
The external relations of the European Union and its Member States

Lessons from recent developments in the
economic sphere

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Introduction

Since the creation of the European project, the external relations of the European Union (EU) and its Member States have been central to their development at the international level. A striking feature of international relations today is the increasing number of international organisations and international agreements, as well as the increasingly wide range of matters they touch upon. This naturally leads the EU and its Member States to make active use of their external powers. If the EU has been granted many external powers – through the treaties and case law – the Member States may still pursue autonomous actions provided they do not infringe EU law.

In this context, it became necessary to clarify the rules regulating these powers in order to determine with more certainty whether it was for the Union or for the Member States to act in a particular situation. The Lisbon Treaty brought such clarification, but it did not solve all the problems raised by the conclusion of international agreements and the participation in international organisations. The competence may differ depending upon the matters concerned leading sometimes to the participation of both the EU and the Member States. And even in situations where the EU has exclusive competence, it may be that, in practical terms, it is impossible for the EU institutions to fulfil their role. In such a situation, the Member States will have to take over, complying however with the position defended by the Union. The complexity of the rules regarding the conclusion of international agreements reflects a lack of clarity which, in turns, impacts upon the ability of the Union to speak with one voice

and the transparency of its position. Despite such complexity, the EU and the Member States still have to negotiate and conclude agreements with third countries or international organisations on a regular basis. It is all the more complicated in sectors which present strategic importance for the Member States and the EU and which therefore are already subject to heavy national and/or EU regulation.

External relations of the EU and the allocation of competences

Article 47 of the Treaty on the European Union (TEU) provides that the Union has legal personality. Despite a lack of reference in the treaties to the Union's international personality, the Court of Justice of the European Union (CJEU or the Court) already recognised it in its famous *AETR* judgment which states that 'in its external relations the [Union] enjoys the capacity to establish contractual links with third countries over the whole field of objectives [of the Treaties]'.¹ The treaties contain various legal bases for the conclusion by the EU of international agreements with third countries and international organisations. However, the ability of the EU to conclude international agreements is complicated first by the rules regulating the allocation of competences between the Union and its Member States, and by the remaining power of the latter to conclude such agreements.

The exclusive competence of the Commission to conclude international agreements

The Lisbon Treaty, for the first time, lists the exclusive competences of the Union. Article 3(2) TFEU indicates that the EU has an exclusive competence for the conclusion of international agreements. Article 216 TFEU reiterates the exclusive competence of the Union to 'conclude agreements 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'. Such agreements are binding upon the institutions of the Union and on its Member States.

¹ Case 22/70, *Commission v. Council – (AETR)* [1971] ECR 263, para. 14.

When a legislative act of the Union expressly provides for the exclusive competence of the Union – such as for the Common Commercial policy² – this competence exists ‘even if the specific matters covered by those agreements are not yet, or are only very partially, the subject of rules at [the EU] level’.³

In addition to these express competences, Article 216 also foresees a competence to act arising from its internal competence. Such a possibility flows from the *AETR* judgment, in which the CJEU held that, even if the EU Treaties did not expressly confer a competence upon the EU to conclude an international agreement in a particular field, such a competence could also flow from other provisions of the Treaties and from measures adopted by the EU institutions. The Court, considering that the attainment of the objective pursued by those rules and the objectives of the Treaties themselves would be compromised if Member States were free to adopt international agreements affecting EU rules,⁴ held that ‘each time the [EU], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules’.⁵ This judgment establishes a parallelism between the internal and external competences of the EU insofar as the EU institutions have exercised their competence at the internal level by adopting common rules to implement a common policy. This condition has been given a broad interpretation as it also includes the adoption of rules outside the scope of a specific common policy. In Opinion 2/91, the Court stressed that the authority of the *AETR* decision ‘cannot be restricted to instances where the [Union] has adopted [EU] rules within the framework of a common policy. In all areas corresponding to the objectives of the Treaty, Article [4(3) TEU] requires Member States to facilitate the achievement of the [Union]’s tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.’⁶

However in Opinion 1/94,⁷ the Court adopted a more restrictive view requiring that the policy area in question be fully harmonised at EU level

² Art. 207 Treaty of the Functioning of the European Union (TFEU) (ex-Art. 133 TEC), [2010] OJ C83/49.

