice of legal basis…').
[233] Judgment of 26 November 2014, *Parliament and Commission v Council*, Joined Cases C-103/12 and C-165/12, EU:C:2014:2400, paragraph 1.

between 'access to waters', meaning access for the sole purpose of fishing, and 'access to resources', meaning access to the fisheries resources. In order to grant access to resources, there should first be an international agreement granting access to waters on the basis of Articles 43(2) and 218(6)(a)(v) of the TFEU such as the Declaration *in casu*.[234]

The Council, the Czech Republic, Spain, France and Poland did not agree with the European Parliament and the Commission's point of view. The distinction between 'access to waters' and 'access to resources' was deemed artificial and the Declaration could not grant the one without the other. The aim and content of the Declaration is the granting of fishing opportunities, which includes the concept of 'fishing authorisations'. In addition, Article 43(3) of the TFEU does not require the fixing of fishing opportunities in quantitative terms.[235]

The stakes in this case are clear: if the Court would consider Article 43(2) of the TFEU to be the applicable legal basis, the consent of the European Parliament would be necessary to adopt the Declaration *in casu*. However, if Article 43(3) of the TFEU would be the correct legal basis, the European Parliament should only be consulted on the basis of Article 218(6)(b) of the TFEU and consequently, its influence on the policy of the Member States in the Council would be smaller. In my view, the distinction between 'access to waters' and 'access to resources' is in any way artificial. Furthermore, it can be discussed whether the procedure of Article 218 of the TFEU is even applicable to the adoption of a unilateral declaration such as the one *in casu*.[236]

iii. Conclusion

Based on the above, it can be concluded that the choice of the correct legal basis is crucial in determining the role that should be granted to the European Parliament in the conclusion of an international agreement. Indeed, in the recent *WRC-15* case, the Court itself stressed that the indication of the legal basis determines the procedure to adopt an act and consequently preserves the prerogatives of the EU institutions.[237]

In the context of the CFSP, the Member States stress the specific objectives of the CFSP measures that justify a more limited role for the European Parliament. For instance, even if such a measure contributes to the

[234] Judgment of 26 November 2014, *Parliament and Commission v Council*, Joined Cases C-103/12 and C-165/12, EU:C:2014:2400, paragraphs 36-40.
[235] Judgment of 26 November 2014, *Parliament and Commission v Council*, Joined Cases C-103/12 and C-165/12, EU:C:2014:2400, paragraphs 41-44.
[236] Ricardo Gosalbo-Bono and Frederik Naert, 'The reluctant (Lisbon) Treaty and Its Implementation in the Practice of the Council' in Piet Eeckhout and Manuel Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing, Portland – Oregon 2016) 55 (hereafter: Ricardo Gosalbo-Bono and Frederik Naert, 'The reluctant (Lisbon) Treaty…').
[237] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 50 referring to Judgment of 1 October 2009, *Commission v Council (CITES)*, C-370/07, EU:C:2009:590, paragraph 48.

economic and social development of a developing country, it does not fall within the ambit of development cooperation. Outside the framework of the CFSP, involvement of the European Parliament cannot fully be excluded. Member States will most likely indicate a legal basis that does not come under one of the five situations of Article 218(6)(a) of the TFEU so that the European Parliament should only be consulted following Article 218(b) of the TFEU.

In any case, as reiterated several times in the previous sections, indicating the correct legal basis is complex and a lot of pressure is put on the development of criteria to distinguish these legal bases. Following Peter Van Elsuwege and Soledad R. Sánchez-Tabernero, the establishment of "*clear criteria to define the scope of the CFSP in relation to other EU policies, in particular the external dimension of the [area of freedom, security and justice]*" is needed. Currently, the Court puts a lot of weight on the context of an agreement but this only leads to the avoidance of setting a clear standard to determine the predominant purpose at the intersection between CFSP and non-CFSP matters.[238]

b. Attempts to limit the role of the European Commission

In accordance with Article 218(3) of the TFEU, the Council has the capacity to designate the European Union negotiator or the head of the European Union's negotiating team depending on the subject of the agreement envisaged. Whenever these negotiations are in the hands of the Commission, it is likely that the Council will closely follow how this institution promotes the general interest of the European Union during such negotiations. Furthermore, it can be expected that the Council will monitor what the Commission undertakes autonomously as external representative of the European Union on the basis of Article 17(1) of the TEU. [239]

i. Restraining the margin of discretion of the Commission in negotiations

In the *Negotiating Directives* case, the Commission, supported by the European Parliament, demanded the Court to partly annul a Council Decision stipulating that the Commission should report to the Council while negotiating the linking of the EU emissions trading scheme with an emissions trading system in Australia. Furthermore, an annex to this decision comprised negotiating directives to be followed by the Commission, including the statement that "*detailed negotiating positions of the Union shall be established by the special committee or the Council*".[240] According to the Commission, the Council did not respect the boundaries of its power to adopt negotiating directives. Those directives are meant to define the substantive policy options

[238] Peter Van Elsuwege, 'Securing the Institutional Balance…' 1388 and Soledad R. Sánchez-Tabernero, 'The choice of legal basis…' 910.
[239] Article 17(1) of the TEU stipulates: "*The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. […] With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. […].*"
[240] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraph 1.

and objectives that need to be taken into account during the negotiations. However, they are not supposed to include the conditions in which negotiation must take place.[241] The Commission has full competence when it comes to direct decision-making power during the negotiations and the special committee that can be designated following Article 218(4) of the TFEU is only a consultative organ.[242]

The Council and the supporting Member States in contrast contended that the Council's ability to adopt negotiating directives is not limited and that it can determine the procedural conditions in which negotiation must be conducted. Establishing these procedural arrangements is "*a corollary of its right to decide whether or not [an] authorisation should be granted*".[243] Poland, for instance, argued in its intervention that the Council's powers to follow the negotiations actively is permanent and that these powers cannot be limited to the adoption of negotiating directives when authorising the opening of the negotiations. Since the Council will only sign and conclude the international agreement on behalf of the European Union when the outcome of the negotiations is acceptable to this institution, this involvement is necessary to avoid negative effects for the relation with the third country concerned.[244] Besides, the Council stressed that the negotiations conducted by the Commission should be conducted within the mandate given to it. Establishing negotiating positions in the special committee is supposed to guide the Commission and does not imply an obligation to achieve the recommended result.[245] Finally, Germany more specifically argued that the Commission's wish to act in full autonomy cannot prevail to the possibility to utilise the expert knowledge of the Member States in the matter of the international agreement.[246]

It can be deduced from the aforementioned that the Member States in the Council exploit their possibility on the basis of Article 218(2) of the TFEU to adopt negotiating directives for the Commission. These directives namely constitute a tool to influence the negotiations in the context of an international agreement indirectly and, according to the Council, it can do so unlimited. It is furthermore apparent that the Member States refer to the impact such negotiating directives can have: negative effects of non-signing by the Council on the relation with the third country concerned can be avoided and the expert knowledge of the Member States in

[241] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraph 35.
[242] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraph 39.
[243] The supporting Member States in this case were the Czech Republic, Denmark, Germany, France, the Netherlands, Poland, Sweden and the United Kingdom. See: Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraphs 45 and 48.
[244] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraph 52.
[245] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraphs 53-54.
[246] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraph 56.

the concerned matter can be used. Notwithstanding this interpretation of Article 218(2) of the TFEU, the Commission should have a certain margin of discretion in its role as negotiator. It should have the possibility to make concessions and counter-proposals in order to achieve the best result for the general interests of the European Union. To the contrary, it cannot be expected that the Commission represents the interests of the Council or the European Parliament.[247] Therefore, the question is where the Court will determine the limits of the adoption of negotiating directives by the Council.

ii. Limiting initiatives of the Commission

The Council opposed a written statement of the Commission submitted on behalf of the European Union to the International Tribunal for the Law of the Sea (hereafter: ITLOS) in the *ITLOS* case.[248] The Council and the Member States submitted that the Commission breached Article 218(9) of the TFEU, entailing that the Council can adopt decisions establishing the positions to be adopted on behalf of the European Union in a body set up by an international agreement, when that body is called upon to adopt acts having legal effects.[249] Furthermore, the Commission cannot disregard the Council's policy-making role following Article 16(1) of the TEU while ensuring the external representation of the European Union. Since the written statement *in casu* could have significant consequences at the international level, the Council should have determined its content while the Commission should have ensured the execution of the by the Council defined policy.[250] Article 335 of the TFEU cannot be a justification for the intervention of the Commission either. It is true that this provision provides the capacity for the Commission to represent the European Union in legal proceedings, however, it cannot do so autonomously outside of matters relating to its own operation.[251] Finally, the Council and the Member States contended that the Commission's conduct did not respect the principle of sincere cooperation between the EU institutions in accordance with Article 13(2) of the TEU.[252]

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[247] Ricardo Passos, 'The External Powers of the European Parliament' in Piet Eeckhout and Manuel Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing, Portland – Oregon 2016) 108 (hereafter: Ricardo Passos, 'The External Powers of the European Parliament').

[248] Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraph 1.

[249] The intervening Member States were the Czech Republic, Greece, Spain, France, Lithuania, the Netherlands, Austria, Portugal, Finland and the United Kingdom. See: Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraphs 41-42.

[250] Article 16(1) of the TEU stipulates: "*The Council […] shall carry out policy-making and coordinating functions as laid down in the Treaties.*" See: Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraphs 43-45.

[251] Article 335 of the TFEU stipulates: "*In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.*" See: Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraphs 46 and 48.

[252] Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraph 78.

The Commission on the other hand claimed that it needs to ensure the general interest of the European Union in the context of the representation of the European Union before an international court.[253]

A final case illustrating the tendency of the Council to challenge the field of action of the Commission on the international level, was the case concerning the signature by the Commission, on behalf of the European Union, of an Addendum to the Memorandum of Understanding on a Swiss financial contribution.[254] This Addendum was intended to stipulate the agreement of the Swiss Federal Council to negotiate with Croatia on a financial contribution to this country.[255] According to the Council and the intervening Member States, the signature of this Addendum by the Commission constituted a breach of the principle of conferral between the EU institutions and, therefore, of the principle of institutional balance following Article 13(2) of the TEU. The Commission defined the European Union's policy by accepting the content of the Addendum without asking the Council about its position. Furthermore, it influenced the European Union's policy by deciding to treat the Addendum as a matter coming under the exclusive competence of the European Union.[256] The fact that the Addendum is not binding does not grant the Commission the power to adopt it. It is true that the non-binding character implies that Article 218 of the TFEU does not apply, however, it should be taken into account "*in so far as it reflects the general distribution of powers among the institutions, as established in Articles 16 and 17 TEU*". In essence, Article 17 of the TEU does not confer upon the Commission the power to sign a non-binding international agreement on behalf of the European Union without the consent of the Council.[257]

In the view of the Commission however, the signature of the Addendum constituted a part of the executive and management functions of the Commission on the basis of Article 17(1) of the TEU. Indeed, the Council has a policy-making function and needs to ensure consistency in the European Union's external action. The Commission on the other hand has the duty to execute that policy and is supposed to ensure the European Union's external representation on the basis of Article 17(1) of the TEU. In the view of the Commission, "*it should enjoy a degree of autonomy*" in this executing-task, meaning that it should be able to sign non-binding instruments of a political nature on behalf of the European Union "*in so far as they reflect a position established by the Council, without any need for that institution's prior approval*".[258]

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[253] Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraph 53.
[254] Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraph 1.
[255] Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraph 14.
[256] The Czech Republic, Germany, Greece, France, Lithuania, Hungary, the Netherlands, Poland, Finland and the United Kingdom were the intervening Member States in this case. See: Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraphs 21 and 24.
[257] Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraphs 22-23 referring to Judgment of 23 March 2004, *France v Commission*, C-233/02, EU:C:2004:173, paragraph 40.
[258] Article 17(1) of the TEU stipulates: "*The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. […] It shall exercise coordinating, executive and management functions, as laid*

In these last two cases, the Council mainly stresses the difference between its own function and the function of the Commission. The Council is supposed to be the policy-maker of the European Union while the Commission has the capacity to execute this policy. Concretely, this implies, in the view of the Council, firstly, that the Commission does not have the power to adopt decisions establishing European Union positions to be adopted in a body set up by an international agreement. Secondly, Article 335 of the TFEU does not entail the ability for the Commission to autonomously represent the European Union in legal proceedings. Thirdly, the Commission cannot sign a non-binding international agreement on behalf of the European Union without the consent of the Council and lastly, the Commission should always take the policy-making function of the Council into account following the principle of sincere cooperation.

It should be noted that prohibiting the Commission to sign non-binding agreements might come in the way of the efficiency and effectiveness of the external action of the European Union. On the other hand, this could be balanced out if the Council, and thus the Member States, would only react to the actions of the Commission in areas deemed too sensitive.[259]

iii. Conclusion

The Member States are keen on safeguarding their policy-making role in the external relations of the European Union. This can be deduced from the Council's tendency to restrain the margin of discretion of the Commission in negotiations as well as from the Council's demands to the Court to limit the Commission's international initiatives. As regards negotiations conducted by the Commission, there should, according to me, be struck a balance between the Council's right to determine the external policy of the European Union and the Commission's margin of discretion to be able to play a full part in negotiations at the international level. As regards initiatives of the Commission, a similar reservation can be made. From my personal point of view, the Member States' dominance in determining the external policy should not compromise the efficiency of the European Union's external action.

c. Attempts to avoid qualified majority voting

Apart from trying to limit the role of the other EU institutions, Member States can also seek to avoid being bound by the views of the other Member States in the Council itself. If there would be a decision in the

down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. […]." See: Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraphs 26 and 28.

