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EU EXTERNAL ACTION AFTER THE COLLAPSE OF THE PILLAR STRUCTURE: IN SEARCH OF A NEW BALANCE BETWEEN DELIMITATION AND CONSISTENCY

PETER VAN ELSUWEGE*

1. Introduction

Back in the 1970s, the Member States decided on a strict separation between their intergovernmental European Political Co-operation (EPC) and the supranational and mainly economically oriented external relations of the then European Economic Community (EEC). From the outset, it became clear that the institutional and procedural division between different aspects of EU external action is difficult to square with the complex and interdependent structures of the international system. Even though the Community dimension gradually extended to include non-economic issues, and the EPC transformed into a Common Foreign and Security Policy (CFSP) as an integrated but separate part of the European Union's constitutional structure, the management of this dualism remains a key challenge for the Union.[1] The legal regulation of sanctions, exports of dual-use goods as well as the fight against terrorism and the proliferation of small arms and light weapons all illustrate the complexity of this exercise.

It is, therefore, no coincidence that the Treaty of Lisbon introduced new legal rules and procedures to enhance the coherence and consistency of the EU's external action. Institutional innovations such as the High Representative of the Union for Foreign Affairs and Security Policy ("High Representative") and a European External Action Service (EEAS) aim to overcome the dualist nature of EU external relations. Moreover, the formal abolition of the pillar structure, the express attribution of a single legal personality to the Union, and

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1. See e.g. Neuwahl, "Foreign and Security Policy and the Implementation of the Requirement of Consistency under the Treaty on European Union" in O'Keeffe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (London, 1994), pp. 227–246; Schmalz, "The Amsterdam provisions on external coherence: Bridging the Union's foreign policy dualism?", 3 EFA Rev. (1998), 421–442; Wessel, "The inside looking out: Consistency and delimitation in EU External Relations", 37 CML Rev. (2000), 1135–1171.

the reshuffling of the EU's external competences create the impression of a fully integrated EU external action. However, the Common Foreign and Security Policy remains "subject to specific rules and procedures".[2] This is highlighted by the fact that the provisions on CFSP are included in Title V of the Treaty on European Union (TEU) whereas all other substantive areas of the EU's external action are laid down in Part V of the Treaty on the Functioning of the European Union (TFEU). The "mutual non-affectation clause" of Article 40 (ex 47, as amended) TEU confirms the distinction between the CFSP and the other policies of the Union. Despite the growing recognition that a formal separation between "high" and "low" politics is highly superficial,[3] this division remains crucial for the determination of the appropriate legal bases and decision-making procedures. The result is a paradox. From a political point of view, the reorganization of the EU's external competences in the Treaty of Lisbon is a worthwhile and logical attempt to create a more coherent foreign policy. In legal terms, however, the new Treaty provisions do not solve the complex dichotomy between CFSP and non-CFSP actions and even increase the potential for inter-institutional conflicts.[4]

This article aims to clarify the relationship between the objective of increased foreign policy coherence, on the one hand, and the division of EU external powers and policies, on the other. After analysing the implications of the EU's single legal personality (2) and clarifying the place of CFSP in the EU legal order (3), it is argued that the ill-defined nature of CFSP competences and the abolition of the hierarchical delimitation rule of former Article 47 (now as amended Art. 40) TEU faces the Court of Justice with a nearly impossible task to delineate the boundaries between the different components of EU external action (4). Finally, specific attention is devoted to the duty of consistency (5) as a constitutional principle to balance inter-institutional competence competition.

2. Art. 24(1) TEU.

3. Louis, "The European Union: from External Relations to Foreign Policy?", 2 *EU Diplomacy Papers* (2007), 4; Hill, *The Changing Politics of Foreign Policy* (London, 2003), p. 4.

4. A good example is pending Case C-130/10 between the European Parliament and the Council regarding the appropriate legal basis of EU Regulation No. 1286/2009 amending Regulation (EC) No. 881/2002 imposing restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban. See *infra* section 4.2.

2. Common Foreign and Security Policy and the unity of the EU legal order

The express grant of a single legal personality to the Union (Art. 47 TEU, introduced by Lisbon) finally terminates the outdated academic debate between those who regard the CFSP as a separate framework of cooperation subject to general rules of international law and the defenders of a unitary approach to EU law.[5] The introduction of treaty-making powers in the field of CFSP with the Treaty of Amsterdam and the abundant use made of that provision already reduced the practical relevance of this discussion.[6] Moreover, the Courts increasingly applied a holistic approach for the interpretation of non-Community provisions in the pre-Lisbon period.[7] Whereas the Treaty of Lisbon thus appears to codify the conventional wisdom with regard to the unity of the EU legal order, questions remain as far as the implications of this concept are concerned.[8] It is, for instance, not entirely clear whether the principles of direct effect and primacy also apply to the area of CFSP (2.1.) and what the institutional implications of the EU's unitary legal order are (2.2.).

2.1. *The principles of primacy and direct effect*

Pursuant to a Declaration attached to the Final Act of the 2007 Intergovernmental Conference, "the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States". The Declaration refers to "the well-settled case law of the European Court of Justice" to come to this conclusion and also an Opinion of the Council Legal Service of 22 June 2007 confirms "the existing case law of the Court of Justice".[9] Given the absence of any case law regarding the question of primacy for CFSP matters,

5. With regard to this academic discussion, see e.g. Everling, "Reflections on the structure of the European Union", 29 CML Rev. (1992), 1053–1077; Von Bogdandy, "The legal case for unity: The European Union as a single organization with a single legal system", 36 CML Rev. (1999), 887–910; Wessel, "Revisiting the international legal status of the EU", 5 EFA Rev. (2000), 507–537; Leal-Arcas, "EU legal personality in foreign policy?", 24 *Boston University International Law Journal* (2006), 165–212.

6. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations* (OUP, 2004), p. 155.

7. See e.g. Case C-105/03, *Pupino*, [2005] ECR I-5285; Case C-355/04, *Segi and Others* v. *Council*, [2007] ECR I-1657. On this trend, see further Wessel, "The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation", 5 EuConst (2009), 117–142.

8. Herrmann, "Much Ado About Pluto? The 'Unity of the European Union Legal Order' Revisited" in Cremona and De Witte (Eds.), *EU Foreign Relations Law. Constitutional Fundamentals* (Oxford, 2008), p. 20.

9. Declaration No. 17 concerning primacy, O.J. 2007, C 306/256.

it is difficult to derive from those statements any conclusions about the effect of CFSP measures within the legal orders of the Member States. Also under the Lisbon provisions, the Court is deprived of an opportunity to clarify this issue directly.[10] The problem remains, of course, that national courts may be confronted with conflicts between CFSP acts and national law.

The thesis of a unitary legal order, the duty of consistent interpretation of EU law[11] and the absence of express language limiting the application of primacy all could be taken to imply that this principle also covers CFSP. The question is, however, whether the arguments used by the European Court of Justice in *Costa* and *Simmenthal* to reach its conclusions about the primacy of EC law can be transferred to the Union as a whole. In those groundbreaking judgments, the ECJ found that, through the conclusion of the EEC Treaty in 1957, the Member States had created a new and autonomous legal order distinct from ordinary international law.[12] The EEC's institutions, personality, legal capacity and representation on the international level all contributed to this conclusion. In the light of those elements, there appears to be no doubt that the Union, which replaces and succeeds the European Community (Art. 1 TEU, as amended by Lisbon), constitutes "a new legal order of international law".[13] The special status of the CFSP does not affect this conclusion. The Union's action on the international scene – including the CFSP – is guided by a single set of principles and objectives[14] and is based on a single institutional framework.[15] This means that the Union possesses and exercises its own competences, which are not merely equivalent to the collective exercise of the competences retained by the Member States.[16] In addition to the general principle of loyal or sincere co-operation,[17] Article 24(3) (ex 11, as amended) TEU underlines the binding character of CFSP activities: "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. ... They shall refrain from any action which is contrary to

10. Pursuant to Art. 24 TEU (ex Art. 11 EC, as amended), the ECJ has no jurisdiction in the area of CFSP, with the exception of restrictive measures against natural or legal persons and in order to police the borderline with other Union policies.

11. *Pupino*, cited *supra* note 7, para 47.

12. Case 6/64, *Costa* v. *ENEL*, [1964] ECR 585; Case 106/77, *Simmenthal*, [1978] ECR 629.

13. Cremona, "Defining competence in EU external relations: Lessons from the Treaty reform process" in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations* (Cambridge, 2008), p. 64.

14. Art. 23 TEU (introduced by Lisbon).

15. Art. 13 TEU (ex 7 EC , as amended).

16. Case C-91/05, *Commission* v. *Council* (*ECOWAS*), [2008] ECR I-3651, para 61.

17. Art. 4(3) TEU (ex Art. 10 EC).

the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations."

