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The European Union and the Security-Development Nexus: Bridging the Legal Divide

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List of Abbreviations

AAP	Annual Action Programme
ACP	African, Caribbean and Pacific
AD	Administrator
AFSJ	Area of Freedom Security and Justice
AG	Advocate-General
AIDCO	(former) EuropeAid Cooperation Office
ALA	Asia and Latin-America
AMISOM	AU Mission in Somalia
APF	African Peace Facility
APSA	African Peace and Security Architecture
ASEAN	Association of Southeast Asian Nations
AU	African Union
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
CIMIC	Civil-Military Cooperation
CIVCOM	Committee for Civilian Aspects of Crisis Management
CJEU	Court of Justice of the EU
CMC	Crisis Management Concept
CMCO	Civil-Military Coordination
CMCP	Crisis Management and Conflict Prevention
CMP	Crisis Management Procedures
CMPD	Crisis Management and Planning Directorate
CMR	Critical Maritime Routes
COREPER	Committee of Permanent Representatives of EU Member States
CPCC	Civilian Planning and Conduct Capability
CRCT	Crisis Response Coordination Team
CROC	EEAS Crisis Response and Operational Coordination department
CRS	EEAS Crisis Response System
CSDP	Common Security and Defence Policy
CSP	Country Strategy Paper
DAC	Development Assistance Committee (OECD)
DCI	Development Cooperation Instrument
DevCom	Council Development Committee
DG	Directorate-General
DG DEV	(former) Commission DG Development
DG DEVCO	Commission DG EuropeAid Development and Cooperation
DG ELARG	Commission DG Enlargement
DG RELEX	(former) Commission DG External Relations
EAM	Exceptional Assistance Measure
EC	European Community
ECA	European Court of Auditors
ECD	European Consensus on Development
ECHO	Commission department for Humanitarian aid and Civil Protection
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community

ECtHR	European Court of Human Rights
EDA	European Defence Agency
EDC	European Defence Community
EDF	European Development Fund
EEAS	European External Action Service
EEC	European Economic Community
EIB	European Investment Bank
EIDHR	European Instrument for Democracy and Human Rights
EIP	European Institute of Peace
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Programme
ENPI	European Neighbourhood and Partnership Instrument
EOM	Election Observation Mission
EP	European Parliament
EPA	Economic Partnership Agreement
EPC	European Political Cooperation
ERM	Early Response Mechanism
ERTA	European Road Transport Agreement
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EU	European Union
EU NAVCO	EU Naval Coordination Cell
EUBAM	EU Border Assistance Mission
EUCAP	EU Capacity-Building Mission
EUFOR	EU Force
EUISS	EU Institute for Security Studies
EUMC	EU Military Committee
EUMM	EU Monitoring Mission
EUMS	EU Military Staff
EUPOL	EU Police Mission
EURATOM	European Atomic Energy Community
EUSR	EU Special Representative
EUTM	EU Training Mission
EWS	Early Warning System
FAC	Foreign Affairs Council
FFM	Fact-Finding Mission
FPI	Service for Foreign Policy Instruments
GAERC	General Affairs and External Relations Council
GNP	Gross National Product
GSC	General Secretariat of the Council
GSP	Generalised System of Preferences
HDI	Human Development Index
HOAI	Horn of Africa Initiative
HoD	Head of Delegation
HoM	Head of Mission
HQ	Headquarter
HR	High Representative of the Union for Foreign Affairs and Security Policy
IcSP	Instrument contributing to Stability and Peace
IFI	International Fund for Ireland
IfS	Instrument for Stability
IGAD	Inter-Governmental Authority for Development
IGC	Inter-Governmental Conference

IMF	International Monetary Fund
IPA	Instrument for Pre-accession Assistance
IRP	Interim Response Programme
JFD	Joint Framework Document
JHA	Justice and Home Affairs
LDC	Least Developed Country
MD	Managing Director
MDG	Millennium Development Goal
MEP	Member of European Parliament
MFF	Multiannual Financial Framework
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NIP	National Indicative Program
NSCI	Nuclear Safety Cooperation Instrument
OCTs	Overseas Countries and Territories
ODA	Official Development Aid
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the EU
OPCEN	Operations Centre
PAP	Pan-African Programme
PCA	Partnership and Cooperation Agreement
PCD	Policy Coherence for Development
PeSCo	Permanent Structured Cooperation
PFCA	Political Framework for Crisis Approach
PI	Partnership Instrument
PJCC	Police and Judicial Cooperation in Criminal Matters
PMG	Politico-Military Group
PNR	Passenger Name Records
PPEWU	Policy Planning and Early Warning Unit
PRSP	Poverty Reduction Strategy Paper
PSC	Political and Security Committee
PSO	Peace Support Operation
QMV	Qualified Majority Voting
REC	Regional Economic Community
RELEX	External Relations
RIP	Regional Indicative Program
RRM	Rapid Reaction Mechanism
RSO	Regional Security Officer
RSP	Regional Strategy Paper
SALW	Small Arms and Light Weapons
SAP	Structural Adjustment Programme
SBC	State-Building Contract
SEA	Single European Act
SG	Secretary-General
SHARE	Supporting Horn of Africa Resilience
SitCen	Situation Centre
SITROOM	EU Situation Room
SLA	Service Level Arrangement
SNA	Somali National Army
SNE	Seconded National Expert
SSR	Security Sector Reform

SWD	Staff Working Document
TAM	Technical Assessment Mission
TEC	Treaty establishing a European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFG	Somali Transitional Federal Government
UK	United Kingdom
UN	United Nations
UNCED	UN Conference on Environment and Development
UNDP	UN Development Programme
UNSCR	UN Security Council Resolution
UNTS	UN Treaty Series
US(A)	United States (of America)
VCDR	Vienna Convention on Diplomatic Relations
WB	World Bank
WEU	Western European Union
WFP	World Food Programme
WMD	Weapon of Mass Destruction
WTO	World Trade Organisation

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1. Introduction – The EU and the security-development nexus: setting the scene

> *Écartez les causes secondaires qui ont produit les grandes agitations des hommes, vous en arriverez presque toujours à l'inégalité. Ce sont les pauvres qui ont voulu ravir les biens des riches, ou les riches qui ont essayé d'enchaîner les pauvres. Si donc vous pouvez fonder un état de société où chacun ait quelque chose à garder et peu à prendre, vous aurez beaucoup fait pour la paix du monde.*
>
> Alexis de Tocqueville, *De la Démocratie en Amérique*, 1850

In the late 1990s the EU started embracing the idea that security and development policies should be intertwined and mutually reinforcing. This formula had since a couple of years been making strides in the international circles of the United Nations (UN), the World Bank (WB) and the Organisation for Economic Cooperation and Development (OECD). Numerous EU policy declarations gradually gave traction to this concept and acknowledged the indivisibility of external policies that tackle insecurity, instability, poverty and development. An often recurring phrase is that "there cannot be sustainable development without peace and security, and without development and poverty eradication there will be no sustainable peace".[1] This progressively evolved into a commitment, expressed by the Council in November 2007, that the "nexus between development and security should inform EU strategies and policies in order to contribute to the coherence of EU external action".[2]

With its wide-ranging competences, covering the continuum between security and development policies, the Union portrays itself as ideally positioned to tackle the various interrelated causes of poverty and instability in third countries. Whereas the rationale of this rather intuitive commitment appears straightforward, its operationalisation is much less so. Efforts to fine-tune security and development initiatives constantly confront the EU with the limits of its constitutional system. This has long contained development cooperation and the Common Foreign and Security Policy (CFSP) – which includes the Common Security and Defence Policy (CSDP) – in two separate pillars, governed by essentially different rules, procedures and actors. The Treaty-rooted special treatment of the CFSP in

[1] For instance: Council (S407/08) Report on the Implementation of the European Security Strategy - Providing Security in a Changing World, 11.12.2008, 8.
[2] Council Conclusions on Security and Development, 2831st External Relations Council meeting, Brussels, 19-20.11.2007, para. 2.

essence served to shield it from the general dynamic of European integration. It was thereby designed to keep a distance along exactly those lines that the commitment to a security-development nexus aims to cohere. The Treaty of Lisbon[3] brings this constitutional architecture significantly more in line with such an integrative policy commitment. It makes an end to the hampering pillar structure and scales up the duty of consistency across its entire external action system. Yet, while the EU's legal order is now undeniably unified, the CFSP remains legally delimitated and subject to special rules and procedures.

The EU's efforts to enhance the security-development nexus form a key test case for understanding the impact of this altered constitutional reality. This research will hold this policy commitment up to the mirror of the Union's evolving Treaty foundations, in order to unravel the full scope, effectiveness and challenges of this endeavour. The relation between EU security and development policies, actors and competences will be analysed along three different tracks, namely policy-making, institutional design and relations, and the judicial track of competence delimitation. This aims at establishing a comprehensive understanding, on each of these three dimensions, of the differences between security and development systems, the consequences for EU policy outcomes, the efforts that are taken to transcend these differences, and their effectiveness in maximising positive connections and avoiding counterproductive actions.

This introductory chapter will first shed light on the origins of the concept of a security-development nexus in the global context (1.1.1.), unravel its meaning and draw up a concise state of affairs of the existing research on the topic (1.1.2.). This will be followed by a discussion of how this concept has been picked up by EU institutions (1.1.3.). The second part will enunciate on the research objectives that this PhD dissertation undertakes and the questions it aims to answer (1.2.). A final section will then shortly explain the chosen methodology as well as the research scope and design (1.3.).

1.1. The conceptual framework of the security-development nexus

1.1.1. Tracing the roots of the security-development link

Many observers associate the rising awareness of the interdependence between security and development with the 1990s and the end of the Cold War. Yet, in fact the understanding of this link goes back further and can even be argued to be inherent to the concepts of development and security. On a very general level, if development is defined as "the movement upward of the entire social

[3] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, OJ C306/1, 13.12.2007.

system",[4] and security as "a reasonable level of predictability at different levels of the social system",[5] then it is evident that both are interconnected. The meaning of these concepts is obviously contested, constantly changing and dependent on the context to which they are applied.

Interestingly, Hettne situates this context a couple of centuries earlier than most scholars, namely in the emerging Westphalian order.[6] He finds a first link between security and development in the 18th century thinking on the liberal peace ideology, equating commercial societies to peaceful societies. During the subsequent Napoleonic wars of the early 19th century, progress, in the form of the so-called Enlightenment, was "forced upon Europe through empire".[7] The end of these wars meant the start of the European Concert, which lasted from 1815-1914, when the more stable rivalry between the great powers prompted industrial development for military needs. Unsurprisingly, such aggressive economic expansion was fragile, and eventually led to the disaster of the two World Wars.

The connections between development and security grew considerably more explicit in the post-war period, through diverse efforts to reconstruct severely damaged countries, revive the international economy and ensure that such a devastating global war would never happen again. These efforts in turn lay at the basis of the creation of several international organisations that still dominate the debate on the security-development interface today, such as the WB, the International Monetary Fund (IMF), the UN, the OECD and the EU. Of particular relevance in this regard are the United States Truman doctrine and the associated Marshall Plan consisting of emergency assistance for helping to rebuild Europe's war-torn economies in order to prevent "misery and want" from attracting the spread of communism.[8] In his address outlining this plan at Harvard University, US Secretary of State George Marshall made one of the earliest plain policy references to what one calls today the security-development nexus. He professed that “[t]he United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace”.[9] This also implies that the awareness about the security-development link lay at the basis of modern development aid, which is built on the legacy of Marshall's plan.

The subsequent phases in the evolution of the security-development link are marked by three main events: the start of the Cold War, the end of the Cold War and the 9/11 terrorist attacks. Rather than watersheds, these incidents provide loose demarcations signalling the completion of ongoing evolutions. In the Cold War period geostrategic motivations soon overshadowed the initial post-war

[4] G. Myrdal, 'What is Development?' (1974) *Journal of Economic Issues* 8(4), 729.
[5] B. Hettne, 'Development and Security: Origins and Future' (2010) *Security Dialogue* 41(1), 33.
[6] Ibid. 35-41.
[7] Ibid. 37.
[8] US President Harry Truman, Address to Congress on Turkey and Greece, 12.03.1947.
[9] G. Marshall, Speech at Harvard University, 05.06.1947.

concerns of poverty eradication and post-conflict reconstruction. In the bipolar world, where the US and the Soviet Union dominated respectively the capitalist Western and communist Eastern Bloc, development aid became a tool to keep and obtain friends around the globe and prevent countries from falling prey to the opposing ideology. Hettne accurately dubbed this "the geopolitics of poverty".[10] The importance hereof only increased with the decolonisation of the 'Third World' in the 1950s, 60s and 70s, when the leaders of these newly independent states took their destiny in own hands and were able to choose their preferred partners. Cold War security policy, on the other hand, consisted mainly of building up and maintaining mutual military threats, which could be termed the 'geopolitics of insecurity'.

Yet, the links between security paradigms and aid played mainly on a global level. It affected the distribution of aid resources across countries, but the in-country dynamics of both policy fields remained largely unaffected.[11] Development actors were often working "*in* conflict and *around* conflict but they carefully avoided working *on* conflict".[12] Moreover, Cold War motivations were not the only driving force of global development flows. Other factors included a kind of altruism stemming from feelings of post-colonial responsibility,[13] the need for raw materials, the desire to hold on to overseas markets, etc. The increasing use of policy conditionality attached to aid envelopes made an end the in-country separation of development and security. This was most pronounced in the IMF and WB-managed Structural Adjustment Programmes (SAPs), which put heavy demands on aid recipient and served to spread the free-market model.[14]

When the Cold War ended in the late 1980s, the separation between both policy areas only became more blurred, the connections more explicit and complex, and the interpretations more diverse. At first, the downfall of the geopolitics of poverty and insecurity tended to create a renewed enthusiasm in both policy communities for a return to their core objectives of developing and securing. Yet, the end of superpower support also cut the ground beneath a great number of politically and economically ill-governed regimes. Many of them fell into decay, causing widespread instability, public unrest, rebellion and armed combat. Rather than on-off episodes of inter and intra-state conflict, this new

[10] Hettne (2010) op.cit. note 5, 33.
[11] P. Uvin, 'Development and Security: Genealogy and Typology of an Evolving International Policy Area' in H.G. Brauch, et al. (eds), *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (Springer-Verlag, Berlin, 2008) 151.
[12] N. Tschirgi, 'Security and Development Policies: Untangling the Relationship' in S. Klingebiel (ed), *New Interfaces Between Security and Development: Changing Concepts and Approaches* (Deutsches Institut für Entwicklungspolitik, Bonn, 2006) 47.
[13] Ravenhill refers to "a certain psychological satisfaction from providing development assistance" to the world's poorest (J. Ravenhill, *Collective Clientelism: the Lomé Conventions and North-South Relations* (Columbia University Press, New York, 1985) 35).
[14] B.J. Riddell, 'Things Fall Apart Again: Structural Adjustment Programmes in Sub-Saharan Africa' (1992) *The Journal of Modern African Studies* 30(1), 53-68.

situation gave rise to a state of "durable disorder",[15] challenging the common practices of both development and military actors.

On the one hand, the failures of international security interventions in the first half of the 1990s, such as those in Somalia[16] and Bosnia,[17] painfully laid the limitations of a conventional military approach bare. This led to a growing realisation of the need to engage in civilian activities and with development actors. In the often revived words of former German Chancellor and Nobel Peace Prize laureate Willy Brandt: "development policy is the peace policy of the 21st century",[18] or more bluntly stated by the former US chairman of the Joint Chiefs of Staff: "[w]e can't kill our way to victory".[19] Development practitioners, on the other hand, saw their costly efforts in no time undone by widespread political instability, weak governance and conflict.[20] The tragedy of the 1994 genocide in Rwanda, a model student on every development scale, shook up the world and debunked the believe that aid could remain blind for conflict dynamics.[21] This myth of nonpartisan aid was wiped most influentially off the map in Anderson's book 'Do No Harm', wherein she argued that:

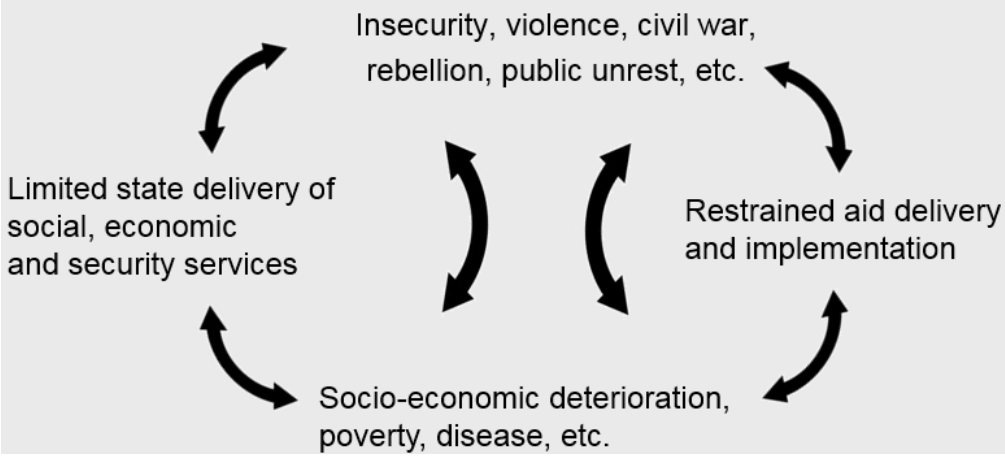
> *[a]lthough aid agencies often seek to be neutral or nonpartisan toward the winners and losers of a war, the impact of their aid is not neutral regarding whether conflict worsens or abates. When given in conflict settings, aid can reinforce, exacerbate, and prolong the conflict; it can also help to reduce tensions and strengthen people's capacities to disengage from fighting and find peaceful options for solving problems.*[22]

This new environment of durable disorder unmistakably exposed the destructive vicious circle of poverty fuelling state erosion, instability, rebellion and (civil) war. This complicated and restrained the delivery and implementation of aid as well as the state's provision of social, economic and security services, which consequently formed a breeding ground for further socio-economic deterioration and instability (cf. Figure 1). It moreover blurred the hitherto strictly circumscribed roles of military personnel, aid workers and diplomats. These unprecedented challenges required an entirely new policy approach that turned the covert Cold War connections between security and development

[15] P.G. Cerny, 'Neomedievalism, Civil War and the New Security Dilemma: Globalization as Durable Disorder' (1998) *Civil Wars* 1(1), 36-64.
[16] The UN intervention in Somalia (UNOSOM II) ended with a traumatic apotheosis in the 1993 Battle of Mogadishu where 20 UN-troops were killed (after which their bodies were dragged by local crowds through Mogadishu's streets), leading to the withdrawal of the entire UN mission.
[17] The biggest stain on the record of the UN Protection Force (UNPROFOR) in Croatia and in Bosnia and Herzegovina was the failure to prevent the 1995 Srebrenica massacre of more than 8,000 Bosnian Muslims.
[18] As quoted in D. Buchner, *Die Entwicklungshilfepolitik der BRD nach dem Regierungswechsel 1998* (GRIN Verlag, München, 2001) 26.
[19] CNN, 'Admiral: Troops alone will not yield victory in Afghanistan', *CNNPolitics.com*, 10.09.2008.
[20] F.M. Alamir, 'The Complex Security-Development Nexus: Practical Challenges for Development Cooperation and the Military' (2012) *Security and Peace* 30(2), 70.
[21] See further: P. Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (Kumarian Press, Hartford, 1998) 275p.
[22] M.B. Anderson, *Do No Harm: How Aid Can Support Peace - Or War* (Lynne Rienner Pub, Boulder, 1999) 1.

policies into a more inclusive, organic and outspoken agenda. This set in motion an exercise of conceptual thinking in which the UN, the WB and the OECD took the lead. The overarching paradigm shift was the reorientation of both development and security policies from the state to the human level.[23] A people-centred view was set to soften security and military approaches, with more attention for facilitating humanitarian aid, post-conflict reconstruction and winning the hearts and minds of local populations. It also caused a refocus of development cooperation on poverty reduction, culminating in the replacement of the IMF and WB SAPs by the Poverty Reduction Strategy Papers (PRSPs) and the adoption in 2000 of the Millennium Development Goals.[24]

Figure 1: The destructive vicious cycle of poverty and instability



Because development workers became more involved in capacity-building and governance issues, and security actors expanded their portfolios with various civilian tasks, the interfaces between them naturally increased. This often caused coordination and cooperation challenges, requiring more policy guidance, which then further multiplied the interactions between security and development actors and policies.[25] The result was a constant flow of conceptual adaptations that sometimes tended to make it difficult to see the wood for the trees. This post-national human shift also signalled a lack of confidence in the capacity of states leading to a transnational assumption of responsibility for human welfare. This is exemplified by the concept of Responsibility to Protect [26] and humanitarian

[23] Some of the key documents regarding this new focus on human security and development are the series of Human Development Reports launched by the UN Development Programme (UNDP) in 1990; UN Secretary-General B. Boutros-Ghali, Report pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992 (A/47/277-S/24111) *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping* (United Nations, New York, 1995) n.p.; OECD, *Guidelines on Peace, Conflict and Development Cooperation* (OECD/DAC, Paris, 1997) 80p.; D. Narayan, et al., *Voices of the Poor: Can Anyone Hear Us?* (World Bank, New York, 2000) 343p.; and UN Commission on Human Security, *Human Security Now* (CHS, New York, 2003) 168p.

[24] UN General Assembly Resolution (A/RES/55/2) *United Nations Millennium Declaration*, New York, 08.09.2000.

[25] F.M. Alamir, 'Introduction: The Complex Security-Development Nexus - a Challenge and an Opportunity for Development Cooperation' (2011) *digital-development-debates.org* (5), n.p.

[26] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (ICISS, Ottawa, 2001) 91p.

interventions on the security front, and democracy promotion and aid conditionality on the development front. Such evolutions gave rise to increasingly assertive policies, colliding with conventional standards of territorial sovereignty.

The interventionist agenda got a significant leg up after the terrorist attacks in the US on 11 September 2001 and the subsequent 'Global War on Terror'. 9/11 served the world with an inexorable wake-up call that 21st century global threats would not be stopped by borders or distance. The fact that terrorism, but also other (perceived) threats such as organised crime, diseases, piracy and mass population displacements, often originate in weak states has moreover led to a 're-problematisation' of poverty.[27] This has resulted in a range of new security frameworks which do not excel in clarity, but abounded in country categorisations, such as fragile states (US and EU), failed states (Fund for Peace), weak states (Brookings), countries at risk of instability (CRI – UK), low income countries under stress (LICUS – WB), etc. The US National Security Strategy tellingly summarises the new risk perception as follows: "America is now threatened less by conquering states than we are by failing ones".[28] The main threats are no longer of a military nature but emerge from the 1.5 billion people living in a permanent state of insecurity, unremitted cycles of violence and pervasive lawlessness.[29]

In the meanwhile famous words of UN Secretary-General Kofi Annan: "there will be no development without security and no security without development".[30] It is in this context and time frame of the early 2000s that the emergence of the term 'security-development nexus' is situated. There is no generally accepted definition, as it rather appears a catch-all phrase for the whole of connections between development and security challenges as well as the policies and concepts designed to address them. Many of these policies, such as conflict prevention, peace and state-building, and concepts such as fragility, resilience and instability, are in their turn loosely defined phrases, leading to a "conceptual chaos"[31] which "has come to mean many things to many people".[32] Another key characteristic of this changing landscape is the greater conceptual involvement of governmental actors, which "[i]nstead of acting as arms-length policy makers in a multilateral arena, … have become primary stakeholders (and 'stickholders') in the security-development calculus".[33]

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[27] C. Büger and P. Vennesson, *Security, Development and the EU's Development Policy* (European University Institute, Florence, 2009) 20-21.
[28] US White House, *National Security Strategy of the United States of America* (White House, Washington, 2002) 1.
[29] W. Bank, *World Development Report: Conflict, Security, and Development* (World Bank, Washington, 2011) 2-6.
[30] UN Secretary-General Kofi Anan, Report to the UN General Assembly (A/59/2005) *In Larger Freedom: towards Development, Security and Human Rights for All* (UN, New York, 2005) 31p.
[31] Büger and Vennesson (2009) op.cit. note 27, 38.
[32] N. Tschirgi, M.S. Lund and F. Mancini, 'The Security-Development Nexus' in N. Tschirgi, M.S. Lund and F. Mancini (eds), *Security and Development: Searching for Critical Connections* (Lynne Rienner Publishers, Boulder, 2010) 6.
[33] Tschirgi (2006) op.cit. note 12, 50.

While this short historical overview has shown that "[t]here has never been a golden age in which development was a-political and shielded from security concerns",[34] some argue that at present the balance has tilted excessively away from principled development towards an opportunistic use of aid.[35] Concepts like fragility, for instance, risk to (re-)instrumentalise or securitise aid, because they allow to portray an "an ever-widening range of social trends through the lens of security".[36] In this context the NGO ActionAid described the global war on terror as "a return to the cold war days with terrorism replacing communism as the bogey".[37]

1.1.2. Studying the security-development nexus: a coat with many pockets

The study of the link between development and security is everything but new. Already in 1942 Quincy Wright wrote 'A Study of War' wherein he describes the vicious circle of poverty, despotism and bellicosity in great detail.[38] In 1950 Lasswell connected such findings to practical recommendations that could just as well have been extracted from a present-day policy paper: "Our greatest security lies in the best balance of all instruments of foreign policy, and hence in the coordinated handling of arms, diplomacy, information and economics".[39] It is however only since the early 2000s that this link is approached as a nexus, resulting in an ever more explicit policy commitment to enhance coherence. According to the Oxford English Dictionary a nexus can refer to "a connection or series of connections linking two or more things", "a network" or "a means of connection".[40] What then does the recognition of and commitment to a nexus between development and security mean and imply?

An impressive range of econometric analyses provides more content to this connection and extensively documents the impact of security variables on development indicators and *vice versa.* On a global level, the fact that wealthier nations are significantly less affected by civil war provides preliminary evidence for this rather intuitive link (cf. Figure 2). On a more specific level, the devastating impact of conflict on a country's socio-economic situation is most famously documented by Paul Collier who describes it as "development in reverse".[41] Besides the unsurprising destruction of infrastructure and diversion of

[34] P. Vennesson and C. Büger, 'Coping with Insecurity in Fragile Situations', *European Report on Development* (European University Institute, Florence, 2009) 5.
[35] D. Trachsler and D. Möckli, 'Sicherheit un Entwicklung: Zwischen Konvergenz und Konkurrenz', *CSS Analysen zur Sicherheitspolitik* (Center for Security Studies (CSS) - ETH, Zurich, 2008) 1-2.
[36] J.-A. McNeish and J.H.S. Lie, 'Introduction: Hearts and Minds: A Security–Development Nexus?' in J.-A. McNeish and J.H.S. Lie (eds), *Security and Development* (Berghahn Books, New York, 2010) 3.
[37] J. Cosgrave, *The Impact of the War on Terror on Aid Flows* (ActionAid, London, 2004) 15; The opportunistic use of aid is confirmed by the fact that, between 2002 and 2010, two fifths of the entire USD 178 billion global increase could be attributed to Iraq and Afghanistan alone, where Western security concerns were particularly at stake (Oxfam, 'Whose Aid is it Anyway? Politicizing Aid in Conflicts and Crises', *Briefing Paper No. 145* (Oxfam, Oxford, 2011) 2).
[38] Q. Wright, *A Study of War* (University of Chicago Press, Chicago, 1942) for instance 313-314.
[39] H.D. Lasswell, *National Security and Individual Freedom* (McGraw-Hill, New York, 1950) 75.
[40] Oxford English Dictionary (Oxford, Oxford University Press) <www.oed.com> (last accessed on 15.05.2015).
[41] P. Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (Oxford University Press, New York, 2007) 27.

resources away from development, he finds evidence that violence reduces growth by about 2.3% a year.[42] Other research calculates that armed conflict has cost Africa at least USD 284 billion between 1990 and 2005, roughly the amount the continent received in Official Development Aid (ODA) during that same period.[43] Yet another study points to the demolishing impact of civil war on a country's trading levels, which take decades to recover.[44] The WB sums it up plainly: "people living in fragile and conflict-affected states are more than twice as likely to be undernourished as those in other developing countries, more than three times as likely to be unable to send their children to school, twice as likely to see their children die before age five, and more than twice as likely to lack clean water".[45]

Figure 2: Incidence of civil war by country income per capita, 1960-2006

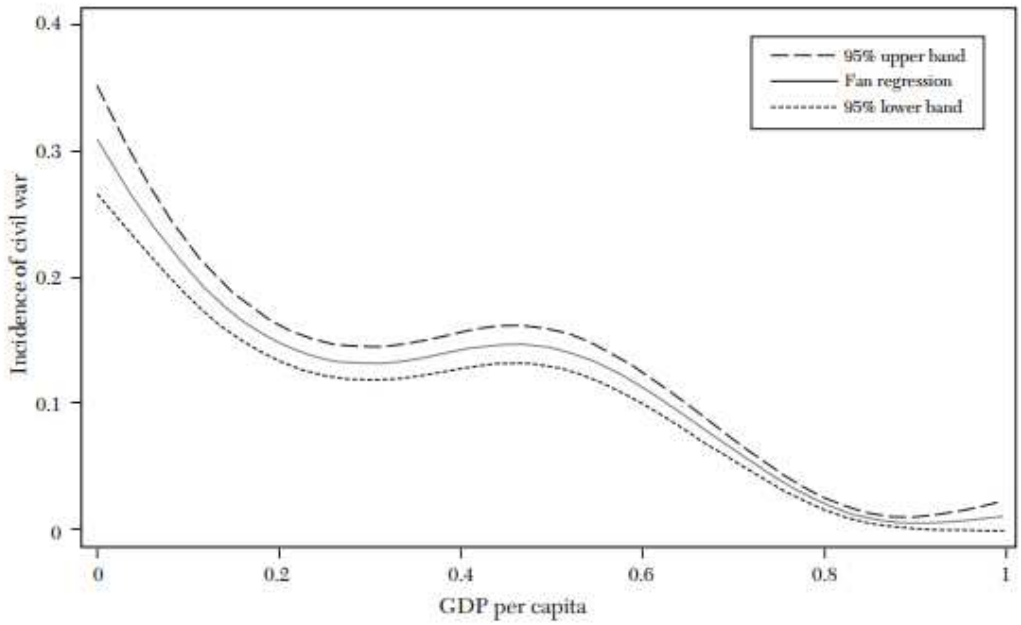

Figure 3: Incidence of Civil War by Country Income per Capita, 1960–2006

Sources: Figure displays the results of a Fan regression of the incidence of civil war on GDP per capita percentiles (bandwidth = 0.3, bootstrapped standard errors). Population and GDP data are drawn from the World Development Indicators (World Bank 2008). Civil war incidence is drawn from the UCDP/PRIO armed conflict database (Gleditsch et al. 2002; Harbom and Wallensteen 2007).

Source: C. Blattman and E. Miguel, 'Civil War' (2010) Journal of Economic Literature 48(1), 7.

Yet, it is not only conflict that has a destructive impact, various studies also find that socio-economic deterioration, such as youth unemployment,[46] commodity price shocks[47] or economic decline,

[42] Ibid. 17-37.
[43] IANSA, OXFAM and Saferworld, 'Africa's Missing Billions: International Arms Flows and the Cost of Conflict', *Briefing Paper 107* (Oxfam, Oxford, 2007) 8-9.
[44] P. Martin, T. Mayer and M. Thoenig, 'Civil Wars and International Trade' (2007) *Journal of the European Economic Association* 6(2-3), 1-9.
[45] World Bank (2011) op.cit. note 29, 5.
[46] For instance: T. Azeng and T. Yogo, 'Youth Unemployment and Political Instability in Selected Developing Countries', *ADBG Working Paper Series No 171* (African Development Bank Group, Tunis, 2013) 25p.
[47] For instance: O. Dube and J. Vargas, 'Commodity Price Shocks and Civil Conflict: Evidence from Colombia' (2013) *The Review of Economic Studies* 80(4), 1-38.

stimulates violence and instability. A negative growth drop of 5% would for instance increase the propensity for conflict by one-half the following year.[48] Combined with the finding that low-income countries face a risk of civil war of around 14 per cent in any five-year period,[49] this provides strong evidence for the above-mentioned vicious circle or "conflict trap".[50]

The abundance of econometric analyses documenting this destructive chain reaction is mirrored by a variety of studies attempting to unravel and understand the connection. Various explanatory factors have emerged, such as horizontal inequality (particularly explosive if it is along ethnic, social, religious or political lines), demographics, environmental change, economic structures, democratic process, governance issues, the presence and use of natural resources, etc.[51] Yet, contrary to the precision of the above numbers, these explanations remain rather blurred, with limited to no consensus on an overall elucidatory framework.

While it is evident that challenges of insecurity and poverty are related, the exact causal connections are complex and difficult to establish. This results from a number of methodological problems. *First*, there is the evident struggle with counterfactuality, leaving the question of what would have happened in the absence of a certain war or a given period of peace subject to speculation. The answer to this question would be particularly insightful "because many countries at war have previously been doing badly both economically and with respect to social indicators, and their continued weak performance is not necessarily attributable to the conflict".[52] A *second* difficulty arises in establishing the direction of any causal relationship between development and security. Rather than war putting a brake on development, it might for instance be that rich countries are rich, in part, because they did not witness recent episodes of conflict.[53] *Third*, any relation between poverty and instability may be spurious due to hidden/confounding variables. Social unrest, for instance, "may lead to both civil conflict and less

[48] E. Miguel, S. Satyanath and E. Sergenti, 'Economic Shocks and Civil Conflict: An Instrumental Variable Approach' (2004) *Journal of Political Economy* 112(4), 741.
[49] Collier (2007) op.cit. note 41, 20.
[50] P. Collier, et al., *Breaking the Conflict Trap: Civil War and Development Policy* (World Bank, Washington, 2003) 221p.
[51] For instance: : R. Kanbur, 'Poverty and Conflict: The Inequality Link', *Coping with Crisis: Working Paper Series* (International Peace Academy, New York, 2007) 10p.; R. Cincotta, 'Demographic Challenges to the State' in N. Tschirgi, M.S. Lund and F. Mancini (eds), *Security and Development: Searching for Critical Connections* (Lynne Reinner Publishers, Boulder, 2010) 77-98; S. Dalby, *Security and Environmental Change* (Polity, Cambridge, 2009) 200p.; M. Humphreys, *Economics and Violent Conflict* (Harvard University, 2003) 28p.; J. Snyder, *From Voting to Violence* (W.W. Norton, New York, 2000) 382p.; T. Addison and M.S. Murshed, 'From Conflict to Reconstruction: Reviving the Social Contract', *WIDER Discussion Paper No. 48* (United Nations University, World Institute for Development Economics Research, Helsinki, 2001) 17p.; P. Le Billon, *Fuelling War: Natural Resources and Armed Conflicts* (Routledge, New York, 2006) 128p.
[52] F. Stewart, 'Development and Security' (2004) *Conflict, Security & Development* 4(3), 263-264.
[53] Humphreys (2003) op.cit. note 51, 2.

economic activity in ways that obscure the link between poverty and violence".[54] This leads some authors to question the effect of poverty on conflict as such.[55]

Unsurprisingly therefore, it has become common practice in many studies and policy papers on the topic to argue that more research on the security-development nexus is needed. This is indispensable for answering the key question of what a nexus between development and security implies and "what can and/or should be done, by whom and for whom in [its] name".[56] While there is indeed no shortage of evidence on the destructive chain reaction of insecurity and underdevelopment, it proofs considerably more complicated to turn this into a positive policy guide.[57] Research undertaken by leading experts in 2006 concluded that the different configurations of security and development "can be mutually supportive, mutually harmful or independent of each other […] Claiming the contrary can only lead to faulty diagnosis and inappropriate responses".[58]

Yet, all too often the nexus serves as an empty and ready-made formula for policy-makers "trying to make sense of competing interpretations of the complex and pressing problems in [conflict-prone] societies".[59] According to a 2013 Chatham House report "[t]here is a curious absence of attempts to understand what different people and policy texts mean when they talk of a nexus, and the familiar uneasy relationship between intellectual enquiry and policy formulation becomes particularly fraught in the ways in which it has become almost a mantra or catch-all phrase".[60] That this generality stands in the way of designing effective policy approaches is clear from Chandler's critique on the above-mentioned human shift: "[o]nce 'well-being' becomes the measurement of development — and security an important constituent of well-being — then … any policy initiative can be held to be contributing to the most ambitious of transformative objectives and yet have little observable impact on the ground".[61]

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[54] R. Fisman and E. Miguel, 'Do conflicts cause poverty, or vice-versa?', *voxeu.org*, 29.11.2008.

[55] Djankov and Reynal-Querol for instance argue that this effect disappears for ex-colonies once historic variables such European settler mortality and population density are included (S. Djankov and M. Reynal-Querol, 'Poverty and Civil War: Revisiting the Evidence' (2010) *The Review of Economics and Statistics* 92(4), 1035-1041). In this same line, Abadie provides evidence that any causal connection between poverty and hosting terrorism is indirect and can be better explained by political freedom indicators (A. Abadie, 'Poverty, Political Freedom, and the Roots of Terrorism' (2005) *American Economic Review* 95(4), 50-56).

[56] M. Stern and J. Öjendal, 'Exploring the Security-Development Nexus' in R. Amer, A. Swain and J. Öjendal (eds), *The Security-Development Nexus: Peace, Conflict and Development* (Anthem Press, London, 2012) 15.

[57] Stewart (2003) op.cit. note 52, 376.

[58] IPA, 'The Security-Development Nexus: Research Finding and Policy Implications', *Program Report* (International Peace Academy, New York, 2006) 6.

[59] Tschirgi, Lund and Mancini (2010) op.cit. note 32, 6.

[60] Chatham House, 'Navigating the Nexus: The Interplay of EU Security and Development Policies in Africa', *Africa Summary* (Chatham House, London, 2013) 6.

[61] D. Chandler, 'The Security-Development Nexus and the Rise of 'Anti-Foreign Policy'' (2007) *Journal of International Relations and Development* 10(4), 377-378.

In this light, it is becoming increasingly clear that the nexus is not a "fixed reality",[62] but a concept in motion subject to continuous doctoring as lessons are learned and evidence evolves. These evolutions do not only apply to the intricate connections between challenges of poverty, development, security and stability, but also between the policies designed to address them. Long gone are the days when one could still assume, against any better judgment, that advancements in the area of development would automatically lead to improved security and *vice versa*. External interference is never neutral and tends to create winners and losers in the targeted communities. While these patterns are relatively straightforward with regard to security interventions, they are more concealed and complex for development aid. Already in 1999 an OECD report noted that "[a]ll aid, at all times, creates incentives and disincentives, for peace or for war".[63] Mary Anderson accurately sums up five general ways in which this can happen: "(1) aid resources are often stolen by warriors and used to support armies and buy weapons; (2) aid affects markets by reinforcing either the war economy or the peace economy; (3) the distributional impacts of aid affect inter-group relationships, either feeding tensions or reinforcing connections; (4) aid substitutes for local resources required to meet civilian needs, freeing them to support conflict; (5) aid legitimizes people and their actions or agendas, supporting the pursuit of either war or peace".[64]

The manners in which these negative aid impacts manifest themselves are diverse and highly context-specific, defying universal formulas. However, the failure to take them into account can lead to ineffective, counterproductive or even destructive policy outcomes. Keen for instance finds that externally encouraged liberalisation policies in Sierra Leone fed into the 1990s civil war by encouraging inflation, reducing state services in health and education, fuelling corruption and taking away attention for human rights abuses by the military.[65] Another example is how the influx of aid to Somalia in the 1980s incited widespread corruption by the Darood clan of late dictator Siad Barre, arousing the envy of other tribes and the perilous aversion to the international community.[66] More recently, a 2011 OECD survey found that an uneven distribution of in-country aid is often perceived as contributing to the marginalisation of certain areas, risking to augment tensions and cause conflicts.[67] Conversely, knowledge of these mechanisms allows to design aid in ways that lessen the risk of social tension by satisfying peoples' basic needs, and thus reduce alienation.[68] Yet, there are clearly risks attached to

[62] M. Duffield, 'The Liberal Way of Development and the Development-Security Impasse: Exploring the Global Life-Chance Divide' (2010) *Security Dialogue* 41(1), 62.
[63] P. Uvin, *The Influence of Aid in Situations of Violent Conflict* (OECD, Paris, 1999) 4.
[64] Anderson (1999) op.cit. note 22, 39.
[65] D. Keen, 'Liberalization and Conflict' (2005) *International Political Science Review* 26(1), 73-89.
[66] K. Sabala, 'Regional and Extra-Regional Inputs in Promoting (In)Security in Somalia' in R. Sharamo and B. Mesfin (eds), *Regional Security in the post-Cold War Horn of Africa* (Institute for Security Studies, Pretoria, 2011) 97.
[67] OECD, *International Engagement in Fragile States: Can't We do Better?* (OECD, Paris, 2011), 43.
[68] Duffield (2010) op.cit. note 62, 57.

the increased involvement of aid in conflict dynamics, or its use by military actors to win hearts and minds. Development practitioners are increasingly becoming the target of attacks,[69] leading to an increased bunkering of aid that comes at the prize of losing touch with local populations.

The security-development nexus is thus all but a clearly-circumscribed concept, let alone a straightforward policy exercise. Since the mid-1990s, a transitory phase took place of adapting the 20th century compartmentalised foreign policy machinery to the new all-embracing, interwoven and transboundary development and security challenges. The concept of a security-development nexus serves to bring more clarity and structure to this complexity but has also become "a commodity over which intellectual ownership [is] as unclear as important".[70] In this light, some authors go as far as arguing that the security-development nexus is inherently biased and question its good intentions. As put by Stern and Öjendal, “the echoes of the harmonious plea for attention to ‘the nexus’, resonate as confusion, lack of conceptual clarity and ideological divisions at best, and as rhetorical facades, interest politics and shallow political correctness at worst”.[71] One of the strongest criticisms comes from Chandler. He argues that the nexus is not based on any new or concrete scientific consensus or evidence as to what works. Rather, it results from a "desire to pass the buck for policy responsibility" by diffusing the policy-burden and stressing "the limits of what can be achieved by external policy-making".[72] McNeish and Lie question whether the promotion of the link between both policy areas does not serve to turn development into a "Trojan horse" legitimising military interventions.[73] In the same vein, Sörensen and Söderbaum claim that it serves to reinvent the lost concept of development and to legitimise a more radical interventionist agenda.[74] Duffield finally claims that "the current bunkering of the aid industry and increasing risk aversion on the part of aid workers … are more indicative of a deepening development-security impasse rather than a new beginning".[75] While the concept of the security-development nexus is thus not undisputed, the practical challenges of fine-tuning interventions in both areas persist. In order to remain relevant and lead to better results, this research therefore argues that policy-makers should make urgent work of concretising what they mean with this concept, how they plan to operationalise it and the manner in which this will address current shortcomings.

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[69] A. Stoddard, A. Harmer and K. Haver, 'Providing Aid in Insecure Environments: Trends in Policy and Operations', *ODI Humanitarian Policy Group Report 23* (Overseas Development Institute, London, 2009) 34p.

[70] R. Amer, A. Swain and J. Öjendal, 'Researching the Security-Development Nexus Through a Multi-Disciplinary Approach' in R. Amer, A. Swain and J. Öjendal (eds), *The Security-Development Nexus: Peace, Conflict and Development* (Anthem Press, London, 2012) 1.

[71] Stern and Öjendal (2012) op.cit. note 56, 16.

[72] Chandler (2007) op.cit. note 61, 364-365.

[73] McNeish and Lie (2010) op.cit. note 36, 2.

[74] J.S. Sörensen and F. Söderbaum, 'Introduction: The End of the Development-Security Nexus?' (2012) *Development Dialogue* 58, 7.

[75] Duffield (2010) op.cit. note 62, 54.

1.1.3. The security-development nexus in an EU context

The security-development link lies at the origins of the European integration project with its initial aim of eliminating the possibility of war through joint economic development. Yet, throughout the first decades, the predominant focus of this project remained very much economic. This expressed itself internally through the gradual creation of a single market, and externally through the development of a common trade policy. A genuine security component was only added with the 1993 Maastricht Treaty which created the CFSP, and further reinforced in 2001 when the Laeken European Council declared the Common Security and Defence Policy (CSDP) [76] operational. While development cooperation has always formed part of the EU's policy arsenal, it also had to await the Maastricht Treaty for a formal recognition and basis in primary law.

The fact that the EU lacked a strong security arm during the 1990s probably explains its initial absence from the international debate on the security-development nexus. The starting signal for a more comprehensive approach was given by the 2001 Göteborg European Council, adopting the EU Programme for the Prevention of Violent Conflicts.[77] This programme recognised both European Community (EC) and CSDP competence for conflict prevention and called to mainstream this objective in the work of all relevant institutions. It was followed by a whole range of documents recognising and fastening the link between CFSP, CSDP and development cooperation, in different gradations and from various angles. Essential in this regard are the 2003 European Security Strategy[78] and the 2006 European Consensus on Development[79] – the EU's security and development 'bibles'.

Such statements represent more than mere rhetoric and have incited the development of an impressive institutional machinery in the Commission, Council General Secretariat (GSC) and more recently the European External Action Service (EEAS); a vast range of instruments, including innovative financial tools such as the Instrument contributing to Stability and Peace (IcSP) and the African Peace Facility (APF); as well as conflict and development-sensitive procedures and mechanisms. The diversity of these structures and policies enables the EU to span the continuum between security and development challenges, covering areas that range from security sector reform to conflict prevention, peace-building and post-conflict reconstruction. Consequently, the EU holds great potential but at the

[76] This was initially named European Security and Defence Policy or ESDP, with the C only introduced by the Lisbon Treaty to affirm its strengthened nature (cf. *infra* 2.3.); Presidency Conclusions, European Council, Laeken, 14-15.12.2001, para. 6
[77] Presidency Conclusions, *EU Programme for the Prevention of Violent Conflicts*, European Council, Göteborg, 15-16.06.2001.
[78] Council, *A Secure Europe in a Better World – European Security Strategy*, 12.12 2003.
[79] 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*, OJ C46/1, 24.02.2006.

same time faces considerable hurdles in ensuring that its various actions do not work at cross-purposes.

Another complexity is that the integration rationale of the security-development nexus collides with the EU's constitutional system that subjects the CFSP (including the CSDP) to special rules of delimitation. Development cooperation and the CFSP may be linked together closely in policy rhetoric, they are governed by very different policy and legal regimes, complicating a coherent or unified approach. Development policy is set out in a specific chapter of the Treaty on the Functioning of the EU (TFEU),[80] listing its principles and objectives as well as the applicable decision-making framework. It is governed by the ordinary legislative procedure, implying a formal proposal of the Commission and co-decision by the European Parliament (EP) and Council, with full judicial competence of the EU Court of Justice (CJEU).[81] Despite the Lisbon Treaty's streamlining of EU external action, the CFSP, on the other hand, is excluded from the TFEU and governed by "specific rules and procedures" set out in Article 24(1) of the Treaty on European Union (TEU). These are dominated by the Member States, as represented in the Council and the European Council, and accord only limited roles to the Commission, Parliament and CJEU. This makes the nexus at the same time legally complex as it requires difficult choices of legal basis, administratively challenging as these choices have to be made across very distinct policy-making communities, and politically sensitive as they affect the division of competences and balance of power between EU institutions and with Member States.

While the Union has made great strides in targeting its efforts increasingly at the mutual challenges of insecurity and poverty, most observers agree that its track record is still mixed and fails to exploit the full potential of its diverse policy arsenal. An EU-commissioned assessment of the Commission's support to peace-building and conflict prevention found in 2011 that the EU's institutional set-up put important strains on the effectiveness and coherence of its actions.[82] A 2012 OECD peer review of EU development cooperation moreover concluded that it does not succeed in matching its decade-old ambitions regarding this nexus with concrete and effective action on the ground.[83] More recently, a 2014 Parliament report lamented that institutional and procedural shortfalls still prevent coherent EU action in crisis and fragile areas.[84] These various reports and criticisms will be analysed in more detail in the subsequent chapters.

[80] Chapter 1 of Title III 'Cooperation with Third Countries and Humanitarian Aid' under Part V on 'The Union's External Action'.
[81] Article 209(1) TFEU.
[82] ADE, *Thematic Evaluation of European Commission Support to Conflict Prevention and Peace-Building* (Aide à la Décision Economique, Brussels, 2011) 100.
[83] Development Assistance Committee (DAC), *Peer Review: European Union* (Organisation for Economic Cooperation and Development (OECD), Paris, 2012) 33-34.
[84] European Parliament Report (2013/2146(INI)) on the EU comprehensive approach and its implications for the coherence of EU external action, 03.04.2014, para. 14.

In spite of the obvious challenges and complexity, the many statements on the nexus contain only the flimsiest of guidelines or instructions on how this commitment should be achieved in practice. A lot of faith is put in repeated, but rather generic, calls on all relevant actors to enhance coherence and coordination between their various development and security-related initiatives. This impromtu approach arguably serves to avoid the thorny issue of dividing labour between, and thus delineating, the separate policy realms of development cooperation and the CFSP/CSDP. On the one hand, leaving such a wide margin of appreciation to ad hoc decision-making allows a flexible policy approach that can easily capitalise on changing contexts and arising opportunities. On the other hand, it tends to hide the many complexities of implementing this nexus and risks to result in duplication, fragmentation and inter-institutional tensions. The classic example of the latter is a conflict between the Council and the Commission in 2005, which ended up before the EU Court of Justice, on whether disarmament support to the Economic Community of West African States (ECOWAS) ought to be a development or a CFSP measure. (cf. *infra* 5.2.2.).[85] Such tensions are evidently not beneficial for the EU's commitment to enhance coherence between these policy fields.

By interlinking the CFSP/CSDP and development cooperation both constitutionally and institutionally, the Lisbon Treaty opens significant opportunities to move beyond this ad hoc approach. In the first place by streamlining the EU`s external action system. This is most visible through the abolition of the pillar structure and dissolving the European Community into the EU.[86] Moreover, all the EU's external action principles and objectives are now grouped together in a single Treaty article with a reinforced duty to ensure consistency between them.[87] This coherence rationale is reflected in the creation of institutional functions such as the High Representative of the Union for Foreign Affairs and Security Policy /Vice-President of the Commission, the EEAS and the EU Delegations. At the same time, and as mentioned above, the specific status of the CFSP as a more intergovernmental form of cooperation has survived the Treaty changes and will continue to challenge the strive for closer ties between security and development competences. This is most outspoken in Article 40 TEU stating that the implementation of both CFSP and TFEU competences shall not affect the other's procedures and institutional balance. Arguably, one of the main post-Lisbon challenges for EU external action will therefore be to solve this integration-delimitation paradox. In other words, how to reconcile the remaining plea for delimitation of the CFSP, with the equally strong call for coherence, integration and comprehensiveness. As the security-development nexus embodies the many hurdles of developing an

[85] Case C-91/05, *Commission v Council (Small Arms and Light Weapons - SALW),* ECLI:EU:C:2008:288.
[86] Article 1 of the Lisbon Treaty on European Union (hereafter: TEU).
[87] Article 21 TEU.

effective policy across institutional and procedural divides, it constitutes an important test-case for these recent Treaty changes.

1.2. Research questions and design

The Lisbon Treaty provides no details or hints on how to cope with its contradicting calls for integration and delimitation. This puts the onus on policy-makers and the judiciary that will have to demonstrate considerable tact and creativity to get round this integration-delimitation paradox. This research inserts this often underexposed legal dimension in the discourse and scholarly work on the EU's commitment to the security-development nexus. It holds up the EU's political rationale to the reality of its underlying constitutional structure, with its inherent limits and obstacles, in order to grasp the scale of this commitment and the usefulness and effectiveness of the EU's current approach. This will moreover enable a better understanding of the actual impact of Treaty reform in the area of EU external action.

