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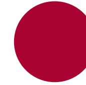

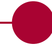

External action in the field of development cooperation policy – the impact of the Lisbon Treaty

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Morten Broberg and Rass Holdgaard

EU External Action in the Field of Development Cooperation Policy

The Impact of the Lisbon Treaty

Sieps
Swedish Institute for European Policy Studies

Morten Broberg and Rass Holdgaard

EU External Action in the Field of Development Cooperation Policy

The Impact of the Lisbon Treaty

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Preface

The relationship between the six founding EU members and, first of all, African countries and territories has for a long time been very important. This was the case even before they signed the Treaty of Rome on 25 March 1957. In the decades that followed, historical ties as well as the changing international environment to a considerable extent formed the European Union´s relations with the developing countries. The primordial constitutional set up and subsequent constitutional developments, however, played an important part in forming the Union's development cooperation policy. The object of the present report is to examine the legal impact of the 2009 Lisbon Treaty on the Union's development cooperation policy, in particular by placing it in its historical context.

"EU external action in the field of development cooperation policy – The impact of the Lisbon Treaty" is the fourth report published in the context of the SIEPS research project *The EU external action and the Treaty of Lisbon*. It provides a well-timed evaluation of the implications that the Lisbon Treaty has had on the external posture of the European Union in a field that traditionally has played an important role in the European Union's external policy; namely development cooperation.

Jörgen Hettne
Acting Director

SIEPS carries out multidisciplinary research in current European affairs.
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and policy-making at Swedish and European levels.

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Executive summary

This report identifies and accounts for the institutional and substantive changes made to the European Union's development cooperation policy by the Lisbon Treaty.* It assesses to what extent and how these changes affect the ability of the "European area" (i.e. the sum of EU and Member States) to act as a coherent and effective player on the international scene in the field of development cooperation. The report examines only the legal and constitutional aspects of the EU's development cooperation, i.e. those aspects which are directly related to primary EU law, including notably the Treaties, rather than to secondary legislation.

Leaving aside the special provisions on the overseas countries and territories (OCTs), during the period from the entry into force of the Rome Treaty in 1958 and until the entry into force of the Maastricht Treaty in 1993, it was mainly left for the Court of Justice to define the basic legal framework for the Union's development cooperation policy. In case law from this period, the Court largely supported the Commission's approach with regard to the place and importance of development cooperation policy in the EU constitutional system. During this period the Court accepted that the common commercial policy, the Union's predominant external policy at the time, could be broadly construed, and thus used to pursue development cooperation policy objectives. In this way, important aspects of development cooperation policy were brought within the confines of the Union's exclusive competence. The report shows that, apart from relations with the OCTs, the legal constitutional framework established in this case law created a trade-biased foundation for the Union's and the Member States' development cooperation policy. Another important finding with regards to this first period is that the Union's development cooperation policy competence was weak outside the common commercial policy field. As a third important finding with respect to the first period, the report shows that it was clear from early on that the financing mechanism formed an important way to influence the Union's development cooperation policy. Attempts by the European Parliament to gain influence through its budgetary prerogatives were not supported by the Commission and failed when the Court firmly rejected to expand the concurrent nature of the Union's development cooperation policy competence through the Parliament's budgetary powers.

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* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

A second period began with the entry into force of the Maastricht Treaty in 1993. With this Treaty, the Union's development cooperation was given a Title in the EC Treaty, and thus a policy of its own. This continues to constitute the single most important constitutional change to the EU's development cooperation policy. The new Treaty provisions were based on three legs laying down the principles, *inter alia,* for how the European Union and the Member States were to cooperate in the field of development cooperation. Nevertheless, also after Maastricht, new competence conflicts over the precise delimitation of the European Union's development cooperation policy *vis-à-vis* other policies arose. Moreover, after Maastricht, the "cohabitation" of development cooperation and the European Union's promotion of its own values (in particular, human rights and democracy) was challenged.

A third period was introduced with the Lisbon Treaty that entered into force in 2009. This Treaty introduced a number of changes to the constitutional legal framework, which governs the Union's development cooperation policy. Some of these changes are codifications and (technical) adjustments, which will not give rise to significant problems in the future. Other changes may have a longer-lasting impact and carry the potential for future constitutional conflicts, which may influence on the Union's ability to carry out an effective development cooperation policy. First and foremost, by reorganising and streamlining the development cooperation policy objectives, the Lisbon Treaty leaves a lasting constitutional impact on the Union's development cooperation policy. The explication and reorganisation of the Union's external relations objectives and principles and the streamlining of the development cooperation policy objective (i.e. the identification of poverty reduction/ eradication as a primary objective) are likely to have a lasting constitutional impact on policy-making and legal methodology in this area. Presumably, this change will be incremental and therefore probably largely unnoticed in the day-to-day politics. Furthermore, it seems likely that post-Lisbon the European Union's development cooperation policy is faced with three main legal, constitutional challenges:

The organisation of the financial aid aspect of the European Union's development cooperation policy remains crucial.

Finding the right constitutional balance for development cooperation policy vis-à-vis other policies

The relationship between the 28 Member States' development cooperation policies and that of the European Union.

In addition to these three main legal, constitutional challenges, the report points out that the Lisbon Treaty has introduced new battlefields for

institutional conflicts, including that between the Parliament and the Commission concerning the choice between delegating and implementing acts and that concerning division of tasks between the Commission and the European External Action Service (EEAS).

Overall, the report concludes that, despite the fact that the old constitutional challenges remain, it is possible to identify two overall positive tendencies: *First,* since the entry into force of the Maastricht Treaty, the European Union has had a development cooperation policy framework with a global and comprehensive outlook. *Second,* thanks to four decades of Court of Justice rulings, this policy is now governed by well-known legal principles — including notably principles to define the legal basis and the duty of loyal cooperation — some of which have even been refined and, partly, codified in the Lisbon Treaty. The global outlook of the Union's development cooperation policy post Lisbon, and the increasing institutionalisation of the legal constitutional framework, which governs this policy, are positive signs that the Union and its Member States are moving towards a framework, which will gradually construct a more coherent and efficient development cooperation policy for the EU.

1 Introduction

In this report, we identify and account for the institutional and substantive changes made to the European Union's development cooperation policy by the Lisbon Treaty.[1] Our aim is to assess to what extent and how these changes affect the ability of the "European area" (i.e. the sum of EU and Member States) to act as a coherent and effective player on the international scene in the field of development cooperation.[2] In the report, we examine only the legal and constitutional aspects of the EU's development cooperation, i.e. those aspects which are directly related to primary EU law, including notably the Treaties, rather than to secondary legislation.

In section 2, we provide an overview of the road leading from the entry into force of the Rome Treaty[3] in 1958 until the Lisbon Treaty's entry into force in 2009. On this basis, in section 3, we turn to analysing the changes brought about by the Lisbon Treaty. Finally, in section 4, we summarise our findings and identify what we consider to be the three main constitutional challenges for European Union development cooperation policy in the future.

1.1 From Rome to Lisbon

1.1.1 Taking stock – looking back

We begin with an account of the development of the EU's legal constitutional framework for development cooperation. As is the case for most of the EU's external policies, the piecemeal and case law based evolution of its legal framework is important to bear in mind in order to understand the place and nature of EU development policy today. There are at least two reasons for this:

Firstly, we assume that there is a dialectic interaction between the *legal constitutional framework* within which a particular policy must be confined,

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1 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

2 This report is about the division of competence between the European Union (as such) and its Member States. In this regard, it is useful to apply a terminology that enables us to distinguish between the *"Member States"* and the *"European Union"*. Moreover, apart from where we use quotations, as a rule, we do *not* distinguish between European Economic Community, European Community, and European Union, but instead we use the term *"European Union"*. On the other hand, we have been careful to distinguish between the *"EC Treaty"* (EC Treaty as well as EEC Treaty), *"EU Treaty"*, *"Treaty on the Functioning of the European Union",* and *"Treaty on European Union"*.

3 Treaty Establishing the European Economic Community art. 3, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter Rome Treaty or EEC Treaty].

and the output of this policy. The way that the legal framework for a particular Union policy – such as trade, environment, or development cooperation – is construed is a product of the priorities at the time of the relevant EU intergovernmental conference (IGC) when the final formulation of the policy is decided. In addition, the subsequent interpretation and application of the framework will be affected by the evolving political priorities and needs. Simultaneously, when a policy is in place, we may also expect that the legal framework chosen will structure and bias the policy choices made.

Secondly, when looking at the contemporary challenges in today's European Union development cooperation policy, we submit, the main *legal constitutional challenges* are not new, though some of them have taken on a new shape with the Lisbon Treaty. Indeed, some of these still-existing challenges have even resulted in conflicts, which have been dealt with prior to the entry into force of the Lisbon Treaty, directly or indirectly, by the Court of Justice of the European Union, as we shall see below.

In section 2.2, we first consider the phase that began with the entry into force of the Rome Treaty in 1958 – a time when several of the founding Member States were still colonial powers. Even though de-colonisation gained momentum during the 1960s, it was not until the entry into force of the Maastricht Treaty[4] in 1993 that the Union's development cooperation policy was reflected at Treaty-level through the introduction of a specific Title on development cooperation policy in the EC Treaty.[5] The entry into force of the Maastricht Treaty probably constitutes the single most important constitutional milestone in the European Union's development cooperation policy, and therefore naturally marks the beginning of the second phase. This second phase, which lasted until 2009 when the Treaty of Lisbon entered into force, is considered in section 2.3.

1.2 Rome to Maastricht

1.2.1 Development cooperation policy under the Rome Treaty – weak constitutional foundation

The first phase of European Union development cooperation policy stretches across a 35-year period – i.e. from the entry into force of the Treaty of Rome in 1958 and until the entry into force of the Maastricht Treaty in 1993. This phase is first of all characterised by a narrow and incomplete conception of

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[4] Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht Treaty].

[5] Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (CE 321) 1 [hereinafter EC Treaty or EC].

EU development cooperation policy and, consequently, a weak constitutional basis for this policy. In particular, the Rome Treaty did not provide an explicit legal basis for a global, coherent policy in the field. This is not to say that development cooperation was not part of that Treaty. France, supported by Belgium, made it a condition of signing up to the Rome Treaty that the European Union would establish and maintain permanent relations with what at the time of the negotiations were Member State colonies.[6] Hence, under Part IV of the Rome Treaty, "association status"[7] was accorded to the so-called Overseas Countries and Territories (OCTs), meaning those non-European countries and territories that had "special relations with Belgium, France, Italy and the Netherlands", as it was phrased in Article 131 of the Treaty of Rome.[8]

For the OCTs, the main implication of being granted association status was that the tariff measures that applied among the EU members were extended to the former, thereby allowing both OCT and EU products reciprocal customs duty-free access to their respective markets.[9] The EU also provided development cooperation assistance to the OCTs.[10] In other words, the EU-OCT relationship included market access as well as economic assistance, the two components that still today constitute the main pillars of EU development cooperation policy.

From the outset, EU development cooperation policy was not intended to replace, but merely to supplement, the development cooperation policies of the Member States.[11] However, not all the founding members of the European Union found it attractive to finance, via EU development cooperation assistance, what primarily were French colonies.[12] Therefore, rather than financing such assistance through the European Union's general budget, a special financing mechanism – called the European Development Fund

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6 Martin Holland, The European Union and the Third World 25–27 (2002); Joseph A. McMahon, The Development Co-operation Policy of the EC 31 (1998); and Halima Noor-Abdi, The Lomé IV Convention, The Legal and Socio-Economic Aspects of African, Caribbean and Pacific States (ACP) and European Community (EC) Cooperation 33–36 (1997).

7 Whereas today the "association" of a country with the European Union implies the prospect of future membership, the association provided for in Article 131 EEC did not carry with it such prospects.

8 See now Article 198 in the Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

9 Implementing Convention on the Association of the Overseas Countries and Territories with the Community art. 9, Mar. 25, 1957, 298 U.N.T.S. 3.

10 *Id*. art. 1-7.

11 *Id*. art. 1.

12 Lorand Bartels, *The Trade and Development Policy of the European Union*, 18 European Journal of International Law 715, 718–719 (2007).

(EDF) – was established in 1958 providing for a division of the Member States' financing obligations which differed from those of the general budget. The first EDF was established for a limited period, and its budget was kept separate from the Union's general budget. When the first EDF expired, it was followed by a time-limited second EDF, which in turn was replaced by a third EDF. And this has continued so that, today, a tenth EDF is in place and soon to be replaced by the 11th EDF.

De-colonisation, which primarily took place in the European Union's early years, sparked demands for a redefinition of the relationship between the Union and the former colonies.[13] As a consequence, the European Union and its Member States, together with the so-called Associated African and Malagasy Countries,[14] entered into the First Yaoundé Convention of Association covering the period 1964–1969.[15] This convention was to replace the provisions of the Treaty of Rome as the legal framework governing the relationship between the two sides.[16] When the First Yaoundé Convention expired the parties replaced it by a Second Yaoundé Convention, which covered the period 1971–1975.[17] This convention-based regulation of the relationship between, on the one hand, the European Union and its Member States and, on the other hand, primarily former colonies in Africa has been maintained until today. Arguably, the main difference between the Treaty of Rome's provisions on OCTs and the subsequent international agreements was that the former was designed to govern the Union's relationship with dependent or "subordinate" territories, whereas, in principle, the international agreements were negotiated between equal and sovereign parties.[18]

Over the years, the successors to the First Yaoundé Convention have widened both the number of developing countries covered by the international agreements and the scope of the European Union's cooperation with these developing countries so that, in addition to trade and development assistance,

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[13] Martin Holland, The European Union and the Third World 3 (2002).

[14] Generally known under the French acronym EAMA.

[15] Convention d'association entre la Communauté économique européenne et les États africains et malgache associés à cette Communauté, 1964 O.J. (P 93) 1431.

[16] For those overseas countries and territories that did not acquire independence, the Rome Treaty's OCT provisions continued to apply.

[17] Convention d'association entre la Communauté économique européenne et les États africains et malgache associés à cette Communauté, 1970 O.J. (L 282) 2.

[18] Halima Noor-Abdi, The Lomé IV Convention, The Legal and Socio-Economic Aspects of African, Caribbean and Pacific States (ACP) and European Community (EC) Cooperation 41–42 (1997).

new policy fields were included in the framework of cooperation.[19] Moreover, a new political dimension was introduced into the framework of EU development cooperation policy according to which respect for democracy, human rights, and the rule of law was made an integral part of the Union's relations with developing countries.[20]

With the accession of Spain and Portugal to the European Union in 1986, Latin America and the non-European States bordering the Mediterranean received increased attention. Hence, the Union concluded broad development cooperation agreements with these countries, as well as with India, Pakistan, and the then five ASEAN states of Indonesia, Malaysia, Philippines, Singapore, and Thailand. Moreover, with the political changes that swept through Central and Eastern Europe towards the end of the 1980s, the European Union decided, *inter alia*, to direct considerable development funds to those neighbouring countries.

As is apparent from the above, the Rome Treaty did not establish a legal constitutional framework for a comprehensive, global approach to development policy. It was, geographically and thematically, incomplete, providing mainly for special economic relations with a number of primarily former French colonies (the OCTs). Outside this sphere, from a legal constitutional perspective, the "European area's" development cooperation policy began to develop either as components of or supplements to other policies or outside the EU's legal constitutional framework. Moreover, it developed in forms which were not foreseen in the constitutional framework set up with the Rome Treaty in 1958. Thus, as we shall see in section 2.2 below, at the Treaty-level, development cooperation appeared to be a component of other EU policies. Sometimes development cooperation policy formed a natural part of these other policies, whereas at other times it seemed to be at odds with or competing with these other policies. In particular, there were clashes between development cooperation and the basic principles of the Union's common commercial policy – clashes which to a considerable extent were a reflection of the fact that the European Union at that time was an "Economic Community", which had exclusive competence over the common commercial policy, whereas the competence over development cooperation policy was shared between the Union and the Member States. The incomplete and weak

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[19] Including *inter alia* cultural cooperation, environmental protection, support for structural adjustment, and the question of debt relief.

[20] Lorand Bartels, Human Rights Conditionality in the EU's International Agreements 13–15 (2005); see, for example, the preamble to the Third ACP-EEC Convention, 1986 O.J. (L 86) 3 (also known as the Lomé III Convention), and art. 5 in the Fourth ACP-EEC Convention, 1991 O.J. (L 229) 3 [hereinafter Lomé IV Convention].

constitutional basis of the EU's development cooperation policy in this period is clearly evident in the competence conflicts concerning the legal bases on which the EU should carry out its development cooperation policy.

1.2.2 The first competence conflict; development cooperation as a subordinate (or subsumed) policy

In the late 1960s and early 1970s the Member States and the European Union[21] jointly concluded a number of international commodity agreements. However, when in the mid-1970s an international agreement on rubber was negotiated, disagreement arose between the European Commission and the Council of Ministers as to the question of competence. The agreement was negotiated within the framework of the United Nation's Conference on Trade and Development (UNCTAD), and while there was no doubt that the negotiations concerned a trade agreement, it was equally clear that development cooperation formed a central component of it. It was not contested that the European Union was entitled to participate in the agreement envisaged; however, the Commission and the Council disagreed as to whether the agreement's subject matter came entirely within the powers of the Union, or whether it possibly gave rise to a division of powers in such a way as to justify the joint participation in the agreement of both the Union and of the Member States. This prompted the Commission to ask the Court of Justice for an Opinion on the matter, which led to a ruling that became known as *Natural Rubber Agreement*.[22]

The Commission argued that the agreement envisaged came entirely, or at least in essentials, within the context of the provisions on the common commercial policy in the Rome Treaty,[23] which meant that the negotiation and conclusion of the agreement came within the Union's exclusive powers. In contrast, the Council held that the subject matter of the agreement fell outside the framework of the common commercial policy and thus called for a division of powers between the Union and the Member States so that the agreement would have to be concluded in accordance with the pattern of other similar so-called "mixed agreements". Thus, the question was whether the Union's (exclusive) competence in the area of common commercial policy was a sufficient legal basis for the conclusion of the Agreement, or whether the development cooperation policy aspects of the Agreement entailed that competence was shared between the Union and the Member States.

