

# The external action paradox of the Lisbon Treaty: reconciling integration with delimitation

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Paper prepared for the Copenhagen Business School Graduate Conference 'United We Stand – The EU, its current challenges and the way forward', 21-22 June 2012

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## Abstract

Ever since its creation the CFSP constituted a deliberately separate category of EU cooperation. The Lisbon Treaty largely undoes this and takes a significant leap towards integrating the CFSP and former Community elements in a streamlined external action system. It abolishes the pillar structure, accords a single legal personality to the Union and puts in place a common external action framework governed by a single set of principles and objectives. Yet, at the same time the CFSP remains overtly separate from the other external competences and is still governed by specific rules and procedures. This concurrent emphasis on integration and delimitation places the Union for a genuine paradox that may put the accountability of the Lisbon Treaty's institutional novelties significantly to the test and force the EU judiciary as well as policy-makers to look for creative ways of adjudicating on and conducting external policy.

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## 1. Introduction

The European Union's role in foreign affairs has gradually developed from a by-product of European economic integration into a fully-fledged system that spans the whole spectrum of external policy-making, from trade, diplomacy over development cooperation and humanitarian aid to the various aspects of security policy and military (co)operation. Whereas EU external action represents a dynamic system in constant evolution, it has been marked by a persistent tension between the Member States' willingness to integrate its defence and security aspects in, while at the same time stressing its separateness from mainstream European integration. In this manner Member States can reap the benefits of scale and impact that go along with European cooperation without giving up their painstakingly guarded sovereignty.<sup>1</sup>

The tension between integration and delimitation was casted in the concrete of the Union's pillar structure. The Maastricht treaty strictly separated the Common Foreign and Security Policy (CFSP) – where the Member States retain a higher degree of control over decision-making – from the European Community (EC), while nonetheless gathering both under the common umbrella of the European Union.<sup>2</sup> This approach of running with the hare of integration and hunting with the hounds of delimitation resulted in a particularly complex and fragmented external action system.

The most recent round of constitutional engineering that ended in December 2009 with the entry into force of the Lisbon Treaty resolutely plays the integration card. Constitutional innovations such as the abolition of the pillar structure and institutional novelties like the creation of a triple-hatted High Representative are clearly aimed at uniting the different strands of EU external action. Quite contrary to this oft heralded integration rationale, a look between the lines of the new treaties shows a continued strong delimitation between the former Community external activities, that are now set out in the Treaty on the Functioning of the EU (TFEU), and the CFSP that inelegantly remains confined to the Treaty on European Union (TEU).

After elaborating on the evolution of EU's dualistic external action system (2), this article will argue that the Lisbon Treaty's simultaneous call for integration and delimitation places the Union for a genuine paradox (3). This causes considerable challenges for the Lisbon Treaty's new institutional structures (4), the judiciary (5) and policy-makers (6) that will force them to break taboos and look for new and creative ways of conducting external policy.

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<sup>1</sup> E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, Oxford, 2002) pp. 1-4.

<sup>2</sup> Besides the EC and the CFSP, the Maastricht Treaty created a third pillar for Justice and Home Affairs (JHA), later reformed and rebranded by the Treaty of Amsterdam as Police and Judicial Cooperation in Criminal Matters (PJCC).

## 2. The development of the CFSP between integration and delimitation: a determined choice not to choose

Strict delimitation of policy areas is neither possible nor desirable in the complex interconnected domain of external action.<sup>3</sup> The initial choice for keeping the European Political Cooperation (EPC), that was set up in 1970 to coordinate the Member States' foreign policies, entirely separate from the European Economic Community (EEC) soon proved unworkable. The unavoidable links between the EPC and the EEC clearly came to the surface with regard to policies on dual use goods, i.e. goods that may be used for both civil and military ends, and economic sanctions against third states.<sup>4</sup> The Single European Act (SEA) of 1986 consequently brought both forms of cooperation together in a single binding document and thus, in a way, laid the basis for the tension between integration and delimitation that has characterised EU external action ever since.

The Maastricht Treaty rooted this tension even deeper in the legal structure of the EU by spreading external action over two treaties and three pillars governed by a single institutional framework.<sup>5</sup> Contrary to the rather strong division of roles in the EC, the treaty provisions on the CFSP accorded a dominant position to the Council and the European Council with only limited roles for the Commission, the Court and the European Parliament.<sup>6</sup> The Herculean task of ensuring consistency between the whole of EU external activities was entrusted to the Council and the Commission without a possibility of legal enforcement by the Court or any specifications of how this had to be achieved.

While one of the main reasons for this intricate Treaty structure was to underscore the separateness of the CFSP vis-à-vis the EC, their constantly broadening scope and the ever-expanding globalisation process only intensified their interdependency. The Treaty reforms of Amsterdam and – to a lesser extent – Nice have reacted by gradually toning down the CFSP's distinct status, for instance by according it treaty-making powers,<sup>7</sup> extending the use of qualified majority voting (QMV),<sup>8</sup> and charging most CFSP expenditure to the EC budget.<sup>9</sup> However, Article 47 TEU – that found its origin already in Article 32 SEA – remained an unaffected stronghold in defence of delimitation. This article states that nothing in the TEU “shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them”. The result has been a political system where the division of competences always prevails over considerations of effectiveness.<sup>10</sup>

The rather awkward position of the CFSP, balancing on the verges of integration and delimitation, lays at the foundation of the complex EU external action structure, that is characterised by entangled

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<sup>3</sup> E. Cannizzaro, 'Unity and Pluralism in the EU's Foreign Relations Power' in C. Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press, Oxford, 2007) p.218.

<sup>4</sup> S. Nuttall, 'Interaction between European Political Cooperation and the European Community' (1987) 7 *Yearbook of European Law*, pp. 211-249.