[259] Valerie Demedts and Merijn Chamon, 'The Commission back on the leash: No autonomy to sign non-binding agreements on behalf of the EU: Council v. Commission' (2017) 54 Common Market Law Review 245, 255 (hereafter: Valerie Demedts and Merijn Chamon, 'The Commission back on the leash:…').

Council by a qualified majority vote, they namely run the risk of being bound by such a majority while their individual view might not be in accordance with the one of this majority.

In a recent case of October 2017, the Commission demanded the Court to annul the conclusions of the Council on the World Radiocommunication Conference of the International Telecommunication Union 2015 (hereafter: WRC-15).[260] According to the Commission, the Council endangered the European Union's policy by looking for consensus for the adoption of conclusions while it should have adopted a decision on the basis of qualified majority voting.[261] Consequently, the Council did not establish binding positions which the Member States had to follow at the WRC-15. It "*rather required the Member States to use their best endeavours. Such a requirement is not however apt to ensure strong and unified external representation of the European Union on the international stage and, consequently, fails to achieve the objectives set by the Treaties*".[262]

The Council on the other hand, supported by the Czech Republic, France, Germany, and the United Kingdom, claimed that it did adopt a binding European Union position in accordance with Article 218(9) of the TFEU.[263] Furthermore, irrespective of the applicability of qualified majority voting, it cannot be said that the Council acted outside the procedure of Article 218(9) of the TFEU on the basis of the fact that it was possible to reach unanimity. In addition, the Council argued that it needed to act unanimously since unanimity is required whenever the Council wants to amend a proposal from the Commission following Article 293(1) of the TFEU.[264] The Council even referred to the institutional balance. This balance could be disrupted by accepting the complaint of the Commission considering that it is the Council's consistent practice to adopt conclusions instead of decisions in the framework of the world radiocommunication conferences.[265]

The contention in this case is an example of how the EU institutions do not agree on the voting rules to adopt an act such as Council conclusions. The Council on the one hand contends that such acts need to be adopted by consensus while the Commission on the other hand bases itself on Article 16(3) of the TEU to argue that such acts must be adopted by qualified majority voting. A search for consensus instead of a qualified majority would lead to a different result according to the Commission.[266] In any case, it is in my view doubtful that

[260] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 1.
[261] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraphs 25-26.
[262] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 28.
[263] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 29.
[264] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 32.
[265] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 35.
[266] Article 16(3) of the TEU stipulates: "*The Council shall act by a qualified majority except where the Treaties provide otherwise*." See: Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 26.

the Court would allow a flexible interpretation of the procedures in the Treaties on the basis of a 'consistent practice' of one of the EU institutions.

d. 'Hybrid decisions'

In the context of the Air Transport Agreement with the United States, which is a mixed international agreement, the Council and the Member States adopted a 'hybrid decision' to conclude the agreement.[267] Such a hybrid decision is adopted "*by both the Council and the Representatives of the Governments of the Member States meeting within the Council*".[268] In this *Mixed International Agreements* case, the Commission, supported by the European Parliament, asked the Court to annul this 'hybrid decision' on the ground of a breach of the principle of conferral of powers between the EU institutions and a breach of the procedure of Article 218 of the TFEU for the adoption of international agreements by the European Union.

Firstly, the Commission contended that the Council should have adopted the decision for the conclusion of the international agreement alone: "*the Council cannot in fact unilaterally derogate from the procedure set out in Article 218 TFEU by involving the Member States in the adoption of that decision*".[269] According to the Council and the intervening Member States on the other hand, there are no detailed arrangements concerning the negotiation and conclusion of mixed agreements. Consequently, the Council and the Member States may decide on the precise form of this negotiation and conclusion. Moreover, the joint decision was the expression of close cooperation between the European Union and its Member States when it comes to the management of mixed agreements.[270] Secondly, in the Commission's view, the Council breached its duty to decide by qualified majority voting on the basis of Article 218(8) of the TFEU since the decision *in casu* was adopted unanimously together with the Representatives of the Governments of the Member States.[271] The Council and the Member States however claimed that the requirement of a qualified majority is necessarily met when there is an unanimous decision. In addition, it is deemed usual "*to have a number of voting rules in the case of international agreements*". This results from the need of the Member States to reach a consensus

[267] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraph 1.
[268] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraph 6. See: Joris Larik, 'Pars Pro Toto: The Member States' Obligations of Sincere Cooperation, Solidarity and Unity' in Marise Cremona (ed), Structural Principles in EU External Relations Law (Hart Publishing, Oxford 2018) 185 (hereafter: Joris Larik, 'Pars Pro Toto:…').
[269] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraphs 20-21.
[270] The intervening Member States in this case were the Czech Republic, Denmark, Germany, Greece, France, Italy, the Netherlands, Poland, Portugal, Finland, Sweden and the United Kingdom. See: Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraphs 27-28.
[271] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraph 29.

either in a joint decision, or, by individual decisions of the Member States.[272] Thirdly, the Council, in the view of the Commission, impinged on the sincere cooperation between the EU institutions. It also created confusion regarding the international legal personality of the European Union and the powers of the European Union to adopt a decision by itself at the international level.[273] The Council argued to the contrary that such confusion would rather be created by adopting a decision on the conclusion of a mixed international agreement without including the corresponding decision of the Member States. Besides, the Council reiterated that the joint decision precisely expresses the obligation of close cooperation between the European Union and its Member States as regards the unity in the international representation of the European Union.[274]

It is clear that the adoption of a 'hybrid decision' only has advantages according to the Member States. Firstly, the adoption of such a decision provides an arrangement for the negotiation and conclusion of mixed agreements which clearly shows the close cooperation between the European Union and its Member States to the concerned third countries. Secondly, such a decision can be adopted unanimously since the Member States need to reach a consensus in any case for the conclusion of a mixed agreement. Thirdly, confusion regarding the international legal personality of the European Union can be avoided by adopting a joint decision.

According to Catherine Flaesch-Mougin, in practice, excluding the possibility of adopting 'hybrid decisions' might lead to more tensions regarding the division of competences in situations wherein these kind of decisions did not require a clear view on this division. In addition, she follows the view of the Council that 'hybrid decisions' can serve the unity in the international representation of the European Union.[275] Furthermore, Thomas Verellen questions the Court's embracing of mixed agreements if it would deny the possibility of adopting 'hybrid decisions': "*To allow and accept mixity in a context in which a proposed international agreement could without great difficulty be considered as falling within the scope of the EU's competences on the one hand, while on the other hand denying individual Member States qua sovereign states a meaningful role in the pre-ratification phase of the treaty-making process is an incoherent position to defend.*"[276]

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[272] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraphs 31-32.
[273] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraphs 33-34.
[274] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraphs 35-36.
[275] Catherine Flaesch-Mougin, 'Chronique L'action extérieure de l'Union européenne - Dans un arrêt d'importance constitutionnelle, la Cour annule une décision hybride relative à la signature et à l'application provisoire de deux accords mixtes dans le domaine du transport aérien' (2015) Revue Trimestrelle De Droit Européen 617, 618-619.
[276] Thomas Verellen, 'On hybrid decisions, mixed agreements and the limits of the new legal order: Commission v. Council ("US Air Transport Agreement")'(2016) 53 Common Market Law Review 741, 753-754.

2. Individual Member States

In case the Council does not act in line with the expectations of a Member State, individual Member States have the possibility to initiate legal proceedings against the Council independently. Additionally, they also have the possibility to intervene in a preliminary procedure following Article 267 of the TFEU if this procedure concerns a matter of their interest. Consequently, these possibilities should also be taken into account when examining the attempts of the Member States to retain their competences at the international level.

When it comes to starting procedures against the Council individually, two Member States are taking the lead. The United Kingdom and Germany each initiated several procedures in the context of the external relations of the European Union. The reasons of the United Kingdom to do so can be presumed. A clear motivation is for instance the safeguarding of its possibility to opt-out in the matter of the area of freedom, security and justice. Nonetheless, in the 'Review of the Balance of Competences between the UK and the EU' conducted by the British Foreign and Commonwealth Office, it was concluded that the balance of competences was 'about right'.[277] However, this does not necessarily mean that there is consensus on the interpretation of these grounds for competence.

As far as Germany is concerned, the Lisbon judgment of the Bundesverfassungsgericht, the German Federal Constitutional Court, and this Court's stance on European integration in general might provide a declaration. Indeed, this Court strongly adheres to the idea that "*the 'Masters of the Treaties' must keep a say in the way the distribution of competences between the EU and the Member States is practised and that they are insofar obliged or entitled to exercise at least a remote control over this practice*".[278] However, it should be noted that the German Federal Constitutional Court does provide practical support for the enforcement of European law "*once competences have been transferred to the European Union and are put into action*".[279]

A similar structure to the one used to discuss the attempts of the Member States through the Council will be followed. Firstly, the attempts of the individual Member States on the substance will be discussed **(A)**. Secondly, it will be shown how individual Member States try to retain control on the procedural level **(B)**. Thirdly, and specifically for the attempts of individual Member States, the use of opt-outs will be addressed **(C)**.

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[277] Francis G Jacobs, Foreword in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, Portland – Oregon 2017) v. The several reports can be found here: https://www.gov.uk/guidance/review-of-the-balance-of-competences.

[278] Peter M. Huber, 'The Federal Constitutional Court and European Integration' (2015) 21 European Public Law 83, 88.

[279] Beke Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After Lisbon' (2012) 61 International and Comparative Law Quarterly 665, 667.

A. On the substance: limitations to the ambit of the legal bases in the Lisbon Treaty

In the context of individual initiatives of the Member States, it can be observed that the scope of the CCP **(a)** and the scope of the ERTA-doctrine **(b)** have caused controversy.

a. Attempts to limit the ambit of the CCP

In the *Daiichi Sankyo* case, which has already been discussed shortly in the first part of this research, the relevant preliminary question regarding the scope of the CCP was the question whether Article 27 of the Trade-Related Aspects of Intellectual Property Rights-Agreement (hereafter: TRIPs Agreement) falls within a field for which the Member States have primary competence.[280] The Commission was convinced of the fact that the TRIPs Agreement as a whole falls within the scope of Article 207(1) of the TFEU since it relates to the 'commercial aspects of intellectual property'.[281] The intervening Member States in this case were Greece, Germany, France, Italy, the Netherlands, Portugal, Finland, Sweden and the United Kingdom. They conversely argued that the majority of the rules of the TRIPs agreement, such as Article 27, relate to international trade only indirectly. Therefore, Article 27 does not fall within the CCP but within the shared competence in the field of the internal market. According to these Member States, the pre-Lisbon case-law on mixed agreements, such as the *VLK* case, should be applied meaning that "*it must be determined whether, in the field covered by the relevant article of the agreement in question, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it*". In that way, it can be determined whether Article 27 of the TRIPs Agreement remains the responsibility of the Member States.[282]

Similar to the situation in the *Conditional Access Services* case, discussed in section 2.1, the intervening Member States thus argued that the competence of the European Union *in casu* was a shared one. Article 27 of the TRIPs Agreement would not come under the European Union's exclusive competence for the 'commercial aspects of intellectual property' since the agreement only indirectly relates to international trade. Advocate General Cruz Villalón tried to strike a balance between the new Article 207(1) of the TFEU, which includes these 'commercial aspects of intellectual property', and the wide scope of the TRIPs Agreement which, according to the Member States exceeded mere 'commercial aspects'.[283] In terms of clarity however,

[280] Article 27 of the TRIPs Agreement concerns 'patentable subject matter' (Trade-Related Aspects of Intellectual Property Rights (TRIPs), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organisation, concluded at Marrakesh on 15 April 1994). See: Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraph 40.
[281] Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraph 43.
[282] Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraphs 42 and 44 referring to Judgment of 8 March 2011, *Lesoochranárske zoskupenie VLK (VLK)*, C-240/09, EU:C:2011:125, paragraphs 31-32.
[283] Opinion of Advocate General Cruz Villalón delivered on 31 January 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:49. See: Joris Larik, 'No mixed feelings:…' 785.

a clear-cut view on the addition of 'commercial aspects of intellectual property' to Article 207(1) of the TFEU would be welcomed. According to Joris Larik, the textual change of Article 207(1) of the TFEU should be taken into consideration: "*it would be overreaching to interpret safeguards in the EU Treaties on conferral, or 'constitutional identity', as meaning that the Member States 'were not really serious', so to say, when they, as Masters of the Treaties, explicitly expanded the scope of the CCP to include 'the commercial aspects of intellectual property', and 'foreign direct investment' for that matter*".[284]

b. Attempts to limit the ambit of the ERTA-doctrine

In the *Broadcasting Organisations* case and in Opinion 1/13, the Court established, against the will of the Member States, that the test of "*an area already covered to a large extent*" also applied in the post-Lisbon era. The *Green Network* case was the last case in this series of case-law concerning the post-Lisbon interpretation of the ERTA-doctrine.[285] The specificity in this preliminary ruling was that Italy, the only Member State involved in this procedure, did not yet conclude an international agreement which would be capable of affecting "*an area already covered to a large extent*". Italian law only provided the possibility of concluding one. According to the Court, this was irrelevant: the conclusion was envisaged and therefore, the risk of common EU rules being affected by the potential international agreement should be taken into account.[286] Eventually, the Court took the opportunity in this case to stress once again that also the foreseeable future development of EU law should be considered when analysing whether an area is already covered to a large extent.[287]

One might expect the post-Lisbon interpretation of the ERTA-doctrine to be clear on the basis of these three cases, however, in the *OTIF* case, Germany once again challenged its limits. In this case, Germany, supported by the United Kingdom and France, argued that the Council could not establish a position to be adopted on behalf of the European Union at a session of the Revision Committee of the Convention concerning International Carriage by Rail (COTIF).[288] According to Germany, the Member States and the European Union have a shared competence in the area of transport on the basis of Article 4(2)(g) of the TFEU. Consequently, if the Council wants to adopt a common position on behalf of the European Union on the basis

