1. The duty of loyal cooperation between the Community and Member States has particular significance in the exercise of competences under the Treaty: this is all the more so where those competences are shared.

2. It is in that context that the present case arises. Both the Community and Sweden are parties to a multilateral agreement regulating substances harmful to the environment. Can Sweden propose to add a new substance to the agreement, or is it forced to act in tandem with the Community?

3. The answer, as will become apparent, does not depend only on whether Sweden has the competence to act individually; it also depends on how it chooses to act.

4. The present case concerns the regulation of persistent organic pollutants (‘POPs’), substances which are particularly harmful to the environment and human health. POPs are toxic, resist degradation and bioaccumulate (that is to say, work their way up the food chain). As such, the negative effects of POPs – via transport by air, water and migratory species – may occur far from the place of their initial release.

5. Those cross-border negative effects have led to POPs being regulated under several multilateral environmental agreements. One such multilateral agreement is the Stockholm Convention on POPs (‘the Convention’). The Convention is a mixed agreement, to which

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1 — Original language: English.

both the Community and Sweden are parties. It requires parties to reduce or eliminate the release of POPs listed in its annexes.

6. Any party to the Convention may propose that a substance be considered a POP and added to the annexes to the Convention (‘added to the Convention’). In essence, after a substance is thus proposed the POPs Review Committee (‘POPRC’) will verify whether the substance satisfies the Convention’s requirements, conduct a risk assessment, and issue a final recommendation on the possible addition of the substance.

7. Throughout the POPRC’s technical review the parties to the Convention may submit observations and, after this review is carried out, they have the ultimate decision on whether a substance is added to the Convention. A conference of the parties is held, usually once a year, in order to decide on amendments such as these additions. The conference of the parties strives to reach decisions by consensus but, failing that, it can adopt decisions by a three-quarters majority.

8. It is important to note that, under the Convention, any party thereto may refuse to be bound by an amendment. It has a period of one year in which to take a decision to that effect, which coincides with the period preceding the entry into force of the amendment.

9. Another multilateral environmental agreement on POPs regulation is the POPs Protocol to the Convention on Long Range Transboundary Air Pollution (‘the Protocol’).³ The Protocol is similar in many respects to the Convention but, as its name indicates, it is mostly concerned with the air transport of pollutants. One key similarity is that any party to the Protocol may propose that a substance be added to the list of POPs in the annexes to the Protocol (‘added to the Protocol’). Both the Community and Sweden are parties to the Protocol.

10. The cross-border negative effects of POPs have also led to their regulation at the

³ — The Convention on Long Range Transboundary Air Pollution was concluded in 1979; the Protocol dates from 1998.
Community level, most notably by Regulation No 850/2004 (‘the POPs regulation’). \(^4\) to both the Convention and the Protocol. The Commission proposal did not include PFOs.

11. The present case deals with Sweden's proposal to add to the Convention a particular group of substances: perfluorooctane sulfonates (‘PFOs’). It is not disputed that PFOs can be qualified as a POP. However, at the time of Sweden's proposal PFOs were not included in any of the abovementioned international and Community instruments regulating POPs.

12. It is important to note the chronology of the events surrounding Sweden's proposal, and also whether those events relate to the Convention or to the Protocol.

13. On 4 August 2004, the Commission proposed that the Council authorise it to submit, in the name of the Community and its Member States, a proposal to amend the annexes

14. Also in August 2004, Sweden proposed that PFOs be added to the Protocol. \(^5\)

15. On 8 September 2004, the Council’s ‘international environment group’ met. During this meeting, Sweden raised the issue of adding PFOs to the Convention, stating that it expected such an addition to be the subject-matter of a common proposal and that it would refrain from submitting its own proposal in the meantime. Sweden raised this issue again in the group’s meeting of 12 January 2005.

16. In March 2005, the Council adopted conclusions on a common proposal to add


\(^5\) — Sweden clarified by a letter of 31 October 2005 that the technical review initiated by its proposal was indeed intended to add PFOs to the Protocol. There were some doubts over Sweden’s intentions on account of its statement in the Report of the 22nd Session of the Executive for the Convention on Long-Range Transboundary Air Pollution of 24 January 2005, paragraph 30, which referred to paragraph 4(d) of a certain Decision 2003/10 – which states that the Task Force on POPs, created under the Protocol, will ‘carry out such other tasks … as the Executive Body may assign it’ (instead of Sweden referring to paragraph 4(c) of that decision, which deals with preparing ‘technical reviews on … new substances proposed by the Parties for inclusion [in the Protocol]’).
certain substances to the Convention. The choice of those substances was to be made on the basis of the substances already included in the Protocol, which were also covered by the POPs regulation. As mentioned above, at the time PFOs were not covered by any of those instruments (as no conclusion had been reached on Sweden’s proposal under the Protocol).