<sup>5</sup> Ex Article 3 TEU.

<sup>6</sup> P. Eeckhout, *EU External Relations Law* (Oxford University Press, Oxford, 2011) pp. 486-487.

<sup>7</sup> Ex Article 24 TEU.

<sup>8</sup> Ex Articles 23(2), 24(3) and 27(e) TEU.

<sup>9</sup> Article 28 TEU; for a complete discussion of the Amsterdam changes: F. Dehousse, 'After Amsterdam: A Report on the Common Foreign and Security Policy of the European Union' (1998) 9(3) *European Journal of International Law*, pp. 525-539.

<sup>10</sup> G. De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, Oxford, 2008) p. 10.

competences and diffused responsibility between actors and policies of the EC, the EU and the Member States. This structure has proved a fertile ground for duplication and fragmentation that has often been overcome by constructive ad hoc arrangements, but also resulted in time-consuming coordination and occasionally bureaucratic infighting.<sup>11</sup>

The Union's Treaty structure has not left scholarly debate unmoved either. A first subject of legal controversy stems from the ambiguous meaning of the Article 47 TEU prohibition of "affecting" the EC. This has led to diametrically opposed views on the nature of the EC-CFSP relationship. A number of authors have aimed to shed more light on the issue by placing Article 47 in its context but differ in their conclusions. Those emphasising the Article 1 TEU provision that the Union is founded on the Communities and supplemented by the TEU, together with the requirement expressed in Article 2 TEU that the Union shall maintain in full the *acquis communautaire*, believe that Article 47 gives precedence to EC competences over those of the CFSP.<sup>12</sup> Others have read Article 47 together with the Article 3 TEU duty of ensuring consistency of all external activities and the Article 2 TEU requirement of asserting the EU's identity on the international scene, in particular through the CFSP. They conclude that Article 47 excludes "any legal hierarchy"<sup>13</sup> and instead refers to "the parallelism between first and second pillar competences".<sup>14</sup>

The approach of the EU Court of Justice (ECJ) leans towards the first view but attaches quite far-reaching consequences to it. It interprets Article 47 TEU as a hierarchical delimitation rule implicating that TEU competences may not "encroach"<sup>15</sup> upon the powers conferred on the Community.<sup>16</sup> This means that a measure that could properly be adopted on the basis of the EC Treaty, should be based on the latter. If the measure had instead been adopted under former Titles V (second pillar) or VI (third pillar) of the EU Treaty, it infringed Article 47 TEU and had to be annulled. With regard to the relationship between CFSP and EC competences this approach was developed in the ECOWAS ruling.<sup>17</sup> This concerned a dispute between the Commission and the Council on the appropriateness of Council Decision 2004/833/CFSP providing support to the Economic Community of West-African

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<sup>11</sup> R. Baratta, 'Overlaps between European Community Competence and European Union Foreign Policy Activity' in E. Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International, The Hague, 2002) pp. 51-75.

<sup>12</sup> P. Eeckhout, op.cit. note 6, pp.172-173; M. Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge, 2008) pp. 42-43.

<sup>13</sup> R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43(2) *Common Market Law Review*, p. 351.

<sup>14</sup> A. Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences' in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge, 2008) pp. 93-98; See also: G. De Baere, op.cit. note 10, pp. 267-268 and 298.

<sup>15</sup> This term was first coined by Advocate General Fennelly in Case C-170/96, *Commission v. Council* [1998] ECR I-2782, para. 8.

<sup>16</sup> Case C-176/03 (Environmental Penalties), *Commission v. Council* [2005] ECR I-7907, paras 40, 51 and 53; Case C-440/05, *Commission v. Council (Ship-Source Pollution)* [2005] ECR I-9128, paras 54, 69 and 74.

<sup>17</sup> Case C-91/05, *Commission v. Council (ECOWAS)* [2008] ECR I-3651, para. 58-62; For a thorough discussion of this controversial judgment see: C. Hillion and R.A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?' (2009) 46(2) *Common Market Law Review*, pp. 551-586; P. Van Elswege, 'On the Boundaries between the European Union's First Pillar and Second Pillar: a Comment on the ECOWAS Judgment of the European Court of Justice' (2009) 15(3) *Columbia Journal of European Law*, pp. 531-548.

States (ECOWAS) to deal with the calamitous spread of small arms and light weapons (SALW).<sup>18</sup> The Commission contested the legality of this Decision and held that such activity had to be adopted within the framework of the Community's development cooperation policy. The Court found that the measure pursued both development cooperation and CFSP objectives without one being incidental to the other. Consequently, Article 47 TEU made it mandatory to follow the Community legal basis.

The ECJ bases its conclusion, among others, on the broad definition of EU development cooperation in the European Consensus on Development,<sup>19</sup> by the way a non-binding policy statement, and the fact that the contested decision notes that the spread of SALW "reduces the prospects for sustainable development".<sup>20</sup> In this manner the Court thus imposes a "watertight"<sup>21</sup> hierarchical demarcation at the expense of further integration.<sup>22</sup> With the outcome of this case in mind EU institutions will probably be less inclined to include cross-references to other EU competences in future legislation.<sup>23</sup>

A second source of legal debate is whether the CFSP constitutes a separate intergovernmental order of cooperation or rather forms part of a unitary framework of EU law.<sup>24</sup> Several developments seem to have settled the dispute increasingly in the direction of the latter view. For one thing, the Court increasingly applies a unified concept of EU law that governs "the integrated but separate legal orders"<sup>25</sup> and uses EC analogy to interpret EU provisions.<sup>26</sup> For another, a close reading of the Treaties demonstrates that the CFSP is more constraining on Member States foreign powers than the misleading "intergovernmental" label would suggest.<sup>27</sup> Moreover, also the Treaty-suggested Council-European Council duopoly over the CFSP does not accurately reflect reality. Incited by the growing

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<sup>18</sup> Council Decision (2004/833/CFSP) of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons, O.J. L359/65, 04.12.2004.