This analysis is conducted along three interrelated tracks. *First*, the track of policy formulation, legislative design and implementation. This focusses on the political approach to the security-development nexus, the process of adopting legal instruments to tackle the various challenges at stake, and their respective legal bases. *Second*, the institutional track analyses the diverging institutional balance under security and development competences, the past and present track record of cooperation and coordination between EU institutions and the Lisbon Treaty's innovations to their legal design. *Third*, the judicial track studies the EU Court of Justice's approach in delineating security and development competences and how the constitutional seclusion of the CFSP affects the Court's methodology in selecting appropriate legal bases. Along each of these three tracks four key questions are posed: (1) what are the differences between development cooperation and CFSP/CSDP in policy/legislative, institutional and judicial terms; (2) what obstacles and challenges result from these differences; (3) which efforts are taken to transcend them and maximise positive connections between both policy fields; and (4) how effective are these efforts in making full use of the EU's diverse machinery?

In order to make these analyses more susceptible and tangible, this research regularly draws examples from the design and implementation of the Union's development cooperation and CFSP activities in the Horn of Africa. The EU defines this region geographically as the member countries of the Intergovernmental Authority for Development (IGAD), namely Djibouti, Eritrea (although suspended since 2007), Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda. The pervasive challenges of poverty, deprivation and instability that plague the Horn of Africa, make it an unfortunate but key test ground for the EU's commitment to the nexus. Important with regard to this research is that these

challenges result in the activation of the full range of EU security and development policies, as well as a strong commitment to gear them closely together in the Union's 2011 Strategic Framework for the Horn of Africa.[88]

This *first* introductory chapter, which will wind up with a final part on the research scope and methodology, will be followed by a *second* chapter on the evolving relationship between development and security competences in the EU`s changing constitutional architecture. This advanced from prudent interaction between two policy fields without explicit legal bases under the Rome Treaty framework, over the "integrated but separate" legal orders of the Treaty of Maastricht, towards the paradox of the Lisbon Treaty where security and development competences hinge between integration and delimitation. The evolution of this constitutional framework sets out the legal boundaries within which the growing commitment to the security-development nexus has matured.

This commitment forms the focus of the *third* chapter focussing on the policy track in cohering security and development. Starting from an overview of the EU's evolving lexicon on the security-development nexus, it will be studied how these words match the legal framework for EU external action. The EU's attempts to overcome the spanners thrown by the latter serve as an ideal test-case for giving effect to the Lisbon Treaty's coherence leitmotiv. A second main part of this chapter will go deeper into the Union's toolbox for tackling the security-development interface. The legal divide cutting across the latter has led both development and security instruments to gradually evolve towards the core of their interface, causing evident challenges of overlap and fragmentation.

The *fourth* chapter treats the role of institutions and institutional design in interlinking development cooperation and CFSP/CSDP. It starts from an analysis of the traditional love-hate relationship between the Council and the Commission, condemned to close cooperation in the day-to-day management of CFSP and development aid. The two have taken various initiatives to smoothen interaction and cooperation, but this has not been able to avoid occasional collision over the location of the borderline between both policy fields. The Lisbon Treaty introduces a number of changes that could defuse this situation. Most visible are the creation and transformation of institutional functions transcending the CFSP-TFEU boundary, namely the High Representative, the EEAS and the EU Delegations. The practical translation of their vague Treaty mandates, competences and structures will in turn be anatomised in order to better understand their potential for aligning the EU's diverse policies spanning the nexus between development cooperation and CFSP.

The *fifth* chapter sheds light on the role of the judiciary in drawing the line between the CFSP and development cooperation. After elucidating the complex and often puzzling case law on the choice of

[88] Council, A Strategic Framework for the Horn of Africa, 3124th Foreign Affairs Council (FAC) meeting, 24.11.2011.

legal basis, the focus will turn to the Court's evolving approach in setting the outer limits of development and security competences. Following a number of cases that abstractly touched upon their scope and nature, both policy areas were prepared for the perfect storm in the contentious *SALW* case. The Court delivered its ruling on the eve of the Lisbon Treaty's ratification without specifying whether and how the latter's profound changes would impact its current relevance. A constitutional examination of this question will therefore be followed by an analysis of a number of recent cases providing some preliminary indications of how the CJEU would strike the security-development balance at present.

The *sixth* chapter focusses on recent policy evolutions that are absorbing the debate on the security-development nexus in the talk of a comprehensive approach towards EU external action. This results from and takes into account the new institutional framework, put in place by the Lisbon Treaty, which is gradually leaving behind its growing pains. In a first section it will be analysed what is new about the so-called comprehensive approach and whether it has better prospects to succeed. A subsequent section will dissect the practical translation of this new approach in the form of regional and thematic strategies, with a particular focus on the EU Strategic Framework for the Horn of Africa. With Article 22 TEU the Lisbon Treaty inserted a provision specifically designed for such comprehensive strategies spanning the CFSP-TFEU divide. A final section will elaborate on the design and untapped potential of these 'European Council decisions on strategic interests and objectives of the Union'.

With the stock-in-trade of the six preceding chapters, the *final* concluding chapter draws the policy, institutional and judicial tracks together. It will summarise the evolutions and tendencies along each of them to understand similarities, differences and possible spill-over effects. This serves to generate broader insights about the current practices, main obstacles, challenges and prospects regarding the EU's long-standing commitment to the security-development nexus.

1.3. Research scope and methodology

As mentioned above, this PhD research aims to analyse the impact, effectiveness, challenges and potential of the EU`s ambition to enhance coherence along the security-development nexus. The analysis is conducted with specific attention for the EU`s changing external action architecture, and in particular the constitutional innovations of the Lisbon Treaty. To date, there has not been a comprehensive study that lays bare the facts of this decade-old EU commitment across its entire institutional, political and legal system. While a number of authors have studied the political aspects of the security-development nexus in the context of the EU,[89] the void is particularly remarkable on

[89] For instance: K. Del Biondo, S. Oltsch and J. Orbie, 'Security and Development in EU External Relations: Converging, but in which Direction?' in S. Biscop and R. Whitman (eds), *The Routledge Handbook of European Security* (Routledge, New York,

the level of legal analysis, with Koutrakos, Hoffmeister, Martenczuk, Blockmans and Wessel as notable exceptions.[90] Even separately, the policy fields of EU development cooperation and the CFSP have received rather limited attention from academic lawyers. With regard to the CFSP this is not surprising, given that law has long been kept out of European cooperation on foreign and security policy. In parallel with the growing CFSP activity in the 1990s and the Amsterdam, Nice and Lisbon Treaty changes, legal analysis is catching up quickly.[91] This is much less the case with regard to EU development cooperation that, even if it only received a formal legal basis in the Maastricht Treaty, has from the outset developed in particularly legalistic terms (cf. *infra* Chapter 2).

In delineating the scope of this research certain choices were made that unavoidably exclude a number of subjects from the intended scheme. *Firstly*, security and development are broad and deep-ranging issue areas. Therefore, the nexus between them touches upon a wide array of interrelated policies that all have an impact on the effectiveness of the EU`s approach. In order to enable a profound study the focus of this dissertation lies predominantly on the interrelation between development cooperation and the CFSP/CSDP. This implies that other fields – included by certain authors in their analysis of the nexus – such as humanitarian aid, justice and home affairs and trade, will only be touched upon in passing. *Secondly*, the wide fields of development cooperation and CFSP/CSDP could each easily be attributed a separate monograph. Therefore the choice was made to focus mainly on the grey area between them where the division of competences is obscure and interactions are manifold. *Thirdly*, the research concentrates on the impact of the security-development pledge with regard to the Union`s internal division of competences and labour. Evidently, the Member States' separate development and security initiatives also have an important impact on policy outcomes. The internal organisation is however very different from country to country and it would lead us too far to treat all 28 Member States in the scope of this study. Therefore it was decided to treat the EU-Member States relationship only on a general level, combined with their collective representation in and by the Council of Ministers and the European Council. *Finally*, for these same reasons the relations of the EU

2012) 126-142; D. Sicurelli, 'Framing Security and Development in the EU Pillar Structure. How the Views of the Commission Affect EU Africa Policy' (2008) *European Integration* 30(2), 217-234; R. Youngs, 'Fusing Security and Development: Just another Euro-Platitude?' in M. Carbone (ed), *Policy Coherence and EU Development Policy* (Routledge, London, 2009) 95-113.

[90] See respectively: P. Koutrakos, 'The Nexus between the European Union's Common Security and Defence Policy and Development' in A. Arnull, et al. (eds), *A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, Oxford, 2011) 589-608; F. Hoffmeister, 'Inter-Pillar Coherence in the European Union's Civilian Crisis Management' in S. Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (TMC Asser, The Hague, 2008) 157-181; B. Martenczuk, 'Community Cooperation Policy and Conflict Prevention' in V. Kronenberger and J. Wouters (eds), *The European Union and Conflict Prevention: Policy and Legal Aspects* (TMC Asser, The Hague, 2004) 189-210; S. Blockmans and R.A. Wessel, 'The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?', *CLEER Working Papers 2009/1* (Centre for the Law of EU External Relations, The Hague, 2009) 47p.

[91] See for instance: R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutionalist Perspective* (Kluwer Law International, The Hague, 1999) 383p.; P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press, Oxford, 2013) 318p.; M. Trybus and N.D. White (eds), *European Security Law* (Oxford University Press, Oxford, 2007) 381p.

with other international organisations in enhancing the security-development link, will not form the focus of analysis.

This dissertation undertakes a law-in-context study, based mainly on a desk review of primary and secondary EU legislation, case law of the EU Court of Justice, academic analyses and research reports that cover the various aspects of the PhD topic. Throughout the research these various angles and approaches, straddling the fields of EU and international law as well as political sciences and international relations, have been bundled in a comprehensive manner in order to uncover critical (dis)connections and generate new insights. Whilst not losing sight of this overall subject, the author has regularly written articles and participated in conferences on specific subjects related to the general theme. In addition, a dozen of semi-structured in-depth interviews were undertaken with academic researchers and relevant stakeholders within the EU institutions, including the EEAS, DG EuropeAid Development and Cooperation (DEVCO) and the EU Delegations to the African Union and Ethiopia. In a rather informal setting, with guaranteed anonymity, questions were asked on inter-institutional relations, personal perceptions of the security-development nexus, EU coordination and the impact of the Lisbon Treaty on such issues, as well as on their respective positions and working environment. These interviews were not aimed at drawing general conclusions on EU staff perceptions, but rather at gaining better and real-time insights from the forefront of the PhD topic.

2. Security and development competences in the EU's evolving constitutional architecture

> *Life can only be understood backwards; but it must be lived forwards.*
>
> Søren Kierkegaard, 1843

While EU development cooperation and the CFSP are today well-established policy areas with an extensive institutional machinery, this has not been self-evident and Member States have found it difficult to pool authority in these areas. It is therefore not surprising that both emerged largely outside the Treaty framework. It was not until 35 years after the initiation of European integration by the 1951 Paris Treaty that an agreement could be reached on an explicit but limited Treaty basis for political cooperation on security issues in the Single European Act. It took even until 1993 before development cooperation was formally inserted in the Treaties. Both areas, as well as the interaction between them, consequently evolved in a pragmatic fashion. An outsider's look at the EU's current constitutional and institutional framework for security, defence and development policies therefore reveals a peculiar and complex design that has little in common with that of its Member States or any other international organisation.

First, whereas the EU promotes itself as a global development actor building equal partnerships around the world,[92] its development policies are in practice dominated by donor-recipient dynamics that are geographically tilted towards a strange coalition of African, Caribbean and Pacific (ACP) states. The CFSP has despite its ambitious mandate covering "all areas of foreign policy and all questions relating to the Union's security"[93] a rather tight budget of EUR 2.3 billion for 2014-2020 and limited operational capacity. Second, even though they both form a constitutive part of the EU's external action system, development cooperation and the CFSP, including the CSDP, are separately established in each of the

[92] See for instance: Council (16344/07) The Africa-EU Strategic Partnership: A Joint Africa-EU Strategy, 09.12.2007.
[93] Article 24(1) TEU.

Union's two founding Treaties.[94] Moreover, in what appears a rather confusing and contradictory design, the TEU first links their objectives closely together, only to draw a firm line between them in a subsequent provision. Indeed, Article 21 TEU instructs the Union to ensure consistency between the policies of poverty eradication and strengthening international security, while Article 40 subsequently prohibits the implementation of CFSP and TFEU policies from affecting each other's Treaty-defined procedures and institutional balance. Finally, some of the EU's institutional actors that play a central role in the policy-making process of development cooperation, are conspicuous by their absence in the CFSP. The Parliament acting as a co-legislator with the Council on development issues, the Court overseeing the application of law, and the Commission as a sort of budgetary and technical development agency, are each accorded very limited roles when operating under the CFSP. The latter evolves according to the pace set unanimously by the Member States represented in the European Council and the Council.

Besides confusing observers and occupying lawyers, the institutional fragmentation and constitutional contradictions of EU security and development policies are illustrative for the bipolarity that has characterised the EU's external action system ever since its creation.[95] Whereas the European integration project has gradually evolved – both out of necessity and out of a growing appreciation for economies of scale – towards increasing communality on the economic strands of external policy, such as development cooperation, trade and humanitarian aid, this was much less the case for the more political CFSP. With regard to the latter, Member States constantly balance between two gravitational forces. On the one hand, they are in varying gradations driven by a certain reluctance to give up their sovereignty in this sensitive area so closely connected with their existence as a state.[96] On the other hand, the desire for more international leverage has cautiously pushed them towards political integration. The unavoidable interaction with economic aspects of EU foreign policy subsequently necessitated ever more efforts to enhance the coherence between them and steadily include political elements in mainstream European integration.

This balancing exercise has arisen clearly in every EU Treaty reform exercise. At the constitutional level the constant driving force has been the preservation of separateness between political and economic aspects of foreign policy, while the acknowledgement of their practically unavoidable interaction led to a more political commitment to cohere. Confronted with the shortcomings of the EU's system in the

[94] Respectively in Chapter 1 of Title III "Cooperation with Third Countries and Humanitarian Aid" under Part V on "The Union's External Action" of the TFEU, and the TEU's Title V on "General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy".

[95] A. Dashwood, 'The Continuing Bipolarity of EU External Action' in I. Govaere, et al. (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff, Leiden, 2014) 3-16.

[96] Markedly, it forms one of the four components to qualify as a state in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.

face of global crises, these reforms have time and again departed from a grand – and from a historic perspective rather repetitive – commitment for a more effective and coherent EU foreign policy as well as for strengthening the famous single voice. Yet, the constant outcome has been to counterbalance steps towards more coherence and integration with safeguards for the Member States acquired foreign policy rights. The current EU constitutional framework must therefore be seen as the most recent step in this balancing exercise undertaken by the Member States as masters of the Treaties. It is shaped as much by the current equilibrium between safeguarding sovereignty and enhancing coherence, as it is by the lessons learned from past constitutional reforms and the expectations for the future. In order to understand the complexities of the present constellation for EU security and development cooperation, as well as the opportunities and limitations to transcend them, it is therefore necessary to first take a few steps back and learn how the EU gradually came to its current design. The aim of this chapter is not to provide a comprehensive analysis of the EU's evolving constitutional structure, nor to summarise the many excellent writings on this topic.[97] Rather, it will focus on the evolving place, scope and nature of EU development and security competences in the changing legal construction of the Union.

First, the analysis will concentrate on the emergence of European cooperation in the fields of security and development (2.1.). In the absence of an extensive legal framework in the era of the Rome Treaty, this part will focus more on how the evolving practice and customs have impacted on legal developments. Second, the analysis will turn to the era of the Maastricht Treaty and its (in)famous pillar structure (2.2.). Besides a new legal bedding for the interaction between development and security policies, it provided both areas with a broader scope and focus. The rapid geopolitical changes of this period continuously challenged EU leaders to catch up with an ever-evolving reality, leading to the successive Treaty changes of Amsterdam and Nice, as well as constant engineering to the fundamentals of EU development policy. A final part will elaborate on the recent constitutional reform of the Lisbon Treaty (2.3.). With its strong focus on enhancing the coherence of EU external action, while nonetheless clinging to the delimitation of the CFSP within a unified legal order, this new constellation represents a genuine paradox that poses considerable challenges for today's policy-makers and the judiciary. Under these last two titles the analysis will focus on the impact of the EU's

[97] Some recent examples are: D. Curtin and I. Dekker, 'The European Union from Maastricht to Lisbon: Institutional and Legal Unity out of the Shadows' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford, 2011) 155-185; R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) *European Constitutional Law Review* 5(1), 117-142; 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) 19-51.

evolving constitutional order. The relevant policy, institutional and judicial aspects will be dealt with extensively in the succeeding chapters.

2.1. The Rome era: security and development without legal basis

The mainspring of the EU's[98] founding fathers lay in the link between common economic development and sustaining peace on the European continent. That this was not a mere inward-looking intuition, but represented a broader sense of responsibility for global peace and prosperity is clear from the famous Schuman Declaration of 9 May 1950. Therein the then French Foreign Minister professed that the pooled production of coal and steel "would be offered to the world as a whole, without distinction or exception, with the aim of raising living standards and promoting peace as well as fulfilling one of Europe's essential tasks — the development of the African continent".[99] Such a provision did however not make it into the 1951 Paris Treaty establishing the European Coal and Steel Community (ECSC Treaty).[100]

Six years later the European integration project took a major leap forward with the Rome Treaty establishing the European Economic Community (EEC).[101] With regard to external relations its provisions remained few and lapidary. The Treaty departed in its first preamble from the determination "to lay the foundations of an ever-closer union among the peoples of Europe", but shied away from any form of political cooperation. Even though this legal framework, which did not foresee legal bases for development, foreign policy or security actions, remained unaltered until 1986, both policy areas underwent a significant transformation in those 30 years. In the absence of law, this process was mainly driven by pragmatism, gradually adding layers and forms of integration, cooperation and coordination to the existing European policies. These first decades have left a clear mark on the current security and development system and it is therefore not surprising that both have recently been defined as a "policy patchwork".[102]

In chronological order this section will explore the emergence of the EU's development policy (2.1.1.), followed by the start of political cooperation in the seventies and their ever-extending common ground

[98] For the sake of clarity and cohesion, we will throughout this dissertation use the term EU to refer to the evolving organisation that was created in 1957 by the Rome Treaty as the EEC, became the umbrella for the EC and the intergovernmental pillars after the Treaty of Maastricht and evolved into the current unified constellation set out in the Lisbon Treaty. Only when referring to a specific state of this organisation in history, or to one of its subsystems, will we use the acronyms EEC or EC.

[99] R. Schuman, *Declaration on the Birth of Europe*, Paris, 09.05.1950.

[100] Treaty establishing the European Coal and Steel Community, Paris, 18.04.1951.

[101] Treaty establishing the European Economic Community, Rome, 25.03.1957.

[102] See with regard to EU development cooperation: M. Holland, *The European Union and the Third World* (Palgrave Macmillan, Houndmills, 2002) 1; and for the CFSP: F. Bindi and I. Angelescu, 'The Open Question of an EU Foreign Policy' in F. Bindi and I. Angelescu (eds), *The Foreign Policy of the European Union: Assessing Europe's Role in the World* (Brookings Institution Press, Washington, 2012) 327.

(2.1.2.). This will illustrate how the EEC and intergovernmental political cooperation gradually grew closer, laying the basis for the anchorage of their connection in the Single European Act (2.1.3.).

2.1.1. Rome and Yaoundé: the seeds of an EU development programme

The roots of the EEC's development programme lay in the 1950s and the then prevailing era of European colonialism. Article 3(k) of the Rome Treaty listed as one of the Community's activities "the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development".[103] This policy of association was further developed in Part IV of the EEC Treaty and contained two central characteristics that still dominate EU development relations to date: market access and financial aid.[104] First, Articles 131-136 EEC were tantamount to treating the associated countries and territories[105] as EEC Member States regarding trade, investment and the reduction of custom duties. Given the experimental nature of this system the details were set out in a five-year Implementing Convention. This Convention contained the second main element, namely that of financial aid. It created the European Development Fund (EDF) to fulfil the Rome Treaty's aim of furthering "the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire".[106] The EDF, which still exists at present and is thus one of the oldest EU instruments, was established outside the scope of the EEC budget, with a separate contribution key. This was mainly due to the limited enthusiasm among Member States to finance primarily French colonies.[107] EDF project proposals were to be submitted by Member States "in agreement with the local authorities", decided upon by the Council and administered by the Commission.[108] The Fund was established as additional to the existing national aid programmes, and was not followed by a reduced responsibility from the part of the Member States. With this design the Convention laid the foundation of two other key elements of EU development policy, namely the central position of the Commission as a sort of EU development agency and the fact that European policy was not aimed at replacing, but at complementing Member States' programmes.

[103] This provision resulted from a French negotiating strategy to save its declining French Union of colonial dependencies (Ravenhill (1985) op.cit. note 13, 48). Schrijver candidly notes that "[t]here can be little doubt that the entire association regime was meant to maintain colonial linkages and the economic advantages that resulted from them and to spread the costs over all EEC members" (N. Schrijver, 'The EU's Common Development Cooperation Policy' in M. Telo (ed), *The European Union and Global Governance* (Routledge, London, 2009) 177).

[104] M. Broberg, 'What is the Direction for the EU's Development Cooperation after Lisbon? A Legal Examination' (2011) *European Foreign Affairs Review* 16(4), 540-541.

[105] These countries were listed in Annex IV of the EEC Treaty and included around 25 French associated countries and dependencies, two Belgian territories (Belgian Congo and Rwanda-Burundi), Italian Somaliland and the Dutch dependent territory of New Guinea.

[106] Article 131 EEC.

[107] Broberg (2011) op.cit. note 104, 541.

[108] Article 2-5 of the Implementing Convention on the Association of the Overseas Countries and Territories (OCTs) with the Community, Rome, 25.03.1957.

Yet, only nine months after the entry into force of the Rome Treaty on 1 January 1958, Guinea was the first of the Treaty's associated states to gain independence, soon followed by Mali and Senegal, in a whirlwind decolonisation process that was completed by 1962. The abrupt ending of Europe's colonial era rendered Part IV of the Rome Treaty vacuous for a great number of previously associated states, leaving the EEC without a Treaty basis for general development policy. Remarkably, its development programme nonetheless evolved through legal rather than political commitments, grafted on three other Treaty provisions.[109] *First*, Article 113 EEC (*ex* Article 133 EC, current Article 207 TFEU) granting the EEC exclusive competence on tariffs and trade in the context of the Common Commercial Policy (CCP), was used as legal basis for the conclusion of commodity agreements as well as the generalised system of preferences (GSP).[110] In both cases this legal foundation was questioned and subsequently approved by the Court.[111] *Second*, the flexibility clause of Article 235 EEC (*ex* Article 308 EC, current Article 352 TFEU) enabled the Council, in the absence of a specific legal basis, to take action necessary for the attainment of one of the EEC's objectives in the course of the operation of the common market. This was used for the adoption of certain development-related Council Regulations, for instance those establishing technical and financial assistance and a food aid policy.[112] *Finally*, Article 238 EEC (*ex* Article 310 EC, current Article 217 TFEU) provided the Union with a seemingly unlimited competence to conclude association agreements, only specifying that these may involve "reciprocal rights and obligations, common action and special procedures". This has proven to be the most important provision for the substantive expansion and concretisation of EU development policy, particularly through the successive agreements with the ACP group of states. [113] Especially in the early years, these conventions formed the testing ground, model and guide shaping much of the nature of the EU's global development relations.

Contrasting with the determined fashion in which African independence movements shook off the colonial yoke, the substantive direction of the Rome Treaty was largely continued in a post-colonial Convention concluded between the EEC and 18 ex-colonies on 20 July 1963 in Yaoundé.[114] Whereas

[109] S. Barbagallo, 'Evolution of the Legal Framework of the European Union's Development Cooperation Policy' in C. Cosgrove-Sacks (ed), *Europe, Diplomacy and Development: New Issues in EU Relations with Developing Countries* (Palgrave Macmillan, Houndmills, 2001) 193-195.

[110] The former aimed at regulating trade and ensuring price stability of certain raw materials, the latter was created in 1971 to allow developing country exporters to pay lower duties on their exports of a certain number of industrial and agricultural products to the EU market.

[111] Respectively in Opinion 1/78, *International Agreement on Natural Rubber*, ECLI:EU:C:1979:224; Case C-45/86 *Commission v Council (GSP)*, ECLI:EU:C:1987:163.

[112] Council Regulation (442/81/EEC) on financial and technical aid to non-associated developing countries, OJ L048/2, 17.02.1981; Council Regulation (3972/86/EEC) on food-aid policy and food-aid management, OJ L370/12, 22.12.1986.

[113] Contrary to the other two legal grounds, the association formula for these development conventions was never challenged. This is partly related to the fact that these were concluded as mixed agreements (P. Eeckhout, *EU External Relations Law* (Oxford University Press, Oxford, 2011) 128).

[114] Guinea was the only country that chose to end the association; Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community and annexed documents, signed at Yaoundé, 20.07.1963.

the focus of the association remained on market access and financial aid, the fact that this now concerned government-to-government relations between independent states, supported by an entirely new institutional machinery, evidently changed its connotation. On the one hand, financial aid was diversified and rebranded as "financial and technical cooperation".[115] On the other hand, market access provisions were no longer about treating dependencies as EEC Member States, but about establishing explicitly reciprocal trade preferences. When this Convention came to an end in 1969 it was – despite mainly Dutch and German scepticism about these preferential relations with states with which they had only limited links[116] – replaced by a second and similar Yaoundé Convention that ran for another five years.[117]

2.1.2. The 70s and the growing calls for cooperation on foreign policy and development

The discussion to balance Europe's growing economic integration with a political dimension is as old the integration project itself and has always been contentious. After "a succession of crushes" and political squabbling in vainly trying to create a European Defence Community (EDC)[118] and a European Political Community in the fifties, and the "Fouchet fiasco" of the sixties,[119] EU Heads of State or Government considered in 1969 that the time was ripe for a new endeavour. They instructed their foreign ministers "to study the best way of achieving progress in the matter of political unification",[120] resulting less than a year later in the adoption of the Davignon or Luxembourg Report. This represented the birth of European Political Cooperation (EPC) and instantaneously laid down two of its essential notions. *First*, it was acknowledged that the "[c]urrent developments in the European Communities make it necessary for the Member States to step up their political cooperation" and that "foreign policy concertation should be the object of the first practical endeavours to demonstrate" this vocation to

[115] This aid was increased from USD 581 million for 1958-1962 to USD 800 million under the 1963-1969 Yaoundé Convention (C. O'Malley, 'Some Legal Issues Involved in the Association of the European Economic Community with the African and Malagasy States' (1969) *The Journal of Legal Pluralism and Unofficial Law* 1(1), 66-68).

[116] Sussex University Centre for Contemporary European Studies in association with the Commission of the European Communities London office, 'The European Community and the developing countries' (1969) *European Studies* 5, 3.

[117] Second Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community and annexed documents, signed at Yaoundé, 29.07.1969. The ease with which this Convention was renewed, resulted to a great extent from the fact that development cooperation was at that time often seen as a temporary phenomenon that would soon make itself redundant.

[118] Koutrakos describes how the trauma of the failed EDC experience, which strikingly took a strong integrationist approach on defence at the very genesis of European integration, was so profound that during the next 50 years Member States ensured that any progress in political cooperation was restricted to the softer end of the high politics spectrum (Koutrakos (2013) op.cit. note 91, 5-13).

[119] P. Tsakaloyannis, 'The EC, EPC and the Decline of Bipolarity' in M. Holland (ed), *The Future of European Political Cooperation: Essays on Theory and Practice* (MacMillan Academic and Professional LTD, Houndsmill, 1991) 37.

[120] Final Communiqué, Meeting of EEC Heads of State or Government, The Hague, 01-02.12.1969, para. 15.

the world.[121] The relationship with the Communities thus constituted the *raison d'être* of the EPC. *Second*, contrary to the Fouchet plan's aim of controlling the Communities by superimposing an intergovernmental structure,[122] the report confirms that "the European Communities remain the original nucleus from which European unity has been developed and intensified".[123]

Even though Member States were clearly aware of the potential for EPC-EEC interaction, the Report accorded only one short reference stating that the "Commission will be consulted if the activities of the European Communities are affected by the work of the Ministers".[124] This constituted a first incidence of the famous and contentious 'affect-language' that has ruled Treaty provisions on CFSP/non-CFSP relations from the SEA over Maastricht to Lisbon (cf. *infra*). Remarkably at this stage, affecting the EEC – the assessment of which was left to the discretion of EPC actors – only required Commission consultation, whereas since the SEA this has become a prohibition guarded by the Court. The Luxembourg report established a prudent system of consensual consultation, information exchange, harmonisation and joint action "when it appears feasible and desirable".[125] It contained only the flimsiest backing in terms of guidelines and institutions.[126] The loose wording in the report signalled a game played by political rather than legal rules.[127] This did however not mean that the EPC was entirely noncommittal. The continuous adoption of common positions and declarations formed a sort of "*aquis politique*" providing content to the initially rather empty EPC shell.[128] This *acquis* had a *de facto* binding character as a kind of customary law that "naturally does not envisage any sanctions but which has nevertheless taken on the character of a recognized rule which can be occasionally broken but whose existence one still recognizes".[129]

In the absence of grand design, it was the manner in which the EPC reacted to events that determined its nature and evolution.[130] The evolving customs were successively codified in ministerial reports that were never elevated to Treaty rank but formed a "morally binding non-legal foundation".[131] The

[121] Report by the Foreign Ministers of the Member States on the Problems of Political Unification, Luxembourg, 27.10.1970, para. 10 (hereafter: Luxembourg report).
[122] P.J. Kuijper, 'Fifty Years of EC/EU External Relations: Continuity and the Dialogue Between Judges and Member States as Constitutional Legislators' (2007) *Fordham International Law Journal* 31(6), 1573.
[123] Luxembourg report, Part I, para. 2; The Hague Communiqué, op.cit. note 120, para. 4.
[124] Luxembourg report, Subsection V.
[125] Ibid., Part II.I.
[126] Only a small-scale Political Committee was created to prepare the six-monthly travelling circus of foreign ministers; D. Allen and W. Wallace, 'European Political Cooperation: The Historical and Contemporary Background' in D. Allen, R. Rummel and W. Wessels (eds), *European Political Cooperation* (Institut für Europaische Politik, Bonn, 1982) 21.
[127] M. Lak, 'Interaction between European Political Cooperation and the European Community (external): Existing Rules and Challenges' (1989) *Common Market Law Review* 26(2), 281-282.
[128] Ibid., sic.
[129] H. Simonet (acting Council President), Address to the European Parliament, 15.11.1977 (Proceedings of the European Community, Appendix No. 223); W. Wessels, 'European Political Cooperation: a New Approach to European Foreign Policy' in D. Allen, R. Rummel and W. Wessels (eds), *European Political Cooperation* (Institut für Europaische Politik, Bonn, 1982) 15.
[130] S. Nuttall, *European Political Cooperation* (Oxford University Press, Oxford, 1992) 4.
[131] Lak (1989) op.cit. note 127, 282.

Luxembourg Report was followed in 1973 by a new Copenhagen Report formalising the "constructive and continuing dialogue" that had become a reality.[132] One of the main driving forces behind this progressive adaptation was an early variation of the balancing exercise between the unworkable separation of the EPC and the EC, and the strong sensitivity regarding the intergovernmental nature of the former. While this implied that bridges between them could only be established prudently,[133] it proofed difficult in practice to identify a single EPC topic that did in no way impinge upon EEC matters.[134] This relation between the new-born EPC and the maturing EEC provoked considerable tensions in the early years with national diplomats "at best inclined to treat the Commission with the high courtesy of condescension".[135]

In parallel with this rising experimentation in the field of political, as well as economic, cooperation, the Commission found that also EEC development policy could not "remain as ill-equipped as it is now".[136] This call was quickly, but rather hesitantly, picked up by the EEC Heads of State that held their first-ever debate on development in October 1972. They affirmed their resolve to raise efforts in aid and cooperation, but added that special consideration would be due to "the countries towards whom historically, geographically and through signed commitments the Community has specific obligations".[137] It is therefore not surprising that it took until 1981 before development aid to non-associated states formed the subject of a separate Regulation.[138]

Things evolved quickly in the early 1970s and these advances in the fields of political and development cooperation were brought together in December 1973 in the Declaration on European Identity. With this notable initiative of forward-looking strategic thinking (which could therefore be seen as an early predecessor of the 2003 European Security Strategy) Member States aimed "to achieve a better definition of their relations with other countries and of their responsibilities and the place which they occupy in world affairs".[139] Most importantly in this context, it expressed the need for adequate means

[132] Report by the Foreign Ministers of the Member States on European Political Cooperation in Foreign Policy Matters, Copenhagen, 23.07.1973, Part I (hereafter: Copenhagen report).
[133] J. De Ruyt, *L'Acte Unique Européen* (Ed. de l'Université de Bruxelles, Brussels, 1989) 238.
[134] Already during the first EPC meeting of foreign ministers in Munich, on the issue of the Conference on Security and Cooperation in Europe (CSCE), a Commission delegation was – with considerable reluctance – admitted during the last hour to discuss the economic aspects at stake.
[135] S. Nuttall, 'The Commission: The Struggle for Legitimacy' in C. Hill (ed), *The Actors in Europe's Foreign Policy* (Routledge, London 1996) 130.
[136] Significantly, the Commission for the first time went beyond a purely economic definition of development cooperation and acknowledged that developmental problems would never be fully settled through dismantling tariffs and quotas alone (Commission Memorandum (SEC(71) 2700 final) on a Community Policy for Development Co-operation, 27.07.1971, 17 and 23).
[137] Meeting of EEC Heads of State or Government, the First Summit Conference of the Enlarged Community, Paris, 19-21.10.1972, 21. See further: J. McMahon, *The Development Co-operation Policy of the EC* (Kluwer Law International, London, 1998) 6-8 and 16.
[138] Council Regulation (442/81/EEC) on financial and technical aid to non-associated developing countries, OJ L048/8, 21.02.1981.
[139] Document on the European Identity published by the Nine Foreign Ministers, Copenhagen, 14.12.1973.

of defence to guarantee Europe's security and independence, as well as awareness that "[t]here can be no real peace if the developed countries do not pay more heed to the less favoured nations".[140] However, this unbridled enthusiasm, also present in the commitment to convert Member States' relations "into a European Union before the end of this decade", vanished with the outbreak of the 1973 oil crisis.[141] The following era of Europessimism brought Member States back with both feet on the familiar ground of incrementalism.

The next major evolution for coherence between the EEC and EPC was the formal creation of the European Council at the Paris Summit of 1974. Recognising the need for an overall approach to the internal and external problems facing Europe, the Heads of State or Government decided to formalise their meetings and conduct them simultaneously "in the Council of the Communities and in the context of political cooperation".[142] This made the European Council the first and only level where an overall EPC-EC approach could be formally discussed. While its *raison d'être* thus lay in cohering both strands of European integration, it was immediately added that "[t]hese arrangements do not in any way affect the rules and procedures laid down in the treaties or the provisions on political cooperation in the Luxembourg and Copenhagen reports".[143] This typical language, that has today become one of the trademarks of EU constitutional tinkering, represents another example of the traditional balancing exercise between legally delimiting and practically cohering EPC and Community policies. In practice, however, the European Council held only two significant discussions on EPC[144] and never took a comprehensive approach that embraced both dimensions. In these early years of EPC-EEC interaction it was another provision of the Paris Summit that had most impact, namely the possibility for foreign ministers meeting in the EEC Council to "hold political cooperation meetings at the same time" for the purpose of consistency.[145] This laid the basis for an increased blurring of the artificial distinction between foreign policy and economic issues, which was accompanied by the ever more common practice of Commission participation in EPC discussions.[146]

With the second Yaoundé Convention expiring at the end of 1975, this period also provided the backdrop for negotiations on a new agreement with the associated states. Besides reckoning with the

[140] Ibid., paras 8, 12 and 20.
[141] Paris Summit (1972) op.cit. note 137, 16; Tsakaloyannis (1991) op.cit. note 119, 36.
[142] Communiqué, Meeting of EEC Heads of State or Government, Paris, 09-10.12.1974, paras 2-3.
[143] Ibid.
[144] Namely, in 1980 when adopting the Venice Declaration on the Middle East and in The Hague in 1986 when discussing apartheid in South Africa (further: S. Nuttall, 'Interaction between European Political Cooperation and the European Community' (1987) *Yearbook of European Law* 7, 216-217.
[145] Paris Communiqué (1974) op.cit. note 142, para. 3.
[146] A clear result of this increased flexibility was the granting of EEC extraordinary aid to promote democracy in Portugal in 1975, constituting one of the earliest experimentations with policy conditionality (N. Van Praag, 'Political Cooperation and Southern Europe: Case Studies in Crisis Management' in D. Allen, R. Rummel and W. Wessels (eds), *European Political Cooperation* (Institut für Europaische Politik, Bonn, 1982) 96-97).

enlarged EEC after the 1973 accession of Denmark, Ireland and particularly the United Kingdom with its Commonwealth,[147] this agreement had to reconcile the Member States' desire for "safe-guarding of what has been achieved"[148] with the Commission's push for a broader and deeper Community development policy. Development Commissioner Cheysson noted that "[i]f we are earnest about wanting these countries to develop we must realize that the development aid policies to be pursued will be part and parcel of our general policies and not a separate part of our action".[149] The 1975 Lomé Convention struck the balance mainly in the advantage of Member States. While considerably broader than its predecessors, it stuck to the old friends of aid and trade. Significantly, in the light of the call from developing countries for a New International Economic Order (NIEO), preferences were made non-reciprocal and systems were set up for the stabilisation of export earnings (STABEX) as well as trade promotion. Despite the failure of the Yaoundé Conventions to significantly improve overall trade with the associates and the considerable problems of delayed aid,[150] the Lomé Convention proofed sufficiently attractive to be joined by 21 Commonwealth states and 20 other sub-Saharan African countries, which were now addressed as the 46 African, Caribbean and Pacific states (ACPs).[151]

The Lomé Convention was particularly successful in distancing itself from the discredited colonial past, while simultaneously drawing on traditional ties.[152] On the one hand, Commissioner Cheysson professed that "the Community does not meet the same allergies, the same inhibitions as some of our member countries, if not all, do meet. … we Europeans show clearly that we have decided not to interfere in internal policies, not to make our aid a means of pressure".[153] On the other hand, its apolitical nature became a political strategy of its own to promote this partnership as an alternative to superpower domination. Lister termed this system "welfare neo-colonialism", which essentially boiled down to exchanging assistance for EEC influence.[154] Indeed, contrary to the rhetoric of equality, the parameters of this partnership were set by the EEC. Whereas the exclusion of politics was highly appreciated by the associated partners, the system soon showed its first cracks.[155] In the light of the

[147] The 1972 Brussels Treaty provided that the non-European territories maintaining special relations with the UK could be associated upon a decision of the EEC Council (Article 117 Act Concerning the Conditions of Accession and Adjustment of the Treaties, Brussels, 22.01.1972).
[148] Ibid. Protocol 22.
[149] C. Cheysson, 'Europe and the Third World after Lomé' (1975-1976) *The World Today* 31(6), 232-239.
[150] L. Bartels, 'The Trade and Development Policy of the European Union' (2007) *The European Journal of International Law* 18(4), 726.
[151] ACP-EEC Convention of Lomé, signed at Lomé, 28.02.1975. A number of former UK colonies, particularly in Asia, were considered as too developed to be associated in the Convention. Separate systems of trade preferences were established (M. van Reisen, 'The Enlarged EU and the Developing World: What Future?' in A. Mold (ed), *EU Development Policy in a Changing World: Challenges for the 21st Century* (Amsterdam University Press, Amsterdam, 2007) 42).
[152] M. Lister, *The European Community and the Developing World* (Avebury, Aldershot, 1988), xii.
[153] C. Cheysson, 'The Relationship Between the European Community and Africa', address delivered at the conference 'Europe and Africa: Trends and Relationships', Royal African Society, London, 20.10.1977.
[154] Lister (1988) op.cit. note 152, xii, 58 and 186-189.
[155] D. Frisch, *La Politique de Développement de l'Union Européenne: Un Regard Personnel sur 50 Ans de Coopération Internationale* (European Centre for Development Policy Management, Maastricht, 1988) 19-20.

atrocities committed by the Amin regime of Uganda, the Council saw it necessary to ensure that its assistance "should on no account lead, with respect to the people of that country, to an increase in or prolongation of their being deprived of basic rights".[156] Aid to Uganda was discretely minimised and largely redirected from the government to international NGOs. Before long, these "Uganda Guidelines" were expanded to Equatorial Guinea in a manner that, although overstepping the Lomé mandate, could count on the approval of other ACP states.[157] It was only when the EEC attempted to include a declaration on human rights in the 1979 revision of the Lomé Convention that it came up against a wall of ACP resistance, leading the EEC to quietly back down.[158]

While the EPC thus remained a diplomatic reserve and the formal framework of EEC development cooperation purely economic, the interface between them started to expand in reaction to a growing European sensitivity for human rights. A first attempt to provide the EPC with a Treaty basis and the EPC-EEC interaction with a formalised constitutional bedding was undertaken by the 1975 Tindemans Report on European Union.[159] It appeared more than one step too far for most Member States. Eventually, it took two major international crises – the 1979 Soviet invasion of Afghanistan and the 1980 Iranian hostage crisis – to convince all leaders of the necessity to take a next stride in solidifying the EPC. Besides a number of important procedural changes, the 1981 London Report included several innovations for EPC-EEC relations. *First*, it tasked the Presidency with coordinating Community and political cooperation aspects of relevant subject-matters.[160] *Second*, the Commission's maturing role as a bridging actor was acknowledged by fully associating the latter with the EPC, at all levels.[161] Even though it was not further specified what this implied, the language signalled a willingness to drop the remaining barriers and considerably expand the Commission's role. Particularly the fact that the same Commission representatives attended the Political Committee and COREPER meetings,[162] allowed them to exchange relevant information and implement EC policy with a completer picture in mind. Yet, the delineation of these roles remained ill-defined, requiring considerable tact from Commission representatives and emphasising the complexity resulting from the absence of a single institutional framework.[163] A *final* important novelty of the report was the explicit recognition of the EPC's role

[156] Council Declaration on the situation in Uganda, Hansard, 21.06.1977, para. 2.2.59.
[157] Lister (1988) op.cit. note 152, 197.
[158] Second ACP-EEC Convention, signed at Lomé, 31.10.1979; C.C. Twitchett, *A Framework for Development: The EEC and the ACP* (Allen and Unwin, London, 1981) 127.
[159] L. Tindemans (Prime Minister of Belgium), Report on European Union to the European Council, 29.12.1975.
[160] Report by the Foreign Ministers of the Member States on European Political Cooperation, London, 13.10.1981, para. 12 (hereafter: London Report).
[161] London Report., para 12.
[162] COREPER is the Committee of Permanent Representatives, composed of Member States' ambassadors in Brussels, preparing the work of the Council.
[163] P. De Schoutheete, *La Coopération Politique Européenne* (Nathan, Paris, 1986) 56.

regarding the political aspects of security. Even though Cold War security threats had from the outset been part of EPC discussions, this was never before mentioned so explicitly in a ministerial report.

2.1.3. The Single European Act and the LAT-relation of security and development

The London report provided the EPC with a more solid framework and a clear commitment to lift foreign policy coordination to a higher level. In its wake the EPC started taking an ever more active approach that did not steer clear of any subject of international importance. Also the Community's external posture was continuously boosted through a combination of its increasing economic integration and the CJEU's activity in developing its external competences.[164] Not only did this imply that the EEC had become a bloc of importance that could no longer be disregarded in global affairs, also its separation from the EPC was increasingly untenable. Central and most eye-catching in the amplified intertwining during the 1980s were the increasing linkages between trade and foreign policy. The deepened economic integration meant that Member States could no longer go it alone regarding the export of dual-use goods[165] and the application of economic sanctions. Particularly the latter became part of a rapidly evolving and pragmatic mechanism where political decisions in the EPC were coordinated with and followed by EEC action to restrict or disrupt economic ties with certain regimes.[166]

Contrary to the extensive study of these rising ties between commercial and foreign policy, it is much less known that also EEC development policy and the EPC were increasingly faced with the fact that they could not be truly effective without the other. For one thing, in the midst of the Cold War, even the simple provision of development aid tended to imply a political decision to engage with a certain regime. In this context it became ever more obvious that development policy had political repercussions, and progressively – yet often tacitly – political objectives worked their way through in aid disbursement. Such objectives were increasingly defined in the context of the EPC. This remained however a purely declaratory policy area that was useful in deploring and welcoming developments, but lacked the means to give effect to such statements. In this respect development aid was of particular value as both carrot and stick. First, aid could provide incentives to help and convince partners of taking a certain course. Second, in the light of the limits to the EEC budget, disruptions of

[164] The Court's doctrine of implied powers largely compensated for the absence of much Treaty guidance (for a more detailed account: G. De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, Oxford, 2008) 16-29).
[165] Dual-use goods are products and technologies that can be used for both civilian and military purposes. The difficulty of coming up with a European regime for the regulation of their export led to a considerable stalemate in 1984, to a certain extent halting the *rapprochement* between the EPC and Community (Nuttall (1992) op.cit. note 130, 266).
[166] For an extensive analysis: P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Hart Publishing, Portland, 2001) 49-91.

or restrictions on development ties were even more straightforward. One example of how this drove the EPC and development policy into each other's arms occurred in the context of the Soviet occupation of Afghanistan. EU foreign ministers meeting successively in the EPC and EEC framework on 15 January 1980 adopted an EPC declaration expressing grave concern at the military intervention, followed by a Council decision cancelling the 1979 food aid programme to Afghanistan.[167]

Evidently, this only worked when the EPC and EEC development policy marched to the same tune. In spite of some good examples and few cases of blatant incoherence, the political control of aid has been a permanent source of friction between EPC actors and the Commission.[168] Development experts denounced the pressure being exerted on autonomous Community policies and those responsible for foreign policy lamented the political blindness of development programmes. While such tensions are not specific to European governance and occur in all political systems, the former was unique in the absence of any coping mechanism. Development and foreign policy lacked a strong embracive structure, implying that divergences could not easily be cushioned by any high-level arbitration or policy guidance. Such complexities of fine-tuning the EPC with EEC development (as well as commercial) policy led to intensifying calls for tiding up their legal ties. The loudest call came from the German and Italian foreign ministers Genscher and Colombo, formulating a proposal to set up a European Union and abolish the institutional and procedural demarcation lines between the EC and the EPC. Yet, this proposal aimed "to do too many things at once in too sketchy a way" and resulted in two years of fierce discussions that eventually toned down most of the proposed innovations in the sober Solemn Declaration of 1983.[169]

The first prudent steps across this divide were eventually taken by the third Lomé Convention, which entered the minefield of political dialogue on tiptoes. Contrary to their fierce opposition against any such inclusion in Lomé II, the initial impetus this time came from the ACP side. It was borne out of frustration that the EEC hid behind the Convention's apolitical nature to avoid discussing South Africa's apartheid regime at the May 1982 joint Council of Ministers. In this context, a Nigerian government minister argued that "it is unimaginable for an economic organ like the Lome Convention to exist and function and even be meaningful without political dimensions".[170] The European Commission subsequently proposed to improve the impact of the Convention by better fine-tuning projects with the local context through a dialogue on policies. This would be situated "between the rigid conditionality imposed by financing bodies and the irresponsibility of non-conditionality".[171] Yet, it was

[167] S. Nuttall, 'Annual Survey of European Political Cooperation' (1982) *Yearbook of European Law* 2(1), 253-254.
[168] Nuttall (1992) op.cit. note 130, 267-268.
[169] P. Neville-Jones, 'The Genscher/Colombo Proposals on European Union' (1983) *Common Market Law Review* 20(4), 684; Meeting of EEC Heads of State or Government, *Solemn Declaration on European Union*, Stuttgart, 19.06.1983, 24-29.
[170] As quoted in Lister (1988) op.cit. note 152, 200.
[171] Commission Communication (COM(82) 640 final) Memorandum on Community Development Policy, 5.10.1982, 16.

perceived by ACP partners as too much of an intrusion into their sovereignty, and the issue turned into the most contentious element of the Lomé III negotiations. The EEC was determined to avoid more "cathedrals in the desert"[172] and consensus was finally reached on the establishment of "exchanges of views" aimed at ensuring maximum effectiveness of cooperation schemes.[173] Although no full-blown political dialogue, this constituted a first step towards widening development cooperation beyond its aid and trade-components.

At the June 1985 European Council it was finally agreed to convene an Inter-Governmental Conference (IGC) "to draft a treaty on a common foreign and security policy" and amend the EEC Treaty so as to add new momentum to the European construction process, and in particular the completion of the internal market.[174] Although the mandate thus consisted of working on two separate Treaties, with no explicit mention of tackling their interrelation, all Member States' drafts paid attention to this question.[175] It was only at the eleventh hour that the IGC decided to merge both treaties in a Single European Act, which included the amendments to the EEC Treaty and squeezed the EPC provisions in a single Article 30.[176] Given that the objective of a Union, mentioned as a future aim in the preamble, was not within reach, the singleness in itself constituted a significant achievement. According to Lak it translated "the consensus of all concerned to keep open a future option for a single system".[177] At the same time, the 'Single' European Act could also be seen as a misnomer because the EEC and the EPC remained very much separate. The only element of rapprochement was Article 30(5) SEA entrusting the Presidency and the Commission with the special responsibility for ensuring that the consistency between the Community and EPC was sought and maintained. Member States obtained the addition that each should, in this endeavour, stay "within its own spheres of competence". In this most legal, yet non-judiciable, of SEA provisions on the EPC, this aimed to ensure that the Commission would not acquire additional foreign policy competences.[178]

As "a last-minute political compromise" between the proponents and opponents of including the separately drafted EEC amendments and EPC provisions in the same document, Article 32 SEA was

[172] This was a deprecatory term used to describe the EEC's grotesque infrastructure projects with often short-lived results because they failed to take into account the local context; W. Brown, *The European Union and Africa: The Restructuring of North-South Relations* (I.B. Tauris & Co Ltd, London, 2002) 68-69.
[173] Article 215 Third ACP-EEC Convention, signed at Lomé, 08.12.1984.
[174] Presidency Conclusions, European Council, Milan, 28-29.06.1985, para. 1.2.1.
[175] Lak (1989) op.cit. note 127, 288-290.
[176] Single European Act, Luxembourg, OJ L169, 28.02.1986. This last minute merger is clear from the repeated references to "High Contracting Parties" – reminding of a classic international treaty – instead of "Member States" in Article 30; E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, Oxford, 2002) 43.
[177] Lak (1989) op.cit. note 127, 289-290. However, proposals for a review of the SEA provisions after five years to consider further rapprochement to the Communities were rejected by the IGC.
[178] Nuttall (1987) op.cit. note 144, 214.

added.[179] It stated that "nothing in this Act shall affect the Treaties establishing the European Communities". Article 31 SEA assigned the Court of Justice – despite its complete exclusion from EPC matters – as ultimate border guard. This served to guarantee that the new EPC provisions would not, in the sense of the *lex posterior derogat legi priori* rule of customary international law, be interpreted as derogating from or amending the older EEC Treaty.[180] It could at that stage hardly be foreseen how much these few sentences would in the following decades occupy legal and academic scrutiny aimed at entangling the nature of the EU's legal order.