Whereas "mutual (political) solidarity" is not a traditional normative legal concept,[18] Article 28(2) (ex 14, as amended) TEU specifies that CFSP decisions "commit the Member States in the positions they adopt and in the conduct of their activity". As a corollary, it can thus be argued that also in the field of CFSP the sovereignty of the Member States has been limited.[19] However, this does not mean that all characteristics of the old Community legal order, in particular those of pre-emption, direct effect and primacy, automatically apply to the area of CFSP. A general application of those principles would place the national courts in a precarious position. They would be obliged to set aside national provisions in favour of CFSP decisions without having a possibility to seek guidance from the Court of Justice under the preliminary ruling procedure. Arguably, such a situation would be detrimental for the uniform application of EU law.[20] The exclusive jurisdiction of the Court of Justice and, in particular, its task "to ensure uniform interpretation of the treaty by national courts and tribunals" is indeed a key element of the closely connected concepts of direct effect and primacy.[21] In the absence of such a role for the Court of Justice in CFSP affairs, the appropriateness of those principles to define the relationship between CFSP acts and national law is questionable. The distinct nature of the Union's CFSP competences is an additional argument for being careful with the Union-wide application of well-known Community concepts.[22] In contrast to other EU competences, CFSP competence does not fall within one of the three categories listed in Article 2 TFEU (exclusive, shared and supporting or complementary). Arguably, the drafters of the treaty intentionally provided for a non-defined, *sui generis* category of competences to underline the specific nature of the CFSP as a distinct policy field of the Union, which is not subject to pre-emption and not merely complementary to Member States' activities.[23]

18. Koutrakos, "Primary law and policy in EU external relations – Moving away from the big picture", 33 EL Rev. (2008), 670.

19. Lenaerts and Corthaut, "Of birds and hedges: The role of primacy in invoking norms of EU Law", 31 EL Rev. (2006), 289–290.

20. "Editorial Comments: The CFSP under the EU Constitutional Treaty – Issues of Depillarization", 42 CML Rev. (2005), 327; Cramer, "Does the codification of the principle of supremacy matter?", 7 CYELS (2004–2005), 72–73.

21. Case 26/62, *Van Gend en Loos*, [1963] ECR 1; *Simmenthal*, cited *supra* note 12, para 14.

22. "Editorial Comments", op. cit. *supra* note 20, 327.

23. Cremona op. cit. *supra* note 13, p. 65; De Baere, *Constitutional Principles of EU External Relations* (OUP, 2008), pp. 110–112.

2.2. *The institutional dimension*

The Treaty of Lisbon not only confirms the gradual integration of CFSP in the unitary legal order of the Union, it also includes a number of institutional innovations to transcend the traditional dichotomy between "high" and "low" politics in EU external relations. This is most visible in the function of the High Representative, which no longer exclusively deals with CFSP – as was the case under the previous treaty regime – but now also has responsibilities with regard to other aspects of the EU's external action.[24] In her activities, the High Representative is assisted by a "European External Action Service" (EEAS), which is "a functional autonomous body of the European Union, separate from the Commission and the General Secretariat of the Council".[25] The former Commission delegations are transformed into Union delegations under the authority of the High Representative and are integrated in the new EEAS structure. This new institutional architecture aims to bridge the gap between CFSP and the other policy areas in an attempt to create a more coherent EU external representation. However, the limits of this exercise become obvious in the continued distinction of external representation tasks: the President of the European Council and the High Representative represent the Union for CFSP issues at their respective political levels whereas the Commission ensures the external representation for the other policy areas.[26] The Treaty of Lisbon is not very helpful to understand the circumscription of the different functions. That this ambiguity about who speaks for the European Union leads to confusing situations became obvious when US President Barack Obama decided not to attend an EU-US summit in Madrid because it was unclear who the US leader should meet.[27] Another example concerns the EU's representation at G20 meetings where the EU delegation is composed of both the President of the European Council (Van Rompuy) and the President of the Commission (Barroso). Depending on the subject of the discussions (CFSP or not) Van Rompuy or Barroso take the floor. In areas where the two overlap, they decide on a case-by-case basis who can speak on behalf of the Union.[28]

24. Compare Art. 18 TEU (introduced by Lisbon) to ex Art. 26 TEU (Nice version).

25. Art. 2 of the Draft Council Decision establishing the organization and functioning of the European External Action Service, Council of the EU, 8029/10, 25 March 2010.

26. Art. 15(6) TEU (President of the European Council); Art. 17 TEU (Commission) and Art. 27(2) TEU (High Representative). See in general "Editorial comments: The post-Lisbon institutional package: Do old habits die hard?", 47 CML Rev., 597–604.

27. Rettman, "US blames Lisbon Treaty for EU summit fiasco", *EUObserver,* 3 Feb. 2010 (www.euobserver.com).

28. Popp, "Van Rompuy and Barroso to both represent EU at G20", *EUObserver*, 19 March 2010 (www.euobserver.com).

The continued importance of the dichotomous distinction between CFSP and non-CFSP actions is also visible with regard to the procedure for the negotiation and conclusion of international agreements. It is certainly a positive evolution that the old distinction between EU and EC agreements has been replaced by a comprehensive treaty-making competence of the Union on the basis of Article 216 TFEU. This provision clarifies that the Union may conclude agreements with third countries or international organizations in all policy areas of the Union, thus including the CFSP. The Union's specific treaty making-competence in the field of CFSP is further expressly laid down in Article 37 (ex 24) TEU. Significantly, the treaty-making procedures differ depending on the subject of the envisaged agreement. Article 218(3) TFEU makes clear that for agreements "exclusively or principally" related to CFSP, the High Representative takes the initiative to start the procedure. In all other areas, this is a competence of the Commission. The Council then authorizes the opening of the negotiations and nominates the Union negotiator or the head of the Union's negotiating team. CFSP agreements are negotiated by the High Representative or one of her special envoys whereas in all other cases the Commission is the negotiator. Also with regard to the conclusion of the agreement, differences remain. There is, for instance, no formal role for the European Parliament in the conclusion of CFSP agreements and the voting procedure in the Council depends upon the content of the agreement.[29] Hence, despite the "depillarization" of the Union, the specific procedural rules applicable in the area of CFSP imply that the old challenges of delimitation remain to exist.

3. Understanding the place of CFSP in the EU legal order

The relationship between the CFSP and the other policies of the Union is often perceived as an antithesis between intergovernmentalism and supranationalism. It is argued that this distinction is no longer appropriate to understand the position of the CFSP in the EU legal order (3.1.). Alternatively, the different rules in the field of CFSP are explained on the basis of the specific features of foreign affairs (3.2.).

3.1. *The intergovernmentalist nature of the CFSP in perspective*

It cannot be denied that the institutional features of the CFSP differ significantly from what is commonly called the "Community method". The latter is

29. According to Art. 218(8) TFEU, the Council decides unanimously "when the agreement covers a field for which unanimity is required for the adoption of a Union act".

characterized by the checks and balances of the *trias politica* whereas the CFSP is dominated by the institutions which are assimilated with the executive power. The orientation and implementation of the CFSP is almost exclusively determined on the basis of a close cooperation between the European Council, the Council and the High Representative of the Union for Foreign Affairs and Security Policy.[30] Of course, the High Representative is also a full member and vice-president of the Commission but she is appointed by the European Council and works under a mandate from the Council.[31] In order to avoid any discussion on the intention of the Member States, Declaration No. 14 notes that "the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament". Article 31 (ex 23, as amended) TEU further clarifies that unanimity voting remains the basic rule in the (European) Council and no legislative acts can be adopted. Last but not least, the Court of Justice has no jurisdiction to review the legality of CFSP decisions, with the exception of restrictive measures against natural or legal persons and in order to police the borderline with other Union policies.[32]

The institutional design of the CFSP is usually invoked to point at the intergovernmental nature of the Member States' cooperation in this field. However, it seems no longer correct to describe the CFSP as a purely intergovernmental system of co-operation, which is radically opposed to the supranational nature of other areas of EU law. The case law of the European Court of Justice and the evolution of the treaties indicate that the CFSP normative order includes a set of procedural and substantive rules that are clearly distinct from traditional international law and restrain the external competences of the Member States.[33] In a longer term perspective, the innovations brought with the Treaty of Lisbon can be regarded as a further step in the evolution of the CFSP "from a purely intergovernmental system based on consensus and international law into a fully-fledged system based on treaty law which includes institutions that operate under the rule of law and which have been given law-making powers."[34]

First, the new treaty provisions make it crystal clear that CFSP is an integral and equivalent part of the EU's external action. This can be derived from Article 1(3) TEU, proclaiming the equal legal value of the TEU and TFEU, and from the equal protection guaranteed by Article 40 TEU (cf. *infra*).

30. Art. 26 (ex 13, as amended) TEU.

31. Art. 18 TEU (introduced by Lisbon).

32. Art. 24 (ex 11 as amended) TEU.

33. See e.g. *Segi and Others* v. *Council*, cited *supra* note 7; *ECOWAS*, cited *supra* note 16; Hillion and Wessel, "Restraining external competences of the Member States under CFSP" in Cremona and De Witte, op. cit. *supra* note 8, pp. 79–121.

