Differentiated integration and the principle of loyalty

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Differentiated integration – Internal and external differentiation – Duty of loyalty – Loyalty as a constraint on differentiation – Agreements between member states – Unity of Union action – Relationship between enhanced cooperation and *inter se* agreements

Introduction

In a crisis-ridden European Union, which at times appears too heavily burdened by diverging national interests and preferences to effectively cope with challenges, differentiation is widely and increasingly perceived as a necessity. Perhaps ironically, even the impending departure from the bloc of the Member State so far most vocal in resisting deeper and uniform integration has not made differentiated integration lose its appeal. On the contrary, calls for differentiation have multiplied since the 2016 Brexit referendum and have notably been endorsed by the Declaration celebrating the 60th anniversary of the Treaty of Rome.[1]

This perception, together with the new forms of differentiation that have emerged especially in the area of economic governance, has injected new life into a never faded scholarly debate on the merits and pitfalls of differentiated integration. From a legal perspective, it has prompted us to look at the limits that differentiated integration finds in the founding Treaties and in a number of general principles of the EU legal order.

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[1] *See* B. de Witte, 'The Future of Variable Geometry in a Post-Brexit European Union', 24 *MJ* (2017) p. 153.

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The article addresses the implications of one such principle, namely the principle of loyalty,[2] for differentiated integration. Although many attempts have been made to identify constraints on differentiation,[3] it appears that the potential of the principle of loyalty has not yet been fully explored in this regard. Indeed, whilst it is generally acknowledged that loyalty may operate as a limit to differentiated integration, loyalty-based constraints on differentiation are rarely examined in detail or in a systematic way.[4]

At the outset, the article defines the notion of differentiated integration and classifies its manifestations, distinguishing those internal to the EU legal order (primarily enhanced cooperation and opt-out mechanisms) from those 'external', occurring through international agreements between member states. Having recalled the features of loyalty that make it particularly interesting to look at differentiated integration through the lens of this principle, the article examines the role of loyalty within differentiation mechanisms internal to the EU legal order, showing that it operates as a guiding principle underpinning several primary law provisions regulating differentiation. Drawing on case law from the area of external relations, the article suggests that loyalty may also constitute an important constraint on the member states' ability to conclude *inter se* agreements.[5] In this respect, whilst the member states retain the competence to enter into international agreements between themselves, loyalty restrains their freedom to do so when the conclusion of the agreement is liable to jeopardise the effectiveness of EU action. Building on this finding, the final paragraph suggests that applying the principle of loyalty to *inter se* agreements may also help conceptualise the relationship between this form of differentiation and enhanced

[2] It is debatable whether loyalty and sincere cooperation are actually synonyms or whether sincere cooperation only covers one dimension of the principle of loyalty. In this article, however, which does not aim at a comprehensive analysis of loyalty, the two terms will be used interchangeably, even though this implies a certain degree of simplification.

[3] *See*, for instance, J. Wouters, 'Constitutional Limits to Differentiation: The Principle of Equality', in B. de Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) p. 301; D. Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos 2004); A. Ott, 'Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?', in A. Ott and E. Vos (eds.), *Fifty Years of EU Integration: Foundations and Perspective* (T.M.C. Asser Press 2009) p. 113; E. Pistoia, *Limiti all'integrazione differenziata dell'Unione europea* [*Limits to Differentiated Integration of the European Union*] (Cacucci 2018).

[4] For an important exception, though only discussing the role of loyalty in constraining international agreements between member states, *see* A. Dimopoulos, 'Taming the Conclusion of Inter Se Agreements between EU Member States: The Role of the Duty of Loyalty', 34(1) *Yearbook of European Law* (2015) p. 286.

[5] This article only addresses loyalty as a constraint on the external action of the member states, whereas it does not consider loyalty-based obligations that bind EU institutions in the context of EU external relations.

cooperation in areas of shared competence. A short conclusion sums up the main findings.

Internal and external differentiation

Often referred to through metaphors – such as multi-speed Europe, variable geometry, integration à la carte[6] – the notion of differentiated integration encompasses those instances where not all member states participate in a given EU policy to the same extent and at the same time.[7]

Differentiated integration has long been a distinctive feature of the EU legal architecture. Although derogations from uniformity have always existed,[8] differentiation *stricto sensu* has become a regular component of the EU legal order since the Maastricht Treaty, which for the first time introduced potentially permanent opt-outs from wide policy areas[9] such as the Economic and Monetary Union[10] and social policy.[11] The Treaty of Amsterdam marked a further important step in the evolution of differentiation by introducing not only additional opt-outs, but also enhanced cooperation.[12] Whereas opt-outs are

[6] *See* A. Stubb, 'A Categorization of Differentiated Integration', 34(2) *Journal of Common Market Studies* (1996) p. 283; D. Thym, 'Competing Models for Understanding Differentiated Integration', in B. de Witte et al. (eds.), *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) p. 28.

[7] Differentiated integration should therefore be distinguished from flexibility in a wider sense, which encompasses a wide range of derogations from uniformity such as minimum harmonisation or the leeway left to the member states in the implementation of directives. On this distinction, *see* F. Tuytschaever, *Differentiation in European Union Law* (Hart 1999) p. 2-3. For a similar definition, emphasising the link between differentiated integration and the willingness of individual member states to participate in EU policies, *see* Stubb, *supra* n. 6, p. 283 (the author defines differentiated integration as 'a model of integration strategies that try to reconcile heterogeneity within the European Union and different groupings of member states to pursue an array of public policies with different procedural and institutional arrangements').

[8] *See* D. Hanf, 'Flexibility Clauses in the Founding Treaties, from Rome to Nice', in de Witte, Hanf and Vos (eds.), *supra* n. 3, p. 3.

[9] *See* D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', 30 *CMLR* (1993) p. 17; B. de Witte, 'The Elusive Unity of the EU Legal Order after Maastricht', in M. de Visser and A.P. van der Mei (eds.), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Intersentia 2013) p. 53 at p. 54.

[10] Protocols were negotiated granting an exemption to the United Kingdom (currently Protocol No. 15) and Denmark (currently Protocol No. 15).

[11] A Protocol on Social Policy authorised 11 out of the 12 member states 'to have recourse to the institutions, procedures and mechanisms of the Treaty' in order to adopt measures in the field of social policy. In fact, it introduced an opt-out for the United Kingdom. The Protocol, which was supplemented by an Agreement on Social Policy among the 11 participating member states, was repealed by the Treaty of Amsterdam.

[12] This mechanism, originally called 'closer cooperation', was renamed 'enhanced cooperation' by the Treaty of Nice. Although its essential features have remained unaltered, the rules on enhanced

specific, in that they totally or partially exempt individual member states or pre-defined groups of member states from participation in a certain policy area, enhanced cooperation is neither pre-determined with regard to participating member states nor confined to specific sectors.