The SEA's main relevance for the EPC consisted of codifying 15 years of pragmatism. This did however not come with a major substantive upgrade and the EPC remained without clear tasks and objectives. In remarkably noncommittal language the contracting parties purported to "inform and consult each other on any foreign policy matters of general interest".[181] National sovereignty was in no way ceded and in the words of Nuttall this boiled down to a commitment, unusual in a legal instrument, "to endeavour but not necessarily to succeed".[182] The most important novelty was institutional and concerned the creation of a Secretariat, based in Brussels and tasked to assist the Presidency in the preparation, implementation and administration of EPC matters.[183] This made an end to "[t]he fact that EPC archives had to be carried halfway across Europe in a suitcase"[184] and provided for much-needed "continuity and consistency beyond the debilitating rhythm of six-months Presidencies".[185] A subsequent Ministerial Decision added a second task for the EPC Secretariat, namely that of assisting the Presidency in ensuring consistency with Community provisions.[186] This indicates that Member States foresaw a considerable workload resulting from this new duty. The practical impact of the SEA on EPC-EEC relations should in any case not be overrated. Its main value lies in the traces it has left on the further development of the EU legal order by anchoring the legal fragmentation of its external action system, combined with a political quest for coherence.[187] In the framework of the SEA, EPC and EEC policies were living apart together: legally separate, but increasingly seen as "twin pillars of a European identity".[188]

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[179] B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Routledge, Abingdon, 2012), 147-148 and 27.
[180] E. Pache, 'Art. M EUV' in E. Grabitz and M. Hilf (eds), *Das Recht der Europaïschen Union* (Beck'sche Verlagsbuchhandlung, Munich, 1999) para. 22.
[181] Article 30(2)(a) SEA.
[182] Nuttall (1992) op.cit. note 130, 253; see also: R. Dehousse and J.H.H. Weiler, 'EPC and the Single Act: from Soft Law to Hard Law' in M. Holland (ed), *The Future of European Political Cooperation: Essays on Theory and Practice* (Macmillan Academic and Professional LTD, Houndmills, 1991) 137.
[183] Article 30(10)(g) SEA.
[184] Nuttall (1992) op.cit. note 130, 20.
[185] Lak (1989) op.cit. note 127, 293.
[186] Decision of the Foreign Ministers, meeting in the Framework of the EPC on the occasion of the signing of the SEA, 28.02.1986, Title III.
[187] Van Vooren (2012) op.cit. note 179, 18.
[188] Nuttall (1987) op.cit. note 144, 211.

A conspicuous absentee in the SEA was development cooperation. In the light of the Community's ever-growing engagement and the repeated calls for setting up an outright policy, it is mind-blowing that the opportunity was not taken to finally grant it a basis in law. This did however not stop development cooperation and the EPC from poaching into each other's territory. Ethiopia was one of the places where this became most obvious by the diametrical collision of geostrategic interests, political apathy regarding the Marxist and atrocious Derg regime and the humanitarian concerns about its starving population. This incited a prudent yet authoritative statement on Ethiopia and the Horn of Africa in July 1986. Foreign Ministers simultaneously confirmed the EEC aid programme and warned to pay a close eye to the human rights situation, leaving the door open for aid conditionality.[189] At this same meeting, the EPC and EEC adopted a Declaration on Human Rights, which constituted their first ever joint statement. In clear terms they affirmed that "in the administration of aid the European Community and its Member States will continue to promote fundamental rights", without which lasting peace and security are unattainable.[190]

2.2. The Maastricht era: the integrated but separate legal orders of CFSP and development cooperation

The entry into force of the Maastricht Treaty at the end of 1993 represented a significant constitutional landmark heralding the start of a new era for European integration. It meant the creation of the European Union based on three loosely connected pillars. The first encapsulated the three existing Communities and represented European cooperation in its most integrated form.[191] Codifying its expansion beyond mere economic issues, the EEC was rechristened as European Community (EC). To this core the Treaty added two intergovernmental pillars: the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA). The Treaty of Maastricht also marked the first formal recognition of a European development policy, at last providing it with an authoritative legal source besides the geographically-biased ACP Conventions.

In a first part the new constitutional era set in motion by the Maastricht Treaty will be analysed (2.2.1.). Besides a new legal bedding for the interaction between development and security policies, this provided both areas with a broader scope and focus, thereby increasing chances of overlap and interaction. A second part will explain how the inherently unfinished nature of this reform exercise, as well as rapid geopolitical changes, required further constitutional engineering (2.2.2.). In addition to

[189] Statement of the Foreign Ministers, meeting in the context of the EPC, on Ethiopia and the Horn of Africa, Brussels, 21.07.1986.
[190] Declaration of the Foreign Ministers on Human Rights, Brussels, 21.07.1986.
[191] The European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom) and the European Economic Community (EEC).

the reform exercises of Amsterdam and Nice, the fundamentals of EU development policy underwent significant transformations, determinatively leaving behind past attempts to stay clear of politics.

2.2.1. Security and development firmly encapsulated in two separate pillars

This section will first elaborate on the internal and external stimuli that incited the Maastricht Treaty changes. This will be followed by an exposition of the first ever Treaty bases for development cooperation and CFSP. A final subsection will then shed light on the complex tangle of constitutional push and pull factors regulating the relationship between both revamped competences.

The route towards the pillar structure

As with most of the EU's leaps towards closer integration, the context in which the Maastricht Treaty saw the light of day was one of "good crises"[192] pushing Member States towards action. This was mainly incited by the changes in the Eastern bloc under the leadership of Mikhail Gorbachev. Significantly, the European reaction took off much quicker in the EEC framework compared to the very cautious EPC attitude.[193] In 1988, while foreign ministers were still busy "paying close attention to the developments currently taking place in the Soviet Union and Eastern Europe",[194] the EEC adopted a first ever joint declaration with COMECON (Council for Mutual Economic Assistance) on the establishment of official relations.[195] This was soon followed by EEC trade and cooperation agreements with Hungary and Czechoslovakia.

The abrupt fall of the Iron Curtain in 1989 provoked wide-ranging challenges and opportunities that were as much economic as political, as much foreign as domestic, requiring responses from both the EPC and the EEC that did not stop at the demarcation between them. This prompted the 1989 European Council to affirm "the full validity of the comprehensive approach integrating political, economic and cooperation aspects" in relations with countries of central and Eastern Europe.[196] The relevance of the EPC format was struck another important blow when a group of 24 Western states charged the Commission to coordinate their economic assistance to central and Eastern European countries under the major PHARE programme. This included the inherently political task of attaching and checking conditionality provisions. In the light of the ever more obvious inadequacy of the existing machinery, the European Council decided in June 1990 – when the preparations for the IGC on economic and monetary Union were already in full swing – to convene a second IGC on political

[192] "Never let a good crisis go to waste" is a famous quote from Winston Churchill.
[193] S. Nuttall, *European Foreign Policy* (Oxford University Press, Oxford, 2000) 34-36.
[194] Statement of the Foreign Ministers, meeting in the Framework of the EPC, concerning East-West Relations, 13.06.1988.
[195] Joint Declaration on the Establishment of Official Relations between the European Economic Community and the Council for Mutual Economic Assistance, 25.06.1988.
[196] Presidency Conclusions, European Council, Madrid, 26-27.06.1989, 10.

Union.[197] The urgency of this exercise was only further underlined by Europe's indecisiveness following Iraq's invasion of Kuwait and the outbreak of war in Yugoslavia in the early 1990s.

In the midst of these turbulent years, EEC Member States also had to negotiate a new Convention with the ACP group of states, to be signed by the end of 1989. Too early to fully grasp the impact of the relentless downfall of communism, Lomé IV nonetheless provided a first indication of the new direction European development policy would take. For one thing, in the new multipolar world, it suddenly came within the EEC's reach to realise its longstanding ambition of becoming a significant international actor. Its considerable flows of development aid could evidently help to open doors in this undertaking. Second, "the end of the cold war exposed the previously unspoken disquiet about the value and effectiveness of aid given to undemocratic and corrupt regimes". This cleared the way for intensified political interference under Lomé IV.[198] The most drastic innovation in this regard was the inclusion of funds earmarked to support the World Bank's Structural Adjustment Programmes (SAPs).[199] This went directly against the critical stance the EC had previously taken regarding this neoliberalist-inspired conditionality mechanism. The EEC's move was criticised as a radical departure "from partnership to paternalism".[200] In spite of this, Lomé remained the only existing framework for interregional North-South cooperation based (although more rhetorically than effectively) on the pioneering model of equality and mutual respect. The magnetism of this model was clearly illustrated by the fact that not a single ACP state left the Convention and its membership even expanded from 46 in Lomé I to 69 states in Lomé IV.

Against the backdrop of collapsing regimes and rising intra-state tensions across the globe, the Rome European Council of December 1990 stressed "the vocation of the Union to deal with aspects of foreign and security policy, in accordance with a sustained evolutive process and in a unitary manner".[201] Yet, time was ticking and many essential questions were still to be answered before the Maastricht Treaty would finally be signed on 7 February 1992: what substance, objectives and means would be given to the still empty vessel of the CFSP, how would this new policy relate to the existing Communities, and whether and how should cooperation on defence be included? In March 1991 the Commission undertook a first attempt and proposed a far-reaching overhaul of the existing external relations system. Departing from the conviction that "it is not possible to affirm the identity of the Union and the consistency of its international personality simply by adding a foreign and security policy to existing policies", it proposed a truly common foreign policy based on majority voting, close involvement of

[197] Presidency Conclusions, European Council, Dublin, 25-26.06.1990, para. 1.
[198] P. Burnell, *Foreign Aid in a Changing World* (Open University Press, Buckingham, 1997) 190-191.
[199] Fourth ACP-EEC Convention, signed at Lomé, 15.12.1989, Section 3.
[200] A. Oyewumi, 'The Lomé Convention: From Partnership to Paternalism' (1991) *The Round Table: the Commonwealth Journal of International Affairs* 318, 136.
[201] Presidency Conclusions, European Council, Rome 14-15.12.1990.

the Commission and the Parliament and the absorption of the Community by the Union.[202] Such proposals went much too far for Member States and eventually backfired on the Commission that remained on the side-lines of further discussions.

Despite fierce criticism,[203] the separation of the CFSP was eventually casted in the concrete of the Maastricht pillar structure. Even though this metaphor[204] did not make its way into the Treaty, it has become so much engrained in the practice and analysis of the EU that observers are still struggling with a loss for words after its formal abolishment by the Lisbon Treaty. Around the "altar" of the existing Communities, the two intergovernmental pillars of the CFSP and JHA were erected, with as main attachment "a loose, tarpaulin-like structure … under the heading of an undefined 'European Union'", lacking legal personality.[205] While acknowledging that foreign policy is an essential building block of European integration, this peculiar structure served to restrict the prerogatives of the Commission, Parliament and Court, and delimitate the CFSP as unequivocally alien to EC's autonomous legal order.[206] In this manner Member States could reap the benefits of scale and impact that go along with European cooperation without giving up their painstakingly guarded sovereignty.

The long-awaited legal bases for development cooperation and security policy

The Treaty of Maastricht signalled the formal start of EU development and security cooperation. In a separate Title XVII of the Treaty establishing a European Community (TEC) development cooperation was charged with very broad objectives, namely to 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.[207]

[202] European Commission proposal on common external policy, reproduced in R. Corbett, *The Treaty of Maastricht - From Conception to Ratification: A Comprehensive Guide* (Longman, Essex, 1993) 218-229.
[203] The Belgian Chamber of Representatives firmly rejected the tripartite structure (Resolution on the Intergovernmental Conferences on European Political Union and Economic and Monetary Union, 27.06.1991, reproduced in Ibid., 321-323) and former Commission President Delors denounced it as "organized schizophrenia" (C. Goldsmith, 'Delors calls latest EC plan 'crippling'', *International Herald Tribune*, 21.11.1991).
[204] The pillar metaphor was proposed by French representative Pierre de Bossieu in the course of the IGC (A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Routledge, London, 1999) 449-450); J. Cloos, et al., *Le Traité de Maastricht: Genèse, Analyse, Commentaires* (Brussels, Bruylant, 1993) 466).
[205] D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) *Common Market Law Review* 30(1), 23.
[206] As established in Case C-26/62, *Van Gend en Loos v Administratie der Belastingen,* ECLI:EU:C:1963:1.
[207] Article 130u (1) Maastricht TEC (ex Article 177(1) TEC).

Moreover, in November 1991 Member States had adopted a resolution formally putting forth the observance of human rights and democracy as an essential element of development programming.[208] This was consolidated in Article 130u(2) (*ex* Article 177(2)) TEC affirming that Community development 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 implementation of these objectives, by means of multiannual programmes and international agreements, was guided by the baselines of cooperation, coordination and coherence. The Treaty provisions on these 3 C's signalled both their importance for the future of EU development cooperation and the inadequacy of previous policy frameworks.[209] First, EC development policy was now explicitly established as a non-pre-emptive shared competence that was to be "complementary to the policies pursued by the Member States".[210] This bias towards action aimed to augment total development resources and European impact. Second, the coordination between EC and Member States aid programmes was established in Article 130x (ex Article 180) TEC, which also provided for the possibility of joint EC-Member State action. Finally, Article 130v TEC (ex Article 178 TEC) included an innovative mainstreaming clause to enhance coherence, obliging the Community to take account of development objectives in other policies that are likely to affect developing countries. The objectives of EU development policy were to be realised through multiannual programmes as well as by the European Investment Bank (EIB). These provisions were however not to "affect co-operation with the African, Caribbean and Pacific countries in the framework of the ACP-EEC Convention". This curiously worded exception did not mean that the new Treaty framework was not applicable to the largest group of developing countries. It rather aimed to safeguard the specific status of the EDF, as external to the Community budget.[211] Nonetheless, rooting this exception in primary law was all but beneficial for developing a truly global and coherent development policy.[212]

The area of political cooperation also underwent a major transformation. The ad hoc and informal travelling cooperation and consultation were turned into a more systematic policy with pre-defined objectives, with legal instruments and commitments, a firm foot in the Brussels-based EU machinery

[208] Resolution of the Council and of the Member States meeting in the Council, on Human Rights, Democracy, and Development, 28.11.1991, 122.
[209] Holland (2002) op.cit. note 102, 118.
[210] Article 130u(1) Maastricht TEC; see also Article 130y (ex Article 181) TEC. The previous lack of a Treaty basis for development cooperation had led to confusion regarding the nature of this competence. Months before the entry into force of the Maastricht Treaty, the Court confirmed its complementary nature in Joined Cases C-181/91 and C-248/91, *Parliament v Council and Commission (Bangladesh)*, ECLI:EU:C:1993:271; and Case C-316/91, *Parliament v Council (EDF)*, ECLI:EU:C:1994:76.
[211] B. Martenczuk, 'Cooperation with Developing and Other Third Countries: Elements of a Community Foreign Policy' in S. Griller and B. Weidel (eds), *External Economic Relations and Foreign Policy in the European Union* (Springer, Vienna, 2002) 397-398.
[212] The same holds true for the colonial-era provisions on associating OCTs, which were simply copy-pasted into the new Treaty. This meant a lost opportunity for aligning objectives.

and the seeds of a common defence policy. *First*, contrary to the prudent SEA language, it was determinatively stated that "[t]he Union and its Member States shall define and implement a common foreign and security policy, governed by the provisions of this Title and covering all areas of foreign and security policy".[213] This seemingly unlimited and "strikingly tautological" [214] scope was narrowed down in three main ways:[215] vertically, because Member States kept a firm hand on the CFSP steering wheel driven by unanimity;[216] horizontally, by means of the delimitation clause of Article M (*ex* Article 47) TEU, which will be discussed below; and substantively, through the objectives set out in the five following indents of Article J.1(2) (*ex* Article 11(1)) TEU:

- to safeguard the common values, fundamental interests and independence of the Union;
- to strengthen the security of the Union and its Member States in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter;
- to promote international co-operation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

Albeit still very broad, these objectives indicated that the CFSP covered the foreign policy of the Union "in a limited and specific sense, namely the political, security and defence aspects of external relations, as distinct from their economic and social aspects".[217] Several authors pointed to the exceptional nature of CFSP competence that was "defined in purely functional terms"[218] and "characterized by an absence of the technique of detailed and specific attribution of competences".[219] Yet, their formulation is not so different from the Treaty objectives for development cooperation. The lack of a foreordained material content rather appears to be linked to external policy as such. Notably, reading the CFSP's final aim of developing and consolidating human rights and democracy along the earlier mentioned Article 130u(2) TEC, reveals that the Maastricht Treaty (willingly or unwillingly) provided a first glimpse

[213] Article J.1(1) Maastricht TEU.
[214] 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) 215.
[215] Wessel (1999) op.cit. note 91, 73.
[216] The Treaty included some exceptions allowing Qualified Majority Voting (QMV) for implementing measures (Article J.3(2) TEU). Commission President Delors criticised these exceptions as a "procedural nightmare" (Goldsmith (1991) op.cit. note 203).
[217] 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) 75.
[218] Cannizzaro (2007) op.cit. note 214.
[219] De Baere (2008) op.cit. note 164, 101.

of the close connection – or rather overlap and impossible separation – of security and development competences.

Second, the new Title V on CFSP set out a more legalised form of cooperation based on the principles and general guidelines defined by the European Council. From the SEA the new Treaty took the instruments of joint actions and common positions, unfortunately without grasping the opportunity to better explain their scope and nature. The subsequent political decision to publish these CFSP instruments in the EU's Official Journal was therefore key, as it confirmed their affinity to EC law. To these instruments the Treaty added the systematic co-operation between Member States, requiring them – in clear language – to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity [and] refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations".[220]

Thirdly and crucially, the EU was accorded a single institutional framework (cf. *infra*).[221] This meant that it was no longer a meeting of foreign ministers but the EU Council that set the course of the CFSP. As a direct consequence, the EPC Secretariat was included in the Council's General Secretariat. This unequivocally rendered the CFSP part and parcel of the Brussels-based EU machinery and laid the basis for what would become an extensive foreign policy apparatus within the Council.

Finally, in very cautious terms Article J.4 included "the eventual framing of a common defence policy, which might in time lead to a common defence". It assigned the Western European Union (WEU) to elaborate and implement EU decisions and actions with defence implications.[222] The main relevance of these highly conditional provisions lay in the fact that they were for the first time included in primary law.[223]

The Treaty of Maastricht took political cooperation to a new level,[224] but could not meet the high expectations that were raised by the new denomination of a *Common* Foreign and Security Policy. In fact, by explicit design the CFSP does not share the precision, regulatory nature and enforceable rights and obligations with the EU's other common policies.[225] Also on the level of decision-making the CFSP

[220] Article J.1(3)-(4) Maastricht TEU (*ex* Article 11(2) TEU, current Article 24(3) TEU).
[221] Article C (ex Article 3) TEU.
[222] The WEU was founded in 1948 to implement the Brussels Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence. It did not include all E(E)C Member States: Greece joined in 1995, Ireland and Denmark were observer countries.
[223] E. Remacle, 'La Politique Etrangère et de Sécurité Commune de l'Union Européenne après Maastricht' in M. Telò (ed), *Vers une Nouvelle Europe?* (Ed. de l'Université de Bruxelles, Brussels, 1992) 242.
[224] De Schoutheete de Tervarent does not agree and finds that "the Treaty, while innovative in many other fields, such as Monetary Union or legislative co-decision, brings few changes to the field of foreign policy" (P. de Schoutheete de Tervarent, 'The Creation of the Common Foreign and Security Policy' in E. Regelsberger, P. de Schoutheete de Tervarent and W. Wessels (eds), *Foreign Policy of the European Union: From EPC to CFSP and Beyond* (London, Lynne Rienner, 1997) 61).
[225] S. Keukeleire, *Het Buitenlands Beleid van de Europese Unie* (Kluwer, Deventer, 1998) 154.

scene was established completely different, with the European Council and the Council as leading characters, the European Parliament in a consultative role, the Court excluded and the Commission to remain 'fully associated'. The exact meaning of that last phrase was again left to the common discretion of Member States. Problematically however, the CFSP was not equipped with the means or framework that would allow it to fulfil its essential goal, namely "to assert [the Union's] identity on the international scene".[226] The creation of this new Union policy was not accompanied by a commensurate expansion of tools and staff to move beyond a policy of declarations towards genuine operationability. Moreover, the Treaty did not provide for a CFSP budget. Administrative expenditure was to be charged to the EC budget, and with regard to operational costs the Council was left with a time-consuming choice to charge it either to Member States or the EC, on whose generosity it was thus made dependent.[227]

An intricate tangle of constitutional push and pull factors

The TEU connected the legal orders underlying the policies of development and CFSP in particularly complicated ways, based on a tangle of push and pull factors which have occupied and confused legal scholars ever since. Read in isolation, references to the EC-CFSP relationship may create false impressions, and it is essential to understand them in a holistic manner.

The loudest call for consistency (or coherence)[228] was included in Article C (*ex* Article 3) TEU stating that 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". This Herculean assignment was entrusted to the Council (no longer merely the Presidency) and the Commission, yet without practical guidelines, mechanisms to regulate disagreement or a possibility of legal enforcement before the Court. The central Treaty vehicle for ensuring consistency was the creation of the single institutional framework. This did not merely imply that CFSP and EC institutions were from now on legally required to interact, but essentially that the same institutions would act in both frameworks, applying variable rules and procedures.[229] Certain authors were rather sceptic and called

[226] Article B (*ex* Article 2) TEU.
[227] Article J.11 TEU.
[228] Whereas consistency is the term used in the English version of the Treaties, other language versions refer to 'coherence'. Both concepts are however not interchangeable. Consistency is generally referred to as a static notion aimed at avoiding contradictions (negative obligations), while coherence is more dynamic and is directed at building synergies (positive obligations). Taking into account the reality that most language versions refer to the dynamic notion of coherence and based on a functional interpretation of the Treaties, there is a consensus in literature that the requirement of 'consistency' foreseen in the English version entails more than avoiding contradictions and presupposes a quest for synergy between the different actions of the Union. In line with the Treaties, this dissertation will consequently use the word consistency in its broadest sense. See further: C. Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in M. Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press, Oxford, 2008) 12-16.
[229] Koutrakos (2001) op.cit. note 166, 35-36.

it for instance more of "an institutional 'géometrie variable' than a single framework".[230] Curtin goes as far as depicting it "mere lip-service to an ideal [as i]t is single only in the sense that the intergovernmental pillars do not have institutions of their own", only EC institutions generously put at their disposal.[231]

Another key factor in this regard is the preservation of the *acquis communautaire*. It was established in Article B (*ex* Article 2) TEU as a central objective which the Union shall maintain in full and "build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community". The vanguard of its protection was Article M (*ex* Article 47) TEU:

> *Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.*

This phrase, which clearly built upon Article 32 SEA, became one of the most thoroughly dissected and discussed provisions in EU external relations law. At first sight this "Chinese wall",[232] seeking to avoid intrusion of the Community by the intergovernmental pillars, appears to stand in contrast with the requirement of consistency. Yet, it can also be seen as a specific expression hereof, aimed at avoiding policy contradictions under the supervision of the Court.[233] In line with the above interpretation of Article 32 SEA, Herrmann convincingly argues that Member States, by virtue of *ex* Article 47 TEU, waived "their right to transfer competences to the EU which they had – even non-exclusively – already transferred to the EC".[234] It was a logical counterbalance to the broad functional scope of the CFSP that would otherwise provide Member States an escape route for their obligations under the EC framework. This is in line with the "vocation communautaire"[235] established in Article A (*ex* Article 1 TEU) stating that "[t]he Union shall be founded on the European Communities, supplemented by the policies and forms of co-operation established by this Treaty".

Taken together these references to the EC-CFSP relationship expressed a balance or a tension – the views differ – between the duty of consistency and the protection of the evolving *acquis*

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[230] Editorial, 'Post-Maastricht' (1992) *Common Market Law Review* 29(2), 202.
[231] Curtin (1993) op.cit. note 205, 28.
[232] Kuijper (2007) op.cit. note 122, 1574.
[233] Article L Maastricht TEU, *ex* Article 46 TEU.
[234] Herrmann (2008) op.cit. note 97, 41.
[235] B. Weidel, 'Regulation or Common Position - The Impact of the Pillar Construction on the Union's External Policy' in S. Griller and B. Weidel (eds), *External Economic Relations and Foreign Policy in the European Union* (Springer, Vienna, 2002) 36.

communautaire. On the one hand, Koutrakos notes that these provisions "flesh out the idea that the Community legal framework and the CFSP operate on the basis of a symbiotic relationship".[236] Eeckhout, on the other hand, submits that the CFSP supplementing the TEC with a less integrated policy, while nonetheless covering all areas of foreign and security policy, constitutes the "original sin of overall EU external action".[237]

The ambiguous interpretation of these provisions caused considerable confusion regarding the nature of the Union and its pillars. Particularly in the early days, this gave rise to a vehement, and often philosophical, debate between diametrically opposed camps speaking out either for the complete separation of the Union from the Community or the full absorption of the Communities in the single organisation of the Union.[238] The edges of these extremes were gradually taken off with scholars conjuring up various denominations and metaphors in trying to grasp the complex reality of this new Union: from a "*Staatenverbund*" [239] (or an alliance of states) over a "Greek temple" or a "French Gothic Cathedral"[240], to a "Russian doll" or "layered international organisation".[241] With the hindsight of time it is clear today that the initial bogey of a "Europe of bits and pieces" did not materialise.[242] The EU's pillars, while governed by inherently distinct policy regimes, were characterised more by their relation to the overall system of the Union, than by their mutual seclusion as isolated entities. That this was a complex reality to grasp is most clearly illustrated by the General Court that accurately, yet paradoxically, reverted to a *contradictio in terminis* to describe "the coexistence of Union and Community as integrated but separate legal orders".[243] This chasm is further reflected in the fact that the Maastricht Treaty foresaw a single procedure for accession and amendment, while nonetheless requiring an explicit bridge – *nota bene* the only one – to link the CFSP with EC trade policy for imposing sanctions on third countries.[244]

The Union's muddled constitutional design has unsurprisingly continued to attract fundamental criticism. Particularly the pillar structure has been described as an excessively intricate and formalistic

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[236] Koutrakos (2001) op.cit. note 166, 35. See also: De Baere (2008) op.cit. note 164, 298; Curtin and Dekker (2011) op.cit. note 97, 174.
[237] Eeckhout (2011) op.cit. note 113, 172.
[238] See respectively M. Pechstein and C. Koenig, *Die Europäische Union* (Mohr Siebeck, Tübingen, 2000) 36-52; and A. von Bogdandy, 'The Legal Case for Unity: the European Union as a Single Organization with a Single Legal System' (1999) *Common Market Law Review* 36(5), 887-910. Further on this debate: Wessel (2009) op.cit. note 97, 118.
[239] Bundesverfassungsgericht, *Maastricht case* [1993] 89, 155, 12.10.1993, Part C.
[240] B. de Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?' in T. Heukels, N. Blokker and M. Brus (eds), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law International, The Hague, 1998) 51-67.
[241] D. Curtin and I. Dekker, 'The EU as a "layered" international organization: Institutional Unity in Disguise' in P. Craig and G. de Bùrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999) 101.
[242] Compare in this regard Curtin (1993) op.cit. note 205, 17-69; and Curtin and Dekker (2011) op.cit. note 97, 155.
[243] Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:T:2005:331, para 156 and Case T-315/01, *Kadi v Council and Commission*, ECLI:EU:T:2005:332, para 120.
[244] Respectively Articles N and O Maastricht (*ex* Articles 48 and 49) TEU and Article 228a Maastricht (*ex* Article 301) TEC.

straightjacket that cannot be rhymed with the interconnected reality of everyday life.[245] Curtin bluntly called this a case of "bricoleur's amateurism"[246] and De Baere concluded to "inherent constitutional messiness" resulting in a political system were the division of competences always prevailed over considerations of effectiveness.[247] Yet, both the fog that hangs over this debate and the fragmentation of the Union's external action system are no *accident de parcours* but a determined choice of the Treaty's architects. The choice for fragmentation resulted from a meticulous attempt to enshrine the delicate balance between sovereignty and effectiveness in the Treaty framework. The choice for vagueness avoided setting the EU's constitutional nature in stone, so as to keep all options on the table and avoid pushing the EU in an unmanageable direction. This implied that the European Union was per definition an unfinished project and it is therefore not surprising that further constitutional engineering would soon be underway. Indeed, Article N TEU called to convene an IGC in 1996 to examine the need for revising the new TEU so that it maintains in full the *acquis communautaire* and for improving the provisions on foreign, security and defence policy.

2.2.2. Prolonged (constitutional) engineering: the Amsterdam and Nice Treaties

The Amsterdam Treaty: what it did and did not do

Scarcely had the ink of the Maastricht Treaty dried when the June 1994 European Council called the Westendorp Reflection Group in motion for preparing the approaching IGC. In familiar language the latter drew up a report expressing a strong commitment to guarantee a single European voice in external policy.[248] Despite a broad foundation in the Maastricht Treaty, the CFSP had failed to take off, mainly due to its lack of an operational arm. Ironically, while it was created partly in reaction to the EU's impotence in the Balkans, the EU still reverted to the TEC flexibility clause to tackle instability in this region.[249] A consensus for further constitutional reform soon emerged, but those who had insisted on the insertion of Article N in the Maastricht Treaty in order to efface the CFSP-EC divide, slinked off empty-handed.

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[245] F. Jacobs, 'The Lisbon Treaty and the Court of Justice' in A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law after Lisbon* (Oxford University Press, Oxford, 2012) 202; R. Torrent, 'The "Fourth Pillar" of the European Union after the Amsterdam Treaty' in A. Dashwood and C. Hillion (eds), *The General Law of E.C. External Relations* (Sweet & Maxwell, London, 2000) 234.
[246] Curtin (1993) op.cit. note 205, 22-24.
[247] De Baere (2008) op.cit. note 164, 303 and 10.
[248] Presidency Conclusions, European Council, Corfu, 24-25.06.1994; Reflection Group for the 1995 Intergovernmental Conference (SN 520/95 (REFLEX 21)) *A Strategy for Europe*, Brussels, 05.12.1995 (Westendorp Report).
[249] De Boisseu highlighted the legal questionability of such measures as follows: "if you can explain how assistance to the provisional administration in Kosovo is necessary for the realisation of the internal market, I wish you luck!" (P. De Boissieu, Oral Contribution to the Convention on Foreign Policy and External Relations: CFSP Financing, 15.10.2002; Quoted in D. Spence, 'The Commission and the Common Foreign and Security Policy' in D. Spence (ed), *The European Commission* (John Harper, London 2006) 362).

The Treaty of Amsterdam, which entered into force on 1 May 1999, kept up the much-maligned pillar structure in all its splendour. Arguably therefore, the amended Treaty was more relevant for what it did not, than for what it did do. In particular, it meant the definitive abandonment of hope that the division between EC external competences and the CFSP could be regarded as a temporary construction.[250] This division was only indirectly tackled through a number of changes serving to slightly tone down the CFSP's separate status. Some were textual and presented symbolical expressions of the Treaty drafters' joint commitment. For one thing, *ex* Article 3 in the new TEU[251] not only required the Commission and the Council to ensure the consistency of the Union's external relations, security, economic and development policies, but also to "cooperate to this end". Beyond symbolism, this has been interpreted as an extension of the duty of sincere cooperation between EU Institutions[252] to EU external action as a whole, including the CFSP.[253] Second, *ex* Article 11 TEU made the definition and implementation of the CFSP the sole responsibility of the Union, instead of the earlier reference to the 'Union and its Member States'. This indicated that Member States do not have an identity separate from the Union when acting under Title V TEU, latently stressing that the CFSP should not be seen as purely intergovernmental. In this same line, a number of new possibilities for QMV were introduced in *ex* Article 23(2) TEU.[254]

Most importantly, the Amsterdam Treaty gave the CFSP a much-needed operational servicing that allowed this policy to finally take off. This consisted of a number of improvements to its instruments, institutions and financing. *First*, the CFSP's instruments were rationalised and expanded. *Ex* Article 12 TEU inserted a clear listing, while subsequent provisions provided some useful – albeit still vague – clarifications on their nature and scope. The second pillar was moreover accorded Treaty-making powers,[255] as a concession from those Member States that were reluctant to grant the EU legal personality. Despite this prudence, these new powers played a central role in enhancing the global

[250] Dashwood (1998) op.cit. note 253, 1019-1020.
[251] The Amsterdam Treaty renumbered the TEU and TEC articles.
[252] While *ex* Article 5 EC only imposed such a duty upon Member States, the Court had already established by way of analogy that "inter-institutional dialogue […] is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions" (Case C-204/86, *Greece v Council,* ECLI:EU:C:1988:450, para. 16; Case C-65/93, *Parliament v Council,* ECLI:EU:C:1995:91, para. 23).
[253] A. Dashwood, 'External Relations Provisions of the Amsterdam Treaty' (1998) *Common Market Law Review* 35(5), 1028.
[254] In yet another compromise between efficiency and national interest, this new potential was compensated with the possibility for each Member States to step on the brake if it could demonstrate "important and stated reasons of national policy". Incongruously, this implied that a vote by qualified majority could only be taken if all Member States agreed to be bound by it. One important exception to this rule was the possibility of constructive abstention. This implied that a Member State could submit a formal declaration to abstain from a vote, in which case it would not be obliged to apply the decision, but would accept that it commits the Union (*ex* Article 23(1) TEU). These new procedural provisions risked to significantly complicate the decision-making process, but were in fact rarely used.
[255] *Ex* Article 24 TEU.

impact, visibility and recognition of the CFSP, in turn contributing to and presenting Member States with the "fait accompli" of the Union's implied legal personality.[256]

Second, on the institutional level the Amsterdam Treaty presented two innovations that have strongly impacted on the CFSP's development. First, it introduced the function of High Representative for the CFSP. This was designed to "reconcile respect for sovereignty of States with the need for diplomatic and financial solidarity".[257] The CFSP High Representative was simultaneously made Secretary-General of the Council, among others to ensure that this figure would remain "a high-ranking civil servant rather than a political personality".[258] The Treaty prescribed that the High Representative should assist the Presidency and the Council in CFSP matters, "in particular through contributing to the formulation, preparation and implementation of policy decisions, and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties".[259] As put by a former Council Director General for External Relations this made the High Representative in essence the "servant" of the Council.[260] However, in the thick of the Kosovo war unfolding at the EU's borders, the June 1999 Cologne European Council nonetheless opted for a top-level political personality by appointing former NATO Secretary-General Javier Solana.[261] With his excellent contacts, diplomatic skills and status, Solana not only presented a much-needed "antidote to the excessive bureaucratization of CFSP processes",[262] he arguably had a larger impact on the expansion of the CFSP than any other Amsterdam Treaty provision. Yet, he always remained like "a dog on the end of a lead, over time the lead has been let out but it is still there and could be pulled up at any time".[263] A second major institutional innovation was the creation of a Policy Planning and Early Warning Unit (PPEWU, more commonly referred to as the Policy Unit) in an attached Declaration.[264] The Policy Unit was established in the GSC under the responsibility of its Secretary-General/High Representative. Illustrative for a growing commitment to consistency, provision was made for appropriate cooperation with the Commission "in order to ensure full coherence with the Union's external economic and development policies". These institutional innovations better equipped the

[256] Herrmann (2008) op.cit. note 97, 37. For a more elaborate analysis: J.W. De Zwaan, 'The Legal Personality of the European Communities and the European Union' (1999) *Netherlands Yearbook of International Law* 30, 75-113; and R. Leal-Arcas, 'EU Legal Personality in Foreign Policy' (2006) *Boston University International Law Journal* 24(2), 165-212.
[257] Reflection Group (SN 520/95 (REFLEX 21)) op.cit. note 248.
[258] F. Dehousse, 'After Amsterdam: A Report on the Common Foreign and Security Policy of the European Union' (1998) *European Journal of International Law* 9(3), 534.
[259] *Ex* Articles 26 and 18(3) TEU. In vague language Article 18(5) TEU moreover added that "[t]he Council may, whenever it deems it necessary, appoint a special representative with a mandate in relation to particular policy issues" (cf. *infra* 4.2.3.).
[260] B. Crowe, 'Some Reflections on the Common Foreign and Security Policy' (1998) *European Foreign Affairs Review* 3(3), 322.
[261] Presidency Conclusions, European Council, Cologne, 03-04.06.1999, para. 4.
[262] C. Bretherton and J. Vogler, *The European Union as a Global Actor* (Routledge, London, 2006) 169.
[263] Ibid., 169.
[264] Declaration No. 6 on the Establishment of a Policy Planning and Early Warning Unit, attached to the Final Act of the Amsterdam Treaty.

Council – that had before the Maastricht Treaty predominantly held legislative and administrative functions – for its new executive role in the CFSP.

A *final* operational improvement of the CFSP occurred at the level of its financing. The Maastricht Treaty system (distinguishing between operational and administrative costs, and requiring unremitting choices between either Member States or EC financing) had unnecessarily prolonged decision-making. The solution found in the Amsterdam Treaty was to charge all CFSP expenditure to the EC budget, "except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise".[265] The practical inappropriateness of this cross-pillar construction (cf. *infra* Chapter 3) clearly lost it from the Member States' determination to avoid opening up a new bag of EU money.[266]

One of the other main reasons for which the Amsterdam IGC was called in motion was the revision of the Treaty's defence provisions. The upgrade remained however purely semantic. Treaty language was no longer about the eventual but about the "progressive framing" and the restraining reference to "in time" was dropped. [267] The Union would no longer request, but "will avail itself of the WEU to elaborate and implement decisions and actions of the Union which have defence implications". Moreover, the European Council's principles and general guidelines for the CFSP could now include matters with defence implications.[268] The most pertinent innovation was the formal embracement of the Petersberg tasks, a list of policy responses to post-Cold War security threats adopted by the WEU in June 1992.[269] These consisted of "humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peace-making".[270]

In the field of development cooperation the Amsterdam Treaty made only one modification. From an area governed by the cooperation procedure it was moved to co-decision, putting the European Parliament on par with the Council as full-blown legislator. This raises the question as to whether more adjustments were not needed or not wanted. At least one argument pleading against the former was the remaining lack of legal bases for related areas like humanitarian and emergency aid and financial and technical assistance to non-developing countries. [271] The lacuna for humanitarian aid was

[265] *Ex* Article 28 TEU.
[266] Denza (2002) op.cit. note 176, 188-189. The Parliament, Council and Commission reached an Inter-Institutional Agreement on CFSP financing in the margins of the Amsterdam IGC (OJ C286/80, 22.09.1997, point 2.3.1.). Schmalz saw this as a sign of political will to "overcome doctrinal warfare and pave the way for pragmatic solutions, thereby considerably enhancing the potential for bridging external dualism" (U. Schmalz, 'The Amsterdam Provisions on External Coherence: Bridging the Union's Foreign Policy Dualism' (1998) *European Foreign Affairs Review* 3(3), 431).
[267] *Ex* Article 17(3) TEU.
[268] *Ex* Article 13(1) TEU.
[269] Western European Union Council of Ministers, Petersberg Declaration, Bonn, 19.06.1992.
[270] *Ex* Article 17(2) TEU.
[271] Another confirmation that it was lack of will rather than need to reform EU development policy arises from the various expressions of preference for the national level by UK and German ministers at the end of the 1990s (J. Orbie, 'The EU's Role in Development: A Full-Fledged Development Actor or Eclipsed by Superpower Temptations?' in S. Gänzle, S. Grimm and D.

circumvented by reverting to the TEC's Title XVII on development.[272] This creativity was questionable as certain humanitarian activities sat uncomfortably with the Treaty's socio-economic development objectives. For financial and technical assistance to non-developing countries EU lawmakers ambiguously reverted to the flexibility clause of *ex* Article 308 TEC.[273] The latter required a unanimous Council vote and the consultation of the Parliament. These procedural differences were particularly equivocal in the light of another Treaty void, namely the absence of a definition exposing what exactly constitutes a developing country. Rather than on a substantive justification, the applicable legal regime for financial and technical cooperation with a certain country or region thus depended on arbitrary policy choices, causing legal uncertainty, unpredictability and potential inter-institutional tensions.[274]

In the meantime, EU development policy did however not stand still. Essentially, the ever more prominent position of democratic principles and human rights resulted in 1995 in the adoption of an official policy to include their observance as a specific clause in all new trade and cooperation agreements.[275] A couple of months later this was put in practice with the mid-term review of the Lomé Convention. This not only stressed their importance, but made democracy and human rights essential elements on which grounds the agreement could be suspended.[276] It moreover introduced the by now famous notion of good governance and the practice of phased programming. The latter was aimed at making the whole process more flexible to respond to changes and needs regarding the executed projects and "the specific situation of the ACP State concerned".[277] Yet, it also implied that aid figures were no longer an entitlement but depended on the commitment and capacity of receiving countries. Presented with little fanfare, this EU policy turn quickly met the lukewarm response of scholars and

Makhan (eds), *The European Union and Global Development: An 'Enlightened Superpower' in the Making?* (Palgrave Macmillan, Houndmills, 2012) 26-27 and footnote 5).

[272] Council Regulation (1257/96/EC) concerning humanitarian aid, OJ L163/1, 02.07.1996.

[273] This was for instance used for the PHARE programme (cf. *supra* 2.2.1.), as well as TACIS programme providing assistance to partner states in Eastern Europe and Central Asia (Council Regulation (1279/96/Euratom/EC) concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia, OJ L165/1, 04.07.1996).

[274] The problems herewith are illustrated by the 1996 MEDA Regulation covering EU cooperation with countries in North-Africa and the Middle East. The last indent of the preamble states that because "the measures under this Regulation go beyond the framework of development assistance and are intended to apply to countries only in part classifiable as developing countries" (without specifying which countries this concerns) "this Regulation cannot be adopted other than on the basis of the powers provided for in Article 235 of the Treaty" (*ex* Article 308 TEC, current Article 352 TFEU); Council Regulation (1488/96/EC) on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, OJ L189/1, 30.07.1996.

[275] Commission Communication (COM(95) 216 final) on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, 23.05.1995.

[276] Article 5(1)(3) and Article 366a of the Agreement Amending the Fourth ACP–EC Lomé Convention, signed in Mauritius, 04.11.1995 (hereafter: Lomé IVb).

[277] Article 282(4)(d) Lomé IVb. By the end of the first five-year period of Lomé IVb only half of the total allocated funds had been spent (G.R. Olsen, 'The European Union's Development Policy: Shifting Priorities in a Rapidly Changing World' in O. Stokke and P. Hoebink (eds), *Perspectives on European Development Co-operation : Policy and Performance of Individual Donor Countries and the EU* (Routledge, London, 2005) 590).

NGOs, united in their criticism on the erosion of the long-standing notion of partnership.[278] That the EU was serious about its revamped ideals is illustrated by the impressive list of ACP countries that saw their cooperation with the EU suspended over human rights problems in the course of the 1990s, including Equatorial Guinea, Haiti, Liberia, Malawi, Somalia, Sudan, Togo, Zaire, Niger and Nigeria.[279]

The Nice Treaty: tinkering around the edges

The three and a half years between the signing of the Amsterdam Treaty in October 1997 and the Nice Treaty in February 2001 witnessed a rapid metamorphosis in the area of European security and defence cooperation. This was instigated less by Treaty changes than by "Europe's military revolution" at the Saint-Malo Summit between France and the UK, the EU's most powerful states in terms of military capabilities and global impact.[280] Triggered by the persisting rumble in the Balkans, the two countries issued a declaration stressing in remarkably resolute terms – particularly in the light of the UK's traditional reserve regarding deeper EU integration – that "the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises".[281] This commitment was welcomed and repeated by the June 1999 European Council, expressing a willingness to provide the Union with "the necessary means and capabilities to assume its responsibilities regarding a common European policy on security and defence".[282] An attached Presidency Report called for the necessary decision-making and institutional arrangements.[283] In a swift course of events this was followed in December 1999 by the adoption of an (over)ambitious headline goal to boost Europe's "readily deployable military capabilities".[284] The initial focus on EU military crisis management capacity was soon extended with a Civilian Headline Goal to upgrade the Member States' joint police, judicial and civil protection capacities.[285]

In the light of these fundamental changes it is remarkable that the opportunity of the Nice Treaty was not taken to give the emerging European defence policy a firmer Treaty basis. The limited codifications could only be read between the lines of the amended TEU. First, all references to the EU availing itself

[278] For instance: K. Arts and J. Byron, 'The Mid-Term Review of the Lomé IV Convention: Heralding the Future?' (1997) *Third World Quarterly* 18(1), 86-89; Olsen (2005) op.cit. note 277, 592; G. Crawford, 'Whither Lomé? The Mid-Term Review and the Decline of Partnership' (1996) *The Journal of Modern African Studies* 34(3), 516.
[279] OECD-DAC (2012) op.cit. note 83, 46.
[280] G. Andréani, C. Bertram and C. Grant, *Europe's Military Revolution* (Centre for European Reform, London 2001) 83p.
[281] Joint Declaration issued at the British-French Summit, Saint-Malo, 03-04.12.1998, paras 1-2.
[282] Presidency Conclusions, European Council, *Declaration on Strengthening the Common European Policy on Security and Defence*, Cologne, 03-04.06.1999.
[283] Presidency Report on strengthening of the common European policy on security and defence, European Council, Cologne, 03-04.06.1999, para. 3.
[284] Presidency Progress Report on strengthening the common European policy on security and defence, European Council, Helsinki, 10-11.12.1999. This was followed in 2004 by Headline Goal 2010 (Presidency Conclusions, European Council, Brussels, 17-18.06.2004, para. 2).
[285] Presidency Conclusions, European Council, Santa Maria da Feira, 19-20.06.2000, para. 11.

of the WEU in defence matters were revoked, implying that the EU was ready to assume its own responsibility. Second, the CFSP's Political Committee was rechristened Political and Security Committee (PSC) with the new responsibility to "exercise, under the responsibility of the Council, political control and strategic direction of crisis management operations". [286] Its specific role, modalities and functions were set out in a Council Decision, which was moreover the first official document mentioning the existence of the European Security and Defence Policy (ESDP).[287] Notably, the reference to a "common policy", cited in the Treaty and all preceding European Council conclusions on defence since Cologne, was quietly dropped.[288] The ESDP was subsequently declared operational and "capable of conducting some crisis-management operations" at the 2001 Laeken European Council.[289]

Further Nice Treaty changes were mainly targeted at preparing the Union institutionally for the upcoming big bang enlargement, and adaptations in the field of external relations were fairly limited. One of the main changes was the extension of the Treaty's provisions on enhanced cooperation to the CFSP.[290] Also noteworthy was the introduction of a Title XXI TEC on "Economic, Financial and Technical Cooperation with Third Countries". Given that most – if not all – development measures under Title XX qualify as economic, financial and technical assistance, an *effet utile* reading reveals that the new Title must have be designed to specifically address developed countries.[291] Contrary to the co-decision procedure applicable under the Treaty's development cooperation provisions, *ex* Article 181a(2) only required the consultation of the Parliament. As there was still no EU definition for a developing country, these procedural differences were again bound to lead to confusion. It is for instance difficult to understand why South Africa is a recipient under the Development Cooperation Instrument (DCI), while the TACIS programme, which includes cooperation with a number of Central Asian countries that rank below South Africa on every development scale, is governed by *ex* Article 181a TEC.

International practice does not provide much guidance either as the definitions applied by instances as the WB, OECD, UNDP necessarily reflect the needs of the organisation that developed and maintains them.[292] A 2000 Commission Communication references "by way of example" to the list of developing countries developed by the OECD Development Assistance Committee (DAC), but this is not consistently applied in other official documents.[293] "Development is, what the master says it is" and

[286] *Ex* Article 25 TEU.
[287] Council Decision (2001/78/CFSP) setting up the Political and Security Committee, OJ L027/1, 30.01.2001, Annex.
[288] The June 1999 Cologne European Council referred to a "common European security and defence policy" (op.cit. note 282) and *ex* Article 17 TEU to a "common defence policy".
[289] Presidency Conclusions, European Council, Laeken, 14-15.12.2001, para. 6.
[290] *Ex* Articles 27 a-e and Articles 43-45 TEU.
[291] M. Broberg and R. Holdgaard, 'EU External Action in the Field of Development Cooperation Policy: The Impact of the Lisbon Treaty', *SIEPS 2014:6* (Swedish Institute for European Policy Studies, Stockholm, 2014) 26-28.
[292] Martenczuk (2002) op.cit. note 211, 389-392.
[293] Commission Communication (COM(2000) 0212 final) The European Community's Development Policy, 26.04.2000.

the absence of a formal definition gives the EU certain leeway that allows a political usage of the term.[294] In the *EIB* case this question was presented to the Court. It recognised the particular attention accorded by EU institutions to the OECD's list of ODA recipients, but found that "the concept of 'developing country' must be given an autonomous Community interpretation. That is equally true in view also of the dynamic nature of the developing country category, in the sense that it is liable to evolve in response to events which are difficult to predict".[295] Despite the absence of such an interpretation, the Court found reason to reject the Council's argument that *ex* Article 181a EC was in itself broad enough to cover cooperation with both developing and other third countries.[296] This was in its view contrary to the letter and spirit of the Treaty and would result in an unlawful restriction of Title XX on development cooperation.[297]

The paradigmatic shift of the Cotonou Convention

Contrary to these limited Treaty changes, it became ever more clear that the EU's aid system was in dire need of reform. This was underlined by two sobering events at the end of the millennium: the resignation of the Santer Commission over allegations of fraud, nepotism and mismanagement of aid[298] and the first ever official impact assessment of EU development assistance.[299] The latter marked down EU development policy for its limited coordination, complementarity and consistency with other policy areas and Member States' programmes. It criticised the delayed and inefficient implementation, weak monitoring and unsustainable impact on poverty alleviation. This led the freshly appointed Development Commissioner Poul Nielson to publicly conclude that the Commission machine was "was designed for producing directives, regulations, trade negotiations … For development assistance, it doesn't work".[300] These events set in motion a reform process aimed at making the whole system more professional, efficient and expeditious.[301] This revitalisation of EU development policy made an end to the "decade of non-decisions" that had followed the Maastricht Treaty.[302] The most visible expression

[294] K. De Feyter, *World Development Law: Sharing Responsibility for Development* (Intersentia, Antwerpen, 2001) 2. Moreover, explicitly defining the term might be painful for certain EU Member States that would make a poor score. For instance, on the scale of the Human Development Index (HDI) of UNDP the ACP state of Barbados currently ranks number 38, above seven EU Member States ranging from Poland (number 39) to Bulgaria (number 57) (<http://hdr.undp.org/en/data> (last accessed on 19.05.2015); example via Holland (2002) op.cit. note 104, 6-7).
[295] Case C-155/07, *Parliament v Council (European Investment Bank - EIB)*, ECLI:EU:C:2008:605, paras 52-53.
[296] V. Randazzo, 'Annotation on Case C-155/07, Parliament v Council' (2009) *Common Market Law Review* 46(4) 1286-1287.
[297] Case C-155/07, op.cit. note 295, paras 52-54.
[298] Committee of Independent Experts, *First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission* (Brussels, 1999) 146p.
[299] ICEA/DPCC, *Development and humanitarian assistance of the EU: An evaluation of the instruments and programmes managed by the European Commission* (ICEA/DPCC, Brussels, 1999) n.p.
[300] Quoted in Olsen (2005) op.cit. note 277, 598.
[301] Commission Communication (COM(2000) 814 final) on the reform of the Management of External Assistance, 16.05.2000; Commission Communication (COM(2000) 456 final) concerning the development of the external service, 18.07.2000.
[302] M. Carbone, 'Mission Impossible: the European Union and Policy Coherence for Development' in M. Carbone (ed), *Policy Coherence and EU Development Policy* (Routledge, London, 2009) 17 and 9-10.

hereof was the creation in 2001 of the EuropeAid Cooperation Office (AIDCO). In one strike this aimed to improve the quality of aid disbursement and loosen the administrative burden on DG Development in order to transform it from a narrow technical agency into a comprehensive pool of expertise on development policy and strategy.