³ Case C-459/03, *Commission v. Ireland* [2006] ECR I-4635, paras. 94–5.

⁴ Case C-266/03, *Commission v. Luxembourg* [2005] ECR I-4805, para. 41.

⁵ *AETR*, para. 17. ⁶ Opinion 2/91 [1993] ECR I-1061, paras. 10–1.

⁷ Opinion 1/94 – WTO Agreement [1994] ECR I-5267.

for it to become an exclusive competence. But subsequently the Court held that the exclusive competence of the EU institutions could flow from the fact that an international agreement fell into an area largely covered by EU rules, in particular in 'areas where there are harmonising measures'.⁸

Even where the EU has adopted such common rules, it will only benefit from an exclusive competence to conclude international agreements if a Member State's action 'might affect those rules or alter their scope'.⁹ In Opinion 2/91, the Court adopted an extensive interpretation of this condition, considering it is fulfilled when the commitments arising from an international agreement were merely liable to affect EU rules even though there was no contradiction between the international agreement and the Directives at stake.¹⁰ The Court went even further when it ruled that a mere proposal submitted by Greece to the International Maritime Organisation (IMO), which initiated a procedure potentially leading to the adoption by the IMO of new rules, had an effect on EU rules. According to the Court, Greece 'took an initiative likely to affect the provisions of the Regulation'.¹¹

The ability of the Member States to enter into international agreements

Article 2(1) TFEU provides that '[w]hen 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'. Such exclusivity means that the competence has been entirely transferred by the Member States to the Union. Any action by a Member State in the same area is *a priori* in conflict with EU law. Yet, EU Member States have continued to conclude international agreements in their own name with or without the Union. Although they may appear extraneous to EU law, such agreements are still relevant for the Union.¹²

Article 4(2) provides a non-exhaustive list of areas in which the Union does not hold an exclusive competence, but shares its competence with the Member States, including, *inter alia*, the internal market, environmental

⁸ Opinion 1/03 – Lugano Convention [2006] ECR I–1145, para. 118.

⁹ AETR, para.17. ¹⁰ Opinion 2/91, paras. 9, 25–6.

¹¹ Case C-45/07, *Commission v. Greece* [2009] ECR I-00701, paras. 21–3.

¹² Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States', *Fordham International Law Journal*, 34 (2011), 1310.

protection, transport and energy. Regarding the external relations of the EU, when a specific field falls within a shared competence, it is likely to lead to the conclusion of a mixed agreement signed by the Union and the Member States on the one hand and third parties on the other. The category of shared external competence is broad and encompasses different situations. This may result from an explicit provision in the treaty or from the fact that the agreement covers different matters falling both within EU and Member States competences. In these areas, Member States may only exercise their power to the extent that the Union has not exercised – or ceased to exercise – its competence. A Protocol on the exercise of shared competences annexed to the Lisbon Treaty specified that ‘when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area’.¹³ This leaves a certain margin for Member States’ intervention.

Agreements concluded by the Member States without the participation of the Union cover a broad range of situations, such as when agreements were concluded by the Member States before they adhered to the Union and when agreements concern a matter falling outside the competence of the EU. Such agreements are generally not binding on the EU and the CJEU has no jurisdiction to give rulings on their interpretation. However, the Union is bound by them whenever they are integrated into the EU legal order through an express ‘*renvoi*’ or when the EU has taken over the powers formally vested in the Member States.¹⁴ Moreover, in a situation where the Union itself is not bound by an agreement but all the Member States are, the Court indicated that the latter fact is ‘liable to have consequences for the interpretation of . . . the provisions of secondary law which fall within the field of application of [the international agreement]’.¹⁵ This finding is based on ‘the customary principle of good faith, which forms part of general international law, and of Article [4(3) TEU]’ considering that it was ‘incumbent upon the Court to interpret those provisions taking account of [the international agreement concerned]’.¹⁶

Even where an agreement concerns a matter falling within the exclusive competence of the EU, Member States may still act, provided

¹³ Protocol (No. 25) on the Exercise of Shared Competence [2010] OJ C83/307.