34. Gosalbo Bono, "Some Reflections on the CFSP Legal Order", 43 CML Rev. (2006), 393.

Moreover, Article 23 TEU clarifies that the same principles and objectives apply to the CFSP and the other external policies of the Union. The equal legal status granted to the CFSP stands in stark contrast to the former pillar structure of the Union. Under the pre-Lisbon Treaty provisions, Community policies enjoyed priority over the other components of the Union.[35]

Second, the limited jurisdiction of the Court of Justice is not to be overestimated. It is true that CFSP decisions cannot be challenged directly but given the fuzzy boundaries between this policy and the other areas of EU external action, Article 40 (ex 47, as amended) TEU gives ample opportunities to clarify the legal status of the CFSP in the future. Moreover, the extension of the Court's jurisdiction to restrictive CFSP measures against natural or legal persons closes a significant gap in the protection of individual rights. The listing of a person's name on terrorist lists, subject to multiple cases where the Court was confronted with the limits of its powers in the past,[36] now indisputably falls within the Court's jurisdiction.[37]

Third, whilst unanimity remains the rule for CFSP matters, the Treaty of Lisbon provides new options for decision-making on the basis of qualified majority voting (QMV). In addition to the already existing possibility for the Council to act by QMV when adopting implementing decisions, this is now also the case for CFSP decisions proposed by the High Representative following a specific request from the European Council. Even though the individual Member States thus preserve the possibility to avoid decision-making by QMV, it cannot be excluded that, in practice, an active High Representative, backed by a well-functioning External Action Service, is given a rather broad mandate to make proposals that can subsequently be adopted by QMV in the Council.[38] Of course, also in this hypothesis the Member States can still invoke the "national interest" exception. If the High Representative cannot find a compromise solution, the Council may – on the basis of QMV – request that the matter be transferred back to the European Council for a decision by unanimity. The dynamic interplay between unanimity and QMV is further reinforced through the introduction of a so-called "bridging clause" or *passerelle*.[39] Accordingly, the European Council can unanimously decide to further extend

35. Cremona, op. cit. *supra* note 13, p. 34.

36. See e.g. Case T-299/04, *Selmani* v. *Council and Commission*, [2005] ECR II-20; Case C-354/04P, *Gestoras Pro Amnestia and Others*, [2007] ECR I-1579; *Segi and Others* v. *Council*, cited *supra* note 7.

37. Of course, a direct action brought by individuals is subject to the conditions of Art. 263(4) TFEU.

38. Wouters, Coppens and De Meester, "The European Union's External Relations after Lisbon" in Griller and Ziller (Eds.), *The Lisbon Treaty. European Constitutionalism without a Constitutional Treaty?* (Vienna – New York, 2008), p. 163.

39. Art. 31(3) TEU.

the use of QMV in the field of CFSP, except for decisions with military or defence implications. This simplified treaty revision procedure points, at least symbolically, at an intention to further mitigate the predominance of unanimity voting in the future.

Fourth, the Treaty of Lisbon widens the scope for enhanced cooperation in the field of CFSP. Under the Nice provisions, this was only possible with regard to the implementation of a joint action or a common position not related to military or defence matters.[40] The Lisbon provisions extend the opportunity for enhanced cooperation to the entire spectrum of CFSP activities, including the area of security and defence. Member States wishing to establish enhanced cooperation within the framework of the CFSP have to address their request to the Council. The High Representative will give an opinion on the consistency with the CFSP as such and the Commission will do the same as far as the relationship with the other Union policies is concerned.[41] The European Parliament is only informed about this request.

Ultimately, the Council decides unanimously on the expediency of the enhanced cooperation.[42] Not surprisingly, this procedure is different as far as enhanced cooperation in other areas of non-exclusive Union competences is concerned. Authorization to proceed with enhanced cooperation in those fields is granted by the Council on a proposal from the Commission and after obtaining the consent of the European Parliament.[43] In other words, the provisions on enhanced cooperation reflect the general procedural differentiation between CFSP and non-CFSP action within the EU legal order. It is noteworthy that also in the context of enhanced cooperation, a procedural *passerelle* is provided in Article 333 TFEU. For enhanced cooperation in areas subject to a unanimity requirement, such as obviously the CFSP, the participating Member States in the Council can unanimously decide to act by QMV.[44] This does not apply to decisions having military or defence implications. The combination of both the possible establishment of enhanced cooperation with a limited group of

40. Ex. Art. 27 B TEU.

41. Art. 329(2) TFEU. The concern about the consequences of enhanced cooperation for the consistency of the EU's activities is further reflected in Art. 334 TFEU, which provides that "[t]he Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end."

42. It is noteworthy that under the Nice provisions, enhanced cooperation for the implementation of a Joint Action or Common Position was granted by QMV. Hence, the general application of the unanimity rule is the price to pay for the extended scope of enhanced cooperation in CFSP matters.

43. Art. 329(1) TFEU.

44. Art. 333(1) TFEU. The same procedural *passerelle* exists with regard to the transfer from the special to the ordinary legislative procedure (Art. 333(2) TFEU). This is, however, irrelevant with regard to the CFSP given that no legislative acts can be adopted in this field.

Member States[45] and the option of a procedural transfer to QMV instead of unanimity in the Council introduces a significant form of flexibility in the traditionally rigid CFSP structures.

In addition to the option of enhanced cooperation for CFSP matters, introduced with Nice and extended with Lisbon, the new Treaty provisions also facilitate the use of flexibility instruments in the specific area of Common Security of Defence Policy (CSDP). Under Article 42(5) and Article 44 TEU, the Council may entrust the implementation of a CSDP initiative to a group of Member States, which are willing and capable to carry out such a task. The Treaty also provides an explicit legal basis for the already established European Defence Agency,[46] and envisages a possibility to set up specific groups bringing together Member States engaged in joint projects.[47] Most significant is perhaps that Member States which fulfil higher criteria for military capacities and which are willing to make more binding commitments can establish so-called "permanent structured co-operation" within the Union framework.[48] Protocol No. 10 includes minimum requirements in terms of military capacity and commitment from the Member States. In comparison to enhanced cooperation, which is linked with a specific initiative, the rationale is to create a permanent structure to be called upon for "the most demanding missions".[49] Despite the traditionally strong intergovernmental character of cooperation in defence and security issues and in contrast to the authorization of enhanced cooperation (cf. *infra*), the Council adopts a decision establishing permanent structured cooperation on the basis of QMV and also the participation of new Member States or the suspension of a Member State which no longer fulfils the criteria is subject to QMV.[50] On the other hand, the decision-making within the framework of permanent structured cooperation requires unanimity and there is no bridging clause foreseen in the treaty.

Taken together, the above mentioned amendments to the treaties illustrate that the CFSP has undergone a significant evolution since its introduction with the Treaty of Maastricht. Therefore, the equation with the traditional

45. Pursuant to Art. 20(2) TEU, at least nine Member States are to take part in enhanced cooperation.

46. Art. 42(3) TEU. The European Defence Agency (EDA) was established on 12 Jan. 2004 on the legal basis of ex Art. 14 (now, as amended 28) TEU. Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of a European Defence Agency, O.J. 2004, L 245/17. All Member States except Denmark are participating in the EDA.

47. Art. 45 TEU.

48. Art. 42(6) and 46 TEU, together with Protocol No. 10 on Permanent Structured Cooperation.

49. Cremona, "Enhanced Cooperation and the Common Foreign and Security Policies of the EU", *EUI Working Papers* No. 2009/21, 14.

50. Art. 46 TEU.

understanding of intergovernmentalism in international organizations seems no longer correct. Confirming previous trends, the Treaty of Lisbon further transforms the CFSP from a purely intergovernmental system based on general international law into a fully integrated part of EU law. This evolution is still unfinished given the limited role of the Court of Justice and the ill-defined relationship between CFSP and the other external policies of the Union. As a result, the institutional balance of the Union is constantly under strain.

It is rather paradoxical that initiatives to enhance the coherence of the EU's external action intensify the turf battles between the EU institutions. The discussions surrounding the establishment of the European External Action Service, for instance, clearly illustrate the ongoing "bureaucratic power struggle".[51] Too often this debate is reduced to a distinction between a supranational versus an intergovernmental approach for the organization of the EU's external relations. Supporters of the former fear for an intergovernmental contamination of the Community method, whereas the latter warn for a communautarization of the CFSP.[52] It is, however, questionable whether this kind of "dichotomous reasoning" is still an appropriate framework for discussion.[53]

3.2. *The constitutional uniqueness of foreign affairs*

Presenting the relationship between the CFSP and the other external policies of the EU as an antithesis between intergovernmentalism and supranationalism is not only a huge oversimplification, it also seriously complicates the reform of the EU's institutional structure. Whereas the introduction of what could be called "trans-pillar institutions" such as the High Representative and the EEAS point at a worthwhile attempt to increase the coherence of the EU's external action, the irresistible habit of regarding those innovations through the prism of a zero-sum game between two opposing models of integration leads to an almost insoluble dilemma.[54]

51. The notion "bureaucratic power struggle" as an element inhibiting the coherence of the EU's external action is borrowed from Nuttall, "Coherence and consistency" in Hill and Smith (Eds.), *International Relations and the European Union* (OUP, 2005), p. 92. See e.g. Phillips, "Member States and EU Commission clash over diplomatic service", *EUObserver*, 2 March 2010 and Vogel, "Turf war continues over EU's diplomatic corps", *European Voice*, 11 March 2010.

52. This was, for instance, clearly illustrated in the joint debate on the EEAS following the adoption of the European Parliament Report on the institutional aspects of setting up the European External Action Service (Rapporteur: Elmar Brok, A7-0041/2009), see: Council of the EU, 27 Oct. 2009, 15133/09.

53. De Baere, op. cit. *supra* note 23, pp. 222–227; Van Gerven, *The European Union. A Polity of States and Peoples* (Hart, 2005), pp. 264–265.

54. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Hart, 2001), p. 47.