Even though ACP became ever more known as an acronym for anachronism, the absence of a consensual EU framework document meant that the relations with this group continued to act as a gauge for EU development policy. To understand its changing fundamentals it is inescapable to analyse the new milestone in these relations that was reached with the signing of the Cotonou Agreement on 23 June 2000.[303] Departing from a more multi-faceted conception of poverty, the scope of the new Convention – which is after two revisions in 2005 and 2010 still applicable today[304] – is considerably wider than that of its predecessors. It incorporates a number of cross-cutting themes, such as institutional development and capacity building, and new fields of cooperation, such as migration, arms control, drugs, organised crime and – particularly remarkable –peace and security. Article 1 includes the latter among the central goals of the Convention, together with the promotion of a stable and democratic political environment. This new focus culminates in Article 11 on 'peace-building policies, conflict prevention and resolution', which is a striking insertion for an agreement widely portrayed as a development partnership (cf. *infra* 3.2.1.). The essential elements of human rights, democratic principles and the rule of law – the non-observance of which forms a basis for suspending the agreement – are extended from one cursory reference in Lomé IVb to an extensive exposition in Article 9 of the Cotonou Convention.[305] To reconcile ACP resistance against adding good governance to this list with the EU's insistence on its importance, the latter is added as a fundamental element, meaning that "only serious cases of corruption, including acts of bribery" constitute violations of the Agreement.[306]

In addition to this fortified conditionality, Cotonou marks the paradigmatic end of non-reciprocal trade preferences for all but Least Development Countries (LDCs), and replaces this with a (controversial) push for free trade agreements based on regional integration.[307] Other notable shifts include the emphasis on civil society, the centrality of political dialogue and the strengthening of phased programming with enhanced differentiation based on "a partner's level of development, its needs, its

[303] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou, 23.06.2000, OJ L317/3, 15.12.2000 (hereafter: Cotonou Convention).
[304] In 2015 it was collectively decided that no revision of the Cotonou Agreement would be undertaken.
[305] The provisions on suspension are included in Article 96 Cotonou Convention.
[306] Article 9(3) Cotonou Convention.
[307] According to Dearden this was the result of an EU-dominated negotiation process that led ACP governments to accept unrealistic demands (S. Dearden, 'The Future Role of the European Union in Europe's Development Assistance' (2003) *Cambridge Review of International Affairs* 16(1), 115). For a detailed analysis: G. Faber and J. Orbie (eds), *Beyond Market Access for Economic Development: EU-Africa relations in Transition* (Routledge, London, 2009) 384p.

performance and its long-term development strategy".[308] The thread in all these changes is that they put politics rather than economics, reform rather than assistance, at the centre EU-ACP relations. In this manner Cotonou is the culmination of a process that gradually moved from the Yaoundé Convention's "automatic, no-strings-attached process of entitlement into assistance conditional upon accurately outlined needs and the attainment of economic and political performance indicators".[309] Furthermore, the end to non-reciprocal trade preferences, the focus on regional integration and the upgraded conditionality, meant a normalisation of the ACPs' position, bringing it more in line with the EU's relations vis-à-vis the rest of the world.[310]

This substantive broadening of the Agreement occurred in ways that often mismatched with its portrayed rhetoric. It is for instance not immediately clear how a stronger focus on poverty reduction and the fundamental principles of "equality of the partners and ownership of the development strategies … in all sovereignty" can be reconciled with tightened conditionality.[311] This has sceptically been interpreted as a shift from "co-operation to coercion" with the partnership's rhetoric only "designed for domestic consumption in Europe and for purposes of legitimation in ACP states".[312] More generally, it signalled the end of the autonomous nature of development policy as well as of its pole position in EU relations with developing countries. From the early 2000s, EU development cooperation was increasingly perceived as only one of the EU's various external instruments that can target development.[313]

2.3. The Lisbon era: security and development hinging between integration and delimitation

It was clear from the outset that the Nice Treaty had prepared the Union for its widening, but fell short on constitutional reforms to enable its deepening. Already one year before its entry into force the December 2001 Laeken European Council set in motion a debate about the future of the European Union, which had been called for in an annexed Declaration to the Nice Treaty.[314] The Laeken

[308] Article 2 Cotonou Convention.
[309] A. Hadfield, 'Janus Advances? An Analysis of EC Development Policy and the 2005 Amended Cotonou Partnership' (2007) *European Foreign Affairs Review* 12(1), 43.
[310] K.E. Smith, 'The ACP in the European Union's Network of Regional Relationships: Still Unique or Just One in the Crowd?' in K. Arts and A. Dickson (eds), *EU Development Cooperation: from Model to Symbol* (Manchester University Press, Manchester, 2004) 68-70.
[311] Article 2 Cotonou Convention. The 1999 impact assessment of EU aid notably acknowledged that "principles of partnership and dialogue have limited effect in countries not sufficiently committed to economic and social reform or which are unable to enforce them" (ICEA/DPCC (1999) op.cit.note 299, title 4).
[312] S.R. Hurt, 'Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention' (2003) *Third World Quarterly* 24(1), 161 and 165.
[313] M. Carbone, 'International Development and the European Union's External Policies: Changing Contexts, Problematic Nexuses, Contested Partnerships' (2013) *Cambridge Review of International Affairs* 26(3), 486-488.
[314] Declaration No. 23 on the Future of the Union attached to the Nice Treaty, para. 3.

Declaration expressed a clear desire to see "Europe more involved in foreign affairs, security and defence, in other words, greater and better coordinated action to deal with trouble spots in and around Europe and in the rest of the world".[315] This longest of Treaty reform exercises had to search its second wind after the Constitution's inglorious demise.[316] Yet, the push to strengthen the CFSP and streamline the whole external action system – with the watchwords of coherence, effectiveness and unity – never left the negotiating table. The general feeling that the artificial pillar demarcations held down the EU in realising its global ambitions dominated both the 2003-2004 IGC on the Constitution for Europe and the 2007 Lisbon IGC on the Reform Treaty.

Not only Treaty amendments tempered the CFSP's distinctiveness, also in practice the pillar struts lost ever more ground to the inescapable interaction of policies and actors struggling to transcend them. In a first part it will be shortly explained how the gradual erosion of the pillar structure had already been set in motion long before its formal abolition by the Lisbon Treaty (2.3.1.). A second part will then shed light on today's complex reality of the EU's unified but diverse legal order (2.3.2.). This has led to paradoxical demands of integrating and delimitating external policies, which will be set out with a focus on the renewed development and security competences.

2.3.1. The gradual erosion of the pillar structure

The Member States' willingness to legally delimitate, while acknowledging the practical necessity of cohering the three pillars, was inscribed in the complex reality of the Maastricht Treaty system. Even though only the case for delimitation was legally enforceable, and thus appeared stronger, the overwhelming practice of interaction gradually sapped the pillar foundations from various directions. In line with the subsequent structure of this dissertation, three levels can be distinguished at which this took place, namely the policy, institutional and judicial level. An in-depth discussion of the interaction between development and security policies, actors and competences on these levels will be left for the respective chapters. The aim of this title is rather to give a concise and general overview of the evolutions that paved the way for the Lisbon Treaty's unification of the EU's constitutional system.

Two tendencies played at the *policy-making* level. On the one hand, the fact that global challenges did not stop for pillar boundaries led to a rising cross-pillarisation of EU external action. The challenges of the 21st century fight against terrorism, climate change, poverty, etc. are so all-embracive that they do not allow neatly separated policy responses. Remarkably, in tackling these challenges, EU institutions

[315] Presidency Conclusions, *Laeken Declaration on the Future of the European* Union, European Council, Laeken, 14-15.12.2001.
[316] For a detailed account of this process: P. Berman, 'From Laeken to Lisbon: The Origins and Negotiation of the Lisbon Treaty' in A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law After Lisbon* (Oxford University Press, Oxford, 2012) 3-40.

and Member States have appeared much less occupied with pillar demarcations than the Treaty's obsession with competence delimitation might suggest. Only occasionally did outright incoherence or tensions occur, and motives of pragmatism and loyal cooperation generally held the upper hand. This is clearly illustrated by the above mentioned EU sanctions regime. Second, the differences between the pillars were much smaller than the misleading 'supranational' EC and 'intergovernmental' CFSP(/JHA) labels indicated. For one thing, the EC increasingly reverted to soft law instruments to get all Member States on board.[317] For another, CFSP provisions were more restraining on Member States than often presented.[318] Whereas its procedures were indeed designed so that all of them needed to consent, once adopted their very purpose was to limit the freedom for national action. Many Treaty provisions on CFSP were formulated in particularly resolute terms, and whilst not enforceable before the Court, they were undoubtedly legally binding.[319] There would indeed be no interest in strictly defining the conditions that allow to deviate from joint actions, or to carefully formulate certain possibilities for QMV, if the CFSP had no obligatory character.[320] Finally, the general tendency to work towards consensus in the Council softened the sharp contrast between the unanimity-governed second pillar and the frequent provision for majority voting in the EC. Yet, it should also be noted that it is often the possibility of QMV – and the associated risk for Member States to be outvoted – rather than its actual use that leads to more far-reaching decisions.

At the *institutional* level the absence of a Community dimension in the CFSP was partly compensated by what has been variously termed by political scientists as "Europeanisation", "socialization", "brusselisation" or "going native".[321] In general terms this means that the growing interaction between Member States' CFSP representatives gradually detaches them from their capitals and leads them to increasingly adhere to a common EU culture. The prodigious practice of the single institutional framework took a further swipe at the pillar walls. Rather than EU institutions operating in two separate constellations, they form part of a complex network with multiple variations in rules, procedures and interactions, both within and between the pillars. Resulting from a certain sense of

[317] A clear example is the Open Method of Cooperation (OMC). For an elaborate analysis: L. Senden, *Soft Law in European Community Law* (Hart, Oxford, 2004) 533p.
[318] For a complete discussion: 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) 79-121.
[319] This is for instance clear from *ex* Articles 11(2), 14(3), 15 and 16 TEU.
[320] C. Blumann, 'La Singularité de la Décision dans le Domaine de la Politique Etrangère et de Sécurité Commune' in I. Govaere, et al. (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff, Leiden, 2014) 275-276.
[321] Respectively, S. Duke and S. Vanhoonacker, 'Administrative Governance in the CFSP: Development and Practice' (2006) *European Foreign Affairs Review* 11(1), 176; A. Juncos and K. Pomorska, 'Invisible and Unaccountable? National Representatives and Council Officials in EU Foreign Policy' (2011) *Journal of European Public Policy* 18(8), 1096; G. Müller-Brandeck-Bocquet, 'The New CFSP and ESDP Decision-Making System of the European Union' (2002) *European Foreign Affairs Review* 7(3), 260; A. Juncos and C. Reynolds, 'The EU's Common Foreign and Security Policy: The Quest for Democracy' (2007) ibid.12(1), 140.

"Eigendynamik",[322] the Treaty-suggested Council-European Council duopoly over the CFSP ever less reflected reality. Incited by the growing cross-pillarisation, the Commission obtained a seat at the table in nearly all stages of CFSP decision-making and the Parliament got a foot in the door by exploiting its legal and budgetary powers to the fullest.

A similar tendency occurred at the *judicial* level. Even though it was officially named "the Court of Justice of the European Communities", the latter progressively acted as constitutional Court for the EU as a whole. The EU's 'integrated but separate legal orders' provided the explanatory framework for an increasing number of cases that can be subdivided in two categories. First, the Court gradually developed a unified concept of EU law, most notably in its evolving jurisprudence on the cross-pillar choice of legal basis, which will be discussed extensively in Chapter 5. Second, the Court developed a practice of using EC analogy as a source of inspiration to interpret EU provisions.[323] While this was applied mainly with regard to the third pillar, specifically in relation to the legal effect of common positions[324] and the duty of loyal cooperation,[325] this made clear that the pillar walls were not impermeable for principles of the autonomous EC legal order. Moreover, the Court extended the EC rules on transparency and access to documents to the EU as a whole.[326]

The ever-growing practice of policy, institutional and judicial interaction transcending pillar walls boosted the EU's image of a single actor. Certain authors have convincingly argued that "even the sacrosanct Community principles of direct effect and primacy over the law of the Member States cannot be said to be completely alien to the CFSP".[327] However, the latter remained a deliberately less integrated legal system that could not *a priori* and unconditionally be subjected to EC rules and principles. The key question is now if and to what extent the Lisbon Treaty's streamlining of the EU's constitutional system has altered this situation.

2.3.2. The integration-delimitation paradox of the Lisbon Treaty

A first part of this section will lay bare the various Treaty changes to the overall constitutional framework for EU external action. This depicts how the concomitant calls for cohering and detaching CFSP and TFEU dimensions of external policy have given rise to a genuine integration-delimitation paradox, posing significant challenges to policy-makers, institutional loyalty and the judiciary. Taking

[322] Wessel (2009) op.cit. note 97, 141.
[323] Wessel (2009) op.cit. note 97, 141.
[324] Case C-355/04, *Segi and Others v Council*, ECLI:EU:C:2007:116.
[325] Ibid., para. 52; and Case C-105/03, *Pupino*, ECLI:EU:C:2005:386, para. 42.
[326] Case T-174/95, *Svenska Journalistförbundet v Council*, ECLI:EU:T:1998:127; and Case T-14/98, *Hautala v Council*, ECLI:EU:T:1999:157, paras 41-42.
[327] R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) *Common Market Law Review* 43(2), 378.

into account this altered constitutional reality, a second part will discuss what changes the Lisbon Treaty brings for the scope and nature of CFSP and development cooperation.

Untangling the Lisbon Treaty's engineering to the EU's constitutional system

The Treaty of Lisbon, which entered into force in December 2009, was proudly presented as a thorough reform exercise that will "give the Union a single voice in external relations"[328] and make it "work more efficiently and effectively".[329] In reforming EU external action the new Treaty resolutely plays the integration card. Chiefly, it dissolves the EC into the Union which "shall replace and succeed" it.[330] With much relieve and even greater hope for the future, this so-called depillarisation is repeatedly put forward as one of the most notable Treaty changes.[331] This move is confirmed and completed by assigning legal personality to the EU as whole,[332] according the TEU and TFEU (which replaces the *ex* TEC) equal legal value,[333] drawing up a unified framework for concluding international agreements,[334] expanding the provisions on enhanced cooperation to the CFSP as a whole,[335] and rebranding the CFSP's joint actions and common positions as 'decisions' in line with all other competences.[336]

Article 21 TEU constitutes the centrepiece of the streamlined external action architecture (cf. Box 1). It calls on the Union to work for a high degree of cooperation in all fields of international relations in order to achieve the various EU external objectives that are now grouped together in this single provision. Article 21(3) TEU then calls on the Union to "ensure consistency between the different areas of its external action and between these and its other policies". The Council and the Commission, assisted by the newly designed High Representative of the Union for Foreign Affairs and Security Policy (cf. *infra*), are entrusted with this task and shall cooperate to that effect. This duty now has an equivalent in Article 7 TFEU and falls under the supervision of the CJEU, boosting its status as

[328] Commission Press Release (IP/07/1922) 'Commission welcomes signature of the Treaty of Lisbon and calls for its swift ratification', Brussels, 13.12.2007.
[329] CFSP High Representative Speech (S 194/08) 'EU Foreign, Security and Defence Policy', address to the European Parliament by Javier Solana, Brussels, 04.06.2008.
[330] Article 1 TEU.
[331] See for instance: Commission, Division of competences within the European Union, 23.03.2010 <http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm> (last accessed on 19.05.2015); Jacobs (2012) op.cit. note 245.
[332] Article 47 TEU.
[333] Article 1 TEU.
[334] Article 218 TFEU.
[335] This means that it is no longer limited to the implementation of joint actions and common positions, and includes security and defence matters. Yet, procedural differences remain in place. For an elaborate discussion: M. Cremona, 'Enhanced Cooperation and the Common Foreign and Security Policies of the EU', *EUI Working Papers No. 2009/21* (European University Institute, Florence, 2009) 17p.
[336] Sari points out that this was mainly a public relations exercise to make the CFSP appear less complex (and distinct), but has done nothing to rationalise the functions and usage of these instruments (A. Sari, 'Decisions on Operational Action and Union Positions: Back to the Future?' in H.-J. Blanke and S. Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer, Berlin, 2012) 547).

constitutional principle.[337] Taken together these reforms establish a strong duty for EU institutions to interlink and integrate various external policies and objectives. In the light of the above-discussed erosion of the pillar structure, this does not represent a complete rupture with the past, but rather an attempt to catch up "with 'living' and sedimentary practices" that had gradually ripened.[338]

Box 1: Article 21 TEU

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;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

[337] Yet, as argued by Van Elsuwege this duty in essence "remains an important political concept in need of pragmatic solutions" (P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance between Delimitation and Consistency' (2010) *Common Market Law Review* 47(4), 1012 and 1015-1017).
[338] Curtin and Dekker (2011) op.cit. note 97, 156.

(h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Contrary to this often heralded integration rationale, a close look at the Lisbon Treaty reveals a continued strong delimitation of the CFSP, albeit within an undeniably unified legal order. A first element of separation results from the odd structure of and distinction between the Lisbon's TEU and TFEU. This does not radiate legal logic, but results from its origins in the divided legacy of both the ill-fated Constitution and the Maastricht Treaty structure. The Constitution had aimed to radically simplify the old legal architecture by turning two separate founding Treaties for two distinct but interconnected legal entities into a single legal organisation and Treaty. The Lisbon Treaty, on the other hand, unifies the legal nature of the Union, but spreads its provisions over two legally equivalent Treaties.[339] This (incomplete) reversion to the old Treaty structure served as a symbolic return to incrementalism in an effort to meet popular discontent about the Constitution's unbidden leap towards a European federation.[340] Roughly, the current distinction between the two Treaties runs across the lines of separating primary from secondary EU rules. The TEU sets out the main constitutional and institutional structure, whereas the TFEU covers the organisation of the specific competences of the Union.[341] This would have been a complex yet not illogical Treaty structure, were it not for the odd position of the CFSP, which is as only substantive policy confined to the TEU[342] (with the notable exception of Article 215 TFEU establishing a bridge to the CFSP in relation to targeted sanctions).[343] Consequently, the proclaimed unity of EU external action only extends to its general principles and objectives. The specific provisions remain inelegantly split as if the Union were no

[339] B. de Witte, 'The Question of the Treaty Architecture: 1957-2007' in A. Ott and E. Vos (eds), *Fifty Years of European Integration : Foundations and Perspectives* (TMC Asser, The Hague, 2009) 19.
[340] M. Cremona, 'The Two (or Three) Treaty Solution: The New Structure of the EU' in A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law after Lisbon* (Oxford University Press, Oxford, 2012) 40-41.
[341] Article 1 TFEU indeed clarifies that it "organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences".
[342] Notably, also enlargement only has a legal basis in the TEU (Article 49).
[343] Targeted sanctions are directed at individuals, companies and organisation rather than states (cf. *infra* 5.3.2.).

integrated legal entity, but simply "a franchiser who organises the 'corporate identity'" of separated TFEU and CFSP legal regimes.[344]

The Treaty structure is not the only remainder of the CFSP's distinct nature, nor was it a necessary condition to achieve this. Article 24(1) TEU emphasises that the CFSP is still "subject to specific rules and procedures". These largely stick to unanimous decision-making dominated by Member States in the Council and the European Council. Besides one addition to the list of QMV exceptions,[345] Article 31(3) TEU introduces the so-called 'passerelle clause'. This empowers the European Council to unanimously adopt a decision stipulating new CFSP areas where the Council shall act by qualified majority. Notably, this makes it possible to gradually extend QMV in the CFSP without reverting to the heavy Treaty revision procedures of Article 48 TEU. Yet, both additions are consistent with the CFSP's traditional philosophy that makes such exceptions dependent upon prior unanimous decisions. Thereby, they incongruously highlight the reluctance of Member States to soften their grip on the CFSP.[346] The Parliament, for its part, is regularly consulted "on the main aspects and the basic choices" of the CFSP and CSDP.[347] The Commission loses its status of full association and shared right of initiative to the new High Representative, but this is compensated by the latter's double hat as Vice-President of the Commission (cf. *infra* 4.3.). Finally, Article 24(1) TEU emphasises the absence of the Court's jurisdiction with respect to CFSP provisions. In addition to the exception of monitoring compliance with Article 40 TEU (the successor to the non-affect clause of *ex* Article 47 TEU which will be discussed further below), it extends jurisdiction towards reviewing the legality of restrictive measures against natural or legal persons.[348] This is an important, yet not entirely new extension, as it essentially codifies the manner in which the Court had filled this legal gap in the *Kadi and Al-Barakaat* cases.[349] In essence the CFSP thus remains an area for which the Treaty formulates strong legal discipline, which is to a great extent left to Member States' benevolence.

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[344] Herrmann (2008) op.cit. note 97, 36.

[345] This concerned the adoption of a decision defining a Union action or position on a proposal from the High Representative following a specific request from the European Council (Article 31(2) TEU). It is important to note that none of the other QMV exceptions had ever been used in practice, and the provision for constructive abstention (Article 31(1) TEU, *ex* Article 23(1) TEU) only once by Cyprus with regard to the establishment of an EU Rule of Law mission in Kosovo in 2008 (J.-C. Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press, Cambridge, 2012) 77).

[346] I. Govaere, 'Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations post-Lisbon' (2011) *Cambridge Yearbook of European Legal Studies* 13, 102.

[347] Article 36 TEU.

[348] These restrictive measures, and particularly targeted sanctions, raise specific issues regarding the CFSP-TFEU interface (cf. *infra* 5.3.2. and further: I. Cameron (ed), *EU Sanctions: Law and Policy Issues concerning Restrictive Measures* (Intersentia, Cambridge, 2013) 266p; P. Van Elsuwege, 'The Adoption of "Targeted Sanctions" and the Potential for Inter-institutional Litigation after Lisbon' (2011) *Journal of Contemporary European Research* 7(4) 488-499).

[349] Joined Cases C-402/05 and C-415/05, *Kadi and Al Barakaat*, ECLI:EU:C:2008:461, paras 234-236; See further: P.J. Cardwell, D. French and N.D. White, 'Annotation Joined Cases C-402/05 and C-415/05, Kadi and Al Barakaat' (2009) *International and Comparative Law Quarterly* 58(1), 229-240.

Other hints of what these "specific rules and procedures" imply are given throughout the Treaties. Articles 2-6 TFEU list and clarify the different categories of EU competences but make no mention of the CFSP. Various ideas have been put forward regarding its exact nature.[350] In any case, this explicit exclusion after a Treaty reform process that was set to deliver a "better division and definition of competence",[351] serves to emphasise the CFSP's distinctness. Further reminders are the exclusion of the CFSP from the flexibility clause of Article 352 TFEU,[352] the separate procedural rules for international agreements that relate to the CFSP in Article 218 TFEU (cf. *infra* 5.3.2.), the exclusion of legislative acts,[353] the CFSP-specific duty of loyalty in Article 24(3) TEU,[354] and several attached Declarations that repeat *ad nauseam* that the CFSP and TEU provisions do not affect the Member States existing powers and responsibilities.[355]

Box 2: Article 40 TEU

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.

This belt-and-braces approach of underlining the normative distinctiveness of the CFSP is elevated to the level of a constitutional principle in Article 40 TEU. The meaning of its two paragraphs (cf. Box 2) has set many academic tongues wagging. On the one hand, Article 40 TEU can be seen as a confirmation of the streamlined external action system, balancing the old provision by putting CFSP and TFEU competences on an equal footing. On the other hand, it also stresses the delimitation of CFSP

[350] CFSP competence has alternately been categorised as non pre-emptively shared (M. Cremona, 'The Union's External Action: Constitutional Perspectives' in G. Amato, H. Bribosia and B. de Witte (eds), *Genèse et Destinée de la Constitution Européenne : Commentaire du Traité Etablissant une Constitution pour l'Europe à la Lumière des Travaux Préparatoires et Perspectives d'Avenir* (Bruylant, Brussels, 2007) para. 31), shared or concurrent (Gosalbo Bono (2006) op.cit. note 327, 364) and *sui generis* (De Baere (2008) op.cit. note 164, 112).

[351] Laeken Declaration (2001) op.cit. note 315, Title II.

[352] This is literally repeated in Declaration No. 41 on Article 352 TFEU annexed to the Treaty of Lisbon.

[353] Article 24(1) TEU. This new and undefined terminology causes confusion. Eeckhout argues that the exclusion of legislative acts in the CFSP results from the absence of full parliamentary and judicial supervision, therefore implying the exclusion of normative action imposing obligations on individuals (Eeckhout (2011) op.cit. note 113, 478-483).

[354] The general duty of loyalty set out in Article 4(3) TEU in essence applies to the whole range of EU competences. Yet, the at first sight redundant repetition for the CFSP entrusts supervision specifically to the High Representative and the Council, instead of the Court (see further: 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*, CLEER Working Papers 2012/5 (Centre for the Law of EU External Relations, The Hague, 2012) 52-56).

[355] See in particular Declarations No. 13 and 14 concerning the CFSP and Declaration No. 24 concerning the legal personality of the EU, annexed to the Lisbon Treaty.

and TFEU competences by according its predecessor a Janus-face to prevent mutual contamination. Curiously, it was at a very late stage of the Convention's proceedings that it was decided to include a successor to *ex* Article 47 TEU in the new constitutional text. Ricardo Passos of the Parliament's legal service notes that it was only when it became clear that depillarisation would not translate into a general judicial competence for the CJEU, that the need for such an article was felt.[356] Its main purpose was thus to ensure that the continued exclusion of the CJEU from the CFSP, would not prevent it from adjudicating this policy's delimitation from TFEU external competences.

It has been argued that this Article stands for a new "creeping pillarization" because there should be no room for such a clause in an integrated Treaty system.[357] Taking into account the specific nature of foreign affairs allows to smoothen off the rough edges from this view. This helps to avoid the "irresistible habit of regarding those innovations through the prism of a zero-sum game between two opposing models of integration [that] leads to an almost insoluble dilemma".[358] The CFSP's distinctness fits to a certain extent in the broader global context of foreign policy, which is throughout most political systems characterised by an exceptional dominance of executive power, typically according less prominent positions to judicial and legislative actors.[359] This results from the fact that foreign affairs are more strategic than regulatory, and require more speed, flexibility and confidentiality than a traditional system of checks and balances allows. Combining these insights, it can be argued that Article 40 TEU, rather than setting up mutual lines of defence, reflects the desire of placing the CFSP in a separate subsystem that evolves on its own rhythm, yet in harmony with TFEU competences as part of the Union's unitary legal order.[360]

In a way, the Lisbon Treaty has thus undertaken to reduce the appearance but not the substance of primary law complexity. Consequently, "[t]he CFSP framework retains its different characteristics, albeit within a constitutional context which lacks obvious signs of division".[361] For all the talk about simplifying the constitutional system, the debate on the nature of the EU legal order is therefore still open. Legal unity is undoubtedly the order of the day, but with regard to the CFSP it seems still

[356] R. Passos, 'Le Système Jurisdictionnel de l'Union' in G. Amato, H. Bribosia and B. De Witte (eds), *Genèse et Destinée de la Constitution Européenne : Commentaire du Traité Etablissant une Constitution pour l'Europe à la Lumière des Travaux Préparatoires et Perspectives d'Avenir.* (Bruylant, Brussels, 2007) para. 16.
[357] Cannizzaro (2007) op.cit. note 214, 230-232.
[358] Van Elsuwege (2010) op.cit. note 337, 998-999.
[359] Gosalbo Bono (2006) op.cit. note 327, 378-379.
[360] This interpretation of Article 40 TEU is in line with an evolution in international Treaty law where the conflictual *lex posterior derogat legi priori* is being replaced by a clause of "mutual supportiveness" between legal regimes, expressing a relationship of co-existence, consistency, and complementarity. For an analysis of this shift in international law: R. Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: a Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) *The European Journal of International Law* 21(3), 649-679. An example of such a clause can be found in Article 22(1) of the UN Convention on Biological Diversity, Rio de Janeiro, UNTS vol. 1760, p. 79, 05.06.1992.
[361] Koutrakos (2013) op.cit. note 91, 29-30.

fragile.[362] In the good tradition of EU legal scholarship various metaphors have again popped up: from a "marbling effect" of loose fragments to the CFSP as a "hidden horizontal pillar".[363]

One important novelty of the Lisbon Treaty is that it better arms the duty of consistency to attenuate the remaining delimitation of the CFSP. It does so by fortifying and extending institutional bridges that facilitate efforts to give effect to it. First, the European Council, which was long the only institution that could approach the political and economic aspects of foreign policy in an integrated manner, has been accorded a permanent President. This enables a more stable, visible and accountable input of this 'light house' institution to develop the general political directions and priorities of the Union.[364] A second institutional bridging function is established in the person of the High Representative of the Union for Foreign Affairs and Security Policy (hereafter: High Representative or HR), who combines the three hats of High Representative for the CFSP, Vice-President of the Commission responsible for external relations and Chair of the Foreign Affairs Council (FAC).[365] The leitmotiv in each of these three mandates is to better interlink, cohere and coordinate the various dimensions of EU foreign policy.[366] This integrative function trickles further down to the European External Action Service (EEAS), which assists the High Representative in her/his vast range of responsibilities and mirrors the hats of its principle in both composition and responsibilities. In turn, this bundling of competences is translated to the field level by transforming the old Commission Delegations into EU Delegations representing the entire range of EU competences. The details of these new functions will be thoroughly analysed in Chapter 4.

By improving the EU's ability to bridge the different compartments of external action, these institutional upgrades attach weight to the Lisbon Treaty's widely praised call for coherence. However, as mentioned, the compartmentalisation itself has survived the Treaty changes and many questions about how to reconcile this with the Treaty's coherence rationale are left unanswered. Clearly, the Member States could only find "unity within obscurity"[367] and intentionally left many key elements regarding the structure and function of its most significant innovations to political discretion. Against the background of this constitutional confusion, the main question for this research is how these changes and this complexity can and do impact on the practice of EU external action, and the security-development nexus in particular. In the Union's founding Treaties there has always been a tension between the Member States' clench to sovereignty in foreign affairs and the need to cooperate and

[362] Curtin and Dekker (2011) op.cit. note 97, 156 and 173.
[363] Respectively: Ibid., 185; Govaere (2011) op.cit. note 346, 87-111.
[364] Article 15(1) TEU.
[365] Article 18 TEU.
[366] See particularly Articles 18(4), 21(3), 26(2), 16(6) and 32 TEU.
[367] J. Wouters, D. Coppens and B. De Meester, '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) 198.

integrate in order to play a role of importance on the global stage. Yet, the Treaty of Lisbon, by formulating the loudest ever call for coherence, while sticking to the delimitation of the CFSP, has turned this tension into a genuine integration-delimitation paradox. With all the public rhetoric focussed on integrating the whole spectrum of foreign policies, and the underlying legal framework still in delimitation mode, the EU risks to get itself into a fix.

On the level of policy-making, the merger of legal personalities considerably simplifies the conduct of foreign relations and strengthens the external identity of the EU, but does not eliminate the need to delimitate between CFSP and TFEU competences.[368] Failing to fully value the heterogeneity of the EU's legal system and the intricacy of such an undertaking might engender duplication and fragmentation. This might in its turn result in substandard policy outcomes that do not fully exploit the potential of the Lisbon Treaty reforms. On the institutional level the paradox between integrating and delimitating the CFSP might seriously put the loyalty and accountability of the new institutional bridging bodies to the test. Rather than smoothening institutional divides this holds the risk of adding fuel to the fire of old inter-institutional tensions. It is therefore not surprising that Van Elsuwege expects the delimitation between CFSP and non-CFSP external action "to become a major battlefield for inter-institutional conflicts in the post-Lisbon era".[369] Some of these conflicts will undoubtedly end up before the Court, which has, given the unification of external action objectives and the equal value of CFSP and TFEU competences, been deprived of much means to objectively choose between legal bases. In the subsequent chapters we will analyse the impact of this integration-delimitation paradox along these three trajectories of policy-making, institutional design and judicial supervision, through a focus on the nexus between EU development cooperation and the CFSP.

Security and development in the unified EU legal order

The Lisbon Treaty constitutionally connects development cooperation and the CFSP in the horizontal external action objectives of Article 21 TEU. Whereas they previously only touched/overlapped in the common Treaty goal of consolidating and supporting democracy, the rule of law and human rights, this is today only one of the various shared objectives governing their implementation. This is explicitly confirmed in Article 23 TEU for the CFSP and Article 208(1) TFEU for development cooperation.[370]

[368] B. de Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations?' in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals - Essays in European Law* (Hart Publishing, Portland, 2008) 9.
[369] P. Van Elsuwege, 'The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty' in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford, Hart Publishing, 2013) 119.
[370] In this same spirit, Article 3(5) TEU presribes that "[i]n its relations with the wider world, the 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".

Consequently, the eradication of poverty is under a legal obligation to contribute to preserving peace, preventing conflicts and strengthening international security, and *vice-versa*. This is however not made so explicit as the enumeration of objectives does not concretise specific interfaces, prioritise between them or reconcile potentially conflicting goals.

The reshuffling of principles and aims is not the only Treaty change to both policy areas. With regard to development cooperation the Convention's Working Group on External Action professed a clear commitment to make this policy more effective.[371] Comparing the three main objectives that were put forward there with the eventual outcome in the Lisbon Treaty delivers good insights into the profundity of this reform. *First*, the Convention stressed the need to clarify the purpose, role and added value of EU development cooperation in relation to Member States. Some participants went as far as arguing that "decision-making at EU level should extend to the use of aid at national level".[372] The result on this first commitment is rather mixed. On the positive side the Treaty clarifies that development cooperation is a shared competence and adds that – contrary to the general principle of pre-emption – "the exercise of that competence shall not result in Member States being prevented from exercising theirs".[373] This confirms the principle of complementarity, which is also made more explicit under the development title. It clarifies that "[t]he Union's development policy and that of the Member States shall complement and reinforce each other".[374] For this purpose and in order to promote the efficiency of their action, they shall coordinate their policies and consult each other on their aid programmes.[375] On the negative side, the Treaty does not specify the added value and fails to break "the deafening silence in answer to the questions of Europe's distinctive development role and what policy elements are best coordinated at the EU level".[376]

A *second* commitment was to clarify the purpose and role of EU development cooperation with regard to other policy areas and include it "as an element of the global strategy of the Union vis-à-vis third countries".[377] This commitment is often termed Policy Coherence for Development (PCD). For one thing, it is of course addressed by the streamlining provisions of EU external action set out above. For another, the development title repeats the pledge to "take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries".[378] This was already included in the previous Treaty framework and can thus hardly be seen as a further

[371] European Convention (CONV 459/02) Final Report of Working Group VII on External Action, 16.12.2002, paras. 53-57.
[372] Ibid., para. 54.
[373] Article 4(4) TFEU.
[374] A literal reading of ex Article 177 TEC might have suggested a subordination of EC development cooperation to Member States programmes. This view was however clearly countered by the Court in Case C-268/94, *Portugal v Council*, ECLI:EU:C:1996:461, para. 31.
[375] Articles 208(1) and 210(1) TFEU.
[376] Holland (2002) op.cit. note 102, 13.
[377] European Convention (CONV 459/02) op.cit. note 371, paras. 53 and 55.
[378] Article 208(1) TFEU.

clarification and integration of the role and objectives of development cooperation within EU external action as a whole. Moreover, the relation to the chapter on economic, financial and technical cooperation measures with third countries remains unclear. Even though it is now explicitly specified that the latter covers cooperation "with third countries other than developing countries",[379] that last term is still nowhere defined. Yet, given that both areas are now covered by the ordinary legislative procedure, this fuzzy differentiation will no longer cause procedural complications.

A *third* commitment consisted of establishing poverty eradication as the central aim of EU development policy. This is realised in Article 208(1) TFEU,[380] and also Article 21(2)(d) expresses that the EU shall "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty". This represents in fact the only element of prioritisation in the EU's external action objectives. It can be seen as a return to the core business of development cooperation and counterbalances the potential instrumentalisation of aid which might result from its inclusion in the unified external action toolbox. Schütze argues that this serves to narrow the scope of development cooperation to measures aimed directly at poverty eradication.[381] Yet, Article 208(1) TFEU simultaneously places development policy "within the framework of the principles and objectives of the Union's external action". Also for development cooperation agreements, set out in Article 209(2) TFEU, it is provided that these can pursue the objectives of Article 208 TFEU as well as those set out in Article 21 TEU. Arguably therefore, the new Treaty provisions – crucial with regard to the security-development nexus – integrate development cooperation in the EU's foreign policy spectrum, while ensuring that development policies shall only pursue the other external action objectives to the extent that they are secondary (not primary) to eradicating poverty (cf. *infra* 5.3.2. on the *Philippines PCA* case).

As set out above, the changes to the CFSP mainly result from its altered position in the EU legal order. A central question in this regard is how to reconcile the horizontal EU external action objectives with the CFSP's 'ring-fenced' nature.[382] Particular confusion arises in the light of the deprivation of its own specific objectives, with only the deceiving elucidation that it shall cover "all areas of foreign policy and all questions relating to the Union's security".[383] While preserving peace, preventing conflicts and strengthening international security is now a common goal of EU external as a whole, TFEU competences such as trade, development cooperation and humanitarian aid do retain their own

[379] Article 212(1) TFEU.
[380] This expresses that development cooperation has as "primary objective the reduction and, in the long term, the eradication of poverty".
[381] R. Schütze, 'EU Development Policy: Constitutional and Legislative Foundation(s)' (2013) *Cambridge Yearbook of European Legal Studies* 15, 707.
[382] P.J. Cardwell, 'On "ring-fencing" the Common Foreign and Security Policy in the Legal Order of the European Union' (2013) *Northern Ireland Legal Quarterly* 64(4), 443.
[383] Article 24(1) TEU.

specific objectives.[384] This can however not mean that the CFSP is devoid of substance, nor that it has an unlimited scope. On the first account, the single list of objectives must not be interpreted as nullifying the principle of conferral, but rather as symbolising and emphasising "the diverse, albeit indivisible, whole, which the totality of the Union's external policies form".[385] On the other hand, the CFSP is certainly not unlimited either. Article 40 TEU read in combination with the TFEU's attribution of external competences indicates that the CFSP can only be defined by default. Detracting the TFEU's external competences from 'all areas of foreign policy' reveals its traditional focus on the political, security and defence aspects of EU external relations.

Compared to the rather modest modifications to the CFSP, the area of security and defence was tackled more thoroughly. Most of the reforms served to catch up with the rapidly evolving dynamics that soon outdated *ex* Article 17 TEU in the variety of activities and the rapid institutionalisation. This is reflected in the upgrade from a single Article to a whole Treaty section, its formal inclusion as an integral part of the CFSP and the label change from ESDP to C("Common")SDP.[386] Yet, if the common nature of the CFSP is already a point of debate, this is definitely the case for this area where decision-making remains "hyperintergovernmental".[387] The changed denomination must therefore be seen as a symbolic status upgrade, and getting carried away about the possible implications hereof amounts to "putting the cart before the horse".[388] Furthermore, the conditional mood has been removed from the scope of this policy. From now on the progressive framing of a common Union defence policy "will" (not 'might') lead to a common defence, "when" (not 'should') the European Council, acting unanimously, so decide.[389] Yet, one should be careful not to over-interpret semantics, particularly in an area that has evolved to a great extent outside the Treaty framework. Moreover, the primary law wording gives rise to terminological confusion. Besides the CSDP, Article 42(2) TEU mentions the "common Union defence policy", which is being progressively framed, and the yet-to-be decided "common defence". A close reading suggests that the CSDP is the umbrella term for the common Union defence policy, referring to "missions outside the Union",[390] and the common defence, relating to the EU's own security and military protection.

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[384] Respectively in Articles 206, 208 and 214 TFEU.

[385] Koutrakos (2013) op.cit. note 91, 34. On the basis of the discussions in the Convention, Grevi argues that its insertion was meant to "fuel strategic thinking, help focus minds and priorities and foster convergences among Member States" (G. Grevi, 'The Institutional Framework of EU External Action' in G. Amato, H. Bribosia and B. de Witte (eds), *Genèse et Destinée de la Constitution Européenne : Commentaire du Traité Etablissant une Constitution pour l'Europe à la Lumière des Travaux Préparatoires et Perspectives d'Avenir* (Bruylant, Brussels, 2007) 784).

[386] Article 42(1) TEU.

[387] Wouters, Coppens and De Meester (2008) op.cit. note 367, 165.

[388] B. Angelet and I. Vrailas, 'European Defence in the Wake of the Lisbon Treaty', *Egmont Paper 21* (Egmont Royal Institute for International Relations, Brussels, 2008) 18.

[389] Article 42(2) TEU.

[390] Article 42(1) TEU.

First, with regard to the common Union defence policy, it is important that the Treaty codifies the growing variety of external missions by extending the Petersburg tasks. In particular, joint disarmament operations, military advice and assistance, conflict prevention and post-conflict stabilisation are added to this non-exhaustive list. All these tasks may moreover contribute to the fight against terrorism.[391] Since this is the only occasion where EU primary law explicitly refers to activities in the grey area between security and development, a literal reading of the TEU may create the false impression that the security-development nexus is a CSDP preserve. A number of other changes aim to smoothen the implementation of the CSDP. First, Articles 42(5) and 44 TEU enable the Council to entrust the implementation of a CSDP initiative to a group of Member States, which are willing and capable to carry it out.[392] Further, Article 41(3) TEU inserted two novelties to speed up the financing of CSDP missions and operations, the effectiveness of which essentially depends on a swift reaction. With regard to CFSP initiatives and non-military preparatory activities for carrying out Petersberg tasks, the Council shall adopt a decision establishing the specific procedures for guaranteeing rapid access to EU budget appropriations. For those tasks with military or defence implications, the Council shall adopt by QMV, on a proposal from the High Representative, a start-up fund for the urgent financing of preparative initiatives.[393] While these novelties, which have not been operationalised yet, allow to accelerate decision-making once the necessary funds are committed, they do nothing to ease the difficult quest for civilian and military capabilities. The Treaty does not allow the EU to develop its own capabilities and the CSDP thus continues to depend on national means.[394] Even though Article 42(3) appears to promulgate in fierce terms that the Member States "shall" make these available, this obligation is "vague in its scope, and silent in its implications".[395] Rather than Member States being bound by the CSDP, it is the CSDP that remains prisoner of their political will. Declarations 13 and 14 confirm that CSDP provisions "do not prejudice the specific character of the security and defence policy of the Member States".

Second, the common defence, whilst still conditional upon a unanimous European Council decision, is no longer an entirely distant concept. Important steps towards military integration are the inclusion of a NATO-like[396] collective defence clause in Article 42(7) TEU and the solidarity clause of Article 222 TFEU. The latter provides for joint action when a Member State is object of a terrorist attack or victim

[391] Article 43(1) TEU
[392] See further: T. Tardy, 'In groups we trust: Implementing Article 44 of the Lisbon Treaty', *EUISS Brief Issue 27* (EU Institute for Security Studies, Paris, 2014) 4p.
[393] Article 41(3) TEU.
[394] Article 42(1) TEU.
[395] Koutrakos (2013) op.cit. note 91, 63.
[396] Article 5 of the North Atlantic Treaty, Washington, 04.04.1949.

of a natural or man-made disaster.[397] Moreover, in the absence of unanimity among Member States to proceed further in the direction of a common defence, the Treaty provides the possibility of creating a 'Schengen/Eurozone of Defence' [398] through the new provisions on Permanent Structured Cooperation (PeSCo) in Article 42(6) and 46 TEU. Compared to the ad hoc nature of enhanced cooperation, which seeks to establish coalitions of the willing for specific policy initiatives, PeSCo – as its name indicates – aims to set up a more permanent mechanism. It is targeted at Member States that fulfil higher criteria for military capabilities and are willing to make more binding commitments to develop their defence capacities.[399] In a final effort to catch up with reality, the European Defence Agency (EDA), which was called in motion by the 2003 Thessaloniki European Council, receives a firm basis in Article 42(3) and 45 TEU.[400] Its tasks and responsibilities, which mainly aim at creating a level playing field between the Member States' Defence Ministers, the Commission, the market and the industry, are outlined in noticeable detail.

Together with the specific Petersberg tasks this constitutes a considerable level of precision that is alien to the rest of the CFSP. Whereas this may seem at first sight remarkable in an area that is so strictly guarded by the Member States, it is precisely this last element that might provide the explanatory factor. Indeed, there is no risk for Member States to be bound against their will by CSDP decisions as none of the CFSP's QMV exceptions applies in this specific area.[401] Yet, given that political considerations still prevail over legal commitment, one may wonder whether this anchorage of the CSDP in the Treaty was really necessary and will change anything in practice.[402] It is in this regard illustrative that few of the major novelties, such as the start-up fund, Article 44 TEU or PeSCo, have yet been put in practice.[403]

2.4. Conclusion

EU development and security competences have trodden long and peculiar paths in the EU's evolving legal order(s). The result is a particularly intricate legal system based on a number of inherent paradoxes. EU development cooperation evolved throughout most of its existence without explicit basis in the founding Treaties. Legal creativity nonetheless ensured that it was from the start part and

[397] A laborious compromise between Member States and EU institutions on the implementation of this clause could only be reached in June 2014 (Council Decision (2014/415/EU) on the arrangements for the implementation by the Union of the solidarity clause, OJ L192/53, 01.07.2014).
[398] J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, Cambridge, 2010) 276.
[399] Protocol No. 10 on permanent structured cooperation established by Article 42 TEU attached to the Lisbon Treaty.
[400] Presidency Conclusions, European Council, Thessaloniki, 19-20.06.2003, para. 65.
[401] Article 31(4) TEU.
[402] Koutrakos (2013) op.cit. note 91, 78.
[403] Discussions on Article 44 TEU started early 2015 in the EU's Politico-Military Group (PMG). Based on an EEAS food-for-thought paper and an analysis of the Council Legal Service, Member States will undertake an exercise study.

parcel of Europe's integration project. Paradoxically, it held a more prominent position in the EU's system when it had no direct basis in primary law and gradually moved out of the picture after its codification in the Treaty of Maastricht. The common description as a "cornerstone" of European integration from the 1950s to the early 1980s,[404] contrasts sharply with the limited policy and public attention it receives today.

From a substantive point of view, the Maastricht Treaty presented a quantum leap for EU development policy. Contrary to the struggle of inserting a simple 'exchange of views' on policy issues and a reference to human rights in the 1984 Lomé III Convention, the new Treaty professed in the clearest of terms that this 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'. This cleared the path for a less secluded policy, more sensitive to prevailing political issues and in line with the whole EU foreign policy spectrum. Yet, this simultaneously opened the EU up to criticism of how its partnership approach to North-South relations gradually changed to 'paternalism' or even 'coercion'. Increasingly, the EU's geared-up political role came to usurp the external spotlights, resulting in the dethroning of development cooperation. The Lisbon Treaty aims to turn this tide by uprating the eradication of poverty as a central aim of the EU's external action framework. However, it fails to answer key questions regarding the added value, position and role of EU development cooperation vis-à-vis other policies and Member States' programmes, which might endanger the realisation of its primary aim.

Although it is often the scapegoat for the EU's low stance on the global scene, the CFSP has from a historical perspective made great strides. After a number of failed attempts and associated traumas, it evolved from largely non-committal political consultation in the 1970s to a Common Foreign and Security Policy, firmly rooted in the Treaties, with an expanding operational arm in the form of the CSDP. In the light of the traditional executive dominance of foreign affairs, as well as the close connection to state sovereignty, the CFSP differs from all other EU policy areas in that compliance with its decisions is monitored by Member States, as represented in the Council and the European Council, rather than by the Commission or the Court. The inherent paradox of the CFSP is that it is designed to form the heart and beacon of EU external action, yet can only be defined by default.

The legal framework underlying the EU's security and development competences has evolved from complete separation in the Rome era, over prudent bonds under the Maastricht pillar structure, to a subsequent tightening in policy practice that was confirmed in the Lisbon Treaty's unified legal order. Rather than by grand design, this evolution was mostly driven through a two-way process of matter-

[404] M. Lister, *The European Union and the South: Relations with Developing Countries* (Routledge, London, 1997) 22.

of-fact necessity. On the one hand, the advanced economic integration of the Union made it impossible for Member States to go it alone for inherently political decisions such as the imposition of sanctions or the disruption of aid flows. On the other hand, the interconnected challenges of foreign policy shattered the illusion that primarily economic areas such as development and trade could be decoupled from politics. This gradually evolving awareness of unavoidable interaction resulted in "a legal order in which different layers have been successively added, in line with the functional method of achieving what was possible – where the logic of compromise marking intergovernmental agreements took precedence over the need for systematic consistency".[405] This led to a particularly intricate constitutional structure that reflects a delicate balance between the growing need for integration and the desire of Member States "to control exactly how much competence they give to the EU and how much power they give to its institutions to exercise these competences".[406] This is expressed in a meticulous system of vertical and horizontal division of powers, counterbalanced with an ever more ambitious but amorphous call for consistency.[407]

The Lisbon Treaty more than ever tilts this call to a constitutional level by placing it under the supervision of the Court, dissolving the EC into the Union, unifying the external action system and assigning new institutional functions with a clear mandate to unite EU foreign policy. After decades of constitutional confusion regarding its position it can today no longer be doubted that the CFSP is an inherent part of the Union's single legal order. Nonetheless, the Lisbon Treaty is still only "a suspended step towards integration", [408] and retains the CFSP's particularity in full glory. This approach of running with the hare of integration and hunting with the hounds of delimitation resulted in a strong paradox. The Lisbon Treaty is particularly sparing of detail on how to solve this, but all the more generous in the room of manoeuvre for policy-makers and the judiciary. Drawing inspiration from biology, the challenge on the policy, institutional and judicial tracks is thus to ensure that the symbiosis of the CFSP and TFEU organisms does not turn into a situation of parasitism, where the benefit of the one is to the harm of the other, or even a synnecrosis, meaning that interaction is detrimental to both of them. The optimal scenario is one of mutualism, ensuring that close association is beneficial to TFEU and CFSP external activities.

[405] G.L. Tosato, 'Simplification of the Treaties as a Constitutional Process' in S. Cassese and G. Della Cananea (eds), *Institutional Reforms in the European Union : Memorandum for the Convention* (EuropEos, Rome, 2002) 185.
[406] J.-C. Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press, Cambridge, 2006) 59.
[407] A. Ott, 'Between Pillars and Policies: The Quest for Consistency in EU External Relations Law' in M. de Visser and A.P. van der Mei (eds), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Intersentia, Cambridge, 2013) 2.
[408] J. Wouters and T. Ramopoulos, 'Revisiting the Lisbon Treaty's Constitutional Design of EU External Relations' in L.S. Rossi and F. Casolari (eds), *The EU after Lisbon: Amending or Coping with the Existing Treaties?* (Springer, Cham, 2014) 221-226.

3. The security-development nexus on the policy track

> *Our plans miscarry because they have no aim. When a man does not know what harbour he is making for, no wind is the right wind.*
>
> Lucius Annaeus Seneca, 4 BC – AD 65

As discussed in the previous chapter the TEU and TFEU provide the CFSP and development cooperation with wide-ranging mandates. The Lisbon Treaty constitutionally connects their objectives in Article 21 TEU and renders them an organic part of the indissoluble whole which the EU's external action now forms.[409] Primary law has however never specified how to deal with connections or the grey area between them. Consequently, the EU's pledge to enhance the security-development interface has matured entirely in policy statements and declarations based on these extensive Treaty objectives as well as the responsibility of the Commission, the Council and (more recently) the High Representative for ensuring the consistency of EU external action.

The key challenge in this undertaking is that the EU's constitutional system firmly divides – as most clearly expressed in Article 40 TEU – what this policy nexus aims to unite. This obviously complicates the choice of legal basis in the grey area between security and development, and resulted in two very separate sets of policy instruments on both sides of the legal fracture. These have gradually evolved towards the core of the security-development interface, with the ever-present risk of missing synergy opportunities, duplication and fragmentation. Under the first title of this chapter, the EU's evolving lexicon on the security-development nexus will be compared and contrasted with the reality of its complex and fragmented legal framework (3.1.). A second part will set out what this implies for the Union's range of instruments, with specific attention for fine-tuning and coordinating the respective development and security toolboxes (3.2.).