Although it is often regarded as the most distinctive embodiment of the attempt to embed differentiation within the supranational framework,[13] enhanced cooperation is certainly not the most relevant form of differentiated integration in practice[14] and was never resorted to until 2010. Indeed, other tools of differentiation have been used extensively even after the introduction of enhanced cooperation. Not only have opt-out arrangements not disappeared, they have instead grown in number and scope.[15] By now major areas of EU action such as the Economic and Monetary Union and the Area of Freedom, Security and Justice are characterised by a high degree of differentiation, with some member states not participating at all or participating only to a very limited extent in large policy fields.

Furthermore, in addition to being pursued through specific mechanisms embedded in the EU framework, differentiated integration may also be the result of member states concluding international agreements between themselves.[16] Whereas enhanced cooperation and opt-out rules are regulated by EU primary law and internal to the EU legal order, *inter se* agreements represent a tool of external differentiation.[17]

While not all *inter se* agreements may be considered forms of differentiated integration, some of them certainly are, due to only some member states being contracting parties and to the close connection they present with the EU

cooperation have also undergone important modifications through Treaty revisions: for an overview, see S. Peers, 'Enhanced Cooperation: The Cinderella of Differentiated Integration', in de Witte et al. (eds.), *supra* n. 6, p. 76.

[13] Thym, *supra* n. 6, p. 41.

[14] Peers, *supra* n. 12, p. 76.

[15] B. de Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order', in de Witte et al. (eds.), *supra* n. 6, p. 11-15.

[16] On the phenomenon generally, *see* B. de Witte, 'Old-Fashioned Flexibility: International Agreements between Member States of the European Union', in G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?* (Oxford University Press 2000) p. 31; B. de Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in de Witte et al. (eds.), *supra* n. 3, p. 231; J. Heesen, *Interne Abkommen: völkerrechtliche Verträge zwischen den Mitgliedstaaten der Europäischen Union* (Springer 2015).

[17] For a similar partition, *see* M. Condinanzi, 'L'integrazione differenziata nell'ambito dell'Unione europea', in M. Vellano (ed.), *Il futuro delle organizzazioni internazionali – Prospettive giuridiche* [*The Future of International Organisations – Legal Perspectives*] (Editoriale Scientifica 2015) p. 405; Pistoia, *supra* n. 3, p. 13-19. For the purposes of this article, the concept of 'external differentiation' does not refer to agreements with third countries aimed to exporting parts of the EU *acquis* beyond EU borders, a phenomenon which is usually classified as a form of differentiated integration (*see*, for instance, Ott, *supra* n. 3, p. 118-120).

legal order.[18] For instance, the Schengen Agreements[19] were meant to complement the establishment of the internal market, since the abolition of internal border controls was instrumental to the enjoyment of free movement rights. A similar example of differentiated integration was the Treaty of Prüm, an agreement on cooperation in criminal matters concluded among seven Member States in 2005. Significantly, both the Schengen *acquis* – i.e. the two Schengen Agreements and the acts adopted on their basis – and the Treaty of Prüm were later incorporated into EU law.

Perhaps unexpectedly, *inter se* agreements have resurfaced in recent years as a technique of differentiated integration. The most prominent examples are the Treaty on stability, coordination and governance in the Economic and Monetary Union, or 'Fiscal Compact', and the Treaty establishing the European Stability Mechanism. Since not all member states are contracting parties and both agreements are closely connected with the rules on budgetary constraints and coordination of economic policies existing within the EU legal order, they represent clear cases of differentiated integration.[20]

In addition, resort to *inter se* agreements as a tool of differentiated integration has not been limited to the adoption of emergency-driven measures in the harshest phase of the sovereign debt crisis. Similar arrangements have been put in place in completely different policy areas, including the internal market. This was the case for the agreement establishing the Unified Patent Court, which is complementary to the regulations on the European patent with unitary effect,[21]

[18] *See* B. de Witte, 'An undivided Union? Differentiated integration in post-Brexit times', 55 *CMLR* (2018) p. 227 at p. 241: '*Inter se* agreements become a true alternative form of variable geometry when they serve the purpose of allowing a group of Member States to move European integration forward in the face of the opposition of other Member States'.

[19] In 1985 five Member States concluded at Schengen an agreement on the gradual abolition of checks at their common borders; other Member States later joined and the agreement was supplemented by an implementing convention in 1990. Both agreements and the acts adopted on their basis, jointly forming the so-called Schengen *acquis*, were later incorporated into the EU legal framework by the Treaty of Amsterdam.

[20] *See* A. Dimopoulos, 'The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity', in M. Adams et al. (eds.), *The Constitutionalization of Budgetary Constraints* (Hart 2014) p. 41.

[21] The application of Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection is made conditional upon the entry into force of the Agreement on a Unified Patent Court (*see* Art. 18 para. 2 of the Regulation). On the relationship between the two instruments *see* R. Baratta, 'The Unified Patent Court – What is the "common" trait about?', in C. Honorati (ed.), *Luci e ombre del nuovo sistema UE di tutela brevettuale* [*The EU Patent Protection. Lights and Shades of the New System*] (Giappichelli 2014) p. 101; C. Waldow, 'An Historical Perspective II: The Unitary Patent Package', in J. Pila and C. Waldow (eds.), *The Unitary EU Patent System* (Hart 2015) p. 33. The same condition is set for the entry into force of Council Regulation

and the agreement on the Single Resolution Fund, a key component of the Banking Union.[22]

Internal and external differentiation operate rather differently from one another. The contrast is especially stark between enhanced cooperation and *inter se* agreements. The Treaties regulate enhanced cooperation in detail,[23] making recourse to this instrument conditional upon compliance with a number of requirements, both substantive and procedural. For instance, enhanced cooperation is only available as a last resort, i.e. when action by the EU as a whole is not possible,[24] and its establishment requires a Council authorisation by qualified majority.[25] Its implementation must respect EU law and in particular the prohibition of discrimination, the integrity of the internal market and the economic, social and territorial cohesion.[26] Furthermore, some provisions protect the position of non-participating member states and encourage their participation after the enhanced cooperation has been initiated.

Acts adopted under the enhanced cooperation procedure form part of EU law and do not differ from other secondary law measures but for their scope of application, which is limited to the participating member states. As sources of the EU legal order, they enjoy primacy over national law and possibly direct effect in the legal orders of the member states. By contrast, agreements between member states, connected as they may be to the EU legal order, are still an external source. They are not part of EU law and thus enjoy neither primacy over national law nor direct effect, unless the domestic law of the member states so provides. Moreover, they cannot benefit from enforcement mechanisms which are specific to EU law, a factor that could further limit their effectiveness.[27]

(EU) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (*see* Art. 7 para. 2 of the Regulation).

[22] Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund. The Single Resolution Fund has been established by Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010. The purpose of the agreement is to provide the Single Resolution Fund with the financial resources necessary for its functioning. Contributions are collected from credit institutions on a national basis and subsequently transferred to the Single Resolution Fund by the contracting member states. The choice to resort to an intergovernmental agreement has been criticised: *see* F. Fabbrini, 'On Banks, Courts and International Law. The Intergovernmental Agreement on the Single Resolution Fund in Context', 21 *MJ* (2014) p. 444.

[23] The relevant provisions are Art. 20 TEU and Arts. 326-334 TFEU.

[24] Art. 20(2) TEU.

[25] Art. 329 TFEU.