<sup>19</sup> Joint statement by 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, 'The European Consensus on Development' (O.J. C46/1) 24.2.2006.

<sup>20</sup> Case C-91/05, op.cit. note 17, paras 19 and 66.

<sup>21</sup> Opinion of Advocate General Mengozzi, para. 116.

<sup>22</sup> B. Van Vooren, 'EU-EC External Competences after the Small Arms Judgment' (2009) 14(1) *European Foreign Affairs Review*, pp. 17-24.

<sup>23</sup> P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance between Delimitation and Consistency' (2010) 47(4) *Common Market Law Review*, pp. 1015-1016.

<sup>24</sup> For a more detailed discussion of this academic debate, see: C. Herrmann, 'Much Ado about Pluto? The 'Unity of the Legal Order of the European Union' Revisited' in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals: Essays in European Law* (Hart Publishing, Portland, 2008), pp. 19-51; B. de Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?' in T. Heukels, et al. (eds), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law International, The Hague, 1998) pp. 51-67.

<sup>25</sup> T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3544, para 156 and T-315/01, *Kadi v Council and Commission* [2005] ECR II-3659, para 120.

<sup>26</sup> For the unified concept see for instance: op.cit. note 16; Joined Cases C-317/0 and C-318/04, *European Parliament v. Council (PNR)* [2006] ECR I-4721; Case C-91/05, op.cit. note 17. For the EC analogy, see: Case C-105/03, *Pupino* [2005] ECR I-5285; Case C-355/04, *Segi and Others v. Council* [2007] ECR I-1657. For a more elaborate discussion of this tendency in case law: R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) 5(1) *European Constitutional Law Review*, pp. 134-141.

<sup>27</sup> This is for instance clear from Article 11(2), Article 14(3), Article 15 and Article 16 TEU. See further: C. Hillion and R. Wessel, 'Restraining External Competences of EU Member States under CFSP' in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals: Essays in European Law* (Hart Publishing, Portland, 2008) pp. 79-121.

cross-pillarisation of EU external action, the Commission has obtained a seat at the table in all stages of CFSP decision-making, the Parliament got a foot in the door by exploiting its legal and budgetary powers to the fullest and the Court of Justice augmented its say over the CFSP through overseeing the borderline with the EC on the basis of Article 47 TEU.<sup>28</sup> This process of closing up between the two legal orders has been determinedly confirmed by the Lisbon Treaty changes.

### 3. The integration-delimitation paradox of the Lisbon Treaty

The Lisbon Treaty was proudly presented as a thorough reform and reorganisation exercise that will “give the Union a single voice in external relations”<sup>29</sup> and make it “work more efficiently and effectively”.<sup>30</sup> By dissolving the EC into the Union, and thus formally abolishing the pillar structure, the Treaty leaves no doubt that the EU constitutes a unitary legal order.<sup>31</sup> This is confirmed by according legal personality to the Union as a whole<sup>32</sup> and is reflected in the grouping of all the external action principles and objectives, including those of the CFSP, in a single Article 21 TEU. Moreover, it can no longer be argued that the CFSP is of subsidiary nature because the Community bias of ex Article 47 TEU is undone by according a similar level of protection to both CFSP and TFEU competences in the new Article 40 TEU (cf. supra). Another case in point is that the TEU and TFEU are accorded equal legal value.<sup>33</sup>

At first sight the Lisbon Treaty thus seems to make an end to the debate on the nature and interrelationship of the EU and former EC legal orders.<sup>34</sup> Yet, a closer look at the new treaties reveals that the earlier-mentioned absence of choice between integrating and delimitating the CFSP is more present than ever. On the one hand, the common list of external action objectives and the recurring Treaty requirement to conduct CFSP and TFEU external policies within their framework<sup>35</sup> express a strong plea – and arguably even a duty – for EU institutions to interlink and integrate various foreign policy objectives. On the other hand, a choice will still have to be made between different legal bases with their varying division of powers. Even though the specificity of the CFSP’s “specific rules and procedures”<sup>36</sup> has been slightly reduced, with extended possibilities for QMV<sup>37</sup> and a somewhat

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<sup>28</sup> C. Herrmann, op.cit. note 24, pp. 19-51; on the ECJ’s role with regard to CFSP: M.-G. Garbagnati Ketvel, ‘The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy’ (2006) 55(1) *International and Comparative Law Quarterly*, pp. 77-120.

<sup>29</sup> Commission (IP/07/1922) ‘Commission welcomes signature of the Treaty of Lisbon and calls for its swift ratification’, Brussels, 13 December 2007.

<sup>30</sup> EU High Representative for the CFSP (S 194/08) ‘Address to the European Parliament on EU Foreign, Security and Defence Policy by Javier Solana, Brussels’, 4 June 2008.

<sup>31</sup> Article 1 TEU.

<sup>32</sup> Article 47 TEU; yet the former absence of an explicit recognition hereof was the result of political rather than legal doubt (R. Leal-Arcas, ‘EU Legal Personality in Foreign Policy’ (2006) 24(2) *Boston University International Law Journal*, pp. 211-212).

<sup>33</sup> Article 1 TEU.

<sup>34</sup> R. Wessel, op.cit. note 26, p. 118.

<sup>35</sup> Article 24(2) TEU, Article 205, 207(1), 208(1), 212(1) and 214(1) TFEU.