¹⁴ See e.g. Case C-439/01, *Libor Cipra and Vlastimil Kvasnicka v. Bezirkshauptmannschaft Mistelbach* [2003] ECR I-745, para. 24.

¹⁵ Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owner (Intertanko) and others v. Secretary of State for Transport* [2008] ECR I-4057, para. 52.

¹⁶ *Ibid.*, para. 52.

that they obtain an authorisation from the EU.¹⁷ Such an authorisation will, for instance, be granted when the EU is not formally represented within an international organisation, or cannot itself negotiate and conclude an agreement because the international body reserves the right to adhere to States, excluding regional integration organisations such as the EU. The Court has acknowledged the fact that the International Labour Organisation was not open to EU adherence and that, therefore, Union competence ‘may, if necessary, be exercised through the medium of the Member States acting jointly in the [Union]’s interest’.¹⁸ In this situation, the Council adopts a decision expressly authorising the Member States to conclude an agreement or a general framework of regulations establishing the procedure to be followed by the Member States.¹⁹

External relations of the EU and their practical implications

Position of the EU in international organisations

The possibility for the EU to negotiate and conclude international agreements has been recognised by the treaties but the question of its participation in international organisations or bodies has not been entirely dealt with.²⁰ Yet, in practice, it is sometimes difficult for the EU to express its opinion and to maintain a strong and credible position at the international level.

No provision directly relates to the participation of the EU in international organisations. Article 211 TFEU provides that ‘the Union and the Member States shall cooperate with third countries and with the competent international organisations’. Article 218(9) lays down the rules applicable in establishing ‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects’. This Article arguably does not apply to the discussions and negotiations within these organisations.

As a general matter, the founding treaties of international organisations do not foresee the adherence of regional organisations such as the EU.

¹⁷ See e.g. Regulation No. 662/2009 of 13 July 2009 Establishing a Procedure for the Negotiation and Conclusion of Agreements between Member States and Third Countries on Particular Matters Concerning the Law Applicable to Contractual and Non-contractual Obligations [2009] OJ L 200/25.

¹⁸ Opinion 2/91, paras. 5 and 37.

¹⁹ Regulation No. 847/2004 on the Negotiation and Implementation of Air Service Agreements between Member States and Third Countries [2004] OJ L 157/7.

²⁰ Alan Hervé, ‘The Participation of the European Union in Global Economic Governance Fora’, *European Law Journal*, 18 (2012), 145.

Therefore, the status of the Union depends not only on the allocation of competences within the EU but also, and most importantly, on the rules of the organisations in question. The EU has full membership in a limited number of organisations including, for instance, the Food and Agricultural Organisation (FAO). Within the World Trade Organization (WTO) the Union holds a special status similar to full membership except for the voting rights.²¹ The Member States are often also members of other organisations so that many competences are shared between them and the EU. The EU may also be granted an observer status which implies that it ‘can attend meetings of a body or an organisation, but without voting rights.’²² This is, for instance, the case within agencies of the United Nations (UN). Such a status entails important limitations, such as the fact that the EU’s presence may be limited to formal meetings or an intervention coming after all of the other interventions.

The representation of the EU

Whether it can directly participate in international organisations or in the negotiation of international agreements or not, the question of the representation of the Union and its Member States matters. Article 218 TFEU lays down the rules generally applicable to the negotiation and conclusion of agreements between the Union and third countries or international organisations. The Treaties confirm the essential role played by the Commission. Article 17(1) TEU provides that ‘[w]ith the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union’s external representation’.