[26] Art. 326 TFEU.

[27] On advantages and disadvantages of external differentiation compared to internal tools of differentiation, *see* Thym, *supra* n. 6, p. 49-52; de Witte, *supra* n. 18, p. 243-244.

In spite of such differences, enhanced cooperation and *inter se* agreements share a functional link, since they could potentially be alternative to one another. Recourse to either instrument is precluded in areas of EU exclusive competence. For obvious reasons, since enhanced cooperation is a mode of exercise of a Union competence,[28] it cannot be used where the EU has no competence at all. But in areas of shared competence, both enhanced cooperation and international agreements are in principle available. Actual practice suggests a general preference for acting within the framework of EU law, either out of commitment to the integration project or for practical reasons. However, there are also instances where member states have concluded international agreements between themselves despite the possibility to resort to EU law. Whether they have done so out of a legitimacy concern, under the assumption that the EU might not have competence or for reasons of mere convenience, it is clear that international agreements between member states can sometimes represent an alternative to internal instruments of differentiated integration. Against this backdrop, it is worth exploring the impact of loyalty on *inter se* agreements, and whether loyalty-based constraints may have a bearing on the choice between internal and external differentiation mechanisms.[29]

Loyalty and its relevance to differentiated integration

Although it has existed in the EU legal order since its inception, the principle of loyalty has gradually become, in the hands of the Court of Justice, a major factor in shaping the relationship between the Union and the member states.[30] Significantly, the Treaty rule on loyalty was defined as 'the single most dynamic provision in the Treaty'.[31]

Currently, this principle is enshrined in Article 4(3) TEU,[32] which distinguishes three dimensions of loyalty. In addition to evoking mutual

[28] *See* Art. 20(1) TEU, which states that enhanced cooperation is established 'within the framework of the Union's non-exclusive competences', by making 'use of its institutions' and 'by applying the relevant provisions of the Treaties'.

[29] *See* second last section *infra*.

[30] *See* J. Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Communities Institutions under Article 10 EC', 31 *Fordham Int Law J* (2007) p. 1483; O. Porchia, *Principi dell'ordinamento europeo* [*Principles of the EU Legal Order*] (Zanichelli 2008).

[31] L. Gormley, 'Some Further Reflections on the Development of General Principles of Law within Article 10 EC', in U. Bernitz et al. (eds.), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) p. 303.

[32] Art. 4(3) TEU reads as follows:

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

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

obligations of respect and assistance between the Union and the member states, thereby clarifying that loyalty also binds the EU institutions,[33] Article 4(3) TEU imposes on the member states some more precise duties. On the one hand, member states have an obligation – phrased in very broad terms – to ensure the attainment of obligations imposed by EU law. Furthermore, they are under a general duty to facilitate the exercise of EU competence. Arguably, the scope of this duty is even broader, since it does not require the existence of a specific obligation but merely stems from the principle of conferral. On the other hand, symmetrically to the positive duty to facilitate EU action, member states also have a negative duty of abstention from taking any measure liable to threaten the attainment of objectives set out in the Treaties.

A detailed analysis of the principle of loyalty and the obligations stemming from it would be beyond the scope of this article.[34] Some features of loyalty, however, intuitively suggest that this principle is relevant to differentiated integration.

First, loyalty is instrumental in achieving the Union's objectives. By making clear that the member states must cooperate for their attainment, the Treaty establishes a strong link between loyalty, on the one hand, and the effectiveness and uniform application of EU rules, on the other. This connection is apparent from seminal cases such as *von Colson*[35] and *Francovich*,[36] where the Court of Justice relied on loyalty to justify a duty of consistent interpretation and the liability of member states for breaches of EU law, respectively.

A second aspect that may be of interest for the study of differentiated integration is the connection between loyalty and unity. In the area of external relations, the Court of Justice has extensively relied on loyalty as a legal tool to ensure the unity of Union action.[37] Since differentiated integration, by its very

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

[33] Moreover, Art. 13(2) TEU adds an inter-institutional dimension to sincere cooperation, requiring EU institutions to 'practice mutual sincere cooperation'.

[34] For a detailed and systematic analysis of loyalty in the EU legal order, *see* M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014).

[35] ECJ 10 April 1984, Case 14/83, *von Colson*, para. 26.

[36] ECJ 19 November 1991, Joined Cases C-6/90 and C-9/90, *Francovich*, para. 36.

[37] For instance, in its Ruling 1/78 of 14 November 1978, the ECJ held that under Art. 192 of the Euratom Treaty member states were prevented from taking 'unilateral action […], even if it were collective and concerted action, [which] would have the effect of calling in question certain of the essential functions of the Community and in addition of affecting detrimentally its independent action in external relations' (para. 33); similarly, in Opinion 2/91 of 19 March 1993 it stated that a 'duty of cooperation […] results from the requirement of unity in the international representation of the Community' (para. 36). *See also* ECJ 14 July 1976, Joined Cases 3, 4 and 6/76, *Kramer*, para. 42-44; Opinion 1/94 of 15 November 1994, para. 108; Opinion 2/00 of 6 December 2001, para.

nature, represents a derogation from unity, loyalty could then be expected to operate as a source of constraints on differentiation.

Finally, in addition to being ancillary to other provisions with a view to ensuring their effectiveness, loyalty constitutes an autonomous source of obligations.[38]

These features suggest that loyalty may play a significant role in regulating differentiated integration, acting as a brake to the fragmentation that could ensue from the member states not all or not equally participating in a given policy field. In particular, the possibility to derive specific obligations from the general duty of loyalty suggests that differentiation may suffer further constraints than those deriving from conferral or from the supremacy of EU law.

Loyalty-based rules in internal differentiation

In every instance of internal differentiation, member states and EU institutions alike are bound by loyalty obligations under Article 4(3) TEU. Indeed, both enhanced cooperation, which is nothing but a special procedure for the exercise of a Union competence, and opt-out arrangements are entirely embedded in the EU framework. Therefore, all the obligations Article 4(3) TEU refers to are fully applicable. In particular, participating member states are required to ensure the full effectiveness of EU measures regardless of limitations in geographic scope that may derive from recourse to enhanced cooperation or from some member states being excluded by virtue of an opt-out. In addition, all member states must abstain from taking measures that could jeopardise the attainment of the Union's objectives, including those pursued through differentiation. This obligation applies not only to the participating member states, but crucially also to those non-participating in the measure, which should not hinder the implementation of actions they do not take part in. Finally, duties of mutual assistance and cooperation between institutions and member states are of particular importance

18. For a comprehensive overview of the case law on loyalty in the context of external relations, *see* C. Hillion, 'Mixity and coherence: The significance of the duty of cooperation', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited* (Hart 2010) p. 87; E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations', 47 *CMLR* (2010) p. 323; F. Casolari, 'The Principle of Loyal Cooperation: A "Master Key" for EU External Representation?', in S. Blockmans and R.A. Wessel (eds.), *Principles and Practice of EU External Representation*, CLEER Working Papers 2012/5; S. Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* [*International Agreements of EU Member States and Third States*] (Ledizioni 2018) p. 274-295; A. Thies, 'The Search for Effectiveness and the Need for Loyalty in EU External Action', in M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart 2018).