<sup>36</sup> Article 24(1) TEU.

<sup>37</sup> Articles 31(2) second indent and 31(3) TEU as well as the extension of enhanced cooperation to the CFSP as a whole (Article 20 TEU).

enhanced ECJ role,<sup>38</sup> unanimity voting remains the norm and the Treaty's centre of gravity still lies with the Council and the European Council.<sup>39</sup>

This keeps the stakes high for the institutions to determine an appropriate legal basis for EU actions or positions. The Commission and the Parliament obviously have an interest in activities being framed as TFEU external policies, whereas the balance tips towards the Member States represented in the Council under the CFSP framework. The choice of legal basis is therefore particularly problematic when competence boundaries are fuzzy, for instance in areas such as crisis management or security sector reform, where it is likely to continue causing duplication and confusion in inter-institutional relations.<sup>40</sup>

The Lisbon Treaty thus formulates concurrent pleas for integration and delimitation, posing a paradox that is not only challenging for inter-institutional loyalty, policy-making and judicial supervision, but also leaves ample room for debate on the actual position of the CFSP in the Union's unitary legal order. First, the proclaimed unity of EU external action has only been extended to the general provisions, principles and objectives, with the specific provisions continuing to be divided between two Treaties. The CFSP's complete exclusion from the other external competences in the TFEU, that essentially "organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences" is difficult to rhyme with an integrated Treaty framework.<sup>41</sup> It has furthermore been suggested that this reorganisation deprives the CFSP of its own specific objectives.<sup>42</sup> However, Advocate General Bot has indicated that these can simply be deducted from the common list by comparing it with the pre-Lisbon enumeration of CFSP objectives in ex Article 11(1) TEU.<sup>43</sup>

The fact that the Member States, as masters of the Treaties, reverted back to the two-Treaty structure after the ill-fated Constitution, is not merely a result of path dependency but also part of a deliberate choice to stress the CFSP's distinctiveness.<sup>44</sup> This is further stressed by its specific rules and procedures and various other provisions such as the separate procedures for adopting international agreements that relate principally or exclusively to the CFSP,<sup>45</sup> its exclusion from the so-called "flexibility clause" of Article 352 TFEU and the fact that the CFSP is not listed among the areas of Union competence in Article 3-6 TFEU. This belt-and-braces approach of underlining the CFSP's particularity is clearly aimed at curbing its impact on the Member States' foreign policy competences, as is – in so many words – expressed in Declarations 13 and 14 annexed to the Treaty.

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<sup>38</sup> The ECJ's jurisdiction now comprises the legality of restrictive measures against natural or legal persons (Article 24(1) TEU), overseeing both sides of the CFSP-TFEU boundary (Article 40 TEU) and the duty of consistency that includes CFSP as well as other EU policies (Article 21(3) TEU).

<sup>39</sup> J. Wouters, et al., 'The European Union's External Relations after the Lisbon Treaty' in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Springer, Vienna, 2008) pp 162-165.

<sup>40</sup> S. Stetter, 'Cross-pillar Politics: Functional Unity and Institutional Fragmentation of EU Foreign Policies' (2004) 11(4) *Journal of European Public Policy*, pp. 720-737

<sup>41</sup> Article 1 TFEU.

<sup>42</sup> C. Herrmann, op.cit. note 24, p. 47.

<sup>43</sup> Pending Case C-130/10, *Parliament v. Council*, Opinion of Advocate General Bot, para. 69.

<sup>44</sup> M. Cremona, 'The Two (or Three) Treaty Solution: The New Structure of the EU' in A. Biondi, et al. (eds), *EU Law after Lisbon* (Oxford University Press, Oxford, 2012) pp. 49-54; Eeckhout does not agree and calls the Treaty structure "an accident of the EU's constitutional history, rather than a matter of conscious design" (P. Eeckhout, op.cit. note 6, p. 166).

<sup>45</sup> Article 218 TFEU.

The Lisbon Treaty thus hides rather than abolishes the EU pillar structure. This determined delimitation pleads against expanding the Court's interpretation of "a new legal order" in the sense of *Van Gend en Loos* and thus applying EU law principles such as primacy, direct effect and sincere cooperation to the CFSP realm.<sup>46</sup> A legal order is usually defined as a "set of norms that belong together, eg because they are applicable in a given territory as the land or to certain subjects of law".<sup>47</sup> Can the CFSP then really be said to belong fully to the Union's unitary legal order? Whereas the negative answer is irreconcilable with the single legal personality and the inseparability of the treaties, the affirmation is not entirely convincing either. It seems thus too early to entirely close the debate on the nature of the EU legal order.

Second, there is the ambiguity concerning the new Article 40 TEU stating that:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

On the one hand, compared to its predecessor, this article can be read as a confirmation of the integrated external action system that puts CFSP and TFEU competences on an equal footing. On the other hand Article 40 also stresses the delimitation between them by according protection in both directions and prescribing that the implementation of the one shall not affect the application of the procedures and extent of the powers of the other. This reference to implementation, procedures and powers is new compared to the old Article 47 that sought to protect the TEC as such. It can be read as a confirmation of the principle that each measure requires an appropriate legal basis,<sup>48</sup> that takes into account the institutional balance, meaning that each institution "must exercise its powers with due regard for the powers of the other institutions".<sup>49</sup> In a way, this article thus embodies the Lisbon Treaty's integration-delimitation paradox and "represents the most vivid illustration of the difficulty of dismantling the normative barriers erected by the pillarization without, at the same time, reducing (lifting) the institutional barriers deriving from the existence of a plurality of decision-making procedures".<sup>50</sup>

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<sup>46</sup> Case C-25/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12; M. Cremona, op.cit. note 44.