[284] Joris Larik, 'No mixed feelings:…' 792-793.
[285] Judgment of 26 November 2014, *Green Network SpA*, C-66/13, EU:C:2014:2399.
[286] Judgment of 26 November 2014, *Green Network SpA*, C-66/13, EU:C:2014:2399, paragraph 37. See: Fernando Castillo de la Torre, 'The Court of Justice and External Competences After Lisbon:…' 155.
[287] Judgment of 26 November 2014, *Green Network SpA*, C-66/13, EU:C:2014:2399, paragraphs 33 and 61 referring to Opinion of 14 October 2014, *Convention on the civil aspects of international child abduction*, 1/13, EU:C:2014:2303, paragraph 74. See: Fernando Castillo de la Torre, 'The Court of Justice and External Competences After Lisbon:…' 156-157.
[288] Judgment of 5 December 2017, *Germany v Council (OTIF)*, C-600/14, EU:C:2017:935.

of Article 218(9) of the TFEU, it can only do so relating to provisions of the agreement which fall within the competence of the European Union.[289] Referring to the *ERTA*-case, Germany claimed that such a common position can therefore only be adopted if there are "*common rules of the Union which the decision at issue is liable to undermine or the scope of which it is liable to alter*". Germany continued by stating that this presupposes that the European Union has already adopted common rules in the matter of the provisions at issue.[290] It can therefore be concluded that Germany, together with the United Kingdom and France, added the condition of pre-existing common rules to its interpretation of the ERTA-doctrine. In this context, Germany also disputed that the European Union has the capacity to conclude an international agreement if none of the situations of exclusive external competence of Article 3(2) of the TFEU applies. Whenever there is a shared competence, such as transport, and in the absence of common rules, the European Union does not have the competence to adopt a position under Article 218(9) of the TFEU.[291] In other words, Germany contested the existence of an external competence of the European Union when it is not exclusive.[292]

It can be observed that Germany asked the Court to limit the external competence of the European Union on the basis of the ERTA-doctrine to a considerable extent. In my view, a negative answer of the Court can be expected. Firstly, regarding the criterion of pre-existing common rules, the Court for instance established in the aforementioned cases that the 'foreseeable future development' of common EU rules should be taken into account. Secondly, regarding the idea that the European Union only has external competence when it is exclusive, Article 216 of the TFEU should be taken into consideration. Article 216 of the TFEU namely provides the European Union's competence in general to conclude international agreements. In any case, if the Court would not follow the view of Germany, this would constitute a confirmation of the fact that the Council has the possibility to adopt positions on the basis of Article 218(9) of the TFEU regarding elements of shared competences in the context of mixed agreements.[293]

[289] Judgment of 5 December 2017, *Germany v Council (OTIF)*, C-600/14, EU:C:2017:935, paragraphs 32-33.
[290] Judgment of 5 December 2017, *Germany v Council (OTIF)*, C-600/14, EU:C:2017:935, paragraph 34.
[291] Judgment of 5 December 2017, *Germany v Council (OTIF)*, C-600/14, EU:C:2017:935, paragraphs 38-39 and 41.
[292] Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' in Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations* (Nomos, Baden-Baden 2018) (forthcoming) 3 (hereafter: Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity').
[293] Hannes Lenk and Szilárd Gáspár-Szilágyi, 'Case C-600/14, Germany v Council (OTIF). More clarity over facultative 'mixity'?', European Law Blog, 11 December 2017, available at https://europeanlawblog.eu/2017/12/11/case-c-60014-germany-v-council-otif-more-clarity-over-facultative-mixity/.

B. On the procedure: the negotiation and conclusion of international agreements following Article 218 of the TFEU

In the framework of the procedure of Article 218 of the TFEU, not only the Council itself but also the individual Member States might try to prevent qualified majority voting in order to avoid the risk to be bound by the view of the other Member States in the Council **(a)**. A more far-reaching option is trying to avoid guidance of the European Union on the basis of Article 218 of the TFEU in general, for instance, by challenging an act of the Council which establishes the position to be adopted on behalf of the European Union in the context of an international agreement **(b)**.

a. Attempts to avoid qualified majority voting

The *Turkey Agreement* case concerned a decision of the Council on the coordination of social security systems for the benefit of Turkish nationals in the framework of the association agreement with Turkey.[294] According to the United Kingdom, such a decision cannot be based on Article 217 of the TFEU. This provision namely entails the possibility for the European Union to conclude association agreements with third countries. However, a distinction should be made between an association agreement as such and decisions adopted under such an agreement. These decisions should be adopted on the legal bases appropriate to their subject-matter.[295] This point of view was followed by both the Council and the Commission but the Court did nonetheless indicate Article 217 of the TFEU as a legal basis for the decision in combination with Article 48 of the TFEU. According to the Court, "*Article 217 TFEU necessarily empowers the European Union to guarantee commitments towards third countries in all fields covered by the FEU Treaty*". The Court moreover stressed that "*the legal basis of a measure must be determined having regard to the measure's own aim and content*".[296]

One of the other main disagreements in this case is to be situated in the question of which voting rule should be applied. Following the United Kingdom, decisions under Article 218(9) of the TFEU need to be adopted applying the rules of Article 218(8) of the TFEU meaning that the Council should act by qualified majority voting except in the situations where unanimity is required by this Article, for instance, in case of association agreements.[297] The Council submitted that the applicable voting rule depends on the specific legal basis,

[294] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraph 1.
[295] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraph 26.
[296] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraphs 32, 34, 36 and 61.
[297] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraph 27.

however, if Article 217 of the TFEU would constitute this basis, the Council indicated that there should be unanimity. Eventually, in this situation, qualified majority voting in accordance with Article 218(9) of the TFEU would be the voting rule that should be applied according to the Commission.[298]

Summarised, the Court was asked to give its general view on the voting rules in the context of international agreements. The different point of views were logically the following. According to the United Kingdom, unanimity voting should be applied since Article 218(8) of the TFEU stipulates that there should be unanimity for association agreements. The Council agrees in case Article 217 of the TFEU would constitute the legal basis of the decision and the Commission on the other hand claims that only a qualified majority should be reached in the Council. In my view, the conclusion of Advocate General Kokott is the only coherent one considering my idea that the conclusion of an association agreement is clearly a political decision while the further implementation thereof is less far-reaching. According to Advocate General Kokott, "*the unanimity requirement within the Council […], like the requirement of consent of the European Parliament […], concerns only the initial conclusion of an association agreement or structural amendments to such an agreement*".[299]

Since this case also concerned the invoking of an opt-out by the United Kingdom, it will be further discussed in section C.

b. Attempts to avoid guidance of the European Union

In the *OIV recommendations* case, Germany, supported by seven other Member States, requested the annulment of a Council Decision establishing the position to be adopted on behalf of the European Union in the framework of the International Organisation of Vine and Wine (hereafter: OIV).[300] This Council Decision was adopted on the basis of Article 218(9) of the TFEU and, according to Germany and the other Member States, this Article does not apply in the context of international agreements, like the OIV agreement, which are concluded by the Member States and not by the European Union itself. In the view of these Member States, the wording of Article 218(9) of the TFEU – "*on the Union's behalf*" – makes clear that a right of the European Union to be represented or to vote in the international organisation is required to adopt positions

[298] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraphs 32 and 34.
[299] Opinion of Advocate General Kokott delivered on 17 July 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2114, paragraph 97.
[300] Judgment of 7 October 2014, *Germany v Council (OIV recommendations)*, C-399/12, EU:C:2014:2258. The supporting Member States were the Czech Republic, Luxembourg, Hungary, the Netherlands, Austria, Slovakia and the United Kingdom.

on this basis.[301] The ratio of this provision is namely to allow the European Union to react when an international agreement to which the European Union is a party, is breached by another contracting party. Applying Article 218(9) of the TFEU to international agreements concluded by the Member States would impair the principle of conferral.[302] The fact that the position was adopted in the framework of a shared competence, the area of agriculture, and that the OIV's recommendations are no acts of international law which are binding upon the European Union, was invoked by the Member States to strengthen their position.[303] The Council, supported by the Commission, claimed on the other hand that it can adopt positions on behalf of the European Union on the basis of Article 218(9) of the TFEU as soon as the relevant area falls within the competence of the European Union. It is therefore irrelevant whether the European Union itself is a party to the international organisation.[304]

Germany's argument in this case is quite straightforward: if the European Union is not a party to an international agreement, the Council cannot establish positions to be adopted in a body set up by that agreement. The consequences of a negative reaction of the Court to this argument cannot be underestimated. It would mean that "*even where the Member States are full members of an international organisation, based on a treaty they concluded in their own name, and even in situations where the EU is not present, they may be prevented from submitting their own proposals and be obliged to defend a Union position they opposed within the Council*".[305]

C. The use of opt-outs

In three similar cases concerning agreements with third countries, the United Kingdom, supported by Ireland, invoked Protocol No 21 on their position relating to the area of freedom, security and justice. This Protocol entails that the United Kingdom and Ireland do not participate in the decision-making relating to this matter and do not apply the measures adopted in this context. An exception can be made when they explicitly express the wish to be bound by the measure.

In all three cases, the United Kingdom and Ireland argued that the adoption of the decision of the Council at issue was based on the incorrect legal basis of Article 48 of the TFEU regarding measures in the field of

[301] Judgment of 7 October 2014, *Germany v Council (OIV recommendations)*, C-399/12, EU:C:2014:2258, paragraphs 29-30.
[302] Judgment of 7 October 2014, *Germany v Council (OIV recommendations)*, C-399/12, EU:C:2014:2258, paragraphs 32-33.
[303] Judgment of 7 October 2014, *Germany v Council (OIV recommendations)*, C-399/12, EU:C:2014:2258, paragraphs 34-36.
[304] Judgment of 7 October 2014, *Germany v Council (OIV recommendations)*, C-399/12, EU:C:2014:2258, paragraph 39.
[305] Joris Larik, 'Pars Pro Toto:…' 190.

social security. This deprived them of "*the option that they have, by virtue of EU primary law, to opt out of the adoption of a decision*".[306] In other words, the Court ruled in these cases on the distinction between split and full conferral. The *EEA Agreement* and *Swiss Agreement* cases will be addressed firstly **(a)**. Afterwards, the more recent *Turkey Agreement* case will be discussed **(b)** and an overall conclusion on the use of opt-outs will be given **(c)**.

a. EEA Agreement and Swiss Agreement cases

In the *European Economic Area (hereafter: EEA) Agreement* and *Swiss Agreement* cases, the United Kingdom and Ireland demanded the Court to annul a decision of the Council concerning the position to be taken by the European Union on social security in the framework of these agreements. In the view of these Member States, this decision should have been adopted on the basis of Article 79(2)(b) of the TFEU providing for the competence to define the rights of third-country nationals residing legally in a Member State.[307] Adoption of this decision on the basis of that provision would have allowed the United Kingdom and Ireland to opt out. In order to convince the Court that Article 79(2)(b) of the TFEU was the correct legal basis, the United Kingdom referred to this provision as a basis for the adoption of similar measures granting rights to third-country nationals.[308]

In the case concerning the Swiss Agreement, the United Kingdom referred to the fact that Article 48 of the TFEU is connected to the free movement within the European Union. This provision is thus merely intended

[306] Article 48 of the TFEU stipulates: "*The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.*" See: Judgment of 26 September 2013, *United Kingdom v Council (EEA Agreement)*, C-431/11, EU:C:2013:589, paragraph 34; Judgment of 27 February 2014, *United Kingdom v Council (Swiss Agreement)*, C-656/11, EU:C:2014:97, paragraph 29 and Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraph 19.

[307] Article 79 of the TFEU stipulates: "*1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: […] (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; […]*." See: Judgment of 26 September 2013, *United Kingdom v Council (EEA Agreement)*, C-431/11, EU:C:2013:589, paragraph 31 and Judgment of 27 February 2014, *United Kingdom v Council (Swiss Agreement)*, C-656/11, EU:C:2014:97, paragraph 28.