[38] *See* Klamert, *supra* n. 34, p. 234-241, with references to the relevant case law.

in the context of differentiation, in order to contain fragmentation and ensure the coherence of the EU *acquis*.

Loyalty and enhanced cooperation

The Treaty provisions on enhanced cooperation reflect the concern for the integrity of the EU legal order and expressly provide for specific duties deriving from loyalty. A loyalty-driven rationale is most evident in the symmetric obligations imposed by Article 327 TFEU. According to this provision, enhanced cooperation shall respect the competences, rights and obligations of non-participating member states. Conversely, non-participating member states are under a loyalty obligation to not impede implementation of the enhanced cooperation.

The last resort condition, stipulating that recourse to enhanced cooperation is only allowed when it has been established that the measure cannot be adopted by the EU as a whole,[39] is similarly based on loyalty.[40] It aims to prevent unnecessary recourse to differentiation, which could lead not only to fragmentation of the EU legal order but also to a marginalisation of some member states in EU decision-making processes.

Another provision that is evidently based on the duty of sincere cooperation is Article 328(1)(2) TFEU, which requires the Commission and the participating member states to promote the participation of as many member states as possible. This provision is a corollary of the more general principle of openness, also closely connected to loyalty,[41] which stipulates that participation in enhanced cooperation shall be open to all member states. These requirements are meant to ensure that enhanced cooperation remain a tool for the advancement of integration[42] and to prevent it from being abused in order to segregate a minority. In addition, although enhanced cooperation might well lead to permanent differentiation, encouraging non-participating member states to join at a later stage is instrumental in restoring unity if it is possible and practicable. Indeed, the whole Treaty framework on enhanced cooperation, combining a set of legal requirements subject to judicial review with the guarantee of openness, appears to be intended to lead to this result.[43]

Finally, the obligation to respect EU law (Article 326 TFEU) is equally rooted in and should be read in the light of the principle of loyalty. Whereas respect for

[39] Art. 20(2) TEU.

[40] Thym, *supra* n. 3, p. 247.

[41] *Ibid.*, p. 249.

[42] *See* Art. 20(1), second sentence, TEU: 'Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process'.

[43] *See* E. Pistoia, 'Enhanced cooperation as a tool to… enhance integration? *Spain and Italy v Council*', 51 *CMLR* (2014) p. 247 at p. 258.

the Treaties is an obvious and direct consequence of the hierarchy of sources and is required of any secondary law measure, regardless of the procedure followed for its adoption, acts implementing an enhanced cooperation also have to respect other secondary law measures and cannot derogate from them. Although this limitation may seem odd since enhanced cooperation does not generate a separate legal order over which EU law would enjoy primacy, it is justified by the need to limit the fragmentation potentially ensuing from recourse to differentiated integration and, more importantly, to protect the expectation of non-participating member states that existing EU measures adopted by the EU as a whole will continue to apply fully.

In conclusion, even a superficial analysis shows that loyalty is strongly embedded in the Treaty provisions on enhanced cooperation and that obligations arising from it are instrumental in preventing fragmentation and ensuring that differentiation does not result in encroachment on the rights of the non-participating member states.

Loyalty and opt-out mechanisms

The role of loyalty as a guiding principle underpinning differentiation mechanisms, if perhaps less evident, is equally important in the context of opt-out arrangements regulated in Protocols attached to the Treaties. Opt-out mechanisms respond to the concern of specific member states unwilling to commit to supranational integration in given policy areas. Although such arrangements may be construed in several different ways, their main feature is the total or partial exclusion of the member state concerned from participation in the relevant EU policy.

However, some of the existing opt-out protocols also provide for opt-in mechanisms, allowing the member states concerned to participate in EU legislation on a selective basis. Both the Schengen Protocol (Protocol No. 19 attached to the Treaties) and the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice (Protocol No. 21) follow this model.[44] They grant the United Kingdom and Ireland an opt-out from the Schengen *acquis* integrated into the European Union and from measures

[44] By contrast, neither Protocol No. 22 on the position of Denmark nor the provisions granting the United Kingdom and Denmark an opt-out from the adoption of the common currency provide for selective participation in EU acts covered by the exemption. In such cases, participation of the 'outs' can still be secured either through international agreements or through the establishment of special arrangements in secondary law instruments. An interesting example of the latter is provided in Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, which under certain conditions allows non-euro area Member States to participate in the new framework for banking supervision centered on the European Central Bank.

falling within the Area of Freedom, Security and Justice, respectively, but also foresee mechanisms for their participation in EU measures on a case-by-case basis.

Since granting to a member state the right to opt-in to individual measures inevitably involves a risk of fragmentation, both protocols make participation of the 'outs' subject to conditions and to articulated procedures.[45] Space limitations prevent a detailed discussion of these complex arrangements. Suffice it to note that both protocols attempt to strike a balance between ensuring the widest possible participation of the United Kingdom and Ireland, on the one hand, and the coherence and effectiveness of the relevant EU policy, on the other.[46] In addition, both protocols refer to the rules on enhanced cooperation. Protocol No. 19 defines the adoption of measures building on the Schengen *acquis* without the participation of Ireland or the United Kingdom as an enhanced cooperation, implying that the general Treaty rules on enhanced cooperation apply insofar as they are compatible with the provisions laid down in the Protocol.[47] Although Protocol No. 21 does not contain an equally general reference, it regulates the subsequent participation of the United Kingdom or Ireland in measures already adopted by referring to Article 331(1) TFEU, which lays down the procedure for joining an enhanced cooperation in progress.[48] Either through specific arrangements or by referring to the provisions on enhanced cooperation, the regime of opt-outs in the Area of Freedom, Security and Justice therefore heavily relies on loyalty-based obligations to reconcile the selective participation of those member states having opted out from that policy area with the coherence of the *acquis*.

Loyalty as a constraint on external differentiation

Loyalty-based constraints have a prominent role in regulating internal differentiation. It remains to be seen whether similar constraints also apply to the member states when they, instead of acting within the framework of EU law, resort to international law as an instrument of differentiation.

Although the EU treaties do not explicitly regulate or constrain the phenomenon of member states entering into international agreements between themselves,[49] some constraints have been identified by the Court of Justice or inferred by scholars based on general principles or on structural features of the EU

[45] *See* Art. 5 Protocol No. 19; Art. 3 and, for proposals amending existing acts, Art. 4a Protocol No. 21.

[46] Art. 5(3) Protocol No. 19; Art. 4a(2) Protocol No. 21.

[47] *See* ECJ 8 September 2015, Case C-44/14, *Spain* v *Parliament and Council*, para. 47.

[48] Art. 4 of Protocol No. 21.

[49] At least not in general terms. A specific limit is to be found in Art. 344 TFEU, which preserves the jurisdiction of the Court of Justice by prohibiting Member States from submitting disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

legal order.[50] Indeed, from the EU perspective, joint action of the member states concluding international agreements among themselves does not differ from unilateral action consisting in the adoption of legislation at the national level.[51] It can therefore be assumed that similar constraints apply.