<sup>47</sup> C. Herrmann, op.cit. note 24, p. 33.

<sup>48</sup> Case C-45/86, *Commission v Council (Generalised System of Preferences)* [1987] ECR I-1517, para. 11.

<sup>49</sup> Case C-70/88, *European Parliament v Council* [1990] ECR I-2041, para 22; M. Cremona, op.cit. note 44, p.56.

<sup>50</sup> E. Cannizzaro, op.cit. note 3, p. 231.



## 4. The High Representative, the EEAS and EU delegations: bridges or breaches?

The constitutional integration of the EU's external action structure is reflected in a number of institutional innovations. First there is the integrated position of High Representative of the Union for Foreign Affairs and Security Policy. This function combines the three hats of main responsible for conducting the CFSP, Vice-President of the Commission responsible for external relations and Chair of the Foreign Affairs Council (FAC).<sup>51</sup> The High Representative interlinks the various dimensions of EU foreign policy as reflected by the consistency and coordination focus of its three portfolios.<sup>52</sup>

To deal with these vast range of duties the High Representative is assisted by a European External Action Service (EEAS) that mirrors the three hats of its principal in both composition and responsibilities. The EU diplomatic corps is composed of staff from the Commission, the General Secretariat of the Council (GSC) and the Member States.<sup>53</sup> It contributes to work of the Commission in the area of aid programming<sup>54</sup> and incorporates the CFSP/CSDP (Common Security and Defence Policy) crisis management bodies providing critical support through detailed planning, resource generation and policy execution.<sup>55</sup> Besides these "quasi-institutional prerogatives"<sup>56</sup> the EEAS fulfils the traditional role of the GSC that consists of administratively and politically supporting the chairs of certain horizontal and all geographic and CSDP-related committees and working parties of the Foreign Affairs Council (FAC).<sup>57</sup>

A final and often underestimated change is the transformation of Commission delegations into EU delegations covering the entire range of EU competences.<sup>58</sup> They significantly contribute to EU intelligence gathering through monitoring, analysis and reporting and allow the EU to engage more strategically with its partners and coordinate Member States' representations on the ground.<sup>59</sup>

Yet, while these institutional novelties bridge the different compartments of EU external action, the compartmentalisation itself has survived the Lisbon Treaty changes. This could collide with the integration assignments of the new structures and put their loyalty and effectiveness significantly to the test. First, the promising conviction voiced by the participants of the European Convention that "a single representation would improve the Union's capacity to act effectively and convincingly on the global stage" stands out oddly against the plethora of actors that have been assigned a representational mandate.<sup>60</sup> Delimitation remains the norm with the High Representative's role

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<sup>51</sup> Article 18 TEU.

<sup>52</sup> See Article 16(6), 18(4) and 22(3) TEU.

<sup>53</sup> Article 27(3) TEU.

<sup>54</sup> Article 9 Council Decision(2010/427/EU) *Establishing the Organisation and Functioning of the European External Action Service* [2010] O.J. L201/30, 3.8.2010 (further: "EEAS Decision").

<sup>55</sup> Article 4(3)(a) EEAS Decision.

<sup>56</sup> B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service' (2011) 48(2) *Common Market Law Review*, p. 491.

<sup>57</sup> Council Decision (2009/908/EU) of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, O.J. L322/28, 9.12.2009, Annex II.

<sup>58</sup> Article 221 TFEU.

<sup>59</sup> Article 32 and 35 TEU.

<sup>60</sup> European Convention (CONV 459/02 WG VII 17) Final Report of Working Group VII on External Action, 16.12.2002, para 65.

limited to representing CFSP affairs on ministerial level.<sup>61</sup> On the level of Heads of State or Government the Union's CFSP representation is taken care of by the President of the European Council,<sup>62</sup> while the Commission is responsible for all non-CFSP issues.<sup>63</sup> Not seldom international matters transcend competence boundaries and ad hoc arrangements will have to be made.<sup>64</sup>

Further, because of her/his extensive – and according to some “impossible” – task description, the High Representative will have to cope with diverging allegiances.<sup>65</sup> This results from Article 18(4) TEU providing that the High Representative shall be bound by Commission procedures when exercising Commission responsibilities, only then and to the extent that this is consistent with his/her CFSP and FAC responsibilities.<sup>66</sup> This implicates that depending on the hat the High Representative is wearing she/he is answerable to different principals and has to abide by their respective rules.

The EEAS struggles with a similar split of accountability subject to the hat of the High Representative it is supporting. This implicates that the old complexities of determining the often fuzzy competence boundaries have become inherent to the everyday functioning of the EEAS.<sup>67</sup> The delimitation has also seeped through in the service's composition with the distinctiveness of the personnel working in the CFSP/CSDP crisis management entities legally rooted in Article 4(3)(a) of the EEAS Decision stating that the “specificities of these structures, as well as the particularities of their functions, recruitment and the status of the staff shall be respected”. It has moreover been translated in physical terms because the crisis management staff will remain in their old premises instead of moving to the new EEAS building.<sup>68</sup> If the associated difficulties are not overcome the EEAS' asset of diversity might become a liability.

The Union delegations, that constitute an integral part of the EEAS, struggle with additional challenges because they cover the whole spectrum of EU policies and thus have a broader remit than their parent institution. For this reason, the EU missions include besides EEAS staff also “direct” Commission personnel. All staff, “whatever their status, and for all its activities” fall under the authority of the Head of Delegation, who is in his/her turn accountable to the High Representative for the overall management of the delegation and the coordination of all Union actions on the ground.<sup>69</sup>

The Head of Delegation does not only receive instructions from and reports to the High Representative and the EEAS, but also the Commission. The latter may moreover, in its area of competences, issue direct instructions to or request reporting from certain sections of the delegation, putting the EEAS in copy and executed under the overall responsibility of the Head of

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<sup>61</sup> Article 27(2) TEU.