[308] Judgment of 26 September 2013, *United Kingdom v Council (EEA Agreement)*, C-431/11, EU:C:2013:589, paragraph 32.

to benefit employed and self-employed migrant workers who are nationals of EU Member States.[309] Ireland argued in the latter case that the legal basis of a decision such as the one at issue needs to be determined in accordance with the aim and content of the measure and not with the framework agreement. Moreover, the not opting in of the United Kingdom and Ireland would not impinge on the achievement of the aims of the Swiss Agreement.[310] Since the Court did not follow the opinion of the United Kingdom and Ireland in the *EEA Agreement* case, these Member States argued that the case concerning the Swiss Agreement was different: the Swiss Agreement is namely not similar to the EEA Agreement in terms of ambitions, liberalisation and legal integration.[311]

The Council, conversely, stressed that the purpose of the decision was to be situated in the realisation of the internal market within the whole EEA, respectively, in the implementation of the free movement of persons between the European Union and Switzerland.[312] Hence, in the view of the Council, supported by the Commission, such a decision does not come under the competence of the European Union to develop a common immigration policy.[313]

b. Turkey Agreement case

The third case is the most recent *Turkey Agreement* case.[314] As described above, the contested decision of the Council in this case concerned the coordination of social security systems for the benefit of Turkish nationals. The United Kingdom, supported by Ireland, again argued that Article 48 of the TFEU could not constitute the legal basis for this measure. Moreover, the United Kingdom, unlike Ireland, claimed that the Council denied their right to opt-out.[315] Since the Court did not follow this reasoning in the *EEA Agreement* and *Swiss Agreement* cases, as will be described below, the United Kingdom contended that a differentiation should be made. The Turkey Agreement would not have the same purpose in the sense that it is not intended to extend the internal market to Turkey or to secure the free movement of persons between the European Union and

[309] Judgment of 27 February 2014, *United Kingdom v Council (Swiss Agreement)*, C-656/11, EU:C:2014:97, paragraph 30.
[310] Judgment of 27 February 2014, *United Kingdom v Council (Swiss Agreement)*, C-656/11, EU:C:2014:97, paragraph 34.
[311] Judgment of 27 February 2014, *United Kingdom v Council (Swiss Agreement)*, C-656/11, EU:C:2014:97, paragraph 36.
[312] Judgment of 26 September 2013, *United Kingdom v Council (EEA Agreement)*, C-431/11, EU:C:2013:589, paragraph 37 and Judgment of 27 February 2014, *United Kingdom v Council (Swiss Agreement)*, C-656/11, EU:C:2014:97, paragraph 40.
[313] Judgment of 26 September 2013, *United Kingdom v Council (EEA Agreement)*, C-431/11, EU:C:2013:589, paragraph 36 and Judgment of 27 February 2014, *United Kingdom v Council (Swiss Agreement)*, C-656/11, EU:C:2014:97, paragraph 43.
[314] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449.
[315] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraphs 19-20 and 28.

Turkey. Moreover, the decision would not have as a purpose to extend the new regime coordinating social security systems to Turkey and would just be limited to updating the rights of Turkish workers at that time.[316]

As established above, the Court decided in this specific case that Article 217 of the TFEU, entailing the competence of the European Union to conclude association agreements, should be added as a legal basis to Article 48 of the TFEU. According to Michal Kutlík, the Court based this decision on the fact that Turkey cannot be placed on an equal footing with the Member States contrary to the EEA-countries and Switzerland. Hence, Article 217 of the TFEU should be added to the provision for the specific internal competence, such as, *in casu*, Article 48 of the TFEU. Michal Kutlík criticises this "*rather unpredictable ad-hoc approach*" for its lack of legal certainty.[317]

c. Conclusion

As a general observation, it should be noted that "*choosing the correct legal basis or bases for international agreements and decisions on EU positions remains a significant challenge*".[318] This exercise can be hampered even more by the political mechanism of opt-outs as shown above. The stakes for the United Kingdom and Ireland are simply high: the choice of the legal basis determines whether they are bound by a certain act or whether they are free to decide on being bound. However, the Court stresses in each of these cases that an act "*must be assessed on its own aim and content in order to establish the proper legal basis*" and linking these acts *in casu* to the common immigration policy is in my view quite far-fetched. In any case, a general tendency of the Court to prefer a legal basis implying full conferral instead of split conferral can be observed.[319] In that way, the arguments of the United Kingdom and Ireland in these cases are side-lined.

3. Comparison and conclusion

A couple of final remarks can be formulated after the analysis of the – in the case-law observed – attempts of the Member States to retain control of the division of competences. In general, it should be noted that the majority of the cases is initiated by the Council. This implies that in the majority of the situations, the Member States are on the same wavelength regarding their view on the external competences of the European Union. Since, in such situations, the arguments of the Council are broadly supported, they are easier to generalise as

[316] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraphs 24-25.
[317] Michal Kutlík, 'C-81/13 UK v Council – third time and still no charm?', European Law Blog, 21 April 2015, available at http://europeanlawblog.eu/2015/04/21/c-8113-uk-v-council-third-time-and-still-no-charm/.
[318] Ricardo Gosalbo-Bono and Frederik Naert, 'The reluctant (Lisbon) Treaty…' 52.
[319] Inge Govaere, 'To Give or To Grab:...' 89-90.

tendencies of the Member States of the European Union. In contrast, if individual Member States initiate procedures, their specific individual motivations should be taken into account.

When taking a closer look to the concrete discussed attempts, the following conclusions can be drawn. Firstly, as regards the scope of the CCP, a general tendency amongst the Member States can be observed. To avoid the application of the legal basis of the CCP, which implies exclusive competence for the European Union, Member States argue that use should be made of the shared competence for the internal market. They base such an argument on the fact that the measures *in casu* are only indirectly related to international trade. Secondly, it can be said that numerous limitations to the open ground for EU competence on the basis of the ERTA-doctrine are suggested: the "*an area already covered to a large extent*"-test cannot be applied after the codification in Articles 3(2) and 216 of the TFEU; whenever common EU rules grant a degree of discretion to the Member States, these common rules cannot be taken into account to determine the area covered and lastly, rules of primary law cannot constitute common rules in the sense of the ERTA-doctrine. Germany argued individually in this context that the application of the ERTA-doctrine requires pre-existing common rules and that there can be no external competence for the European Union if it is not exclusive. Thirdly, regarding the scope of the CFSP, Member States develop a common defence in the Council against the European Parliament that wants to increase its influence in this policy.

The procedural provision of Article 218 of the TFEU appears to be surrounded with a lot of uncertainty. When it comes to trying to limit the role of the European Parliament and the European Commission in this context, it seems that a consensus can be found between the Member States in the Council. Logically, it can also be observed that the Member States do not object the use of 'hybrid decisions'. However, individual Member States do initiate procedures against the Council in the context of Article 218 of the TFEU when they want to avoid any guidance of the European Union. Moreover, they initiate such procedures to prevent qualified majority voting when they fear to be bound by a qualified majority of the other Member States.

Since opt-outs are only granted to the United Kingdom, Ireland and Denmark, cases concerning this political mechanism are naturally cases initiated by one of these individual Member States.

Part three of this dissertation will discuss the reaction of the Court to the observed attempts in order to ascertain whether the Member States are (post-Lisbon) 'Masters of the Treaties' in the external relations of the European Union.

PART 3. INTERPRETATION OF THE DIVISION OF COMPETENCES BY THE EUROPEAN COURT OF JUSTICE

In order to assess the role of the Member States as 'Masters of the Treaties' in the European Union's external relations in the post-Lisbon era, the reaction of the Court to the attempts of the Member States explained in part two of this dissertation should be examined. From the legal creativity of the Member States it can namely be deduced that they undoubtedly did an effort to retain control of the division of competences laid down by the Lisbon Treaty. However, if the Court would not accept these efforts, they would be in vain.

The view of the Court on its own jurisdiction in this matter should be addressed firstly. Can the Court itself decide whether there is competence of the European Union, what the nature of such a competence is and how the competence should be interpreted? In that case, there would be judicial *Kompetenz Kompetenz*. To the contrary, if the question of competence would be deemed a political one, there is legislative *Kompetenz Kompetenz* **(3.1)**. Secondly, the concrete reactions of the Court to the attempts described in part two should be discussed. In line with the general tendency of the Court's case-law, it can be expected that the interpretation of the competences of the European Union will be rather broad **(3.2)**. Finally, as established in the first part of this dissertation, the principle of sincere cooperation of Article 4(3) of the TEU can be said to establish 'a duty to remain silent'. How did the Court develop this duty and what influence can it have on the margin of the Member States to influence the European Union's external action **(3.3)**?

1. How does the Court see its own jurisdiction?

The question of who can decide on the scope and nature of the European Union's competence is a very sensitive one. Article 5(2) of the TEU points out that competences are conferred upon the European Union by the Member States. This provision seems to indicate that the Member States want to affirm their position as 'Masters of the Treaties'. The Court of Justice takes the opposite approach: it has the capacity to determine European Union-competence and does not hesitate to make this clear in its case-law.[320] The justification the Court uses, is the fact that it is 'the ultimate authority' in deciding on the interpretation and application of the Treaties.[321]

[320] See for instance its reasoning in the *Broadcasting Organisations case* and Opinion 1/13 as described in section 1.3, A, b.

[321] Gunnar Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor' (2011) 17 European Law Journal 470, 472-473.

These two approaches can be opposed as 'legislative *Kompetenz Kompetenz*' or 'Member State *Kompetenz Kompetenz*' on the one hand and 'judicial *Kompetenz Kompetenz*' or 'Union *Kompetenz Kompetenz*' on the other hand. In the view of the Court, its Union *Kompetenz Kompetenz* is justified since it cannot be allowed that national courts rule on the legality of EU measures. This would endanger the European Union's autonomous legal order as an independent source of legal authority.[322] The Member States on the other hand should in their view have *Kompetenz Kompetenz* since they have, as sovereign states, the final ability to decide on the extent of their transfer of sovereignty to the European Union.[323] Timothy Moorhead's suggestion to reconciliate these approaches is that there should be a search for acceptable presumptions of compatibility. The persuasive quality of the judgments of the Court is in this context crucial to maintain a stable co-existence of orders. According to this author, the Court has in this sense combined the supremacy of EU law with "*substantive concessions to domestic constitutional requirements through their adoption as Union general principles*" to prevent constitutional crises.[324]

According to Armin von Bogdandy and Jürgen Bast it cannot be doubted that the Court intervenes as 'guardian of the order of competences'. Judicial scrutiny on the division of competences is necessary since controlling compliance with this division is not a purely political question.[325] Mario P. Chiti goes even further by calling the judges in the Court 'the real Masters of European law'. According to him, this is a consequence of the fact that the European Union "*operates as a value-based supra-national player, and it shall guarantee those principles inside its borders in an Area of freedom and justice*".[326] He perceives Courts in general as the 'fundamental watchdogs of legalism'.[327] In my view, this would mean that there is not necessarily a contradiction between 'legislative *Kompetenz Kompetenz*' and 'judicial *Kompetenz Kompetenz*'.

In any case, it should also be noted that the Court allocates itself a broad jurisdiction in general. In the context of mixed agreements for instance, it established in the *MOX Plant* case that it does not only have exclusive jurisdiction regarding provisions of exclusive competence of the European Union but also regarding provisions of shared competence.[328] Moreover, the Court's role in the external relations of the European

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[322] Timothy Moorhead, *The Legal Order of the European Union – The Institutional Role of the Court of Justice* (Routledge, London 2014) 90 (hereafter: Timothy Moorhead, *The Legal Order of the European Union*) referring to Judgment of 15 July 1964, *Costa v E.N.E.L.*, 6/64, EU:C:1964:66, p. 594.
[323] Timothy Moorhead, *The Legal Order of the European Union* 90.
[324] Timothy Moorhead, *The Legal Order of the European Union* 106-107.
[325] Armin von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing/CH Beck, Oxford 2010) 297-298.
[326] Mario P. Chiti, 'Judicial and Political Power: Where is the Dividing Line?: A Praise for Judicialization and for Judicial Restraint' (2015) 21 European Public Law 705, 715 (hereafter: Mario P. Chiti, 'Judicial and Political Power:…').
[327] Mario P. Chiti, 'Judicial and Political Power:…' 720.
[328] Judgment of 30 May 2006, *Commission v Ireland (MOX Plant)*, C-459/03, EU:C:2006:345, paragraphs 63, 121 and 132. See: Stanislas Adam, Purdey Devisscher and Peter Van Elsuwege, 'Chronique de jurisprudence communautaire – Les relations extérieures (1er janvier 2006 – 31 décembre 2008)' (2009) 3-4 Cahiers de droit européen 465, 495.

Union does not end when it has decided on the division of competences. By referring to the principle of sincere cooperation on the basis of Article 4(3) of the TEU, the Court monitors the conduct of the external action by the European Union and the Member States. In that way, the external action of the European Union forms "*a collective exercise of external competences through cooperation under the auspices of the Court of Justice*".[329] This subject will be further elaborated on in section 3.3.

2. Broad interpretation of the external competences of the European Union

As will be described below, it can be gleaned from the Court's judgments in the cases discussed in part two of this dissertation that the Court in general applies a broad interpretation of the external competences of the European Union. This observation is, in my view, in line with what can be expected and in line with how the Court sees its own jurisdiction in this matter **(A)**. However, some limitations to this broad interpretation can be observed and should therefore be discussed **(B)**.

My overview below presents the exceptions to this broad interpretation in a schematic way.

BROAD INTERPRETATION OF THE EXTERNAL COMPETENCES OF THE EUROPEAN UNION IN GENERAL WITH A FEW EXCEPTIONS	
Ambit of the CCP	restrictive view of the CCP regarding the commercial aspects of intellectual property, transport, investment protection and ISDS
Ambit of the ERTA-doctrine	cannot be applied to a situation where the EU rule referred to is a provision of the TFEU and not a rule adopted on the basis of the TFEU
Role of the European Parliament in the CFSP	no consultation or consent on the basis of Article 218(6) of the TFEU
European Commission's autonomous powers at the international level	consultation of the Council when expressing positions on behalf of the European Union before an international court
	no power to sign a non-binding agreement that is the result of negotiations with a third state

[329] Eleftheria Neframi, 'Vertical Division of Competences and the Objectives of the European Union's External Action' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: constitutional challenges* (Hart Publishing, Oxford 2014) 90-91 and 94.