3.1. The EU's commitment to the security-development nexus: about words and deeds

The need for coherence between security and development policies, which is stressed in policy declarations nearly to the point of monotony, did not arrive out of the blue on the policy agenda of EU

[409] Koutrakos (2011) op.cit. note 90, 591.

institutions. As for the motives to undertake development cooperation and security missions, also the drive to enhance their interface is not a matter of unrestrained altruism, but results from a variety of interrelated factors. *First*, the EU's philanthropic intentions are closely related to so-called 'enlightened self-interest'. This means that breaking the vicious cycle of socio-economic deterioration and instability in faraway places is necessary to guarantee the European way life. In the words of former External Relations Commissioner Patten: the "idea of an inter-relationship between peace and development is not new … [b]ut the scale of the problem and the appalling repercussions of recent conflicts have made this a matter of self-preservation".[410] *Second*, the security-development nexus is about an optimal use, and averting the waste, of scarce resources. Development efforts take significant time to yield results, which can be wiped out in the blink of an eye through the psychological and physical damage done by violence and war. The CFSP and particularly the CSDP, on the other hand, "can promote but seldom achieve decisive progress". [411] Sustainable results require sequenced follow-up by longer-term (development) programmes. *Finally*, discussions on the security-development nexus not seldom have a hidden agenda relating to political power and influence. Security and development competences are governed by diverging procedures and an essentially different institutional balance. This implies that determining the borderline and division of labour between them is not a mere theoretical or technical exercise, but has an inherently political nature. Given their differentiated involvement, the Commission, the Parliament and possibly even the Court of Justice can be said to have an interest in activities being framed as development cooperation, whereas the balance tips towards the Member States under the CFSP framework.

Since the late 1990s, these motivations have in varying gradations influenced the rising policy agenda of EU institutions promoting coherence between security and development actors, policies and initiatives. This process has not been univocal, but resembles a conceptual chaos of ever-changing terminology, reminiscent of a kid that cannot choose which toy to play with. The security-development nexus is an all-purpose concept relating to and touching upon numerous EU documents. The aim of this section is therefore not to give a complete overview, but rather to set out concisely the key policy statements and main evolutions in the EU's lexicon on this topic (3.1.1.). A second section will then explore their feasibility in the light of the Union's disjointed constitutional structure (3.1.2.).

[410] C. Patten, 'Europe in the World: CFSP & its relation to development', address at the Overseas Development Institute, London, 07.11.2003, 5.
[411] L.-E. Lundin, *CSDP Senior Mission Leaders and the Comprehensive Approach: A Need-to-Know Guide* (Swedish Agency for Peace, Security and Development, Stockholm, 2014) 4.

3.1.1. The evolving lexicon of EU institutions

The awareness about the interrelation of security and development was not alien to the EU in its early years, as evidenced by the above references to the 1950 Schuman Declaration or the 1973 Document on European Identity.[412] It is however only since the late 1990s that this linkage is progressively put forward as an explicit policy guide. Prompted by its disappointment in the 1995 Council Conclusions on 'Preventive diplomacy, conflict resolution and peace-keeping in Africa'[413] – which offered little decisiveness in the aftermath of the 1993 Rwanda-trauma – the Commission came forth as pioneer for a more integrated approach. The initial impetus was given in a Communication on 'The European Union and the Issue of Conflicts in Africa'.[414] With notable precision, this innovative policy document undertakes a rare attempt at defining the by now typical, but increasingly obscured, terminology of conflict prevention and root causes of conflicts. With the introduction of 'structural stability' it makes a first attempt to conceptualise the security-development linkage. This term refers to a "situation involving sustainable economic development, democracy and respect for human rights, viable political structures and healthy social and environmental conditions, with the capacity to manage change without to resort to violent conflict".[415] In the Commission's view, achieving structural stability requires a comprehensive and pro-active approach maximising the Union's leverage through an optimal use of its available instruments. A subsequent Green Paper cautioned that "[a]ny subordination of cooperation policy to foreign policy measures could jeopardize development objectives, which are medium and long-term and hence require continuity of action".[416]

Box 3: Selected key EU documents relating to the security-development nexus	
1996	Commission Communication on The European Union and the Issue of Conflicts in Africa
2001	EU Programme for the Prevention of Violent Conflict (Göteborg Programme)
2003	European Security Strategy
2004	A Human Security Doctrine for Europe
2004	Action Plan for Civilian Aspects of ESDP
2005	Commission Communication on Policy Coherence for Development
2006	European Consensus on Development

[412] Op.cit. notes 99 and 139.
[413] Council Conclusions on Preventive Diplomacy, Conflict Resolution and Peacekeeping in Africa, 1891st General Affairs Council Meeting, Brussels, 4.12.1995.
[414] Commission Communication (COM(1996) 332 final) on the European Union and the issue of conflicts in Africa: peace-building, conflict prevention and beyond,, 06.03.1996.
[415] Ibid., 2.
[416] Commission Green Paper (COM(96) 570) on relations between the European Union and the ACP countries on the eve of the 21st century: Challenges and options for a new partnership, 20.11.1996, 41.

2007	Joint Africa-Europe Strategy
2007	Council Conclusions on Security and Development
2007	Council Conclusions Towards an EU Response to Situations of Fragility
2008	Report on the Implementation of the European Security Strategy
2011	Council Conclusions on Conflict Prevention
2011	New Deal for Engagement in Fragile States
2012	The Agenda for Change
2013	Joint Commission and High Representative Communication on the EU's comprehensive approach to external conflict and crises
2014	Council Conclusions on the EU's comprehensive approach

Initially, this approach only found limited hearing with the Council, wary of Commission intrusion in the Member States-dominated security domain.[417] Yet, the Commission stood firm, with Development Commissioner Pinheiro professing in 1999 that "development co-operation is indisputably the single most important instrument for an effective policy of peace-building".[418] A final push in 2001[419] eventually prompted the adoption by the Göteborg European Council of the 'EU Programme for the Prevention of Violent Conflicts' (also: Göteborg Programme). This represents a clear commitment to move away from pigeonholing security and development. It introduces a multi-dimensional approach through an integrated use of the EU's structural long-term instruments – including "development co-operation, trade, arms control, human rights and environment policies as well as political dialogue" – and short-term preventive actions by a broad range of diplomatic and humanitarian tools.[420] While still kept separate, the CSDP structures for civilian and military crisis management were moreover to contribute to the EU's conflict prevention capabilities.

These connections are further cultivated in the 2003 European Security Strategy (ESS), drafted by then High Representative for the CFSP Javier Solana. While recognising the need for fine-tuning the EU's external toolbox, the ESS gears the latter firmly towards security objectives that mainly serve to counter threats to the EU's own safety.[421] These are said to result from terrorism, weapons of mass destruction (WMDs), organised crime and state failure. This philosophy of equating security challenges abroad with the EU's own safety is continued in the 2004 Barcelona Report on a 'Human Security

[417] See for instance the remarkably terse Common Position (97/356/CFSP) concerning conflict prevention and resolution in Africa, OJ L153/1, 11.06.1997.
[418] Quoted in Olsen (2005) op.cit. note 277, 594.
[419] Commission Communication (COM(2001) 211 final) on Conflict Prevention, 11.4.2001.
[420] Göteborg Programme (2001) op.cit. note 77, 3.
[421] European Security Strategy (2003) op.cit. note 78. This security bias is also clear on a procedural level, as the drafting mainly occurred in the Council Secretariat with minimal involvement of the Commission. See further: J. Faust and D. Messner, 'Europe's New Security Strategy: Challenges for Development Policy' (2005) *The European Journal of Development Research* 17(3), 7.

Doctrine for Europe'. This report, commissioned by Solana and drafted by a group of distinguished practitioners and academics, focussed on implementing the ESS. One of the starting points was that "Europeans cannot be secure while others in the world live in severe insecurity".[422] In line with the emerging UN lexicon,[423] it conceptualises human security as departure from state security towards "freedom for individuals from basic insecurities caused by gross human rights violations".[424] A 2007 follow-up Madrid Report [425] complements this rather theoretical approach with operational instructions for the CFSP and CSDP operations, which were however only limitedly picked up by EU institutions.[426] In this sense it is telling that the call in the Madrid Report on Member States to "agree a public declaration of their commitment to principles which put Human Security at the heart of the European Union's external operations" was never realised.[427]

The launch of the first CSDP missions in 2003 further contributed to the emerging security-bias of EU external action. *Ex* Article 17(2) TEU formally limited the Petersberg list to "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peace-making". Yet, this initial focus on military and defence aspects was soon extended with a civilian dimension, bringing the CSDP irrevocably within the radius of development activity. This led the European Council to convey, in its 2004 Action Plan for Civilian Aspects of ESDP, that "synergy between EU development assistance activities and civilian crisis management under ESDP should be elaborated and better developed, including in post-conflict stabilisation and reconstruction".[428] This plan was part of broader efforts to improve civil-military cooperation (CIMIC) and coordination (CMCO) in EU external action. There exists some confusion regarding the exact differences between these two concepts. In general terms, CIMIC is not specific to the EU and emerged in the context of NATO to improve the interaction of military and civilian actors at field/tactical level. CMCO is a politico-strategic concept developed in the context of the CFSP/CSDP to improve coordination of the actions of all relevant EU actors involved in the planning and subsequent implementation of crisis response. [429] In this context a draft Comprehensive Planning Concept was developed "as a living document" to be enhanced on the basis

[422] Study Group on Europe's Security Capabilities, *The Barcelona Report: A Human Security Doctrine for Europe*, Presented to CFSP High Representative Solana, Barcelona, 15.09.2004, 5.
[423] UN Commission on Human Security (2003) op.cit. note 23, 159.
[424] Study Group on Europe's Security Capabilities (2004) op.cit. note 422, 5.
[425] Human Security Study Group, *The Madrid Report: A European Way of Security*, Madrid, 08.11.2007, 31p.
[426] See further: H. Merket, 'The EU, Human Security and the Insulation of the CFSP: Comparing Recent Policy and Judicial Tendencies' in A. Matta and T. Takács (eds), *Human Security as a Tool for Comprehensive Approach for Human Rights and Security Linkages in EU Foreign Policy*, CLEER Working Papers 2014/5 (Centre for the Law of EU External Relations, The Hague, 2014) 21-33.
[427] Human Security Study Group (2007) op.cit. note 425, 7; M. Martin and T. Owen, 'The Second Generation of Human Security: Lessons from the UN and EU Experience' (2010) *International Affairs* 86(1), 211-224.
[428] European Council, *Action Plan for Civilian Aspects of ESDP*, Brussels, 17-18.06.2004, para 12.
[429] Council Note (14457/03) Civil Military Co-ordination (CMCO), 07.11.2003; See further: N. Hynek, 'EU Crisis Management after the Lisbon Treaty: Civil–Military Coordination and the Future of the EU OHQ' (2011) *European Security* 20(1), 81-102.

of lessons learned in operational experience.[430] It aims to ensure "a systematic approach designed to address the need for effective intra-pillar and inter-pillar co-ordination" in EU crisis management planning".[431] However, this concept remained rather light on cross-pillar guidance and was never formally approved.

If the ESS is the bible of European security, then the 2006 European Consensus on Development (ECD) is its counterpart for the EU's aid and cooperation policies. In a notable sign of resoluteness, unity and cohesion this statement was adopted jointly by the Council, Member States, Parliament and Commission. Departing from the conviction that "insecurity and violent conflict are amongst the biggest obstacles to achieving the [Millennium Development Goals (MDGs)]" it expresses a more cyclical view on the security-development connection. It regards both as "important and complementary aspects" that "[w]ithin their respective actions … contribute to creating a secure environment and breaking the vicious cycle of poverty, war, environmental degradation and failing economic, social and political structures".[432] Unfortunately this balanced link is not continued in the 2007 Joint Africa-EU Strategy adopted by European and African Heads of States or Government. The importance attached to "peace and security as preconditions for political, economic and social development" is reflected in a particularly vibrant partnership on Peace and Security. However, its MDG partnership remains entirely isolated from security concerns.[433]

The ECD remains to date "the compass" for actions under the EU's development policy, as expressed by European Parliament President Schulz and High Representative Ashton who signed and gave new impetus to the Consensus on 3 April 2014.[434] In relation to the security-development nexus it does not excel in vision and precision, but embraces a number of concepts that left indelible traces on this continuously evolving policy debate. *First*, it affirms the Union's commitment to promote Policy Coherence for Development (PCD), meaning that it "shall take account of the objectives of development cooperation in all policies that it implements which are likely to affect developing countries, and that these policies support development objectives".[435] Rooted in Article 208(1) TFEU, PCD departs from the realisation that improving development cooperation is important, but "in itself not sufficient to enable the developing world to reach the [MDGs]".[436] Consequently, five focal areas

[430] Council Note (13983/05) Draft EU Concept for Comprehensive Planning, 03.11.2005, para.5.
[431] Ibid., paras 4-6.
[432] European Consensus on Development (2006) op.cit. 79, para. 37.
[433] Council (16344/07) op.cit. note 92, para. 13.
[434] High Representative Ashton and European Parliament President Schulz, Joint Statement on the European Consensus on Development, Brussels, 03.04.2014.
[435] European Consensus on Development (2006) op.cit. 79, para. 9.
[436] Commission Communication (COM(2005) 134 final) on Policy Coherence for Development: Accelerating progress towards attaining the Millennium Development Goals, 12.04.2005, 1. The idea emerged from the 2004 Council Conclusions on Effectiveness of External Relations (2559th External Relations Council meeting, Brussels, 26.01.2004) professing that in order for coherence to be achieved, "aid deployment must form part of a mutually reinforcing mix of policies supporting the

are to contribute to this objective: trade and finance, climate change, food security, migration and – most importantly for this research – security. A *second* important trace left by the ECD is the focus on 'fragile states' or 'state fragility'.[437] Although it is still included alongside the concept of 'failed states', it incited a move away from this ideologically more disparaging term that saw the light of day in the context of the ESS and the global war on terror.

It was most authoritatively picked up by the November 2007 General Affairs and External Relations Council (GAERC) which organised the first ever joint meeting of EU Development and Defence Ministers. Symptomising the EU's anomaly of conceptual multiplication, the Council adopted two sets of related – and arguably unnecessarily separated – Conclusions, one on 'an EU Response to Situations of Fragility' and another on 'Security and Development'. The first situates itself "within the framework of the European Consensus on Development" and seeks to establish a more comprehensive and forward-looking use of all EU and Member States development instruments in fragile states.[438] The Conclusions on Security and Development are broader and build on both the ECD and the ESS. This took the security-development nexus to a new level by expressing a firm belief that it "should inform EU strategies and policies in order to contribute to the coherence of EU external action".[439] Typically for EU jargon, it is added "that the responsibilities and roles of development and security actors are complementary but remain specific". These Conclusions constitute the first time that the Council addresses the security-development inter-linkage beyond the level of generalist rhetoric. It is therefore useful to reproduce in full the relevant provisions on 'pragmatic actions'.

2007 Council Conclusions on Security and Development

Strategic Planning

8. The EU is addressing insecurity, and conflicts and their root causes, through a wide range of instruments. Inter-linkage between security and development should be seen as an integral part of the ongoing EU efforts, including those to enhance Civil-Military Coordination (CMCO) in order to address complex crises in a coherent manner.

9. To enhance coherence and consistency, the Council calls for further intensified cooperation within and between Council bodies, Commission services and Member States, in particular by improving the

external objectives of the Union". For this purpose it called upon the Commission to establish criteria for aid allocation based on need and performance, particularly taking account of the "difficulties faced by countries in crisis or in conflict".

[437] European Consensus on Development (2006) op.cit. 79, paras 98-92.

[438] Council Conclusions on an EU Response to Situations of Fragility, 2831st External Relations Council meeting, Brussels, 19-20.11.2007, paras 1 and 12.

[439] Council Conclusions on Security and Development (2007) op.cit. note 2, paras 1-2.

sequencing in the strategic planning of their short term and longer-term actions. This should be promoted by:

- a more systematic consideration by the relevant Council bodies of the potential synergies between security and development, for example through joint meetings where appropriate, including across pillars;
- systematically carrying out security/conflict sensitive assessments and conflict analysis, where appropriate, in the preparation of country and regional strategies and programmes;
- taking into account the development dimension in the preparation of CFSP/ESDP activities, and taking into account security aspects, including the CFSP/ESDP dimension, in the preparation of development activities;
- engaging in in-depth consultations, strategic political and conflict analyses and screenings with a view to planning and acting consistently on early signs of tension, instability and fragility;
- ensuring coordination across the pillars through consistent planning arrangements (Member States, Commission and General Secretariat of the Council (GSC)), sequencing and implementation arrangements, including joint Fact Finding Missions and the joint establishment of a Crisis Management Concept (CMC) for a given crisis, where appropriate;
- promoting joint training courses and joint Assessment Missions;
- intensifying cooperation with international institutions, in particular the UN, during the strategic planning process, especially on the basis of the Joint Statement on EU-UN Cooperation in Crisis Management.

The uncertain future of the Lisbon Treaty after its rejection in the 2008 Irish referendum regrettably queered the pitch for this heightened policy commitment. This standstill was only prolonged by the inter-institutional wrangling regarding the practical implications of its often nebulous external relations provisions which followed its eventual ratification. The pledge to take the security-development nexus forward in EU external action is confirmed in subsequent policy statements, but not taken any further. The 2008 Report on the implementation of the ESS for instance dedicates a separate section to the issue, but stays clear of ground-breaking changes.[440] Similarly the 2012 Agenda for Change, setting out a vision for the future of EU development policy, simply repeats the commitment to improve the interface with security policy.[441] Also the 2010 revision of the Cotonou Agreement brought the text in line with this growing consensus, without adding any new ideas or more

[440] Report on the Implementation of the European Security Strategy (2008) op.cit. note 1, 8.

[441] Council Conclusions on Increasing the Impact of EU Development Policy: an Agenda for Change, 3166th Foreign Affairs Council meeting, Brussels, 14.05.2012; Commission Communication (COM(2011) 637 final) Increasing the impact of EU Development Policy: an Agenda for Change, 13.10.2011.

concrete measures. Article 11(2) of the Agreement now states that "[t]he interdependence between security and development shall inform the activities in the field of peace building, conflict prevention and resolution which shall combine short and long-term approaches, which encompass and go beyond crisis management".[442]

Telling for this lost impetus is that the commitment in both sets of 2007 Council Conclusions, to concretise this new agenda by preparing an Action Plan, lost traction.[443] Based on the experiences of a number of pilot countries a draft Action Plan on Fragility was prepared in 2010. Yet, as a confirmation of their unnecessary separation the Council first decided to merge the latter into a single Action Plan on Security, Fragility and Development, only to postpone the debate until a decision on the scope and mandate of the EEAS would be reached.[444] Despite repeated reminders and reiterations of the commitment by the OECD, and even the Commission and the Council,[445] this forbearance led to acquittance and the Action Plan was shelved in the absence of any political sponsorship. Today, this stands as an inglorious reminder of the EU's struggle to turn words into deeds. In a similar vein, the announced review of the Göteborg Programme did not produce any new guidelines but resulted in a simple reaffirmation that the old commitment "remains a valid policy basis for further European Union action in the field of conflict prevention".[446] Given that the dust of the Lisbon Treaty was still settling in 2011, it was presumably considered too early for any undertakings that risked to add fuel to the fire of disentangling fuzzy competence boundaries.

In the absence of internal momentum, the EU appeared to invest all the more externally in the New Deal for Engagement in Fragile States. This was adopted at the Fourth High Level Forum on Aid Effectiveness in Busan in December 2011. Although the Union had contributed little to the drafting stage, its common position for this Forum shows a level of commitment that stands in sharp contrast to the prudent declarations of the four preceding years.[447] The key innovation of this New Deal is that it gives effect to the longstanding rhetoric of local ownership by according a central role to the G7+, a voluntary association of fragile and conflict-affected states. It introduces country-led fragility assessments, ensuring a shared understanding of conflict drivers and enabling contextualised

[442] Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, OJ L287/3, 04.11.2010.
[443] Council Conclusions on Security and Development (2007) op.cit. note 2, para. 15; Council Conclusions on an EU Response to Situations of Fragility (2007) op.cit. note 438, para. 16.
[444] Council Annual Report (10477/10) on the Implementation of the EU Programme on the Prevention of Violent Conflict, 31.05.2010, 29.
[445] Respectively, OECD-DAC (2012) op.cit. note 83, 33-34; Commission Staff Working Document (SEC(2010) 421 final) Policy Coherence for Development Work Programme 2010-2013, 21.04.2010, 34; Council conclusions on Common Security and Defence Policy, 3275th Education, Youth, Culture and Sport Council meeting, Brussels, 25-26.11.2013, para. 8
[446] Council Conclusions on Conflict Prevention, 3101st Foreign Affairs Council meeting, Luxembourg, 20.06.2011, para. 2.
[447] Council Conclusions on an EU Common Position for the Fourth High Level Forum on Aid Effectiveness (Busan, 29 November – 1 December 2011), 3124th Foreign Affairs Development Council meeting, Brussels, 14.11.2011.

responses. This essentially aims to turn international partners into "facilitators and enablers" rather than imposers of best practices, but ironically faces severe funding shortages.[448]

Two decades of rising commitments to enhance the policy nexus between security and development have thus witnessed a coming and going of new concepts trying to catch this complex reality. From structural stability over conflict prevention, root causes of conflict, human security, a security-development nexus, failed states to fragility, the EU proofed significantly better in conceptualisation than operationalisation; better in following international practice than taking the lead. Now that the contours of the Lisbon Treaty's restructuring are starting to take their definitive shape, EU institutions appear ready for another endeavour with the 'comprehensive approach', which will be discussed in Chapter 6.

3.1.2. The (neglected) legal and political complexity

In 2009 the Commission acknowledged that "[t]he broad agreement on the principles underpinning the security/development nexus contrasts with the difficulties encountered in their implementation".[449] A few months before the entry into force of the Lisbon Treaty this could still be seen as a sin of the "the pillar structure [which] impedes coherent action between military and development components".[450] There is however ample evidence that this disparity between principles and implementation did not end with the depillarisation. While it is generally agreed that development cooperation and the CFSP progressively converged throughout the past decade, with positive effects on policy outcomes, the EU's full potential is far from realised. A 2012 OECD-DAC peer review of EU development policy, a 2011 evaluation of the Commission's support to conflict prevention and peace-building, a 2014 Parliament study on external action coherence, and a 2013 CSDP Lessons report all call to increase institutional cooperation and procedural fine-tuning of development and security policies.[451] Also scholarly work points to concerns of intra and inter-institutional compartmentalisation, coordination and coherence.[452] All these issues will be discussed in more detail in the present and following chapters.

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[448] M. Tran, 'Apathy over aid effectiveness threatens global partnership', *theguardian.com Poverty Matters Blog*, 15.08.2013.
[449] Commission Staff Working Document (SEC(2009) 1137 final) accompanying the Report on Policy Coherence for Development, 17.09.2009, 62.
[450] Ibid., 73.
[451] OECD-DAC (2012) op.cit. note 83, 33-34; ADE (2011) op.cit. note 82, 100; European Parliament (2013/2146(INI)) op.cit. note 84, para. 14; EEAS Deputy Secretary-General (00407/14) Annual 2013 CSDP Lessons Report, 12.03.2014.
[452] See for instance: M. Overhaus, 'Security-Development Nexus: Perspectives for the EU's Next Financial Framework' (2013) *European Foreign Affairs Review* 18(4), 511-528; M. Carbone, 'An Uneasy Nexus: Development, Security and the EU's African Peace Facility' ibid. 103-124; S. Keukeleire and K. Raube, 'The Security-Development Nexus and Securitization in the EU's Policies towards Developing Countries' (2013) *Cambridge Review of International Affairs* 26(3), 556-572; Del Biondo, Oltsch and Orbie (2012) op.cit. note 89, 126-141.

In section 1.1.2., the difficulty of extracting a constructive policy guide from the well-documented "doom spiral"[453] of poverty and instability was discussed. In effect, the finding of the International Peace Academy in 2004, that practice is running ahead of meaningful debates to support this nexus, still stands today.[454] The EU pledges to inform its strategies and policies by the security-development nexus without displaying much knowledge of the causal connections between aid and stabilising tensions. The Treaties give the EU's development and security competences a very broad scope and the link between them can refer to various – potentially contradicting – aims, means and activities. Yet, few attempts are made to specify, concretise or narrow down the infinite number of possible linkages that alluding to such a nexus implies. According to the Commission, "no one questions … the role that development plays for preventing conflicts, ensuring durable exits from conflicts and for accompanying crisis management through protective, confidence-building and crisis-alleviating measures".[455] The how and why of this role is however not made explicit, nor is the potential for counterproductive action. Unfortunately, such uninformed assumptions by far outnumber realistic assessments of the actual impact of development action on security objectives and *vice versa*.

Box 4: Counterintuitive aid results in Somalia and Somaliland

An interesting example of how more aid does not necessarily lead to more stability is provided by contrasting the cases of Somalia and Somaliland. While Somalia, the long-standing problem child of the international community, has received tons in aid throughout the past decades, its northern neighbour – that seceded in 1991 during the country's civil war – is not globally recognised as a sovereign nation and thus not formally eligible for international assistance. It is nonetheless the latter that displays impressive socio-economic progress under stable circumstances, with Somalia lagging seriously behind on both accounts. Whilst numerous factors evidently need to be taken into account, Eubank finds part of the explanation precisely in the limited availability of aid in Somaliland. This forced its government to turn to business leaders and citizens for support, whom in return negotiated responsive political institutions that proof today better fit to keep the peace.[456]

In addition to the lacunae in the understanding of security-development linkages, EU efforts to operationalise the intuitive complementarity of development cooperation and security and defence policy are complicated by their particularly outspoken constitutional delimitation. This implies that while the challenges of insecurity and poverty are ruthlessly cross-cutting, the Union's means to cut

[453] Vennesson and Büger (2009) op.cit. note 34, 14-16.
[454] IPA, *The Security-Development Nexus: Conflict, Peace and Development in the 21st Century* (International Peace Academy, New York, 2004) 6.
[455] Commission Staff Working Document (SEC(2009) 1137 final) op.cit. note 449, 62.
[456] N. Eubank, 'Taxation, Political Accountability and Foreign Aid: Lessons from Somaliland' (2012) *The Journal of Development Studies* 48(4), 465-480.

across the legal divide between the policy areas that address them are limited. EU institutions cannot simply respond to needs and rely on good intentions in their efforts to tackle the interconnected challenges of poverty, inequality, development, rebellion, instability and war. They must respect the Union's division of competences and act within the limits of the powers conferred upon them by the Treaty. Every initiative on the security-development continuum requires a legal basis, a provision in the budget and a financial instrument establishing the basis on which money can be spent for that type of action (cf. *infra* 3.2.).[457] It is however "difficult to unite what the Treaty and its authors so clearly wished to separate".[458] Moreover, the Union's development and security communities are very separate entities for whom the idea of a nexus tends to have a different meaning and impact.

First, the conceptualisation of the nexus is in essence a political undertaking. Hereby the power of definition "implies the power to define not only the relevant field of interest, but also the material content of practices, the distribution of resources and subsequent policy responses".[459] How this has tended to oppose the Council Secretariat and the Commission, which before the creation of the EEAS formed the centre of gravity in the daily management of respectively CFSP/CSDP and development cooperation (cf. *infra* Chapter 4), is clear when contrasting statements of Director in the GSC Cloos and the former Director General of DG DEVCO Fotiadis. The former articulated strategically that:

> *the link between political objectives defined in ESS and the actual use of Community funds should be strengthened. The question has also to be asked whether we get good value for money for our external assistance and development aid. The EU (EC and Member States) provides 54 % of the world's ODA … But the results achieved in terms of development and in terms of the EU's influence and visibility are not commensurate with that effort.*[460]

Portraying aid in terms of political influence tends to upset development staff within the Commission. Yet, that the latter is no plaster saint either is made clear by Fotiadis, who held that the nexus "represents an opportunity to boost Policy Coherence for Development … and to strengthen the role and visibility of the Commission's activities".[461] The Commission's introduction of the 'structural stability' concept (cf. *supra* 3.1.1.) provides an early illustration of how this can influence policy framing: "[t]he security sector has not traditionally been a focus of EC co-operation. However in many countries,

[457] M. Cremona, 'The EU and Global Emergencies: Competence and Instruments' in A. Antioniadis, R. Schütze and E. Spaventa (eds), *The European Union and Global Emergencies: a Law and Policy Analysis* (Hart Publishing, Oxford, 2011) 12.
[458] C.W.A. Timmermans, 'The Uneasy Relationship Between the Communities and the Second Union Pillar: Back to the "Plan Fouchet"?' (1996) *Legal Issues of European Integration* 26, 69.
[459] Stern and Öjendal (2012) op.cit. note 56, 15.
[460] J. Cloos, 'EU Foreign Policy: Where Next after the European Security Strategy?' in A. Deighton and V. Mauer (eds), *Securing Europe? Implementing the European Security Strategy* (Center for Security Studies, Zürich, 2006) 123.
[461] F. Fotiadis, 'The Security Development Nexus; the use of development funds for security-related issues', Note for the Attention of Commissioner A. Piebalgs, 04.11.2010, 6 (document on file with the author).

achieving structural stability may require fundamental overhaul of the state security sector".[462] An example from the other side is the European Security Strategy establishing "[s]ecurity as a precondition of development" and adhering to the concept of 'failed states' to advance security objectives in the programming of development aid.[463]

Second, also the impact of the security-development nexus is felt differently by the EU's development and security communities. Development actors that get more involved with security issues risk to undermine their traditionally autonomous and neutral status. This brings along an increasing exposure to threats, necessitating a difficult trade-off between bunkering the development sector and safeguarding the much-needed interaction and confidence-building with local communities. It is therefore not surprising that many in the aid community "long for the 'good old days' of technical, apolitical, simplicity: a clear mandate, a specialized technical assistant to execute it, and a nice photo of a new piece of infrastructure".[464] For security actors, the increasing involvement with development practitioners and their practices of local engagement erodes the traditionally more secretive and shielded nature of their work. Military personnel, in particular, are not always at ease when cooperating with actors that do not fit their logic of discipline and hierarchy.[465]

The coherence call of the nexus thus challenges deep-seated practices. Consequently, it is a highly sensitive and all but straightforward process. For some, both communities "remain frustratingly separated",[466] for others – particularly within the aid community – this interaction has already reached too far and challenges the autonomous goals of the individual policy areas.[467] This has led to diverging criticism ranging from a far-reaching securitisation of aid, over an insufficient developmentalisation of security, to the nexus as a re-legitimisation of development cooperation – or even an example of "aid-industry boosterism".[468] The security-development agenda calls for a much-needed fine-tuning of activities, but this can evidently not come at the price of undermining the *raison d'être* of both policy fields. In other words, it requires a delicate balance between the rationales of Articles 21 and 40 TEU. The different meaning and impact of this agenda in the EU's divided security and development communities resulted in very different views on how to strike this balance between the autonomy and insulation of objectives. This might explain why – yet does not make it any more acceptable – EU institutions struggle to adopt consensual plans of action in this area. These are of vital importance for

[462] Commission (COM(2001) 211 final) op.cit. note 419, 14.
[463] European Security Strategy (2003) op.cit. note 78, 2.
[464] Uvin (2008) op.cit. note 11, 161.
[465] Alamir (2012) op.cit. note 20, 71-72.
[466] Stern and Öjendal (2012) op.cit. note 56, 15.
[467] Oxfam (2011) op.cit. note 37, 36p.
[468] Respectively: Ibid.; Biondo, Oltsch and Orbie (2012) op.cit. note 89, 133; N. Bagoyoko and M.V. Gibert, 'The Linkage between Security, Governance and Development: the European Union in Africa' (2009) *Journal of Development Studies* 45(5), 791-794; and ISN, 'The Security-Development Nexus: An Illusion?' (Swiss Federal Institute of Technology, Zurich, 2012) n.p.

living up to this commitment and exploiting the full potential of the EU's broad range of instruments. As put in a 2013 Parliament report:

> *[w]ith its long-term and continued presence, the critical mass of financial support, the vast range of tools, instruments and political and economic power, the EU could be a critical and important actor in fragile states. However, there is no consensus yet on either the means of setting precise objectives, or on the design of policies and implementation mechanisms to reach those objectives that ensure coherence across the different domains*.[469]

The biannual reports on PCD and the yearly reporting on the implementation of the Göteborg Programme (which was unfortunately halted in 2010)[470] provide key moments of stocktaking and lessons-learning, but cannot compensate for the absence of strategic thinking. The next section will demonstrate that this strategic void has not prevented the EU from developing an impressive policy arsenal. Lacking a shared vision, this occurred however in a rather ad hoc fashion, with obvious risks of fragmentation, duplication and inter-institutional tensions.

3.2. The security-development toolbox: centrifugal forces at play [471]

The insulation of the CFSP implicates that the EU can only approach the security-development interface by way of instruments and policy communities that are deliberately kept separate along those lines. As primary law does not define the outer limits of EU development cooperation and CFSP/CSDP, both sets of toolboxes have gradually converged towards the core of the nexus. A key question is therefore whether secondary law provides more clarity on the division and delimitation of development and security competences. In order to answer this question, this section will respectively set out the Union's development cooperation instrumentarium on the interface with the CFSP (3.2.1.), its security arsenal on the interface with development (3.2.2.) and the challenges of fine-tuning and coordinating this whole (3.2.3.).

3.2.1. Development instruments on the interface with security policy

After fierce inter-institutional negotiations, the Council adopted, on 2 December 2013, the EU's new multiannual financial framework (MFF) for the years 2014-2020.[472] The external financing instruments

[469] M. Gavas, et al., 'EU Development Cooperation in Fragile States: Challenges and Opportunities' (European Parliament DG for External Policies, Brussels, 2013) 13.
[470] See: Commission Staff Working Document (SWD(2013) 456 final) EU 2013 Report on Policy Coherence for Development, 31.10.2013; Council Annual Report (10477/10) op.cit. note 444.
[471] This section is partly based on the following article of the author: H. Merket, 'The EU and the Security-Development Nexus: Bridging the Legal Divide' (2013) *European Foreign Affairs Review* 18(4), 83-102.
[472] Council Regulation (1311/2013/EU/Euratom) laying down the multiannual financial framework for the years 2014-2020, OJ L347/884, 20.12.2013 (hereafter: MFF Regulation).

largely follow the lines of the previous MFF.[473] Five of them hold the legal basis of development cooperation (Article 209(1) TFEU).[474] Two are thematic instruments (the Instrument contributing to Stability and Peace (IcSP) and the European Instrument for Democracy and Human Rights (EIDHR)) and three have a geographic focus (the European Neighbourhood Instrument (ENI), the Development Cooperation Instrument (DCI) and the Partnership Instrument (PI)). In addition there is the earlier mentioned European Development Fund that finances cooperation under the Cotonou Agreement and remains outside the EU budget.

Before setting out the relevant security-related components of these instruments, this section will shortly enunciate on their reach and scope. The ENI builds further on the former European Neighbourhood and Partnership Instrument (ENPI) and provides support to the sixteen countries covered by the European Neighbourhood Programme (ENP).[475]

Box 5: The EU's instruments related to development cooperation (2014-2020)	
European Neighbourhood Instrument (ENI)	EUR 15,433 million
Development Cooperation Instrument (DCI)	EUR 19,662 million
Partnership Instrument (PI)	EUR 955 million
Instrument contributing to Stability and Peace (IcSP)	EUR 2,339 million
European Instrument for Democracy & Human Rights (EIDHR)	EUR 1,333 million
European Development Fund (EDF)	EUR 30,506 million

The DCI is made up of three components.[476] Its geographic programmes cover all developing countries that are not included under the Cotonou Agreement, the ENI and the Instrument for Pre-accession Assistance (IPA). Thematic programmes address development-related global public goods and challenges. Their geographic scope is wider and only excludes (developing) countries covered by the IPA. The third component is the Pan-African programme (PAP), backing up the Africa-EU strategic

[473] The 2007-2013 MFF had undertaken a drastic reform reducing the various legal instrument from 30 to seven with significant efficiency gains and more streamlined and simplified procedures (see further: S. Bartelt, 'The Institutional Interplay Regarding the New Architecture for the EC's External Assistance' (2008) *European Law Journal* 14(5), 655-679).

[474] They all share the additional legal basis of economic, financial and technical cooperation with third countries (Article 121(2) TFEU). The Partnership Instrument (PI) further adds Article 207(2) TFEU on the common commercial policy (CCP).

[475] Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. Whereas the Russian Federation is eligible for multi-country and cross-border programmes, bilateral cooperation is now funded under the Partnership Instrument; Regulation (232/2014/EU) establishing a European Neighbourhood Instrument, OJ L77/27, 15.03.2014 (hereafter: ENI Regulation).

[476] Regulation (233/2014/EU) establishing a financing instrument for development cooperation for the period 2014-2020, OJ L77/44, 15.3.2014 (hereafter: DCI Regulation).

partnership and covering activities of a trans-regional, continental or global nature.[477] In line with the Lisbon Treaty, the primary objective of the DCI is to eradicate poverty and additionally to foster sustainable economic, social and environmental development, and consolidate and support democracy, the rule of law, good governance, human rights and the relevant principles of international law.[478] It is moreover brought in line with the Agenda for Change, meaning that it contains stronger elements of differentiation to focus on countries most in need.

The PI is an entirely new financial instrument supporting "cooperation measures with countries with which the Union has a strategic interest in promoting links, especially developed and developing countries which play an increasingly prominent role in global affairs, including in foreign policy, the international economy and trade, multilateral fora and global governance, and in addressing challenges of global concern, or in which the Union has other significant interests".[479] It aims to intercept countries that have outgrown development aid.[480] As the Regulation does not explicitly touch upon security, crisis or fragility-related issues, it will not be discussed further in this chapter.

The IcSP is the successor to the Instrument for Stability (IfS). It aims to provide swift crisis-response in countries victim to or at risk of crises or natural disasters and build the capacity of the EU and third countries for crisis preparedness, conflict prevention and peace building.[481] As it is the EU instrument most explicitly tackling the security-development nexus, it will be analysed in detail below.

The EIDHR supports the promotion of human rights and democracy in countries where these are under threat. With its focus on and support to civil society organisations it allows the EU to engage in countries with which cooperation is low, officially suspended or non-existent. The new Regulation aims to give the Union a stronger capacity to respond promptly to human rights emergencies, focus more on vulnerable groups and target countries where human rights are most in danger.[482]

The 2012 OECD-DAC peer review of EU development cooperation stipulates that setting up the new MFF requires "finishing on-going conceptual work on security, fragility and development".[483] As discussed above this work has still not been finalised at present. In this light, this section aims to

[477] It is interesting to note 100% of the actions under the geographic programmes have to fulfil the OECD's criteria for Official Development Aid (ODA), while this is 95% for the thematic actions (this was 90% under the previous DCI) and 90% for the PAP (Article 2(3) DCI Regulation). This is mainly due to the transversal nature of these last two components.
[478] Article 2(1) DCI Regulation.
[479] Article 2(1) Regulation (234/2014/EU) establishing a Partnership Instrument for cooperation with third countries, OJ L77/77 15.03.2014 (hereafter: PI Regulation).
[480] In this manner the PI is essentially complementary to the DCI, but besides a general call for ensuring coherence (Article 3(4) PI Regulation) nothing is provided on how to fine-tune and demarcate both instruments. This is all the more problematic in the absence of a consensual EU definition for a developing country (cf. supra 2.3.2.).
[481] Regulation (230/2014/EU) establishing an instrument contributing to stability and peace, OJ L77/1, 15.03.2014 (hereafter: IcSP Regulation).
[482] Regulation (235/2014/EU) establishing a financing instrument for democracy and human rights worldwide, OJ L77/85, 15.03.2014 (hereafter: EIDHR Regulation).
[483] OECD-DAC (2012) op.cit. note 83, 15.

uncover to what extent EU institutions have succeeded in making development instruments more security-sensitive.

The 'traditional' external financing instruments

In tackling the interface with security policy the Union has undertaken a gradual adaptation of its development cooperation toolbox following a two-tiered approach: security-sensitising its development activities and targeting development instruments directly at security challenges.

First, enhancing the security-sensitivity of traditional development funding consists of directing them at the so-called root causes of conflict, such as "[p]overty, economic stagnation, uneven distribution of resources, weak social structures, undemocratic governance, systematic discrimination, oppression of the rights of minorities, destabilising effects of refugee flows, ethnic antagonisms, religious and cultural intolerance," etc.[484] In this manner, over two thirds of funding under the 11th EDF and more than half of the 2014-2020 DCI will be targeted at people in fragile situations.[485] Yet, despite the constantly changing needs in such circumstances, the importance of inter-service consultation and democratic scrutiny implies that the Commission cannot propose very light procedures. Consequently, it has introduced a number of measures to make development cooperation more responsive to unpredictable security challenges. These include the mainstreaming of conflict prevention in country strategy papers (CSPs), conflict impact assessments, a root causes checklist with a watch list of countries most at risk of instability, trainings and efforts to increase the flexibility of development programming.

This last element appears in various forms and shapes. First, there is the inclusion of ad hoc emergency procedures to revise country or regional strategy papers. This occurs "[i]n the event of crises or threats to democracy, the rule of law or human rights and fundamental freedoms, or of natural or man-made disasters".[486] Second, for countries included on the crisis declaration list (annually revised by the Commission), grants can be awarded without a call for proposals. Moreover, special procedures can be negotiated to speed up the procurement of essential goods and services. A third category consists of reserving funds for unexpected events by underprogramming aid envelopes or setting aside a 'rainy day fund'. The MFF Regulation includes a general Emergency Aid Reserve with a fixed annual amount of EUR 280 million. This is "intended to allow for a rapid response to specific aid requirements of third countries following events which could not be foreseen when the budget was established, first and

[484] Commission (COM(2001)211) op.cit. note 419, 5.
[485] Commission, *Operating in Situations of Conflict and Fragility: An EU Staff Handbook* (DG DEVCO, Brussels, 2014) iii.
[486] Article 7(10) ENI Regulation, Article 11(5) DCI Regulation and Article 7(4) of Council Regulation (2015/322/EU) on the implementation of the 11th European Development Fund, OJ L58/1, 03.03.2015 (hereafter: EDF Regulation). This option is not included under the PI Regulation.

foremost for humanitarian operations, but also for civil crisis management and protection".[487] This amount, which covers rapid responses under all external instruments, is evidently very limited.

Consequently, several instruments dispose of their own emergency reserves. A new provision in the DCI allows to leave funds unallocated "in order to ensure an appropriate response of the Union in the event of unforeseen circumstances, in particular in fragile and post-crisis situations".[488] In addition, the Commission may now adopt immediately applicable implementing acts under the DCI Regulation "[o]n duly justified imperative grounds of urgency, such as crises or immediate threats to democracy, the rule of law, human rights or fundamental freedoms".[489] In other cases or under other instruments there is also the possibility of reverting to budgetary reserves or surpluses. The EDF, for its part, disposes of two separate envelops: a general A-envelop for national indicative programming and a B-envelop for unforeseen needs, exogenous shocks and humanitarian, emergency and post-emergency assistance.[490] The proportion of unallocated funds has been stepped up over time and an ever larger percentage of the B-envelop is left unassigned to any particular country.[491]

A specific EU modality to intervene in fragile states is the state-building contract (SBC), introduced in late 2012.[492] This is a particular type of budget support[493] targeted at intervening rapidly in crisis situations to address basic needs, restore essential public functions and cushion social, economic and political deterioration. The EU's general experience with budget support is rather mixed.[494] Given that crisis situations often go hand in hand with weak state authorities, corruption and human rights violations, this new modality attaches stronger safeguards to this hazardous undertaking. The combination of aid conditionality and predictability gives the EU stronger leverage and the partner country more impact to manage instability. As argued by the Commission, "[l]ack of capacity is seldom a good reason for bypassing local authorities, as it eliminates the opportunity for learning by doing".[495] In this reasoning, the SBCs allow fragile countries to take the lead and gain legitimacy from re-establishing basic services. However, it cannot "be seen as a cure-all to stabilise an environment" and

[487] Article 9 MFF Regulation.
[488] This amount is limited to 5 % for each type of programme, except for countries and regions in crisis, post-crisis or situations of fragility, where no such limitation is provided (Article 10(6) DCI Regulation).
[489] Article 12(2) DCI Regulation.
[490] Annex IV Article 3(2) Cotonou Agreement.
[491] M. Gavas, 'The European Commission's Legislative Proposals for Financing EU Development Cooperation' (Overseas Development Institute, London, 2012) 16.
[492] Commission, *Budget Support Guidelines: Programming, Design and Management - A modern approach to Budget Support* (DG DEVCO, Brussels, 2012) 14-18.
[493] As opposed to project aid, budget support is a development cooperation modality where aid is transferred directly into the national budget of the partner country to increase funding for national strategies of poverty reduction or social and economic reform. Besides SBC there are two other budget support modalities: general budget support (GBS) and sector budget support (SBS). See further: Commission Communication (COM(2011) 638 final) The Future Approach to EU Budget Support to Third Countries, 13.10.2011.
[494] See for instance: OECD-DAC Network on Development Evaluation, *Synthesis Report: Application of new approach to the evaluation of Budget Support operations: Findings from Mali, Zambia and Tunisia* (OECD, Paris, 2011) 27p.
[495] Commission (2014) op.cit. note 485, 89.

more efforts need to be undertaken to connect this with longer-term capacity-building and more systematically incorporate better risk management.[496] A more persistent problem is the difficulty of guaranteeing buy-in for the EU's objectives of human security and development from often fragmented state authorities.[497]

Finally, the EU regularly reverts to ad hoc shock-absorbing schemes such as the Food Facility (providing a rapid response mechanism to soaring food prices), Vulnerability-Flex (V-Flex – helping ACP countries cope with the impact of the global financial crisis and economic downturn) or the Supporting Horn of Africa Resilience (SHARE – responding to the 2011 food crisis) programme. These mechanisms deliver counter-cyclical aid to mitigate sudden socio-economic deterioration.

The *second* track of adapting the EU's aid toolbox consists of targeting development instruments more directly at security challenges with the argument that they undermine development activities. The Union's showpieces in this undertaking are the IcSP and the African Peace Facility (APF). Before going deeper into their functioning, it is important not to ignore the ability of traditional external instruments to finance security-oriented actions. For one thing, all the above instruments are accorded – with varying gradations – a role in the elastic field of security sector reform (SSR). This goes from strengthening the rule of law, over capacity-building, to fostering democratic accountability and oversight of the security and justice sectors.[498] In this regard, a key change under the new MFF is that the prevention as well as settlement of conflicts is mainstreamed as transversal objective under the IcSP, DCI and ENI.[499]

Additionally, several instruments touch upon specific elements of the interface with security and defence policy. The EIDHR is the key framework for the Union's election observation missions (EOMs). Furthermore, the fact that its activities do not require governmental approval in the targeted country enables the EU to engage in sensitive areas such as the fight against torture and harmful traditional practices, preventing the use of child soldiers and "promoting the peaceful outcome of electoral processes, the reduction of electoral violence and the acceptance of credible results by all segments of society".[500]

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[496] V. Hauck, G. Galeazzi and J. Vanheukelom, 'The EU's State Building Contracts: Courageous assistance to fragile states, but how effective in the end?', *ECDPM Briefing Note No. 60* (European Centre for Development Policy Management, Maastricht, 2013) 4.

[497] M. Bernardi, T. Hart and G. Rabinowitz, 'EU State Building Contracts: Early lessons from the EU's new budget support instrument for fragile states', *ODI Report February 2015* (Overseas Development Institute, London, 2015) 37p.

[498] First priority area Annex II ENI Regulation; objectives of geographic cooperation I(a)(e) Annex I DCI Regulation; Article 2(1)(a)(ii) and (iv) EIDHR Regulation; and Article 33 Cotonou Agreement.

[499] Fourth recital preamble IcSP Regulation, Article 3(3) and 12(1) DCI Regulation and Article 2(2)(e) ENI Regulation. The latter adds that it will undertake measures that promote "security in all its forms".

[500] Article 2(1)(b)(ii) and (x) and Article 2(1)(d)(iv) EIDHR Regulation.

Whereas the 2007-2013 DCI embarked still prudently upon post-crisis and fragile situations, this instrument is now placed from the outset and firmly within the context of the security-development nexus. This is included as a general area of activity under geographic programming and set out in more detail under the specific objectives of all the various regions.[501] It involves promoting reconciliation, strengthening early warning systems, building institutional capacity, post-conflict reconstruction and even state and peace-building. While this appears to increase the potential for overlap with the IcSP (cf. *infra*), it is notable that a number of previous duplications, such as demining and demobilisation and reintegration of former combatants, have now been left out of the DCI Regulation.

The specificity of the EDF is that it finds its origin in the Cotonou Agreement, which has Article 217 TFEU on associations as its legal basis. This implicates that the European *Development* Fund is not determined or confined by the Union's development cooperation objectives. As mentioned above the most striking expression of this broad legal basis is Article 11 of the Cotonou Agreement, including commitments on peace-building, conflict resolution, combatting terrorism and even countering the proliferation of weapons of mass destruction. That this accords the EDF a far-reaching role on the verge of the CFSP and CSDP is most clearly demonstrated by the African Peace Facility.

The African Peace Facility

The creation of the APF is situated in the context of the transformation of the Organisation for African Unity (OAU) into the African Union (AU) in the early 2000s. One of the main priority areas of this regained commitment for pan-African governance was that of peace and security. It resulted from strong political will among African leaders to put more effort in preventing, managing and resolving conflicts by the continent as a whole. This is embodied in the creation of the African Peace and Security Architecture (APSA) as a long-term structure that functions in collaboration with and acts through the building blocks of Africa's Regional Economic Communities (RECs). Yet, African leaders abounded in ambition what they lacked in resources. The July 2003 AU Summit consequently requested the EU "to examine the possibility of setting up a Peace Support Operation Facility to fund peace support and peace keeping operations conducted under the authority of the AU".[502]

Whereas the EDF was considered most suited, its design did not allow for such reactive support. Consequently a separate facility was to be erected under its auspices. In December 2003, the ACP-EC Council of Ministers adopted a decision on the use of resources from the 9th EDF for the creation of a

[501] Article 5(3)(c)(iv) and Annex I.A.III.(d) and I.B. DCI Regulation.
[502] AU Assembly (Assembly/AU/Dec.21 II) Decision on the Establishment by the European Union of a Peace Support Operation Facility for the African Union, Maputo, 10–12.07.2003, para. 5.

Peace Facility for Africa.[503] This was soon rebranded as African Peace Facility to reflect the continent's central ownership. That a solution could be found so rapidly was due to an "accidental convergence" of bureaucratic interests.[504] The AU's philosophy of 'African solutions for African problems', connected with the Union's general goal of an ambitious foreign policy, the Commission's willingness to become more engaged in the field of African security as well as the increasing risk aversion among EU Member States. In the spirit of African solidarity, and given that the 9th EDF's envelop for regional cooperation and integration was at the moment of its creation already exhausted, the necessary APF resources were obtained by shaving off 1,5 % from EDF allocations notified to individual ACP countries (the 'shaving off' or 'slicing mechanism') and topped up an equal amount of unallocated EDF resources.[505]

This unusual entry of development aid into the field of peace-keeping necessitated – in the words of former Commissioner Nielson – "a veritable slalom between the pillars of the Maastricht Treaty".[506] The compromise formula is that interventions are requested by the AU, managed by the Commission and – in an innovative bridge between the Commission and CFSP decision-makers[507] – subject to approval by the PSC. The relevant Council bodies should moreover be informed or consulted in due time "in order to ensure that, in addition to the military and security dimension, the development and finance related aspects of the envisaged measures are being taken into account".[508] The funding from the EDF was established as a temporary solution to overcome the complexity of filling an entirely new bag of money. Yet, while the slicing mechanism has meanwhile been abandoned, EDF funding for the APF has today – in spite of regular controversies[509] – become a well-established practice. Because the APF is not an instrument in itself, but a facility under the EDF, there is no dedicated regulation stipulating its aims. Article 15 of the 11th EDF Regulation only covers the financing arrangements and leaves the objectives, scope and nature of possible interventions to be defined in three-year action programmes. Given this clear entrance in the traditional CFSP territory of peace-keeping a more solid and accountable legal basis would not be redundant.