<sup>62</sup> Article 15(6) TEU.

<sup>63</sup> Article 17(1) TEU.

<sup>64</sup> C. Kaddous, 'Role and position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty' in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Springer, Vienna, 2008) pp. 210-213.

<sup>65</sup> H. Mahony, 'EU foreign minister has 'impossible' task ahead', *EUObserver.com*, 16 November 2009.

<sup>66</sup> J. Wouters, D. Coppens and M. De Meester, op.cit. note 39, pp. 154-155.

<sup>67</sup> H. Merket, 'The European External Action Service and the Security-Development Nexus' (2012) 17(3) *European Foreign Affairs Review*, forthcoming.

<sup>68</sup> A. Rettman, 'EU foreign service moves into new home', *EUObserver.com*, 17 February 2012.

<sup>69</sup> *Ibid.*

Delegation.<sup>70</sup> While this diversity of staff, competences and interactions could feed into a comprehensive EU approach towards its partners, it is conditional upon clear lines of authority and channels of information. This is particularly true for the Commission that has to deal with two ostensibly similar but actually very different categories of staff (those transferred to the EEAS and those directly sent to delegations). A number of agreements have been concluded in this regard, but a lot will still depend on ad hoc solutions and interpersonal relations.<sup>71</sup>

The intricacy of the Union's new diplomatic system is well illustrated by the incident with the management of development funding in the first months after the launch of the EEAS.<sup>72</sup> The problem originated from the fact that the Commission keeps its responsibility over the management and implementation of EU financial instruments,<sup>73</sup> but lost its authority over the delegations to the EEAS. Since the Heads of Delegation have become EEAS officials they are not as such competent to appropriate funding, which remains a Commission responsibility. Whereas the general financial regulation was adapted to accommodate those changes in a timely manner,<sup>74</sup> the adaptation of the European Development Fund (EDF),<sup>75</sup> the EU's largest external action instrument, was overlooked. This was only rectified five months later and in the mean time EDF spending, oddly, had to be signed off by the most senior Commission official in the delegation. The eventual solution for all financial instruments is that the Commission sub-delegates the power of authorising officer for operational appropriations to the Heads of Delegation. The latter must in that case apply Commission rules and "refer to the Commission as their institution".<sup>76</sup> Once again the midway between integration and delimitation thus results in a certain amount of schizophrenia with the associated challenges of loyalty and accountability.

## 5. The Court as ultimate guard of the CFSP-TFEU border area

The ultimate arbitrator of the rightful exercise of CFSP and TFEU external competences is the EU Court of Justice. The ECOWAS-case demonstrates that pre-Lisbon the Court's preoccupation with protecting the Community *acquis* largely superseded the importance of ensuring effective and consistent external action. In the absence of any rule of hierarchy it seems difficult to maintain this line of reasoning in the post-Lisbon constellation. Moreover, the Lisbon Treaty turns the duty of consistency from a non-judiciable obligation into a central constitutional principle. The ECJ is no longer excluded from adjudicating the responsibility of the Council, the Commission and the High

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<sup>70</sup> Commission (SEC(2012)48) Working Arrangements between Commission Services and the European External Action Service (EEAS) in Relation to External Relations Issues, 13.01.2012, p. 3.

<sup>71</sup> Ibid.; Service Level Agreement between Commission services with staff in EU Delegations and the European External Action Service of 20 December 2010; Administrative Arrangement between the services of the Commission and the EEAS of 13 December 2010.

<sup>72</sup> T. Vogel, 'Heads of delegation to get authority for EDF money', *European Voice*, 10 March 2011.

<sup>73</sup> Article 9 EEAS Decision.

<sup>74</sup> Article 1(10) Regulation (1081/2010/EU EURATOM) of 24 November 2010 amending Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as regards the European External Action Service, O.J. L311/9, 26.11.2010.

<sup>75</sup> The EDF is not part of the general budget and finances development cooperation with the African, Caribbean and Pacific (ACP) countries through separate Member States' contributions.

<sup>76</sup> Article 1(2) Council Regulation (370/2011/EU) of 11 April 2011 amending Regulation (EC) No 215/2008 on the Financial Regulation applicable to the 10th European Development Fund, as regards the European External Action Service, O.J. L102/1, 16.4.2011.

Representative to ensure that it is upheld “between the different areas of its external action and between these and its other policies”.<sup>77</sup> It is not clear if and how the Court will give effect to this extended jurisdiction,<sup>78</sup> but in any case it constitutes a further argument to rebalance the current delimitation-focussed case law.

How the Court will strike a new balance between integration and delimitation of competences in the CFSP-TFEU border area will mainly depend on the degree of “separateness” it still accords to the former. The creation of a single EU legal order offers strong arguments to expand the old Community legal basis case law, to which it attaches “constitutional significance” and that is free of any hierarchical delimitation.<sup>79</sup> According to the Court’s standard formulation the choice must be based on “objective factors which are amenable to judicial review”.<sup>80</sup> These can be found through an analysis of the measure’s main or predominant aim and content. Only exceptionally does this result in multiple legal bases if a measure simultaneously pursues a number of non-incident objectives or has several components that are indissolubly linked.<sup>81</sup> Moreover, the landmark Titanium Dioxide doctrine holds that it is not possible to combine a procedure that prescribes involvement of the Parliament with one that does not, nor reconcile unanimity in the Council with qualified majority voting (QMV).