17. On 6 July 2005, the Council’s ‘international environment group’ reached agreement on a common proposal to add PFOs to the Protocol once the Commission had submitted a proposal on control measures at Community level.

18. This meeting of the ‘international environment group’ also dealt with the addition of PFOs to the Convention. Sweden toughened its position and made clear that, if an agreement on a common proposal were not reached, it would submit such a proposal unilaterally. Despite this, the group only managed to agree that the addition of substances should be proposed, postponing to a later date the decision on which substances to add.

19. On 14 July 2005, Sweden acted in accordance with its stated position and unilaterally proposed the addition of PFOs to the Convention, informing the Presidency on the same day. Sweden’s proposal is, as mentioned, the object of the present case and should therefore be assessed by reference to the situation obtaining at the material time. Nonetheless, some subsequent events are worth noting.

20. On 8 September 2005, the Council decided to authorise the Community and its Member States to submit a common proposal to add PFOs to the Protocol once the Commission had submitted a proposal concerning restrictions under Directive 76/769 on the use of PFOs.

21. On 24 April 2006, the Council decided to authorise the Community and its Member

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6 — Document 11386/05 of 22 July 2005, the written procedure in the Council regarding this decision having been closed on 8 September 2005 (document 13305/05).

States to submit a common proposal to add certain substances – which did not include PFOs – to the Convention. 8

24. The Commission sent a letter of formal notice to Sweden questioning the compatibility of Sweden's proposal with Community law. Since it was not satisfied with Sweden's responses to its letter of formal notice and subsequent reasoned opinion, it brought the present action under Article 226 EC.

22. If and when PFOs are finally added to the Convention or the Protocol, they will also be included among the substances covered by the POPs regulation. 9

23. After Sweden had submitted its proposal, a directive introducing control measures for PFOs was also proposed and adopted. 10

25. It should be made clear from the outset that the Commission does not dispute that PFOs should be considered to be POPs; indeed, subsequent Community legislation has confirmed that they are. Considering the cross-border effects of PFOs and in the absence of Community legislation, resorting to international instruments was the only possible means for Sweden to prevent such negative effects on its environment and the health of its citizens.

26. The Commission contends that Sweden was not allowed to act as regards the dangers

8 — Council Decision 8541/06/EC of 24 April 2006; its fourth recital reads: ‘In accordance with Article 8 of the Convention, any Party may submit a proposal to the Secretariat for listing a chemical in the Annexes to the Convention. … Based on the requirement of close cooperation in the international representation of the Community, proposals should be submitted by the Community and the Member States together. The Commission added a minute statement to this decision, where it affirmed its opinion that the decision ‘fully support[s] that Member States are not to make unilateral submissions not agreed at Council.’

9 — See Article 1(1) of the POPs regulation.

posed by PFOs. It argues that a Community regulatory framework – notably the POPs regulation and Directive 76/769 – already existed, even though at the material time such regulatory framework did not include PFOs.

27. This, as Member States have rightly pointed out, is the language of exclusive competence. However, the Commission did not raise the issue of infringement of an exclusive competence at the requisite stage of the pre-litigation procedure. Therefore, this plea should be considered inadmissible and the relevant arguments disregarded.

28. Nevertheless, even if a plea of infringement of exclusive competence were admissible, it would be destined to fail. As the Court has stated, '[the] external competence of the Community in regard to the protection of the environment … is not exclusive but rather, in principle, shared between the Community and the Member States.'

29. Both the Community regulatory framework on which the Commission relies and Sweden’s accession to the Convention are based on Title XIX of the EC Treaty, concerning the environment (Articles 174 EC to 176 EC). The distribution of competences operated by the Treaty is biased towards action: neither Member States nor the Community can block the other from pursuing a higher level of protection of the environment.

30. As such, the Community regulatory framework in question should be understood as introducing minimum standards, which in no way prevent further action by Member States. Since this framework did not at the material time cover PFOs, the Community could not have acquired exclusive competence over their regulation.

31. While a plea of exclusive competence is inadmissible, the Commission has correctly raised in the pre-litigation procedure the

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12 — The Community can acquire exclusive competence through internal regulation according to the well-known ERTA principle, see Case 22/70 ERTA [1971] ECR 263, and Opinion 1/94 [1994] ECR I-5267, paragraph 77.
issue of infringement of Article 10 EC, on which I shall concentrate. 13 There are two facets to this alleged infringement.