Despite this clear statement, the issue of the representation of the Union is not entirely solved. The situation is complicated when – and this is most often the case – the matter discussed is of concern for both the EU and the Member States, and the Union has been granted a mere observer status. In such a case, the EU is generally represented by both the Commission and the Member State holding the presidency of the Union.²³ This

²¹ This flows from the fact that the Community was already a *de facto* member of the GATT.

²² Knud Erik Jørgensen and Ramses A. Wessel, ‘The Position of the European Union in (other) International Organizations: Confronting Legal and Political Approaches’ in Panos Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar Publishers, 2011), 269.

²³ Hervé, ‘The Participation of the European Union in Global Economic Governance Fora’, 150.

system is however not optimal as it creates confusion for third countries and requires careful discussions and statements by each party taking the floor.

One of the most interesting situations is when the EU has an exclusive competence in a given area but is not a member of the international organisation concerned, or cannot therefore conclude an agreement itself. According to Article 4(3) TFEU, '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' and further facilitate the achievement of the Union's tasks, refraining from 'any measure which could jeopardise the attainment of the Union's objectives'. It follows that when the Union has competences that are at least exclusive and cannot be a member of an international organisation, the Member States must defend the EU's interests.²⁴

The need for co-ordination

When Member States conclude international agreements, they must cooperate with each other as well as with the Union. For instance, the Court stated that 'where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the [EU] and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the [EU] institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the [EU].'²⁵

When an international agreement is to be negotiated solely by the Member States, a common position must be reached. In *AETR*, the Court indicated that the Council and the Commission should 'reach agreement . . . on the appropriate methods of cooperation with a view to enduring most effectively the defence of the interests of the Union'.²⁶ In Opinion 2/91, the Court emphasised that co-operation was 'all the more necessary' since the Union could not conclude the agreement by itself. It added that '[i]t is therefore for the [Union] institutions and the Member States to take all the measures necessary so as best to ensure such cooperation both in the procedure of submission to the competent authority and ratification of Convention No 170 and in the implementation of commitments resulting from that Convention'.²⁷

²⁴ Opinion 2/91. ²⁵ Opinion 1/94, para. 108.

²⁶ *AETR*, para. 87. ²⁷ Opinion 2/91, paras. 37–8.

Compliance with EU law by the Member States

When entering into international agreements, Member States are not totally free to exercise their powers as they wish. The duty of sincere co-operation imposes on them to ‘exercise their international powers without detracting from Union law or from its effectiveness’²⁸ and requires them to facilitate the achievement of the Union’s tasks, as well as to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. For instance, the Court held that in relation to a bilateral agreement regarding a matter falling within the competence of the Member States, ‘the latter may not disregard [EU] rules but must exercise their powers in a manner consistent with [EU] law’. It added 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 [EU] law imposes on them’.²⁹

In *Commission v. Greece*, the Court further clarified that ‘[t]he mere fact that the [Union] is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect [Union] rules promulgated for the attainment of the objectives of the Treaty’.³⁰ The duty of co-operation is therefore applicable to both the Commission and the Member States. The Court went further in deciding that even if the Commission had not entirely fulfilled its duty of co-operation – the Commission could arguably have done more to reach a common position – it does not entitle a Member State to ‘unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of [EU] law’.³¹

The Court confirmed that this duty is of general application and does not depend either on whether the Union competence was exclusive, or on any right of the Member States to enter into obligations towards third countries.³² Where an EU Member State fails to comply with EU law, the Commission has powers to bring the infringement to an end and, where necessary, may refer the case to the ECJ under Article 258 TFEU

²⁸ K. Lenaerts and P. Van Nuffel, *European Union Law* (Sweet & Maxwell, 2011), 874.