Limits to external differentiation flowing from the nature of EU competence and from the primacy and autonomy of EU law

The first set of limits stems from the system of competences and particularly from the nature of certain competences attributed to the Union. Whenever the EU has exclusive competence, it is obvious that member states are barred from acting, whether individually by adopting internal legislation or collectively by concluding international agreements, as the Court of Justice has recognised in several cases.[52] In addition to EU competences that are *a priori* exclusive, and in a similar vein, pre-emption also limits the ability of member states to resort to *inter se* agreements, in the same way as it constrains their power to act unilaterally.[53]

Secondly, *inter se* agreements find a limit in the primacy of EU law. The Court of Justice has affirmed the supremacy of EU law over international agreements between member states ever since 1962.[54] The recent *Pringle* and *Ledra* rulings, which dealt with the relationship between the Treaty establishing the European Stability Mechanism and the EU legal order, are fully consistent with this finding. In the *Pringle* case, in order to assess whether the member states could legitimately conclude the agreement establishing the European Stability Mechanism, the

[50] *See notably* de Witte (2000), *supra* n. 16, p. 39-55; de Witte (2001), *supra* n. 16, p. 240-245; Heesen, *supra* n. 16, p. 197-376; Thym, *supra* n. 6, p. 52-55.

[51] *See* J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2009) p. 209; Heesen, *supra* n. 16, p. 233; de Witte, *supra* n. 18, p. 243.

[52] ECJ 30 June 1993, Joined Cases C-181/91 and C-248/91, *European Parliament* v *Council of the European Communities*, para. 16; ECJ 2 March 1994, Case C-316/91, *European Parliament* v *Council of the European Union*, para. 26; ECJ 27 November 2012, Case C-370/12, *Pringle*, para. 158.

[53] It has even been argued that 'a more severe pre-emption standard' should apply to joint actions of the Member States as compared to their unilateral action (de Witte (2000), *supra* n. 16, p. 41-42).

[54] ECJ 27 February 1962, Case 10/61, *Commission* v *Italy*, although specifying that Community law would take precedence 'in matters governed by the EEC Treaty' over agreements between Member States 'concluded before its entry into force'. In the later *Matteucci* case, the Court held that primacy also applies when the agreement concerns an area not governed by EU law but is liable to interfere with the application of EU measures (ECJ 27 September 1988, Case 235/87, *Matteucci*, para. 16). *See also*, in clearer and more general terms, ECJ 15 January 2002, Case C-55/00, *Gottardo*, para. 33, where the Court stated that 'when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required […] to comply with the obligations that Community law imposes on them'.

Court did not content itself with verifying that the member states had retained competence for the adoption of a permanent stability mechanism, but also examined whether the agreement was compatible with EU law.[55] In the *Ledra* judgment, it clarified the role of the Commission in the operation of the European Stability Mechanism and held that Union institutions are bound by the Charter of Fundamental Rights even when acting outside the EU framework. Despite the brevity of the reasoning and the Court's exclusive reliance on obligations specific to the Commission,[56] the Court's argument appears to be grounded on the more general premise that in case of conflict EU law enjoys primacy and must prevail over obligations under the international agreement. These judgments, however, make clear that primacy may only be invoked where EU law and the international agreement impose inconsistent obligations. Since it operates as a conflict rule, primacy only requires that *inter se* agreements do not contradict EU law. Hence the Court's emphasis on compatibility between EU law obligations and the Treaty establishing the European Stability Mechanism in *Pringle*.[57] Yet, as long as the agreement does not conflict with EU law, no further constraints can be derived from primacy.[58] As a consequence, whilst it may limit the application of an agreement inconsistent with EU law, primacy may not be relied upon to prevent the member states from concluding it.

A further source of constraints is the autonomy of the EU legal order, as the recent *Achmea* judgment shows.[59] On that occasion, the Court held that Article 8 of the Dutch-Slovak investment treaty, which allowed for investment disputes to be submitted to an arbitral tribunal external to the EU judicial system, called into question 'the preservation of the particular nature' of EU law.[60] Admittedly, the relationship between autonomy and primacy is yet rather unclear. Defined by one author as 'a mechanism for establishing a kind of "external" primacy of EU law',[61] autonomy is arguably a general principle of the Union legal order,[62] as such prevailing over national law. However, in *Costa* v *ENEL* the autonomy of the Community featured in the Court's reasoning as the very foundation of

[55] *Pringle*, *supra* n. 52, paras. 108-147.

[56] ECJ 20 September 2016, Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising*, paras. 57-59.

[57] *See* B. de Witte, T. Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*', 50 *CMLR* (2013) p. 805 at p. 829.

[58] *See* Dimopoulos, *supra* n. 4, p. 286.

[59] ECJ 6 March 2018, Case C-284/16, *Achmea*, para. 32-37.

[60] *Achmea*, *supra* n. 59, para. 58.

[61] A. Dimopoulos, 'Achmea: The principle of autonomy and its implications for intra and extra-EU BITs', *EJIL Talk*, 27 March 2018, < www.ejiltalk.org/achmea-the-principle-of-autonomy-and-its-implications-for-intra-and-extra-eu-bits/ > , visited 8 July 2018.

[62] Autonomy has been defined as 'a systemic or constitutional principle derived from the fundamental objectives of the EU legal system' (M. Klamert, 'The autonomy of the EU (and of EU law): Through the kaleidoscope' 42 *ELR* (2017) p. 815 at p. 816-817).

primacy.[63] Aside from the theoretical discussion, the Court appears to refer to autonomy where the preservation of fundamental, structural features of the EU legal order are at stake,[64] rather than as a mechanism to solve normative conflicts.

Loyalty as a source of further constraints on external differentiation

In addition to the abovementioned limits, further constraints arguably stem from the principle of loyalty. On the one hand, loyalty may be instrumental in ensuring the primacy and the autonomy of EU law. On the other hand, and more importantly, loyalty is also the source of stand-alone obligations.

In certain instances, loyalty complements other obligations imposed by the EU Treaties. When the application of an *inter se* treaty may jeopardise the fulfillment of obligations arising out of EU law, loyalty imposes on the member states, as the Court of Justice held in *Matteucci*, 'a duty to facilitate the application of the [EU law] provision and, to that end, to assist every other member state which is under an obligation under [EU] law'.[65] In such cases, loyalty is instrumental in ensuring the primacy of EU law.

Based on some cases where the Court of Justice emphasised the need for effective mechanisms aimed at ensuring that the effectiveness of EU measures is not impaired by international obligations of the member states,[66] it has been argued that loyalty also requires the inclusion of conflict clauses in *inter se* agreements, making their application conditional upon compatibility with EU law.[67] Yet, since obviously neither the primacy of EU law nor the loyalty-based

[63] ECJ 15 July 1964, Case 6/64, *Costa v ENEL* ('It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question').

[64] A close link between autonomy and the 'essential' or 'specific' characteristics of EU law is established, in particular, in Opinion 2/13 of 18 December 2014 (para. 167 and 174) and in the *Achmea* judgment, *supra* n. 59 (para. 33 and 35).