The APF's focus of funding was initially limited to peace support operations (PSOs) and their relevant capacity. Under the 10th EDF the Facility was integrated in the Joint Africa-EU Strategy as a constituent

[503] Decision of the APC-EC Council of Ministers (3/2003/EC) on the use of resources from the long-term development envelope of the ninth EDF for the creation of a Peace Facility for Africa, OJ L345/108, 21.12.2003.
[504] Carbone (2013) op.cit. note 452, 103.
[505] Article 1(1) Decision of the APC-EC Council of Ministers (3/2003/EC) op.cit. note 503.
[506] P. Nielson, 'EU Aid: What Works and Why', *UNU-WIDER Working Paper No. 2012/76* (United Nations University - World Institute for Development Economics Research, Helsinki, 2012) 13.
[507] G. Grevi, 'Pioneering Foreign Policy: The EU Special Representatives', *Chaillot Paper n° 106* (EU Institute for Security Studies, Paris, 2007) 101.
[508] Article 15(d) EDF Regulation.
[509] The Council and Commission legal services for instance disagreed on APF funding in 2006. The former noted that the Commission did not have the power to use development budget appropriations to fund peace-support objectives. The Commission, on the other hand, argued that this was justified because conflicts are destroying the possibility of delivering development aid (D. Cronin, 'Legal spat over Africa aid funds', *European Voice*, 01.02.2006).

part of the Africa-EU Partnership on Peace and Security.[510] This turned the EU from a payer into a player and expanded the scope of the APF significantly to all phases of the conflict cycle. It includes funding for the Africa-EU dialogue on peace and security, post-conflict stabilisation, conflict management and prevention, with crucial support for critical APSA structures such as the African Standby Force and a Continental Early Warning System. A crucial comparative advantage to other EU instruments is that – as the APF/EDF is not part of the EU budget – it is not subject to the primary law exclusion of expenditure having military or defence implications (cf. *infra* 6.1.2.).[511] This is not without limits as the EDF Regulation requires programming to "be designed so as to fulfil to the greatest extent possible the criteria for official development assistance".[512] The 2014-2016 Action Plan in this regards excludes the financing of "ammunitions, arms and specific military equipment, spare parts, salaries for soldiers and training for soldiers".[513] Particularly innovative is the APF's Early Response Mechanism (ERM), which backs up fact-finding and mediation missions. The funding is transferred in advance to the AU, meaning that it can be released rapidly once specific initiatives – with a maximum timespan of 12 months – are approved. At relatively low cost, i.e. a budget of EUR 15 million for 2014-2020, a great number of fairly successful mediation missions have been carried out. "[I]t is reasonable to surmise that several millions of Euros and the lives of hundreds might have been saved"; however these remain "one-off missions … [which do] not necessarily increase AU or REC institutional capacity for mediation".[514]

The 2006 independent mid-term review of the first APF called it "a bold move because it confronts head on the fraught security and development nexus".[515] Two more recent independent evaluations continue the laudation of the Facility as a "game changer" with "a direct and positive impact on the lives of millions of Africans".[516] It enhanced the EU's credibility and gave the AU political clout with a physical and political presence in peacekeeping that was unimaginable ten years earlier.[517] In a similar vein, stakeholders across the AU, international and regional organisations and civil society acclaim the APF for its achievements and the concerns it addresses.[518] Particularly, its demand-driven design which

[510] Council (16344/07) op.cit. note 92, paras 18 and 20.
[511] Article 41(2) TEU.
[512] Article 1(3) EDF Regulation.
[513] Council Note (8269/14) Three-year Action Programme for the APF: 2014-2016, 28.03.2014, 13.
[514] IBF, *Part 1 of the African Peace Facility Evaluation: Reviewing the Procedures of the APF and Possibilities of Alternative Future Sources of Funding* (IBF International Consulting, Brussels, 2011) 13-15.
[515] J. Mackie, et al., *Mid term evaluation of the African Peace Facility framework contract* (European Centre for Development Policy Management, Maastricht, 2006)11.
[516] ADE, *African Peace Facility Evaluation - Part 2: Reviewing the Overall Implementation of the APF as an Instrument for African Efforts to Manage Conflicts on the Continent* (Aide à la Décision Économique, Brussels, 2013) 9.
[517] IBF (2011) op.cit. note 514, 9; ADE (2013) op.cit. note 516, 9.
[518] See: IBF (2011) op.cit. note 514, 1

supports rather than dictates,[519] and the manner in which it gives effect to the often empty vessels of empowerment, ownership and partnership are regularly praised.

However, paradoxically, the APF can also be seen as undermining these exact principles of ownership and partnership. The Facility in a way symbolises EU disengagement by contracting out security policy to African actors.[520] Moreover, the one who pays the piper tends to call the tune, meaning that the APF risks to undermine rather than boost African ownership. Indeed, "there is the real danger that it is the EU that decides when, where and how 'African solutions to African problems' are applied".[521] This is further exacerbated by the significant under-delivery of parallel contributions by African states, making it difficult for them to be meaningful partners. The AU's institutional capacity has gradually been scaled up, but its track record in peace-keeping missions is at best mixed, while the role and commitment of RECs remains generally substandard. This implies that the APF's impact and results rest on precarious foundations.

The most widely shared critique of the APF is that it diverts money away from development objectives. As significant as the praise for where its resources go to, is the discontent regarding where they come from. Quoting the 20th century Austrian economist-philosopher Ludwig von Mises: "it may sometimes be expedient for a man to heat the stove with his furniture. But he should not delude himself by believing he has discovered a wonderful new method of heating his premises". This is evidenced by the fact that, despite a number of flexibility clauses, EDF procedures often remain too cumbersome to tackle the unpredictable challenges at issue. Under ideal circumstances it still takes two months for requests to go through the Brussels decision-making machinery. IBF's evaluation of the APF even makes note of two requests for peace support which were still waiting for a decision after one year and three months.[522] This is mainly due to political sensitivities and the fact that the APF is often poorly understood by parts of the Commission machinery that are not used to manage peace support.

A final significant problem is that the continuous widening of the APF's strategic agenda, spreads its resources very thin in terms of financing and human resources, both at the level of the EU and the AU.[523] Consequently, the APF's utility often remains limited to that of a fire extinguisher treating the symptoms of African conflicts without providing sustainable solutions. Boosting African capacity through the Facility is essential because other financing instruments can either not engage in peace and security matters or do not have a continental coverage. The African environment is unfortunately

[519] Chatham House (2013) op.cit. note 60, 4.
[520] Carbone (2013) op.cit. note 452, 121.
[521] T. Chafer, 'The AU: a New Arena for Anglo-French Cooperation in Africa?' (2011) *The Journal of Modern African Studies* 49(1), 70.
[522] IBF (2011) op.cit. note 514, 28.
[523] ADE (2013) op.cit. note 516, 81-83.

not very welcoming to this objective. The unremitting need for short-term responses to emerging conflict continues to steer funding in the direction of rapid peace-keeping deployments. Further damaging sustainability are the insufficient links to the EU's other tools and activities: "[w]hile there have been examples of joint planning between the APF and different EU instruments, this has not occurred in a systematic manner or been informed by an overall strategic or 'comprehensive' plan for EU engagement in support of peace and security organisations in Africa".[524]

The 2014-2016 APF Action Plan acknowledges many of these challenges and weaknesses. It aims to enhance African ownership and deliver "a better balance between salary support and support to key processes within partner institutions that underpin lasting capacity building".[525] Furthermore, authorisation procedures are simplified and the EU will propose the creation of special fund to finance African-led peace operations in cooperation with the AU and the UN. Yet, the Action Plan does not incorporate many of the useful suggestions put forward in two independent evaluations that were commissioned for this exact purpose. These approach the APF as "the best available instrument, but also as a tool that can be further improved".[526] Their suggestions consist of the inclusion of a wider range of military costs, procedural modifications inspired by the IcSP (cf. *infra*) and a stronger decentralisation of implementation responsibilities to EU Delegations.[527] The latter would not only improve outreach, visibility and communication, but also enable a more "hands-on", politically-sensitive and responsive use of resources (cf. *infra* 4.4.).[528] Finally, the support for and effectiveness of APF funding would benefit from better targeting funding at early warning, mediation and conflict management, for instance by using specific earmarks. It is in this sense rather discouraging that former EEAS Executive Secretary-General Vimont, expects APF resources under the first action plan to be depleted by 2015 already, due to the costly support of peace missions in Somalia and the Central African Republic.[529]

The Instrument covering Stability and Peace

The IcSP is the EU's 'flagship instrument' to address the security-development nexus.[530] It is the successor to the Instrument for Stability (IfS), which in its turn built further on the Rapid Reaction Mechanism (RRM). These successive name changes provide a first indication of the ever more

[524] Ibid., 87-88.
[525] For that purpose the APF Action Plan prescribes that the EU's contribution to uniformed personnel allowances should not exceed 80% of the costs from 2015 onwards (Council Note (8269/14) op.cit. note 513, 5).
[526] IBF (2011) op.cit. note 514, 39.
[527] Respectively Ibid., Annex 3.3, 33-34 and 45-46.
[528] ADE (2013) op.cit. note 516, 84-85.
[529] See: N. Gros-Verheyde, 'La sécurité de l'Europe : en Afrique !', *Bruxelles2.eu*, 19.04.2014.
[530] S. Gänzle, *Coping with the 'Security-Development Nexus': The European Community's Instrument for Stability - Rationale and Potential* (German Development Institute, Bonn, 2009) 12.

determined entrance into the field of peace and security. This is not the result of a smooth process, but involved considerable inter-institutional wrangling on the scope and radius of EU development cooperation, which will be analysed in more detail below.

In the early 2000s, the need for an instrument enabling a more flexible response to situations of (emerging) crisis was widely felt. Significantly less agreement existed on the legal basis for such measures. Given that the CFSP did not abound in resources, the Council eventually agreed with the Commission's proposal to erect the mechanism as part of the *ex* Community. Yet, to counterbalance this hitherto clearest embarkation of an EC instrument upon security issues, it significantly toned down the scope of the proposed instrument. Particularly, the aim "to provide immediate financing for non-combat activities related to urgent operations of crisis management and conflict prevention, with a view to fostering international peace and security",[531] proofed a step too far for many Member States. Rather than on any new fields of activity, the emphasis in the Council Regulation was therefore put on rendering traditional Community responses more rapid, efficient and flexible in the context of crises or urgencies.[532] Yet, even for this tempered RRM, the *ex* EC in essence lacked a Treaty basis. Sanctuary was sought in the flexibility clause of *ex* Article 308 TEC (current Article 352 TFEU), which is *de jure* reserved for actions that are necessary "in the course of the operation of the common market". The justification for this choice was not particularly sound. The second indent of the preamble merely explained that "[t]he aims of aid and cooperation programmes and/or the conditions for their proper execution may be jeopardised or directly affected by, *inter alia*, the emergence of situations of crisis or conflict".

Between 2001 and 2006 the RRM demonstrated its added value by supporting around 50 projects in 25 countries.[533] With an annual budget of EUR 30 million and a time limitation of six months per funded activity, the mechanism was however not sufficiently equipped to re-establish sustainable stability on a broad scale. The Commission therefore proposed in 2004 to take it to a new level by creating the Instrument for Stability. Even though there had been no changes to the Treaty-defined scope of development cooperation since the creation of the RRM, the Commission now considered that the civilian aspects of crisis response came within the scope of *ex* Article 179 (current Article 209 TFEU) as well as the new Nice Treaty Article 181a (current Article 212 TFEU) on economic, financial and technical cooperation with third countries. The argument again built on the destructive impact of instability on the implementation of development aid. Such juggling with the principle of conferral unavoidably

[531] Article 1 Commission Communication (COM(2000) 119 final) Proposal for a Council Regulation creating the Rapid Reaction Facility, 31.10.2000.
[532] Council Regulation (381/2001/EC) creating a rapid-reaction mechanism, OJ L57/5, 27.02.2001 (hereafter: RRM Regulation).
[533] S. Keukeleire and J. MacNaughtan, *The Foreign Policy of the European Union* (Palgrave Macmillan, Houndmills, 2008) 221.

opens the door for increased overlap between TEU and *ex* TEC competences.[534] The Commission put the arguably arbitrary limitation of this causality on the notable extension of the IfS towards peace-keeping and support. Such activities, "while clearly contributing to the objectives of Articles 179 and 181a, justify a legal basis in [*ex*] Article 308 of the Treaty".[535]

What followed were tense inter-institutional negotiations to solve the delicate question "as to whether or not the IfS would be in a position to effectively walk the 'thin line' between security and development, neither infringing on the prerogatives of the one or the other by eventually 'securitising development' or 'developmentalising security policy'".[536] The discussions focused more on legalistic arguments of competence delineation than on the content and effectiveness of the tool at issue.[537] This stood in sharp contrast to the spirit of solidarity that was widely portrayed in the run-up to the adoption of the 2006 European Consensus on Development. The Council eventually vetoed the inclusion of peace-keeping and peace-support,[538] but agreed on the expansive nature of development and cooperation, implying that the Regulation could be adopted on the bases of *ex* Articles 179 and 181a TEC.[539] In the light of the ongoing proceedings in the *Small Arms and Light Weapons* case, the Council moreover objected the inclusion of support measures tackling the proliferations of such arms (cf. *infra* 5.2.2.). Its veto did not extend to harmful remnants of war, through mine detection and clearance as well as stockpile destruction,[540] laying bare the artificiality of the emerging competence boundaries in secondary law. The eventual IfS Regulation presented a sea change to the experimental RRM. It accorded the instrument a substantial budget of EUR 2,062 million (2007-2013), speeded up decision-making and introduced a capacity-building dimension to ensure better crises preparedness.

The relevance of such a stability instrument was consequently not questioned in the negotiations on the most recent MFF. Rather, discussions focussed on how its shortcomings could be tackled and whether or not it should be further expanded to cover new fields of activity. The IcSP to a large extent follows the structure of the IfS with a short and long-term component. The non-programmable short-

[534] A. Dashwood, 'Conflicts of Competence in Responding to Global Emergencies' in A. Antioniadis, R. Schütze and E. Spaventa (eds), *The European Union and Global Emergencies. A Law and Policy Analysis* (Hart Publishing, Oxford, 2011) 42-43.
[535] Commission Communication (COM(2004) 630 final) establishing an Instrument for Stability, 29.09.2004, 2. The arbitrary nature of this reasoning is evidenced by the Parliament that went as far as arguing that the wording of *ex* Articles 179 and 181a TEC did not exclude the financing of peace-keeping and support (D. Gauci, 'The European Parliament and EU External Aid: Measures of Response to Emergency Situations' in A. Antioniadis, R. Schütze and E. Spaventa (eds), *The European Union and Global Emergencies: a Law and Policy Analysis* (Hart Publishing, Oxford, 2011) 281-283.
[536] Gänzle (2009) op.cit. note 530, 53.
[537] A. Dewaele and C. Gourlay, 'The Stability Instrument: Defining the Commission's Role in Crisis Response' (2005) *European Security Review* (26), 12.
[538] Also the promotion of nuclear safety and fighting the proliferation of weapons of mass destruction was taken out and included in a separate Nuclear Safety Cooperation Instrument (NSCI).
[539] Regulation (1717/2006/EC) establishing an Instrument for Stability, OJ L327/1, 24.11.2006 (hereafter: IfS Regulation). This implied the application of the co-decision procedure. As this was the first time the Parliament was involved in security-related external action, it was particularly keen on safeguarding its prerogatives (A. Beer (MEP), 'Bridging the crisis management – peacebuilding gap? The new Stability Instrument and possible CSO contributions', Speech delivered in Berlin, 26.04.2007.
[540] Article 3(2)(h) IfS Regulation).

term component (Article 3 IcSP Regulation) aims to preserve or (re-)establish the essential conditions for cooperation. It is directed at providing a quick response to the following unforeseen events: (1) a situation of urgency, crisis or emerging crisis; (2) threats to democracy, law and order, the protection of human rights and fundamental freedoms, or the security of individuals; (3) a situation risking to escalate into armed conflict or to severely destabilise the country or region concerned; (4) urgent needs in countries where the Union has invoked essential elements clauses to suspend cooperation. The long-term component (Article 4 IcSP Regulation) funds capacity-building and crisis preparedness in areas such as law and order, early warning, reconciliation and recovery. The new Regulation introduces a stronger focus on conflict prevention and peace-building, and no longer limits capacity-building to 'the context of stable conditions for the implementation of cooperation policies'.[541] This components supports efforts of (1) promoting early warning and conflict-sensitive risk analysis in policy-making and implementation; and (2) facilitating the building of capacity in confidence-building, mediation, dialogue and reconciliation, with specific attention for inter-community tensions; (3) strengthening capacities for participation and deployment in civilian stabilisation missions; (4) improving post-conflict and post-disaster recovery; and (5) curbing the use of natural resources to finance conflicts. The IcSP adds a new third dimension (Article 5 IcSP Regulation), which is detached from the former long-term component, namely to address specific global and trans-regional threats to peace, international security and stability. The support under this component covers (1) threats to law and order, the security of individuals, critical infrastructure and public health; as well as (2) the mitigation of and preparedness against risks, whether of an intentional, accidental or natural origin, related to chemical, biological, radiological and nuclear materials or agents.

The slightly increased budget of 2,339 million (2014-2020) is spread as follows over the three components: 70% for Article 3, 9% for Article 4 and 21% for Article 5 IcSP Regulation.[542] As the name of the refurbished instrument suggests, the Council's veto on undertaking peace-building efforts through development assistance vanished. Another important novelty is that the IcSP attaches considerably more weight to consistency, complementarity, continuity, synergies and arriving at the most efficient use of all the EU's available resources. Whereas the IfS concentrated predominantly on alignment with other development cooperation instruments, this is now resolutely extended to all the Union's CFSP and TFEU external activities.[543] The IcSP's main added value does not lie in the type of support it provides. Comparable to the aforementioned instruments this consists mainly of financial and technical assistance, topped up with elements of transferring know-how, information and best

[541] Article 1(2)(b) IfS Regulation.
[542] The Commission has from the outset pushed for a stronger focus on longer-term capacity-building. Yet, it only obtained a small reduction from 73 to 70% for the short-term component.
[543] Article 2(2) IcSP Regulation.

practices, risk assessment, research and analysis, early warning and training.[544] The uniqueness and significance of the IcSP lay in the rapidity of response and the conditions of crisis wherein it operates.

First, to put the IcSP into effect the Commission can decide on Exceptional Assistance Measures (EAMs) and Interim Response Programmes (IRPs). The former do not require heavy comitology[545] procedures if their cost remains below EUR 20 million.[546] It implies that the Commission does not need to obtain the approval of the PSC, but can simply inform it of the measures it plans to take.[547] The maximum duration of EAMs has been increased from 24 under the IfS to 30 months at present.[548] IRPs, on the other hand, are not subject to time constraints but always trigger comitology. In practice the focus has clearly been on the speediness of response, with sole use of EAMs that only seldom exceeded the EUR 20 million bar.[549]

A *second* key feature of the IcSP is its gap-filling function. It only operates "to the extent that an adequate and effective response cannot be provided under [the other external assistance] instruments".[550] This can be due to a sense of urgency, the trans-regional nature of the problem, the exclusion of the supported area from other ODA-bound instruments or the non-country specific nature of assistance. By addressing these blind spots the IcSP prepares the ground for development cooperation and closes the gap with CFSP activities. Much more than is the case for the APF, the IcSP's management is sub-delegated to EU Delegations that are closely involved in the identification of programmes and projects. This enables a better coordination of EU activities and reduces the risk of overlap. The availability of IcSP resources often provides the catalyst for EU Delegations to tackle conflict prevention and peace-building more profoundly.[551] It moreover stimulates an exchange of information between headquarters and Delegations, among different Commission bodies and with the

[544] IcSP support is not limited to ODA-eligible activities. According to the Commission this "allows the EU to properly tackle the security and development nexus" (Commission Communication (COM(2011) 845 final) Proposal for a Regulation establishing an Instrument for Stability, 07.12.2011, 4). It hereby indicates that ODA-criteria put a brake on this commitment. Some therefore wonder whether these limitations are still relevant in the context of today's strive for comprehensive foreign policies (France is among the main supporters of opening up ODA to security spending (X, 'France pushes for security spending to be recognised as development aid', *EurActiv.com*, 18.02.2015).

[545] Comitology refers to the intricate process whereby the Commission's implementing powers, conferred on it by the EU legislator, are exercised in cooperation with committees composed of Member States representatives.

[546] Article 7(3-4) IcSP Regulation (the Commission had proposed to scale this up to EUR 30 million).

[547] The PSC subsequently has 48 hours to object (IBF (2011) op.cit. note 514, 33).

[548] Moreover, in cases of protracted crisis and conflict, the Commission may now adopt a second EAM of maximum 18 months. The Commission's proposal to adopt very urgent EAMs of up to EUR 3 million without informing the Council *ex ante* did note make it through the decision-making process (Commission (COM(2011) 845 final) op.cit. note 544, Article 7(6)). In its 2012 peer review of EU development cooperation also the OECD-DAC had expressed its support for this exception (op.cit. note 83, 70).

[549] Commission Annual Report (COM(2012) 405 final) on the Instrument for Stability, 24.07.2012, 3-4 and accompanying Staff Working Document.

[550] Article 2(3) IcSP Regulation.

[551] S. Görtz and A. Sherriff, '1st Among Equals? The Instrument for Stability and Conflict Prevention and Peacebuilding in the EU's New Financial Perspective', *ECDPM Briefing Note No. 39* (European Centre for Development Policy Management, Maastricht, 2012) 5.

PSC and the geographic working groups of the EEAS, making it a politically responsive tool.[552] Nonetheless, significant difficulties continue to arise "in linking project-driven demands from the field with policy driven demands deriving from various EU commitments".[553]

This IcSP's *raison d'être* thus lies in the link with other EU instruments. It is therefore unfortunate that it is precisely on this point that three significant difficulties emerge. *First*, the gap-filling conditions to activate the IcSP are not clearly defined. This is particularly problematic in fragile states, which constantly hinge between crises and stability. Given that the types of support and many of the areas covered are similar to those addressed by the DCI, ENI and EDF, the risk for overlap is obvious. One solution would be to put in place indicators allowing to identify crisis situations and establish mechanisms to ensure better in-country coordination of the available instruments.[554] *Second*, the IcSP is meant to cushion the blow of instability but often proves too slow. A 2011 independent evaluation of the Commission's support to conflict prevention and peace-building concludes that despite being the most rapid of EU external assistance instruments, this was still insufficient in all five conducted country case studies.[555] If the minimum time span for the launch of an intervention of two to six months can already appear very long for victims of crisis, in practice it is rather nine to eleven months with reported excesses of one and a half year.[556] A particularly good practice of accelerating this process are the pre-approved Standing Facilities, which are activated through IcSP financing decisions and allow the immediate launch of small-scale and targeted activities.[557] *Third*, the limited duration of IcSP initiatives stems from the desire to make best use of its limited funding and confine long-term support to the EU's traditional external instruments. Yet, often stabilisation fails because no adequate follow-up is provided when IcSP initiatives come to an end.[558] The easiest solution is then to exhaust the IcSP's possibilities for extension, leading to an unnecessary depletion of its resources.

[552] A. Soliman, A. Vines and J. Mosley, 'The EU Strategic Framework for the Horn of Africa: a Critical Assessment of Impact and Opportunities' (European Parliament DG for External Policies, Brussels, 2012) 20-21.
[553] Italtrend, Socopa and EPRD, *Evaluation of the Instrument for Stability Crisis Preparedness Component (2007-2013)* (Italtrend C&T, Brussels, 2014) 7.
[554] Particularly puzzling in this regard was the – by now rectified – provision of the old DCI Regulation stating that "[m]easures covered by [the IfS Regulation] … shall not, in principle, be funded under this Regulation, except where there is a need to ensure continuity of cooperation from crisis to stable conditions for development" (Article 5(2) Regulation (1905/2006/EC) establishing a financing instrument for development cooperation, OJ L378/41, 27.12.2006). This not only implied that both instruments gave precedence to the other, the only exception to this principle under the DCI regulation constituted precisely the assigned role of the IfS.
[555] Namely Bolivia, CAR, Georgia, Kyrgyz Republic, Sierra Leone (ADE (2011) op.cit. note 82, 39).
[556] Ibid., annex 3, 16-17.
[557] Examples hereof are the Facility for urgent Policy Advice, Technical Assistance, Mediation and Reconciliation, the Conflict Resources Facility (CRF) and the Transitional (post-conflict) Justice Facility (TJF) (see for instance: Commission Staff Working Document (SWD(2013) 292 final) Accompanying the 2012 Annual Report on the Instrument for Stability, 26.7.2013, 28-33).
[558] Gavas et al. (2013) op.cit. note 469, 27.

Making optimal use of this impressive policy machinery

Box 6: The case of South Sudan: facilitating the birth of a country trough EU development aid

The case of South Sudan, the world's newest country, provides a good illustration of how these various instruments often operate in parallel. During its independence referendum, which took place between 9 and 15 January 2011, the EU deployed an Election Observation Mission (EOM) funded by the EIDHR. An IfS intervention of EUR 15 million simultaneously aimed at delivering "peace dividends" during the referendum and post-referendum process, through the provision of basic services to the population.[559] Later that same year, this was followed by a second IfS tranche (EUR 18 million) providing support to conflict prevention, peace building and stabilisation efforts, with a particular focus on the border areas with Sudan. In the light of the rising tensions between Sudan and South Sudan, the EU further mobilised EUR 1.1 million from the APF enabling the Intergovernmental Authority for Development (IGAD) to establish a platform for peace talks and a monitoring mechanism. Even though the developmental needs in this country – which has since 2014 overtaken Somalia as the most fragile country on earth[560] – are huge, it is not eligible for EDF funding because is it still no signatory to the Cotonou Agreement.[561] The EU decided to partly fill this funding gap with an ad hoc allocation of EUR 200 million from decommitted resources of previous EDFs.[562] These funds support projects in the areas of food security, health, education, stabilisation, security, human rights and the rule of law. In addition, South Sudan benefits from DCI thematic programmes on food security and support to non-state actors.

The above illustration of EU aid to South Sudan (cf. Box 6) shows clearly how the EU has, over the years, unfolded an impressive range of development instruments tackling the interface with security. It has been calculated that the support of these instruments to conflict prevention and peace-building constituted EUR 7.7 billion for the period 2001-2010, or 10% of the total Commission-managed development budget.[563] This repertory covers a wide variety of activities. Yet, its impromptu development, combined with the Union's tendency to accumulate rather than to rationalise, has given rise to a labyrinth of funds which is difficult and costly to manage.[564] A key question is therefore

[559] Commission (MEMO/11/908) EU development cooperation with South Sudan, 14.12.2011.
[560] FFP, *Fragile State Index 2014* (The Fund For Peace, Washington, 2014) 39p.
[561] Even though South Sudan's request to accede was approved already by the June 2012 ACP-EU Joint Council of Ministers, its government appears to be backtracking on this commitment due to concerns over the obligation to accede to the Rome Statute recognising the jurisdiction of the International Criminal Court (ICC) (A. Mehler, H. Melber and K. van Walraven, *Africa Yearbook Volume 9: Politics, Economy and Society South of the Sahara in 2012* (Brill, Leiden, 2012) 37.
[562] Council Decision (2011/315/EU) concerning the allocation of funds decommitted from projects under the ninth and previous European Development Funds for development cooperation in Southern Sudan, OJ L142/61, 28.05.2011.
[563] ADE (2011) op.cit. note 82, 7. It is interesting to note that more than half of these funds benefited only four countries, unsurprisingly of geostrategic importance: the Palestinian territories, Afghanistan, Iraq and Sudan).
[564] D. Lecompte and T. Vircoulon, 'L'Aide de L'Union Européenne: du Dévelopmment à la Sécurité, l'Exemple du Fonds Européen de Développement', *Note de l'Ifri Juin 2014* (Institut Français des Relations Internationales, Paris, 2014) 1.

whether this gets the most out of the Union's potential. A number of reports indicate that although the EU has come a long way in security-sensitising its aid instruments, the challenges and obstacles are still manifold. These can be grouped in two categories (in Chapters 4 and 6 we will analyse to what extent the more recent involvement of the EEAS and HR offers room for improvement).

First, the most recurring sore point is the difficult balance between the adaptability and predictability of development funding.[565] A valuable purpose of multiannual programming is to improve the reliability of aid streams. The lengthy procedures moreover have a protective function guaranteeing checks and balances, transparency and accountability. The downside hereof is a reduced adaptability to changing and unforeseen circumstances, which are the order of the day in fragile and crisis situations. Ceasefires, reconciliations or settlements offer frail windows of opportunity which can easily burst.[566] Consequently, donors face short timeframes (often lasting no longer than a couple of months) to promote mediation, restore critical infrastructure, put economic development back on track and re-ignite the provision of basic social, economic and security services.[567] Multiannual programming makes it difficult to draw on new funds or divert resources away from established focal areas and priorities. Despite introducing ever more acceleration mechanisms, the 2011 evaluation of the Commission's management of security-related aid found that the time-lapse between the identification and approval of development initiatives can still take up to one year.[568] In 2014 the Court of Auditors put the spotlight on the complex eligibility rules which lead to poor targeting of funds.[569] Moreover, the fixation with spending puts too much emphasis on compliance with the conditions for getting and using the resources, rather than on the objectives and results achieved. An associated tension is that efforts to stabilise crises situations or prevent the escalation of conflict do not always easily correspond to 'the primary aim of eradicating poverty' and targeting aid at the neediest.[570]

A *second* key problem is much less inherent to the nature of development cooperation and might therefore be more easily overcome. As pinpointed in a 2013 Parliament report, "[i]nvesting in expertise in fragility and conflict-prevention has not, to date, been a priority, particularly at the operational level".[571] As a result, conflict impact assessments are often not carried out, conflict analysis and

[565] See for instance: OECD-DAC (2012) op.cit. note 83, 21.
[566] UN Secretary-General, *Report on peacebuilding in the immediate aftermath of conflict*, General Assembly Sixty-Third session, A/63/881–S/2009/304, New York, 11.06.2009.
[567] L. Chauvet and P. Collier, 'Helping Hand? Aid to Failing States ', *DIAL Document de Travail DT/2006-14* (Développement, Institutions et Analyses de Longe terme, Paris, 2006) 14.
[568] ADE (2011) op.cit. note 82, 85.
[569] European Court of Auditors, *Making the best use of EU money: a landscape review of the risks to the financial management of the EU budget* (ECA, Brussels, 2014) 102 p.
[570] For instance, combatants that are the focus of reintegration policies, are often not those most in need of assistance (Overhaus (2013) op.cit. note 452, 516).
[571] Gavas et al. (2013) op.cit. note 469, 7.

prevention is insufficiently mainstreamed and early warning does not seep through in policy-making.[572] This implies that despite all the rhetoric, the EU's development machinery is still too often working 'in' rather than genuinely 'on' conflicts. Consequently, too much efforts go to mitigating the consequences of conflict, instead of addressing its root causes. This is a costly weakness "as it means that interventions are more likely to take place in a context where time-horizons are shorter and resource requirements are more significant", placing an undue burden on rapid response mechanisms.[573] Moreover, investment in preventive action has a considerably higher cost effectiveness than intervening after the outbreak of conflict.[574] Despite making up a considerable portion of EU development aid, resources tackling the interface with security policy remain a very specific niche, of which few development staff are fully aware. This hampers coherence between the various policy tools and can result in a poor transition from crisis responses to long-term cooperation. Moreover, there remains considerable room to scale up coordination, which could simultaneously improve cross-learning between instruments.[575] The EDF's B-envelope, the IcSP's flexibility and the APF's focus on African ownership, could all provide meaningful sources of inspiration for the whole development arsenal.

3.2.2. CFSP instruments on the interface with development policy

The bulk of CFSP activity has no explicit basis in the Treaty and takes the form of statements and declarations expressing the Union's views and positions on diverse global events. These range from vague non-committal expressions of support over condemnations, denunciations to forthright announcements of future EU action. There is no formal category of CFSP statements[576] and their scope is often broader than this single policy area.[577] For their operationalisation such statements rely on legal acts, which are used on a rather lower scale. These are laid down in Article 25 TEU and include decisions defining (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; and (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii).[578] Given the broad primary law scope of the CFSP it is not surprising that these instruments have from the outset embarked on policy fields that are also targeted by EU development policies. A clear example

[572] ADE (2011) op.cit. note 82, 93-95.
[573] Gavas et al. (2013) op.cit. note 469, 24.
[574] See for instance: M. Chalmers, 'Spending to Save? The Cost-Effectiveness of Conflict Prevention' (2007) *Defence and Peace Economics* 18(1), 1-23.
[575] OECD-DAC (2012) op.cit. note 83, 71.
[576] The only form of categorisation is their inclusion in a separate tab 'CFSP Statements' on the Council website. See: <http://www.consilium.europa.eu/press/press-releases/latest-press-releases/newsroomloadbook?lang=en&bid=73&lang=1&cmsid=257> (last accessed 02.12.2014).
[577] A February 2014 Declaration on Zimbabwe, for instance, discusses relations in the framework of the Cotonou Agreement and the possibility of resuming support under the EDF (High Representative (6673/14) Declaration on behalf of the EU on the review of EU-Zimbabwe relations, 19.02.2014.
[578] As mentioned above, the first two subcategories respectively replace the old CFSP joint actions and common positions.

is the control of SALW which was subject of a 1999 CFSP Joint Action.[579] Its successor formed the subject of the well-known Commission challenge before the Court in the *SALW* case (cf. *infra* 5.2.2.).

In the early days of the CFSP, a source of considerable contention with regard to development policy was the repeated recourse to Community means for giving effect to CFSP decisions. This was often a manner to deal with the limited availability of own CFSP resources. Yet, the fact that the EC would be reduced to an executive branch of the CFSP was irreconcilable with *ex* Article 47 TEU. The classic example is the 1994 Common Position on Rwanda which included commitments on the progressive resumption of development cooperation.[580] The Commission objected to this unlawful intrusion into the Community's autonomy, while the Council Legal Service argued that this was justified as the EC would remain fully competent to choose the respective operational measures.[581] The hatchet was finally buried in a joint Council-Commission *Mode d'emploi* on Common Positions.[582] In essence, this established that such positions could cover the whole spectrum of EU and EC policies, as long as they did not impose binding obligations that would infringe on the autonomy of EC institutions. Arguably, this resulted more in a linguistic than a substantive change of course. The typical new formulation consisted of the Council noting that "the Commission intends to direct its action towards achieving the objectives of this Common position, where appropriate, by pertinent Community measures".[583] Kuijper calls this formula of pushing the Community into action while carefully avoiding to impede upon the *acquis communautaire* a practice of "gentle subordination".[584] It appears that the further maturing of the Union as well as the constitutional and institutional changes brought about by the Lisbon Treaty have made an end to this legal tinkering (cf. *infra* Chapter 6).

The most persistent sources of overlap with or rapprochement to development cooperation results from the gradual operationalisation of the CFSP. This started with the Treaty of Amsterdam that created the function of High Representative for the CFSP as well as the Special Representatives (EUSRs) operating under his/her authority. Even though EUSRs are part of the CFSP chapter of the TEU, and are therefore *sensu stricto* CFSP actors, some of their mandates clearly touch upon development competences. In the next chapter on the institutional track, the EUSRs will be studied more in-depth. The single most visible factor in moving this policy area closer to the interface with development policy is the CSDP. Its initial purpose, expressed at the 1999 Cologne European Council, to develop "an EU

[579] Joint Action (1999/34/CFSP) on the EU's contribution to combating the destabilising accumulation and spread of small arms and light weapons, OJ L93/27, 08.04.1999.
[580] Common Position (94/697/CFSP) on the objectives and priorities of the EU vis-a-vis Rwanda, OJ L283/1, 29.10.1994.
[581] Timmermans (1996) op.cit. note 458, 67-68.
[582] Doc. 5194/95 of 06.03.1995, unpublished (content described in Koutrakos (2001) op.cit. note 166, 45-46).
[583] See for instance: Article 5 Common Position (1999/722/CFSP) concerning EU support for the implementation of the Lusaka ceasefire agreement and peace process in the Democratic Republic of Congo, OJ L286/1, 09.11.1999.
[584] Kuijper (2007) op.cit. note 122, 1577.

military crisis management capacity"[585] was one year later extended with a civilian component as well as conflict prevention.[586] This was only formally codified by Article 43(1) Lisbon TEU extending the lists of Petersberg tasks. Given that it proofed considerably more onerous to unfold the CSDP's military than civilian dimension, the latter soon took the upper hand. Of the 17 ongoing (at the time of writing) CSDP missions and operations 11 are of civilian nature and only 6 have a military mandate (cf. Box 7). Even though they are all designed as short-term interventions, 8 have been operational for more than 6 years, with EUFOR ALTHEA Bosnia-Herzegovina nearing its 11th birthday.

Both civilian missions and military operations are generally small-scale in nature and have a rather narrowly targeted mandate.[587] CSDP military operations have been conducted to enforce peace-agreements, provide deterrence, stabilise security conditions, protect civilians and critical infrastructure, support and prepare the ground for international peacekeeping missions, combat piracy at sea and provide military training. Civilian missions have been delivering contributions to security sector reform (including the restructuring of armies, rule of law missions and police reform), border management and monitoring. All of these missions and operations operate in environments where the EU also deploys development cooperation activities. Points of contact are consequently unavoidable. Evidently, the more the balance tilts towards civilian missions and the longer the planning horizon, the more the security-development distinction blurs. As these interactions are highly context-specific section 6.2. will further elaborate on this issue by means of the particular case of the EU's CFSP/CSDP and development activities in the Horn of Africa.

[585] Cologne Presidency Report (1999) op.cit. note 283, Annex II.

[586] Santa Maria de Feira Presidency Conclusions (2000) op.cit. note 285, 11-12. The CSDP's focus on conflict prevention is clear from the annual reports on the EU Programme for the Prevention of Violent Conflict, which always referred extensively to CSDP activities (see for instance the 2008 annual report of the Council (10601/08), 17.06.2008).

[587] EULEX Kosovo, as the only civilian mission with an executive mandate, exceptionally employs over 2000 international and local staff. On the military side EUNAVFOR Atalanta is an unusually large operation comprising around 1200 personnel. Staff numbers in other missions and operations range from less than ten to a couple of hundreds.

Box 7: Ongoing CSDP missions and operations (chronologically)				
Mission/Operation	**Nature**	**Main tasks**	**Launch**	**Current Legal Basis**
EUFOR ALTHEA Bosnia-Herzegovina	Military	Building capacity of the BiH armed forces; supporting BiH in its efforts to maintain a safe and secure environment; supporting the overall EU comprehensive strategy for BiH.	December 2004	Joint Action 2007/720/CFSP amending Joint Action 2004/570/CFSP
EUSEC RD Congo	Civilian	Supporting DRC authorities in rebuilding an army that will guarantee security throughout the country; creating conditions for making social and economic development possible again.	June 2005	Council Decision 2015/883/CFSP amending Decision 2010/565/CFSP
EUBAM RAFAH Palestinian Territories	Civilian	Providing a third party presence at the Rafah Crossing Point in order to contribute to its opening and to build confidence between the Israeli Government and the Palestinian Authority.	November 2005	Council Decision 2014/430/CFSP amending Joint Action 2005/889/CFSP
EUPOL COPPS Palestinian Territories	Civilian	Supporting the reform and development of police and judicial institutions; acting as key coordinator for the international community in these areas.	January 2006	Council Decision 2015/599/CFSP amending Decision 2013/354/CFSP
EUPOL Afghanistan	Civilian	Supporting the reform process towards a trusted police service; helping to establish civilian policing arrangements that ensure appropriate interaction with the justice system;	June 2007	Council Decision 2014/922/CFSP amending Decision 2010/279/CFSP
EULEX Kosovo	Civilian	Assisting and supporting the Kosovo authorities in developing and strengthening an independent and multi-ethnic justice, police and customs system.	February 2008	Council Decision 2014/685/CFSP amending Joint Action 2008/124/CFSP
EUMM Georgia	Civilian	Providing civilian monitoring in order to contribute to stabilisation, normalisation and confidence building in support of a durable political solution for Georgia.	September 2008	Council Decision 2014/915/CFSP amending Decision 2010/452/CFSP
EU NAVFOR Atalanta	Military	Protecting WFP vessels and AMISOM shipping; deterring, preventing and repressing acts of piracy and armed robbery off the Somali coast; monitoring fishing activities.	December 2008	Council Decision 2014/827/CFSP amending Joint Action 2008/851/CFSP

EUTM Somalia	Military	Mentoring, advising and supporting the Somali authorities to build up and train the Somali National Armed Forces and to implement the Somali National Security and Stabilisation Plan.	April 2010	Council Decision 2015/441/CFSP amending Decision 2010/96/CFSP
EUCAP Nestor	Civilian	Supporting the development of maritime security; strengthening the maritime criminal justice system, from investigation, over arrest, detention to prosecution.	July 2012	Council Decision 2014/485/CFSP amending Decision 2012/389/CFSP
EUCAP SAHEL Niger	Civilian	Promoting the interoperability of Nigerien security forces; supporting the development of regional and international coordination in fighting terrorism and organised crime.	August 2012	Council Decision 2014/482/CFSP amending Decision 2012/392/CFSP
EUTM Mali	Military	Providing military training and advice to the Malian Armed Forces in order to build their capacity to restore territorial integrity and reduce terrorist threats.	February 2013	Council Decision 2014/220/CFSP amending Decision 2013/87/CFSP
EUBAM Libya	Civilian	Advising, training and mentoring the Libyan authorities in developing border management and security at the country's land, sea and air borders.	May 2013	Council Decision 2015/800/CFSP amending Decision 2013/233/CFSP
EUAM Ukraine	Civilian	Mentoring and advising Ukrainian authorities in establishing sustainable and accountable security services for delivering the rule of law.	December 2014	Council Decision 2014/486/CFSP
EUCAP Sahel Mali	Civilian	Assisting and advising the Malian security forces in improving their operational efficacy; re-establishing hierarchical chains; reinforcing the role of judicial and administrative authorities.	January 2015	Council Decision 2015/76/CFSP amending Decision 2014/219/CFSP
EUMAM RCA	Military	Advising CAR authorities in preparing the upcoming security sector reform and assisting armed forces in building capacity, quality, accountability and effectiveness.	March 2015	Council Decision 2015/78/CFSP
EU NAVFOR Mediterranean	Military	Supporting the detection and monitoring of migration networks (first phase), conducting boarding, search, seizure and diversion of suspected vessels (second phase), taking all necessary measures to render those vessels inoperable (third phase).	June 2015	Council Decision 2015/778/CFSP

To manage this considerable range of responsibilities the CFSP has a relatively small budget of EUR 2.3 billion for 2014-2020.[588] Most of these funds are absorbed by civilian CSDP missions (which are concomitantly financed by voluntary Member States contributions) and the EUSRs. In 2012 these accounted respectively for 86% and 8% of the annual CFSP budget.[589] It is part of the general Union budget, implying that the Commission is responsible to administer funds.[590] Given that the latter is not politically responsible for or formally involved in their adoption, it has degradingly been called the "cashier" of the CFSP.[591] This situation causes a number of complications necessitating procedural detours. A first obstacle arises with regard to the financial framework for CSDP missions. The financial reference amount is laid down in the respective Council Decision, whereas the impact statement specifying the expected costs can only be prepared by the Commission. The latter drafts this statement based on the input it receives from the mission Head and staff. It then forwards it to the Council, incorporates any possible amendments the latter submits, after which it is again send to the Council for formal adoption. Only through this intricate procedure can the Commission's budgetary powers be reconciled with the Council's final say on how the money should be spent.[592] A similar issue arises with regard to the CSDP Heads of Missions, which are assigned to implement the mission's budget,[593] but have no authority under the Treaty to do so. For this purpose they sign a Special Advisor contract with the Commission entrusting them with the technical implementation of the mission's finances.[594] This also implies that besides the formal chain of command, the Head of Mission "shall report fully to, and be supervised by, the Commission regarding the activities undertaken in the framework of his/her contract".[595]

CSDP military operations cannot be charged to the EU budget and Member States are not obliged to contribute to their financing.[596] For about 10% these are funded by a separate Athena mechanism to

[588] Compare this for instance with the EUR 7.7 billion allocated by the external financing instruments to contribute to conflict prevention and peacebuilding over the period 2001-2010, op.cit. note 563.
[589] High Representative (14924/13) Annual Report - Main aspects and basis choices of the CFSP, 16.10.2013, Annex I.
[590] Since 2010 this task is taken on by the Foreign Policy Instruments Service (FPI) which forms full part of the Commission but is co-located in the EEAS' premises (cf. *infra* section 4.3.).
[591] J. Monar, 'The Finances of the Union's Intergovernmental Pillars: Toruous Experiments with the Community Budget' (1997) *Journal of Common Market Studies* 35(1), 77-78.
[592] G. Sautter, 'The Financing of Common Foreign and Security Policy – on Continuity and Change' in H.-J. Blanke and S. Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer, Berlin, 2012) 580.
[593] See for instance: Article 6(4) Council Decision (2012/389/CFSP) on the EU Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR), OJ L187/40, 17.07.2012 (hereafter: EUCAP Nestor Decision).
[594] Commission Communication (COM(2009) 9502 final) on Specific Rules for Special Advisers of the Commission entrusted with the implementation of operational CFSP actions and contracted international staff, 30.11.2009.
[595] See for instance: Article 13(5) EUCAP Nestor Decision. That this may be source of confusion is clearly illustrated by the *Elitaliana SpA v Eulex Kosovo* case. The fact that the applicant wrongly identified Eulex Kosovo, and not the Commission, as the party responsible for dismissing its tender was "not excusable" according to the Court and led to the dismissal of its action (Case T-213/12, *Elitaliana v Eulex Kosovo*, ECLI:EU:T:2013:292, paras 42-46).
[596] Article 41(2) TEU.

which Member States provide resources based on their GNP.[597] It covers a range of common costs – from the preparation to the termination phase – for activities such as fact-finding, recruitment of local staff, medical evacuations and treatment, travel and accommodation, communications, etc.[598] The remaining 90% of the operations' costs is covered by the participating Member States on the basis of a 'costs lie where they fall' principle. This is one of the sorest points and – in the words of High Representative Ashton – "securing Member States' commitment to supporting missions and operations, especially when it comes to accepting risk and costs, can be challenging, resulting in force generation difficulties".[599] A partial but limited remedy is Athena's Early Financing Scheme, endowed with provisional appropriations worth EUR 19 million from 19 Member States (which can later detract it from their contribution). It becomes operational as soon as a Crisis Management Concept is adopted.[600]

In the light of these limited resources and capabilities there is currently no drive to move CSDP missions and operations beyond the targeted contributions they deliver at present. The advantage of this approach is that it allows the CSDP to build up significant niche expertise and establish a comparative advantage, particularly with regard to monitoring as well as mentoring, advising and training police, judicial and military services. On the other hand, CSDP missions and operations have been criticised as lacking critical mass and delivering "small contributions to very big problems".[601] The Parliament laments the lack of a clear doctrine to operationalise the Petersberg tasks and "regrets the modest nature of CSDP interventions, especially the military ones, consisting mainly of small-scale military training missions instead of substantial European contributions to peacekeeping and peace enforcement".[602] With regard to the CSDP's growing focus on SSR, General Coelmont, the former Belgian representative to the EU Military Committee (EUMC), finds that generally a "homeopathic dose" is delivered while "the real stuff was needed".[603] Arnaud Danjean, the former chair of the European Parliament Subcommittee on Security and Defence, goes as far as calling civilian missions pretexts which simply serve the EU's good conscience.[604]

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[597] Article 24(4) Council Decision (2015/528/CFSP) establishing a mechanism to administer the financing of the common costs of EU operations having military or defence implications (Athena) and repealing Decision 2011/871/CFSP, OJ L84/39, 28.03.2015 (hereafter: Athena Decision).

[598] A complete list is set out in Annex I-IV Athena Decision.

[599] High Representative/Head of the EDA, Final Report on the CSDP, 15.10.2013, 3. While a Mission Support Platform to fine-tune Member States contributions is currently under consideration, the more ambitious idea of a setting up of a Shared Services Centre, together with an Integrated Resource Management System, faces more difficulties.

[600] Article 26 Athena Decision. For instance, this scheme provided EUR 7.3 million to EUTM Somalia and EUR 7 million to EUNAVFOR Atalanta in 2014.

[601] Koutrakos (2013) op.cit. note 91, 129.

[602] European Parliament Report (2014/2258(INI)) on financing CSDP, 22.04.2015, paras 1 and 3.

[603] J. Coelmont, 'A comprehensive approach without a security strategy is a hallucination', *europeangeostrategy.org*, 08.05.2014.

[604] L. Merelle, 'Quand le mot « politique » manque à l'Europe. Le bilan de Arnaud Danjean', *Bruxelles2.eu Le Club*, 03.04.2014

The mandate of civilian CSDP missions is often not so different from that of the security-related projects funded under the external financing instruments (cf. *infra* 6.2.). Yet, the approach is inherently different as the CSDP constitutes – even more than the CFSP – a quarantined compartment shielded from interaction with other areas of EU external action. It is "a deeply introverted policy", preoccupied with the often military-style management of its own – very specific – challenges and characteristics.[605] The sovereignty-sensitive nature of the CSDP has resulted in the emergence of an autonomous legal, political, and administrative structure characterised by deep and secluded institutionalisation and proceduralisation of planning, decision-making and implementation (cf. *infra* 4.1.). This separate compartment is in its turn further compartmentalised along civil and military lines. "[S]eparated at birth", these have since remained parallel strands of a single casing. Under the guise of civil-military cooperation (CIMIC) and coordination (CMCO) (cf. *supra* 3.1.1.) a difficult process was set in motion to strengthen the ties. Yet, this tended to overlook the politico-strategic level, leaving measures at the operational-tactical level without any guidance.[606] Under the impetus of the civilian-military cell within the EU Military Staff (EUMS)[607] and the Joint Situation Centre (SitCen), the CSDP is gradually becoming more successful in converging both strands.[608] Yet, it seems that this demanding undertaking has, throughout the past decade, consumed most of the energy for an equally important debate on the security-development nexus within CSDP circles.

3.2.3. Challenges of fine-tuning and coordination: the choice of legal basis in practice

Over the years the EU has established an impressive amalgam of instruments spanning the whole spectrum of interrelated security and development challenges. From the prevention, over the emergence and the termination of conflict to reconciliation and post-conflict reconstruction, the Union has various instruments in place which allow it to play a role of significance. The main challenge remains to turn this embracive policy reach into comprehensively coordinated action. A key problem in this undertaking is that the improvised manner in which this evolution took place has come to blur the logics of what exactly distinguishes development cooperation from the CFSP/CSDP.

Many of the external financing instruments, and the CFSP as a whole, share the policy fields of conflict prevention, peace-building and keeping, reconciliation and crisis management. This occurs without much encompassing policy guidance and limited or no pronounced division of labour. This can be

[605] Koutrakos (2013) op.cit. note 91, 181.
[606] M. Drent and D. Zandee, *Breaking the Pillars: Towards a Civil-Military Security Approach for the European Union* (Clingendael - Netherlands Institute of International Relations, The Hague, 2010) 23.
[607] Called into being by the Presidency Conclusions, European Council, Brussels, 12-13.12.2003, para. 90.
[608] See further: P.M. Norheim-Martinsen, *The European Union and Military Force: Governance and Strategy* (Cambridge University Press, Cambridge, 2012) 77-102.

problematic as the legal, procedural and institutional divide between CFSP and development cooperation, combined with functional specialisation and essentially distinct policy horizons, obstruct the exchange of relevant development and security-related expertise across departmental boundaries. Moreover, development and security funding follow an inherently different logic. Whereas for development cooperation a budget is dedicated before it is decided how it will be spent, in the CSDP it is first decided that something needs to be done and only then attempted to assemble the necessary resources. As a consequence, the EU's development and security communities often talk at cross-purposes. Security-related departments are said to be not really interested in or well informed on development issues, while development actors remain sceptical of the security and defence community.[609] A key example is the PCD agenda which Krätke compares to a "dialogue of the deaf", because PCD administrators as "bearers of bad news and other reminders" often become isolated from the administrations they aim to cohere.[610] As a result, the practical consequences of different policy choices on the respective security or development perimeters remain unclear and thus unsatisfactorily anticipated. This is further exacerbated by the EU's deficient human resources policy, which provides insufficient attention and resources to the tail ends of the development cooperation and CFSP/CSDP, where the nexus is enacted. While the EU has all the major building blocks in place, this prevents EU institutions from adding these up for a measured response to crises and fragility.[611] In Chapters 4 and 6, it will respectively be discussed to what extent the institutional innovations of the Lisbon Treaty and the new tendencies of comprehensive and strategic policy design are meeting these shortcomings.