²⁹ Case C-55/00, *Elide Gottardo v. Istituto nazionale della previdenza sociale (INPS)* [2002] ECR I-413, paras. 32, 3.

³⁰ *Commission v. Greece*, paras. 30–1. ³¹ *Ibid.*, para. 26.

³² See e.g. *Commission v. Luxembourg*, para. 58.

for failure of the Member State to fulfil its obligations under EU law. Not only are Member States not allowed to conclude an agreement that would expressly violate EU rules, but they must also implement their international obligations in such a way as to take account of their EU obligations.³³

Illustration of the complexity of the allocation of competences between the EU and its Member States through international negotiations in two specific sectors

The complexity of the principles and rules described in Sections I and II tends to create a lack of clarity and of certainty, which can be illustrated through two recent examples of negotiations in strategic sectors for the EU and its Member States.

*1 Postal services: the Universal Postal Convention*³⁴

The Universal Postal Union (UPU) is an inter-governmental organisation acting as the primary forum for co-operation between postal sector players. In 2012, the UPU Congress, bringing together all the member countries, met to define the future world postal strategy and to review the Universal Postal Convention, including the system of terminal dues. Terminal dues correspond to the remuneration for the costs of handling and delivering cross-border mail in the country of destination. They are an important source of revenue for postal operators, in particular for those in transition economies and developing nations. The proposal made in view of the 2012 UPU Congress was trying to bring terminal dues closer to costs, which, in practice, would still be far from the actual costs of handling international mail.

The review of the terminal dues system raised two issues of considerable importance for the EU and its Member States. First, in application of the EU Treaties and the case law on the allocation of competences between the EU and the Member States, it appears that terminal dues is a subject matter that falls within the exclusive competence of the EU for two reasons.

³³ See e.g. Joined Cases C-176/97 and C-177/97, *Commission v. Belgium and Luxembourg* [1998] ECR I 3557.

³⁴ See Damien Geradin, 'Legal Opinion on the Compatibility of the Proposed Target System for Terminal Dues with EU Law' (29 April 2012), available at http://jcampbell.com/ref_upu_doha/eu/20120429_Legal%20Opinion%20-%20UPU%20System%20Terminal%20Dues.pdf.

First, the regulation of terminal dues falls *a priori* within the scope of the Common Commercial Policy. Secondly, the *AETR* doctrine seems to be applicable as the EU has developed a policy aiming to complete the internal market for postal services and has adopted common rules regulating the provision of postal services, including terminal dues – such as the Postal Directive. Besides, any action of the Member States might affect those rules or alter their scope. Therefore, the question can be raised as to whether, by participating in the 2012 Universal Postal Convention and voting on the proposed system of terminal dues, the Member States would infringe EU rules on the repartition of competence.

As the EU is not a member of the UPU, Member States were thus to co-ordinate their position in order to negotiate and conclude the agreement on its behalf. In the past, efforts have been made towards co-ordination between Member States and the EU. In 2004, the Commission adopted a Communication reaffirming the importance of ensuring ‘that the Commission participates to the fullest extent possible in work in the UN system which concerns issues for which it is responsible within the EU’.³⁵ The Commission called for a common EU position during the negotiations and co-ordination among the Member States and with the Commission.³⁶ Despite the Council Resolution that followed, the Member States showed ‘little apparent coordination’ in the 2004 and 2008 Congresses, submitting individual proposals, sometimes inconsistent with each other.³⁷ Yet, the Commission clarified in the above-mentioned Communication that, whether the EU has exclusive competence or not, all Member States are obliged to somehow co-ordinate their positions.³⁸ Although this goal was reiterated by the Council in 2008, no common position was found.³⁹

The second issue raised by these negotiations was linked to the compatibility of the proposed system of terminal dues with EU law. The UPU Target System of Terminal Dues seems to diverge not only from the Postal Directive⁴⁰ but also from the EU Treaties, and more specifically from its

³⁵ Commission Communication, The Universal Postal Union Congress 2004, COM(2004) 398 final, para. 14.