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[21] Then the European Economic Community.

[22] Opinion 1/78, International Agreement on Natural Rubber, 1979 E.C.R. 2871.

[23] Then Article 113 of the EEC Treaty, now Article 207 TFEU.

In its ruling, the Court of Justice held that the Treaty provisions on the common commercial policy also covered agreements where development cooperation policy played an important role. In this sense, development cooperation policy was considered to be *subordinate* to, or subsumed in, the exclusive common commercial policy. Hence, in principle, the European Union would have exclusive competence with regards to the negotiation and conclusion of the *Natural Rubber Agreement*, and these negotiations would have to be conducted within the decision-making framework of that policy. However, the Court added, to the extent that *financing* the machinery to be set up under the *Natural Rubber Agreement* were to be assumed by the Member States, this would mean that there would be a mixed agreement.

Subsequently, in its judgment in what has become known as the *First GSP* case from 1987, the Court of Justice confirmed that the common commercial policy took precedence over development cooperation policy.[24] The *First GSP* case concerned the legality of two regulations whereby the European Union would offer access to the European market at preferential tariffs for certain products originating in developing countries. When the Commission originally proposed these regulations, they were based on the Treaty's provisions on common commercial policy. However, before adopting the two regulations, the Council introduced an additional legal basis because, in its view, the regulations had development cooperation policy aims in addition to commercial policy aims. According to the Council, the implementation of development cooperation policy therefore went beyond the scope of the Treaty's common commercial policy provision, and consequently necessitated recourse to what is sometimes referred to as the flexibility clause, which today we find in Article 352 TFEU.

The Court did not find in favour of the Council. It first observed that the link between trade and development cooperation had become progressively stronger in modern international relations, and that it was as part of this development that the European Union's system of generalised preferences[25] was based. That system, the Court observed, reflected a new concept of international trade relations in which development cooperation aims played a major role. The Court, however, went on to observe that the Union's common commercial policy should contribute "to the harmonious development of world trade", which presupposed that commercial policy would be adjusted in order to take account of any changes of outlook in international relations. Likewise, other common commercial policy provisions provided not only

[24] Case 45/86, Commission v. Council (First GSP Case), 1987 E.C.R. 1493.

[25] So-called *generalised system of preferences* or *GSP* – hence the name of the case.

for measures to be adopted by the institutions and for the conclusion of agreements with non-member countries, but also for common action "within the framework of international organizations of an economic character" – an expression which, according to the Court, was sufficiently broad to encompass the international organisations which might deal with commercial problems from a development cooperation policy point of view.

Referring to its earlier ruling in the *Natural Rubber Agreement* case, the Court went on to observe *that* "the existence of a link with development problems does not cause a measure to be excluded from the sphere of the common commercial policy as defined by the Treaty", *that* "it would no longer be possible to carry on any worthwhile common commercial policy if the [Union] were not in a position to avail itself also of means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade", and *that* "[a] 'commercial policy' understood in that sense would be destined to become nugatory in the course of time". On this basis, the Court of Justice ruled that the contested regulations were measures falling within the sphere of the common commercial policy, and that since the Council had the power to adopt them pursuant to the Treaty's provisions on the common commercial policy, the Council was not justified in adding as legal basis what is now found in Article 352 TFEU. Arguably, the Court of Justice's rulings in the *Natural Rubber Agreement* case and the *First GSP* case suggest, we submit, that development cooperation policy was considered to be subordinate to, or subsumed in, the common commercial policy.

1.2.3 European Parliament competences circumscribed; development policy competence as a complementary competence

Whilst, on the face of it, the *Natural Rubber Agreement* and *First GSP* cases merely concerned the somewhat technical question of whether or not development cooperation policy was subordinate to the common commercial policy, with regards to substance the Court of Justice's answer to this question had an immediate impact on the division of competence between the European Union and the Member States: If the development cooperation policy was subordinate, the European Union had exclusive competence, but if development cooperation policy was not subordinate, the Member States would retain some competence. Hence, in reality, the two cases also reflected a competence battle between the Commission and the Member States (the Council). As we shall see immediately below, this vertical competence battle

was also apparent in two other cases which concerned the legal situation prior to the Maastricht Treaty.[26]

The first of the two cases, normally referred to as the *Emergency Aid for Bangladesh* case,[27] concerned the provision of humanitarian aid to Bangladesh. The background to the case was the devastating effects left by a cyclone that hit Bangladesh in April 1991. The Commission made an immediate grant of aid to Bangladesh and prepared a plan for further special aid to the country. The Commission put this plan forward to the Council, but the plan never appeared on the formal agenda of a regular Council meeting. On 14 May 1991, at a working lunch, the ministers for foreign affairs decided to provide special aid as proposed by the Commission. The Member States could provide this aid either directly or via the Commission, and all but one granted it directly to Bangladesh.

In proceedings brought against the Council and the Commission, respectively, the European Parliament challenged the ministers for foreign affairs' decision, arguing that the two institutions had infringed the Parliament's prerogatives in budgetary matters. The Court of Justice found against the Parliament. In particular, it pointed out that the European Union did not have exclusive competence in the field of humanitarian aid, and that, consequently, the Member States were not precluded from exercising their competence in that regard collectively in the Council or outside it.[28] Since the Union did not have exclusive competence, the Parliament could only challenge the decision if it were an act of a Union institution. Following an examination of the circumstances in which the decision had been taken, the Court of Justice concluded that the contested act was not an act of the Council, but an act taken by the Member States collectively. This led the Court to declare the Parliament's application against the Council to be inadmissible.[29]

It is noteworthy that to a considerable extent both Advocate General Jacobs and the Court of Justice based their respective reasoning upon the view that in the field of humanitarian aid the European Union did not have exclusive competence. The Advocate General went on to observe that the Union held

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[26] Even though one of the rulings (*Lomé IV*) was only rendered after the entry into force of that Treaty.

[27] Joined Cases C-181/91 and C-248/91, European Parliament v. Council and Commission (Emergency Aid for Bangladesh), 1993 E.C.R. I-3685.

[28] Para. 16 of the judgment.

[29] Para. 25 of the judgment. The Court also rendered the action brought against the Commission inadmissible, since the Member State contributions did not qualify as items of Union revenue and the expenditure relating thereto did not constitute expenditure of the Union.

concurrent competence with that of the Member States,[30] whereas the Court abstained from expressly qualifying the competence, even though, presumably, it shared the view of its Advocate General.[31] The Court's hesitation may be due to the fact that it was far from obvious that the European Union had the necessary legal basis for providing humanitarian aid.[32] The *Emergency Aid for Bangladesh* case, though formally a (horizontal competence) dispute between the institutions, concerned also the (vertical) demarcation line between the Union and the Member States in respect of financing humanitarian aid. The Court firmly established that the Parliament's budgetary powers could not be used to restrain the Member States' capability to provide humanitarian aid outside the Union framework.

In 1994 the *Emergency Aid for Bangladesh* ruling was followed by the Court of Justice's ruling in the *Lomé IV* case brought by the European Parliament against the Council.[33] Again, the European Parliament based its legal challenge on the view that its prerogatives in the field of EU budgetary procedures had been infringed. The case concerned the financing of the Lomé IV Convention between, on the one hand, the European Union and its Member States and, on the other hand, a large number of developing countries in Africa, the Caribbean, and the Pacific (ACP countries). The Lomé Convention was first of all an instrument for development of the ACP countries, and the financing was made via a special fund known as the Seventh European Development Fund (7th EDF). These successive EDFs formed (and continue to form) a peculiar hybrid. They are financed by the Member States out of their national budgets and do not form part of the European Union's budget, but they are managed by the European Commission on the basis of a financial regulation adopted by the Council.[34] The European Parliament claimed that, in the framework of development finance cooperation, it followed from the very words of the Lomé Convention that the European Union as such had

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[30] Para. 25 of the Advocate General's Opinion.

[31] Para. 16 of the judgment.

[32] See Morten Broberg, *Undue Assistance?: An Analysis of the Legal Basis of Regulation 1257/96 Concerning Humanitarian Aid*, 34 European Law Review 769 (2009); Piet Eeckhout, EU External Relations Law 128–129 (2nd ed. 2011); Alan Dashwood, *External Relations Provisions of the Amsterdam Treaty*, *in* Legal Issues of the Amsterdam Treaty 223, (O'Keeffe & Twomey eds., 1999); and Joseph H. H. Weiler, The Constitution of Europe, Do the New Clothes Have an Emperor?, And Other Essays on European Integration 54 n. 117 (1999). It may be added that if the Court of Justice had held that there was no legal basis for providing humanitarian aid this would have meant that the Commission's immediate grant of aid to Bangladesh would have been unlawful.

[33] Case C-316/91, European Parliament v. Council (Lomé IV), 1994 E.C.R. I-653. The case is also sometimes referred to as the *European Development Fund* case or the *EDF* case.

[34] On the background to the EDF scheme, see above section 2.1.

undertaken *vis-à-vis* the ACP States an obligation of international law distinct from those undertaken by the Member States. Consequently, in the view of the European Parliament, the financial resources to be granted constituted Union expenditure which had to be shown in the Union budget and which was subject to the Treaty provisions concerning its implementation.

The Court of Justice did not accept the European Parliament's argument. Rather, it observed that the Union's competence in the field of development cooperation assistance was not exclusive.[35] Accordingly, the Member States were entitled to enter into commitments themselves *vis-à-vis* non-Member States, either collectively or individually, or even jointly with the European Union. Since the European Union did not have exclusive competence, and since the obligation to grant financial assistance under the Lomé IV Convention fell on the Union and its Member States, considered together, the competence to implement the Union's financial assistance provided for under the Lomé Convention was shared by the Union and its Member States. Thus, it was for them to choose the source and methods of financing. It followed that the expenditure necessary for the Union's financial assistance provided for in the Convention was assumed directly by the Member States and distributed by the Seventh EDF which they had set up by mutual agreement. The Union institutions were merely associated with the administration of the Fund, by virtue of that agreement. Consequently, the Court ruled that that expenditure was not Union expenditure which had to be entered in the Union budget and governed by the Treaty provisions on the budget.[36]

The Court of Justice's ruling in *Lomé IV* closely mirrors its previous ruling in *Emergency Aid for Bangladesh*, albeit *Lomé IV* primarily concerned development cooperation policy, whereas *Emergency Aid for Bangladesh* concerned humanitarian aid.[37] Both cases concerned inter-institutional battles in the budgetary field. However, the cases were at least as important from the perspective of the Member States, since, in effect, the European Parliament in these cases attempted to expand or alter the nature of the Union's competence in the field of development cooperation by restraining the Member States' competences to financing development cooperation. In both cases the Court of Justice found that there was "concurrent competence", and therefore

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[35] Paras 26 and 34. See also the Opinion of Advocate General Jacobs in the case at para. 40.

[36] It may be noted that in the *Lomé IV* case the Spanish Government invoked the Treaty regulation as it appeared after the entry into force of the Maastricht Treaty, i.e. after the material time of the proceedings. The Court of Justice apparently accepted the Spanish argument, cf. para. 27 of the ruling.

[37] Contrast with the Opinion by Advocate General Jacobs at para. 41. The Advocate General held that the *Lomé IV* case concerned development cooperation policy as well as humanitarian aid.

the Union and the Member States had a rather wide margin of discretion as regards the preferred division of tasks, including also the possibility of creating hybrid budgetary arrangements.[38] Since, in the field of development cooperation, financing plays a key role, the Court's rulings in both cases were important in order to ensure that Member States retained real shared development cooperation policy competence, which was not subsequently circumvented by the Parliament's budgetary powers.

To sum up, in this founding period of the Union's legal constitutional framework for development cooperation policy the following picture emerges: Leaving aside the special provisions on the OCTs, in large part the legal framework for the Union's development cooperation policy was left for the Court of Justice to define. During this period, the Court largely supported the Commission's approach with regard to the place and importance of development cooperation policy in the EU constitutional system. First, the Court accepted that the common commercial policy, the Union's predominant external policy at the time, could be broadly construed, and thus used to pursue development cooperation policy objectives. In this way, important aspects of development cooperation policy were brought within the Union's exclusive competence. Arguably, the legal constitutional framework established in this case law created a trade-biased foundation for the Union's and the Member States' development cooperation policy. Secondly, outside this field, the Union's development cooperation policy competence was weak. Attempts by the European Parliament to gain influence through its budgetary prerogatives were not supported by the Commission and failed when the Court firmly rejected to expand the concurrent nature of the Union's development cooperation policy competence through the Parliament's budgetary powers.

[38] It may be noted that in subsequent judgments the Court of Justice has provided an interpretation of the duty of loyal cooperation with particular regard to the international representation of the Union and its Member States that arguably places some rather irksome fetters on Member States' room for manoeuvre in an international context. See in particular Case C-246/07, Commission v. Sweden (the perfluoroctane sulfonate or "PFOS" case), 2010 E.C.R. I-3317, at paras 69–105.

2 Maastricht to Lisbon

2.1 Overview

A second phase for the legal constitutional framework of the European Union's development cooperation policy began in 1993 with the entry into force of the Maastricht Treaty, which introduced a specific Title on development cooperation in the EC Treaty.[39] Arguably, this constitutes the most important change at the constitutional level in the field of EU development cooperation policy since 1957 and until this day. The new Treaty provisions were based on three legs – often referred to as the three C's – laying down the principles, *inter alia,* for how the European Union and the Member States were to cooperate in the field of development cooperation. We consider these below in section 2.2. The second phase also witnessed a number of conflicts over the precise delimitation of the European Union's development cooperation policy *vis-à-vis* other policies. This issue will be analysed in section 2.3. Finally, the "cohabitation" between development cooperation and the European Union's values (in particular, human rights and democracy) was brought up in some important cases which we examine in section 2.4.

2.2 Elevating EU development cooperation policy to the constitutional level

The Maastricht Treaty's introduction of a completely new Title on development cooperation in the EC Treaty provided a constitutional basis for the European Union's development cooperation policy. According to the new provisions, the objectives of the Union's policy in the field were the sustainable economic and social development of the developing countries; their smooth and gradual integration into the world economy; the campaign against poverty; and the promotion of democracy, human rights, and the rule of law.[40] The new Title on development cooperation also expressly vested in the European Union Treaty-making competence in the field.[41]

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[39] Title XX of the EC Treaty, entitled "Development Cooperation".

[40] Article 177(1) and (2) EC.

[41] Cf. Article 181 EC (that partly corresponds to Article 211 TFEU). Article 181 EC read as follows: "Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organizations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300." And it went on to state: "The previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements." In the Declaration on articles 109, 130R and 130Y of the Treaty establishing the European Community, 1992 O.J. (C 191) 100, the signatories observed: "The Conference considers that the provisions of […] and Article [181] do not affect the principles resulting from the judgment handed down by the Court of Justice in the AETR case."

As mentioned in section 2.1 above, the "new" policy rested on three legs (the so-called "three Cs"), namely:

- that the Union's policy *vis-à-vis* developing countries respectively other Union policies must be *coherent,*
- that the European Union and the Member States are obliged to *coordinate* their efforts in the field of development cooperation, and
- that European Union development cooperation policy must be *complementary* to the development policies of the Member States.

The requirement in what was then Article 178 EC that there must be coherence between the Union's policy towards developing countries and other Union policies was phrased in the following terms:

> "The Community shall take account of the objectives [that it is required to pursue in the sphere of development cooperation], in the policies that it implements which are likely to affect developing countries."

This obligation arguably also found support in Article 3 EU which, *inter alia,* provided:

> "The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies."

Even though the duty of coherence between development cooperation policy and other policies was introduced at the Treaty-level, it is difficult to identify any substantive legal effects flowing from this obligation.[42] Amongst the questions that even today remain unanswered regarding the construction of the principle of coherence is whether the duty is a legally enforceable one, and whether it exclusively weighs on the European Union in its various policies *vis-à-vis* its development cooperation policy, or whether, when read in conjunction with the duty of loyal cooperation, it also weighs on the Member States in their policies *vis-à-vis* European development cooperation policies.

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[42] See, however, Case C-155/07, European Parliament v. Council (European Investment Bank), 2008 E.C.R. I-8103, at para. 46. See also Morten Broberg, Preventing Incoherence Between New EU Legislation and EU Development Policy, DIIS Comment (2009), *available at* http://diis.dk/sw86797.asp.

With respect to the second C – that the European Union and the Member States were under an obligation to coordinate their policies in the field of development cooperation – Article 180(1) EC provided as follows:

> "The Community and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. …"[43]

The duty to coordinate necessarily presupposed that both Member States and the European Union had competence in the field of development cooperation.[44] However, the duty to coordinate also implied that there were limits to the Member States' and the Union's exercise of their respective competence in the area.

Lastly, and perhaps most importantly, the fact that the competence of the European Union in the field of development cooperation had to be complementary[45] to that of the Member States – i.e. the third C – would appear to have two consequences: *Firstly,* it codified the Court of Justice's implicit findings in *Emergency Aid for Bangladesh* and *Lomé IV* that Member States and the European Union hold concurrent competences. *Secondly,* according to its wording, it implied that the European Union was under an obligation to take due account of the development cooperation policies of the Member States in its pursuance of its own development cooperation policy, thus perhaps even reinforcing the Member States' room for manoeuvre, which was already apparent in the two judgments.[46]

The latter of the two consequences is of particular interest – at least from a theoretical point of view: Essentially, the wording of the Maastricht Treaty made it clear that whilst both the European Union and the Member States had

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[43] The duty of donors of development cooperation assistance to cooperate is now also laid down in the so-called Paris Declaration on Aid Effectiveness, see *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action,* OECD, (2005/2008), http://www.oecd.org/development/effectiveness/34428351.pdf, at para. 32.