34. I believe it is useful to analyse these two facets separately.

32. The first is substantive: it entails an allegation that Sweden’s proposal to add PFOs – or indeed any substance – to the Convention compromises the unity of the international representation of the Community and its Member States.

33. The second is procedural: it bypasses the issue of whether Sweden is entitled to submit such proposals, to focus instead on the coordination of those proposals with an ongoing Community decision-making process.

35. The Commission’s main argument is that, since the Convention is a mixed agreement, Sweden is not permitted to act individually, but only in tandem with the Community or if it is represented by the Community. It should be noted that this argument, as formulated by the Commission, can readily be applied to all mixed agreements.

36. Mixed agreements are typical where there are shared competences, as is the situation in the present case. It is true that the Court has held that the need for unity in the international representation of the Community and its Member States may prevent the latter from acting individually, even if the competence remains shared. 14 Nonetheless,

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13 — The Commission has additionally claimed the infringement of Article 300(1) EC; however, as the United Kingdom has rightly pointed out, this provision concerns ‘the conclusion of agreements’, whereas it is Article 300(2) EC which deals with the ‘positions to be adopted on behalf of the Community in a body set up by an agreement, when that body is called upon to adopt decisions having legal effects’. As such, contrary to the Commission’s contention, an infringement of Article 300(1) EC would not cover Sweden’s proposal and its effects on the Community’s competence to propose substances to the Convention.

it would clearly go beyond this case law to hold that this is true whatever the situation under a mixed agreement.

37. The unity of international representation of the Community and its Member States does not have an independent value; it is merely an expression of the duty of loyal cooperation under Article 10 EC. The question whether such unity is required by the duty of loyal cooperation can be resolved only by analysing the obligations laid down in a specific agreement.

38. The standard for this analysis, as I have previously stated, should be whether the exercise of the shared competence by the Member State – in this case through an international agreement – is liable seriously to compromise the exercise of a Community competence.

39. Following an analysis of Sweden’s proposal to add PFOs to the Convention, I can only conclude that the Community’s competence is not jeopardised. Sweden’s proposal neither forces the Community to be subject to rules that it does not want, nor does it affect its ability to propose rules that it does want.

40. In relation to the Community’s being subject to new rules, the Convention itself allows the Community to refuse to be bound by any amendments, such as the addition of PFOs (should the technical review prompted by Sweden’s proposal result in such an amendment).

41. In relation to the Community’s ability to propose new rules, under the Convention the


16 — See my Opinion in Case C-205/06 Commission v Austria and Case C-249/06 Commission v Sweden [2009] ECR I-1301, points 36 to 42.

17 — The Convention precludes a dual exercise of rights by States and international organisations which are parties to it, and requires a declaration of competence as to the exercise of these rights. Nonetheless, there is a consensus among the parties to the present case that this does not apply in relation to the right to refuse to be bound by amendments to the Convention. That consensual interpretation must be accepted, as the outcome of an action under Article 226 EC should not depend on a disputed interpretation of an international agreement (see my Opinion in Commission v Austria and Commission v Sweden, point 62, and the Opinion of Advocate General Sharpston in Case C-118/07 Commission v Finland [2009], points 34 and 35).
Community remains free both to influence the technical review of PFOs and to make proposals as to their treatment, in the same way as if it had submitted the initial proposal itself. All that Sweden has done is to start the relevant procedure, prompting the technical review of PFOs.

42. The Commission has mentioned two difficulties that may stand in the way of the exercise of the Community’s competence: first, that it has to act in order to avoid being bound by the addition of PFOs to the Convention; and, second, that this addition may trigger (unspecified) demands for compensation from developing countries, which may influence future negotiations on other substances.

43. I see difficulties for the Community, but not excessive ones. It should be borne in mind that such difficulties need to be balanced against the legitimate rights of Member States and the preservation of their competences. The duty of loyal cooperation applies equally to the actions of the Community’s institutions towards Member States. 18

44. If the Community institutions were to prevent Sweden from adequately protecting its environment and the health of its citizens because of vague economic interests, or simply because the Community is required to notify the Convention, they would render the exercise of Sweden’s competence excessively difficult.

45. Sweden is therefore entitled to propose that PFOs be added to the Convention, just as it had competence to accede to it under Article 174(4) EC. However, Sweden will, when submitting any such proposal, be constrained by the fact that the Community is also a party to the Convention; I shall deal with this problem in the following section.