Rather than focusing on the sometimes artificial debate about more or less supranationalism/intergovernmentalism in EU external relations, it appears more accurate to explain the place of CFSP in the EU legal order on the basis of the executive dominance over foreign affairs, as it exists in the constitutional traditions of many countries in the world.[55] Proceeding from this broader comparative perspective, the limited role of the European Parliament in CFSP decision-making and the absence of full jurisdiction for the Court of Justice is not an aberration but, rather, a logical consequence of the specific features of foreign affairs. The strategic character of foreign policy and the inherent importance of confidentiality and flexibility in its decision-making all explain why this area is considered a prerogative of the executive power.[56] In this respect, the situation at the EU level is not fundamentally different from the national context of many EU Member States where the same arguments are used to limit parliamentary involvement in foreign policy.[57] Also with regard to the exclusion of judicial control for CFSP matters, a comparison with the exceptional treatment that national courts accord to foreign affairs issues makes sense. An obvious point of reference is the political question doctrine of the United States Supreme Court[58] but also in the constitutional orders of many EU Member States, foreign and defence policy questions are often given a special treatment.[59] The special status of CFSP within the EU legal order is, in other words, not uncommon and perhaps even inevitable given the nature of foreign policy.[60] Nevertheless, the basic constitutional exclusion of the Court's jurisdiction on CFSP measures is thought to be problematic from the perspective of the rule of law.[61] Instead of an *a priori* limitation of the judicial power to rule on foreign policy and security issues, it is argued that in a mature constitutional system the judges should be allowed to develop their own policy of

55. Eeckhout, op. cit. *supra* note 6, p. 143.

56. Nzelibe, "The Uniqueness of Foreign Affairs", 89 *Iowa Law Review* (2004), 941–1009.

57. Thym, "Beyond Parliament's Reach? The Role of the European Parliament in the CFSP", 11 EFA Rev. (2006), 123–126.

58. See e.g. Henkin, "Is there a Political Questions Doctrine?", 85 *Yale Law Journal* (1976), 597–625; Franck, *Political Questions/Judicial Answers. Does the Rule of Law Apply to Foreign Affairs?* (Princeton, 1992), p. 198.

59. Opinion of A.G. Darmon in Case C-241/87, *Maclaine Watson*, [1990] ECR I-1797, paras. 66–94; Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge, 2003), pp. 98–104.

60. Cremona, "A constitutional basis for effective external action? An assessment of the provisions on EU External Action in the Constitutional Treaty", *EUI Working Papers* No. 2006/30, 17.

61. Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations* (Groningen, 2005), pp. 17–20; Ketvel, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", 55 ICLQ (2006), 118–120; De Baere, op. cit. *supra* note 23, p. 200.

judicial self-restraint. The intensity of judicial review would then essentially depend on the margin of appraisal enjoyed by the Member States. Advocate General Jacobs gave a taste of how the Court could deal with such a situation in his Opinion on the legality of Greek trade sanctions against the Former Yugoslav Republic of Macedonia in the 1990s. Confronted with the question whether Greece was entitled to invoke Article 347 TFEU (ex 297 EC[62]) on the ground of war or serious international tension constituting a threat of war, the Advocate General observed that "the scope and intensity of the review that can be exercised by the Court is severely limited on account of the [political] nature of the issues raised"[63] and ultimately concluded that "there are simply no juridical tools of analysis for approaching such problems."[64] Accordingly, a distinction could emerge between "political questions", such as the appropriateness of certain decisions, where the Courts refrain from adjudicating, and "legal issues", including procedural questions and the adherence to basic principles of law, where the Courts in principle apply a full judicial review.[65] A good example of what such an approach could look like was given by the Court of First Instance (now the General Court) in the *OMPI* case with regard to the legality of (Community) economic and financial sanctions implementing a CFSP common position:

> "Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council's assessment of the factors as to appropriateness on which such decisions are based."[66]

The application of such a marginal review of CFSP acts would amount to a better balance between, on the one hand, respect for the special nature of foreign affairs and, on the other hand, respect for the rule of law and fundamental rights of individuals. Arguably, the new possibility for the Court to rule on proceedings reviewing the legality of decisions providing for restrictive

62. Art. 224 EC in the pre-Amsterdam numbering used at the time of the case.

63. Opinion of A.G. Jacobs in Case C-120/90, *Commission* v. *Greece*, [1996] ECR I-1513, para 50.

64. Ibid., para 59.

65. Ketvel, op. cit. s*upra* note 61, 118; Krajewski, "Foreign Policy and the European Constitution", 22 YEL (2003), 452–453.

66. Case T-228/02, *Organisation des Modjahedines du Peuple d'Iran (OMPI)* v. *Council*, [2006] ECR II-4665, para 159.

CFSP measures against natural or legal persons (Art. 275 TFEU) constitutes an important step forward towards getting the balance right. A further extension of the Court's jurisdiction to all CFSP acts appears logical in light of the EU's single legal personality, the importance attributed to the values laid down in Article 2 TEU and the gradual constitutionalization of the CFSP as an integral part of the EU legal order. However, during the discussions in the European Convention and the Intergovernmental Conferences, it became obvious that political minds are not yet ripe for such a step.[67] Undoubtedly, one of the major reasons why the "Masters of the Treaties" are reluctant to extend the Court's role in CFSP is a fear for judicial activism. It has to be recalled in this respect that the progressive development of the EPC and later the CFSP can be regarded as a response of the Member States to the judges' activist role in defining external Community competences during the first years of the 1970s.[68] The two declarations on CFSP in the Treaty of Lisbon indicate that there is still some uneasiness among the Member States about the implications of EU actions for existing national powers. Giving the Court of Justice a level playing field to determine the legal implications of activities in the field of CFSP is in such a political context still considered to be a bridge too far. Whereas the Member States did not want to draw all conclusions from the constitutional unity of the EU legal order, the Court of Justice faces the challenge to show that it is fit for purpose, i.e. that it can act as a genuine and responsible constitutional court of the Union. A crucial question in this respect is how the Court will deal with the non-defined nature of CFSP competences to find an appropriate balance between CFSP and the other policies of the Union.

4. The delimitation between CFSP and non-CFSP activities

The Treaty of Lisbon provides for the mutual non-affectation of CFSP and non-CFSP measures (4.1.), which places the Court for new challenges of delimitation in the field of EU external action (4.2). The difficulties surrounding the application of this principle in practice are illustrated with the new rules for the adoption of restrictive measures against individuals (4.3.).

67. See: Report on the question of judicial control relating to the Common Foreign and Security Policy, CONV 689/1/03.

68. Kuijper, "Fifty Years of EC/EU External Relations: Continuity and the dialogue between judges and Member States as Constitutional Legislators", 31 *Fordham International Law Journal* (2008), 1572; Denza, *The Intergovernmental Pillars of the European Union* (OUP, 2002), p. 312.

4.1. *The "mutual non-affectation clause"*

Perhaps even more important than the institutional adaptations to increase the coherence of the EU's external action is the introduction of a new delimitation rule to distinguish between CFSP and non-CFSP external actions of the Union. Article 40 TEU lays down that:

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

Taken together with Article 1(2) TEU, which states that both treaties (TEU and TFEU) have the same legal value, this mutual non-affectation clause attributes an equal weight to the various types of EU external action. This new rule stands in stark contrast to the hierarchic relationship between the pillars under the old treaty regime, where, inspired by a fear of intergovernmental contamination of supranational decision-making, several provisions underlined the primacy of EC competences.[69] Former Article 47 TEU in particular aimed to protect the *acquis communautaire* against any encroachment by the EU Treaty.[70] In the *ECOWAS* judgment, the ECJ found that for measures pursuing two aims which are inextricably linked without one being incidental to the other – in this case development cooperation and CFSP – priority should be given to the non-CFSP legal basis. Whenever an act could be adopted on the basis of the EC Treaty it turned out to be impossible to adopt an act with a similar content on the basis of the EU Treaty, irrespective of the nature of the Community competences.[71] This definition of ex Article 47 TEU, in combination with the very broad interpretation of development cooperation, seriously affected the scope for CFSP activities in practice. Hence, the EU's pillar structure did not lead to a potential subordination of Community policies to CFSP

69. See ex Art. 47 TEU in conjunction with ex Art. 1(3) and 2 TEU.

70. *ECOWAS*, cited *supra* note 16, paras. 31–33; Dashwood, "Article 47 TEU and the relationship between first and second pillar competences" in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations* (Cambridge, 2008), pp. 70–103.

71. *ECOWAS*, cited *supra* note 16, paras. 58–62; Van Elsuwege, "On the boundaries between the European Union's First Pillar and Second Pillar: A Comment on the ECOWAS judgment of the European Court of Justice", 15 CJEL (2008), 531–548.

decision-making but rather reduced the CFSP to a narrowly defined, residual category of external relations activities.[72]

The Treaty of Lisbon provisions rebalance the relationship between the CFSP and the other external powers of the Union. This evolution appears logical in light of the unitary character of the EU legal order and the ambition to reinvigorate the CFSP as an important part of the EU's external action. However, whereas the equal protection clause of Article 40 TEU is politically sound, it creates a legal imbroglio. A key problem is the absence of clear criteria to distinguish between CFSP and non-CFSP activities. Despite the Court's standard formulation that the choice of a legal basis "must rest on objective factors which are amenable to judicial review",[73] this is not always an easy and straightforward exercise in the field of EU external relations. Traditionally, the Court applies a so-called "centre of gravity test". Based upon an examination of the aim and content of the measure in question, the "leading objective" dictates which single legal basis will be controlling. In other words, the dominant objective "absorbs" the possible other substantive legal bases which are pursuing objectives of a subsidiary or ancillary nature.[74] In case of an inextricable link between two objectives without one being incidental to the other, recourse to a dual legal basis can exceptionally provide a way out on the condition that procedures laid down for the respective legal bases are not incompatible and do not undermine the rights of the European Parliament.[75] In *ECOWAS*, the option of a joint legal basis for measures falling respectively under the CFSP and the old external competences of the Community has been explicitly excluded. Significantly, the Court did not derive this conclusion from obvious procedural differences but from the constitutional priority rule laid down in former Article 47 TEU. Accordingly, it underlined the distinction between the EU and EC legal orders.[76]

The new provisions on EU external action, introduced with the Treaty of Lisbon, have far-reaching implications for the existing case law and

72. Heliskoski, "Small Arms and Light Weapons within the Union's Pillar Structure: An analysis of Article 47 of the EU Treaty", 33 EL Rev. (2008), 908.