[65] *Matteucci*, *supra* n. 54, para. 19.

[66] ECJ 3 March 2009, Case C-205/06, *Commission* v *Austria*; ECJ 3 March 2009, Case C-249/06, *Commission* v *Sweden*; ECJ 19 November 2009, Case C-118/07, *Commission* v *Finland*.

[67] Dimopoulos, *supra* n. 4, p. 313. Similar clauses are indeed common. For instance, Art. 2(2) of the Treaty on Coordination, Stability and Governance in the Economic and Monetary Union provides that the agreement 'shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union'. Although many other *inter se* agreements include similar provisions, their scope and wording are not always identical. For instance, the priority rule contained in the ESM Treaty is more narrowly phrased and somewhat ambiguous. It provides that memoranda of understanding negotiated on behalf of the ESM 'shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in

duty to ensure its effectiveness are dependent upon express confirmation in the agreement, the lack of a compatibility clause would not as such amount to a breach of EU law.[68] Although it is true that the effects of international agreements in a member state are a matter left to domestic law, nothing prevents EU law from requiring any member state body to disregard a rule of national law that could jeopardise the effective application of EU measures.

The Court of Justice has also established a link between autonomy and loyalty. It has tied both the overall functioning of the EU judicial system[69] and its exclusive jurisdiction under Article 344 TFEU[70] to the member states' duties under Article 4(3) TEU, holding that an infringement of the autonomy of the EU legal system also amounts to a breach of the principle of sincere cooperation.[71] This suggests that member states are under a loyalty-based obligation to terminate *inter se* agreements that may represent a threat to the autonomy of the EU legal order.[72]

Loyalty as a constraint on member states' action in external relations

In addition to being ancillary to primacy and autonomy, however, loyalty is also a source of standalone obligations, which arise regardless of the existence of substantive incompatibilities between EU law and an agreement between member states. In relation to *inter se* agreements, those obligations arguably fulfil a preventive function, imposing constraints on their conclusion rather than mandating a certain conduct after a conflict has materialised.

The exact determination of loyalty-based constraints on the conclusion of international agreements between member states is a difficult task. However, the case law of the Court of Justice on external relations may provide a useful source of inspiration. In this area, the Court has identified loyalty-based limits to the unilateral action of the member states, holding that in the exercise of their own external competence they must not jeopardise the unity of the Union external

particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned'.

[68] *Cf* S. van den Bogaert and V. Borger, 'Differentiated Integration in EMU', in de Witte et al. (eds.), *supra* n. 6, p. 209 at p. 229-230.

[69] *See*, for instance, Opinion 2/13, *supra* n. 64, para. 173.

[70] *See* ECJ 30 May 2006, Case C-459/03, *Commission* v *Ireland (MOX Plant)*, para. 169.

[71] *Achmea*, *supra* n. 59, para. 58.

[72] *See* B. Hess, 'The Fate of Investment Dispute Resolution after the *Achmea* Decision of the European Court of Justice', Max Planck Institute Luxembourg for Procedural Law Research Paper Series No. 2018 (3), p. 10; F. Munari and C. Cellerino, 'EU Law is Alive and Healthy: The Achmea Case and a Happy Good-bye to Intra-EU Bilateral Investment Treaties', *SIDIBlog*, 17 April 2018, < www.sidiblog.org/2018/04/17/eu-law-is-alive-and-healthy-the-achmea-case-and-a-happy-good-bye-to-intra-eu-bilateral-investment-treaties/>, accessed 8 July 2018.

representation. To this effect, loyalty imposes obligations of abstention and consultation.

The Court established the existence of such duties in the early 1980s.[73] Only a quarter of century later, however, did it more precisely define their scope in two parallel cases arising out of infringement proceedings against Germany and Luxembourg (*Inland Waterways* cases). The member states concerned had concluded with third countries agreements on inland waterways without coordinating their action with the Commission, although the latter had been authorised by the Council to negotiate the agreement on behalf of the Union. The Court held that by acting unilaterally without consulting with the Commission, Germany and Luxembourg had disregarded the existence of a common Union position, thereby endangering the unity and coherence of EU external action. This amounted to a breach of the duty of sincere cooperation.[74]

The reasoning developed in the *Inland Waterways* cases was confirmed and further enriched in the later *PFOS* judgment.[75] The case related to the inclusion of a chemical compound (perfluoroctane sulfonate, PFOS) into Annex A to the Stockholm Convention on Persistent Organic Pollutants. Under the Convention, which was concluded as a mixed agreement, the contracting parties must adopt measures restricting production, use, import or export of substances listed in the annexes. When Sweden unilaterally proposed the addition of PFOS to the list, although no consensus had at that time emerged at the Union level on whether that substance should be included in the annex, the Commission started infringement proceedings, complaining that Sweden had compromised the unity of EU external representation. The Court shared the Commission's view and held that under the duty of loyalty Sweden had to abstain from unilateral action, since the latter was liable to jeopardise the implementation of a common EU strategy.[76]

The facts of the *PFOS* case significantly differ from those of the *Inland Waterways* cases. Whereas in the latter cases the Commission had a clear mandate to negotiate the agreement on behalf of the Union based on a Council decision, in *Commission* v *Sweden* the Court was confronted with a more complex scenario. Since no Council decision had been adopted, whether a common strategy existed was less clear and had to be assessed on the basis of an analysis of preparatory

[73] *See* ECJ 5 May 1981, Case 804/79, *Commission* v *United Kingdom*, para. 28.

[74] ECJ 2 June 2005, Case C-266/03, *Commission* v *Luxembourg*, para. 60; ECJ 14 July 2005, Case C-433/03, *Commission* v *Germany*, para. 66.

[75] ECJ 20 April 2010, Case C-246/07, *Commission* v *Sweden*. For a detailed analysis, *see* M. Cremona, 'Case C-246/07, *Commission* v *Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010', 47 *CMLR* (2010) p. 1639; G. De Baere, '"O, Where is Faith? O, Where is Loyalty?" Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the Light of the PFOS Case', 36 *ELR* (2011) p. 405.

[76] *Commission* v *Sweden*, *supra* n. 75, para. 103-104.

works. After carefully conducting such review, the Court concluded that the existence of a common Union strategy could indeed be inferred from Council conclusions and other policy documents.[77] Although no formal decision had been adopted, the matter had been referred to and discussed in the Council. In the Court's view, the involvement of the Council demonstrated, at least, that the question was intended to be decided at EU level. The cases also differ as to the constraints on member states' external powers. In the *Inland Waterways* cases, the Court only emphasised that the member states had to inform and consult with the institutions. By contrast, in the *PFOS* case it made clear that the only way to preserve the unity of Union external representation was for the member states to abstain from unilateral action.

The relevance of the case law on external relations for inter se agreements

It is argued here that the same rationale should apply by analogy to the conclusion of *inter se* agreements, posing a preventive limit to recourse to international law as an instrument of differentiation.