The Lisbon Treaty’s plea to integrate and interlink various external action objectives might reduce the need for multiple legal bases as it could be read as raising “the threshold of when an objective is considered central to an instrument rather than ancillary”.<sup>82</sup> In the Court’s cross-pillar terminology this means that a reference to a TFEU external competence in a CFSP measure, or *vice versa*, would be seen as contributing to consistency rather than encroaching on its powers. Even though the Court has no jurisdiction over the CFSP, the Janus-face of Article 40 TEU arguably allows it to make this assessment for both CFSP and TFEU external measures. This could provide an affirmative answer to Dashwood’s question whether there may be situations “in which it would be permissible to adopt a broadly similar measure under one competence or the other – or, indeed, complementary actions under both of them together – the choice to be determined by policy priorities and by what is the more convenient and practical in a given political conjuncture?”<sup>83</sup>

The question remains how the Court will proceed when it comes to the conclusion that a measure simultaneously pursues a number of objectives without one being incidental to the other. In this regard, it has been suggested that the former Community priority should be maintained by applying

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<sup>77</sup> Article 21(3) TEU.

<sup>78</sup> Some inspiration can be drawn from the close links between the duties of consistency and sincere cooperation. For a more elaborate analysis: P. Van Elsuwege and H. Merket, ‘The Role of the Court of Justice in Ensuring the Unity of the EU’s External Representation’ in S. Blockmans and R.A. Wessel (eds), ‘Principles and Practices of EU External Representation: Selected Legal Aspects’, *CLEER Working Papers 2012/4* (Centre for the Law of EU External Relations, The Hague, 2012), forthcoming.

<sup>79</sup> Opinion 2/00, *Cartagena Protocol* [2001] ECR I-9717, para 5.

<sup>80</sup> Case C-45/86, *Commission v. Council* [1987] ECR I-1517, para. 11; Case C-84/94, *United Kingdom v. Council* [1996] ECR I-5755, para 25 and 51.

<sup>81</sup> Case C-94/03, *Commission v. Council* [2006] ECR I-22, para 36.

<sup>82</sup> B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Routledge, Abingdon, 2012) p. 173.

<sup>83</sup> A. Dashwood, ‘The Law and Practice of CFSP Joint Actions’ in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals: Essays in European Law* (Hart Publishing, Portland, 2008) p. 66.

a *lex generalis/lex specialis* reasoning.<sup>84</sup> The general CFSP competence, that covers “all areas of foreign policy and all questions relating to the Union’s security”,<sup>85</sup> should then only be applied if there is not a more specific competence (e.g. trade, development cooperation, humanitarian aid) available. However, such an approach tends to reinstates a hierarchical relationship between CFSP and non-CFSP external action and thus seems to go against the new Treaties’ *telos* of integrated and consistent external action. The other option of splitting the act in two also remains a non-starter for a measure with a single content and dual purpose.<sup>86</sup>

A possible way to avoid the deadlock might be to break the taboo on the possibility of a dual “cross-pillar” legal basis. Contrary to Advocate General Mengozzi, who attributes a long footnote to the procedural incompatibility of a combined development cooperation-CFSP legal basis, the Court does not elaborate on this issue in ECOWAS and simply states that multiple legal bases are contrary to Article 47 TEU.<sup>87</sup> Although the Court’s brevity confines interpretation to speculation, this seems to suggest that “cross-pillar” legal bases are prohibited in principle due to the “integrated but separate legal orders” for which Article 47 TEU acted as a guarantor.<sup>88</sup>

Depending on the Court’s view of the EU post-Lisbon legal order this first principled obstacle to a dual CFSP-TFEU legal basis might or might not fall.<sup>89</sup> If Article 40 TEU is read as a confirmation of the CFSP’s continuing distinctness, than the Court’s pre-Lisbon reasoning could still apply. If, on the other hand, the ECJ interprets Article 40 TEU as the embodiment of the unitary legal order that emerged after the amalgamation of the Community with the Union, than the logical conclusion should be that CFSP-TFEU legal bases are allowed under the rules established in the general legal basis case law.

Yet, also the walls of the obstacle of procedural incompatibility begin to show cracks.<sup>90</sup> Recent case law has become considerably more flexible with regard to combining different legal bases<sup>91</sup> and *International Fund for Ireland* even seems even to completely overhaul the Titanium Dioxide reasoning. It rules that co-decision in the Parliament and the Council, with the latter deciding by QMV, and unanimity in the Council after consulting the Parliament, can – at least in certain circumstances – be combined by applying the most demanding elements of both procedures, namely

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<sup>84</sup> M. Cremona, *op.cit.* note 12, pp. 45-46.

<sup>85</sup> Article 24(1) TEU.

<sup>86</sup> P. Eeckhout, *op.cit.* note 6, pp. 186-186.

<sup>87</sup> Case C-91/05, *op.cit.* note 17, paras 75-76; and Opinion of AG Mengozzi, *supra* note 21, para. 176 and footnote 76.

<sup>88</sup> R. van Ooik, 'Cross-Pillar Litigation before the ECJ: Demarcation of Community and Union Competences' (2008) 4(3) *European Constitutional Law Review*, pp. 414-416.

<sup>89</sup> Van Ooik, for instance, believes that the deliberate separation of the CFSP still prohibits a dual legal basis: *Ibid.* pp. 417-418.

<sup>90</sup> For an excellent analysis of this evolution, see: T. Corthaut, 'Case C-166/07, European Parliament v. Council of the European Union - Institutional Pragmatism or Constitutional Mayhem' (2011) 48(4) *Common Market Law Review*, pp. 1286-1288.