[44] This is also apparent from Article 181(1) EC which provided that "[w]ithin their respective spheres of competence, the Community and the Member States …"

[45] The complementarity requirement is now also reflected in the Paris Declaration on Aid Effectiveness where the signatories (including amongst others both EU Member States and the European Commission) have undertaken to pursue more effective development cooperation policies through (*inter alia*) complementarity in the field (see para. 35 of the Declaration).

[46] The complementarity requirement in Article 177 EC was phrased as follows: "Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, …"

competence in the field of development cooperation, the latter's competence took priority over that of the former. In other words, Article 177 EC required the European Union to give "right of way" to the Member States in cases of overlap between their respective development cooperation policies.[47] Nevertheless, in practice the provision does not appear to have had a substantial impact; and, as we shall see below, the wording has been amended with the Lisbon Treaty. Perhaps the best way of translating the Maastricht Treaty's complementarity obligation into "competence lingo" is by qualifying it as a type of shared competence where the principle of pre-emption does not apply.[48]

2.3 Defining and delimiting EU development cooperation policy

In section 2.2 above, we have seen that during the first phase of EU development cooperation policy there were tensions between, on the one hand, the European Union's common commercial policy and, on the other hand, the Union's development cooperation policy. Given the original constitutional set-up, the latter proved to be the weaker of these two policies. After the entry into force of the Maastricht Treaty, the question was how the Court of Justice would interpret the new definition – and delimitation – of EU development cooperation policy. In particular, would its place and importance *vis-à-vis* other policies, including notably the common commercial policy, be altered now that it had been given its own Title and with a more general geographical and thematic reach? In this section, we examine how the Court in its case law defined and delimited these new EU development cooperation policy competences during the second phase.

The basis for the Court of Justice's "new" definition of development cooperation policy was laid in the so-called *India Agreement* case: In 1994 the Council adopted a decision concerning the conclusion of the "Cooperation Agreement between the European Community and the Republic of India on Partnership and Development". The decision was jointly based on the Treaty provisions on common commercial policy and on development cooperation. Portugal, however, argued that the legal basis of the contested decision did not confer on the European Union the necessary powers to conclude the

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[47] In Case C-268/94, Portugal v. Council (India Agreement), 1996 E.C.R. I-6177, Advocate General La Pergola at paras 15–18 argued that the wording of Article 177 EC should not be interpreted so as to render European Union competence complementary (i.e. subordinate) to that of the Member States. Instead, he held that none of these took precedence over the other. However, in its judgment, the Court of Justice did not engage in an analysis of this question.

[48] On the reasons behind this delimitation of competence, see Marise Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy*, *in* THE EVOLUTION OF EU LAW 252–253, (Craig & de Búrca eds., 2011).

Agreement as regards *inter alia* a number of provisions relating to various specific fields of cooperation.[49] It therefore challenged the decision, arguing that it should also have been based on what today is Article 352 TFEU,[50] and that all Member States should have taken part in the conclusion of the Agreement.[51]

According to the Portuguese government, the fact that the India Agreement included provisions relating to energy, tourism, culture, drug abuse control, and intellectual property meant that the Council could not base its decision merely on the Treaty provisions on common commercial policy and development cooperation. The Court of Justice rejected the Portuguese claims, finding that the European Union's competence in the field of development cooperation provided a sufficient legal basis for adopting the contested provisions of the Agreement with India. In other words, the Court found that the Treaty Title on development cooperation policy could be given a rather broad scope. Some have pointed out that the Court of Justice feared that this extensive interpretation of the Treaty Title on development cooperation could lead to circumvention of the Treaty-based limits on the European Union's powers.[52] Even if the Court did entertain such doubts, it nevertheless opted for a broad construction of the notion of EU development cooperation policy.[53] In this regard, it is worth noticing that whilst the contested Council decision was based upon the Treaty provision on common commercial policy as well as the Treaty provision on development cooperation, the Court of Justice only made reference to the latter when finding the decision to be lawful. Indeed, it

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49 As well as with regards to the Agreement's provision relating to human rights. We deal with this issue in section 2.4 below.

50 The so-called flexibility provision which requires unanimity amongst all members of the Council.

51 For a general examination of the ruling's impact upon the European Union's development policy, see Steve Peers, *Fragmentation or Evasion in the Community's Development Policy?: The Impact of Portugal v. Council*, *in* The General Law of E.C. External Relations (Dashwood & Hillion eds., 2000).

52 Piet Eeckhout, EU External Relations Law 136 (2nd ed. 2011). See also Marise Cremona, *External Relations and External Competence: The Emergence of an Integrated Policy*, *in* The Evolution of EU Law 161, (Craig & de Búrca eds., 1999).

53 The Court's judgment of 11 June 2014 in Case C-377/12, Commission v. Council (re the Philippine PCFA) (nyr), on the proper legal basis for the Council decision on the signing of the Framework Agreement on Partnership and Cooperation with the Republic of the Philippines, confirms both the importance of the *India Agreement* case and, more generally, the broad construction of the notion of development cooperation post-Lisbon, cf. further below, section 3.2.2.2. Contrast, however, with Piet Eeckhout, EU External Relations Law (2nd ed. 2011), who at p. 136 observes: "… Even if the Court did not accept Portugal's claims, it may have been too restrictive in its analysis, putting up high constitutional hurdles for an effective Community development co-operation policy". The same author at p. 140 characterises the Court's approach as "rather restrictive".

is possible that the decision could have been taken solely on the basis of the Union's competence in the field of development cooperation policy.[54]

Arguably, the ruling in the *India Agreement* case signalled that the Court of Justice took seriously that development cooperation policy had been given its own Chapter and power-conferring provisions with the Maastricht Treaty and was therefore now entitled to its own "space" and *raison d'être*. Whilst in the earlier cases of *Natural Rubber Agreement*[55] and *First GSP*[56] the Court treated development cooperation policy as a component of, and thus subordinate to, the common commercial policy, in the *India Agreement* case, development cooperation policy was treated as a multi-facetted new policy encompassing a broad range of areas that would normally be considered to constitute separate policies. Inevitably, in light of the changes made by the Maastricht Treaty, with the *India Agreement* case, the classic dilemma in the Court of Justice's case law on choice of legal basis was imported into the new and independent policy field of development cooperation: On the one hand, the Union legislator must be careful not to stretch too far the requirement that a specific legal basis must be included merely because a legal measure encompasses a field covered by that measure in a situation where, as in the *India Agreement* case, this area is merely incidental to the overall objective of the measure (*in casu* development cooperation). On the other hand, the Union legislator must respect the principle of conferral and cannot stretch a multi-facetted competence provision (such as that on development cooperation) so far that it twists specific decision-making procedures and empties the Treaty's specific power-conferring provisions of substance. The *India Agreement* case confirms that the Maastricht Treaty entailed a methodological shift in the legal definition of the Union's development cooperation policy. A consequence of the Court of Justice's broad interpretation in the *India Agreement* case of development cooperation policy with regard to competence was that Member States were deprived of the possibility of individually vetoing this kind of measure. This potentially boosted the effectiveness of the European Union's possibilities of legislating in the field of development cooperation.

Another step in the definition of the European Union's development cooperation policy during the second phase was initiated by the Treaty of

[54] Portugal raised the question whether the Council decision could have been made without referring to what is now Article 207 TFEU on common commercial policy. However, the Court of Justice at paras 78–79 declined to answer this question.

[55] Opinion 1/78, International Agreement on Natural Rubber, 1979 E.C.R. 2871.

[56] Case 45/86, Commission v. Council (First GSP Case), 1987 E.C.R. 1493.

Nice's[57] introduction of Article 181a EC in 2003. Article 181a EC formed a completely new Title XXI on Economic, Financial and Technical Cooperation with Third Countries of the EC Treaty, which followed immediately after Title XX on development cooperation.[58] As is apparent from the Title itself, the new provision granted the European Union specific powers to adopt measures concerning economic, financial, and technical cooperation with third countries so that recourse to what is now Article 352 TFEU (the flexibility provision) for adopting such measures would no longer be necessary.

In principle, most – if not all – development cooperation measures may be qualified as economic, financial or technical cooperation with third countries. The introduction of Title XXI (with Article 181a EC as its sole provision) as an adjacent legal basis to that on development cooperation would therefore seem to intrude on the area that prior to the Nice Treaty was covered by the EC Treaty's Title XX on development cooperation. Moreover, whilst the adoption of legal measures under Title XX required the use of the so-called co-decision procedure where the European Parliament was given substantive powers,[59] the Parliament did not have similar powers under the then new Article 181a EC. Therefore, to base a legal measure upon Title XXI rather than Title XX would have a direct impact on the European Parliament's powers with regards to the measure (and thus on the European Union's institutional power balance).

This conflict between Titles XX and XXI came to the fore in the *European Investment Bank* case.[60] The *European Investment Bank* case concerned the European Parliament's action for annulment of a Council decision granting a European Union guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the European Union involving both developing countries and other third countries. The Council adopted this decision solely on the basis of Article 181a EC. The European Parliament's challenge was essentially based upon the argument that the Union guarantee – at least partly – concerned development cooperation projects, and that the decision therefore also should have been based on the Treaty Title on development cooperation. If such dual legal basis had been

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[57] Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, Feb. 26, 2001, 2001 O.J. (C 80) 1 [hereinafter Nice Treaty].

[58] According to Piet Eeckhout, EU External Relations Law 140 (2nd ed. 2011), the Court of Justice's ruling in the *India Agreement* "may have been one of the causes of the insertion into the EC Treaty" of Article 181a EC.

[59] Article 251 EC.

[60] Case C-155/07, European Parliament v. Council (European Investment Bank), 2008 E.C.R. I-8103.

used, the Parliament would have been a co-decider. The Council counter-argued that the term "third countries" used in Article 181a EC in connection with economic, financial, and technical cooperation with such countries was sufficiently wide to encompass both developing countries and other third countries, and so the legal basis was correct.[61]

The Court of Justice did not agree with the Council. Rather, it observed that to follow the Council's line of argument that all economic, financial, and technical cooperation measures with developing countries could be undertaken on the sole basis of Article 181a EC would imply a restriction on the scope of the EC Treaty's Title XX on development cooperation. The Court went on to consider the precise wording of Article 181a EC which in its section 1, first subsection, provided as follows:

> "Without prejudice to the other provisions of this Treaty, *and in particular those of Title XX*,[62] the Community shall carry out, within its spheres of competence, economic, financial and technical cooperation measures with third countries. Such measures shall be complementary to those carried out by the Member States *and consistent with the development policy of the Community*."[63]

By making a close comparison between both the wording and the legal history behind Titles XX and XXI of the EC Treaty, the Court of Justice concluded that, since Title XXI's Article 181a EC was to apply without prejudice to Title XX, this provision was not intended to constitute the legal basis for measures pursuing the objectives of development cooperation within the meaning of the latter Title.[64] The Court then considered on what legal basis the contested decision could (and should) have been taken. It observed that the decision had two components, one of which concerned development cooperation falling under Title XX of the EC Treaty, while the other concerned economic,

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[61] Under Article 179 EC on development cooperation, the European Parliament would have co-decision powers, whereas under Article 181a EC the Parliament would merely have the right to be heard.

[62] Title XX on development cooperation.

[63] Emphasis added.

[64] The Court of Justice in paras 52–54 of the judgment also ruled that the concept of "developing country" must be given an autonomous EU interpretation. And it added that that was equally true in view also of the dynamic nature of the developing country category, in the sense that it was liable to evolve in response to events which were difficult to predict. This notwithstanding, in the actual case the Court considered it to be sufficient to point out that it was common ground that a significant number of countries appearing in the list of eligible countries annexed to the contested decision were capable of falling within that concept, whatever its precise definition. See also Advocate General Kokott at para. 45 in her Opinion in the case.

financial, and technical cooperation with third countries other than developing countries, falling under Title XXI of the same Treaty. Those two components were inseparably linked, without it being possible to identify a main or predominant aim or component. The Court of Justice, however, also found that the procedures respectively laid down in the two different Titles could not be classed as incompatible. It therefore concluded that the contested decision should have been founded, exceptionally, on the dual legal basis of Titles XX (Article 179 EC) and XXI (Article 181a EC).[65] Since the decision had been based on Title XXI alone it was annulled.

With the introduction of the Maastricht Treaty and the pillar structure, a new demarcation line arose between, on the one hand, those matters such as development cooperation policy that fell under the first pillar (the Community pillar) and, on the other hand, other matters that fell under the two other pillars (the Union pillars). For EU development cooperation policy, this demarcation line was the subject of the Court of Justice's ruling in the *ECOWAS* case.[66] Prior to the entry into force of the Lisbon Treaty, the European Union's Treaty system was based on three pillars. Whilst pillar one concerned what was referred to as Community matters (i.e. matters falling under the EC Treaty), pillar two concerned the Common Foreign and Security Policy (CFSP) as regulated by the EU Treaty, whereas pillar three concerned those matters on Justice and Home Affairs that fell under the EU Treaty. Competences and procedures differed considerably between these three pillars, meaning that it had wide-ranging consequences if a legal measure was adopted under one pillar rather than under another.

The *ECOWAS* case concerned the Council's adoption of a decision concerning a European Union contribution to the Economic Community of West African States (ECOWAS) in the framework of the Moratorium on Small Arms and Light Weapons. This decision found its legal basis within the CFSP (the second pillar). The Commission (subsequently joined by the European Parliament) challenged the Council decision, as well as a Council Joint Action, before the Court of Justice arguing that the contribution did not only concern CFSP matters under the second pillar, but also came within the EC Treaty's Title on development cooperation (the first pillar). In order to decide the case, the

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[65] See in this respect Bernd Martenzuk, *Cooperation with Developing and Other Third Countries: Elements of a Community Foreign Policy*, *in* External Economic Relations and Foreign Policy in the European Union 408, (Griller & Weidel eds., 2002).

[66] Case C-91/05, Commission v. Council (ECOWAS), 2008 E.C.R. I-3651. The *ECOWAS* case is sometimes also referred to as the *Small Arms and Light Weapons case,* the *Small Arms* case, or merely the *SALW* case.

Court of Justice therefore had to establish the delimitation between the CFSP and development cooperation.

In this regard, the Court first laid down that the European Union's development cooperation policy was not limited to measures directly related to the campaign against poverty. Nevertheless, in order for a measure to fall within this policy it must contribute to the pursuit of the policy's economic and social development objectives.[67] With particular regard to the actual case before it, the Court of Justice observed:

> "… it is apparent from a number of documents emanating from the Union institutions and from the European Council that certain measures aiming to prevent fragility in developing countries, including those adopted in order to combat the proliferation of small arms and light weapons, can contribute to the elimination or reduction of obstacles to the economic and social development of those countries".[68]

And it continued:

> "Nevertheless, a concrete measure aiming to combat the proliferation of small arms and light weapons may be adopted by the Community under its development cooperation policy only if that measure, by virtue both of its aim and its content, falls within the scope of the competences conferred by the EC Treaty on the Community in that field … That is not the case if such a measure, even if it contributes to the economic and social development of the developing country, has as its main purpose the implementation of the CFSP."[69]

In the actual case, however, the Court of Justice found that the aim and content of the contested decision had two components, neither of which could be considered to be incidental to the other: one falling within Community development cooperation policy and the other within the CFSP.[70] Since the applicable Treaties precluded the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union could not have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fell within a competence

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[67] Para. 67 of the judgment.

[68] Para. 68 of the judgment.

[69] Paras 71–72 of the judgment.

[70] Paras 76–76 and 108 of the judgment. Contrast this with the Opinion of the Advocate General at paras 211–213.

conferred on the Union (at the material time "the Community") by the EC Treaty (i.e. the first pillar).[71] Therefore, the Court of Justice annulled the contested decision.

In sum, during this second phase, the nature of the competence conflicts (both inter-institutional and between the Union and the Member States) changed. The new Title on development cooperation policy, which contained its own power-conferring provisions, changed the discourse: In the second phase, the main question was no longer how much development cooperation policy could be pursued (subsumed) within the framework of other power-conferring provisions, such as ex Article 113 (Common Commercial Policy) and ex Article 235 (the "flexibility provision"). After the entry into force of the Maastricht Treaty, it became less important whether a sustainable notion of international trade relations could embrace development cooperation policy aspects (as was the question in Opinion 1/78 on the *Natural Rubber Agreement*). Rather, in this second phase the most important question was how much could be done within the framework of the new and multi-facetted development cooperation policy. The *India Agreement* case, the *European Investment Bank* case, and the *ECOWAS* case show that this shift in focus created new legal complications:[72] When a new independent Community (first pillar) policy arrives with new competences, the Union must find space for this policy, sometimes to the detriment of the scope of other (existing) Community (first pillar) policies and other (second and third pillar) Union policies.[73]

In a way, the Court's case law concerning the second phase marks a new and more sophisticated approach to the Union's development cooperation policy competence. Whereas during the first phase development cooperation appeared to be a subordinate (subsumed) policy – at least *vis-à-vis* the common commercial policy – the balance shifted during the second phase where development cooperation was put on an equal footing with other first pillar policies and in front of CFSP (second pillar) measures. It may

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71 Para. 77 of the judgment.