A. The Court's broad interpretation of competences of the European Union

In order to give an overview of the broad interpretation of the competences of the European Union by the Court in general, similar subdivisions to the ones in part two of this dissertation will be followed. Firstly, the Court's broad interpretation on the substance will be examined **(a)**. Secondly, the Court's broad interpretation when it comes to the procedure should be addressed **(b)** and finally, the Court's reaction to the invoking of opt-outs will be discussed **(c)**. However, an overarching approach will be applied. The subsequent sections will not discuss in detail all the individual cases that were mentioned in the second part of this dissertation. This section is merely intended to give an overview of the central threads in the case-law of the Court in these matters.

a. On the substance

As regards the post-Lisbon scope of the CCP, the Court established in the *Daiichi Sankyo* case a general definition. An act falls within the CCP if it is essentially intended to promote, facilitate or govern international trade and has direct and immediate effects on international trade. More specifically, for rules in the field of intellectual property, this means that they need to show a specific link to international trade in order to fall under the ambit of the CCP. *In casu*, according to the Court, the rules of the TRIPs Agreement do belong to the CCP since they are an integral part of the World Trade Organisation system and they even constitute one of the principal agreements of this system.[330] To clarify the delimitation between the CCP and the internal market, the Court emphasised in the *Conditional Access Services* case that the CCP relates to trade with third countries and not to trade within the internal market. It also reiterated once again that a specific link to international trade should be established.[331] Since the Convention *in casu* is merely intended to extend the legal protection of conditional access services to third countries, it shows such a specific connection to international trade.[332]

Opinion 2/15 constitutes the last step in the Court's broad interpretation of the CCP for now. Regarding sustainable development, the Court established in this opinion that its two components – social protection of workers and environmental protection – need to be integrated into the external action of the European Union in accordance with Articles 9 and 11 of the TFEU. Consequently, the objective of sustainable development forms an integral part of the CCP.[333] It would, according to the Court "*not be coherent to hold that the*

[330] Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraphs 51-53.
[331] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraphs 56-58 referring to Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraphs 50-52.
[332] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraphs 63-65.
[333] Article 9 of the TFEU stipulates: "*In defining and implementing its policies and activities, the Union shall take into account requirements linked to […], the guarantee of adequate social protection […].*" Article 11 of the TFEU stipulates: "*Environmental protection requirements must be integrated into the definition and implementation of the*

provisions liberalising trade between the European Union and a third State fall within the common commercial policy and that those which are designed to ensure that the requirements of sustainable development are met when that liberalisation of trade takes place fall outside it".[334] One might wonder where the boundaries of such an approach lie.

In cases regarding the scope of the ERTA-doctrine, the Court adopted a dismissive attitude towards the by the Member States suggested limitations. Its interpretation of the ERTA-doctrine, including the test of "*an area already largely covered by EU rules*", is not affected by the more restrictive view of the European Union's exclusive external competence by the Member States since the codification thereof in the Lisbon Treaty.[335] The Court established this view in the *Broadcasting Organisations* case and reaffirmed it in its Opinion 1/13.[336] In this connection, the Court explicitly stressed the fact that also the foreseeable future development of the common EU rules is to be taken into account.[337] Furthermore, even if there is no possible contradiction between these common EU rules and the international commitments, these EU rules may be affected.[338] Lastly, Protocol No 25 should not be taken into account to establish the area covered.[339] It should be noted that the Court's judgment in these cases was not in accordance with the view of Advocate General Sharpston in the *Broadcasting Organisations* case. She pointed out that even if an area is largely covered by EU rules, this does not necessarily mean that there is exclusive competence for the European Union. If the Member States retain competence in "*at least one respect*", there can be no such exclusive competence.[340]

Opinion 1/13 also provided a clarification of the scope of Article 216(1) of the TFEU. This provision points out, *inter alia*, that the European Union can conclude international agreements whenever this is necessary to achieve one of the objectives referred to in the Treaties. According to the Court, this signifies that as soon as

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Union policies and activities, in particular with a view to promoting sustainable development." See: Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 146-148.

[334] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 163.

[335] Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraph 72.

[336] Opinion of 14 October 2014, *Convention on the civil aspects of international child abduction*, 1/13, EU:C:2014:2303, paragraph 73.

[337] Opinion of 14 October 2014, *Convention on the civil aspects of international child abduction*, 1/13, EU:C:2014:2303, paragraph 74 referring to Opinion of 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 1/03, EU:C:2006:81, paragraph 126.

[338] Opinion of 14 October 2014, *Convention on the civil aspects of international child abduction*, 1/13, EU:C:2014:2303, paragraph 86. See also: Opinion of 19 March 1993, *Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work*, 2/91, EU:C:1993:106, paragraphs 25-26 and Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraph 71.

[339] Judgment of 4 September 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraph 73.

[340] Opinion of Advocate General Sharpston delivered on 3 April 2014, *Commission v Council (Broadcasting Organisations)*, C-114/12, EU:C:2014:224, paragraphs 107 and 143. See: Fernando Castillo de la Torre, 'The Court of Justice and External Competences After Lisbon:…' 147.

EU law creates an internal power for the European Union to attain a specific objective, the European Union has the authority to undertake the necessary international commitments for the attainment thereof.[341]

Other limitations to the ERTA-doctrine were likewise dismissed. In Opinion 3/15 concerning the Marrakesh Treaty, the Court stated that the fact that the Member States have a discretion regarding the implementation of a Directive, does not impair the conclusion that an area can already be covered by common rules to a large extent. The EU legislature namely grants the Member States such a discretion.[342] Eventually, in the *OTIF* case, the Court ruled that Germany's view on the ERTA-doctrine could not be accepted. The European Union's external competence does not necessarily need to be exclusive and the existence of such an external competence of the European Union is not dependent on its prior exercise of internal competence in a certain matter.[343]

Lastly, regarding the scope of development cooperation, the Court concluded in the *Philippines Agreement* case that an international agreement's characterisation should be determined on the basis of its essential object and not in terms of individual clauses except when these clauses imply extensive obligations concerning the specific matters with a different objective than development cooperation.[344] *In casu*, transport, environment and readmission do not form objectives of the Philippines Agreement distinct from development cooperation in the Court's view.[345]

In essence, it can be observed that the Court does not hesitate to apply a broad interpretation of the legal bases provided in the Treaties. Determining whether an EU measure comes under the CCP demands a case-by-case assessment of a 'specific link with international trade'. Furthermore, the inclusion of social protection of workers and environmental protection in the CCP broadens its scope to a considerable extent. The scope of the ERTA-doctrine is equally broad. To conclude to an exclusive external competence for the European Union, it suffices that there is an area already largely covered by common EU rules. Besides, foreseeable future developments of common EU rules should also be taken into account and the fact that such rules grant a certain margin of discretion to the Member States is irrelevant. The latter implies that the conclusion of an international agreement could even lead to the harmonisation of certain aspects thereby undoing the internal

[341] Opinion of 14 October 2014, *Convention on the civil aspects of international child abduction*, 1/13, EU:C:2014:2303, paragraphs 67-68.
[342] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 119 and Gesa Kübek, 'The Marrakesh Treaty judgment: the ECJ clarifies EU external powers over copyright law', EU Law Analysis, 17 February 2017, available at http://eulawanalysis.blogspot.be/2017/02/the-marrakesh-treaty-judgment-ecj.html, 3.
[343] Judgment of 5 December 2017, *Germany v Council (OTIF)*, C-600/14, EU:C:2017:935, paragraph 49 and 67 referring to Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 243.
[344] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraphs 38-39 referring to Judgment of 3 December 1996, *Portugal v Council*, C-268/94, EU:C:1996:461, paragraphs 37-39.
[345] Judgment of 11 June 2014, *Commission v Council (Philippines Agreement)*, C-377/12, EU:C:2014:1903, paragraph 55-59.

margin of discretion of the Member States.[346] Consequently, in my view, the threshold to conclude to an exclusive external competence on the basis of Article 3(2) of the TFEU is relatively low. Lastly, international agreements in the context of development cooperation, might include several 'side-objectives' without the need to add additional legal bases.

b. On the procedure

The successive judgments of the Court in the context of the conclusion of international agreements clarified Article 218 of the TFEU in several steps.

Firstly, in the *OIV recommendations* case, it was decided that it is not mandatory that the European Union is a party to an international agreement in order to allow the Council to adopt positions on behalf of the European Union in accordance with Article 218(9) of the TFEU.[347] As established above, this can have as a consequence that Member States need to defend a position of the European Union at the international level while they voted against this position internally.[348]

Secondly, in the case concerning the Declaration on the granting of fishing opportunities in EU waters, the Court made a distinction between Articles 43(2) and 43(3) of the TFEU. Article 43(2) of the TFEU requires a policy decision in the sense that the necessity of a certain measure for the attainment of the objectives of the common fishery policy needs to be assessed. Article 43(3) of the TFEU conversely concerns measures of a primarily technical nature intended to implement the provisions with Article 43(2) of the TFEU as their legal basis.[349] *In casu*, considering the aim and content of the Declaration, it should be seen as an agreement between the European Union and the third country to utilise, under certain conditions, part of the surplus of the allowable catch in the exclusive economic zone, in this case, of French Guiana. Such an offer made to a third country cannot be seen as a technical or implementing measure but implies a policy decision. The decision approving this Declaration therefore needed to be adopted on the basis of Article 43(2) of the

[346] The Member States referred to this situation in their observations regarding the Marrakesh Treaty: "*On that basis, the French, Hungarian and Romanian Governments maintain that it follows from Opinion 1/94 (Agreements annexed to the WTO Agreement), of 15 November 1994 (EU:C:1994:384), that the European Union cannot, by means of an international agreement, render mandatory the adoption of measures relating to an exception or limitation to copyright and related rights for the benefit of persons with a disability when the Member States continue to have a choice as to whether to adopt such measures 'internally'*." See: Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 54.
[347] Judgment of 7 October 2014, *Germany v Council (OIV recommendations)*, C-399/12, EU:C:2014:2258, paragraph 49.
[348] Joris Larik, 'Pars Pro Toto:…' 190.
[349] Judgment of 26 November 2014, *Parliament and Commission v Council*, Joined Cases C-103/12 and C-165/12, EU:C:2014:2400, paragraph 50.

TFEU.[350] As a consequence, the European Parliament should have been asked to give its consent following Article 218(6)(a)(v) of the TFEU.[351] In contrast to the artificial distinction between 'access to waters' and 'access to resources' made by the European Parliament and the Commission, the Court thus contrasts between policy decisions and implementing measures of a primarily technical nature. In my view, this criterion is an adequate one to distinguish between the obligation of consent of the European Parliament on the basis of Article 218(6)(a)(v) of the TFEU and the obligation of consultation of the European Parliament on the basis of Article 218(6)(b) of the TFEU following the ratio of this distinction.

Thirdly, regarding the voting rules to be applied in the context of association agreements, the Court followed the view of Advocate General Kokott in stating that the implementation of an association agreement should be realised by qualified majority voting on the basis of Article 218(8) and (9) of the TFEU.[352] Only the conclusion of an association agreement and the supplementation or amendment of its institutional framework requires unanimity in the Council in accordance with Article 218(8) of the TFEU.[353]

Fourthly, as regards the management of mixed agreements, the Court emphasised in the *Mixed International Agreements* case that 'hybrid decisions', adopted by the Council and the Member States together, are not compatible with the procedure for the conclusion of international agreements following Article 218 of the TFEU. The Court simply deduced from the text of Article 218(5) of the TFEU that only the Council is competent to authorise the signing of an international agreement and, if applicable, the provisional application thereof: "*no competence is granted to the Member States for the adoption of such a decision*". Additionally, such decisions should be adopted by qualified majority voting following Article 218(8) of the TFEU.[354] Lastly, the Court clarified that the duty of cooperation in the managing of mixed agreements cannot be invoked as a justification for the derogation from the procedure of Article 218 of the TFEU.[355]

Fifthly, in the *Negotiating Directives* case, the Court established that an obligation to report to the Council is justified. Since an international agreement, negotiated by the Commission, will be submitted to the Council for approval, it is "*expedient for the Council to possess that information in order to have clear knowledge of*

[350] Judgment of 26 November 2014, *Parliament and Commission v Council*, Joined Cases C-103/12 and C-165/12, EU:C:2014:2400, paragraphs 73 and 79-81.
[351] Judgment of 26 November 2014, *Parliament and Commission v Council*, Joined Cases C-103/12 and C-165/12, EU:C:2014:2400, paragraph 84.
[352] Opinion of Advocate General Kokott delivered on 17 July 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2114, paragraph 97.
[353] Judgment of 18 December 2014, *United Kingdom v Council (Turkey Agreement)*, C-81/13, EU:C:2014:2449, paragraph 66.
[354] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraphs 44-45.
[355] Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraphs 54-55.

the course of the negotiations".[356] Furthermore, Article 218(4) of the TFEU empowers the Council to determine procedural arrangements regarding the transfer of information to and consultation of the special committee of the Council. However, such arrangements may not interfere with the power of the negotiator on the basis of Article 17(1) of the TEU, entailing that the Commission ensures the external representation of the European Union.[357] Such interference occurs when the negotiating directives seek to bind the negotiator. Finally, a designated special committee in the sense of Article 218(4) of the TFEU can only have a consultative function and the Council cannot impose 'detailed negotiating positions' on the Commission.[358]

Sixthly, the Council also tried to limit the Commission's possibility to act in front of international courts. In the *ITLOS* case, the Court however confirmed that such representation can be based on Article 335 of the TFEU.[359] Moreover, Article 218(9) of the TFEU, which provides the capacity for the Council to adopt positions on behalf of the European Union in international bodies, applies in the context of the participation of the European Union 'in' international bodies and not when the European Union is invited to express its view 'before' an international court.[360]

Finally, in the *WRC-15* case, the Council adopted conclusions instead of a decision on the basis of Article 218(9) of the TFEU. The Court stressed in this context that the EU Treaties are the only source for EU institutions to derogate from a decision-making procedure. Consequently, a mere practice of the Council cannot form the basis for such a derogation and cannot "*create a precedent that is binding on the EU institutions*".[361] Since the form of an act inscribed in the Treaties is an essential procedural requirement, a derogation necessarily leads to the annulment of the act. *In casu*, the adoption of conclusions instead of a decision led – according to the Court – to uncertainty regarding the legal nature and the scope of that act which was apt to weaken the European Union's position at the WRC-15.[362]

It can be concluded that in addition to the rather specific clarifications in the *Turkey Agreement* case and the case concerning the Declaration on the granting of fishing opportunities in EU waters, two tendencies of the

[356] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraphs 67-68.
[357] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraphs 78-79.
[358] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraphs 85-90.
[359] Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraphs 58-59 referring to Judgment of 12 September 2006, *Reynolds Tobacco and Others v Commission*, C-131/03 P, EU:C:2006:541, paragraph 94.
[360] Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraph 63.
[361] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraphs 38 and 40-42.
[362] Judgment of 25 October 2017, *Commission v Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraphs 44-45 and 58.