<sup>91</sup> Case C-178/03, *Commission v. Parliament and Council* [2006] ECR I-129, paras 56-60; Case C-242/87, *Commission v. Council (Erasmus Decision)* [1989] ECR I-1425, paras 6 and 37; Joined Cases C-402 and 415/05, *Kadi and Al Barakaat v. Council and Commission* [2008] ECR I-6351, paras 235-236; Opinion 1/08 [2009] ECR I-11129, paras 157 and final conclusion and case note by S. Adam and N. Lavranos, 'Opinion 1/08 of the Court (Grand Chamber), Schedules of specific commitments – Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union, 30 November 2009.' (2010) 47(5) *Common Market Law Review*, pp. 1534-1536.

co-decision and unanimity in the Council.<sup>92</sup> Yet noteworthy, Advocate General Bot in the pending case C-130/10 on restrictive measures against certain individuals did not refer to this ruling and upheld the view that procedural differences stand in the way of combining legal bases.<sup>93</sup>

## 6. The unexploited potential of Article 22 TEU

The external action paradox of the Lisbon Treaty confronts policy-makers with considerable difficulties in reconciling the integrated external action framework with the strict rules of choosing an appropriate legal basis. Interestingly, new Article 22 TEU, that enables the European Council to take decisions that “identify the strategic interests and objectives of the Union”, offers the possibility of satisfying both the demands of integration and delimitation. This article builds on the former common strategies<sup>94</sup> that, at the time of their introduction by the Amsterdam Treaty, were seen as a promising instrument designed to facilitate cross-pillar activity “while leaving the respective decision-making procedures within the three pillars intact”.<sup>95</sup> Decisions taken on the basis of such a strategy could moreover be implemented by QMV in the Council.

These instruments soon fell into disuse for a variety of reasons enumerated by High Representative Solana in his common strategies report of 2000.<sup>96</sup> Among other things the three common strategies that could be adopted were the result of such thorough negotiations among Member States that they lacked clear priorities, flexibility and sharpness.<sup>97</sup> It has also been suggested that this instrument was launched under the guise of enhancing effectiveness and consistency, but in fact only aimed to strike a consensus between those Member States that wanted to introduce QMV in the CFSP and others sticking to unanimity.<sup>98</sup>

Article 22 TEU has a number of advantages over its predecessor that could grant it a more promising future. First, it is better defined and specifically refers to identifying strategic interests of a geographic or thematic nature. Second, whereas the common strategies were strictly limited to the CFSP, the new European Council decisions on strategic interests and objectives are part of the general provisions on the Union’s external action and may relate to CFSP as well as other areas of external action. Finally, these decisions are more inclusive and explicitly involve the High representative for the CFSP and the Commission, that may submit proposals for their respective areas of competence.

On the basis of Article 22 TEU the European Council can thus set out an overall strategic framework for a certain broader area of EU external action. This could then function as a binding reference document that is further implemented by various measures that are in line with the division of competences. Such an approach moreover finds support in the formulation of Article 40 TEU that no

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<sup>92</sup> Case C-166/07, *Parliament v. Council (International Fund for Ireland)* [2009] ECR I-7135, para 69; see further: T. Corthout, *op.cit.* note 90, pp. 1271-1298.

<sup>93</sup> Pending Case C-130/10, *op.cit.* note 43, para. 69.

<sup>94</sup> Former Article 13 TEU.

<sup>95</sup> M. Maresceau, 'EU Enlargement and EU Common Strategies on Russia and Ukraine: An Ambiguous yet Unavoidable Connection' in C. Hillion (ed), *EU Enlargement: A Legal Approach* (Hart, Oxford, 2004) p. 182.

<sup>96</sup> High Representative Solana, 'Common Strategies Report', Brussels, 21 December 2000.

<sup>97</sup> Common strategies were adopted for Ukraine (1999, O.J. L133/1), Russia (1999, O.J. L157/1) and the Mediterranean (O.J. L183/5).

<sup>98</sup> S. Peers, 'Common Foreign and Security Policy' (1997) 17 *Yearbook of European Law*, 546.

longer requires delimitation between legal orders but only as regards the implementation of policies. Yet, the challenge remains to ensure that they are more than a shopping list of objectives and put in place real priorities.

## 7. Conclusion

Ever since its creation by the Maastricht Treaty the CFSP constitutes a distinct category of EU cooperation, characterised by its “integrated but separate” status. This structure has served the purpose of enhancing European integration while preserving national sovereignty with regard to foreign policy. Yet, it has also given rise to a particularly complex and fragmented external action system, where delimitation of competences triumphs over policy effectiveness.

In a reaction to this intricacy, the Lisbon Treaty has taken a giant leap towards integration. The Community was absorbed by the Union and an integrated external action framework has been created. At the same time, however, the delimitation between CFSP and TFEU external policies remains in place and the choice of legal basis continues to weigh heavily on the institutional balance. This simultaneous stress on policy integration and competence delimitation confronts the Union with a genuine paradox that may complicate the functioning of the entire external action system.

The newly created institutional bridges in the form of the High Representative, the EEAS and the EU delegations offer significant potential to unite the various external action strands. However, if they do not succeed in carefully balancing their various responsibilities and accountabilities, they might end up internalising the discord between delimitation and integration with the risk of further fragmentation, efficiency loss and inter-institutional tensions.

The EU Court of Justice, that ultimately oversees the interaction between various external competences, will also have to demonstrate a certain amount creativity to bring its case law in line with the new external action constellation. In particular, its hierarchical delimitation approach in “cross-pillar” litigation seems no longer tenable and will have to take into account the leap towards integration.

Finally, policy-makers are challenged with the task of reconciling the call for interlinking and integrating various external objectives with the limitations of choosing an appropriate legal basis. Arguably, the European Council decisions on the strategic interests and objectives of the Union, as set out in Article 22 TEU, enable the adoption of integrative policy frameworks that can subsequently be implemented through various measures respecting the Union’s division of competences.