Despite the different nature and intensity of complications they may give rise to, both *inter se* agreements and agreements with third countries are manifestations of the member states' treaty-making power as subjects of international law. Logically, loyalty should therefore constrain their freedom to enter into either type of agreement.[78]

One could object that since agreements between Member States are, like their domestic law, subject to the primacy of EU law, there would be no need for preventive constraint. Unlike international agreements with third countries, they would yield to subsequently adopted EU law. Their conclusion would therefore not affect the future exercise of Union competence. However, this argument is not convincing as a general claim. The conclusion of *inter se* agreements could still *de facto* jeopardise the future development of EU law or affect institutional balance.[79] In particular, this would occur where their enforcement is entrusted to judicial bodies outside the EU judicial system. The *Achmea* saga is a case in point. In its judgment, the Court held that international dispute settlement mechanisms contained in intra-EU bilateral investment treaties are incompatible with EU law. By not amending or terminating their agreements and by leaving in place those dispute settlement mechanisms, member states breach their obligations under the EU Treaties. However, since arbitral tribunals might not consider themselves bound to give effect to the primacy of EU law or to preserve its autonomy vis-à-vis

[77] *Ibid.*, para. 89.

[78] *Cf* Dimopoulos, *supra* n. 4, p. 304.

[79] *See* P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 *ELR* (2012) p. 231 at p. 241-242; Dimopoulos, *supra* n. 20, p. 62.

international law, the enforcement of such obligations could encounter additional hurdles that would not arise in case of a conflict between EU law and the domestic law of a member state.[80] This suggests that the rationale for constraining the exercise of the member states' treaty-making power may equally apply in the context of purely *inter se* agreements.

If the analogy is correct, then the lesson for *inter se* agreements to be drawn from the *Inland Waterways* and *PFOS* cases is that if a Union strategy exists, loyalty may at least temporarily prevent member states from assuming international commitments between themselves even absent an actual interference with EU measures. This simple statement, however, hides a number of open questions.

In the *Inland Waterways* cases and in *Commission* v *Sweden*, at stake was the existence of a common position that should form the basis for negotiations with third countries. In external relations, individual action by the member states is alternative to, or competing with, Union action, and may therefore jeopardise the unity of the Union external representation. In the context of differentiated integration, the alternative is not between Union action and member states' action on the international scene, but between *inter se* agreements and EU legislation. Therefore, the content of loyalty duties that the Court identified needs to be translated from the external to the internal dimension.

The most delicate and controversial issue in this respect is to establish when a duty of abstention arises. In the external relations cases, the existence of a common strategy is required, although it may not necessarily be expressed in a formal Council decision. Yet, the *PFOS* case suggests that some involvement of the Council is a necessary condition for a common strategy to come into existence. This requirement is perfectly understandable in external relations, given the pivotal role attributed to the Council in the procedure for the conclusion of international agreements set forth in Article 218 TFEU. It is for the Council to authorise the opening of negotiations and it is again for the Council to approve the conclusion of the agreement. Therefore, a mere initiative of the Commission is not enough to trigger a duty of abstention. But how does this reasoning apply on the internal plane? In the context of legislative procedures, would the presentation of a Commission proposal be sufficient to prevent the lawful conclusion of an *inter se* agreement on the same subject matter?

[80] In the very first intra-EU investment case decided after the *Achmea* ruling, the arbitral tribunal opted for a very restrictive interpretation of the judgment, holding that it did not apply to a multilateral agreement such as the Energy Charter Treaty and had therefore 'no bearing' upon the dispute (*Masdar Solar & Wind Cooperatief U.A.* v *Kingdom of Spain*, ICSID Case No. ARB/14/1, para. 679-683). Although this was not an open rejection of the Court's ruling, it suggests that international arbitral tribunals may not be the keenest supporters of the primacy and autonomy of EU law, to say the least.

In keeping with the external relations analogy, it has been argued that the member states' obligations should be graduated according to the intensity of the legislative preparatory effort.[81] While the tabling of a legislative proposal alone would not oblige the member states to abstain from resorting to international law, it would at least trigger a duty to inform and consult with the Commission. Only when the proposal has been discussed in the Parliament and the Council would then a duty of abstention arise. This is uncertain, however, because abstention and consultation may look as two sides of the same coin rather than completely separate obligations.[82] Indeed, as long as it has not fully coordinated its action with the EU institutions, a member state should arguably also abstain from undertaking international obligations. In this respect, imposing a duty of abstention may be functional to a better coordination of Union and member state action.

Another open question relates to the duration of the duty of abstention. If such duty is instrumental in letting the Union speak with one voice (the unity of external representation), it should logically cease to apply once it has become clear that the Union will not eventually be able to act. The exact limits of this obligation, however, are difficult to determine, both when it comes to the adoption of internal rules and when external action is at stake. Only based on a careful case-by-case analysis is it possible to assess whether action at the EU level is foreseeable in a reasonable future. As will be argued in the next paragraph, criteria for such assessment could be inferred, by analogy, from provisions regulating enhanced cooperation.

Rethinking the relationship between internal and external differentiation in the light of loyalty

In the previous paragraphs, enhanced cooperation and *inter se* agreements between member states have been discussed separately, in order to assess whether and to what extent they encounter constraints based on the principle of loyalty. The finding that loyalty plays an important role not only within the framework of enhanced cooperation, but also as a limit to the ability of member states to enter into international agreements between themselves suggests that loyalty could also shed light on the relationship between internal and external differentiation.

It has already been mentioned that enhanced cooperation and *inter se* agreements can sometimes be alternative to each other. While this is not always the

[81] Dimopoulos, *supra* n. 4, p. 314.

[82] *See* A. Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?', 36 *ELR* (2011) p. 524 at p. 533; Casolari, *supra* n. 37, p. 18.

case, since enhanced cooperation cannot be established in areas where the Union has no competence, the two instruments are potentially alternative whenever the subject matter falls within an area of shared competence. In this case, member states may resort to enhanced cooperation provided that they are at least nine and that they respect the requirements and follow the procedures set forth in the Treaties.

Some authors have argued, either on the basis of loyalty[83] or on the basis of the principle of institutional balance,[84] that after the introduction of enhanced cooperation the members should be barred from resorting to international agreements altogether whenever the subject matter falls within the scope of shared competence, where enhanced cooperation would be available.

As such, this proposition is not convincing. First, it is not supported by the wording of Article 20(1) TEU,[85] which suggests that enhanced cooperation is not an exclusive venue for differentiated integration.[86] Neither can the exclusivity of enhanced cooperation be justified on the basis of the *lex specialis* argument, since the relationship between the Treaty provisions on enhanced cooperation and international agreements between member states is not one between a *lex specialis* and a *lex generalis*.[87] Finally, while in *Pringle* the Court carefully avoided ruling on the relationship between the two instruments,[88] in an earlier case it established that member states may conclude *inter se* agreements in areas of non-exclusive EU competence, such as development aid.[89] Although the judgment predates the introduction of enhanced cooperation, the assumption that the Treaties do not require cooperation between member states to take place within the EU institutional framework holds true regardless of whether action by the Union as a whole or enhanced cooperation is considered.

[83] *See* V. Constantinesco, 'Les clauses de coopeération reinforcée', 33 *RTDE* (1997) p. 751 at p. 755.