Court can be identified. The margin of discretion of both the individual Member States as well as the Council as an EU institution is limited. As regards the individual Member States, they are limited in their autonomous power to adopt positions in an international body as soon as the concerned agreement falls within competence of the European Union. Furthermore, they cannot decide for reasons of efficiency to adopt 'hybrid decisions' in the Council. As far as the Council is concerned, the following limitations can be observed: the Council cannot prevent the Commission to act in front of international courts, it cannot establish detailed negotiating directives to influence the role of the Commission as a negotiator of international agreements and it does not have the possibility to adopt conclusions instead of decisions when this is its usual practice.

c. The use of opt-outs

The Court's view on the use of opt-outs can be described shortly. In the *Conditional Access Services* case, the Court indicated that Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol No 22 on the position of Denmark, annexed to the Treaties, cannot have the slightest effect on the question of the correct legal basis for the adoption of an EU act. The legal basis of such an act needs to be defined on the basis of objective factors and it will be this legal basis that determines whether or not the protocols can be applied.[363] This was reiterated by the Court in the *Swiss Agreement* case.[364]

Furthermore, Protocol 21 and 22 can also be simply irrelevant, for instance, they clearly not apply to the CCP and the common transport policy.[365] Finally, in the *EEA Agreement* case, the Court referred to the fact that the use of the opt-out by the United Kingdom and Ireland could even undermine the objectives of the EEA Agreement.[366]

B. Limitations to the Court's broad interpretation of competences of the European Union and their ratio

As will be established below, four variations of limitations to the broad interpretation of EU competences by the Court can be identified. They will be addressed in turn: limitations to the ambit of the CCP in Opinion

[363] Judgment of 22 October 2013, *Commission v Council (Conditional Access Services)*, C-137/12, EU:C:2013:675, paragraphs 73-74.
[364] Judgment of 27 February 2014, *United Kingdom v Council (Swiss Agreement)*, C-656/11, EU:C:2014:97, paragraph 49.
[365] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 218.
[366] Judgment of 26 September 2013, *United Kingdom v Council (EEA Agreement)*, C-431/11, EU:C:2013:589, paragraphs 65.

3/15 and Opinion 2/15 **(a)**, limitations to the ambit of the ERTA-doctrine in Opinion 2/15 **(b)**, limitations to the role of the European Parliament in the CFSP **(c)** and limitations to the European Commission's autonomous powers at the international level **(d)**.

a. Limitations to the ambit of the CCP in Opinion 3/15 and Opinion 2/15

Regarding the scope of the CCP, the Court did not follow the Commission in its broad interpretation of the 'commercial aspects of intellectual property' of Article 207 of the TFEU in Opinion 3/15 concerning the Marrakesh Treaty. The Court first of all reiterated its definition of the CCP: an EU act falls within that policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.[367] In order to verify this, the purpose and content of an international commitment of the European Union should be examined.[368] According to the Court, the Marrakesh Treaty is in essence intended to improve the position of the beneficiary persons by the facilitation of their access to published works.[369] Regarding the content of the Treaty, the Court established that the rules of the Marrakesh Treaty governing the export and import of accessible format copies do relate to international trade. However, the purpose of these rules must be taken into account and according to the Court, the facilitation of the cross-border exchange of these accessible format copies is merely intended to achieve the non-commercial objective of the Marrakesh Treaty. Therefore, the exchange cannot be equated with international trade for commercial purposes.[370] Moreover, the Court explicitly refuses the view of the Commission that "*of the rules governing intellectual property, only those relating to moral rights are not encompassed by the concept of 'commercial aspects of intellectual property'*". This would cause an excessive extension of the CCP since it would bring rules that have no specific link with international trade within that policy.[371] It is not required that an international agreement pursues exclusively commercial aims in order to come under the ambit of the CCP, however, the measures adopted should be of a commercial nature.[372] In essence, international rules that may apply to works which are commercially exploited and which may indirectly affect international trade do not automatically belong to the European Union's CCP.[373]

[367] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 61 referring to Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraph 51 and Judgment of 22 October 2013, *Conditional Access Services*, C-137/12, EU:C:2013:675, paragraph 57.
[368] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 62.
[369] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 70.
[370] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraphs 87-91.
[371] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 85.
[372] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 99.
[373] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 100.

This view of the Court was not in accordance with the opinion of Advocate General Wahl. He indicated that a large and important component of the Marrakesh Treaty is specifically related to international trade. The opening-up of national markets to accessible format copies from other countries is, according to him, "*one of the key means of achieving the objectives*" of this Treaty.[374] Ana Ramalho also argued in this context that the Marrakesh Agreement should come under the European Union's competence since it provides a cross-border exchange of accessible format copies which is, according to her, intended to promote trade.[375]

As already mentioned in the first part of this dissertation, Opinion 2/15 on the Free Trade Agreement with Singapore also shows a more restrictive view of the Court on the scope of the CCP. Firstly, relating to market access, the Court established that all provisions except for the ones concerning the supply of services in the field of transport belong to the CCP.[376] As regards this supply of services in the field of transport, the Court established that these provisions are excluded from the CCP on the basis of Article 207(5) of the TFEU. This provision entails that the negotiation and conclusion of international agreements in the field of transport are subject to the common transport policy in order to maintain a parallelism between internal and external EU competence.[377] All international agreements in the field of transport are excluded in accordance with the fifth paragraph of Article 207 of the TFEU, not only the ones encompassing cross-border supply of services as the Commission contended. Moreover, services in the field of transport also comprise services "*inherently linked to a physical act of moving persons or goods from one place to another by a means of transport*".[378] Specifically in relation to the Free Trade Agreement, this implies that all – with a few exceptions – provisions connected to services in the field of transport are excluded from the exclusive competence of the European Union for the CCP.[379] However, the Court established that all these provisions fall under the exclusive competence of the European Union following Article 3(2) of the TFEU.

Secondly, relating to investment protection, it is, according to the Court, clear that the addition of 'foreign direct investment' to Article 207(1) of the TFEU by the Lisbon Treaty excludes other foreign investment from this provision. Consequently, the provisions of the Free Trade Agreement concerning other foreign

[374] Opinion of Advocate General Wahl delivered on 8 September 2016, Marrakesh Treaty, 3/15, EU:C:2016:657, paragraph 48.
[375] Ana Ramalho, 'Signed, Sealed, but Not Delivered: The EU and the Ratification of the Marrakesh Treaty' (2015) 6 European Journal of Risk Regulation 629, 631.
[376] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 50.
[377] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 57-59 referring to Opinion of 30 November 2009, *Agreements modifying the Schedules of Specific Commitments under the GATS*, 1/08, EU:C:2009:739, paragraph 164.
[378] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 60-61 referring to Judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraphs 45-46.
[379] These exceptions are: 'aircraft repair and maintenance services during which an aircraft is withdrawn from service', 'the selling and marketing of air transport services' and 'computer reservation system services'. See: Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 68.

investment do not fall within the exclusive competence of the European Union in accordance with Article 3(1)(e) of the TFEU. As a ratio, the Court invoked the fact that direct foreign investment creates direct and immediate effects on trade between the European Union and third states considering that this kind of investment leads to participation in the management or control of a company.[380] However, the Court did not follow the point of view of the Council and some of the Member States that a distinction should be made between protection and admission of direct investments. Article 207 of the TFEU does not draw this distinction and consequently, direct foreign investment does fall within the European Union's exclusive external competence.[381]

A final element of Opinion 2/15 of the Court was the nature of the competence to conclude the provisions relating to ISDS. As mentioned above, in this regard, the Court quite shortly concluded that the provided regime is capable of removing disputes from the jurisdiction of the Member States. Therefore, it does not come under the CCP or under the exclusive competences of the European Union and the respective provisions should be concluded by the European Union together with the Member States.[382]

It should be noted that the Court gave the impression in Opinion 2/15 that the possibility of 'facultative mixity' – in case an agreement falls within shared competence – was excluded. It namely stated that the rules that do not belong to exclusive competence of the European Union "*cannot be approved by the European Union alone*".[383] This raised concerns, for instance, regarding the Stabilisation and Association Agreement with Kosovo which was concluded as a facultative EU-only agreement to overcome the challenge of (non-) recognition.[384] However, in the *OTIF* case, the Court clarified that 'facultative mixity' is a possibility.[385]

In conclusion, the Court did derogate from its generally broad interpretation of the scope of the CCP in Opinion 3/15 and Opinion 2/15. Opinion 3/15 illustrates in my view the needed case-by-case assessment to establish a specific link with international trade. Furthermore, a rather textual interpretation of 'commercial aspects of intellectual property' is given by refusing the Commission's view that only rules relating to moral rights are not encompassed by this concept. The Court's view in Opinion 2/15 is a similar one: provisions in the context of transport are excluded on the basis of Article 207(5) of the TFEU and non-direct foreign investment is not included in the CCP since Article 207(1) of the TFEU only refers to 'foreign direct

[380] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 83-84.
[381] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 85 and 87.
[382] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 292. See: Guillaume Van der Loo, 'The Court's Opinion on the EU-Singapore FTA:…' 5.
[383] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 244 and 292. See: Laurens Ankersmit, 'Opinion 2/15 and the future of mixity and ISDS'
[384] Peter Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement between the EU and Kosovo' (2017) 22 European Foreign Affairs Review 393, 403-404.
[385] Judgment of 5 December 2017, *Germany v Council (OTIF)*, C-600/14, EU:C:2017:935, paragraph 68. See: Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' 3.

investment'. Therefore, it seems that the Court does take into account the drafting of Article 207 of the TFEU in the Lisbon Treaty when the text of the Article is clear.

b. Limitations to the ambit of the ERTA-doctrine in Opinion 2/15

In Opinion 3/15, the Court accepted that the Marrakesh Treaty does fall under the European Union's exclusive competence on the basis of Article 3(2) of the TFEU.[386] In contrast, in Opinion 2/15, the Court decided that the provisions concerning non-direct foreign investment do not come under the ambit of the exclusive external competence of the European Union following Article 3(2) of the TFEU. Indeed, the Court expressly stated that the ERTA-doctrine "*cannot be applied to a situation where the EU rule referred to is a provision of the FEU Treaty and not a rule adopted on the basis of the FEU Treaty"*.[387] The Commission had namely argued that Article 63 of the TFEU – the free movement of capital – would have been affected by the provisions of the Free Trade Agreement. According to the Court, the ratio behind the ERTA-doctrine is that when there is exercise of an internal competence by the European Union, it must, in parallel, be able to use an exclusive external competence in order to prevent the Member States from entering into international agreements that could affect the exercise of the internal competence. Furthermore, since the Treaty provisions have supremacy and international agreements are adopted on the basis of these Treaty provisions, those international agreements cannot "*affect common rules or alter their scope*".[388] The Court continued by establishing that the provisions concerning non-direct foreign investment were not provided for in a legislative act of the European Union and were not necessary to enable the European Union to exercise its internal competence. Consequently, there could be no exclusive external competence of the European Union in this matter.[389] Finally, it was concluded by the Court that the conclusion of international agreements in the field of non-direct foreign investment is a shared competence between the European Union and the Member States following Article 4(1) and (2)(a) of the TFEU.[390]

Following Guillaume Van der Loo, the Court "*rightfully*" ruled in this sense considering the supremacy of rules of primary law over acts adopted on their basis. Indeed, these acts namely include international

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[386] Opinion of 14 February 2017, *Marrakesh Treaty*, 3/15, EU:C:2017:114, paragraph 129. See: Thomas Verellen, 'Opinion 3/15 on the Marrakesh Treaty: The ECJ Reaffirms 'Minimum Harmonisation' Exception to ERTA Principle. Note under Opinion 3/15 ('Marrakesh Treaty')' (2017) 42 Revista General de Derecho Europeo 160, 172-173.
[387] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 230 referring to Judgment of 31 March 1971, *Commission v Council (ERTA)*, 22/70, EU:C:1971:32, paragraphs 17-19.
[388] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 233 and 235.
[389] Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraphs 236-238.
[390] Article 4 of the TFEU stipulates: "*1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; […]*". See: Opinion of 16 May 2017, *EU-Singapore Free Trade Agreement*, 2/15, EU:C:2017:376, paragraph 243.

agreements and consequently, rules of primary law can never be 'affected' by those international agreements.[391]

c. Limitations to the role of the European Parliament in the CFSP

In the *Mauritius Agreement* case, the Court did not follow the European Parliament's broad vision on its role in the CFSP on the basis of Article 218 of the TFEU. In its judgment, the Court elaborated on the objectives and the context of this provision. Article 218 of the TFEU constitutes "*a single procedure of general application concerning the negotiation and conclusion of international agreements*" and in interpreting this provision, the powers of the EU institutions in each field of action of the European Union should be taken into account. Article 218(6) of the TFEU namely implies three different roles for the European Parliament in the conclusion of international agreements: it can be called upon to consent, it can be consulted and it can be excluded. This differentiation is intended to establish symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements. In order to guarantee legal certainty, it is the substantive legal basis of a decision concluding an international agreement that determines which type of procedure applies. *In casu*, the exclusive substantive legal basis fell within the CFSP, consequently, the European Parliament could be excluded on the basis of Article 218(6) of the TFEU.[392]