73. See e.g. Case C-300/89, *Titanium dioxide*, [1991] ECR I-2867, para 10; Case C-336/00, *Huber*, [2002] ECR I-7699, para 30; Case C-176/03, *Commission* v. *Council*, [2005] ECR I-7879, para 45; Case C-440/05, *Commission* v. *Council*, [2007] ECR I-9097, para 61.

74. A good example of this practice can be found in Case C-268/94, *Portugal* v. *Council*, [1996] ECR I-6177. On the "absorption doctrine" in the EU's external relations practice, see Maresceau, "Bilateral Agreements Concluded by the European Community", 309 *The Hague Academy of International Law Recueil des Cours* (2004), 156–158.

75. *Titanium dioxide*, cited *supra* note 73, paras. 17–21; Case C-178/03, *Commission* v. *Parliament and Council*, [2006] ECR I-107, para 57.

76. *ECOWAS*, cited *supra* note 16, paras. 75–77; Van Ooik, "Cross-pillar litigation before the ECJ: Demarcation of Community and Union competences", 4 EuConst (2008), 414–415.

significantly affect the previous delimitation rules. First, the presumption in favour of using non-CFSP powers whenever possible is no longer valid. The CFSP is elevated to an equal level of protection as a result of Article 40 TEU in combination with Article 1(3) TEU. This protection is confirmed in Article 352(4) TFEU (ex 308 EC), which – in line with the Court's findings in *Kadi*[77] – underlines that this legal basis cannot be used for attaining CFSP objectives and must respect the limits set out in Article 40 TEU. Second, as a result of competence overlaps and the intertwined character of different foreign policy areas, the Court's traditional analysis of the "aim and content" of a measure is not well-suited to distinguish between CFSP and non-CFSP actions. The interconnection between the EU's external policies is emphasized in Article 21 TEU, which includes a comprehensive list of objectives for the entire range of EU external action, and in Article 23 TEU, which states that the EU's activities in the field of CFSP are guided by the general principles and objectives of EU external action as a whole. In line with this approach, Article 24(1) (ex 11, as amended) TEU no longer includes any references to CFSP objectives and bluntly states that: "[T]he Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence."

In the absence of specific CFSP objectives, it seems particularly difficult to apply a centre of gravity test. However, at least for the negotiation of international agreements the Treaty itself suggests that such a test is indispensable. Pursuant to Article 218(3) TFEU, the High Representative and not the Commission shall submit recommendations to the Council "where the agreement envisaged relates *exclusively or principally* to the common foreign and security policy". The Council subsequently nominates the Union negotiator "*depending on the subject of the agreement envisaged*". Article 218(6) TFEU further lays down that the European Parliament is not involved in the concluding procedure "where agreements relate *exclusively* to the common foreign and security policy".[78] It is noteworthy that the threshold to exclude the European Parliament is higher than in the case of submitting a recommendation (exclusive CFSP-agreements versus predominant CFSP-agreements) but the baseline that a distinction between CFSP and non-CFSP agreements requires an analysis of the aim and content of the agreement seems obvious. The question is how the Court can deal with this issue given the lack of clearly distinguishable CFSP objectives.

77. Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat* v. *Council and Commission*, [2008] ECR I-6351, paras. 197–203.

78. Emphasis added.

4.2. *A nearly impossible task for the Court of Justice?*

One option is to treat the CFSP as a *lex generalis*, which should be used only when action under a more specific provision (*lex specialis*) is not possible.[79] However, the problem is that this interpretation reintroduces a hierarchic relationship which is difficult to reconcile with the clear language of Article 40 TEU. In addition, the rather broad definition of the Union's external competences in specific policy areas (commercial policy, development policy, economic financial and technical cooperation with third countries and humanitarian aid) potentially reduces the CFSP to a fairly restricted residual category of external relations competence. It is, in other words, hard to see the added value of the new subparagraph protecting the CFSP against encroachment from other Union competences in comparison to the situation under old Article 47 TEU. The Lisbon formulation of this provision would then only be symbolic without real legal consequences.

A possible alternative might be to look at the specific nature of the EU instruments in the field of EU external action. A key distinctive characteristic of CFSP is that it is not possible to adopt legislative acts.[80] Instead, the implementation of the CFSP is based on non-legislative guidelines and decisions[81] which are in principle excluded from the jurisdiction of the Court of Justice.[82] The demarcation between CFSP and other external policies could thus depend upon the legal character of the measures at stake, i.e. on the question whether legislative action is needed or not, rather than on the somewhat artificial exercise of balancing overlapping objectives.[83] However, the meaning of the term "non-legislative" is not unambiguous either and should not be confused with "non-binding" or "non-legal".[84] It is true that the Court's case law suggests that only acts which by their nature are capable of having legal effects can trigger the application of Article 40 TEU.[85] However, the adoption of CFSP acts on the basis of a non-legislative procedure does not imply that those acts are not capable of having legal effects. This is, for instance, illustrated by the

79. Cremona, op. cit. *supra* note 13, p. 46.
80. Art. 24 TEU and Art. 31 TEU.
81. Arts. 25–29 TEU.
82. *Supra* note 10.
83. Herrmann, op. cit. *supra* note 8, p. 20; Corthaut, "An effective remedy for all? Paradoxes and Controversies in respect of judicial protection in the field of the CFSP under the European Constitution" 12 *Tilburg Foreign Law Review* (2005), 119.
84. Cremona, "The Draft Constitutional Treaty: External relations and external action", 40 CML Rev. (2003), 1356–1357.
85. *ECOWAS*, cited *supra* note 16, para 33; Hillion and Wessel, "Competence distribution in EU external relations after ECOWAS: Clarification or continued fuzziness?", 46 CML Rev. (2009), 565.

possibility to adopt restrictive measures against natural or legal persons.[86] It therefore appears that the main difference between legislative and non-legislative acts lies in the decision-making process and does not concern the scope nor the binding force of the act.[87] In other words, the decision to use a CFSP or a non-CFSP legal basis would in this hypothesis essentially be based on procedural grounds. The result is an example of circular reasoning: according to established case law the choice of a legal basis determines the procedure to be followed and not the other way around.[88] Moreover, it does not seem self-evident to assess the requirement for legislative action without looking at the aim and content of the measures in practice.

It is not to be excluded that in the absence of any suitable alternative, the Court will continue to apply its standard centre of gravity test to determine the appropriate legal basis for an EU external action. At first sight, this appears a rather difficult operation given the absence of specific CFSP objectives. However, this problem is not necessarily insurmountable. After all, the blurred distinction between CFSP and non-CFSP external powers of the Union is nothing new and also under the previous treaty regime, the CFSP objectives were broadly defined and non-operational.[89] The general external action objectives laid down in Article 21(2) TEU clearly combine the CFSP aims of former Article 11(1) TEU and the external policies of the EC (development cooperation, commercial policy, environmental policy, etc.). Depending on whether an action essentially aims to pursue the general objectives of points (a) to (c) of Article 21(2) TEU or any of the more specific objectives laid down in points (d) to (e) of the same Article, the CFSP rules and procedures will need to be followed or not.[90] Of course, the difficulty remains for measures pursuing several objectives of equal importance.

Apparently, recourse to a dual legal basis, combining CFSP and non-CFSP powers, also seems excluded under the Lisbon provisions due to procedural incompatibilities and the specificity of the CFSP.[91] In particular, a combination between unanimity and qualified majority voting in the Council appears to be excluded.[92] However, it is noteworthy that – in contradiction to Advocate General Mengozzi[93] – the Court in *ECOWAS* remained silent on the question of

86. Art. 215(2) TFEU.

87. Cremona, op. cit. *supra* note 84, 1356–1357; Wouters, Coppens, De Meester, op. cit. *supra* note 38, pp. 161–162.

88. Koutrakos, "Legal basis and delimitation of competence in EU External Relations" in Cremona and De Witte, op. cit. *supra* note 8, p. 171.