72 Christophe Hillion & Ramses A. Wessel, *Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?*, 46 Common Mkt. L. Rev. 551, 579 (2009), point out that the Court of Justice's wide definition of the EU development cooperation policy did not "ipso facto entail more Community international presence in the field", and that what looked like "a victory for the Commission, and for the Community method, might turn out to be a pyrrhic victory".

73 In the *European Investment Bank* case the Court of Justice observed that the situation is different when a new Union policy is introduced with power-conferring provisions, which explicitly provide that they apply without prejudice to other Treaty provisions, such as Article 181a, cf. paras 39–45 and 47.

be recalled that, in section 2.2 above, we noted that during the first phase the Member States invoked development cooperation policy aspects as a means of retaining their own competence *vis-à-vis* the Commission, cf. e.g. the *Natural Rubber Agreement* Opinion. During the second phase, the roles had been reversed so that the Commission and the Parliament now had an interest in invoking development cooperation policy provisions as the legal basis. Member States wishing a say over how the Union and, by implication, themselves, cooperate with third countries (as was the case when Portugal challenged the Cooperation Agreement with India) no longer had an interest in supporting a broad notion of development cooperation policy. The importance of this structural change should not be underestimated. In particular, it may have created a fertile environment for a more multi-facetted development cooperation policy, which gradually became more independent from the Union's other policies, including notably the policy on the Overseas Countries and Territories, the Common Commercial Policy, and the CFSP.

2.4 Promotion of European values as part of EU development cooperation policy

The end of the cold war – most clearly symbolised by the fall of the Berlin Wall in 1989 – led to a remarkable shift in the international power balance, leaving the United States of America as the only superpower and allowing the European Union much more room to pursue a foreign policy of its own. The European Union to a considerable extent used this to focus on the promotion of "European values", and this is particularly clear in the Union's development cooperation policy.[74] One of the instruments used by the European Union in its furtherance of its values was to include so-called human rights clauses in agreements with third countries,[75] or, as the European Council explained in its 1991 resolution on Human Rights, Democracy and Development:

[74] See Morten Broberg, *From Colonial Power to Human Rights Promotor: On the Legal Regulation of the European Union's Relations with the Developing Countries*, 26 Cambridge Review of International Affairs 675 (2013).

[75] See, generally, Lorand Bartels, Human Rights Conditionality in the EU's International Agreements (2005); and Steve Peers, *Fragmentation or Evasion in the Community's Development Policy?: The Impact of Portugal v. Council*, *in* The General Law of E.C. External Relations (Dashwood & Hillion eds., 2000).

> "The Community and its Member States will explicitly introduce the consideration of human rights as an element of their relations with developing countries; human rights clauses will be inserted in future cooperation agreements."[76]

Moreover, the European Union soon decided that these human rights clauses should be qualified as "an essential element" of the agreement which they formed part of. The reason for this was somewhat legal-technical, since the Union (or rather, the Commission) drew inspiration from Article 60(1) and (3) of the Vienna Convention,[77] which provides that "the violation of a provision essential to the accomplishment of the object or purpose" of an international agreement (a Treaty) constitutes a material breach of that agreement (Treaty) and that "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part". In other words, the 1991 European Council resolution obliged the European Union to introduce human rights clauses in cooperation agreements with the developing countries. And such clauses would explicitly be characterised as "essential elements" in order to provide the European Union with some efficient sanctioning powers *vis-à-vis* the other contracting party (i.e. *vis-à-vis* the developing country or countries) if the latter should breach the human rights clause.

In section 2.3 above, we have seen that in the *India Agreement* case Portugal challenged the Agreement's legal bases (development cooperation policy and common commercial policy) *vis-à-vis* a number of topics covered by the Agreement. However, Portugal also challenged the Agreement's inclusion of a human rights clause. With regard to the human rights clause, Portugal observed that Article 1(1) of the Agreement provided that "[r]respect for human rights and democratic principles is the basis for the cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement." In this regard, Portugal first of all argued that the Treaty provision on development cooperation did not form a sufficient legal basis for the conclusion of the cooperation agreement

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[76] European Council Resolution of 28 November 1991, on Human Rights, Democracy and Development (1991), *available at* http://archive.idea.int/lome/bgr_docs/resolution.html, at para. 10. See also Communication from the Commission, on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (1995) 216 final (May 23, 1995), and the Council Conclusions of 29 May 1995, EU Bulletin No. 5/1995 at point 1.2.3 (1995), *available at* http://bookshop.europa.eu/en/bulletin-of-the-european-union.-5-1995-pbCMAA95005/.

[77] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Entered into force on 27 January 1980.

with India, since this provision concerned development cooperation and not human rights. Portugal further argued that the promotion of human rights did not seem to be merely an incidental aspect of the Agreement, since the contested provision explicitly stated that "[r]espect for human rights (...) constitutes an *essential element*".[78] Based on this line of argument, Portugal concluded that the Agreement could only have been validly adopted if the European Union had also used what is now Article 352 TFEU (the flexibility provision) as legal basis. The latter provision, however, required unanimity amongst the Member States, and would thus have given Portugal the power to veto the adoption of the decision, which in turn would amount to a blocking of the Agreement with India.

The Court found against Portugal. It observed that Article 1(1) of the Agreement merely was a corollary of the requirement that was found in the Treaty provision laying down the objectives of the European Union's development cooperation policy. This provision declared that "Community policy (...) shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms". The European Union was therefore required to take account of the objective of respect for human rights when adopting measures in the field of development cooperation. The Court of Justice went on to observe that the mere fact that Article 1(1) of the Agreement with India provided that respect for human rights and democratic principles "constitutes an essential element" of the Agreement did not justify the conclusion that that provision went beyond the objective stated in the above-mentioned Treaty provision on the objectives of EU development cooperation policy. According to the Court, the very wording of the latter provision simply demonstrated the importance to be attached to respect for human rights and democratic principles, so that, amongst other things, development cooperation policy had to be adapted to the requirement of respect for those rights and principles. The Court also noted that the importance of human rights in the context of development cooperation had already been emphasised in various documents and declarations of the Member States and the Union, which had been drawn up prior to the entry into force of the Maastricht Treaty.[79]

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[78] Emphasis added.

[79] At paras 26–27 of the judgment, the Court, while rejecting the Portuguese argument, made an implicit reference to the possibility of sanctioning infringements of a human rights clause that has been qualified as an "essential element". Lorand Bartels, Human Rights Conditionality in the EU's International Agreements (2005), discusses the ruling at pp. 178–182.

In the *India Agreement* case the Court of Justice found that the inclusion of human rights as an essential element of a cooperation agreement could be based on the development cooperation policy competence (then Article 130y), and the Advocate General even suggested that without the inclusion of such a clause the legality of the cooperation agreement with India could be cast in doubt.[80] Nevertheless, whilst the promotion of European values certainly had come to play an important role during the second phase of European Union development cooperation policy, there still were limits, as reflected in the Court of Justice's ruling in the subsequent *Philippines Border Management Project* case. Here the Court ruled that it is not possible to render any development cooperation measure valid merely by claiming that an overall objective of the contested measure was to promote democracy and respect for human rights.

In the *Philippines Border Management Project* case[81] the European Parliament challenged a Commission decision whereby the Commission had approved a project relating to the security of the borders of the Republic of the Philippines. This project was to be financed under a regulation on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America.[82] According to the Parliament, the Commission had no power to adopt the contested decision since the reasons for the decision were based on considerations connected with the fight against terrorism and international crime. This, the Parliament argued, went beyond the framework of the regulation that served as the decision's basis.

The Court of Justice agreed that the project was designed to implement concrete measures concerned with border management, so the decisive question was whether this objective was lawful. In this respect, the Court observed that the EC Treaty provisions in Title XX on development cooperation:

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[80] Advocate General La Pergola in para. 29 of his Opinion found that it would be the absence, rather than the inclusion, of a human rights clause in the Agreement that would lead to the Agreement being illegal. In the words of La Pergola: "… If that is properly taken into account, the democracy clause must indeed be deemed necessary if development cooperation policy is to be lawfully pursued. I might venture to add that it would be the failure to adopt a clause of that type that would compromise the legality of Community action, because compliance with the specific wording of Article 130u would no longer be guaranteed."

[81] Case C-403/05, European Parliament v. Commission (Philippines Border Management Project), 2007 E.C.R. I-9045.

[82] Council Regulation 443/92, on Financial and Technical Assistance to, and Economic Cooperation with, the Developing Countries in Asia and Latin America, 1992 O.J. (L 52) 1 with subsequent amendment.

> "… refer not only to the sustainable economic and social development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms, whilst complying fully with their commitments in the context of the United Nations and other international organisations."

And the Court continued that it followed from the so-called "European Consensus on Development"[83]:

> "… that there can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the Community's new development policy necessarily proceed via the promotion of democracy and respect for human rights."

The Court of Justice, in other words, found that promoting democracy and respect for human rights as well as creating sustainable development and eradication of poverty were among the objectives of EU development cooperation policy. To achieve these objectives it was necessary to ensure peace and security, and that essentially was the objective of the contested Commission decision. However, the Court of Justice equally observed that the contested decision could only be lawfully adopted if it came within the framework of the regulation on which it was based. In this respect, the Court found that the contested decision's objective of fighting terrorism and international crime fell outside the framework of the regulation on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America. Therefore, the Court annulled the contested decision.

In sum, promoting democracy and respect for human rights clearly falls within the scope of EU development cooperation policy.[84] This, however, according to the Court in the *Philippines Border Management Project* case, does not exempt a legal development cooperation measure from complying with the European Union's fundamental principles, including the principle

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[83] Joint Statement of the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the Commission on European Union Development Policy entitled "The European Consensus", 2006 O.J. (C 46) 1.

[84] This conclusion is not surprising given that Article 177(2) EC provided that "Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."

of conferred powers. Therefore, the fact that, ultimately, a legal development cooperation measure promotes democracy and respect for human rights will not suffice if the legal basis is insufficient for the actual initiatives intended to promote democracy and human rights.

3 Changes brought about by the Lisbon Treaty

3.1 Overview

On 1 December 2009 the Treaty of Lisbon entered into force. It replaced the previous three-pillar system with a unitary one, based on two treaties: The Treaty on European Union[85] (TEU) and the Treaty on the Functioning of the European Union (TFEU). A central objective of the new Treaty system was to improve the Union's position on the international stage. The Lisbon changes both directly and indirectly affected the European Union's development cooperation policy. In section 3.2 below, we examine the Lisbon Treaty's impact on the Union's capabilities to carry out a development cooperation policy and the restraints imposed by the Treaties on the Union in this respect. This is not only a question of the way in which the Lisbon Treaty affects the scope and nature of the Union's development cooperation competence; it is also a question of whether the Lisbon Treaty imposes new obligations on the Union, which may affect the Union's exercise of this competence. In section 3.3, we briefly account for the institutional and organisational changes brought about by the Lisbon Treaty and their likely consequences for the Union's ability to carry out its development cooperation policy. As mentioned, the main point of these sections is not to provide an exhaustive account of how the Union's development cooperation policy might play out after Lisbon, but rather to identify the post-Lisbon legal constitutional challenges in this policy area. In this respect, it is, in our view, of particular interest to consider whether, and to what extent, the classic constitutional challenges in this policy area continue, and whether new challenges have arrived.

3.2 Capabilities and restraints: Scope, exercise and nature of development cooperation competence – status quo?

3.2.1 Introduction

At first glance, the Lisbon Treaty brought only few and limited changes to the European Union's competence in the field of development cooperation. Below we first consider to what extent the Lisbon Treaty has affected the scope of the Union's competence and its ability to exercise this competence (section 3.2.2). Subsequently, we consider the nature of the Union's competence, i.e.

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[85] Consolidated Version of the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

what falls within the Union's ambit and what falls within that of the Member States (section 3.2.3).

3.2.2 Scope of the competences and restraints on the exercise of the competences

3.2.2.1 Overview

The provisions in the EC Treaty's Title XX on development cooperation underwent relatively minor changes before becoming Chapter 1 of Title III of the Treaty on the Functioning of the European Union. Nevertheless, in four ways the Lisbon Treaty entailed changes that, at least potentially, affect the scope of the European Union's competence in the field of development cooperation. The *first* concerns the amendments made with regard to the objectives to be pursued through the development cooperation policy (section 3.2.2.2). Which impact, if any, do these changes have on the Union's competences in the area? Legally speaking, do the changes strengthen the Union's development cooperation policy objectives?

Secondly, the Lisbon Treaty imposes a number of obligations on the Union, which it must observe in its exercise of development cooperation competence (section 3.2.2.3). Are these obligations legally enforceable? Do they impact on the way in which the Union can act in this policy field in the future? In particular, Article 3(5) TEU now appears to impose an obligation on the European Union to promote "European values" in the wider world. Does this affect the way in which the Union can exercise its development cooperation policy competence?

Thirdly, the Lisbon Treaty has made a number of technical amendments of which three deserve particular mention (section 3.2.2.4): *(1)* With the Nice Treaty the European Union was given specific powers in the field of "economic, financial and technical cooperation with third countries". In section 2.3 above we have seen how this new power gave rise to new tensions with the existing powers in the field of development cooperation. Article 212 TFEU, where we now find the provision on "economic, financial and technical cooperation with third countries", has been amended in certain respects. *(2)* The Lisbon Treaty has introduced a specific provision on humanitarian assistance, which now requires its own space, possibly to the detriment of the scope of development cooperation policy competence. *(3)* Finally, the Lisbon Treaty has altered the constitutional framework, which governs the European Union's financing of activities in the field of development cooperation.

3.2.2.2 Amendments to the objectives of European Union development cooperation policy – streamlining and reorganisation

The Lisbon Treaty has reshuffled and explicated the objectives of the European Union in several regards, including with respect to development cooperation policy. Prior to the Lisbon Treaty, Article 177(1) of the EC Treaty provided that the European Union's development cooperation policy should foster:

> "– the *sustainable economic and social development* of the developing countries, and more particularly the most disadvantaged among them,
> – the smooth and gradual *integration of the developing countries into the world economy*,
> – the *campaign against poverty* in the developing countries."[86]

Article 177(2) EC provided that:

> "Community policy in this area shall contribute to the general objective of developing and consolidating *democracy* and the *rule of law*, and to that of *respecting human rights and fundamental freedoms*."[87]

Following the entry into force of the Lisbon Treaty, the corresponding provision – Article 208(1) TFEU – now provides:

> "1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. …
> Union development cooperation policy shall have as its primary objective the *reduction and, in the long term, the eradication of poverty*. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries."[88]

Basically, this reshuffling entails two interesting changes: First, with the second paragraph of Article 208(1), the Union's development cooperation objectives are *streamlined*. This means a much stronger focus on the primary objective, i.e. the fight against poverty in the developing countries. Secondly, the remaining, and previously broadly defined objectives of the Union's development cooperation policy (such as the promotion of democracy and

[86] Emphasis added.
[87] Emphasis added.
[88] Emphasis added.

the rule of law) have been *reorganised* and now form part of the general "framework of the principles and objectives of the Union's external action", cf. the first paragraph of Article 208(1), which must be respected in all the Union's external activities, cf. also Article 205 TFEU and Article 21(3) TEU.

Article 21(1) and (2) TEU list these principles and objectives thus:

> "1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: *democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*
> The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.
> 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
> (a) safeguard its values, fundamental interests, security, independence and integrity;
> (b) *consolidate and support democracy, the rule of law, human rights and the principles of international law*;
> (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
> (d) *foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;*
> (e) *encourage the integration of all countries into the world economy,* including through the progressive abolition of restrictions on international trade;
> …"[89]

[89] Emphasis added.

It is still too early to say which consequences the streamlining and reorganisation have for the Union's priorities and competences in the field of development cooperation. To some extent it may be considered to be a matter of political preference whether one considers these changes to entail a strengthening or a dilution of the previously defined development cooperation objectives. In particular, it can be questioned whether such objectives and principles should be part of the Union's external relations in the first place. However, from a legal constitutional perspective, the interesting question is whether the changes affect the scope of the Union's competences or the Union's ability to exercise these competences. The answer to that question is not clear-cut.

In our view, it must be presumed that the treaty-makers intended these changes to have a real impact on the Union's external relations, including on its development cooperation policy. Therefore, it could be expected that the streamlining and reorganisation will have a noticeable impact, at least in the long run: First of all, to elevate some objectives, which could previously be found in the Chapter on the Union's development cooperation policy (e.g. to support democracy and the rule of law), to horizontal objectives, which must guide all the European Union's actions in the field of external relations, suggests that these objectives have been strengthened from a constitutional point of view.[90] For example, we should expect to see reference to these objectives and principles in more political and legal documents in various fields of the Union's external relations. Moreover, over time, one could expect the Court of Justice to use these objectives and principles as legitimate teleological guidelines in its interpretation of legal acts in all external relations policy areas, including e.g. the Common Commercial Policy. More generally, a likely consequence of this generalisation of objectives and principles, which previously belonged to specific policy areas, is that they will become more firmly embedded in the Union legal order. Second, the streamlining – i.e. the fact that Article 208 TFEU explicitly lays down that the reduction/eradication of poverty constitutes a "primary objective" of European Union development cooperation policy – necessarily suggests that within the field of development cooperation this objective will now be

[90] Prior to the Lisbon Treaty, Article 11 TEU laid down very similar objectives for the EU's Common Foreign and Security Policy as those that now apply to the European Union's policies and actions in all fields of international relations.

accorded particular weight, e.g. in cases of conflict with other objectives.[91] In this respect, it appears arguable that this new primary objective has been strengthened with the amendment. The requirement that poverty reduction/eradication should be a "primary objective" therefore suggests that, among the traditional economic and social objectives, which have always formed a part of the Union's development cooperation policy, there should be a stronger and more specific focus on poverty reduction/eradication in the Union's policy formulation. Arguably, this would seem to mean that the European Union's specific development initiatives must always (also) pursue a goal of poverty reduction. For example, an initiative aimed at improving environmental protection in a developing country should also clearly have a poverty reducing objective in order to fully comply with Article 208 TFEU. Thus, it could be thought, individual development cooperation measures, which do not have as their primary objective to reduce/eradicate poverty – or which, at least, do not contribute to this objective in the overall context of the Union's development cooperation policy – no longer fall within the Union's development cooperation competences. Apart from this preference for poverty reduction/eradication, the streamlining probably does not entail new hard legal obligations as regards the Union's exercise of competence.