Similarly, in the *Financial Sanctions* case, the Court did not accept the European Parliament's argument that some measures require democratic scrutiny and that this should be taken into consideration while choosing the legal basis of an act of the European Union. Indeed, the Court stated that "*it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure*". The difference in involvement of the European Parliament between a legal basis connected to the area of freedom, security and justice and on the other hand a legal basis connected to the CFSP is a consequence of the choice of the framers of the Lisbon Treaty to limit the role of the European Parliament in the CFSP.[393] Regarding the relation between the CFSP and other external action, the Court established in the *Financial Sanctions* case that a legal basis connected to the CFSP implies a procedure that is incompatible with the procedures of legal bases connected to other external action.[394] However, Peter Van Elsuwege does suggest that such a combined legal basis might be possible in the context of international

[391] Guillaume Van der Loo, 'The Court's Opinion on the EU-Singapore FTA:…' 5.
[392] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraphs 51-60.
[393] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraphs 80 and 82.
[394] Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraph 47.

agreements. There are no procedural incompatibilities as a consequence of the single procedure provided for in Article 218 of the TFEU.[395]

The Court conversely did confirm in the *Mauritius Agreement* case that the duty to inform the European Parliament following Article 218(10) of the TFEU applies to all international agreements concluded by the European Union in all its fields of action, including in the area of the CFSP. The European Parliament should be enabled to exercise democratic scrutiny of the European Union's external action and should be enabled to verify that its powers are respected. Since the European Parliament was in this case not immediately informed, the Council breached an essential procedural requirement. The European Parliament's involvement in the decision-making process is namely intended to ensure the fundamental democratic principle that "*the people should participate in the exercise of power through the intermediary of a representative assembly*".[396] The European Parliament cannot perform its duties regarding to the CFSP if the information requirement is not respected.[397]

In essence, it can be deduced from this case-law that the European Parliament's attempt to gain influence in the context of the CFSP was not accepted by the Court. Article 218(6) of the TFEU clearly stipulates that there should be no consent or consultation of the European Parliament and consequently, the crippled character of the CFSP is maintained by the Court. However, its democratic scrutiny cannot be fully excluded: the European Parliament should be informed at all stages of the procedure in accordance with Article 218(10) of the TFEU. In any case, the opposing point of views of the European Parliament and the Council are a natural consequence of their respective roles in the context of the CFSP. The Council is the main actor in this framework while the European Parliament has almost no role.[398]

d. Limitations to the European Commission's autonomous powers at the international level

As established above, the Court confirmed in the *ITLOS* case the possibility for the Commission to appear in front of an international court on behalf of the European Union. However, this possibility is according to the Court not without its limits. The Court namely indicated that the Commission should consult the Council

[395] Peter Van Elsuwege, 'Securing the Institutional Balance…' 1393.
[396] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraphs 72 and 79-81 referring to Judgment of 29 October 1980, *Roquette Frères v Council*, 138/79, EU:C:1980:249, paragraph 33 and Judgment of 19 July 2012, *Parliament v Council (Financial Sanctions)*, C-130/10, EU:C:2012:472, paragraph 81.
[397] Judgment of 24 June 2014, *Parliament v Council (Mauritius Agreement)*, C-658/11, EU:C:2014:2025, paragraph 86.
[398] Peter Van Elsuwege, 'The Potential For Inter-Institutional Conflicts…' 135.

beforehand when it expresses positions on behalf of the European Union before such an international court. This is required by the principle of sincere cooperation of Article 13(2) of the TEU.[399]

Furthermore, the Court limited the broad view of the Commission on its autonomous powers at the international level in the case concerning the Addendum to the Memorandum of Understanding on a Swiss financial contribution to Croatia. According to the Court, the Commission's power of external representation on the basis of Article 17(1) of the TEU does not include the power to sign a non-binding agreement that is the result of negotiations with a third state. Signing such an agreement requires "*an assessment to be made, in compliance with strategic guidelines laid down by the European Council and the principles and objectives of the Union's external action laid down* in *Article 21(1) and (2) TEU, of the Union's interests in the context of its relations with the third country concerned, and the divergent interests arising in those relations to be reconciled*". Consequently, the decision to sign constitutes a policy-making measure which falls within the powers of the Council following Article 16(1) of the TEU.[400] Even when the content of the agreement coincides with the content of the negotiating mandate given by the Council, the Council's approval is necessary to verify the actual content of the agreement.[401]

In my view, these two cases seem to indicate that the policy-making role of the Council should be respected at all times. While it is true that the Commission is competent to represent the European Union on the international level, it cannot ignore the fact that the Council has, in accordance with Article 16(1) of the TEU, the policy-making and coordinating functions. However, according to Valerie Demedts and Merijn Chamon, there is still some uncertainty. In the case concerning the Addendum as described above, the Court did not explicitly recognise that "*Article 218 of the TFEU reflects the inter-institutional relations in the field of external relations*". Consequently, it is not sure whether this provision can be generalised to apply in other situations that are not expressly provided in the Treaties.[402]

[399] Judgment of 6 October 2015, *Council v Commission (ITLOS)*, C-73/14, EU:C:2015:663, paragraph 86. See: Christophe Hillion, 'Conferral, cooperation and balance in the institutional framework of the EU external action' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing, Oxford 2018), p. 46 in the online version available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2917203 (hereafter: Christophe Hillion, 'Conferral, cooperation and balance…).
[400] Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraphs 38-40.
[401] Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraph 43.
[402] Valerie Demedts and Merijn Chamon, 'The Commission back on the leash:…' 260-261.

3. Influence of the principle of sincere cooperation

The principle of sincere cooperation comes into play in situations where there is no exclusive competence for the European Union and as a consequence, Member States act alone or jointly with the European Union. Following Robert Schütze, the Court has imposed specific obligations deduced from the duty of cooperation on the Member States to avoid negative effects of the international actions of a Member State on the conclusion of an agreement by the European Union. Since these obligations limit the exercise of their shared powers, they *"– to some extent – mirror and invert the principle of subsidiarity*".[403] Traditionally, the duty of cooperation was deemed to have a procedural nature. However, as described above, in the *PFOS* case, the Court indicated that it was not satisfied with the procedural obligation to inform and to consult and it prohibited a Member State to exercise its shared competence. This interpretation of the duty of cooperation endangers the autonomous exercise of international powers by the Member States. According to Robert Schütze, the substantive effect of the duty of cooperation "*depends on how early the duty to abstain from international action departing from the Union position starts*".[404]

Indeed, the consequences of the *PFOS* case on the margin of discretion of the Member States to act at the international level cannot be underestimated. Sweden itself argued in this case that it could not be expected to wait for an indefinite period for internal action in the European Union. If it would be expected to do so, this would render shared competence in the context of mixed agreements meaningless.[405] Denmark and the United Kingdom, as intervening Member States, even contended that the principle of sincere cooperation of Article 4(3) of the TEU may not have as a consequence that it takes away a competence vested in the Member States thereby giving the European Union *de facto* exclusive external competence. In that way, the principle of sincere cooperation would in practice become a principle regulating the allocation of competence.[406] The Court in contrast ruled that the duty of sincere cooperation is of general application and that it does not depend on whether the competence of the European Union is exclusive or whether Member States have a right to enter into obligations towards third countries.[407] Such a view is according to the Court justified in order to protect the principle of unity in the international representation of the European Union.[408]

In the post-Lisbon era, there seems to be no follow-up on this case yet. Conversely, the principle of sincere cooperation between the EU institutions, provided for in Article 13(2) of the TEU, does appear regularly in the case-law of the Court. The Commission and the European Parliament invoke this provision in the context

[403] Robert Schütze, *Foreign Affairs and the EU Constitution:…* 337.
[404] Robert Schütze, *Foreign Affairs and the EU Constitution:…* 338-339.
[405] Judgment of 10 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203, paragraphs 62-63.
[406] Judgment of 10 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203, paragraph 65.
[407] Judgment of 10 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203, paragraph 71.
[408] Judgment of 10 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203, paragraph 104.

of the European Union's external relations to monitor the interventions of the Member States through the Council. These interventions should namely "*live up to the spirit of loyalty across all of the EU's external policies*".[409] For instance, in the *Negotiating Directives* case, the Commission submitted that the Council was expanding its own powers by formulating these directives thereby infringing its duty of sincere cooperation.[410]

If it can be assumed that the *PFOS* case is still good law, it is useful to address some of the critical assessments formulated relating to this judgment of the Court. According to Marise Cremona, the *PFOS* case leaves many questions open. For instance, the Court does not clarify when the principle of sincere cooperation implies that there should be a procedural obligation for the Member States to consult the Commission and when it implies a substantive obligation for the Member States. Furthermore, it is not clear when it is possible to conclude that there is a common strategy generating duties for the Member States.[411] According to Marcus Klamert, the obligations of the Member States that should be deduced from this judgment "*cannot be rationalized either by competence or by supremacy*". Moreover, it would be difficult to determine the general implications of this judgment.[412] Finally, Inge Govaere indicates the potential influence of the *PFOS* case on the capacity of the Member States 'to set the international scene'. As described above, Opinion 1/13 of the Court involves that the Member States no longer have the capacity to decide on the accession of third countries to international agreements only covering exclusive competence of the European Union. The *PFOS* case might imply that as soon as there is a common strategy regarding the acceptance of such accession of third countries, the Member States also lose this capacity in matters of shared competence. This would in contrast not be acceptable in situations wherein no common strategy can be observed.[413] Consequently, determining whether there is a common strategy on behalf of the European Union is of major importance.

In conclusion, a distinction can be made between *de iure* exclusivity and *de facto* exclusivity in the context of the external competences of the European Union. *De iure* exclusivity occurs rather quickly due to the broad interpretation of the competences of the European Union by the Court while *de facto* exclusivity appears by a broad interpretation of the principle of sincere cooperation of Article 4(3) of the TEU. However, as will be shown in part four of this dissertation, the ambit and potential influence of the principle of sincere cooperation is not yet entirely clear.

[409] Joris Larik, 'Pars Pro Toto:…' 187-188.
[410] Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraph 37.
[411] Marise Cremona, 'C-246/07 Case Law' (2011) 48 Common Market Law Review 1639, 1663-1664.
[412] Klamert Marcus, *The principle of loyalty in EU Law* 114.
[413] Inge Govaere, 'Setting the international scene:…' 1297-1299.

PART 4. REFLECTIONS ON THE FUTURE

Before concluding this dissertation, a couple of reflections on the future in the context of the principle of conferral **(a)** and in the context of the principle of sincere cooperation **(b)** will be formulated. The purpose of this section is not to give an exhaustive overview of the remaining ambiguities or to examine these ambiguities thoroughly. It includes some thoughts encountered while undertaking this research and personal views on them.

1. Principle of conferral

As can be deduced from the aforementioned, the Lisbon Treaty missed its purpose of bringing clarity in the delimitation of competences between the European Union and its Member States thereby undermining the effectivity of the principle of conferral. Robert Schütze predicted this lack of success and stated that the Lisbon Treaty would even mean a step backwards when it would come into force.[414] For instance, he indicated the ambigious nature of Article 3(2) of the TFEU entailing the codification of the Court's ERTA-doctrine. This provision namely provides in its first situation that the European Union has the exclusive competence to conclude an international agreement when its conclusion is provided for in a legislative act of the European Union. As a consequence, the European Union may empower itself with an exclusive external competence. Such a situation weakens the consitutionalised division of power and Robert Schütze even suggests that it may lead to the interpretation that Treaty Articles providing express external competences *a fortiori* exclude the Member States. However, as far as I know, such a reasoning has never been invoked yet before the Court.

According to Sacha Garben, the lack of clarity surrounding the division of competences, might be solved by granting the European Union a general legislative competence coupled with limits on integration 'by stealth' through soft-law, parallel integration and case-law of the Court.[415] In this situation, the European Union would possess all the powers necessary to achieve the objectives of the Treaties and the current ordinary legislative procedure would be the legislative process. Consequently, the broadness of the European Union's legislative powers would be clear. Since this would mean that all policies of the European Union would be subject to the democratic process, they would also be subject to the limitations inherent thereto. In essence, this would do away with less democratic phenomenons as soft-law and parallel integration.[416] While the

[414] Robert Schütze, 'Lisbon and the federal order of competences: a prospective analysis' (2008) 33 European Law Review 709, 709 (hereafter: Robert Schütze, 'Lisbon and the federal order of competences:…').
[415] Sacha Garben and Inge Govaere, 'The Division of Competences..' 17.
[416] Sacha Garben, 'Restating the Problem of Competence Creep, Tackling Harmonisation by Stealth and Reinstating the Legislator' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, Portland – Oregon 2017) 332-333 (hereafter: Sacha Garben, 'Restating the Problem of Competence Creep…').

advantages of such a system can easily be seen, it is, as Sacha Garben herself indicates, counterintuitive. Considering the observed attempts of the Member States to limit the scope of the legal bases of competence of the European Union, this valuable proposal "*may be a million miles from political likelihood*".[417]

On a more concrete level, the new Article 207 of the TFEU and Opinion 2/15 of the Court will have a major influence on the future conclusion of Free Trade Agreements by the European Union. Szilárd Gáspár-Szilágyi for instance suggests that it might be time for the European Union to conclude separate trade and investment agreements. This would imply that the trade agreement would be concluded by the European Union alone while the investment agreement would be concluded as a mixed agreement. In that way, the CCP cannot be blocked by provisions regarding investment protection and ISDS.[418] Indeed, such a proposal would in my view be a logical consequence of the case-law on the Free Trade Agreement with Singapore. As established above, the Court did not accept the Commission's application of the ERTA-doctrine on non-direct foreign investment. In terms of efficiency, this might therefore be an adequate solution to avoid ratification problems in the Member States regarding provisions of the CCP that actually imply exclusive external competence for the European Union.