89. Gosalbo Bono, op. cit. *supra* note 34, 359.

90. Dashwood, op. cit. *supra* note 70, p. 103.

91. Van Ooik, op. cit. *supra* note 76, 417.

92. Case C-338/01, *Commission* v. *Council*, [2004] ECR I-4829, para 58.

93. Opinion of A.G. Mengozzi in *ECOWAS*, cited *supra* note 16, para 176.

procedural compatibility. In Opinion 1/08 the Court found that an act concluding horizontal international agreements in the framework of the General Agreement on Trade in Services (GATS) must be based both on Article 133(1), (5) (6), second subparagraph EC (now as amended 207 TFEU (1), (4), (5)) and on Articles 71 and 80(2) EC (now 91 and 100 TFEU).[94] This combination not only introduces the involvement of the European Parliament in the field of common commercial policy but, more significantly, combines different voting rules in the Council. In light of this Opinion, it appears that the procedural incompatibility between unanimity and qualified majority voting is not absolute.[95] Despite the apparent procedural complexities, a compromise solution of a double legal basis including CFSP and non-CFSP provisions seems, therefore, not by definition excluded. Such a compromise would, on the one hand, respect the external competences of the European Parliament and, on the other hand, confirm the principle of unanimous decision-making in the Council. Support for such a solution could be found in the very unusual provision of Article 40 TEU, which prescribes a balance between the procedural and institutional characteristics of the EU's CFSP and non-CFSP external competences. If, on the other hand, the Court confirms the incompatibility between the decision-making procedures in the Council, additional elements must be taken into account to determine the appropriate legal basis. Given the specific importance attributed to the rights of participation enjoyed by the European Parliament and in line with the principles of transparency (Art. 1(2) TEU) and democracy (Art. 2 TEU), a preference for the non-CFSP legal basis seems obvious in case of doubt.[96] Again, the application of this variation on the *lex generalis/lex specialis* principle leads to a *de facto* confirmation of the existing situation (cf. *supra*).

Although the centre of gravity test seems clear and logical, its application to concrete situations is far from evident. This was clearly illustrated in the *ECOWAS* case where the Advocate General and the Court followed the same reasoning but came to a different conclusion as far as the nexus between security and development cooperation in the contested decision was concerned. It is indeed very difficult, if not impossible, to draw a clear-cut dividing line between both areas or to define a threshold where either security or development starts being incidental. The new formulation of Article 208 TFEU (ex 177 EC), with a more specific focus on poverty eradication as the "primary

94. Opinion 1/08 Concerning the conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union, 30 Nov. 2009, nyr.

95. Adam and Lavranos, case note on Opinion 1/08, (2010) CML Rev., forthcoming.

96. See in this respect: Opinion of A.G. Kokott *Commission* v. *Parliament and Council*, cited *supra* note 75, para 64.

aim" of development cooperation, will most probably not affect the Court's broad definition of this policy. Both in the *Philippine Border Management* case and in *ECOWAS*, it was underlined that "there can be no sustainable development and eradication of poverty without peace and security"[97] and, as a result, the scope of development cooperation cannot be interpreted narrowly. The Court found support for this view in the "European Consensus on Development", a joint statement of the Council, the Commission, the Parliament and the Member States.[98] The use of this policy document as an interpretative tool for defining the scope of development cooperation is at least somewhat controversial. First, it is difficult to reconcile with the Court's traditional vision that "a mere practice cannot override the provisions of the Treaty"[99] and that the choice of a legal basis is not dependent upon "an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review".[100] Second, this non-binding document was not drafted as a guideline for defining competences but rather aims to formulate a coherent approach to development cooperation beyond sector-specific competences.[101] Third, when a broad interpretation of development is derived from the "European Consensus" it appears equally possible to give a similar broad interpretation to security on the basis of the EU security strategy.[102] The conclusion may therefore well be that there is no perfect solution for the Court to delineate between CFSP and non-CFSP external action. The complex interdependence of international relations implies that any attempt to establish a fixed boundary between areas of activity such as development cooperation and CFSP is almost by definition an artificial endeavour. Hence, additional elements may be taken into account to solve potential inter-institutional conflicts in the field of EU external action. Of particular significance in this respect is the duty of consistency, which is a general principle of the EU (cf. *infra*, 5).[103]

97. Case C-403/05, *European Parliament* v. *Commission*, [2007] ECR I-9045, para 57 and *ECOWAS*, cited *supra* note 16, para 65.

98. O.J. 2006, C 46/1.

99. Case C-327/91, *France* v. *Commission*, [1994] ECR I-3641, para 36.

100. See. e.g. Case 45/86, *Commission* v. *Council*, [1987] ECR 1493, para 11; *Titanium dioxide*, cited *supra* note 73, para 10.

101. Van Vooren, "The Small Arms Judgment in an age of constitutional turmoil", 14 EFA Rev. (2009), 235.

102. A Secure Europe in a Better World, European Security Strategy, Brussels, 12 Dec. 2003, <www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

103. Art. 13(1) TEU and Art. 7 TFEU.

4.3. *Delimitation in practice: The adoption of restrictive measures after Lisbon*

The potential for inter-institutional litigation in the field of EU external action is particularly clear with regard to the adoption of restrictive measures against individuals or non-State entities. In contrast to the pre-Lisbon situation where, in the absence of a specific legal basis, recourse to a combination of Articles 60, 301 and 308 of the EC Treaty provided a pragmatic solution, the Treaty of Lisbon now explicitly foresees in a legal basis for the adoption of so-called "smart sanctions" in Articles 75 TFEU (ex 60 EC) and 215(2) TFEU (ex 301 EC). Clearly inspired by the ECJ's judgment in *Kadi*, both Articles contain the identical provision that "acts referred to in this Article shall include necessary provisions on legal safeguards."[104]

Whereas former Articles 60 and 301 EC operated as Siamese twins for the adoption of economic sanctions, new Articles 75 TFEU and 215 TFEU no longer include any cross-reference. On the contrary, both provisions have a different aim and function within the legal framework of the Union. Article 75 TFEU allows for the adoption of measures necessary to achieve the objectives of the Area of Freedom, Security and Justice (AFSJ), as regards preventing and combating terrorism and related activities. It provides an explicit legal basis for "administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities". Article 215 TFEU, on the other hand, belongs to Part V of the TFEU on the Union's external action and allows for the implementation of CFSP decisions. Of particular importance are the procedural differences for the adoption of smart sanctions under the respective provisions. With regard to Article 215(2) TFEU, the Council acts by qualified majority on a joint proposal from the High Representative and the Commission. The European Parliament only has to be informed about the adopted measures. The situation is different under Article 75 TFEU where the Council and the European Parliament act in accordance with the ordinary legislative procedure.[105]

104. In addition, Declaration No. 25 clarifies that "the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure".

105. The ordinary legislative procedure is laid down in Art. 294 TFEU and principally implies that the Council and the European Parliament co-decide on a proposal from the Commission.

The legal complexities resulting from the ambiguous relationship between Articles 75 and 215(2) TFEU became obvious in the context of the amendments to Regulation 881/2002/EC imposing restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban. In the wake of the *Kadi* judgment of the ECJ, the Commission proposed to adopt those amendments on the basis of Articles 60, 301 and 308 EC.[106] Following the entry into force of the Treaty of Lisbon, the Commission announced that the proposal was to be adopted on the single legal basis of Article 215(2) TFEU implying that the European Parliament was no longer to be consulted on the adoption of sanctions that relate to individuals.[107] Immediately, the Committee on Legal Affairs of the European Parliament contested this course of events and suggested Article 75 TFEU as the proper legal basis for the proposed regulation "since the objective is preventing and combating terrorism and related activities by non-State entities".[108] This position was later confirmed in a European Parliament resolution[109] and resulted, after the adoption of Council Regulation No. 1286/2009 on the basis of Article 215(2) TFEU,[110] in an action for annulment before the Court of Justice.[111]

The pending case between the European Parliament and the Council clearly illustrates the aforementioned dilemmas and paradoxes. From a political perspective, a distinction between the internal dimension of security falling under the provisions related to the AFSJ and the external dimension covered by the CFSP is difficult to justify. From a legal perspective, however, such a distinction is fundamental in order to determine the appropriate legal basis and, accordingly, the decision-making procedures. Applying a centre of gravity test in this case is particularly difficult because the combating of terrorism, which

106. Proposal for a Council Regulation amending Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al Qaida network and the Taliban, COM (2009)187 final, 22 April 2009.

107. Communication from the European Commission to the European Parliament and the Council, "Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures", COM(2009)665 final, 2 Dec. 2009.

108. European Parliament Committee on Legal Affairs, Opinion on the legal basis of the proposal for a Council Regulation amending Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, JURI_AL(2009)430917, 4 Dec. 2009, 8.

109. European Parliament resolution of 19 Dec. 2009 on restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, in respect of Zimbabwe and in view of the situation in Somalia, P7_TA-PROV (2009)0111.

110. Council Regulation (EU) No. 1286/2009 of 22 Dec. 2009 amending Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, O.J. 2009, L 346/42.

111. Action brought on 11 March 2010 – Case C-130/10, *European Parliament* v. *Council*.

is the central aim and purpose of the contested regulation, does not only involve external action on the part of the EU but also directly concerns the objectives related to the AFSJ.[112] Hence, it is at least arguable that both dimensions are equally important and cannot be separated in practice. Moreover, the implementation of a CFSP decision on the basis of Article 215(2) TFEU potentially infringes Article 40(1) TEU insofar as the procedures and powers of the institutions laid down in Title V of the TFEU for the exercise of the Union competences in the AFSJ (Art. 4(2)(j) TFEU) are affected.