As regards Treaty-making competence, Article 209 TFEU provides that

> "The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty."

Thus, Article 209 TFEU explicitly foresees international agreements which have as their objectives some of the horizontal objectives mentioned in Article 21 TEU. In this light, the reorganisation of the Union's development cooperation objectives probably does not entail noticeable new restrictions on the Union's Treaty-making competence in this area. The Court's judgment of 11 June 2014 in the *Philippines Partnership and Cooperation Framework Agreement* case arguably confirms this.[92] This judgment is the first concerning Article 209 TFEU, and the Court's reasoning is interesting in several respects.

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[91] See in this respect also Henrike Klavert, *EU External Action Post-Lisbon: What Place is There for Development Policy?*, 4 The Bulletin of Fridays of the Commission 18, 18–19 (2011), http://ea.au.int/en/sites/default/files/Newsletter%20mars%202011.pdf. Note that eradication of poverty appears both in Article 21(2)(d) TEU and in Article 208 TFEU. In contrast to the other objectives, eradication of poverty has thus been duplicated.

[92] Judgment of 11 June 2014 in Case C-377/12, Commission v. Council (re the Philippine PCFA) (nyr).

Thus, the judgment deserves a closer analysis at this place:

The case concerned the correct legal basis for the Council Decision signing the Philippines PCFA. The Commission had proposed that the Decision be based on Articles 207 TFEU and 209 TFEU (concerning the common commercial policy and development cooperation policy, respectively), in conjunction with Article 218(5) TFEU. The Council, however, decided to add Articles 79(3) TFEU (on readmission agreements), 91 TFEU and, 100 TFEU (on sea and air transport), and 191(4) TFEU (on environmental protection). The Commission brought an annulment action and argued that these additional legal bases were unnecessary and unlawful.

After repeating the well-known principles concerning choice of legal basis, the Court phrased the central question in the case thus: "it must be determined whether, among the provisions of the Framework Agreement, those relating to readmission of nationals of the contracting parties, to transport and to the environment also fall within development cooperation policy or whether they go beyond the framework of that policy and therefore require the contested decision to be founded on additional legal bases".[93]

The Court's analysis of this question can be divided into three parts: First, the Court set out the general framework for examining whether certain provisions in a cooperation agreement could, more broadly, fall within the Union's development cooperation policy, and whether the Philippines PCFA, in particular, pursues the objectives of that policy.[94] The Court concluded that, in principle, it could. It began by recalling the link between Article 208(1) TFEU and Article 21 TEU. The Court noted that reduction/eradication of poverty is the primary objective of the policy, but that the cross-reference to Article 21(2) TEU entails that the objectives mentioned in the latter provision could also be pursued as part of the development cooperation policy. In addition, the Court emphasised that the so-called "European Consensus on Development"[95] confirmed a broad notion of development cooperation, which includes readmission and environmental protection, and that the Development Cooperation Instrument[96] – the European Union's main financing instrument for development cooperation under the Union budget – gave more concrete

93 Para. 35.
94 Paras 36–47.
95 Joint Statement of the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the Commission on European Union Development Policy entitled "The European Consensus", 2006 O.J. (C 46) 1.
96 Regulation 1905/2006 Establishing a Financing Instrument for Development Cooperation 2006 O.J. (378) 1.

expression to this broad notion. As regards the Philippines PCFA, the Court referred to the preamble and the general principles of the Agreement and concluded that "it is apparent from the whole of the Framework Agreement that the cooperation and partnership provided for by it take account especially of the needs of a developing country and, therefore, contribute to furthering, in particular, pursuit of the objectives referred to in Articles 21(2)(d) TEU and 208(1) TFEU".

Second, the Court examined whether the provisions of the PCFA relating to readmission, transport, and the environment also contribute to the pursuit of the objectives of development cooperation.[97] The Court, again, relied heavily on the European Consensus and the Development Cooperation Instrument where migration, transport, and the environment are mentioned and thus linked to development cooperation objectives. The Court concluded that "the provisions of the Framework Agreement relating to readmission of nationals of the contracting parties, to transport and to the environment, consistently with the European Consensus, contribute to the pursuit of the objectives of development cooperation."

Finally, in a third step, the Court examined "the extent of the obligations" set out in the provisions of the PCFA relating to readmission, transport, and the environment.[98] Were they "limited to declarations", or did they determine "in concrete terms the manner in which the cooperation will be limited"? The Court found that the provisions on the environment and transport did not determine in concrete terms the manner in which the cooperation will be implemented. The provisions on readmission, on the other hand, contained specific obligations (of readmission under certain circumstances and of concluding an agreement on this issue). However, this obligation does not prescribe "in concrete terms" the manner in which readmission is to be implemented, since this is left to a subsequent readmission agreement. Therefore, the Court said, it is "apparent" that these three types of provisions of the PCFA "do not contain obligations so extensive that they may be considered to constitute objectives distinct from those of development cooperation that are neither secondary nor indirect in relation to the latter objectives".[99]

This long-awaited judgment is important for the understanding of how the Lisbon Treaty has affected the European Union's external action in the field of development cooperation policy for the following reasons: First, obviously,

[97] Paras 48–55.
[98] Paras 56–58.
[99] Para.59.

the judgment confirms our introductory point in this report, i.e. that the scope of the present development cooperation policy cannot be understood without understanding its evolution. Clearly, the *India Agreement* case provides a crucial backdrop for the *Philippines PCFA* case. The Court, in broad terms, confirmed the basic principles developed in the former case.

Second, however, in the *Philippines PCFA* case the Court clearly reframed the original principles in the *India Agreement* case with a view to take account of subsequent developments in the Union's development cooperation policy. Thus, there is an interesting evolution in the Court's reasoning. In paras 36 *et seq*, the Court appears (merely) to pay lip-service to the innovations in the Lisbon Treaty, i.e. the fact that poverty reduction/eradication is now explicitly the primary aim of the Union's development cooperation policy, and the fact that the Union, when implementing this policy on the basis of Article 209 TFEU, may conclude agreements, which help to achieve the general objectives referred to in Article 21 TEU. However, in the Court's analysis, the real benchmark for determining the scope of the Union's development cooperation policy competence appears to be derived not from Articles 208 TFEU and 209 TFEU, but from the European Consensus and the Development Cooperation Instrument.[100] In particular, it is remarkable that the Court (in para. 55) concludes that the provisions of the PCFA relating to the three contested areas "consistently with the European Consensus, contribute to the pursuit of the objectives of development cooperation".

It is not entirely clear what to make of this reasoning. At first sight, one might wonder whether the Court is suggesting that the outer limits of the Union's development cooperation policy are defined by a soft law (the European Consensus) and a hard law (the Development Cooperation Instrument – a regulation) measure adopted prior to the Lisbon Treaty. From a legal point of view, this would be unacceptable, since it would conflict with the principles of hierarchy of Union law norms. Obviously, this cannot be what the Court meant to say. The above reasoning should be understood, instead, as a practical way of showing that the provisions of the PCFA fell within Article 208(1) TFEU, cf. Article 21(2) TEU. The importance attached notably to the European Consensus document should be understood as an illustration – not a justification – of the conclusion that the provisions of the PCFA fall within the scope of development cooperation. However that may be, the judgment underlines the practical importance of the European Consensus document and the then applicable Development Cooperation Instrument (i.e. Regulation No

[100] Paras 42–43, 49–50, and 55.

1905/2006). Clearly, Member States and Union institutions should be careful when revising these instruments, since the *Philippines PCFA* case suggests that the two measures may have practical, if not legal, importance for the overall scope of the Union's development cooperation competence.

The Court's reasoning leading up to para. 55 of the Philippines PCFA judgment, quoted above, is interesting for another reason. It may suggest that the requirement of policy coherence, which has been strengthened by the Lisbon Treaty, is taken seriously. More precisely, para. 55 may be read to the effect that if the provisions of the PCFA were not "consistent" with the European Consensus (in the French version of the judgment, the Court has termed this "en cohérence avec le consensus européen"), the conclusion might have been different. Thus, the judgment may be thought to reinforce the requirement of policy coherence.

Third, the Court clearly confirms the broad construction of the Union's development cooperation policy competence in two ways. Not only does the Court confirm that this policy is multi-facetted and can cover a *broad* range of policy areas, the Court also accepts that development cooperation competence can be used for relatively *deep* forms of cooperation in this broad range of policy areas. As regards the latter, the Court repeats the distinction made in the *India Agreement* case between cooperation of a declaratory nature and cooperation "in concrete terms". However, the Court accepts that provisions in the Philippines PCFA concerning readmission contain specific legal obligations and clear rules on how to proceed (by conclusion of a readmission agreement), and which thus go beyond mere declaratory statements. In this respect, the *Philippines PCFA* case clearly takes the doctrine developed in the *India Agreement* case a step further.

This flexibility will probably be useful for Union negotiators, including notably the Commission's DG DEVCO, who may wish an ambitious and holistic approach to cooperation with particular developing countries. Arguably, it strengthens the Commission's (and the EEAS') ability to pursue ambitious and multi-facetted types of cooperation in this policy area. However, from a legal point of view, this new step is not unproblematic. The Court – for the first time – appears to accept that clear legal obligations in the area of readmission, which has its own treaty-making competence and a specific decision-making procedure, which differs from development cooperation, can be assumed on the basis of development cooperation.

In this context, it is worth recalling Advocate General Mengozzi's Opinion of 23 January 2014. Like the Court, the AG concluded that the Council wrongly included the above-mentioned three legal bases (concerning transport, the environment, and readmission of third country nationals). However, though he accepted the broad and multi-facetted nature of the notion of development cooperation policy, the Advocate General insisted that a careful analysis should be made before concluding that development coordination policy competence can be used. In the words of the Advocate General: "According to the European consensus on development, the areas for European Union action are defined so broadly as to allow a link to development to be established in every case and no matter what the area concerned. As correctly explained by the Council, the European Union's practice in its relations with less developed countries has evolved significantly and has progressed from being a mere system of financial assistance to the establishment of comprehensive and more elaborate agreements in which reference to 'mutual' advantages is not mere diplomatic language and the relationship put in place is much less lopsided and is, thus, more balanced. It is, however, for that reason that, while I can certainly acknowledge the multi-facetted nature of development cooperation, I find it, by contrast, more difficult to regard the legal basis for development cooperation alone as sufficient when so many and varied areas are covered by the same agreement. I call, in that regard, for a certain vigilance, precisely because the determination of the appropriate legal basis 'has constitutional significance' for the European Union."[101]

This call for vigilance seems warranted, indeed. With the Lisbon Treaty's cross-reference to the Union's general objectives in its external action in Article 21 TEU, and with the Court's heavy reliance on broadly defined secondary (soft and hard) law in its determination of the scope of the Union's competence, it is appropriate to recall the constitutional significance of the choice of legal basis: No specific power-conferring provisions of the Treaty should be allowed to become nugatory (to paraphrase the Court from Opinion 1/78 on the *Natural Rubber Agreement* and the *India Agreement* case), and no policy competence should be allowed to take precedence over another. Indeed, if, for example, the key elements in the Union's readmission policy and the main substantive and procedural obligations *vis-à-vis* specific third countries are, in reality, established in the Union's development cooperation agreements and based on Article 209 TFEU, this would, arguably, be contrary to the principle of conferral. Such practice would at least seem to be contrary to the spirit of the Treaties, which provide for an independent competence

[101] Point 43 of the Advocate General's Opinion (footnotes omitted).

as regards readmission. Moreover, proponents of an ambitious and effective development cooperation policy should not forget that the same reasoning could be used to pursue quite deep forms of development cooperation policy within the framework of, say, the common commercial policy.

Therefore, though the basic demarcation principle in the *Philippines PCFA* case appears to be clear and reasonable (in the end, the crucial question is whether the relevant specific provisions in the agreement determine "in concrete terms" issues, which belong to other policy areas), the application of this principle should be rigorous. Arguably, the Court's reasoning (in paras 56–58) of the *Philippines PCFA* case is remarkably short and superficial and does not provide sufficient security for those who wish to prevent creeping Union competences based on open-ended power-conferring provisions. In particular, it is not clear from the judgment *why* the provisions in the PCFA concerning readmission are not sufficiently "concrete" to warrant their own legal basis, and *how much more* concretisation can be allowed before an additional legal basis is necessary.[102]

In sum, the *Philippines PCFA* judgment clarifies, in a number of ways, the method to be used for demarcating (both as regards width and depth) the Union's development cooperation policy competence. The ruling confirms that the streamlining and reorganisation of the Union's development cooperation policy competences do not restrict the Union's competences, and it clarifies the method for determining whether a multi-facetted agreement can be concluded with reference to the Union's development cooperation competence, and how deep cooperation under such an agreement can be. Overall, the judgment appears to construe this competence even more generously than the *India Agreement* case did. In particular, the Court allows for a very significant interference with the Union's readmission agreement competence. At the same time, the ruling leaves several fundamental questions open.

3.2.2.3 New restraints on the Union's exercise of development cooperation competence? – PCD and value promotion

When exercising its development cooperation policy competences, the Union must comply with EU law, including the general principles. There is nothing new in this respect. However, in the field of development cooperation, after Lisbon two principles appear to require particular attention: The first is

[102] Compare AG Mengozzi's Opinion, points 66 *et seq.* which contains a much more detailed analysis, and which clearly indicates the limits of the use of the development cooperation competence in relation to readmission.

specifically concerned with development cooperation, whereas the second applies to all fields of external action:

First, the Lisbon Treaty has maintained the requirement of policy coherence for development (or PCD) in Article 208(1) TFEU, which provides:

> "The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries."

This obliges the Union to pursue coherence between, on the one hand, its objectives in the field of development policy and, on the other hand, its other policies. This is merely a continuation of the obligation to pursue policy coherence for development that previously was laid down in Article 178 EC.[103] Nothing indicates that the Lisbon Treaty has brought about any substantive changes as regards this obligation.[104]

In this context, it should be noted that the Treaties include other provisions which more generally require the Union to ensure policy *coherence* in its external relations, cf. notably Articles 3(5) and 21(3) TEU as well as Article 7 TFEU. These provisions are broadly concerned with the coherence of the Union's policies, in particular in the field of external relations. This requirement of coherence in the Union's external actions, however, falls outside the present study, which exclusively focuses on the Union's development policy.[105]

The other issue, which deserves particular mention, is the enhanced requirement of value promotion. What impact does the reshuffling of the European Union development cooperation policy objectives have on the Union's competence to promote its own values (such as democracy and human rights) as part of its development cooperation policy? Above in section 2.4 we have shown

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[103] See further section 2.2 above.

[104] It may be noted that the new Article 214 TFEU on humanitarian aid in section 1 requires that "[t]he Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union". Arguably, this is a much narrower coherence obligation than the one laid down in Article 208(1) TFEU.

[105] On the general obligation of the European Union to attain coherence in its external relations prior to the entry into force of the Lisbon Treaty, see Christophe Hillion, *Tous pour un, Un pour tous! Coherence in the External relations of the European Union*, *in* DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (Cremona ed. 2008). For an examination of the same matter post-Lisbon, see Christophe Hillion, *Cohérence et action extérieure de l'Union européenne* (EUI LAW, Working Paper No. 14, 2012), *available at* http://cadmus.eui.eu/bitstream/handle/1814/22354/LAW_2012_14_Hillion_FINAL.pdf.

that the European Union has actively pursued the promotion of democracy and the respect for human rights as part of its development cooperation policy, and that the Court of Justice has accepted this, cf. notably the above-mentioned *India Agreement* case and the *Philippines Border Management Project* case. The Lisbon Treaty, however, has taken this promotion one step further. According to Article 3(5) TEU, in its relations with the wider world, the European Union shall:

> "… uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

This obligation to actively advance European values in the wider world is also reflected in Article 21(1) TEU, which provides that "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, *and which it seeks to advance in the wider world ...*"[106]

It is recalled that prior to the entry into force of the Lisbon Treaty, Advocate General La Pergola in the *India Agreement* case – somewhat *obiter* – argued that the inclusion of a human rights clause constituted a condition of legality. However, the Court of Justice in its ruling in the same case refrained from taking a position in this respect. Whilst it might be going too far to suggest that Article 3(5) TEU entails that inclusion of a human rights clause in international agreements (or, at least, in international development cooperation agreements) is legally required, the introduction of the duty to promote European values does strengthen the argument that the Union might have an obligation to ensure a minimum degree of compliance – and effective remedies in case of breach – in its cooperation with developing countries.

[106] Emphasis added. See also Article 21(2)(a)–(c) TEU as well as Article 205 TFEU. The latter provides that "[t]he Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in [Articles 21 and 22] of the Treaty on European Union."