³⁶ *Ibid.*, para. 51.

³⁷ See James Campell *et al.*, ‘Study for the European Commission, Study on the External Dimension of the EU Postal Acquis’ (WIK Consult: November 2010), 151.

³⁸ *Ibid.*, 149. ³⁹ ‘Common Understanding Paper’, Council, Document 11860/08.

⁴⁰ Directive 97/67/EC of 15 December 1997 on Common Rules for the Development of the Internal Market of Community Postal Services and the Improvement of Quality of Service, OJ L 15, as amended by Directive 2002/39/EC of 10 June 2002, OJ L 176; and Directive 2008/6/EC of 20 February 2008, OJ L 52.

competition rules. However, the case law has clearly stated that, when entering into an international agreement, Member States cannot infringe EU rules. This principle, based notably on the duty of sincere cooperation, may be considered as being even stronger when the Member States are acting on behalf and in the interests of the Union. In view of the 2012 UPU Congress, the Commission stated that it was essential to ensure compatibility between the UPU system and the EU framework and that it was 'necessary to ensure that the rules and the positions taken by the Member States in the coming UPU Congress are compatible, complementary and coherent with [EU] legislation in particular with that included in [the Postal Directive]'.⁴¹

To conclude, the Member States started the negotiations with divergent views – most probably due to divergent economic incentives – despite the necessity for them to defend the EU position. The situation was further complicated by the impossibility for the Union to directly participate in the negotiation and in the conclusion of the agreement. Generally speaking, the decision-making process at the UPU is problematic.

2 Telecommunications: the International Telecommunications Regulations

Telecommunications is subject to heavy regulation at the national as well as the European level. It was therefore logical for the EU and the Member States to react actively to the decision to hold a World Conference on International Telecommunications (WCIT or the Conference) in Dubai in December 2012, with the aim to revise the International Telecommunications Regulations (ITRs). The International Telecommunication Union (ITU) is a specialised agency of the UN which is responsible for information and communication technologies. It currently has a membership of 193 countries. The ITRs define the general principles for the provision and operation of international telecommunications. The Conference had been tasked with reviewing and updating ITRs that had remained unchanged since 1988. The new regulations would reflect the changes that the internet and new forms of communications have had on telecoms.

The main concern of the EU – and the US – was the position defended by countries such as Russia or China to increase regulation and strengthen control of the information spread on the internet. As only ITU members are full participants with the right to vote – other ITU members, including telecommunications operators and regional organisations, having an

⁴¹ Directive 97/67/EC, para. 41.

observer status – the EU and its Member States had to co-ordinate their position. Contrary to the negotiations on terminal dues in the postal sector, the Member States managed here to agree on a common position, consisting of maintaining the current status and avoiding heavier regulation. Reaching a common position was essential for the EU and the Member States in order to defend their position with credibility.

Discussions took place between the EU institutions, the Member States, telecommunications operators and other bodies. In August 2012, the Commission submitted a proposal for a common EU position to submit for discussion in the Council.⁴² It was proposed that, in relation to matters falling within its competence, Member States should ensure that any changes to the ITRs would be compatible with EU law and would not restrict future developments of the EU *acquis*. As regards matters falling outside of the EU competence, Member States were required to adopt common positions. This was underlined by the Cypriot president, who warned that any changes that might restrain future developments in the area of telecommunications and the internet were precluded.⁴³

Beyond the substantial issues raised by these negotiations, the role of the Commission in drafting the common position was questioned. An issue was raised as to whether the Commission – which was not formally represented at the ITU – had the legal right to draft a position that was binding on EU governments. Normally, the Commission is mandated to negotiate on behalf of the EU in areas where the Union holds an exclusive competence. A motion for a Resolution submitted to the European Parliament proposed for the Council to negotiate on behalf of the EU. The Parliament amended it and proposed for the Commission to carry out such negotiations.⁴⁴ In October 2012, the legal service of the Council of the EU indicated that the Commission has the ability to speak on behalf of the Member States on matters where the latter have transferred their lawmaking power to the EU. But the fact that the Commission is not formally represented remained problematic. If it is considered that the

⁴² Proposal for a Council Decision Establishing the EU Position for the Review of the International Telecommunications Regulations to Be Taken at the World Conference on International Telecommunications or its Preparatory Instances of 2 August 2012, COM(2012) 430 final.