[84] *See* F. Fabbrini, *Economic Governance in Europe. Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016) p. 197-199.

[85] 'Member States which *wish* to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences *may* make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties […]' (emphasis added).

[86] *See* C.-D. Ehlermann, 'Différenciation, flexibilité, coopération renforcée: les nouvelles dispositions du traité d'Amsterdam', *RMUE* (1998) p. 53 at p. 66; G. Gaja, 'How Flexible Is Flexibility Under the Amsterdam Treaty?', 35 *CMLR* (1998) p. 855 at p. 869.

[87] *Cf* Klamert, *supra* n. 34, p. 295.

[88] Although the Court of Justice did not address this point, A.G. Kokott argued that the availability of enhanced cooperation as such does not provide a bar to the conclusion of international agreements between member states (View of A.G. Kokott delivered on 26 October 2012, Case C-370/12, *Pringle*, para. 174).

[89] ECJ 30 June 1993, Joined Cases C-181/91 and C-248/91, *European Parliament* v *Council of the European Communities and Commission of the European Communities*.

Nevertheless, admitting that member states enjoy complete freedom in choosing between cooperating within or outside the EU legal order leads to paradoxical consequences.[90] Since enhanced cooperation is subject to stricter conditions, an incentive would be created to resort to international agreements, thereby 'outsourcing' EU law,[91] for the very purpose of escaping the procedural hurdles and the substantive constraints that the Treaties impose on internal differentiation.[92]

Conceivably, a more balanced solution could be achieved by resorting to loyalty as a guiding principle. It has been argued in this article that loyalty obliges the member states to refrain from concluding *inter se* agreements when their action is liable to jeopardise the implementation of a Union strategy. In the context of external relations, what is protected by loyalty is the unity of EU external representation. Similarly, at the internal level, a loyalty-based duty of abstention is instrumental in allowing a common strategy to be implemented through the adoption of EU legislation.

In assessing whether a Union strategy can actually be implemented, enhanced cooperation should be considered. As enhanced cooperation takes place within the EU institutional framework, it should be prioritised over recourse to *inter se* agreements if it offers a viable alternative. This solution is premised on the principle of loyalty, since enhanced cooperation, being embedded in the EU institutional framework and subject to detailed conditions safeguarding the integrity of the EU legal order and the position of non-participating member states, could be regarded as in principle less disruptive than international agreements outside EU law.

Assessing whether enhanced cooperation actually offers an alternative may only be done on a case-by-case basis, but a useful criterion could be drawn from the last resort condition set forth in Article 20(2) TEU. Although it regulates the relationship between enhanced cooperation and 'ordinary' procedures, the requirement could apply to *inter se* agreements by analogy. This would create an order of priorities.[93] If a common Union strategy exists to adopt a certain measure,

[90] *Cf* L.S. Rossi, 'Intégration différenciée au sein et à l'extérieur de l'Union: de nouvelles frontières pour l'Union?', in G. Amato et al. (eds.), *Genèse et destinée de la Constitution européenne* (Bruylant, 2007) p. 1219 at p. 1227.

[91] *See* E. Pistoia, 'Outsourcing EU Law While Differentiating European Integration: The Unitary Patent's Identity in the Two "Spanish Rulings" of 5 May 2015', 41 *ELR* (2016) p. 711 at p. 716.

[92] *See* Gaja, *supra* n. 86, p. 870; F. Amtenbrink and D. Kochenov, '*Towards a More Flexible Approach to Enhanced Cooperation*' in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press 2009) p. 181 at p. 183.

[93] For a similar view, albeit inferred from the *Pringle* judgment, *see* L.S. Rossi, 'The Principle of Equality among Member States of the European Union', in L.S. Rossi and F. Casolari (eds.), *The Principle of Equality in EU Law* (Springer 2017) p. 3 at p. 23. An apparently more nuanced position

it should first be assessed whether the measure can be adopted by the Union as a whole. Should that prove impossible, it should then be verified whether the measure can be adopted under enhanced cooperation. Only as a means of last resort, when neither recourse to the ordinary legal bases nor enhanced cooperation offer prospects of succeeding, would the member states be free to conclude an international agreement between themselves.

On the one hand, by proceduralising the path for the conclusion of *inter se* agreements, the proposed solution could prevent or at least discourage recourse to external arrangements where action can be taken within the Union framework. On the other hand, it would still provide a margin of flexibility, as it would not amount to an outright prohibition of *inter se* agreements in areas of shared competence. Two remarks are in order in this respect. First, the analogy with the external relations cases cited above suggests that loyalty-based obligations of information, consultation and abstention only arise when the prospective agreement impacts on an existing common strategy at EU level. In keeping with the analogy, this would only be the case where some preparatory act for the adoption of Union legislation exists. By tabling a legislative proposal, the Commission could temporarily block the conclusion of the agreement and force the member states to discuss the issue in the Council with a view to assessing whether the measure can be adopted within the Union framework, with or without the participation of all member states.[94] If the Commission does not consider it worthwhile, however, and does not exercise the initiative, the member states would remain free to act outside the EU legal order. Second, the application by analogy of the last resort condition would not impose an unduly severe restraint, since this requirement has so far been interpreted quite liberally: the Court of Justice has held that the last resort condition is satisfied whatever the grounds preventing an agreement from being reached, that no formal vote in the Council is required to conclude that the adoption of legislation for the Union as a whole is impossible in the foreseeable future and that the Council enjoys significant discretion in carrying out this assessment.[95]

Finally, one might wonder whether the last resort condition is the only requirement stipulated for enhanced cooperation that may apply analogically to *inter se* agreements. Whereas there is obviously no reason to apply specific procedural provisions such as those concerning the minimum number of participating member states or the authorisation procedure, the answer is less clear

is taken by Thym, who argues that based on loyalty member states could be expected to 'investigate the feasibility' of internal differentiation before resorting to international law (Thym, *supra* n. 6, p. 55).

[94] *Cf* Dimopoulos, *supra* n. 4, p. 314-315.

[95] *Spain and Italy* v *Council*, para. 53.

as regards the principle of openness. In this respect, loyalty could provide the basis for arguing that no member state should be arbitrarily excluded from joining *inter se* agreements closely connected to EU law, which should in principle be open to all member states unless restrictions are justified based on objective factors.

Conclusion

It is evident from the foregoing that the principle of loyalty may act as a constraint on differentiated integration. On the one hand, most mechanisms of differentiation explicitly regulated by primary law provide for specific loyalty-based obligations, which seek to protect the effectiveness of EU law-making and the coherence of the *acquis*, while at the same time preserving the rights and obligations of non-participating member states. On the other hand, absent guidance in EU primary law, it is harder to retrace the exact implications of loyalty for international agreements between member states. This article has sought to bridge the gap by drawing an analogy with the case law of the Court of Justice on external relations, an area where loyalty is capable of imposing duties of abstention and consultation on the member states. The broad conclusion drawn is that loyalty, in addition to constraining recourse to differentiation by means of international agreements between member states, may also help conceptualise the relationship between differentiated integration within and outside the framework of the EU Treaties.