So far, the institutions have only made a limited number of explicit references to the obligation in Article 3(5) TEU to promote European values.[107] In contrast, however, it is easy to find examples where the European Union commits to generally promoting its values in the wider world. Thus, for instance, in the so-called Stockholm Programme the European Council explicitly laid down that "[t]he Union should continue to promote European and international standards and the ratification of international conventions, in particular those developed under the auspices of the UN and the Council of Europe".[108] Similarly, in a communication concerning "A New Response to a Changing Neighbourhood" the Commission observed that "[t]he EU does not seek to impose a model or a ready-made recipe for political reform, *but it will insist* that each partner country's reform process reflect a clear commitment to universal values that form the basis of our renewed approach."[109] And similarly, in a communication regarding "A dialogue for migration, mobility and security with the southern Mediterranean Countries" the Commission observed that "[t]he EU stands ready to continue supporting all its Southern

[107] Amongst the few examples we find European Parliament Resolution, on the Discrimination against Girls in Pakistan, in Particular the Case of Malala Yousafzai, 2014 O.J. (CE 72) 43; European Parliament Resolution, on Human Rights, Sexual Orientation and Gender Identity at the United Nations, 2013 O.J. (CE 56) 100; European Parliament Resolution, on International Trade Policy in the Context of Climate Change Imperatives, 2012 O.J. (CE 99) 94; European Parliament Resolution, on Human Rights and Social and Environmental Standards in International Trade Agreements, 2012 O.J. (CE 99) 31; and European Parliament Resolution, on EU Policies in Favour of Human Rights Defenders, 2011 O.J. (CE 236) 69; as well as the European Parliament's resolution in which it laid down its priorities for the annual UN Human Rights Councils. In the latter resolutions the European Parliament explicitly referred to Article 3(5) TEU whilst observing that "respect for, and the promotion and safeguarding of, the universality of human rights is part of the European Union's ethical and legal acquis and one of the cornerstones of European unity and integrity", see for instance European Parliament Resolution, on the 13th Session of the United Nations Human Rights Council, 2010 O.J. (C 348) 6. See likewise European Parliament Resolution, on Democracy Building in the EU's External Relations, 2010 O.J. (CE 265) 3, in particular para. F; European Parliament Resolution, on Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban, in Respect of Zimbabwe and in View of the Situation in Somalia, 2010 O.J. (C 286) 5, para. A; and European Parliament Resolution, on Religious Freedom in Pakistan, 2011 O.J. (CE 161) 147, para. A. See also Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, Commission and Others v. Kadi, 2013 O.J. (C 260) 2, para. 103, and the pending Case T-512/12, Front Polisario v. Council, 2013 O.J. (C 55) 14.

[108] The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 2010 O.J. (C 115) 1, at para. 7.6. For another example, see Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Tax and Development Cooperating with Developing Countries on Promoting Good Governance in Tax Matters, SEC (2010) 426 final (Apr. 21, 2010).

[109] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A New Response to a Changing Neighbourhood, COM (2011) 303 final (June 8, 2011) (emphasis added).

neighbours who are willing to commit to democracy, human rights, good governance and rule of law, and to enter into Partnerships with those countries to achieve concrete progress for the people."[110]

The question is, then, whether and, if so, to what extent the obligation to further European values affects the European Union's competence in the field of development cooperation? Here, the answer is probably twofold. Firstly, the obligation in Article 3(5) TEU makes it clear that the European Union must work actively to further its own values. This makes it easier, both internally and externally, to promote the agenda of value promotion in the Union's external activities, including in the specific legal instruments.[111] It also means, however, that Article 3(5) TEU cannot simply be ignored, not even temporarily, in the Union's policy formulation. Depending on how narrowly and short-sightedly the objective is construed, this might limit the Union's possibilities of cooperating with certain third countries.

Secondly, Article 3(5) TEU does not impose specific obligations as to *how* the European Union must further its own values.[112] For example, the new provision does not entail that a human rights clause in a cooperation agreement with a developing country is a condition of internal legality under EU law. Even before the entry into force of the Lisbon Treaty, the European Union was rather active in promoting its own values in the wider world. Overall, in our view, Article 3(5) TEU appears to be important mainly for the Union's international identity, including for its external relations discourses. However, it is questionable whether the requirement to promote its own values in the world is also a legal obligation in specific relations with third countries. Moreover, *nothing* indicates that Article 3(5) TEU requires a *more intensive* effort in this regard.[113]

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[110] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries, COM (2011) 292 final (May 24, 2011).

[111] Morten Broberg, *From Colonial Power to Human Rights Promotor: On the Legal Regulation of the European Union's Relations with the Developing Countries*, 26 Cambridge Review of International Affairs 675, 682–683 (2013).

[112] Though this promotion must respect the other objectives and principles of the Union's external actions.

[113] On the consequences flowing from Article 3(5) TEU, see also Morten Broberg, *What is the Direction for the EU's Development Cooperation after Lisbon?: A Legal Examination*, 16 European Foreign Affairs Review 539, 548–554 (2011), and Morten Broberg, *From Colonial Power to Human Rights Promotor: On the Legal Regulation of the European Union's Relations with the Developing Countries*, 26 Cambridge Review of International Affairs 675, 682–683 (2013).

3.2.2.4 Other amendments, which impact the scope of the Union's development cooperation policy competence

3.2.2.4.1 Development cooperation versus cooperation with third countries

In section 2.3 above, we have seen that in 1993 the Maastricht Treaty introduced a specific Title on "Development Cooperation" into the EC Treaty (Title XX), and that in 2003 the Nice Treaty introduced another Title on "Economic, Financial and Technical Cooperation with Third Countries" into the EC Treaty (Title XXI). It was not immediately clear to what extent the introduction of Title XXI into the EC Treaty affected (narrowed) the scope of that Treaty's Title XX. In the *European Investment Bank* case the Court of Justice effectively ruled that there was no such effect.[114]

Following the entry into force of the Lisbon Treaty, we find the previous Title XXI of the EC Treaty in Chapter 2 of Title III, Part Five of the Treaty on the Functioning of the European Union. This Chapter provides as follows:

> **"Economic, financial and technical cooperation with third countries"**
> Article 212 TFEU
> 1. *Without prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211*, the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries *other than developing countries*. *Such measures shall be consistent with the development policy of the Union* and shall be carried out within the framework of the principles and objectives of its external action. The Union's operations and those of the Member States shall complement and reinforce each other.
> 2. The European Parliament and the Council, acting in accordance with *the ordinary legislative procedure*, shall adopt the measures necessary for the implementation of paragraph 1.
> 3. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.
> The first subparagraph shall be without prejudice to the Member States' competence to negotiate in international bodies and to conclude international agreements.

[114] See section 2.3 above.

> Article 213 TFEU
> When the situation in a third country requires urgent financial assistance from the Union, the Council shall adopt the necessary decisions on a proposal from the Commission."[115]

With regard to the delimitation between the Treaty on the Functioning of the European Union's Chapter on development cooperation *vis-à-vis* the same Treaty's Chapter on economic, financial, and technical cooperation with third countries, we observe that whereas the previous Article 181a EC provided "Without prejudice to the other provisions of this Treaty, and in particular those of Title XX [on development cooperation]", the new Article 212 TFEU provides "Without prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211 [on development cooperation]". Moreover, whereas Article 181a EC provided "Such measures shall be complementary to those carried out by the Member States and consistent with the development policy of the Community", Article 212 TFEU now provides "assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union …". The only apparent difference between Article 181a EC and Article 212 TFEU seems to be that the latter now explicitly lays down that it applies to "third countries other than developing countries". This is, however, merely a codification of the Court of Justice's ruling in *European Investment Bank* on the scope of Article 181a EC.

Thus, it seems fairly safe to conclude that there is no substantive difference between the two provisions when it comes to the effect they may have on the scope of the European Union's development cooperation policy. The Lisbon Treaty has also harmonised the decision-making procedure so that the ordinary legislative procedure applies irrespective of whether a measure is adopted on the basis of one or the other of the two competences.[116] This means that the European Parliament will take full part irrespective of which legal basis is being invoked, thus removing a source of potential inter-institutional conflict.

3.2.2.4.2 Humanitarian aid

With the Lisbon Treaty, the European Union in Article 214 TFEU has been given explicit powers in the field of humanitarian aid. This provision provides as follows:

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[115] Emphasis has been added in the quotation of Article 212.

[116] With the exception of cases falling under Article 213 TFEU.

"*Article 214 TFEU on humanitarian aid*

1. The Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union's measures and those of the Member States shall complement and reinforce each other.
2. Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented.
4. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in paragraph 1 and in Article 21 of the Treaty on European Union.
The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.
5. […]
6. The Commission may take any useful initiative to promote coordination between actions of the Union and those of the Member States, in order to enhance the efficiency and complementarity of Union and national humanitarian aid measures.
7. The Union shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system."

As observed in section 2.3 above, prior to the introduction of Article 214 TFEU, European Union humanitarian aid was provided on the basis of the Union's competence in the field of development cooperation, although it was rather doubtful whether this competence could be used to this end. With the introduction of Article 214 TFEU, any doubts with regards to whether the Union has competence in the field of humanitarian aid have been dispelled. At the same time, based on a *lex specialis* interpretation, it has become equally clear that the Union's competence in the field of development cooperation can

no longer be used to provide humanitarian aid. Article 4(4) TFEU lays down that in the field of humanitarian aid to third countries the European Union and the Member States shall have parallel competences (shared competence without pre-emption).[117]

3.2.2.4.3 Financing development cooperation assistance

Financing has always been a central issue in the field of development cooperation. For development cooperation, as some of the case law concerning the first phase described in section 2.2 above has shown, the Member States have insisted on keeping a main financing instrument (the EDFs) outside the Union framework. In this respect, development cooperation policy differs considerably from other Union policies, such as the common agricultural policy, cohesion funds, etc.

Assistance to the African Caribbean and Pacific (ACP) States falling under the Cotonou Agreement is financed via the so-called EDF, whereas all other development assistance is financed through the European Union's budget. Financing via the EDF essentially means that the funding does not come under the European Union's general budget, but instead is funded by the Member States, is subject to its own financial rules, and is managed by a specific committee. For the period 2008–2013, assistance granted to ACP States and to the overseas countries and territories (OCTs) was funded by the tenth EDF.[118] The consequence of the special scheme set up with regards to the EDFs is that whilst this assistance is administered by the European Commission under Regulation 617/2007,[119] the Member States themselves decide the size of the contribution and also control the funds. Essentially, this means that the European Union institutions have rather limited powers in this respect. This framework is expected to continue in an 11th EDF, which will cover a seven-year period running from 2014–2020.[120] However, the Commission and the European External Action Service (EEAS) have ambitions of bringing the aid scheme to ACP and OCT countries closer to

[117] See also section 3.2.3 below.

[118] The tenth EDF covered the period from 2008 to 2013 and provided an overall budget of EUR 22 682 million.

[119] Council Regulation 617/2007, on the Implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement, 2007 O.J. (L 152) 1.

[120] See the Joint Communication from the Commission and the High Representative to the European Parliament and the Council "Global Europe: A New Approach to Financing EU External Action", COM (2011) 865 final (Dec. 11, 2011).

the Union budget.[121] Do the amendments made by the Lisbon Treaty justify such a development? Whilst the Lisbon Treaty does not explicitly change the existing dual financing system, it may be thought to facilitate such transition. Hence, prior to the Lisbon Treaty, Article 179 EC provided as follows:

> "1. Without prejudice to the other provisions of this Treaty, the Council, acting in accordance with the procedure referred to in Article 251, shall adopt the measures necessary to further the objectives referred to in Article 177. Such measures may take the form of multiannual programmes.
> 2. The European Investment Bank shall contribute, under the terms laid down in its Statute, to the implementation of the measures referred to in paragraph 1.
> *3. The provisions of this Article shall not affect cooperation with the African, Caribbean and Pacific countries in the framework of the ACP-EC Convention.*"

After the entry into force of the Lisbon Treaty, Article 209 TFEU provides the following:

> "1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of development cooperation policy, which may relate to multiannual cooperation programmes with developing countries or programmes with a thematic approach.
> 2. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty.
> The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.
> 3. The European Investment Bank shall contribute, under the terms laid down in its Statute, to the implementation of the measures referred to in paragraph 1."

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[121] On page 11 of the above-mentioned Joint Communication, it is said that "Member States' contribution keys to the 11th EDF should be brought closer to the general EU budget contribution keys in order to facilitate the integration of the EDF in the EU budget at a later stage."

Thus, the EC Treaty's explicit reference in Article 179(3) to the European Union's cooperation with the ACP countries has been deleted. This deletion, it has been argued, means that a formal obstacle to Union budgetisation of EDF funds has been removed.[122]

The Commission and the EEAS consider the Lisbon amendments and the development in EU external relations in general to signal a desire to move the EDF funds closer to the Union budget. However, the Lisbon Treaty amendments in themselves have not been sufficient to foster this development, and, presently, it seems that further integration on this point has been postponed until negotiations on the post-2020 financing.

3.2.3 Nature of the competences

Prior to the entry into force of the Lisbon Treaty, development cooperation was a shared competence between the European Union and the Member States. This is clear from Article 177 EC, which laid down that the European Union's policy in the sphere of development cooperation should be complementary to the policies pursued by the Member States, and it was confirmed by the Court of Justice's ruling in the *Lomé IV* case.[123] One of the novelties of the Lisbon Treaty is that in Articles 2–6 TFEU, the Treaty drafters have explicitly categorised the nature of the European Union's competences in the various fields of EU law. With regard to the areas of development cooperation (and humanitarian aid), Article 4(4) TFEU provides that:

> "… the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs."

It thus follows from Article 4(4) TFEU that the European Union and the Member States have shared competence, and that the Union's exercise of its competence does not pre-empt that of the Member States'.[124] Both have parallel

[122] Cf. Henrike Klavert, *EU External Action Post-Lisbon: What Place is There for Development Policy?*, 4 The Bulletin of Fridays of the Commission 18, 21–22 (2011), http://ea.au.int/en/sites/default/files/Newsletter%20mars%202011.pdf.

[123] See section 2.3 above.

[124] See likewise Marise Cremona, *External Relations and External Competence of the European Union: the Emergence of an Integrated Policy*, *in* The Evolution of EU Law 253, (Craig & de Búrca eds., 2011).

or fully concurrent competences in the field of development cooperation.[125] The parallel nature of European Union and Member States competence is confirmed by Articles 208 and 209 TFEU. Article 208(1) TFEU lays down the complementarity obligation (as did Article 177 EC referred to above). It provides *inter alia*:

> "… The Union's development cooperation policy and that of the Member States complement and reinforce each other."

If the European Union had held exclusive competence in the area of development cooperation, the complementarity obligation would not make sense. Moreover, if competence in the field of development cooperation had been shared with pre-emption, it would seem more logical to render the Member States' competence complementary to that of the Union, whereas Article 208 TFEU categorises the competences of the two sides as mutually complementary.[126] This is further corroborated by Article 209(2) TFEU on the entering into international agreements in the field of development cooperation. It provides:

> "2. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty.
>
> The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements."

Article 209(2) TFEU thus vests in the European Union competence to conclude international agreements in matters of development cooperation, but adds, in line with Article 4(4) TFEU, that this does not pre-empt the competence of the Member States. Thus, the European Union and the Member States continue to have shared competence without pre-emption in the field of development

[125] Article 4 TFEU identifies those areas where shared competence applies. Thus, Article 4(2) TFEU identifies those areas where the normal system of shared competence (i.e. including pre-emption) applies, whereas Article 4(3) and (4) TFEU identify those areas where shared competence without pre-emption applies.

[126] Prior to the entry into force of the Lisbon Treaty, the competence of the European Union was complementary to that of the Member States. The Lisbon Treaty thus has made a change in this regard, which we consider below in this section.

cooperation policy.[127] As Eeckhout notes, "[t]he lack of pre-emptive effect on Member States competences is in the nature of development co-operation policies, which do not involve any law-making of the kind justifying such pre-emption".[128] This does not exclude, of course, that general principles of EU law, such as the duty of loyal cooperation and the principle of supremacy of EU law, may require that Member States do not act in ways that conflict with or undermine the Union's development cooperation activities.

In sum, as regards the scope and nature of the Union's development cooperation policy, very little has changed with the Lisbon Treaty. However, the Lisbon Treaty has subtly amended the hierarchical relationship between Union and Member State development cooperation policies. As noted above, Article 208(1) TFEU lays down that the European Union's development cooperation policy and those of the Member States complement and reinforce each other. This differs from the pre-Lisbon situation where Article 177 EC provided that the European Union's policy in the sphere of development cooperation should be complementary to the policies pursued by the Member States. Hence, whereas Member State policies previously took precedence over the Union's development cooperation policy, today neither can claim superiority over the other. This amendment may provide an important constitutional foundation for a strengthening of Union development cooperation policy *vis-à-vis* the Member States' policies. In particular, it may provide a stronger basis for requiring Member States to comply with general principles of EU law, including the principle of supremacy and the duty of loyal cooperation, also in this field. In the short-term day-to-day policy formulation, however, the change is unlikely to have a real substantive impact.

The European Union's and the Member States' parallel competences in the field of development cooperation leave more room for Member State action than what we find in most other policy areas with shared competence. This fact together with the duty to attain coherence,[129] complementarity,[130] and

[127] By contrast, Duke and Blockmans appear to take the view that, prior to the Lisbon Treaty, European Union and Member States competences in the field of development cooperation were shared *without* pre-emption, whereas following the entry into force of the Lisbon Treaty, the competences have become shared *with* pre-emption. See Simon Duke & Steven Blockmans, The Lisbon Treaty Stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) Establishing the Organisation and Functioning of the European External Action Service, CLEER Legal Brief (2010), *available at* http://www.asser.nl/upload/documents/542010_121127CLEER%20Legal%20Brief%202010-05.pdf.

[128] Piet Eeckhout, EU External Relations Law 139 (2nd ed. 2011).

[129] Article 208(1)(2) TFEU.