⁴³ Speech by Loucas Louca at the European Parliament's plenary session of 20 November 2012.

⁴⁴ European Parliament Resolution of 22 November 2012 on the forthcoming World Conference on International Telecommunications (WCIT-12) of the International Telecommunication Union, and the possible expansion of the scope of international telecommunication regulations. Cf. the Motion for a resolution of 19 November 2012.

EU holds an exclusive competence in the field of telecommunications, a difficulty arises from the fact that the Commission – and more generally the Union – does not have a formal seat at the ITU but holds an ‘observer member’ status. The Union requested the admission of the Commission as an ‘observer in an advisory capacity’ which would not allow it to negotiate on behalf of the EU but would allow officials from the EU executive to ask for the floor and provide advice to Member State delegations on points relating to the EU position. This approach was finally approved.⁴⁵

The proposal for a Common Position put forward by the Commission was adopted by the Council in November 2012. Despite these minor disagreements regarding the role of the Commission, the EU was able – for the first time in the ITU framework – to agree on a position before going to the Conference. This most probably sent an important signal to third countries. When preparing these negotiations, the long-term interests of the EU were carefully balanced in order to allow the Member States and the Union to defend their positions in future negotiations.

Finally, a proposal made in the final discussions introduced elements that were unacceptable to EU Member States including a possible extension of the ITRs to cover internet issues. EU Member States, alongside the United States, did not agree on these proposals. In the opinion of EU participants, the final text risked threatening the future of the open internet and internet freedoms, as well as having the potential to undermine future economic growth. The EU was concerned about this possible harm not only within the EU, but globally, including in developing countries.

Conclusion

The rules regarding the external relations of the EU and its Member States have been progressively developed over time. The EU has been granted more powers and the rules on the allocation of competences have been clarified. However, this evolution does not mean that there is no role to be played by the Member States. On the contrary, they remain essential in two regards. Member States are still entering into international agreements in their own interests – either on their own or next to the EU (mixed agreements). In addition, the EU also needs the Member States to negotiate and conclude agreements on its behalf

⁴⁵ See Transcript of WCIT Dubai, United Arab Emirates, 3 December 2012, Plenary 1.

either for political or legal reasons, such as when international law prohibits it from acting directly. This results in complex situations where both the Member States and the EU institutions may attend an international conference without third countries – and probably the Member States and the EU – knowing who represents whom. If efforts have been made with the Lisbon Treaty to clarify the various external competences of the EU, what remains to be dealt with is the above-mentioned situation. The system would benefit from a review of the rules on the representation of the EU at the international level. But one difficulty lies in the fact that sometimes the Member States prefer to defend their own position, where, as members of the Union, they should try to reach an agreement for the benefit of all them, and to defend such a position. When sitting at the negotiating table, the EU and the Member States should act as one, as any contradiction or disorganisation – even if only apparent – would weaken their position. They would then lose credibility towards third countries and international organisations.

It is therefore claimed that the rules on the representation of the Union should be reviewed in order to strengthen the position and the credibility of the EU at the international level. However, it has been argued that what really matters is not so much the extensive external competence of the EU, the consolidation of its formal representation or an enhanced co-ordination.⁴⁶ What matters is rather the field concerned and the willingness of the EU and its Member States to reach a common position, as illustrated by the differences between negotiations in the postal and the telecommunications sectors.

⁴⁶ Jørgensen and Wessel, 'The Position of the European Union in (other) International Organizations', 285–6.