2. Principle of sincere cooperation

Section 3.3 already indicated that the *PFOS* case did not yet have post-Lisbon follow-up case-law. Consequently, its scope in the post-Lisbon era is in any event somewhat unclear. Numerous possible fields of application of the principle of sincere cooperation can be thought of.

Firstly, regarding the theory of 'facultative mixity' in case an agreement falls within shared competence, Merijn Chamon refers to the suggestion of Piet Eeckhout that in certain situations, the requirement of unity in external representation implies that the European Union should be capable of concluding an agreement alone.[419] In this context, Advocate General Wahl and Advocate General Sharpston both recently expressed their view on the theory of 'facultative mixity'. According to Advocate General Wahl in the context of Opinion 3/15, mixity is only a political choice to a certain extent. In case mixity would be manifestly inappropriate, for instance in situations of urgency, the Member States would not have the possibility to opt

[417] Sacha Garben, 'Restating the Problem of Competence Creep…' 336.
[418] Szilárd Gáspár-Szilágyi, 'Opinion 2/15: Maybe it is time for the EU to conclude separate trade and investment agreements', European Law Blog, 20 June 2017, available at http://europeanlawblog.eu/2017/06/20/opinion-215-maybe-it-is-time-for-the-eu-to-conclude-separate-trade-and-investment-agreements/.
[419] Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' 8 referring to Piet Eeckhout, *EU External Relations Law* 265.

for mixity.[420]Advocate General Sharpston in the context of Opinion 2/15 on the other hand indicated the purely political character of the choice for mixity.[421] Following Merijn Chamon, the principle of sincere cooperation might influence this matter. A follow-up to the *PFOS* case might namely imply that the Member States should not only abstain from acting in order to keep mixity manageable but that they might even need to refrain from adopting a mixed act. This would mean that a positive obligation for the Member States to act through the European Union occurs. However, such a positive obligation should only appear when mixity would be manifestly inappropriate as suggested by Advocate General Wahl.[422] Considering the reactions on the negative obligation flowing from the *PFOS* case, this effect of the principle of sincere cooperation might be perceived as quite far-reaching. Article 4(3) of the TEU namely determines that the European Union and the Member States should 'in full *mutual* respect' carry out the tasks which flow from the Treaties. Consequently, assessing whether opting for mixity would be manifestly inappropriate would in my view require a difficult balancing exercise of the interests of the Member States to appear on the international scene and the efficiency and unity in the external action of the European Union. One might also wonder whether this follow-up would activate a flow of other positive obligations for the Member States deduced from the principle of sincere cooperation.

Secondly, mindful of the efficiency and effectiveness of the European Union's external relations, the suggestion could be made that the principle of sincere cooperation in Article 4(3) or Article 13(2) of the TEU implies that, in certain situations, an interinstitutional agreement must be concluded. For instance, in the context of the abovementioned *Negotiating Directives* case, it could be argued that, if the Council would have wanted to be closely involved in the negotiations, an interinstitutional agreement with the Commission could have been concluded.[423] This might be more in the spirit of the principle of sincere cooperation than the unilateral formulation of detailed negotiating directives. However, it is not certain whether an agreement concluded by only two institutions would be legally acceptable in the light of Article 295 of the TFEU.[424]

Thirdly, as has already been touched upon in section 3.3, it is not entirely clear when it is possible to conclude that there is a common strategy generating the duty of abstention for the Member States on the basis of Article

[420] Opinion of Advocate General Wahl delivered on 8 September 2016, *Marrakesh Treaty*, 3/15, EU:C:2016:657, paragraphs 119-121. See: Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' 11-12.
[421] Opinion of Advocate General Sharpston delivered on 21 December 2016, *EU-Singapore Free Trade Agreement*, Opinion 2/15, EU:C:2016:992, paragraph 74. See: Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' 10-11.
[422] Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' 14-15.
[423] The Commission refers to this possibility in this case. See: Judgment of 16 July 2015, *Commission v Council (Negotiating Directives)*, C-425/13, EU:C:2015:483, paragraph 38.
[424] Article 295 of the TFEU stipulates: "*The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.*"

4(3) of the TEU. For instance, following Marise Cremona, the Court does not distinguish between such a common strategy and the adoption of positions on behalf of the European Union by the Council on the basis of Article 218(9) of the TFEU.[425] In any event, it might be deduced from the *PFOS* case that such a common strategy occurs relatively quickly since, in that case, the Court established that there was a common strategy on the basis of the minutes of one meeting of the Council's Working Party on International Environmental Issues.[426]

Fourthly, there is uncertainty about the potential impact of the principle of sincere cooperation on the Member States' action connected to the CFSP.[427] In any event, the Member States should respect EU law as a whole, including the duty of sincere cooperation, when acting in the domain of the CFSP. As established above, the Commission and the European Parliament monitor the interventions of the Member States through the Council since these interventions should "*live up to the spirit of loyalty across all of the EU's external policies*".[428] As can be deduced from the second part of this dissertation, it might be presumed that this is not in line with the Member States' view on the CFSP. For instance, the Member States did regularly argue that the role of the European Parliament in the framework of the CFSP should be limited.

Fifthly, the principle of sincere cooperation involves restrictions on the free choice of the Member States to bring disputes to international courts. These restrictions are considerably far-reaching since they even apply in situations wherein the Court itself would not have jurisdiction.[429] For instance, in the recent *Achmea* case, the Court established that ISDS in an intra-EU context is not in accordance with the principle of sincere cooperation of Article 4(3) of the TEU. The ISDS system might namely endanger the autonomy of the EU legal order that is safeguarded by its own judicial system.[430] The question remains whether this judgment will have its influence on ISDS-systems in agreements with third countries and thus, similarly to Opinion 2/15, on the future Free Trade Agreements of the European Union.[431]

Finally, it should also be noted that the case-law regarding the principle of sincere cooperation between the EU institutions on the basis of Article 13(2) of the TEU has its influence on the Member States' ability to retain control of the European Union's external relations. As established above, several cases before the Court oppose the Council on the one hand and the Commission and/or the European Parliament on the other hand.

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[425] Marise Cremona, 'C-246/07 Case Law' (2011) 48 Common Market Law Review 1639, 1664.
[426] Judgment of 10 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203, paragraph 89.
[427] Article 275 of the TFEU and Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent:..' 537-538.
[428] Joris Larik, 'Pars Pro Toto:…' 187-188.
[429] Tobias Lock, 'The Not So Free Choice of EU Member States in International Dispute Settlement' (2017) 5 University of Edinburgh School of Law Research Paper Series 1, 1.
[430] Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 34-35 and 58.
[431] See further: Steffen Hindelang, 'The Limited Immediate Effects of CJEU's Achmea Judgement', Verfassungsblog, 9 March 2018, available at https://www.steffenhindelang.de/en/publications/the-disruption-of-the-eus-judicial-dialogue-by-intra-eu-investment-tribunals-and-the-limited-immediate-effects-of-cjeus-achmea-judgement/.

Consequently, the Member States in the Council need to take into account the interests of the Commission and the European Parliament while acting externally.

CONCLUSION

The main research question of this dissertation is the following: are the Member States (post-Lisbon) 'Masters of the Treaties' in the external relations of the European Union? In order to formulate an answer to this question, this dissertation discussed the principle of conferral and the principle of sincere cooperation in the light of the recent case-law of the Court. The principle of conferral determines that the European Union's competences are conferred upon it by the Member States. Does this principle get the fullest possible effect by installing the Member States as 'Masters of the Treaties'? The principle of sincere cooperation on the other hand implies that the Member States and the European Union assist each other, in full mutual respect, in carrying out tasks which flow from the Treaties. Does this principle imply the duty of the European Union to take the interests of the Member States as 'Masters of the Treaties' into consideration?

This Master's dissertation provides a limited, non-exhaustive research of the legal creativity of the Member States to keep control of the Lisbon catalogue of competences. It presents a categorisation of the Member States' attempts to control the delimitation of competences that can be observed in the post-Lisbon case-law of the Court. This can bring more transparency and insight in the relationship between the European Union and its Member States. Such transparency and insight is namely of major importance to enhance the functioning of the European Union internally and to enhance its international reputation.

Lack of clarity and the Member States as 'Masters of the Treaties'

The most important observations regarding the general framework in which this research was undertaken are the following. Firstly, as regards the principle of conferral, the catalogue of competences of the Lisbon Treaty did not bring the clarity that was hoped for. Secondly, as regards the principle of sincere cooperation, it can be said that the *PFOS* case implies a quite far-reaching impact on the Member States' discretion to act at the international level.

In this context of uncertainty, the Member States try to enforce their function as 'Masters of the Treaties' conferring competences to the European Union. On the substance, it can be observed that the Member States try to limit the ambit of the legal bases provided for in the Treaties. On the procedure, the Member States attempt to limit the role of the European Parliament and the European Commission in the conclusion of international agreements. This touches upon the institutional balance and the consequences of such attempts might have a considerable influence on this balance. Furthermore, the Member States show efforts to enforce their own roles within the Council by preventing qualified majority voting and by adopting 'hybrid decisions'. In particular situations, the aim of the Member States is even the complete exclusion of guidance by the European Union at the international level. Lastly, when it comes to the use of opt-outs, the United Kingdom, supported by Ireland, intends to limit its own obligations on the basis of such opt-outs. In doing

so, the United Kingdom and Ireland wish to remain free in deciding to conclude bilateral relations with, for instance, the EEA-countries, Switzerland or Turkey.

The Court as promoter of the European Union's external action

However, if these attempts are not accepted by the Court, they might not have the desired effect for the Member States' striving to be the 'Masters of the Treaties'. In general, it can be observed that the Court takes the opposite approach of the one of the Member States thereby undermining their role as 'Masters of the Treaties'. Nonetheless, in some occasions, the Court does follow the Member States' approach. Firstly, the Court follows their modifications to the competence grounds in the Lisbon Treaty to the extent that they are sufficiently clear. For instance, the Member States' drafting of the European Union's competence for the CCP is textually interpreted by the Court. Secondly, the Court does not accept that the European Parliament tries to increase its grasp on the CFSP to an extent that is not provided for in the Treaties. Finally, the Court safeguards the Council's policy making role by obliging the Commission to take this role into account.

The Court's interpretation of the principle of sincere cooperation between the Member States and the European Union in the post-Lisbon era should be awaited. For now, the principles of the Court established in the *PFOS* case apply in the European Union's external relations. For the Member States, this involves 'a duty to remain silent' in certain situations.

Taking into account the limited scope of this research, it can therefore be concluded that the Member States experience difficulties in establishing their role as 'Masters of the Treaties' in the post-Lisbon external relations of the European Union. Consequently, the principle of conferral does not get the fullest possible effect and the principle of sincere cooperation rather gets an interpretation to the advantage of the European Union itself.

It should be noted that the Lisbon catalogue of competences might not have as a sole purpose the prevention of 'competence creep' implying that the Member States use the law to safeguard their role on the international scene.[432] It might also be intended to allow the citizens of the European Union "*to understand the [legal and social] system so that they can identify the problems, criticise it, and ultimately control it*". However, from the various ambiguities that emerge in the case-law of the Court, it might in my view be deduced that this purpose of the Lisbon catalogue is not achieved either. According to Robert Schütze, "*the failure to obtain greater legal clarification through the establishment of clear(er) constitutional principles may have serious consequences for the legitimacy of the European legal order*".[433]

[432] Ricardo Gosalbo-Bono and Frederik Naert, 'The reluctant (Lisbon) Treaty…' 18-19 and 22.
[433] Robert Schütze, 'Lisbon and the federal order of competences:…' 721-722 referring to Final Report of Working Group IX "Simplification" CONV 424/02, p.1.

Towards fusion of interest

As described in the final part of this dissertation, there are still numerous situations that require clarification. Therefore, many developments are yet to come and these developments have a lot of potential practical influence, such as consequences for the conclusion of Free Trade Agreements by the European Union and the theory of 'facultative mixity'.

A common purpose of the Member States and the European Union might however be presumed: a positive international reputation is in the best interest of all. For instance, an efficient management of mixed agreements might contribute to this. The Court does also commit to this common purpose by expressly taking into account the consequences of its annulments for the relations of the European Union with third states. This often leads to a decision of the Court to temporarily maintain the effects of a contested decision.[434] Finally, there are also ways to allow the Member States to act alongside the European Union. For instance, the Council can adopt a procedural framework that stipulates that the Member States can continue the conduct of an external competence that is exclusive according to the Court.[435]

In any case, finding a balance between the containment and empowerment of the European Union is crucial for the effective government of the European project.[436] Therefore, following Marise Cremona, it should be hoped that the Lisbon Treaty further allows "*the continuing search for a pragmatic balance between the different actors and institutions that play their parts in the competence space of the European Union's external relations system*".[437]

[434] See for instance: Judgment of 28 April 2015, *Commission v Council (Mixed International Agreements)*, C-28/12, EU:C:2015:282, paragraphs 61-62.
[435] Marise Cremona, 'EU External Relations: Unity and Conferral of Powers' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press, Oxford 2014) 74 (hereafter: Marise Cremona, 'EU External Relations: Unity and Conferral of Powers').
[436] Sacha Garben and Inge Govaere, 'The Division of Competences..' 4.
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