18 — See Case C-45/07 Commission v Greece [2009] ECR I-701, paragraph 25; it should be noted that this case dealt with an exclusive Community competence.
46. The implications of the duty of loyal cooperation do not end with the analysis of whether it was possible for Sweden to exercise its competence; the manner in which it did so is equally, if not more, important.

47. Indeed, Sweden's actions may jeopardise the exercise of the Community's competence not because of their subject-matter, but because they undermine the Community's decision-making process.

48. In the field of mixed agreements, the Court has stated that a Member State has a duty to inform and consult the Community institutions prior to engaging in individual action. If fulfilling that duty triggers a Community decision-making process, or is integrated in an ongoing process, the consequence must be that the Member State should engage fully and in good faith in such process.

49. The implications of the duty of loyal cooperation are therefore twofold: first, that Member States cooperate with the Community decision-making process; and, second, that they refrain from taking individual action, at least for a reasonable period of time, until a conclusion to that process has been reached.

50. Sweden seems to have successfully discharged the first part of that duty: it sought to achieve a common proposal on adding PFOs to the Convention. However, Sweden's later


20 — The Court has held that when the decision-making process has culminated in a Council decision authorising the Commission to negotiate a multilateral agreement, this requires ‘if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation’ (see Case C-266/03 Commission v Luxembourg [2005] ECR I-4805, paragraph 60, and Case C-433/03 Commission v Germany [2005] ECR I-6985, paragraph 66). Because in those cases a conclusion to the decision-making process had already been reached, the Court concentrated on the absolute duty for Member States to coordinate their action with the Council decision reached; a duty of abstention was admitted only in principle since, according to my remarks above, such a duty would only apply to Member State action liable seriously to compromise the objectives of the Council decision (see footnote 18 above).
threats to act individually could be perceived as intended to disproportionately influence the Community decision-making process and therefore to interfere with the integrity of the Community’s political process.

51. Furthermore, Sweden failed to discharge the second part of that duty in its entirety. If a Community decision had been reached not to add PFOs to the Convention, it would have been free to act individually. However, a careful examination of the Community decision-making process reveals that no conclusion had been reached by the time Sweden acted. Therefore, Sweden should have refrained from acting.

52. At the time of Sweden’s proposal, an agreement had been reached in the Council’s ‘international environment group’ that a common proposal would be made to add substances to the Convention. Although an agreement was still to be reached on whether those substances would include PFOs, previous Council conclusions had established a preference for substances already included in the Protocol.

53. Not only had Sweden already proposed that PFOs be added to the Protocol, but there was also an agreement in the Council’s ‘international environment group’ to submit such a proposal under the Protocol (which indeed later resulted in a Council decision). With the addition of PFOs to the Protocol imminent, Sweden cannot assert in good faith that a decision not to propose PFOs to the Convention had been taken.

54. The fact that the Council decision which followed Sweden’s proposal did not include PFOs is irrelevant. Sweden’s proposal made a Community proposal superfluous. In any event, Sweden should have forborne from acting individually precisely until a decision of that sort was taken, so as to respect the integrity of the Community decision-making
process and not to interfere with its internal balance of power.

55. Sweden argues that, had it not acted promptly, it would not have been possible to submit the proposal for the addition of PFOs to the Convention to an impending conference of the parties, which would have delayed matters for at least one more year. However, abiding by the duty of loyal cooperation may involve the sacrifice of a Member State’s interests.

56. The Community decision-making process is slow, and Member States must acknowledge that results will not be achieved as promptly as when they act individually. If, however, they were allowed to bypass this process whenever it suited them, Community decision-making would serve no purpose. Furthermore, I am of the opinion that a degree of prudence should be exercised with regard to Member States using their external competences to interfere with the internal balance of power of the Community decision-making process.

57. I am sympathetic to the argument that Member States must not be caught in a never-ending process, in which a final decision by the Community is postponed to the point of inaction. If that proves to be the case, a decision should be deemed to have been taken and Member States should be allowed to act. Nonetheless, that was not the case here: it is sufficient to point out that little more than a week elapsed between Sweden’s announcement that it would act individually if an agreement was not reached and its actual submission of a proposal.

58. Sweden did not let that decision-making process take its natural course and culminate in a Council decision either for or against the addition of PFOs to the Convention. Sweden should have engaged in the Community decision-making process until such a decision was reached, even if, politically, it felt that its efforts to achieve a common proposal on the addition of PFOs to the Convention were as doomed as lemmings heading towards the edge of a cliff.

21 — Similarly, the Court found that the Council was allowed to forego the opinion of the European Parliament if that opinion was withheld in violation of the duty of loyal cooperation (see Case C-65/93 Parliament v Council [1995] ECR I-643, paragraphs 26 to 28).