[130] Article 208(1)(1) TFEU.

coordination[131] arguably highlights the fundamental EU principle of loyal cooperation between the different actors. In this respect, the fact that the Union and the Member States are under an obligation to coordinate their development cooperation policies so as to ensure the effectiveness thereof implies that, in practice, Member State policies must pursue the development cooperation objectives that are laid down in the Treaties – objectives which to a considerable extent are a reflection of objectives originally established within international fora. Like the Union institutions, several Member States nevertheless pursue broader foreign policy objectives through their development cooperation policy, and these broader objectives are sometimes inconsistent with those found in the Treaties. Arguably, this may infringe the general EU law principle of loyal cooperation.

3.3 Institutional changes: Streamlining or new areas of conflict?

3.3.1 Overview

A central objective underlying the Lisbon Treaty was to strengthen the European Union's presence and negotiating ability on the international scene. To this end, the Lisbon Treaty created a new institutional set-up with particular regard to the Union's external relations. However, other institutional changes, not specifically aimed at the Union's presence on the international scene, brought about by the Lisbon Treaty are likely to impact on the European Union's development cooperation policy.

Below we first consider how the Lisbon changes have affected the European Parliament's and the Commission's powers in the legislative process (section 3.3.2). Next, we consider how the Lisbon Treaty's fundamental changes to the so-called comitology system may lead to thorough changes in the balance between, on the one hand, the Member States and, on the other hand, in particular the Commission with regards to the practical implementation of the Union's development cooperation policy (section 3.3.3). Finally, and most importantly, we will consider the consequences which the creation of the post of High Representative and of the European External Action Service will have on EU development cooperation (section 3.3.4).

[131] Article 210 TFEU.

3.3.2 Legal basis challenges by the European Parliament and the Commission

In section 2.3 above the Court of Justice's rulings in the *European Investment Bank*[132] and the *ECOWAS*[133] cases vividly illustrated that prior to the entry into force of the Lisbon Treaty the European Parliament vigorously defended its legislative role under the co-decision procedure (today the ordinary legislative procedure) that applied within the field of development cooperation. It is recalled that the *European Investment Bank* case concerned the delimitation between, on the one hand, development cooperation policy and, on the other hand, economic, financial, and technical cooperation with third countries, where the European Parliament was a co-decider under the former, but not under the latter. This procedural divergence has been abandoned with the Lisbon Treaty so that today the Parliament is a co-decider irrespective of whether a measure is adopted on the basis of one or the other legal basis (or both).

Likewise, in the field of humanitarian aid the new legal basis in Article 214 TFEU provides that measures must be adopted according to the ordinary legislative procedure. The same procedure therefore applies regardless of whether a measure is considered to be development cooperation or humanitarian aid.[134] It follows from this harmonisation of the legislative procedures that disputes like the one in the *European Investment Bank* case regarding the choice of legal basis are unlikely in the future.

The situation illustrated by the *ECOWAS* case is different, however. It is recalled that in the *ECOWAS* case the Commission challenged a measure adopted by the Council within the Common Foreign and Security Policy (CFSP) framework. The pillar structure has been abandoned with the Lisbon Treaty, but the CFSP continues to be governed by special (intergovernmental) provisions in Title V, Chapter 2 of the TEU. At the same time, the new institutional structure,[135] the reorganisation of the Union's external relations

[132] Case C-155/07, European Parliament v. Council (European Investment Bank), 2008 E.C.R. I-8103.

[133] Case C-91/05, Commission v. Council (ECOWAS), 2008 E.C.R. I-3651.

[134] Prior to the entry into force of the Lisbon Treaty, it was debatable whether the Treaty provisions on development cooperation provided sufficient legal basis for the adoption of measures regarding humanitarian aid, cf. above section 1.2.3 at footnote 27. To the extent that the development cooperation measures did not provide a sufficient legal basis, recourse would arguably have to be had to the so-called "flexibility provision" in Article 352 TFEU (which requires unanimity amongst the Member States). See further the discussion in Morten Broberg, *Undue Assistance? An Analysis of the Legal Basis of Regulation 1257/96 Concerning Humanitarian Aid*, 34 European Law Review 769, 772–775 (2009).

[135] See section 3.3.4 below.

objectives, and the reinforcement of the obligation to ensure coherence in the external field[136] are likely to further the use of multi-facetted external relations instruments, such as those which were the subject of the *India Agreement*, the *ECOWAS*, and the *Philippines Border Management* cases. In particular, we may expect an increase in the use of measures which incorporate both CFSP and development cooperation aspects. Such development gives us reasons to expect new clashes between the Council, on the one hand, and the Commission and the European Parliament, on the other.[137] Moreover, as we shall see below, the introduction of the High Representative and the EEAS may even complicate and exacerbate some of these inter-institutional conflicts.

3.3.3 Comitology

Prior to the entry into force of the Lisbon Treaty, comitology committees formed a central part of the European Union's regulatory machinery also in the field of development cooperation.[138] Thus, the European Commission Secretary General's Annual reports show that during the three-year period from 2006 to 2008, 795 implementing measures were adopted by the Commission under Council decision 1999/468 (the comitology decision)[139] in the development cooperation field.[140] Most of these measures were adopted according to the so-called "management procedure". The European

[136] Cf. Article 21(3)(2) TEU.

[137] Indeed, a first such clash has already been played out before the Court in the *Philippines PCFA* case, cf. section 3.2.2.2. above. As we indicate in that section, the judgment suggests considerable constitutional flexibility as regards the possibility of using the development cooperation competence for such multi-facetted instruments. Moreover, it may be read as a reinforcement of the obligation to ensure coherence in the external field.

[138] The committees in the field of development cooperation were "European Development Fund Committee (EDF)", "ENPI Committee (European Neighbourhood and Partnership Instrument)", "DCI Committee (Development Cooperation Instrument)", "IFS Committee (Instrument for Stability)", "INSC Committee (Instrument for Nuclear Safety Cooperation)", "EIDHR Committee (Democracy and Human Rights Committee)", and "Humanitarian Aid Committee (HAC)", cf. Comitology Committees Assisting the European Commission – Total Numbers of Committees February 2008 (2008), *available at* http://ec.europa.eu/transparency/regcomitology/docs/comitology_committees_en.pdf.

[139] Council Decision, Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, 1999 O.J. (L 184) 23.

[140] Cf. Opinion of the Committee on Development for the Committee on Legal Affairs on the Proposal for a Regulation of the European Parliament and of the Council Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers, (COM(2010)0083 – C7 0073/2010 – 2010/0051(COD)) (2008), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-441.193+02+DOC+WORD+V0//EN&language=EN.

Parliament was not satisfied with this and therefore worked towards changing the procedure in order to increase its influence.[141]

The entry into force of the Lisbon Treaty has led to an extensive overhaul of the previous comitology scheme. Articles 289–291 TFEU have introduced a distinction between *legislative acts* and *non-legislative acts*. Acts adopted by legislative procedure constitute legislative acts.[142] Articles 290 and 291 TFEU, however, provide for two categories of non-legislative acts – namely, *delegated acts* (roughly, delegation of legislative powers) and *implementing acts* (roughly, delegation of executive powers). Where the European Commission adopts a delegated act, this act will be under the direct control of the European Parliament and the Council, which can reject the act or revoke the delegation. In contrast, where the Commission adopts an implementing act, only the Member States (but *not* the European Parliament) have the power to control the implementation.[143] From the point of view of the European Parliament, the use of delegated acts possesses the attraction that the Parliament retains some control over the acts to be adopted. On the other hand, it also appears likely that in certain situations the Parliament will favour implementing acts – namely, in those situations where this means that only the precise (less important) technical details are 'postponed' to the implementing act.

This novel distinction leaves considerable scope for interpretation, and disputes between the European Parliament and the Commission (and Council) have arisen in many areas, including in the field of development cooperation. Thus, the Commission's proposal to amend the regulations on the financing instruments for the promotion of democracy and human rights,[144] for cooperation with industrialised and other high-income countries,[145] and for development cooperation[146] led to intense discussions as to whether this should be done through the delegated acts procedure, as the European Parliament argued, or through the implementing acts procedure, as argued by

[141] The European Parliament favoured the so-called regulatory procedure with scrutiny.

[142] Cf. Article 289(3) TFEU.

[143] See Regulation 182/2011, Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers, 2011 O.J. (L 55) 13.

[144] Regulation 1889/2006, on Establishing a Financing Instrument for the Promotion of Democracy and Human Rights Worldwide, 2006 O.J. (L 386) 1.

[145] Regulation 1934/2006, Establishing a Financing Instrument for Cooperation with Industrialised and Other High-Income Countries and Territories, 2006 O.J. (L 405) 41.

[146] Regulation 1905/2006, Establishing a Financing Instrument for Development Cooperation, 2006 O.J. (L 378) 41.

the Council. In the specific case a compromise deal was struck.[147] However, similar battles are likely to arise in the future. The outcome of such future battles will be of decisive importance with regards to the institutional balance of power amongst the European Union's three legislative institutions: the Council, the Commission, and the European Parliament.

3.3.4 High Representative and European External Action Service

Prior to the entry into force of the Lisbon Treaty, it was often argued that in international affairs the European Union punched below its weight, and that an important reason for this was the Union's internal organisation, or rather lack of a coherent organisation. A key objective behind the Lisbon Treaty, therefore, was to improve the Union's ability to act efficiently on the international stage. To this end, a new position as High Representative for Foreign Affairs and Security Policy was created.[148]

One of the essential functions of the High Representative is to bridge both Member State and Union interests. This is reflected in the remarkable array of tasks assigned to the High Representative in Articles 18(2)–(4) and 27(1)–(2) TEU. According to these provisions, the High Representative shall conduct the European Union's common foreign and security policy, contribute proposals to the development of this policy, carry it out as mandated by the Council, and preside over the Foreign Affairs Council. Moreover, the High Representative is one of the vice presidents of the Commission and is generally responsible within the Commission for its external relations responsibilities and for coordinating other aspects of the Union's external action.[149]

The creation of the position as High Representative is intended to significantly improve the European Union's ability to speak with one voice, and thereby to improve coherence in its external affairs policies. In order to enable the High Representative to carry out her tasks, she is assisted by a diplomatic service

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[147] On the specific case, see further Manon Malhère, Financing Instruments for EU External Action: EP and Council Battle it out over Delegated Acts, EUROPOLITICS (2012), *available at* http://www.europolitics.info/dossiers/comitology/ep-and-council-battle-it-out-over-delegated-acts-art325507-73.html.

[148] See Article 18 TEU.

[149] It has been argued that "[t]he High Representative's close link with the EU member states is pushing development cooperation closer to an intergovernmental level", cf. Jeske van Seters, *EU Funding for Africa, Business as Usual or Changes Ahead?*, 4 The Bulletin of Fridays of the Commission 24, 27 (2011), http://ea.au.int/en/sites/default/files/Newsletter%20mars%202011.pdf. Jeske van Seters apparently seems to consider this push towards an intergovernmental level advantageous with regards to improving coordination and complementarity between Member States and the European Union.

– the European External Action Service (EEAS). This service is independent of the Member States as well as of the Council and the Commission. Until now, the staff has primarily been drawn from the Member States' diplomatic services as well as from the Council and the Commission.

Which new constitutional challenges have the creation of these new actors caused for the Union's development cooperation policy?[150] The establishment of the EEAS has been of particular importance for the internal organisation of the Union's development cooperation policy.[151] One of the most contentious issues in relation to the establishment of the EEAS has been – and continues to be – whether and, if so, to what extent this new actor should be in charge of development cooperation policy. This question was at the centre of the sometimes heated debates about the division of tasks between the Commission and the EEAS leading up to Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service.[152] As van Vooren notes:

> "... many in the development community were worried that giving a role to the EEAS in EU development policy was a ruse of the Member States to ensure that aid resources presently managed by the Commission would be used for strategically directed objectives rather than long-term structural development objectives."[153]

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[150] There is already a growing body of literature on the legal nature and competences of the High Representative and the EEAS. Whilst the introduction of these new actors also impacts the Union's development cooperation policy, their impact is a question of a general nature, and therefore falls outside the scope of the present report.

[151] For an early examination of the EEAS, see the European Parliament study by Jan Wouters, et al., The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities (2013), *available at* http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/457111/EXPO-AFET_ET(2013)457111_EN.pdf. With particular regard to the EEAS and development cooperation policy, see pp. 49–50 of the study.

[152] Council Decision, Establishing the Organisation and Functioning of the European External Action Service, 2010 O.J. (L 210) 30. See, for instance, Honor Mahony, Ashton Presents Outline of Diplomatic Service, EU Observer (2010), *available at* http://euobserver.com/18/29769. In his article, Mahony particularly points to the very considerable sums involved in EU development cooperation as a reason why this area came to constitute the ground for one of "the most bitter battles" regarding the scope and contents of the EEAS. See also, for a more recent analysis, Isabelle Tannous, *The Programming of EU's External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO*, 18 European Foreign Affairs Review 329 (2013).

[153] See Bart van Vooren, *A Legal-institutional Perspective on the European External Action Service*, 48 Common Mkt. L. Rev. 475 (2011).

In other words, to transfer development cooperation policy competence from the Commission to the EEAS is not merely a technical question of institutional balance. The transfer of such competence to the EEAS may well lead to a higher degree of coherence between the development cooperation policy and other external policies. In particular, transferring some of this competence to the EEAS might entail a weakening of the marked distinction which hitherto the Commission has applied between, on the one hand, African, Caribbean, and Pacific (ACP) countries and, on the other hand, other developing countries. A transfer of development policy competence to the EEAS may also entail more coherence with regards to thematic divisions, since the transfer to the EEAS means that subjects that previously were treated by different directorates general within the Commission will now be treated under one and the same roof. However, the impetus for the EEAS to create a single, consistent external policy may mean that these policies may become so tightly interwoven that it will prove difficult to distinguish one from the other. In such a situation, it may be feared that the "soft" development cooperation policy objectives will "suffer" under the influence of other "harder" and more traditional foreign policy objectives.[154] Moreover, arguably, one should not exaggerate the positive effects on policy coherence resulting from a transfer of more development policy competence to the EEAS.[155]

[154] See in this respect EEAS One Year On: "Work in progress", for poverty eradication, Concord Europe (2012), *available at* http://www.concordeurope.org/98-eeas-one-year-on-work-in-progress-for-poverty-eradication; and Simon Stroß, Programming Financial Instruments Post-Lisbon: The European External Action Service and the New Institutional Architecture of EU External Action, *Paper for conference* The European Union in International Affairs III (May 3–5, 2012), *available at* http://www.exact.uni-koeln.de/fileadmin/home/strosss/Stross__2012__Programming_financial_instruments_post-Lisbon_-_The_EEAS_and_the_new_institutional_architecture_of_EU_external_action.pdf. See also Mark Furness, Opinion: The European External Action Service's Role in EU Development Policymaking Requires Safeguards, Deutsche Welle (2010), *available at* http://www.dw.de/dw/article/0,,5633787,00.html; and the discussions in Is EU Development Aid Entering a New Era in the Wake of the Lisbon Treaty?, Development Policy Forum (2008), *available at* http://www.dochas.ie/pages/resources/documents/2008_DPF_LT_Report_EN_for_web.pdf. Contrast, however, with the more optimistic view put forward by Mario Giuseppe Varrenti, *EU Development Cooperation after Lisbon: The Role of the European External Action Service* (EU Diplomacy Papers, Working Paper No. 10, 2010), *available at* http://aei.pitt.edu/15480/.

[155] Not all external policy subjects with a close connection to development cooperation policy are transferred to the EEAS. In particular, trade and humanitarian aid remain within the remit of the Commission. Hence, the partial transfer of development cooperation from the Commission to the EEAS is not likely to lead to increased coherence between development on the one hand and trade and humanitarian aid on the other. In this respect, see also Geert Laporte, *The Africa-EU Partnership in a Post-Lisbon and Post-Tripoli Context*, 4 The Bulletin of Fridays of the Commission 13, 16 (2011), http://ea.au.int/en/sites/default/files/Newsletter%20mars%202011.pdf.

It has been argued that the Treaties preclude the transfer of development cooperation policy responsibility to the EEAS. Thus, the law firm of White & Case has argued that "on a strict reading of the Treaty, the role of the EEAS is restricted to the CFSP", and that "[i]t can be argued that development cooperation activities do not substantially relate to the CFSP as defined; rather these activities reside in the realm of 'the rest of the Union's external action' for which the High Representative acts as Commissioner and possesses only a coordination function, and in relation to which the EEAS is to have no role".[156] The law firm continues by noting that the proposal to transfer important parts of development cooperation policy from the Commission services to the EEAS "cannot alter areas of competence as defined under the Treaties, such as the 'exclusive competence' of the Commission in development cooperation activities."[157] And it concludes that "[d]etracting from the exclusive competence of the Commission would require a formal Treaty amendment."[158] Arguments of this kind tend to rest on the Treaty provisions on external representation. Thus, Article 17(1) TEU provides that it is the Commission's competence to "ensure the Union's external representation", whereas Articles 18 and 27 TEU explicitly provide that the High Representative is responsible for the CFSP (only), and that the EEAS is to assist the High Representative.

However, as van Vooren has shown, the legal situation is considerably more complex, and the better view probably is that the constitutional framework introduced by the Lisbon Treaty is ambiguous and that the Treaties leave a considerable degree of flexibility as regards the division of tasks between the Commission and the High Representative/EEAS in the field of external relations.[159] In particular, the general task of the High Representative and the EEAS to ensure consistency in EU external relations suggests that the Treaties do not preclude these new actors from playing a (partial) role also in the formulation and implementation of development cooperation policy. Arguably, the Treaties therefore do not preclude a (partial) transfer of development cooperation policy from the European Commission to

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[156] White & Case LLP, Memorandum entitled Legal Objections to the EEAS' Involvement in EU Development Cooperation Activities (Apr. 16, 2010), at para. 3.7.