Whereas the EU has gradually become more effective in targeting its policies at the interconnected challenges of poverty, instability and violence, the complexity of its machinery and the fragmentation of its approach put a strain on the effectiveness and impact of these efforts. *First*, it leads to considerable overlap. This is evidenced by the area of SSR which is not only a prevalent field of activity under the EU's development instruments, but has become the pet project of the CSDP. In 2006 the EU attempted to bring the uncomfortably separated Commission and Council SSR policies[612] together in a single Policy Framework for Security Sector Reform. However, in trying to sort out a division of labour this two-pager got no further than concluding that "[a] case-by-case analysis based on a situation-specific approach is always needed to assess whether any proposed activities are most appropriately carried out through ESDP or Community action or a combination of both with the objective of ensuring

[609] Biondo, Oltsch and Orbie (2012) op.cit. note 89, 133.
[610] F. Krätke, 'Policy coherence: a sensible idea lost in translation?', *theguardian.com*, 11.11.2013
[611] A. Sherriff and V. Hauck, 'Addressing Peace, Security and State Fragility – How can the EU do Better?', *ecdpm.org/talking-points*, 28.07.2014.
[612] Commission Communication (COM(06) 153 final) A Concept for European Community Support for Security Sector Reform, 24.05.2006; Council Note (12566/4/05) An EU Concept for ESDP Support to Security Sector Reform, 13.10.2005.

effective and coherent EU external action in this area".[613] *Second*, it provokes the duplication of institutional structures and mechanisms. In 2010 the EU disposed, for instance, of around 15 different rapid alert systems spread over the EU institutions.[614] *Finally*, the complexity and fragmentation occasionally incite inter-institutional disagreements on competence delimitation, mostly under the radar but sometimes overtly fought out before the Court (cf. *infra* Chapter 5). Such 'turf-wars', as they are somewhat exaggeratedly called, are particularly problematic in situations of crisis where timely responses are of the essence.

The variety and comprehensiveness of the EU's policy reach is one of its main comparative advantages, but simultaneously its Achilles heel. It implies that fine-tuning these numerous initiatives is all but a self-evident undertaking. The fragmented diversity complicates efforts to come to an optimal mix of its available resources and makes the Union vulnerable to counterproductive action. As acknowledged by former High Representative Ashton, this complexity is exacerbated by the cyclical nature of conflict, rendering it extremely difficult to neatly sequence long-term development action with short-term security interventions.[615] The Commission puts it as follows:

> *In stable contexts, a lack of coherence across policies and related interventions can lead to limited results. In a fragile or conflict-affected situation, lack of coherence can easily lead to no results at all — or even do harm. And a lack of progress in one area — be it political, security, economic or social — risks reversing the whole transition process.*[616]

Particularly the IcSP and the CSDP often poach into each other's preserves. The IcSP is regularly catalytic in preparing the ground for CSDP missions, complementing their objectives or cushioning their termination.[617] This tends to bring along an administrative and institutional density that not only confuses third parties but also EU staff struggling to grasp the vast diversity of projects and budget cycles (cf. *infra* 6.2.).[618] This is further muddled by the compartmentalisation of the CSDP that does not lend to fine-tuning, particularly regarding the highly sensitive and secretive military arm. According to General Coelmont all military CSDP operations have reached their military objectives, but only a very limited number was conducted comprehensively. This implies that "lasting results have seldom or

[613] Council Conclusions on A Policy Framework for Security Sector Reform, 2736th General Affairs Council, 12.06.2006, para. 4 (cf. *infra* 6.1.2. for recent evolutions in this regard).
[614] Council Annual Report (10477/10) op.cit. note 444, 29.
[615] High Representative/Head of the EDA (2013) op.cit. note 599, 12-13.
[616] Commission (2014) op.cit. note 485, 9.
[617] Koutrakos provides an elaborate list of concrete examples on how this interaction occurs in practice: Koutrakos (2013) op.cit. note 91, 219-212. This practice has led one Member of European Parliament (MEP) to caution that the IcSP should "not [become] another budget line for military adventures" (A. Beer quoted in Gänzle (2009) op.cit. note 530, 89).
[618] J. Tejpar and K. Zetterlund, *EUCAP Nestor: Trying to Steer Out of the Doldrums* (FOI - Swedish Defence Research Agency, Helsinki, 2013) 29-32.

never been achieved".[619] Significant complications arise from the discordant time horizons of CSDP activities. Contrary to the seven-year EU budgetary framework, CSDP missions and operations follow a one or two-year programming cycle. On the positive side, this allows considerably more responsiveness and flexibility. Yet, given their increasingly long-term presence this does evidently not match operational realities and makes CSDP activity difficult to align with other EU external action instruments. It obstructs efforts to guarantee a workable exit strategy or follow-up by longer-term programmes. In this regard it is notable that a longer-term planning cycling, with the possibility of annual revisions, is under discussion.[620]

Development cooperation and CFSP/CSDP initiatives thus regularly touch upon each other's competences. Yet, inter-institutional relations are characterised more by acquiescence than tension and disputes only seldom end up before the Court. This begs the question of how in most cases a *modus vivendi* is found. A glance at the practice of choosing an appropriate legal basis on the cross-section of security and development competences resonates more of improvisation than systematisation. Hoffmeister's noticeable effort to disentangle the EU's division of competences in civilian crisis management uncovers a policy-making chaos, with similar efforts in various countries undertaken by different instruments (e.g. a Commission managed border assistance mission EUBAM Moldova/Ukraine and CFSP border assistance in Rafah), entire policy areas moving from the CFSP to the *ex* EC (election observation – which is now conducted under the EIDHR) and *vice versa* (monitoring missions) and an ESDP mission taken over by a Commission-funded project without further notice (EUJUST THEMIS).[621]

In this mishmash of programmes and initiatives approaching the nexus, some criteria that guide the choice of legal basis can nonetheless be identified. When the focus is on funding local or international initiatives, or when project follow-up requires a significant amount of technical/managerial expertise, measures will rather be taken on the legal basis of development cooperation. If action relates to the conclusion of international conventions, involves a large-scale secondment of Member States' experts, relies heavily on national capabilities, requires political judgment and follow-up or when security conditions are unstable, it will instead be adopted under the CFSP. Indeed, many of the focal areas included in the IcSP Regulation, such as mediation, promoting and defending the respect for human rights or strengthening the capacity of law enforcement and judicial authorities, are also undertaken in the CFSP and CSDP realm. Yet, the difference is that in the framework of the IcSP these activities are predominantly assumed through financial and technical assistance, while under the CFSP/CSDP

[619] Coelmont (2014) op.cit. note 603. In his view only EUFOR ALTHEA and EUTM Mali are conducted in a comprehensive fashion.
[620] E. Gross, 'Exit Strategies: What's in a name?', *EUISS Brief Issue 23* (EU Institute for Security Studies, Paris, 2014) 3.
[621] Hoffmeister (2008) op.cit 90, 164-166.

framework more direct action is taken, based on EU and Member States capabilities. In practice, the emphasis thus seems to lie on the content rather than the aim of the measure. This is not illogical given that policies covering the security-development nexus will by definition contribute to both development cooperation and CFSP objectives. However, these criteria are not necessarily conducive to expertise maximisation and lesson learning. To give just one example of missed opportunity for cross-learning: counter-piracy training to coastguards in the Gulf of Guinea is financed under an IcSP project (CRIMGO),[622] while similar activities in the Horn of Africa are undertaken by a CSDP mission (EUCAP Nestor).

In essence, the EU remains instrument rather than strategy-driven. Its discourse may be holistic, the policies that straddle the security-development nexus embody a piecemeal practice of rather small and loosely connected initiatives. In designing the Union's instruments and approach, the division of competences and the question of who does what regularly tend to overshadow the issue of what is being done. In this light a 2013 Parliament report urges the EU to "[c]ommunicate clearly in one document what financing options exist for addressing fragility, which EU organisations are responsible for them, which recipients are eligible and the terms and conditions of each instrument".[623] Not only is such a broad political consensus to be preferred over judicial solutions, it is essential to finally focus all attention on the substance rather than the power balance of this policy nexus.

3.3. Conclusion

Contrary to the inherent notion of the security-development nexus, professing that the aims of development cooperation and the CFSP are inseparable and should thus be closely tied together, the separation between them is firmly enshrined in the Union's DNA. The EU may portray a single policy commitment, its competences, policy regimes and instruments are essentially divided. The EU's respective development and security toolboxes were driven into the grey area between them on tiptoes. Both gradually converged towards the core of the security-development interface and today confidently address its various challenges. Yet, rather than clarifying competence boundaries through secondary law, this has come to blur the logic of what distinguishes development cooperation from the CFSP and particularly the CSDP. Objectives of conflict prevention, crisis management, reconciliation and post-conflict reconstruction cannot be assigned to one or the other EU competence, forging an indissoluble link between development cooperation and the CFSP.

This interaction occurs in a rather improvised manner, barring the EU from systematically coming to an optimal mix of its diverse instrumentarium. Problematically, this gives rise to considerable hurdles

[622] Commission Press Release (IP/13/14), 'New EU initiative to combat piracy in the Gulf of Guinea', Brussels, 10.01.2013.
[623] Gavas et al. (2013) op.cit. note 469, 37.

of fragmentation, duplication and inter-institutional disagreements on competence delimitation. An Action Plan on Security, Fragility and Development never saw the light of day and EU institutions only seem to find consensus in a rather generic call for more coherence. Such an approach, which assumes that it is known what is to be done in the name of the nexus, is difficult to reconcile with the uncertain and contested understanding of its practical implications. It is telling that Keukeleire and Raube found that most EU officials, in spite of good intentions, struggle to make practical sense of this nexus.[624] In this light, the standard refrain, that 'there cannot be sustainable development without peace and security, and without development and poverty eradication there will be no sustainable peace', risks to read as a simplistic 'all good things go together' mantra where security and development initiatives automatically reinforce each other.[625] Without task certainty the EU's rhetorical call for coherence expresses nothing more than a wish and risks to result in a diffusion, or even evasion, of policy responsibility.[626] This creates the impression that it was the mere existence of the EU's extensive armoury that prompted this commitment (as this would signify that the EU was meant to act comprehensively), rather than the commitment serving to improve the functionality of its instruments. In this view, this agenda is more of a teleological inevitability or meant-to-be ideal, than a genuine policy programme allowing to attune individual actions to an overall strategy.[627]

These simplistic impressions which the EU's approach evokes are regrettable in the light of the considerable strides it has made in enhancing the security-development connection. In order to do justice to its achievements and capitalise on the full potential of its impressive and diverse policy-making machinery, EU institutions must urgently come to terms in laying down guidelines and instructions on how to match its words with concrete action on the ground. This will require a comprehensive policy framework that manages to strike the delicate balance between Articles 21 and 40 TEU, between CFSP-TFEU integration and delimitation. Only in this manner can they maximise positive connections across security and development toolboxes and avoid counterproductive action. In Chapter 6 it will be studied whether the comprehensive approach, built on the streamlined institutional and constitutional foundations of the Lisbon Treaty, is more fit for purpose.

[624] Keukeleire and Raube (2013) op.cit. note 452, 558-560.
[625] Vennesson and Büger (2009) op.cit. note 34, 27.
[626] R. Van Der Hoeven, 'Policy Coherence: The Newest Fad in the International Discourse?' in P. Hoebink (ed), *European Development Cooperation: In Between the Local and the Global* (Amsterdam University Press, Amsterdam, 2010) 42.
[627] C. Gebhard and P.M. Norheim-Martinsen, 'Making Sense of EU Comprehensive Security towards Conceptual and Analytical Clarity' (2011) *European Security* 20(2), 222.

4. The security-development nexus on the institutional track

> *It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than a new system. For the initiator has the enmity of all who would profit by the preservation of the old institution and merely lukewarm defenders in those who gain by the new ones.*
>
> Niccolò Machiavelli, 1532

From its founding fathers to its current leaders, the European Union has been governed by a great believe in the role of institutions and institutional change. To many of the obstacles the European integration project has come across throughout its nearly 60 years of existence, a substantial part of the answer has been delivered in terms of institutional and administrative restructuring. The creation of ECSC institutions to indurate peace on the European continent, the establishment of the High Representative for the CFSP in reaction to the Balkan crisis of the late 1990s and the formation of new supervisory bodies in response to the current economic and financial crisis in the Eurozone, are just a number of examples illustrating the Union's deep-seated trust in the problem-solving potential of institutions. As acknowledged by former European Council President Herman Van Rompuy: "[w]e have in the Union a tendency of solving problems by creating new institutions, new jobs".[628] The approach is generally one of accumulation rather than rationalisation. Institutions are only rarely abolished and institutional changes leave deep marks on the EU's governance system. As "the present and the future are connected to the past by the continuity of today's institutions", they can learn us a lot about the nature of the EU beast.[629]

With regard to the CFSP such institutional fiddling has often attempted to better connect it to other (*ex* EC) external policies. Nonetheless, the Union's institutional framework has always remained "[s]ingle by name, dual by regime, multiple by nature".[630] On the positive side, the fact that the nexus is managed in a single institutional framework implies that "it should be politically possible to resolve any issues of coherence resulting from bipolarity".[631] On the negative side, the EU's institutional

[628] X, 'Van Rompuy opposes direct election of the EU's top leaders', *EurActiv.com*, 30.11.2012.
[629] D.C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge, 1999) vii.
[630] Keukeleire and MacNaughtan (2008) op.cit. note 533, 66. The singleness of this framework used to be laid down in *ex* Article 3 TEU, but is now only included in the TEU preamble, as if it was no longer necessary to be emphasised.
[631] Dashwood (2014) op.cit. note 95, 14.

arrangements have been called "a divorce between development and security",[632] with the differentiated roles and institutional balance contributing more to fragmentation than coherence.[633] The most recent and thorough institutional reorganisation was undertaken by the Treaty of Lisbon, which reformed the function of High Representative, created a single foreign service in the form of the EEAS and transformed the old Commission Delegations into genuine Union Delegations. EU leaders confidently announced that these innovations would finally "give the Union a single voice in external relations",[634] overcome the fragmentation of the past and make it "work more efficiently and effectively".[635] This signals a strong conviction that the absence of these mechanisms "was responsible for the underwhelming effect of the Union's foreign policy and, accordingly, that their introduction would place the Union in its well-deserved place at the very centre of the world stage".[636]

The above statements provide ample reason to analyse the impact of these institutional innovations on the conduct of EU external action, by focusing on their advances to enhance the link between development cooperation and the CFSP. For this purpose we will first scrutinise the traditional love-hate relationship between the Commission and the Council in managing the security-development nexus, which preceded the Lisbon Treaty (4.1.). The subsequent titles will respectively analyse the changes brought by the High Representative (4.2.), the EEAS (4.3.) and the Union Delegations (4.4.).

4.1. The traditional love-hate relationship between the Commission and the Council

The EU's institutional framework is sometimes presented as if the Commission has the sole responsibility for the daily management of TFEU external competences such as development cooperation, and the Council for all that concerns the CFSP. This is evidently misconceived as the Council is pivotal under every EU competence, and also the Commission's involvement in the CFSP cannot be ignored (cf. *supra* 2.3.1. and 3.2.2.). The disjointed nature of EU external action, and the management of the security-development nexus in particular, condemn the Commission and Council to close cooperation.[637] Former High Representative Ashton described the complications before the entry into force of the Lisbon Treaty as follows:

[632] C. Gourlay, 'European Union Procedures and Resources for Crisis Management' (2004) *International Peacekeeping* 11(3), 404-421.
[633] De Baere (2008) op.cit. note 164, 273-274.
[634] Commission Press Release (IP/07/1922) 'Commission welcomes signature of the Treaty of Lisbon and calls for its swift ratification', Brussels, 13.12.2007.
[635] CFSP High Representative Speech (S 194/08) op.cit. note 329.
[636] Koutrakos (2013) op.cit. note 91, 55.
[637] The focus on their love-hate relationship under this title does of course not mean that other EU institutions, such as the European Parliament, European Council or EU Court of Justice, have no relevance in these areas. They all play a key role in setting out their scope and direction, but it is the Commission and the Council that manage their daily functioning.

EU work around the world has been guided by two masters: the External Affairs Commissioner and the Council's High Representative. There has been one chain of command for our development efforts, and a completely separate chain of command for our security activities. Too often good people have been hampered by poor systems.[638]

The following sections will succinctly describe the pre-Lisbon Council and Commission apparatus for development cooperation (4.1.1.) and for CFSP/CSDP (4.1.2.), which gave rise to a fragmented management of the security-development nexus (4.1.3.).

4.1.1. The pre-Lisbon Council and Commission apparatus for development cooperation

Both the Council's and the Commission's apparatus for development cooperation underwent a key reform in the early 2000s. The main modalities of the Commission's refurbishment concerned the creation of AIDCO as implementing agency (cf. *supra* 2.2.2.), a deconcentration exercise towards the Delegations and the introduction of Country Strategy Papers (CSPs) setting out multiannual strategic frameworks for cooperation with a strong focus on poverty alleviation. These reforms had an administrative and a political rationale, which were not always in line. On the one hand, they aimed to meet the managerial concern, expressed by the OECD-DAC in 1998, that the EU's "organisational framework has appeared to influence policy, rather than the opposite".[639] On the other hand, the Commission wanted to deliver a stronger counterweight to the rising Council role under the gradually maturing second pillar. For this purpose, particularly the role and responsibilities of DG External Relations (DG RELEX) had to be boosted.

In an effort to professionalise aid policies, as well as to substantiate the EU's claim of becoming a global development actor, the separate ACP portfolio was abolished in the 1999 Prodi Commission and Nielson was made responsible for EU development and humanitarian aid as a whole.[640] His mandate included the entirety of relations with the ACP, but with regard to Asia, Latin America and the Middle East, the Commissioner for External Relations was entrusted with all non-development aspects. Commercial relations with developing countries – which have always been a key component of the Union's aid programme – were the full responsibility of the Commissioner and DG for Trade. Further exacerbating this fragmentation, the reach of DG Development remained restricted to the ACPs, with development programming for all other regions done by DG RELEX. The latter's more political mandate,

[638] C. Ashton, 'Presenting the New EU Diplomatic Service: A united Europe can make a positive difference in the world. Call this a shameless grab for effectiveness', *The Wall Street Journal*, 27.07.2010.
[639] DAC, *Peer Review: European Community* (OECD, Paris, 1998) 3.
[640] This undid the changes of the 1985-1995 Delors Commissions, which had inserted a regional division between ACP, on the one hand, and Asia and Latin America, on the other.

compared to the aid sheltering role of DG Development, regularly caused tensions over the management of the security-development nexus,[641] reminiscent of the current strains between DG DEVCO and the EEAS (cf. *infra* 4.3.). AIDCO was given a global focus for aid implementation and consequently its board was co-headed by the Commissioners for Development and External Relations. Under the 2004-2009 Barroso I Commission, AIDCO (as well as Trade) was even entirely entrusted to the Commissioner for External Relations. Also the Commission Delegations were to report to DG RELEX, further strengthening its coordinating role. This led to criticisms that the Commission's reshuffle, rather than cohering development, turned the Development Commissioner into "an emperor without clothes", [642] and DG Development into "an empty shell".[643] In any case it significantly complicated the latter's responsibility for promoting PCD. The reforms aimed to strengthen the focus of development policies on poverty eradication and alignment with the local context, but simultaneously dispersed aid management over three DGs[644] and one implementing agency. These all had their separate geographic desks, resulting in significant fragmentation and duplication of expertise. The diffusion was only to a limited extent overcome by loosely connecting these separate entities under the heading of a 'RELEX family', with coordination responsibilities that also embodied DG Enlargement (ELARG) and ECHO.[645]

The Council's rationalisation of the early 2000s, in essence, consisted of a reduction in the number of Council configurations from 16 to 9. This was decided at the 2002 Seville European Council in order to streamline decision-making in preparation of the 2004 enlargement.[646] In the field of foreign policy the General Affairs Council was merged with the externally-oriented Councils to form the General Affairs and External Relations Council (GAERC). This covered foreign and security policy, trade, development and humanitarian assistance. The abolishment of a separate Development Council did not imply that European development ministers would no longer meet, as the GAERC could be convened in a development constellation. This move did not escape the constant in the history of affiliating development with broader EU policy-making and led to rising fears of its instrumentalisation. [647]

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[641] Bagoyoko and Gibert (2009) op.cit. note 468, 793.
[642] S. Stocker, 'Time to match EU rhetoric about the fight against poverty with deeds', *European Voice*, 11.05.2000.
[643] Van Reisen (2007) op.cit. note 151, 52-56.
[644] This adds up to four DGs if one counts DG Enlargement, managing aid to candidate countries. Additionally, there were (and are) the DGs covering the external aspects of internal policies such as DG Agriculture, DG Maritime Affairs and Fisheries, DG Environment and DG Justice, Freedom and Security (now DG Home Affairs).
[645] DAC, *Peer Review: European Community* (OECD, Paris, 2002) 32-33.
[646] Presidency Conclusions, European Council, Seville, 24.10.2002, Annex II – Measures concerning the structure and functioning of the Council.
[647] See further: A. Simon, 'The New Organization of the Council of the European Union: Setback or Opportunity for EU Development Cooperation?', *ECDPM Discussion Paper No. 46* (European Centre for Development Policy Management, Maastricht, 2003) 25p. Santiso went as far as professing that these "reforms reflect a desire by EU Member States to 're-nationalize' the management of EC aid" (C. Santiso, 'Reforming European Foreign Aid: Development Cooperation as an Element of Foreign Policy' (2002) *European Foreign Affairs Review* 7(4), 417). This overlooks the fact that development policy has always been the subject of Council meetings. Moreover, the former Development Council was a rather passive constellation which met only twice a year, with not even all Member States represented at ministerial level (S. Woolcock, *European Union Economic Diplomacy : The Role of the EU in External Economic Relations* (Ashgate, Farnham, 2012) 159).

COREPER, which carries out preliminary scrutiny of the Council's dossiers,[648] is in principle designed to rectify such imbalances, but appeared not particularly proactive in promoting PCD.[649] At the senior preparatory level, the Council's Development Committee (DevCom) undertook considerably more efforts. For this purpose, it could rely on support from a number of Council working groups such as the ACP Working Party, the ACP Finance Working Party, the EDF Committee, the Committee for Asia and Latin-America (ALA), etc. Yet, communication and cooperation between these various entities was not always optimal,[650] and DevCom was often fighting a losing battle against vested interest groups and a crowded GAERC agenda.

Logistic and planning support for the Council's role in development policy was delivered by its General Secretariat. More specifically this occurred through a number of regionally and thematically-organised directorates of DG E 'External economic relations and Politico-Military Affairs'. Contrary to the diffusion of responsibilities within the Commission, DG E thus covered the various aspects of this role, ranging from development programming to emergency aid, trade-aspects and human rights. Then again, compared to the Commission, the Council faces considerably more difficulties in ensuring policy coherence at its highest echelons. Decision-making in the Council must navigate various configurations where decisions are generally taken by majority voting, while the Commission brings the various sectors together in the college of Commissioners deciding collegially.

4.1.2. The pre-Lisbon Council and Commission apparatus for CFSP and CSDP

For what concerns the CFSP, the Council always held most cards. At the politico-strategic – and thus most visible – level the well-known key roles were (and are) played by the GAERC, COREPER and PSC. Their decisions require hands-on operational support, particularly with regard to the CSDP, in which the earlier-mentioned Policy Unit, placed under the authority of the HR, has been key. Its main tasks were set out in an annexed Declaration to the Amsterdam Treaty and included monitoring and analysing developments in areas relevant to the CFSP, as well as early warning of crisis situations.[651] After some wrangling regarding its composition – which reminds of the recent establishment of the EEAS by focussing more on who would get in than on what it actually might do (cf. *infra* 4.3.) – it was decided to include a seconded diplomat from each Member State, four members of the GSC and one Commission representative.[652] "[F]requently underestimated if not completely ignored (by lawyers in

[648] See: Article 240 TFEU.
[649] CEPS, *Policy Coherence for Development in the EU Council: Strategies for the Way Forward* (Centre for European Policy Studies, Brussels, 2006) 20-22.
[650] Participants in the ACP Finance Working Party for instance came from finance ministries, while those in the ACP Working Party were send by the respective development ministries. The policy horizon of such officials was often very different and coordination minimal (Woolcock (2012) op.cit. note 647, 160).
[651] Declaration No. 6 attached to the Final Act of the Amsterdam Treaty, op.cit. note 264.
[652] Bretherton and Vogler (2006) op.cit. note 262, 170.

any event)", in the framework of the CFSP, was the role of the GSC, with the CFSP High Representative as Secretary-General.[653] Along with the EU's growing activities in this domain, its DG E staff soon outgrew their role of minute-takers and meeting organisers. In particular, the directorates on 'Defence aspects' and 'Civilian crisis management' were key in providing operational and policy support in the planning and implementation of CSDP missions and operations. This filled the void left by the Commission's lower involvement in the CFSP, and so laid the groundwork for two, opposing, externally-oriented EU bureaucracies in Brussels.

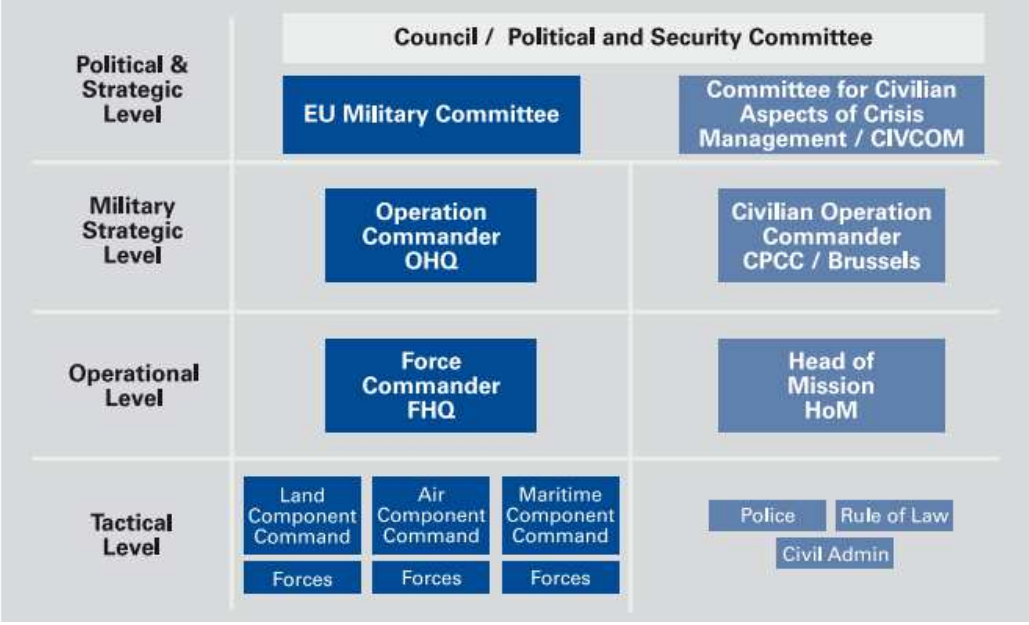
The rapid unfolding of CSDP activity in the 2000s was mirrored by the speed in which new actors and bodies saw the light of day. This was not based on an overarching plan, but rather resulted from mission-oriented pragmatism, ad hoc solutions to rising problems and the lobbying of neutral EU Member States to compensate military evolutions with a civilian counterpart.[654] These bodies, until today, provide critical support to the politico-strategic CFSP formations through planning, assessment, resource generation and policy execution. The aim here is not to give a complete overview but rather to succinctly set out the most important actors and the fields they cover. First, the PSC is assisted by the Politico-Military Group (PMG) which carries out preparatory work, including the political aspects, concepts and capabilities of EU military and civil-military issues, operations and missions. Advice on all military matters, including strategic military options with regard to crisis situations and CSDP operations, is provided by the EU Military Committee (EUMC). As highest military body in the EU, it is composed of Member States Chiefs of Defence. The EUMC is assisted by the EU Military Staff (EUMS), consisting of seconded national military experts. It contributes to early warning, situation assessment and planning, and supervising military aspects in EU crisis management operations. For civilian matters, these tasks are taken on by the Committee for Civilian Aspects of Crisis Management (CIVCOM), composed of national diplomats. It oversees the functioning of civilian CSDP missions and advises the PSC.

For planning, managing and monitoring military operations the EU does not dispose of permanent headquarters.[655] Rather there are seven available locations decided upon on ad hoc basis. When an operation relies on NATO capabilities (under the Berlin Plus arrangements)[656] the latter's Allied Command Operations in Mons, Belgium, will serve as basis. In other cases a choice will be made

[653] Curtin and Dekker (2011) op.cit. note 97, 181.
[654] S. Duke, 'Peculiarities in the Institutionalisation of CFSP and ESDP' in S. Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (TMC Asser, The Hague, 2008) 104. A particularly strong impetus in strengthening the Union's crisis management structures and procedures was given by the 2005 informal European Council at Hampton Court (Presidency Conclusions, European Council meeting, Hampton Court, 15-16.12.2005).
[655] This is mainly due to UK objection (B. Waterfield, '"Big five" tell Baroness Ashton to bypass Britain over EU military HQ', *The Daily Telegraph*, 08.09.2011).
[656] Council Decision (2003/211/CFSP) concerning the conclusion of the Agreement between the EU and NATO on the Security of Information, OJ L80/35, 27.03.2003.

between five Framework States which can avail operational headquarters.[657] A last possibility consists of launching an Operations Centre (OPCEN – the term 'Headquarters' was considered too sensitive and state-like for a number of Member States). This is no standing centre, but a facility in Brussels, staffed by a core team of four officers and disposing of the necessary security and communications equipment. It enables the Council to launch a full-fledged Operations Centre on very short notice. It did so for the first (and so far only) time in March 2012 to improve coordination and strengthen civil-military synergies between the three CSDP operations in the Horn of Africa (cf. *infra* 6.2.3.). Again these evolutions in the military realm were matched at the civilian side by the creation, in August 2007, of the Civilian Planning and Conduct Capability (CPCC). This is a permanent structure under the political control and strategic direction of the PSC and the overall authority of the High Representative. Its staff is more or less equally divided between Council officials and seconded national experts (SNEs) consisting of police officers as well as rule of law, procurement, finance and logistic experts. The Director of the CPCC is simultaneously EU Civilian Operations Commander exercising strategic command and control for the planning and conduct of all civilian crisis management missions. The CPCC has contributed significantly to the professionalisation and standardisation of civilian crisis management. Yet, the 'civilianisation' of the CSDP is stretching the workload beyond its capacity and staff limits.[658]

Box 8: EU command and control structures



Source: J. Rehrl and H.-B. Weisserth, Handbook CSDP (Austria Armed Forces/European Security and Defence College, Vienna/Brussels, 2010) 62.

[657] These five countries are Germany (Ulm), France (Paris), UK (Northwood), Italy (Rome) and Greece (Larissa).
[658] Interview EEAS official, February 2014.

In order to improve civil-military cooperation and coordination it was, on the eve of the Lisbon Treaty's entry into force, decided to merge the GSC DGs for civilian and defence aspects. Together with part of the civilian-military cell of the EUMS, this now forms the Crisis Management and Planning Directorate (CMPD). The mixed civil-military staff of the CMPD works closely with the respective operational headquarters to improve strategic planning, but it does not take over their managerial tasks.[659] While the CMPD will thus not unite the separated worlds, it certainly strengthens the bridge connecting them.[660] In the same spirit the Joint SitCen serves, since its creation in 2002, both the Union's civilian and military communities with round-the-clock intelligence, assessments and early warning.

Although the CFSP's hand-shaking and grand declarations were, before the Lisbon Treaty, generally done by the Presidency and the High Representative for the CFSP, the Commission has from the outset provided much of the organisational backbone. As noted by former Commissioner Patten, "even with the emergence of the CFSP High Representative, Member States look to the Commission to manage the nuts and bolts of that engagement, and to do much of the donkey work".[661] The Treaty framework was rather misleading in this regard. The Commission's most concrete responsibility under the CFSP Title, namely the right of initiative which it shared with Member States, never really materialised.[662] This was mainly due to a reservation not to further provoke Member States that were generally sensitive for what concerned their foreign policy prerogatives.[663] The Commission's much vaguer mandates of being fully associated and ensuring the consistency of EU external activities, in cooperation with the Council, have resulted in considerably more concrete policy-making. The Council's rules of procedure state, without any exception, that the Commission shall be invited to take part in its meetings.[664] The Commission has made full use of this right and is represented in the Council's various CFSP-related gatherings, at all levels. Even though its full association and consistency mandate also apply to the CSDP, the Commission appeared considerably more careful here to avoid stepping on Member States toes. Its seat at the EUMC, for instance, remained long unoccupied.[665] The main exception to this rule has always been the PSC, given that its broad coverage made it difficult to separate military from non-military aspects.

The ever more intensive interfaces with the Commission's traditional responsibilities for external (economic) policy instigated quite some organisational changes. In the aftermath of the Amsterdam

[659]The fact that it is composed of about 4/5 military staff while the majority of CSDP missions are civilian constitutes a source of tension (M.E. Smith, *Building the European External Action Service: Institutional Learning versus Intergovernmental and Bureaucratic Politics*, Paper presented at the UACES Conference on 'The EU Diplomatic System after Lisbon' (London, 31 January-1 February 2011) 20-21).
[660] Drent and Zandee (2010) op.cit. note 606, 36.
[661] Quoted in Spence (2006) op.cit. note 249, 411.
[662] *Ex* Article 22(1) TEU.
[663] Spence (2006) op.cit. note 249, 360.
[664] Article 5(2) Council Decision (2009/937/EU) adopting the Council's Rules of Procedure, OJ L325/35, 11.12.2009.
[665] This absence ended mid-2005 under the Barroso Commission (Spence (2006) op.cit. note 249, 375).

Treaty, the Commission created a specific CFSP Directorate benefiting from state-of-the-art security procedures and equipment. This was rebranded in 2005 as the 'Crisis platform – Policy coordination in the CFSP' to ensure crisis coordination between second pillar operators and the Commission's geographic desks. It included a European Correspondent's Unit (responsible for the Commission's policy input in the CFSP as well as secure communications with Member States), a Crisis Management and Conflict Prevention (CMCP) Unit, a CFSP Counsellor Unit (with mainly managerial and budgetary responsibilities relating to EUSRs and civilian crisis management missions) and a Security Unit (taking care of the input for the Council's CFSP working groups).

Box 9: Commission staff working on conflict prevention and peace-building

Directorate General for External Relations	▪ DG1 - Directorate A - Crisis Platform - Policy coordination in Common Foreign Security o Unit A2: **half of the unit had a background in peace and security**. The unit mostly included staff working on crisis response (through the IfS) and dealing with CFSP sanctions; o Unit A3: included CFSP Programme managers; o Unit A4: included staff handling civil-military relations in the context of ESDP missions, WMD, disarmament, mine actions ▪ DG 1 - Directorate B - Multilateral Relations and Human Rights. o Unit B1 : includes staff following human rights situations worldwide; o Unit B2 : around ten people, with two handling relations with the UN on peace and security; o Unit B3: includes staff handling relations with the OSCE and the Council of Europe.
Directorate General for Development	▪ DGA/Unit C2: includes staff working on peace, security and migration issues. It also includes **one peace-security-development/fragility expert and one working on AU Peace and Security Partnership**;
EuropeAid Cooperation Office	▪ Unit E4: includes staff working on quality aspects in justice and human rights, security and terrorism. It also includes **one CPPB expert**. ▪ Unit F2: includes staff managing Electoral Observation Missions, EIDHR and IfS long-term component. ▪ Unit C6: includes APF programme managers.
EU Delegations	▪ Creation of **political sections** as of 2006 ▪ **Eight Regional Crisis Response Planners** and around 20 IfS project managers (mostly contract agents) towards the end of the evaluation period (2007-2010)

ADE, 'Thematic Evaluation of European Commission Support to Conflict Prevention and Peace-Building' (Aide à la Décision Economique, Brussels, 2011) 73.

Box 9 lists the Commissions extensive conflict prevention and peace-building machinery before the EEAS entered the picture. While general inter-DG cooperation mechanisms were in place – not the least through the college of Commissioners – there existed no dedicated cooperation platform for CFSP or issues of conflict, crisis and fragility. For instance, the Commission's participation in the PSC occurred only through the CMCP Unit of DG RELEX. This implied that DG Development's design of policy and programming towards the ACP countries (where coordination with CFSP/CSDP crisis management has

been most pressing) was only indirectly linked to the GSC and the CFSP High Representative. The same goes for the implementation responsibilities of AIDCO and the Delegations. This again illustrates how not only inter-institutional fragmentation, but also the diffusion of responsibility within the Commission put a strain on coherence across the security-development nexus.[666] These problems were further compounded by significant staff constraints. The CMCP Unit disposed for instance of only one focal point to coordinate the policy aspects of conflict prevention and peace-building. Independent assessors of the Commission's activities consequently concluded that its institutional set-up and human resources policy "were not commensurate with its policy commitment and the level of its funding for [conflict prevention and peace-building]".[667]

4.1.3. Fragmented management of the security-development nexus

The overlapping entities within the two internally heterogeneous bureaucracies of the Council and the Commission, combined with the unclear division of labour in the field of the security-development nexus (cf. *supra* Chapter 3), resulted in considerable uncertainties regarding the precise roles of both institutions.[668] Over the years a number of working arrangements emerged to deal with this inter-institutional gap. These include joint Commission-Council fact-finding/technical assessment missions (FFM/TAM), joint option papers and Crisis Response Coordination Teams (CRCTs). This last practice was introduced in 2001 to address coordination shortfalls among the different instruments from the earliest phase of planning CSDP crisis management operations. The CRCT is no standing facility but a practical vehicle aiming to prepare inclusive Crisis Management Concepts (CMCs). It took the Council and the Commission considerable but instructive efforts to learn how to cooperate in these settings.[669] These are all very useful initiatives, but as High Representative Ashton herself pointed out: "too much depends on ad-hoc arrangements and the creativity of individuals. We achieve comprehensive strategies despite our structures, not because of them".[670] Or, as put by the Commission: "[t]he different services of the Commission and the Council keep each other mutually informed, but there is room for further improving the inter-institutional co-ordination, planning and decision-making".[671]

The Lisbon Treaty includes an important instrument to reconcile such varying institutional concerns in Article 295 TFEU. This regulates inter-institutional agreements between the Parliament, Council and

[666] This was also the opinion of 47% of survey respondents (consisting of Commission officials, staff in Delegations, partner country officials, civil society, Member States, donors, international organisations and implementing partners of the Commission) to the Commission's conflict prevention and peacebuilding evaluation (ADE (2011) op.cit. note 82, 70).
[667] Ibid., v and 51.
[668] Ibid., 66-67 (40 % of the interviewees found that the task division between the Council and the Commission was not well adapted to the challenges at stake).
[669] GSC/Commission (14400/2/02) Follow-up to the CMC Action Plan – Outline Paper on the CRCT, Brussels, 02.12.2002, 2-3.
[670] Ashton (2010) op.cit. note 638.
[671] Commission Staff Working Document (SEC(2009) 1137) see note 449, 62.

Commission to make arrangements for their cooperation "which may be of a binding nature". Such agreements have a long history in inter-institutional relations as pragmatic ways to regulate legal voids and prevent or overcome tensions.[672] Their inclusion in the Lisbon Treaty accords them a firmer status, which might paradoxically diminish their use, as this makes them more prone to monitoring by turf-sensitive institutions.[673] This immediately effectuated with the November 2010 Framework Agreement between Parliament and Commission. Amongst others, the Commission committed to inform and involve the Parliament at every stage of negotiations on international agreements and take its views into account as far as possible in the CFSP.[674] The Council found that this agreement modified the EU's institutional balance and refused to be bound. It declared that it would "submit to the Court of Justice any act or action of the European Parliament or of the Commission performed in application of the provisions of the Framework Agreement that would have an effect contrary to the interests of the Council and the prerogatives conferred upon it by the Treaties".[675] So far this has not materialised. In the subsequent sections it will be examined whether the Lisbon Treaty's institutional fiddling offers better prospects for putting in place concerted approaches to the security-development nexus.

4.2. The EU High Representative for Foreign Affairs and Security Policy

As set out in Chapter 2 the function of High Representative was initially created by the Amsterdam Treaty to deal with the absence of continuity in the CFSP's leadership as well as its poor visibility. Although it is today perceived as one the key innovations empowering this policy area, its insertion into the Treaty was not without controversies. Then Commission President Prodi called this function "a provisional response to a lasting need … [confusing] the roles of the Council and the Commission in a way that could ultimately jeopardise both struts of the institutional system".[676] He therefore believed that the High Representative "should be integrated into the Commission, with a special status tailored to the needs of security and defence".[677] Nonetheless, the Commission and the High Representative soon came to cooperate rather well, largely due to the complementary personalities of Javier Solana, the first CFSP High Representative, and Chris Patten the then External Relations (RELEX) Commissioner. Patten explained the division of labour between them as follows:

> *Javier's role is to help the Council rally the Member States to our common policies and to represent those policies to the world. My role is to ensure that the EU can deliver on those policies, to come*

[672] See for instance the 1997 inter-institutional agreement on the financing of the CFSP (op.cit. note 266).
[673] See further: S. Becker-Alon, *The Communitarian Dimension of the European Union's Common Foreign and Security Policy* (Nomos, Baden-Baden, 2011) 136-146 and 275-276.
[674] Framework Agreement on relations between the European Parliament and the Commission, OJ L304/47, 20.11.2010.
[675] Council Statement (15172/10) on the relations between the European Parliament and Commission, 3039th Employment, Social Policy, Health and Consumer Affairs Council meeting, Luxembourg, 21.10.2010, 17.
[676] R. Prodi (SPEECH/00/352) address to the plenary session of the European Parliament, Strasbourg, 03.10.2000, 6.
[677] Ibid.

up with the necessary ideas and proposals, to implement them and to make sure that Europe's external action is consistent with its internal policies.[678]

Occasional frictions were however unavoidable. Patten for instance had a problem with Solana who, in his view, "as soon as something is designated a 'crisis' … proposes it should at once become the object of a comprehensive Joint Action covering both Community and second pillar issues".[679] He moreover disapproved that the creation of his role had "increased the tendency for CFSP to usurp functions which should be the responsibility of the Commission".[680] Such tensions never culminated and were commonly tempered by pragmatics, not the least because both functions strongly depended on each other. Solana had significant political capital, but was "a chief with very few Indians" and relied for resources and administration on the Commission. The RELEX Commissioner, for his part, held a more back office position with significantly less politico-strategic leverage. Purely focussing on their functional complementarity, there was thus definitely logic in uniting these portfolios.

In what follows we will first entangle the Treaty provisions on the High Representative in order to unveil her[681] expansive tasks and responsibilities (4.2.1.). In a second part it will be argued that it is precisely the confidence put in this single new bridge to provide leadership across competence and institutional boundaries, while the latter remain firmly in place, that render this position the personification of the integration-delimitation paradox (4.2.2.). This results in significant challenges with regard to the loyalty and accountability of this function, complicating efforts to strengthen ties across the security-development nexus. A final section will then discuss the specific case of EU Special Representatives (4.2.3.).

4.2.1. The Treaty framework: crossing competence and institutional boundaries

The European Convention's External Action Working Group felt "that more needed to be done to ensure coherence between foreign policy decisions on the one hand and the deployment of instruments and policy making in the field of external relations on the other hand".[682] In this light they discussed four options to smoothen the tandem of the CFSP High Representative and RELEX

[678] C. Patten, 'A voice for Europe? The future of the CFSP', Brian Lenihan Memorial Lecture delivered in Dublin, 07.03.2001, 4.
[679] Letter by Commissioner Patten to EU foreign ministers of November 2000 quoted in F. Cameron, *An Introduction to European Foreign Policy* (Routledge, New York, 2007) 56.
[680] He gave the example of the EC Monitoring Mission to the Balkans, "which was dreamt up by CFSP and then left as an expensive baby on the Commission's doorstep" (C. Patten, 'External Relations: Demands, Constraints and Priorities', *Agence Europe*, 06.10.2000).
[681] Given that its first two incumbents are women, we will use the feminine pronoun to refer to the High Representative post-Lisbon.
[682] European Convention (CONV 459/02) op.cit. note 371, para. 28.

Commissioner. A first option consisted of strengthening the role of High Representative and enhancing synergies with the Commission, while keeping both functions separate. Secondly, the advocates of introducing the Community method to the widest possible extent in EU external action proposed to fully merge the High Representative into the Commission, forming a single centre for external policy guidance.[683] The third option consisted of uniting both offices in the person of an "External Action Representative", preferably with the rank of Vice-President in the Commission. Finally, there was the proposal of creating an "EU Minister of Foreign Affairs", who would operate under the immediate authority of the European Council President. The Minister would combine the functions of High Representative and External Relations Commissioner and chair the external action Council.

Following significant contention, the consensus in the 2004 Constitutional Treaty was to combine elements of the last two models. The 'Union Minister for Foreign Affairs' united the High Representative's responsibilities for the CFSP, those of Commissioner for external relations as well as Chair of the Foreign Affairs Council, and was simultaneously made Vice-President of the Commission.[684] Both the title and the high-ranking roles are indicative of the Treaty drafters' ambition to enhance the visibility, stability, coherence and effectiveness of EU external action. The Lisbon Treaty, which undid the "constitutional character" of the Constitutional Treaty,[685] abolished the name but maintained the ambitious triple-hatted portfolio[686] of the renamed 'High Representative of the Union for Foreign Affairs and Security Policy'.[687]

As this title suggests, the Treaty mandate is no longer limited to assisting the Council and the Presidency in CFSP matters alone, but includes wide-ranging tasks encompassing the whole EU external action field. This is clear from the impressive increase from three references to the function of High Representative in the *ex* TEU, to nearly 70 in the current TEU and TFEU. If the limited responsibilities of the High Representative under the Amsterdam Treaty were compensated by the choice for the high-profile figure of Solana, these much extended powers were now counter-balanced by opting for someone with a lower international profile.[688] This was the case with Catherine Ashton in 2009 and again with Federica Mogherini in 2014. The various provisions on this function are so

[683] Under this model CSDP issues were to remain subject to a separate arrangement.
[684] Article I-28 of the Treaty establishing a Constitution for Europe, OJ C310/1, 16.12.2004. The GAERC is again split into a General and a Foreign Affairs Council.
[685] Presidency Conclusions, *IGC Mandate*, European Council, Brussels, 21-22.06.2007, para. 3.
[686] Some only distinguish the two hats of High Representative and Commission Vice-President. Others add the hats of chairing the EDA and the EU Institute for Security Studies (EUISS) and simply speak of multi-hatting (for instance: A. Missiroli, 'Commentary: Security Governance Matters' (2013) *Journal of Contemporary European Research* 9(3), 479). Because the three above roles are so key to her mandate, we will speak throughout this dissertation of the triple-hatted HR.
[687] Article 18 TEU.
[688] E. Denza, 'The Role of the High Representative of the Union for Foreign Affairs and Security Policy' in H.-J. Blanke and S. Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer, Berlin, 2012) 486.

dispersed throughout the Treaty that it is not easy to get a clear picture of the new High Representative's (HR) role. Most indications are given with regard to her competence to 'conduct' the CFSP. These can be subdivided in five categories.

First, it includes the power of initiative. Both Articles 18(2) and 27(1) TEU note that the HR shall contribute by her proposals to the development of the CFSP. Article 30(1) TEU specifies that this is a shared right. The Member States and the HR, solely or with the Commission support, "may refer any question relating to the [CFSP] to the Council and may submit to it, respectively, initiatives or proposals". This implies that the Commission no longer has a CFSP right of initiative independent from the HR.[689] A number of other specific cases are provided where the HR has the power of initiative. These include proposals for appointing Special Representatives (cf. *infra* 4.2.3.), the implementation of European Council decisions on EU strategic interests and objectives (cf. *infra* 6.3.), procedures for setting up, administering and auditing the CFSP start-up fund, restrictive measures, the implementation of the solidarity clause and CSDP decisions.[690] This last element is key as the previous Treaty framework did not assign the HR specific CSDP responsibilities. She may moreover "propose the use of both national resources and Union means" for the CSDP and "shall ensure the coordination of the civilian and military aspects" of the Petersberg tasks.[691] Finally, she shall recommend the opening of negotiations to the Council for agreements that relate "exclusively or principally" to the CFSP (cf. *infra* 5.3.2.).[692]

A *second* component of her mandate is executive. The Treaty language is rather confusing in this regard. Article 18(2) TEU states that the HR "shall carry out" the CFSP "as mandated by the Council". This subservient position disappears in Article 24(1) TEU, which suddenly shares her responsibility to "put into effect" the CFSP with the Member States. Rather puzzling, the definition and implementation of the CFSP is here restricted to the European Council and the Council. Article 27(1) TEU then specifies that the HR – with no mention of Member States – "shall ensure implementation of the decisions by the European Council and the Council". Not only is it unclear whether carrying out, putting into effect and implementing the CFSP signal different activities, these Articles also assign various executive agents without specifying a division of labour or clear chain of command. Given that the HR is not

[689] Her power to initiate does not have the same legal value as the Commission's "quasi-exclusive right of legislative initiative" in other policy areas (P. Ponzano, C. Hermanin and D. Corona, 'The Power of Initiative of the European Commission: A Progressive Erosion?', *Study & Research 89* (Notre Europe, Paris 2012) 56p.). Article 17(2) TEU prescribes that "Union legislatives acts may only be adopted on the basis of a Commission proposal, except where the Treaty provide otherwise", while no such provision is provided for CFSP decisions. There is moreover no equivalent of Article 293(1) TFEU prescribing that the Council, when acting on a Commission proposal, may only amend it by acting unanimously.
[690] Respectively: Article 33 TEU, Article 22(2) TEU, Article 41(3) TEU, Article 215(1) TFEU, Article 222(3) TFEU (under the TFEU this right is systematically shared with the Commission) and Article 42(4) TEU.
[691] Articles 42(4) and 43(2) TEU.
[692] Article 218(3) TFEU.

accorded any formal role in decision-making, it is safe to argue that her autonomy falls within the boundaries set by the European Council and the Council.

Third, the HR is jointly with the Council assigned to ensure compliance with CFSP principles, as set out in Article 24 TEU. Besides the (in)famous "specific rules and procedures", this includes the provision that the Union shall conduct, define and implement the CFSP within the framework of the principles and objectives of its external action. The High Representative and the Council must moreover make sure that Member States "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity [,] comply with the Union's action in this area [,] work together to enhance and develop their mutual political solidarity [and] refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness".[693] This supervisory role is however not accompanied by any legal means of enforcement. One may therefore wonder how the HR is to ensure compliance with the principles of a policy that she herself is to 'carry out as mandated by the Council'. An important tool in this regard is her close connection to the PSC, which ensures the political control and strategic direction of crisis management operations under her (and the Council's) responsibility.[694] Moreover the fact the she is appointed by and participates in the European Council gives the HR considerable authority and standing.[695]

Box 10: EU external representation under the Lisbon Treaty

		Non-CFSP	
	CFSP	External action (part V TFEU)	External aspects of sectoral policies
Heads of State or Government level	European Council President	European Commission President	
Ministerial level	High Representative	Commissioners (including the High Representative acting as Vice-President)	
Administrative level	EEAS	Commission services and EEAS HQ services	
In third countries/at international organisations	EU Delegations		

Commission (SEC(2011)881) Vademecum on the external action of the EU, n.d., 14-15.