Despite the observation of the European Parliament Committee on Legal Affairs that "it is completely out of question for the two legal bases of Articles 215 and 75 TFEU to be combined, since they involve incompatible legal procedures",[113] such a solution seems not excluded in light of the Court's case law. Unlike the situation that gave rise to the judgment in *Titanium dioxide*,[114] the Council acts by qualified majority both under the procedure referred to in Article 75 TFEU and under that laid down in Article 215 TFEU. The different roles of the European Parliament in the decision-making process (co-decision with the Council in the context of Art. 75 TFEU and only a right of information under Art. 215 TFEU) is not problematic either. On several occasions, the Court confirmed that a legal basis providing for a limited or even no formal role for the Parliament is compatible with the co-decision procedure.[115] The Court argued that such a combination reinforces the democratic legitimacy of decision-making and ignored the implications for the Council, which is deprived of its exclusive legislative competence.[116]

Significantly, the inter-institutional conflict between the European Parliament and the Council does not extend to Council Regulation No. 356/2010 imposing restrictive measures directed against certain natural and legal persons, entities and bodies in Somalia.[117] Despite the inclusion of comparable sanctions, such as the freezing of funds, financial assets or economic gains belonging to persons and entities outside the official government, this Regulation is

112. The close connection between CFSP and parts of the AFSJ is recognized in the double legal basis (ex Arts. 15 and 34 TEU) of Council Common Position 2009/67/CFSP of 26 Jan. 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2008/586/CFSP, O.J. 2009, L 23/37.

113. European Parliament Committee on Legal Affairs, cited *supra* note 108, 8.

114. *Titanium dioxide*, cited *supra* note 73.

115. *Commission* v. *Parliament and Council*, cited *supra* note 75, para 59; Case C-155/07, *Parliament* v. *Council*, [2008] ECR I-8103, paras. 77–79.

116. See in this respect Opinion of A.G. Kokott in *Commission* v. *Parliament and Council*, cited *supra* note 75, para 61; and *Parliament* v. *Council*, cited *supra* note 115, para 89.

117. Council Regulation (EU) No. 356/2010 of 26 April 2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia, O.J. 2010, L 105/1.

considered to be legally adopted on the single basis of Article 215 TFEU.[118] The main difference with the sanctions against the Al-Qaida network and the Taliban is the more explicit link with the situation prevailing in a given third country (Somalia) and the absence of any reference to terrorism in the text of the Regulation. Taking into account that the scope *ratione materiae* of Article 75 TFEU is limited to the prevention and combating of terrorism in order to establish an AFSJ, this distinction appears logical. On the other hand, terrorism is a volatile concept. For instance, the persons and entities listed in the EU sanctions Regulation against Somalia are all related to *Al-Shabaab*, which has recently been designated as a "terrorist organization" in many countries, and which is suspected of close links with Al Qaida.[119] In order words, the borderline between terrorist activities and other acts threatening the (international) peace and security is not always very clear and may evolve.

5. The duty of consistency in EU external action

In light of the EU's general external objectives, the discussion on the delimitation of competences cannot be disconnected from the concept of consistency.[120] The latter is a guiding principle of the Union and has a specific value in the field of EU external relations. Since the entry into force of the Treaty of Lisbon, it falls within the jurisdiction of the Court of Justice (5.1.) but also remains an important political concept in need of pragmatic solutions (5.2.).

5.1. *A legal obligation subject to control by the Court of Justice*

Articles 13(1) TEU and 7 TFEU provide that the Union shall ensure the consistency between its policies and actions within a single institutional framework and with respect to the principle of conferred powers. With regard to its external activities, the key provision is Article 21(3) TEU, which states that: "The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect."

In comparison to the pre-Lisbon situation (ex Art. 3 TEU), the role of the High Representative is a first important innovation. Taking into account that

118. European Parliament Committee on Legal Affairs, cited *supra* note 108, 8.

119. *Al-Shabaab* is designated as a terrorist organization in the United States, Australia, Canada and the United Kingdom. See <www.nctc.gov/site/groups/al_shabaab.html>.

120. Wessel, op. cit. *supra* note 1, 1149.

this position was essentially created to overcome the division between the external competences of the Council and the Commission,[121] this hardly comes as a surprise. Remarkably, whereas Article 21(3) TEU modestly refers to an assisting role for the High Representative, Article 18(4) TEU is more straightforward and unequivocally states that "[h]e shall ensure the consistency of the Union's external action". In other words, within the EU's institutional framework the High Representative is the first watchdog over the consistency principle. This is further reflected in Article 16(6) TEU on the role of the Foreign Affairs Council, which is presided by the High Representative, and in Article 26(2) TEU as far as external action in the field of CFSP is concerned.

A second significant evolution is the Court's jurisdiction to adjudicate on the duty of consistency. Until the entry into force of the Lisbon Treaty, respect for this obligation was basically entrusted to the political institutions with the Court's role confined to protecting the *acquis communautaire* against any encroachment from intergovernmental influences.[122] Hence, a certain bias in favour of division of competence questions rather than concerns of consistency could be observed.[123] The new Treaty rules may help to rebalance this situation. Moreover, the Court is given an opportunity to clarify the meaning of the consistency provisions. It is well known that in contrast to the term "consistency" which is used in the English text of the Treaty, other language versions refer to the notion "coherence".[124] This linguistic ambiguity continues to exist under the Treaty of Lisbon. What might appear as a rather technical issue nevertheless has important implications because, from a legal point of view, consistency and coherence have a different meaning. Whereas the term "consistency" points at the absence of contradictions between the various external policies, "coherence" refers to the positive obligation of ensuring synergy between the different elements of the EU's external action. They cannot be used interchangeably but should be understood as distinct concepts,[125] which are closely related in the sense that the requirement of consistency forms a first

121. See: Final Report of Working Group VII on EU External Action of the European Convention, CONV 459/02, 16 Dec. 2002.

122. Ex Art. 3 TEU *juncto* Arts. 46 TEU and 47 TEU.

123. Hillion and Wessel, op. cit. *supra* note 85, 581.

124. Wessel, op. cit. *supra* note 1, 1150; Hillion, "Tous pour un, un pour tous! Coherence in the External Relations of the European Union" in Cremona (Ed.), *Developments in EU External Relations Law* (OUP, 2008), p. 12.

125. In this respect, it is remarkable that also the Court of Justice referred to both "coherence and consistency" in two cases regarding the cooperation between Member States and the Community institutions. See: Case C-266/03, *Commission* v. *Luxembourg*, [2005] ECR I-4805, para 60; Case C-433/03, *Commission* v. *Germany*, [2005] ECR I-6985, para 66. See also generally Mathisen, "Consistency and coherence as conditions for justification of Member State measures restricting free movement", in this *Review*.

degree of coherence.[126] Taking into account the reality that most languages refer to the dynamic notion of coherence and, more important, based on a functional interpretation of the treaty, it has been argued that the requirement of "consistency" foreseen in the English language version entails more than avoiding legal contradictions and presupposes a quest for synergy and added value between the different actions of the Union.[127]

Taking into account the importance attributed to the objective of enhanced coherence for EU foreign policy, which was one of the main reasons for revising the treaties,[128] the Court may develop various guidelines leading to substantive and procedural obligations for the institutions comparable to the obligations for the Member States under the duty of cooperation.[129] The latter is a constitutional principle, derived from the treaty provision on loyal or sincere cooperation (Art. 4(3) TEU, ex 10 EC) and developed in the context of mixed agreements.[130] It presupposes that Member States, while exercising their retaining competences, refrain from taking actions which could compromise the effectiveness of Community (now Union) provisions.[131] This implies, for instance, a duty to inform and consult the relevant institutions prior to instituting dispute-settlement proceedings.[132] Simultaneously, it entails a commitment for the EU institutions to cooperate with the Member States, including in areas of exclusive powers,[133] and applies to the dialogue between institutions.[134]

Of particular significance is the close connection between the duty of cooperation and the requirement of unity in the international representation of the Union.[135] The latter is an autonomous objective, which is not explicitly mentioned in the Treaties but can be derived from the objective to assert the EU identity on the international scene as laid down in Article 3(5) TEU (ex 2

126. Gauttier, "Horizontal coherence and the external competences of the European Union", 10 ELJ (2004), 26.

127. Hillion, op. cit. *supra* note 124, pp. 12–16.

128. See IGC 2007 Mandate, Council SG/12218/07, para 1.

129. Hillion and Wessel, op. cit. *supra* note 85, 581.

130. See: Hillion, "Mixity and coherence in EU external relations: The significance of the duty of cooperation", *CLEER Working Papers*, 2009/2. Neframi, "The duty of loyalty: rethinking its scope through its application in the field of EU external relations", 47 CML Rev. (2010), 331–337.

131. Case C-124/94, *Centro-Com*, [1997] ECR I-81, paras. 25–27; Case C-205/06, *Commission* v. *Austria*, [2009] ECR I-1301; Case C-249/06, *Commission* v. *Sweden*, [2009] ECR I-1335; Case C-246/07, *Commission* v. *Sweden*, judgment of 20 April 2010, nyr.

132. Case C-459/03, *Commission* v. *Ireland*, [2006] ECR I-14635, para 179.

133. Case C-45/07, *Commission* v. *Greece*, [2009] ECR I-701, para 25.

134. Case C-65/93, *European Parliament* v. *Council*, [1995] ECR I-643, para 23.

135. Opinion 2/91, *ILO*, [1993] ECR I-1061, para 36; Opinion 1/94, *WTO*, [1994] ECR I-5267, para 108; Opinion 2/00, *Cartagena Protocol on Biosafety*, [2001] ECR I-9713, para 18; *Commission* v. *Sweden*, cited *supra* note 131, paras. 73–75.