[157] *Id.* at para. 3.11. See also at para. 3.9.

[158] White & Case LLP, *supra* note 144, at para. 3.11.

[159] See van Vooren, *supra* note 141, particularly at pp. 486–491.

the EEAS.[160] In this light, as noted by Duke and Blockmans, the debate surrounding the transfer of development cooperation to the EEAS should centre less on issues of legality and more on how development-related interests can be upheld in the EEAS.[161]

At present, a compromise has been struck whereby the EEAS has been given the task of political coordination as regards a number of external assistance instruments.[162] This is merely a power of coordination, however. Thus, the competence actually transferred to the EEAS is procedural in nature and does not concern policy issues. The management of the Union's external cooperation programmes remains the responsibility of the Commission.[163] As the discussions about division of development cooperation competence between the Commission and the EEAS have shown, the Lisbon Treaty's introduction of the EEAS has created a new source of constitutional conflict. It is likely that this conflict will be revived in the next revisions of the division of tasks between, on the one hand, the Commission and, on the other hand, the High Representative and the EEAS.[164]

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[160] See likewise Simon Duke & Steven Blockmans, The Lisbon Treaty Stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) Establishing the Organisation and Functioning of the European External Action Service, CLEER Legal Brief (2010), *available at* http://www.asser.nl/upload/documents/542010_121127CLEER%20Legal%20Brief%202010-05.pdf. But contrast with Mirjam van Reisen, Note on the Legality of Inclusion of Aspects of EU Development Cooperation and Humanitarian Assistance in the European External Action Service (EEAS) (2010), *available at* http://www.eepa.be/wcm/dmdocuments/EEPA_briefing_paper_EEAS.pdf, who at p. 2 observes: "The Lisbon Treaty defines no powers to divide development cooperation policy and humanitarian assistance between the EEAS and the Commission. Any such proposals should be regarded as illegal under the Treaty."

[161] Duke & Blockmans, *supra* note 148, at p. 14.

[162] This is in line with the Report of 23 October 2009 from the Swedish Presidency to the European Council on the European External Action Service (DOC 14930/09) (2009), *available at* http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014930%202009%20INIT.

[163] Article 9 of Council Decision 2010/427/EU. See, generally, Steve Blockmans & Christophe Hillion (eds.), *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU Establishing the Organisation and Functioning of the European External Action Service* (CLEER, Working Paper No. 1, 2013), *available at* http://www.asser.nl/upload/documents/20130220T020029-cleer13-1_web.pdf.

[164] See, Isabelle Tannous, *The Programming of EU's External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO*, 18 European Foreign Affairs Review 329 (2013).

4 Conclusions and Future Challenges

In section 2 we explained that, leaving aside the special provisions on the OCTs, **the Rome Treaty** mainly left it for the Court of Justice to define the basic legal framework for the Union's development cooperation policy. In case law from this period, the Court largely supported the Commission's approach with regard to the place and importance of development cooperation policy in the EU constitutional system. The Court's case law gives rise to three general observations: *First*, the Court accepted that the common commercial policy, the Union's predominant external policy at the time, could be broadly construed, and thus used to pursue development cooperation policy objectives. In this way, important aspects of development cooperation policy were brought within the confines of the Union's exclusive competence. Arguably, apart from relations with the OCTs, the legal constitutional framework established in this case law created a trade-biased foundation for the Union's and the Member States' development cooperation policy. *Secondly*, outside the common commercial policy field, the Union's development cooperation policy competence was weak. *Thirdly*, it was clear from early on that the financing mechanism formed an important way to influence the Union's development cooperation policy. Attempts by the European Parliament to gain influence through its budgetary prerogatives were not supported by the Commission and failed when the Court firmly rejected to expand the concurrent nature of the Union's development cooperation policy competence through the Parliament's budgetary powers.

With the entry into force of **the Maastricht Treaty** in 1993, the rules of the game changed. The Union's development cooperation was given a Title in the EEC Treaty, and thus a policy of its own. This continues to constitute the single most important constitutional change to the EU's development cooperation policy. The new Treaty provisions were based on three legs – often referred to as the three C's – laying down the principles, *inter alia,* for how the European Union and the Member States were to cooperate in the field of development cooperation. After Maastricht, new competence conflicts over the precise delimitation of the European Union's development cooperation policy *vis-à-vis* other policies arose, most famously in the *India Agreement* case, which continues to be a leading authority. Finally, after Maastricht, the "cohabitation" of development cooperation and the European Union's promotion of its own values (in particular, human rights and democracy) were challenged.

The Lisbon Treaty introduced a number of changes to the constitutional legal framework, which governs the Union's development cooperation policy. Some of these changes are codifications and (technical) adjustments, which will not give rise to significant problems in the future. Other changes may have a longer-lasting impact and carry the potential for future constitutional conflicts, which may influence on the Union's ability to carry out an effective development cooperation policy. First and foremost, the Lisbon Treaty, we submit, by reorganising and streamlining the Union´s development cooperation policy objectives, leaves a lasting constitutional impact on this policy. The explication and reorganisation of the Union's external relations objectives and principles and the streamlining of the development cooperation policy objective (i.e. the identification of poverty reduction/eradication as a primary objective) are likely to have a lasting constitutional impact on policy-making and legal methodology in this area. We expect this change to be incremental and probably largely unnoticed in the day-to-day politics, however. Furthermore, our analysis of the scope and nature of the Union's competences and the institutional changes introduced by the Lisbon Treaty suggests that post-Lisbon the European Union's development cooperation policy is faced with three main legal, constitutional challenges:

I *The organisation of the financial aid aspect* of the European Union's development cooperation policy remains crucial. Key concerns are who decides for what purposes the money is spent and who controls the actual use of the money. An important aspect of this is control over the budget. In this regard, the European Parliament has developed into a main actor, as is vividly illustrated by the Court's ruling in the *European Investment Bank* case. Also, after the entry into force of the Lisbon Treaty, the organisation of the financing remains a very significant challenge for a coherent and effective EU development cooperation policy. The Lisbon Treaty means that a step – albeit only a small one – has been taken towards bringing all development cooperation under the ordinary EU budget, which particularly finds support from the European Commission and the European Parliament. However, so far little has changed, and it remains unclear whether the Lisbon Treaty will result in an improvement of the rules of this game, or, conversely, whether it has increased the number of scenarios for, and thus the probability of, conflict over budgetary matters.

II Another set of potential conflicts, which appeared already in Opinion 1/78 on the *Natural Rubber Agreement*, is that of *finding the right constitutional balance for development cooperation policy vis-à-vis other policies:* The challenge is to allow development cooperation to be a policy

in its own right, while finding ways to ensure a coherent overlapping with the EU's other external policy areas. As shown in section 2 above, from a constitutional perspective, development cooperation policy in its own right (i.e. a policy, which did not merely concern associations with OCTs) had a difficult start, partly because of its lack of a strong, independent legal basis, and partly because of its very broad policy scope. Moreover, as became gradually clear after the entry into force of the Maastricht Treaty, the European Union's development policy is by its nature multi-facetted and potentially open-ended. This makes development cooperation difficult to demarcate *vis-à-vis* other policy areas, as is reflected in the Court of Justice's rulings in the *India Agreement* case, the *ECOWAS* case, and, most recently, the *Philippines PCFA* case. The latter case shows that the dilemma of finding the right balance for this multi-facetted policy without diluting either the development cooperation competence or other competences of the Union and the Member States concerns both the width and the depth of the cooperation. This continues to be a central constitutional challenge for the Union. A serious challenge in this respect is to avoid future conflicts between the European Union's common foreign and security policy (CFSP), on the one hand, and the Union's other external policies, on the other hand (i.e. ECOWAS-type conflicts).

III The third and possibly most significant constitutional challenge concerns the *relationship between the 28 Member States' development cooperation policies and that of the European Union*. From a legal point of view, this challenge springs from the fact that, on the one hand, the Treaties clearly lay down that the Member States and the Union hold parallel competences in the field of development cooperation. Whilst, on the other hand, in cases such as *PFOS* the Court of Justice has made it clear that the Member States must duly observe the general principle of loyal cooperation in areas of shared competence. In the sphere of development cooperation, this might be thought to include an obligation to ensure external unity and effectiveness of Member State development policies *vis-à-vis* the Union's development policy. In practice, however, such obligation arguably will imply that Member State policies must pursue the development cooperation objectives that are laid down in the Treaties and which to a considerable extent are a reflection of objectives originally established within international fora. Several Member States nevertheless pursue broader (and sometimes inconsistent) objectives from those found in the Treaties – e.g. openly geopolitical ones. Even though the Union's exercise of development cooperation competence cannot pre-empt Member State competences, after Lisbon the Member

States' development cooperation policies may increasingly run counter to the reinforced horizontal requirements in EU external relations law, such as the duty of loyal cooperation. Whilst this is not a constitutional challenge that can be attributed directly to any specific change made by the Lisbon Treaty, the general changes to the rules governing the Union's external relations introduced by Lisbon appear to have exacerbated this problem.

In addition to these three main legal, constitutional challenges, the Lisbon Treaty has introduced new battlefields for institutional conflicts, including that between the Parliament and the Commission concerning the choice between delegating and implementing acts and that concerning division of tasks between the Commission and the EEAS. The former, in our view, is a variation of the classic legal basis conflict. As regards the latter, perhaps contrary to other recent studies, we do not consider the much-debated conflict concerning the division of tasks between the Commission and the EEAS to have a constitutional impact similar to the three above-mentioned issues. In our view, though the vagueness is unfortunate, and though the conflict is intellectually challenging, we consider this challenge to be manageable.

As can be seen, none of the above three constitutional challenges is new, and none was unknown to the drafters of the Lisbon Treaty. There is, in fact, abundant case law on all three issues, which provides ample evidence of the interests at stake and the potential for conflicts. The vagueness with which previous Treaties have dealt with the challenges was also notorious. So, if the success of the Lisbon reform should be measured by its ability to avoid repetition of old conflicts and to introduce novel instruments for an efficient development cooperation policy, the Lisbon Treaty must be considered a modest achievement: The issue of financing has been left open, the very notion of 'development cooperation policy' continues to be vague and open-ended, potentially covering any aspect of cooperation with developing countries; and the mechanisms of coordination between the Union and its Member States, which are essential to ensure an effective and coherent policy *vis-à-vis* specific third countries, are sketchy at best. It should be borne in mind, however, that the Union's development cooperation policy has been capable of evolving to what it is today within an incomplete constitutional framework.

Overall, we submit that, despite the fact that the old constitutional challenges remain, we can identify the following two overall positive tendencies, which are likely to continue: First, since the entry into force of the Maastricht Treaty,

the European Union has had a development cooperation policy framework with a global and comprehensive outlook. Second, thanks to four decades of Court of Justice rulings, this policy is now governed by well-known legal principles – including notably principles to define the legal basis and the duty of loyal cooperation – some of which have even been refined and, partly, codified in the Lisbon Treaty. The global outlook of the Union's development cooperation policy post Lisbon, and the increasing institutionalisation of the legal constitutional framework, which governs this policy, are positive signs that the Union and its Member States are moving towards a framework, which will gradually construct a more coherent and efficient development cooperation policy for the EU.

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Sammanfattning på svenska

Den här rapporten identifierar och redogör för de förändringar som Lissabonfördraget* har medfört när det gäller EU:s politik för utvecklingssamarbete. Rapporten beskriver hur dessa förändringar har påverkat det ”europeiska områdets” (dvs. EU och medlemsländerna) möjligheter att agera som en sammanhållen och effektiv kraft på den internationella arenan vad gäller utvecklingssamarbete. Rapporten granskar endast de juridiska och konstitutionella aspekterna av EU:s utvecklingssamarbete, dvs. de aspekter som är direkt kopplade till EU:s primärrätt, i synnerhet fördragen. Den behandlar således inte sekundärlagstiftningen (direktiv, förordningar och beslut).

Från Romfördragets ikraftträdande 1958 till dess att Maastrichtfördraget började gälla 1993 var det – bortsett från de speciella bestämmelserna om utomeuropeiska länder och territorier (OCT-områden) – i huvudsak upp till Europeiska unionens domstol att definiera det grundläggande juridiska ramverket för EU:s politik för utvecklingssamarbete. Rättspraxis från den perioden visar att domstolen för det mesta har stött Europeiska kommissionens inställning vad gäller vikten av utvecklingssamarbetet och den roll det spelar inom EU:s konstitutionella system. Domstolen gick exempelvis med på att den gemensamma handelspolitiken – det vid den tiden dominerande inslaget i EU:s utrikespolitik – gavs en bred tolkning och därigenom kunde användas för att uppnå målsättningarna inom utvecklingssamarbetet, vilket medförde att viktiga aspekter inom politikområdet hamnade inom ramen för EU:s exklusiva befogenhet. Rapporten visar att bortsett från relationerna till OCT-området, etablerade det konstitutionella ramverket via rättspraxis en handelsbaserad grund for unionens och medlemsländernas utvecklingssamarbete. En annan slutsats vad gäller perioden är att om man bortser från den gemensamma handelspolitiken så var unionens politik för utvecklingssamarbete i övrigt outvecklad. En tredje slutsats är att det redan tidigt stod klart att finansieringsmekanismen var viktig om man ville påverka unionens politik för utvecklingssamarbete. Europaparlamentets försök att genom sina budgetprivilegier skaffa inflytande över utvecklingssamarbetet fick inte stöd av kommissionen och EU-domstolen avvisade bestämt alla försök att den vägen utvidga EU:s kompetens inom området.

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* Lissabonfördraget om ändring om fördraget om Europeiska union och fördraget om upprättandet av Europeiska gemenskapen, undertecknat i Lissabon den 13 december 2007, 2007 O.J. (C 306) 1 [härefter Lissabonfördraget].

En andra period inleddes med Maastrichtfördragets ikraftträdande 1993. I och med det fick EU:s utvecklingssamarbete en egen rubrik i det dåvarande EG-fördraget och därmed också ett eget politikområde. Detta kvarstår som den enskilt viktigaste konstitutionella förändringen vad gäller EU:s utvecklingssamarbetspolitik. Bestämmelserna i det nya fördraget vilade på tre ben som fastställde principerna bl.a. för hur EU och medlemsländerna skulle samarbeta inom utvecklingssamarbetsområdet. Inte desto mindre uppstod, även efter Maastricht, nya konflikter när det gäller frågan om befogenheter och den exakta avgränsningen mellan EU:s utvecklingssamarbetspolitik och andra politikområden. Efter Maastricht ifrågasattes dessutom ”sammanblandningen” mellan utvecklingssamarbetet och EU:s främjande av de egna värderingarna (i synnerhet de mänskliga rättigheterna och demokrati).

En tredje period inleddes i och med ikraftträdandet av Lissabonfördraget 2009. Med det infördes ett antal förändringar i det konstitutionella juridiska ramverk som styr EU:s utvecklingssamarbetspolitik. Vissa av dessa förändringar är kodifieringar och (tekniska) justeringar som inte kommer att medföra några större tolkningsproblem i framtiden. Andra kan få mer bestående effekter och eventuellt leda till framtida konstitutionella konflikter, vilka i sin tur kan påverka unionens möjligheter att driva en effektiv utvecklingssamarbetspolitik. Men framför allt har Lissabonfördraget – genom att lägga grunden för ett effektivare utvecklingssamarbete – haft en varaktig konstitutionell påverkan på politikområdet. Klargörandet av EU:s utrikespolitiska målsättningar och principer och effektiviseringen av utvecklingssamarbetet (där bekämpande av fattigdom är den primära målsättningen) kommer troligtvis att ha bestående konstitutionell inverkan på politiken och den juridiska metodologin inom området. De här beskrivna förändringarna kommer förmodligen att ske stegvis och därför troligtvis knappast märkas i den dagliga politiken. Det är dessutom högst troligt att EU:s politik för utvecklingssamarbete efter Lissabonfördraget står inför tre stora konstitutionella utmaningar:

Organiseringen av det ekonomiska biståndet kommer även i fortsättningen att vara en avgörande aspekt av EU:s politik för utvecklingssamarbete.
Att hitta rätt konstitutionell balans för utvecklingssamarbetet i förhållande till andra politikområden.
Relationen mellan de 28 medlemsländernas politik för utvecklingssamarbete och EU:s motsvarande politik.

Utöver dessa tre konstitutionella utmaningar, pekar rapporten på att Lissabonfördraget också har medfört att nya institutionella konfliktytor har

uppstått. Som exempel kan nämnas konflikten mellan Europaparlamentet och kommissionen vad gäller valet mellan delegerade akter och genomförandeakter och konflikten rörande fördelningen av uppgifter mellan kommissionen och Europeiska utrikestjänsten (EEAS).

Sammanfattningsvis konstaterar rapporten att trots att gamla konstitutionella utmaningar kvarstår, är det likväl möjligt att peka på två övergripande positiva tendenser: *För det första*, att EU sedan Maastrichtfördraget trädde i kraft har ett ramverk för utvecklingssamarbete som präglas av en global och heltäckande hållning. *För det andra*, att denna politik numera – tack vare fyra decenniers avgöranden i EU-domstolen – styrs av etablerade juridiska principer. Det gäller inte minst de principer, varav några har renodlats och delvis kodifierats i Lissabonfördraget, som definierar den rättsliga grunden för samarbetet samt skyldigheten att respektera principen om lojalt samarbete. Den globala hållning som har präglat EU:s politik för utvecklingssamarbete sedan Lissabonfördragets ikraftträdande och den ökande institutionaliseringen av det juridiska ramverk som styr politikområdet är två positiva tecken på att EU och dess medlemsländer rör sig mot något som gradvis kommer att leda till en bättre sammanhållen och effektivare politik för utvecklingssamarbete.

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