TEU).[136] Whereas the requirement of unity of external representation has so far always been linked to the vertical relationship between the Member States and the Union, nothing seems to prevent an application of this reasoning in respect of the horizontal relationship between the institutions. The underlying rationale that the Union needs to present itself to the outside world as a unified system in order to ensure effective cooperation with third countries is obvious with regard to mixed agreements but also applies to inter-institutional cooperation. Arguably, inter-institutional conflicts about legal basis have a direct impact on the relations with a third country.[137] Moreover, the principle of unified international representation is not exclusively related to mixity but, initially, referred to the unity of the European Atomic Energy Community and the European Economic Community.[138]

Given the overarching aim to ensure the coherence and consistency of the EU's external action and international representation,[139] the Court's case law regarding vertical cooperation between the Union and the Member States could be a source of inspiration for interpreting the horizontal duty of consistency between the Council and the Commission. In this respect, it is also noteworthy that Article 13(2) TEU refers to "mutual sincere cooperation" between the institutions. The parallel with the principle of sincere cooperation between the Union and the Member States, laid down in Article 4(3) TEU, is obvious. Hence, the duty of consistency between the various policies and actions of the Union can be regarded as a derivative of the horizontal and vertical principles of sincere cooperation.

5.2. *A political principle in need of pragmatic solutions*

Despite the increased opportunities to play a constructive role in ensuring a more coherent and effective external action for the Union, the impact of the new legal context is not to be overestimated. Coherence is and remains essentially a policy imperative which largely depends on the political will of the Member States and the EU institutions.[140] It is somewhat paradoxical that judicial interference sometimes risks undermining rather than enhancing the coherence of EU external relations in general. For instance, as a result of the

136. Neframi, op. cit. *supra* note 130, 553.

137. A good illustration is Case C-317/04, *European Parliament* v. *Council*, [2006] ECR I-4721. See Cremona, "Defending the Community interest: the duties of cooperation and compliance" in Cremona and De Witte, op. cit. *supra* note 8, pp. 157–158.

138. Hillion, op. cit. *supra* note 130, 7.

139. See *Commission* v. *Luxemburg*, cited *supra* note 125, para 60; and *Commission* v. *Germany*, cited *supra* note 125, para 66.

140. Koutrakos, op. cit. *supra* note 18, 675.

ECOWAS judgment, the Council may have been less eager to include cross-references to Commission tasks in CFSP decisions or to agree on practical engagements included in general policy documents such as the European Consensus on Development.[141] Fostered by the complexity of EU foreign relations law and the Court's preoccupation with division of competence issues, the potential for inter-institutional disputes increases.[142] This is not a very attractive evolution in a system of EU external relations where close co-operation and understanding among the institutions is a first prerequisite for achieving the objective of coherence in practice.

Apart from the normative dimension of coherence it appears that practical arrangements and initiatives to agree on a comprehensive approach to EU external action are equally important.[143] The establishment of a policy framework for a "whole-of the-Union approach" to development[144] and the regular Commission reports on progress towards "policy coherence for development"[145] point in this direction. However relevant those initiatives may be, they cannot escape the legal reality that "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them."[146] Hence, the question remains how a balance can be found between the political requirement of a coherent external action and the legal straitjacket of the treaties.

A first important instrument to increase the coherence of the EU's activities is offered in Article 295 TFEU: "The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature". For instance, the conclusion of an interinstitutional agreement between the European Parliament and the Council regarding the coordination of legal safeguards required for the adoption of restrictive measures under both Articles

141. Hillion and Wessel, op. cit. *supra* note 85, 584.

142. De Witte, "Too much constitutional law in EU external relations?" in Cremona and De Witte, op. cit. *supra* note 8, pp. 3–15.

143. Koutrakos, "Common Foreign and Security Policy: Looking back, thinking forward" in Dougan and Currie (Eds.), *50 years of the European treaties. Looking back and thinking forward* (Hart, 2009), pp. 163–170.

144. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Policy Coherence for Development – Establishing the policy framework for a whole-of-the Union approach", COM(2009)458 final, 15 Sept. 2009.

145. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "EU 2009 Report on Policy Coherence for Development", COM(2009)461 final, 17 Sept. 2009.

146. Art. 13(2) TEU.

215 and 75 TFEU would certainly contribute to the coherence between the EU's activities under the CFSP and AFSJ.

Proceeding from the unity of the EU legal order, the increased linkage between CFSP and non-CFSP instruments provides another pragmatic solution for what Piet Eeckhout calls the "original sin of overall EU external action".[147] Support for such a pragmatic *modus vivendi* can be implicitly found in the *ECOWAS* judgment, where the Court annulled the implementing CFSP Council Decision while leaving the original CFSP Joint Action untouched. In the absence of any direct jurisdiction on the duty of consistency at that time, the Court pointed at the inclusion of a reference to "the need for consistency of the Union's activities in the field of small arms and light weapons" in the contested CFSP acts to conclude that "the objectives of the contested Joint Action can be implemented both by the Union, under Title V of the EU Treaty and by the Community, under its development cooperation policy".[148] Arguably, this approach of a comprehensive CFSP act leading to both CFSP and non-CFSP implementing measures may help to find a balance between the requirement of consistency and the principle of mutual non-affectation laid down in Article 40 TEU.[149]

The coupling of different legal instruments to ensure policy coherence is anything but new[150] and is fully consistent with the constitutional structure of a unified EU legal order with separate procedural requirements for different policies. The only concern, which already existed at the time of the first CFSP Common Positions on Rwanda and Ukraine in 1994, is that the European Commission risks being reduced to a purely administrative organ implementing CFSP policy. Whereas a mere reference to activities falling under other Union policies is not necessarily problematic, the situation is different when the margin of appraisal enjoyed by the institutions involved in the adoption of the relevant measures is restricted.[151] In order to avoid such a situation, the combination of practical arrangements among the institutions, on the one hand, and the Court's combined interpretation of the duty of consistency and the division of competences, on the other hand, is of utmost importance.

147. Eeckhout, op. cit. *supra* note 6, p. 145.

148. *ECOWAS*, cited *supra* note 16, paras. 86–88.

149. Van Vooren, op. cit. *supra* note 101, 244–248.

150. E.g., the CFSP Common Strategies adopted after the entry into force of the Treaty of Amsterdam all included a specific reference to the objective of consistency and a clause that the implementation would respect the division of powers envisaged by the Treaties. Such coupling of legal instruments also provided a pragmatic solution for the export regime of dual-use goods in the 1990s and exists in the framework of the EU's anti-terrorism policies.

151. Wessel, op. cit. *supra* note 1, 1155.

6. Conclusion

The new legal framework for EU external action is intriguing and challenging. On the one hand, the abolition of the pillar-structure, the reorganization of the EU's external competences and the introduction of new institutional functions such as the High Representative, the President of the European Council and the EEAS, all aim to enhance the consistency and coherence of the Union's external activities and the unity of its international representation. On the other hand, the separate rules and procedures for CFSP also lead to the conclusion that the Lisbon Treaty leaves the Union with "a dual pillar structure in all but name."[152] This paradox is a relic of the EU's historical evolution, where the Member States decided to establish between themselves a system of cooperation in foreign affairs separate from the external relations of the European (Economic) Community. With every amendment of the treaties, the conception of a Union based upon a watertight distinction between a supranational Community and an intergovernmental CFSP became ever more difficult to uphold. The progressive integration of the CFSP in the EU legal order, characterized by a refinement of specific legal rules and institutional mechanisms, continues with the Treaty of Lisbon. Of particular importance are the equivalent legal status of the CFSP in comparison to the EU's other external policies, the extended scope of jurisdiction for the Court of Justice to rule on CFSP decisions providing for restrictive measures against natural or legal persons and the increased flexibility in CFSP decision-making. However, this process is not complete. The absence of full judicial powers of control for the Court of Justice and the different decision-making procedures underline the distinct nature of CFSP.

The position of the CFSP as an integrated yet specific part of the EU legal order challenges the traditional paradigms of European integration.[153] As an alternative to its classification as an intergovernmental pillar[154] or a "*mal nécessaire* of a political compromise",[155] which is inferior and even detrimental to the progress of European integration on the basis of the so-called "Community method", it appears more appropriate to regard the CFSP as a recognition of the specific characteristics of foreign affairs. The requirement to respond

152. Koutrakos, op. cit. *supra* note 18, 669.

153. See also: Tizzano, "The Foreign Relations Law of the EU between Supranationality and Intergovernmental Model" in Cannizzaro (Ed.), *The European Union as an Actor in International Relations* (The Hague, 2002), pp. 135–147.

154. Denza, op. cit. *supra* note 68.

155. De Witte, "The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?" in Heukels, Blokker, Brus (Eds.), *The European Union after Amsterdam – A Legal Analysis* (The Hague, 1998), p. 51.

flexibly to rapidly changing international circumstances and the sensitivity of the issues at stake explain why foreign and defence policy decisions are often excluded from full judicial and parliamentary review in many countries. From this perspective, the separateness of CFSP is not contradictory to the unitary character of the EU legal order. The main challenge, of course, is to find an appropriate balance between the delimitation of the respective external policies of the Union, on the one hand, and the requirement of consistency in the external actions and representation of the Union, on the other hand. Despite the absence of full jurisdiction in the field of CFSP, the Treaty of Lisbon offers new opportunities for the Court of Justice to play a constructive role in this exercise. In particular, the possibility to clarify the duty of consistency as a constitutional principle of EU external action and as a mirror image of the separation of the EU's external powers allows for a more balanced approach in comparison to the almost exclusive focus on competence questions in previous inter-institutional conflicts.

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