[693] Article 24(3) TEU.
[694] Article 38 TEU. Another important provision in this regard is her mediating role in the 'emergency brake' procedure of Article 31(2) TEU.
[695] Article 18(1) and 15(2) TEU.

A *fourth* key component is to represent the Union in CFSP matters, conduct political dialogue with third parties on the Union's behalf and express its position at international organisations and conferences.[696] Despite the European Convention's strong conviction that "a single representation would improve the Union's capacity to act effectively and convincingly on the global stage",[697] the HR is again not the only rooster in the henhouse (cf. Box 10). The President of the European Council "at his level and in that capacity" ensures the external representation of the Union for CFSP issues "without prejudice to the powers of the High Representative".[698] The Commission takes on this representational tasks outside the CFSP.[699] As international matters regularly transcend competence boundaries, ad hoc arrangements and interpersonal chemistry are of the essence.

Fifth and finally, the HR is to "regularly consult the European Parliament on the main aspects and the basic choices of the [CFSP and CSDP] and inform it of how those policies evolve".[700] She shall ensure that its views are duly taken into consideration. The Parliament may address questions or make recommendations to the HR as well as the Council, and shall organise, twice a year, a debate on the progress made in implementing the CFSP.

With this five-stranded role the High Representative replaces "the Presidency as the key animating force of the CFSP",[701] in a manner that is similar to the Commission's traditional role in TFEU policies. If it is challenging to complete the puzzle of her CFSP responsibilities, hardly any pieces are provided concerning the HR's role in the broader framework of EU external action. The task of chairing the FAC is rather straightforward on a general level and consists of taking over this responsibility from the Presidency. This is a key responsibility as the FAC represents the central EU cockpit to "elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent".[702] Chairing means having a hand in shaping EU external action, which for the first time occurs through a figure representing the Union as a whole, rather than an individual Member State. Her participation in the European Council is key here because of its anchoring role in providing "the Union with the necessary impetus for its development and [defining] the general political directions and priorities thereof".[703] In this manner she forms yet another key

[696] Article 27(2) TEU. Article 34 TEU moreover specifies that the HR shall organise the coordination of Member States action at international organisations and conferences and shall be invited to present the Union's position at the UN Security Council.
[697] European Convention (CONV 459/02) op.cit. note 371, para. 65.
[698] Article 16(6) TEU.
[699] Article 17(1) TEU. By not specifying representation arrangements in the sensitive area of shared competences, the Treaty gave rise for considerable strife and differing opinions among EU institutions and Member States (see further: Wouters and Ramopolous (2014) op.cit. note 408, 232-235).
[700] Article 36 TEU.
[701] UK House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the Lisbon Treaty: Third Report of Session 2007-2008*, 20.01.2008, 51.
[702] Article 16(6) TEU.
[703] Article 15(1-2) TEU.

bridge, this time with the Member States foreign ministers which ceased to sit in this highest of EU institutional spheres. Finally, with regard to her hat as Commission Vice-President Article 18(4) TEU specifies, in the tersest of terms, that she "shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3" (i.e. her responsibilities in the CFSP and as FAC Chair). This evidently leaves open many questions regarding her loyalty and accountability, which will be discussed in the next section.

4.2.2. The personification of the integration-delimitation paradox

With this impressive range of duties the office of HR outgrew its supportive role and has become a central figure in moulding and casting EU external action as whole. The integrative potential hereof is most clearly exemplified by the emerging practice of the HR and Commission co-authoring communications that organically combine CFSP and TFEU aspects of external relations.[704] With her three hats she stands with one foot among the Member States in the Council and another in the Commission, giving her mandate an essentially dual nature. This fusion of portfolios was not accompanied by any adaptations to the Treaty powers of the Commission, Council or Member States, nor does this change anything to the robust CFSP-TFEU delimitation. Crowe, former Council Director-General for External Relations, therefore argues that the Treaty does not unite the jobs of CFSP High Representative and External Relations Commissioner but simply assigns them to the same person.[705] A *dual* mandate with a strong coherence rationale to overcome the *duality* of EU external action represents the ultimate personification of the Lisbon Treaty's integration-delimitation paradox (cf. *supra* 2.3.2.). It provides both opportunities to move this figure beyond the mere sum of its institutional components, as well as risks to founder at the rocks of institutional and competence boundaries. [706] Associated problems include bureaucratic navel-gazing, counteraction of vested interests and ultimately loss of time, efficiency and money. Crowe was not the only well-informed insider to be sceptical, also Solana and Patten expressed serious doubts about the viability of this inter-

[704] See for instance: Commission and High Representative Joint Communication (JOIN(2013) 22 final) Towards a Comprehensive Approach to the Syrian Crisis, 24.06.2013; Commission and High Representative Joint Communication (JOIN(2011) 886 final) Human Rights and Democracy at the Heart of EU External Action: Towards a more Effective Approach, 12.12.2011.
[705] B. Crowe, *Foreign Minister of Europe* (The Foreign Policy Centre, London, 2005) 3.
[706] G. Grevi, D. Manca and G. Quille, 'The EU Foreign Minister: Beyond Double-Hatting' (2005) *The International Spectator* 40(1), 75.

institutional straddle as well as the practical feasibility of her sizeable portfolio.[707] In this chapter it will be evaluated to what extent such concerns were justified.

Split loyalty and accountability

This inter-institutional straddle implies diverging and potentially conflicting allegiances. Depending on the hat she is wearing, the HR is answerable to different principals and has to abide by their respective rules. Article 18(4) TEU defines that she shall be bound by Commission procedures when acting as Commission Vice-President, to the extent that this is consistent with her CFSP and FAC responsibilities. This wording offers little to nothing in terms of practical guidance, and moreover appears to subordinate the HR's Commission role to her other hats. This could be particularly restrictive in relation to her role as Chair of the Foreign Affairs Council. The FAC not only deals with CFSP issues but also with TFEU policies such as development cooperation.[708] The language of Article 18(4) TEU therefore appears to release her from collegiality obligations at the tail end of most foreign policy decision-making.[709] This has given rise to some mistrust regarding this "Trojan horse" [710] construction, giving the "representative par excellence of the intergovernmentalism of the CFSP … a seat in the last remaining bulwark of the méthode communautaire'".[711] However, such an interpretation goes against the spirit of the Treaty and also the *travaux préparatoires* suggest that this was not the drafters' intention. The proceedings of the European Convention indicate a more balanced view: "[w]hen he/she exercised his/her right of initiative on CFSP, the Commission should abstain from taking a competing initiative. His/her initiatives on CFSP and decisions to put them into effect would not be subject to prior approval by the College of Commissioners". [712] It should moreover not be forgotten that the HR is a Commissioner *à part entière*, while she acts only as a broker within the FAC, without any voting rights.

The HR's split personality is inherent in the Commission's appointment and resignation rules. The Commission President is elected by the European Parliament, on a proposal from the European Council acting by qualified majority.[713] The list of Commissioners is subsequently drawn up by the Council in common accord with the President-elect and subject as a body to a vote of consent by the

[707] See: European Convention (CONV 356/02) Summary of meeting Working Group VII on External Action, 15.10.2002, para. 9; European Convention (CONV 342/02) Summary of meeting Working Group VII on External Action, 11.10.2002., para. 15.
[708] Only in the case of the Common Commercial Policy will the Chair "ask to be replaced by the six-monthly Presidency" (Article 2(5) Council Decision (2009/937/EU) op.cit. note 664). In addition there are informal Council meetings for defence and development which the High Representative does not always attend (cf. *infra*).
[709] Dashwood (2013) op.cit. note 95, 14-15.
[710] J. Wouters, 'The Union Minister for Foreign Affairs: Europe's Single Voice or Trojan Horse?' in J.W. de Zwaan, J.H. Jans and F.A. Nelissen (eds), *The European Union: An Ongoing Process of Integration. Liber Amicorum Alfred E. Kellerman* (TMC Asser, The Hague, 2004) 77-86.
[711] Kuijper (2007) op.cit. note 122, 1598.
[712] European Convention (CONV 459/02) op.cit. note 371, para. 5.
[713] Article 17(7) TEU.

Parliament.[714] The High Representative/Vice-President is evidently subject to this same vote, but follows a different trajectory to arrive on the list. He/she is appointed by QMV in the European Council with the agreement of the Commission President.[715] This appears to give her a more authoritative rank than other Commissioners. By the same token, all Commission members "shall resign if the President so request", except for the HR for whom additionally a qualified majority in the European Council has to agree.[716] When the Parliament issues a motion of censure, the Commission shall resign as a body, yet, the HR only from the duties that she carries out in the Commission.[717] The practical consequences of this provision are not entirely clear, but it presumably means that either the European Council decides that the HR shall resign completely or she simply gets reappointed in a new Commission.

As *prima inter pares* the HR is entrusted in the Commission with the "responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action".[718] The Treaty does however not distinguish between what constitute these incumbent responsibilities and which are the other aspects. This task is left to the Commission President who decides over the internal organisation of the Commission.[719] Barroso, in his second term that started in 2009, used this discretion in what could be seen as an erosion of the HR's Commission-hat. *First*, by assigning separate portfolios for 'Development', 'International Cooperation, Humanitarian Aid and Crisis Response', 'Enlargement and European Neighbourhood Policy' and 'Trade', no incumbent responsibilities were left for Ashton to fulfil. All these Commissioners evidently have their own plans and ambitions, complicating the HR's efforts to effectively use the Commission's extensive resources as external leadership instrument.[720] While this task division could still be justified in the light of her already dense agenda, this is much less the case for Barroso's *second* move. In announcing the 2010-2014 Commission, he left out 'Trade' from the above portfolios that were to be conducted "in close cooperation with the High Representative/Vice-President".[721] He subsequently erected an External Relations Commissioners group (RELEX), including besides the three above Commissioners those responsible for 'Trade' as well as 'Economic and Monetary Affairs'. The HR was entrusted with presiding this group, however, with the remarkable caveat that "the President can decide to attend

[714] On the basis of this consent the Commission shall then be appointed by QMV in the European Council.
[715] Article 18(1) TEU.
[716] Articles 17(6) and 18(1) TEU. Notably, in cases of serious misconduct or when she no longer fulfils the conditions required to perform her duties, this extra condition does not appear to apply. Article 247 TFEU then empowers the CJEU, on application by the Council acting by a simple majority or the Commission, to retire her, just like any other member of the Commission.
[717] Article 17(8) TEU.
[718] Article 18(4) TEU.
[719] Article 17(6)(b) TEU.
[720] C. Berger and N. von Ondarza, 'The Next High Representative and the EEAS: Reforming the EU Foreign Policy Structures', *SWP Comments 40* (German Institute for International and Security Affairs, Berlin, 2013) 3.
[721] Commission Press Release (IP/09/1837) 'President Barroso unveils his new team', Brussels, 27.11.2009. This is repeated in the Mission Letters of these respective Commissioners, see: <ec.europa.eu/commission_2010-2014/mission_letters/index_en.htm> (last accessed 20.05.2015).

any meeting, which he will then chair".[722] The combination with Ashton's busy schedule and limited proactivity tended to turn her into a technically jobless Vice-President. If her one in three attendance rate in Commission meetings was already very low, the European Court of Auditors reported that only five RELEX Commissioners meetings were held between 2010-2014, none of which chaired by the HR.[723] It further lamented the lack of progress in clarifying the scope of her Vice-President role.[724] In essence, this meant that despite the comprehensiveness of her mandate, the HR still had to share leadership over the security-development nexus within the Commission with then Development Commissioner Piebalgs. Notably, the latter – and not the HR– often functioned as the Commission's linchpin for external relations.[725] Problematically, Ashton described the division of labour between them as "potentially unclear and [to] be clarified".[726]

A wind of change occurred with the 2014 appointment of Juncker as Commission President, exhibiting a will to rivet the HR firmly within the college of Commissioners. Contrary to the President-centred Barroso Commission, Juncker – introducing himself as a "modest chap" – decentralised leadership responsibilities to seven Vice-Presidents.[727] Mogherini leads the team "A Stronger Global Actor" which includes the Commissioners for Development, Neighbourhood and Enlargement Policy, Humanitarian Aid and Trade. Juncker announced that he "will not put any new initiative in the Commission Work Programme or on the agenda of the College that has not received the backing of the relevant Vice-President". This accords the HR the strategic role of filtering and coordinating the external policy aspects of all external portfolios.[728] Her stronger mandate aims to "overcome silo mentalities" and includes arrangements to establish close ties between her cabinet and that of the President (particularly in the light of their concomitant representational duties) and convene at least monthly RELEX meetings presided by her.[729] Johannes Hahn, the Commissioner for European Neighbourhood and Enlargement Negotiations (as well as other Commissioners if the need arises) is explicitly assigned

[722] Commission President Information Note (SEC(2010) 475 final) on the Commissioners groups, 22.04.2010.
[723] ECA, 'The Establishment of the European External Action Service', *Special Report No.11* (ECA, Brussels, 2014) para. 53. Consequently, the HR's participation in the RELEX group was not very different from the pre-Lisbon situation where HR Solana occasionally attended those meetings (UK House of Lords EU Committee, 48th Report of Session 2005–06: Europe in the World, 22.11.2006, para. 45).
[724] Also the Parliament regularly called to activate the High Representative's Commission hat (for instance: European Parliament (2013/2146(INI)) op.cit. note 84, para. 15).
[725] For instance, Barroso did not consider the Commission to be represented through HR Ashton in the FAC and appointed Commissioner Piebalgs as full-fledged Commission representative in those meetings. (J.-M. Barroso, Mission Letter Development Commissioner Andris Piebalgs, 27.11.2009).
[726] High Representative Ashton, *EEAS Review*, Brussels, 2013, 8.
[727] V. Pop, 'New Commission sees greater role for Juncker deputies', *euobserver.com*, 10.09.2014.
[728] Commission (MEMO/14/523) Questions and Answers: The Juncker Commission, 10.09.2014.
[729] J.-C. Juncker, Mission Letter Federica Mogherini: High Representative of the Union for Foreign Policy and Security Policy/Vice-President of the European Commission, Brussels, 10.09.2014, 2-4. The 2013 EEAS Review had announced that the Commission President and HR agreed to scale up RELEX cooperation, with meetings chaired by the latter and jointly prepared by the Commission Secretariat-General and the EEAS (EEAS Review (2013) op.cit. note 726, 8).

as Mogherini's deputy to allow her "to focus her efforts on tackling the real geopolitical challenges".[730] Symbolically, an end was made to the HR's double offices in the Commission's Berlaymont and the EEAS' Triangle building. In order to demonstrate internally and externally that she is full part of the Commission, her one and only seat is now set in the Berlaymont. A logical consequence of the upgraded position of the HR in the current Commission, is that the Development Commissioner, Neven Mimica, is partly taken of his pedestal and shall "contribute to the work of the High Representative".[731] This clears the path for more unified leadership over the security-development nexus within the Commission, but simultaneously holds risks for tilting the balance away from development objectives.

A cooperative relationship with the Member States is equally key to the effectiveness of her function. This is particularly so with the Presidency, which continues to chair nine of the ten Council formations, regularly deciding on the external dimension of their internal subject areas. This explains why the Council's rules of procedure do not accord the HR full independence in setting the FAC agenda, but require her to cooperate with the Presidency trios.[732] Moreover, not all the Council preparatory bodies are chaired by delegates of the HR. This is only so for certain horizontal and all geographic and CSDP-related committees and working parties, while bodies in the area of development cooperation and trade continue to be chaired by the rotating Presidency.[733] Given that the great majority of decisions are shaped and taken at these lower levels, this evidently requires intensive cooperation, coordination and follow-up (cf. *infra* 4.3.1.).

A herculean task description

Besides the challenges of reconciling her various allegiances, the triple-hatted and multitasking High Representative faces practical difficulties in executing her sizeable – and according to some "impossible" – task description.[734] These challenges were already predicted at the time of the European Convention, but eventually no coping mechanisms made their way into the Treaty.[735] Unsurprisingly, the herculean nature of her tasks soon manifested itself. Unrelenting choices had to be made as it proofed near impossible to simultaneously undertake time-consuming consensus-

[730] Juncker (2014) op.cit. note 729, 2-3. The mission letter moreover states that half of her cabinet staff should consist of Commission officials.
[731] J.-C. Juncker, Mission Letter Commissioner for International Cooperation and Development Neven Mimica, 10.09.2014, 3.
[732] Article 2(6) Council Decision (2009/937/EU) op.cit. note 664. The Presidency trios are pre-determined groups of three successive presidencies cooperating to ensure a coherent approach to the Council's work.
[733] Council Decision (2009/908/EU) 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, OJ L322/28, 09.12.2009, Annex II. The growing practice of letters from like-minded Member States' with concrete agenda items, further decreases the agenda-setting powers of the Chair (N. Helwig, 'The High Representative 3.0: Taking EU Foreign Policy to the Next Level', *FIIA Briefing Paper 155* (The Finnish Institute for International Affairs, Helsinki, 2014) 3-4).
[734] H. Mahony, 'EU foreign minister has "impossible" task ahead', *euobserver.com*, 16.11.2009.
[735] European Convention (CONV 459/02) op.cit. note 371, para. 37. Article 33 TEU on the EUSRs provides a basis for delegating authority, yet only in relation to "particular policy issues".

building within the FAC and the Commission, conduct forward-looking strategic thinking regarding the CFSP, react to international crises and conduct political dialogue. For Ashton this was further complicated by the fact that she concurrently had to set up her own office as well as the EEAS. She liked to explain it as follows: "[o]n appointment I was given the Treaty … but that was it, so everything we have done we have had to create … it is like flying a plane while you are still building the wings and somebody might be trying to take the tail off at the same time".[736]

A number of arrangements emerged to deal with her relentless workload. *First*, administratively, the EEAS' senior leadership took over much of the management of the service (cf. *infra* 4.3.) and occasionally stands in for internal EU coordination and lower-level representation. *Second*, in relation to her formal representational functions she chose to rely on both the Presidency[737] and her fellow Commissioners. The Vademecum on EU external action elucidates the arrangement:

> *When the HR/VP is prevented from taking up himself/herself the task of chairing a meeting at ministerial level, he/she can be replaced by a representative of the Member State holding the Presidency of the Council or, where he/she decides so, by a Commissioner (in agreement with the President of the Commission). However, in such a case, the Member State holding the Presidency of the Council should limit itself to the role of presiding over the meeting and (as replacement for the HR) expressing the EU position on CFSP matters (as well as, as the case may be, expressing the views of the Member States on issues within their competence). The presentation of the EU position on all non-CFSP issues should be ensured by another Commissioner(s).*[738]

Third, looser arrangements apply for a number of the HR's operational tasks. This involves Presidency minsters, senior Commission and EEAS staff as well as Special Representatives regularly traveling on the HR's behalf. On all three levels the delegation arrangements remain very ad hoc and practically reinstate the institutional duality which the creation of this office was meant to transcend. In the light of this obscurity, the 2013 EEAS Review calls to clarify this system of political deputies and conclude formal inter-institutional arrangements for the existing practices.[739] Remarkably, the Council Legal Service responds to this suggestion that "[t]he creation of deputies would require a Treaty amendment affecting the institutional balance", thereby suggesting that the current practices may be unconstitutional.[740] In case it would ever come to a Treaty revision, Bergen and Ondarza distinguish

[736] UK House of Lords EU Committee, *Evidence Session with Baroness Ashton of Upholland, High Representative for Foreign Affairs And Security Policy, Vice-President of the European Commission*, 14.06.2011, 3-4.
[737] When the Presidency is unable to replace the HR, this task can be assumed by a ministerial representative from another Member State.
[738] Commission (SEC(2011) 881 final) Vademecum on the external action of the EU, n.d., 22.
[739] EEAS Review (2013) op.cit. note 726, medium-term recommendation 3.
[740] Council Legal Service (14458/13) EEAS Review: indications relating to the legal and institutional issues raised by the recommendations, 04.10.2013, 8.

two possible models.[741] The first is based on the German system of 'Staatssekretär' and would establish a high-level and visible political deputy taking over from the HR in all instances where she cannot be present. The French 'Secrétaire Générale' provides the inspiration for the second option. He/she would be more akin to a high-level official substituting for the HR's internal responsibilities of EU coordination and information-exchange, while the latter remains the single face for the EU externally. Both models of triple-hatted deputies would have a stronger political and symbolic impact than the current delegation arrangements, but are more complex to set up institutionally and legally. Moreover, they risk to simply add a second layer of loyalty complications.

This casts doubts on the feasibility of this innovative piece of Treaty design. As colourfully put by late Professor Peter F. Drucker: "[n]o institution can possibly survive if it needs geniuses or supermen to manage it. It must be organized in such a way as to be able to get along under a leadership composed of average human beings".[742] On the one hand, the HR is uniquely placed to broker whole-of-EU responses to global challenges combining the wide variety of CFSP and TFEU competences. Yet, to achieve this she must sail the murky waters of diverging EU interests and command the trust of often mistrustful Member States, Commissioners and members of Parliament. In line with the general thread of the Lisbon Treaty, the design of the HR reflects a midway between integration and delimitation. The result is a certain feel of incompleteness in relation to the design of this position. Whereas the High Representative was created to provide the Union with a single voice and phone number, she eventually shares this with the European Council, Council and Commission. She is the anchor for everything external within the Commission, but not to the extent that she absorbs or dictates other external portfolios. She is the one and only chair of the FAC, but does not control all of its preparatory bodies. If there is one figure that should and could provide the much-needed leadership over the nexus between development and security, the HR would definitely be it. However, "[w]ith her wings as [Vice-President] clipped, and a mandate, which is largely defined by the Treaty in terms of CSFP, the lop-sided persona of the High Representative has and will have a hard time in effectively joining up the CFSP and non-CFSP strands of EU external action".[743]

It is, at the time of writing, too early to confidently assess the track record of HR Mogherini in this regard. For what concerns HR Ashton it is clear that she accorded considerably more time to diplomacy than to development cooperation, more to crisis management than to conflict prevention, more to

[741] Berger and Ondarza (2013) op.cit. note 720, 2-3.
[742] P.F. Drucker, *Concept of the Corporation* (John Day Company, New York, 1946) 927p.
[743] S. Blockmans and M. Spernbauer, 'Legal Obstacles to Comprehensive EU External Security Action' (2013) *European Foreign Affairs Review* 18(4), 13.

CFSP than to CSDP. Particularly her passivity on defence issues is remarkable[744] given the explicit mandate in the Treaty, her role as chair of the FAC and the close links to the PSC. Ashton's limited attention for and guidance on conflict prevention and development cooperation were – at least partly – related to the internal organisation of the Commission and the Council. Even if the presently scaled-up Vice-President hat makes policy linkages more evident in the Commission, a significant stumbling block remains the division of policy preparation in the Council between the HR for the CFSP and the Presidency for development cooperation.

The integration-delimitation paradox implies that while the HR's effectiveness is dependent on her capacity to transcend diverging institutional interests, she can only be as effective as the other institutions allow her to be.[745] At present, this has not led to realising the renewed potential for pragmatic policy guidance across development cooperation and CFSP/CSDP, free from sclerotic obsession with competence boundaries. In order to facilitate her leadership, the Parliament suggests to establish a Political Council, including representatives of all relevant institutions, to guide and advise the HR's work.[746] Another possibility would be the creation of a personal representative on the security-development nexus (or the comprehensive approach cf. *infra* 6.1.) to pioneer and mainstream this issue throughout the EU's structures and act as a "seismograph" detecting trends, rising tensions and opportunities.[747]

4.2.3. Special Representatives of the Union, or of the CFSP?

At first, the practice of posting EU Special Representatives (EUSRs) did not have a specific legal basis in the Treaty and even preceded the creation of the office of HR for the CFSP.[748] As these proofed valuable assets in expanding the CFSP's diplomatic presence, the function was soon codified in the Amsterdam Treaty. In order to maintain maximal flexibility this was done in a particularly open-ended fashion. *Ex* Article 18(5) TEU tersely stated that "[t]he Council may, whenever it deems it necessary, appoint a special representative with a mandate in relation to particular policy issues".[749] On the basis of this

[744] Gros-Verheyde observed that Ashton attended only two informal Defence Councils during her five-year mandate (N. Gros-Verheyde, 'Dernières absences de Catherine Ashton', *Bruxelles2.eu Le Club*, 04.09.2014) . Mogherini show more commitment in this regard and attended both the September 2014 Milan and February 2015 Riga informal Defence Councils.
[745] P. Koutrakos, 'Primary Law and Policy in EU External Relations: Moving Away from the Big Picture' (2008) *European Law Review* 33(5), 673.
[746] European Parliament Recommendation (2012/2253(INI)) on the 2013 review of the organisation and functioning of the EEAS, 26.04.2013, para. 3.
[747] Helwig (2014) op.cit. note 733, 8.
[748] Then still named EU Special Envoys, Aldo Ajello and Miguel Ángel Moratinos were appointed through two 1996 Joint Actions, respectively in reaction to the crises in the African Great Lakes region and the Middle East (Joint Action (96/250/CFSP) in relation to the nomination of a Special Envoy for the African Great Lakes Region, OJ L87/1, 04.04.1996; Joint Action (96/676/CFSP) in relation to the nomination of an EU special envoy for the Middle East peace process, OJ L315/1, 04.12.1996).
[749] The Nice Treaty left this mandate as it was but included the appointment of EUSRs among the exceptions where the Council could vote by QMV instead of the general CFSP rule of unanimity (e*x* Article 23(2), current Article 31(2) TEU)).

single Treaty paragraph an extensive practice emerged. In nearly 20 years 49 people have occupied 18 different EUSR posts. In the absence of much Treaty guidance the EEAS website provides some clarification: "[t]he EUSRs promote the EU's policies and interests in troubled regions and countries and play an active role in efforts to consolidate peace, stability and the rule of law … They provide the EU with an active political presence in key countries and regions, acting as a 'voice' and 'face' for the EU and its policies".[750] In the words of Solana "EUSRs are the visible expression of the EU's growing engagement in some of the world's most troubled countries and regions. The list of where we have EUSRs is, in part, also a list of where our foreign and security policy priorities lie".[751]

The drafters of the Lisbon Treaty chose to keep the primary law mandate vague, and the according room of manoeuvre for policy-makers broad. The only change in Article 33 TEU is that EUSRs are appointed by the Council "on a proposal from the High Representative", under whose authority they now formally operate. Their mandate is set out in CFSP decisions based on Articles 28 (the former Joint Actions), 31 (2) (the exception for the Council to vote by qualified majority instead of unanimity) and 33 TEU. Member States can propose candidates that will be assessed by the HR, with the support of the EEAS.[752] On the basis of this assessment Member States formulate their recommendation to the PSC, which decides on their political endorsement whereupon they are formally appointed by the Council. At present nine EUSRs are operating in various countries and regions and one has a thematic focus on human rights.[753]

The pragmatic learning-by-doing style of appointing EUSRs, with annual or biannual results-oriented revision of mandates, led to a continuous widening of their responsibilities.[754] To date, this has come to include contributions to the collection and circulation of first-hand information and intelligence, coordination of local, EU, Member States and international actions and positions, policy implementation and making (with a blurred distinction between both as the latter needs permanent nourishment by the experience on the ground),[755] negotiation with and mediation between respective

[750] EEAS, *EU Special Representatives* <http://eeas.europa.eu/policies/eu-special-representatives/index_en.htm> (last accessed 21.05.2015).
[751] CFSP High Representative Speech (S 239/05) Opening remarks by EU High Representative for the CFSP Javier Solana, Seminar with EU Special Representatives, Brussels, 29.06.2005, 2.
[752] Council Note (7510/14) Guidelines on appointment, mandate and financing of EU Special Representatives, 11.03.2014, 4. Before the Lisbon Treaty, this was done by a panel composed of Presidency representatives, GSC and the Commission (Council Note (11328/07) Guidelines on the appointment, mandate and financing of EU Special Representatives, 09.07.2007, 3-4).
[753] The geographical EUSRs are operating in the Horn of Africa, Kosovo, Afghanistan, Bosnia and Herzegovina, South Caucasus and the crisis in Georgia, Southern Mediterranean region, Sahel, Middle East peace process and Central Asia. Remarkably, Solana also appointed two Personal Representatives, one on Non-Proliferation and WMD and another on Human Rights, as well as an EU Counter-Terrorism Coordinator, without any legal basis or legislative framework. While all three positions are still in place today, the portfolio for human rights is now assumed by a genuine EUSR (Council Decision (2012/440/CFSP) appointing the European Union Special Representative for Human Rights, OJ L200/21, 27.07.2012).
[754] C. Adebahr and G. Grevi, 'The EU Special Representatives: What Lessons for the EEAS?' in G. Avery, et al. (eds), *The EU Foreign Service: How to Build a More Effective Common Policy*, EPC Working Paper N°28 (European Policy Centre, Brussels, 2007) 57.
[755] Grevi (2007) op.cit. note 506, 142.

authorities or vying parties, acting as CFSP spokesperson and networking from the grass-roots to the highest echelons of power. This naturally makes EUSRs key actors in the Union's efforts of conflict prevention, crisis management, peace and state-building and post-conflict stabilisation. It is not surprising that nearly all the current geographic EUSRs operate in environments with ongoing CSDP missions.[756] The EUSRs are tasked to provide local political guidance to the respective Heads of Mission of Force Commanders.[757] Besides informing and advising on political developments this involves high-level negotiations to unlock stalemates in sensitive areas such as security sector reform, coordination, joint demarches with Heads of Mission, etc.[758]

The gradual expansion of their scope and geographical reach went along with a step-by-step regulation process through successive 'Guidelines on appointment, mandate and financing of EU Special Representatives', issued by the GCS since 2000. These provide EUSRs with a framework guiding their appointment and resignation, systematising their mandates, regulating links with Brussels, introducing evaluation and review modalities, setting out financial principles and governing their security plan.[759] These remain however rather loose and non-binding documents, adopted without the involvement of the Commission and Parliament. It is therefore not surprising that this stirred up the perennial debate regarding the alleged encroachment by the CFSP on *ex* Community prerogatives.[760] The EUSRs, initially conceived as ad-hoc crisis response instruments, eventually turn to stay for an average period of eight years,[761] with an ever expanding mandate, showing signs of *déjà vu* with development operations. For instance, the recently ended mandate of the EUSR for the AU was based on the objective of supporting institutional development "including through development assistance".[762]

EUSRs are part of the CFSP Chapter and thus *de jure* CFSP actors/instruments. They should "contribute to the unity, consistency and effectiveness of the Union's external action and representation [, and] help ensure that all Union instruments and Member States' actions are engaged consistently to attain the Union's policy objectives".[763] In the light of this cohering mandate it would have been more legally robust if the EUSRs were – like their patron the High Representative – accorded an explicit bridging

[756] The only exception being the EUSR to Central Asia.
[757] This is to be done "in coordination with the relevant Head(s) of Union delegation(s)" (Council (7510/14) op.cit. 752, 6; cf. *infra* 4.4.3.).
[758] Before the creation of a Civilian Operations Commander, the respective EUSR was included in the operational chain of command of CSDP missions.
[759] See for example the most recent Guidelines: Council (7510/14) op.cit. 752.
[760] See for instance: European Parliament Report (2006/2217(INI)) on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP, including the financial implications for the general budget of the European Communities (point H, paragraph 40, of the Interinstitutional Agreement of 06.05.1999), 04.04.2007, para. 58.
[761] ECA (2014) op.cit. note 723, para. 37. This is in spite of the fact that the 2007 Guidelines already prescribed that their tenure of office should not exceed four years (Council (11328/07) op.cit. 752, 1).
[762] Article 2(c)Joint Action (2008/898/CFSP) extending the mandate of the EUSR to the African Union, O.J. L322/50, 02.12.2008.
[763] Council (7510/14) op.cit. 752, 3.

function, at minimum by including them under the TEU's Title III 'Provisions on the Institutions'. Not only is the current structure disputable in the light of the mutual delimitation clause of Article 40 TEU, it is also less effective given the limited influence of EUSRs on shaping and implementing TFEU policies. Yet, this practice is arguably less problematic in the light of the Lisbon Treaty's streamlining of the EU's external action system. The EEAS is *sensu strictu* also a CFSP institution, but – in line with the coherence rationale of Article 21 TEU – this has not prevented the adoption of a Council Decision that gives it a hand on the TFEU competence of development cooperation (cf. *infra* section 4.3.). All-embracive mandates, such as the responsibility of the former EUSR for the Sudans for "supporting institution building and fostering stability, security and development in South Sudan", seem therefore less problematic at present.[764]

Nonetheless, their controvertible legal status causes certain complications from an institutional point of view. This is particularly so because the EUSRs "stand at the crossroads between the institutional dynamics of Brussels headquarters, the often heterogeneous priorities of Member States, and the requirements for action in the field".[765] A particular complication results from the practical necessity to entrust EUSRs with the management of expenditures arising from their mandate, even though they have no formal legal authority to do this.[766] The Treaty restricts the execution of the budget to the Commission,[767] with whom the EUSRs enter in a contractual engagement, making them "accountable to the Commission for all expenditure charged to the CFSP chapter in the EU budget".[768] For this purposes they are employed by the Commission under the formal legal status of CFSP Special Advisors (cf. *supra* 3.2.2. regarding CSDP Heads of Mission).[769] Together with the Commission's management of sizeable development programmes (and formerly the extensive network of Commission Delegations) this implied that the EUSR are often thrown back on the former in the implementation of their mandate. In spite of all this, their mutual contacts remain very much extemporary and the task division between them is broadly perceived as ill-adapted.[770]

EUSRs have always been the odd one out in the EU institutional system. Legally employed by the Commission and formally part of the GSC, the temporary nature of their mandate prevents their full incorporation in the EU system. As diplomatic envoys many of them are moreover only limitedly acquainted with the ins and outs of the EU's bureaucratic structure. For these reasons, rationalised

[764] Article 2 Council Decision (2010/450/CFSP) appointing the EUSR for the Republic of Sudan and the Republic of South Sudan, OJ L211/42, 12.08.2010.
[765] Grevi (2007) op.cit. note 506, 155. This crossroads position is reflected in the practice that allows all EU institutions, including the EEAS and Member States, to second staff to the EUSRs' teams (Council (7510/14) op.cit. 752, 8).
[766] Cf. the discussion on the budgetary responsibilities of CSDP Heads of Mission and Force Commanders in section 3.2.2.
[767] Article 17(1) TEU.
[768] Council (7510/14) op.cit. 752, 11.
[769] Commission (COM(2009) 9502 final) op.cit. note 594, 2.
[770] ADE (2011) op.cit. note 82, 68.

coordination structures and contact points have over time been set up within the Council Secretariat.[771] Yet, the fact that an inter-institutional support cell has the last eight years not moved beyond the phase of analysis and discussion illustrates that this anchoring remains both complex and imperative.[772] The creation of the EEAS, which will be discussed in the next section, offered a good opportunity to rectify this anomaly, particularly because both operate under the authority of the HR. It is therefore surprising that the EUSRs are entirely absent from the EEAS Decision.[773]

This silence seems to be related to their uncertain future after the Lisbon Treaty. [774] With the creation of the EEAS, and in particular the Union Delegations which are now entrusted to represent the whole range of EU competences, the EUSRs appear to lose at least part of their significance. Ashton was consequently quick to announce that EUSRs "should be the exception and not the norm since both Brussels and delegations will be better equipped to deliver on the ground the integrated approach we need".[775] Member States were however less keen on giving up on the EUSRs as this remained one of the few EU external instruments over which they had firm control through the PSC. Article 33 TEU is rather misleading in this regard. Even though it indicates that the High Representative has the monopoly of proposing the appointment of an EUSR, it seems unlikely that the Council would let this depend solely on her initiative.[776] Furthermore, even though Article 33 TEU states that EUSRs carry out their mandate under the HR's authority, the 2014 Guidelines specify that this only relates to operational issues, while the political direction and strategic guidance falls to the PSC.[777]

The survival of the EUSRs turned to be a source of considerable strive between the High Representative and the Member States. In her successive attempts to end ongoing mandates, Ashton faced a wall of Member States' resistance, causing her to backtrack regularly.[778] The tensions ran particularly high when she abruptly refused to renew the operating budget of the EUSR to the Middle East peace process beyond December 2013, "pulling the rug from under his feet".[779] Also the Parliament would

[771] See further: Grevi (2007) op.cit. note 506, 23-24.
[772] Compare on this matter the 2007 and 2014 Guidelines (Council (11328/07) op.cit. 752, 2; and (7510/14) op.cit. 752, 2).
[773] Council Decision(2010/427/EU) establishing the organisation and functioning of the European External Action Service, OJ L201/30, 03.08.2010 (hereafter: EEAS Decision).
[774] Blockmans and Hillion provide another argument, namely that the incorporation of the EUSRs into the EEAS would require a Treaty change for Articles 27 and 33 TEU (S. Blockmans and C. Hillion, 'Recommendations for the Amendment of Council Decision 2010/427/EU Establishing the Organisation and Functioning of the European External Action Service', *CEPS Special Report No. 78* (Centre for European Policy Studies, Brussels 2013) 10). The Council Legal Service, on the other hand, finds a revision of the EEAS Decision sufficient (Council Legal Service (14458/13) op.cit. note 739, 3).
[775] X, 'Action Woman: exclusive interview with EU foreign affairs chief Catherine Ashton', *Parliament Magazine*, 14.06.2010.
[776] The 2014 EUSR Guidelines state that "[w]here it considers that the political context so requires, the Council may invite the HR to present a proposal for the appointment of an EUSR with a mandate in relation to a particular policy issue". Even though this is prudently formulated as invitation, it does not seem to be one that the HR can easily turn down.
[777] Council (7510/14) op.cit. 752, 5.
[778] See for instance: A. Gardner, 'Ashton in power struggle over Middle East policy', *European Voice*, 20.06.2013; A. Rettman, 'Four EU special envoys facing the chop', *euobserver.com*, 06.07.2010.
[779] E. Fouéré, 'The EU Special Representative: A Dying Breed?', *CEPS Commentary* (Centre for European Policy Studies, Brussels, 2013) 2.

rather see the back of the EUSRs given that it is not involved in their appointment and has only very limited scrutiny over their activities. In its 2014 discharge report the Parliament criticised the EUSR's vague responsibilities, their obscure budget and the significant rise in funding. It called to "end to the parallel foreign policy pursued through the EUSRs" and integrate them fully into the EEAS.[780] In her 2013 Review of the EEAS, Ashton acknowledged the "anomaly" of the EUSRs' status and agreed with the need for their incorporation in the EEAS, "while retaining a close link to Member States via the PSC".[781] While no specific time-frame is foreseen, this is listed as a short-term recommendation and the Brussels-based EUSRs have already been co-located with the EEAS.[782] Not everyone agrees with the benefits of this undertaking. Former EUSR Erwan Fouéré calls this "a bureaucratic solution" and warns for the "danger that EUSRs will become buried under multiple layers of EEAS hierarchy",[783] putting their much valued flexibility at risk.

In sum, Special Representatives are a key tool of EU crisis diplomacy and form valuable EU tentacles across the globe. Yet, because they are strongly encapsulated in the CFSP and poorly in the Union's institutional system, they face important shortcoming to give effect to a comprehensive approach to security and development challenges. While their mandates not seldom touch upon development competences, this is not an area they are generally comfortable with, nor do they have much impact on its planning and implementation. Their key value lies in providing the HR eyes, ears, and a voice on the frontline of EU external action. This is invaluable in building up the latter's leadership over the EU's commitment to the security-development nexus. Section 4.4. will elaborate on the field-level interaction and potential for overlap between EUSRs and EU Delegations, while section 6.2.3. will focus on the specific case of the EUSR for the Horn of Africa.

4.3. The European External Action Service[784]

The EEAS, formally launched on 1 December 2010, presents one of the most visible and sweeping changes of the Lisbon Treaty. For the first time in its history, the Union is accorded with a genuine foreign service. Also the amalgamation in a single institutional setting of staff from the Commission,

[780] European Parliament Report (A7-0199/2014) on discharge in respect of the implementation of the general budget of the European Union for the financial year 2012, Section X – European External Action Service, 20.03.2014, para.22. The EEAS' administrative budget is included in the general EU budget, according the EP significantly more oversight (D. Tolksdorf, 'EU Special Representatives: An Intergovernmental Tool in the Post-Lisbon Foreign Policy System' (2013) *European Foreign Affairs Review* 18(4) 479-481).

[781] EEAS Review (2013) op.cit. note 726, 4-5. Yet, in what could be seen as a latent remainder of her opposition, it is added that these are not the only actors that can undertake specific missions. The EEAS should "have flexibility to recruit short-term senior figures (special representatives, *co-ordinators or EU envoys*)" as the need arises.

[782] EUSRs with a country-focus are field-based (cf. *infra* 4.4.3.).

[783] Fouéré (2013) op.cit. note 779, 3.

[784] This section is partly based on the following article of the author: H. Merket, 'The European External Action Service and the Nexus between CFSP/CSDP and Development Cooperation' (2012) *European Foreign Affairs Review* 17(4) 625-652.

the Council and the Member States, with security, defence and development-oriented portfolios, is unprecedented. Even before it was clear how this service would be organised, it was bestowed with the highest of expectations. In a number of speeches Ashton lauded its creation as "a once-in-a-generation opportunity" to finally promote joined-up action and bring together "all the instruments of our engagement – economic and political instruments, development and crisis management tools – in support of a single political strategy".[785]

Discussions on optimising the security-development nexus in EU external action did not shape the debate on the creation of the EEAS. Yet, its aims of enhanced effectiveness and consistency indirectly raise hopes for this particular interface. In this section we aim to understand if and how the EEAS (can) enable(s) the EU to overcome the hurdles that stop it from optimising the security-development linkage. For this purpose, the underlying legal framework that determines its place in the EU institutional framework, its composition, competences and impact on EU decision-making will first be scrutinised (4.3.1.). In a second part it will be argued that the demons of the integration-delimitation paradox again led to a halfway construction that must navigate tricky waters between various institutional interests and across competence rifts in realising the quest for coherence (4.3.2.).

4.3.1. The design and role of the EEAS

In spite of creating an unparalleled foreign service with the potential to significantly overhaul the ins and outs of EU external action, the Lisbon Treaty is remarkably sparing of details regarding its actual role and outlook. Only one succinct paragraph is accorded to this so-called "historic step":[786]

> *In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the [EEAS] shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.*[787]

Besides assisting the HR and cooperating with national diplomatic services, nothing is provided in terms of competences. Its inclusion in the CFSP Chapter of the Treaty, even though the EEAS was from

[785] High Representative Ashton (SPEECH/10/120) Speech to the Foreign Affairs Committee, Brussels, 23.03.2010, 2.
[786] High Representative Ashton (A/127/10) 'The Creation of the European External Action Service', address to the European Parliament, Strasbourg, 07.06.2010, 5. It is in this light puzzling that the HR's spokesperson, reacting to later criticism on the EEAS' opaque organogram, argued that its role "is set out in black and white in the Lisbon Treaty" (M. Mann, 'Unsubstantiated tittle-tattle from anonymous "sources"', *euobserver.com*, 03.10.2011).
[787] Article 27(3) TEU.

the outset meant to support the HR in the various aspects of her mandate,[788] only stirred up more dust. This primary law obscurity laid the basis for the tense negotiations on the nitty-gritty of the EEAS' institutional location, composition, staff and competences that followed the Treaty's ratification. Throughout these so-called *quadrilogue* talks, the HR, Council, Commission and Parliament[789] fiercely sought to ensure a certain degree of control over this EU diplomatic corps.[790] Eight months after the entry into force of the Lisbon Treaty this resulted in the adoption of a Council Decision that was not written for the sake of legal clarity but rather to overcome political differences. The complete 'EEAS package' further includes two Declarations by the HR[791] as well as amendments to the Financial and Staff Regulations and the general budget for 2010.[792] Notably, even though Article 27(3) TEU is the sole legal basis of the EEAS Decision, its numbering in the EU Official Journal is 2010/427/*EU*, and not 2010/427/*CFSP*.[793] This broader legal nature corresponds to its role and functioning as bridging organ, set out in the body of the Decision.[794] Yet, in order to avoid any chance of collision with Article 40 TEU, it would have been more solid to add Article 18 TEU, setting out the HR's three hats which the EEAS is designed to support, and/or the consistency lead of Article 21 TEU, as legal foundation.

As will be discussed below, this "masterpiece of ambiguity"[795] left many important issues unaddressed, some of which were subsequently tackled in service level arrangements (SLAs) with the GSC and the Commission.[796] The risk of complications in implementing the "rushed and inadequately prepared" establishment of the EEAS – *dixit* the European Court of Auditors[797] – was arguably foreseen in the EEAS Decision. Article 13(3) entrusts the HR with a review of its organisation and functioning, covering

[788] See for instance: European Convention (CONV 342/02) op.cit. note 707, para. 25.
[789] Even though the Treaty only prescribes its consultation, the Parliament flexed its muscles over its involvement in the necessary amendments to the EU's financial and staffing regulations to obtain considerable concessions.
[790] See further: L. Erkelens and S. Blockmans, 'Setting up the European External Action Service: An Institutional Act of Balance', *CLEER Working Papers 2012/1* (Centre for the Law of EU External Relations, The Hague, 2012) 32p.
[791] High Representative (12401/10 ADD 1) Declaration on Political Accountability, OJ C210/1, 03.08.2010; High Representative (12401/10 ADD 4) Statement given to the Plenary of the European Parliament on the Basic Organisation of the EEAS Central Organisation, OJ C210/1, 03.08.2010.
[792] Regulation (1081/2010/EU/Euratom) amending Council Regulation 1605/2002/EC/Euratom on the Financial Regulation applicable to the general budget of the European Communities, a regards the European External Action Service, OJ L311/9, 26.11.2010; Regulation (1080/2010/EU/Euratom) amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities OJ L311/1, 26.11.2010.
[793] The fact that the General Court confirmed its jurisdiction over this Decision is another confirmation of this broader legal basis (Case T-395/11, Elti d.o.o. v EU Delegation Montenegro, ECLI:EU:T:2012:274, paras 31-35 (cf. *infra* 4.4.2.)).
[794] Notably, the transfer of responsibility in the area of development cooperation was contested by the law firm White & Case (on assignment of the development NGOs CAFOD and CIDSE) in view of the positioning of the EEAS provision in the CFSP Chapter of the Treaty (White & Case LLP, *Memorandum on Legal Objections to the EEAS' Involvement in EU Development Cooperation Activities* (White & Case, Brussels, 2010) para. 3.7. For a reasoning to the contrary: S. Duke and S. 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', *EIPA Working Paper 2010/W/01* (European Institute of Public Administration, Maastricht, 2010) 13p.
[795] C. Hillion, 'Editorial Comments - The 2013 Review of the European External Action Service: A missed Opportunity?' (2013) *Common Market Law Review* 50(5), 1212.
[796] Article 3(3) EEAS Decision. Gatti lists an important number of these SLAs with various Commission departments: M. Gatti, 'Diplomats at the Bar: The European External Action Service before EU Courts' (2014) *European Law Review* 2014(5), 678, footnote 88.
[797] ECA (2014) op.cit. note 723, para. 70.

inter alia the implementation of Article 6(6), (8) and (11) (staffing provisions) and, if necessary, "accompanied by appropriate proposals for the revision of this Decision". This review, published in July 2013, left few stones of its contentious early years unturned, yet "without addressing what these would require in terms of internal organisational changes [or] modifications in legal texts".[798] In the light of the above, Hillion argues that "one should not overrate the Decision's actual contribution to the organisation and functioning of the Service".[799] In what follows, the analysis of these various documents will consequently be complemented with practical policy and institutional evolutions, in order to shed light on the EEAS' composition, tasks and policy discretion.

An inter-institutional support hub for EU external action

The composition of the External Action Service mirrors the three-hatted portfolio of its principal, the High Representative. The EEAS Decision stipulates that staff transferred from the Commission, GSC and Member States' diplomatic services should each account for an equal share at AD(Administrator)-level.[800] They "shall all have the same rights and obligations and be treated equally".[801] A significant part of the inter-institutional negotiations concerned the departments of the GSC and Commission to be shifted to the EEAS. The final consensus is included in the Annex to the EEAS Decision. From the Commission it integrates entire DG RELEX,[802] including all EU Delegations, as well as the ACP-related geographic directorates of DG DEV. The GSC transfers DG E in its totality, the CFSP/CSDP implementing bodies (Policy Unit, CMPD, CPCC, EUMS and SitCen) and officials on secondment to EUSRs and CSDP missions. The strained negotiations raise the impression that this transfer was not based on any preordained set of objectives for the EEAS, but rather that the latter resulted from the institutional compartments that the negotiating parties were willing to give up.

This is confirmed by the subsidiary, diffused and complex manner in which the EEAS Decision sets out its role and responsibilities. Article 1(2) EEAS Decision stipulates that the EEAS is "a functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives".[803]

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[798] EEAS Review (2013) op.cit. note 726, 15. Notably, the Council Legal Service published its own view on the necessary constitutional and legal amendments (Council Legal Service (14458/13) op.cit. note 739).
[799] Hillion (2013) op.cit. note 795, 1219.
[800] Art. 6(9) EEAS Decision states that, when the EEAS reaches full capacity, Member States staff "should represent at least one third of all EEAS staff at AD level" and Commission and Council officials should together account for "at least 60%". The initial bias towards staff coming from the Commission, due to the *en bloc* transfer of a number of its large departments, has largely been rectified. This is however only on an overall scale. When breaking down these numbers for temporary agents from national diplomatic services we see that these are underrepresented in headquarters (23.8%) and overrepresented in Delegations (46.2%) (figures from the EEAS Review op.cit. note 729).
[801] Art. 6(7) EEAS Decision.
[802] In another seemingly protectionist move, former Commission President Barroso anticipated this transfer to the EEAS by removing several sections from DG Relex to DG Climate Action, DG Energy and DG Enlargement (Blockmans and Spernbauer (2013) op.cit. note 743, 12).
[803] Art. 1(2) EEAS Decision.

The precise nature of these tasks and objectives is however nowhere clearly addressed. This is not entirely surprising as – in line with the Treaty mandate – the title of the EEAS Decision only announces to tackle its 'organisation and functioning'. Article 2 entitled 'Tasks' presents itself as point of reference, but does not include a ready-made description. Rather, it clarifies that the *raison* d'*être* of the EEAS lies – as it name suggests – in being of *service*. This consists of a duty to "support" the High Representative in fulfilling her threefold mandate and "assist the President of the European Council, the President of the Commission, and the Commission in the exercise of their respective functions in the area of external relations".[804] In principle, the scope of the EEAS' role thus depends on the content given to the concepts of 'support' and 'assistance' as well as the broad Treaty-defined mandates of the above institutions. This serves both as a reminder that the latter maintain their key role in EU external action, and a preclusion of overlapping support services that could otherwise give rise to antagonistic external action baronies across the EU system.[805] While the EEAS stands at the service of many, its only true principal remains the HR under whose authority it operates.[806]

This role of inter-institutional support hub is central to its mandate. This is further evidenced by Article 3 requiring the EEAS to support, and work in cooperation with the diplomatic services of Member States, GSC and Commission services. This aims "to ensure consistency between the different areas of the Union's external action and between those areas and its other policies".[807] It is therefore remarkable that Article 3(2) limits the duty to "consult each other on all matters relating to the external action of the Union" to the Commission and the EEAS, and excludes the CSDP. Whilst this last exception is in line with the strong preservation of its intergovernmental character in the Treaty, it is regrettable in the light of the EEAS' potential to bridge the security-development gap. A final paragraph extends this support and cooperation by the EEAS to "the other institutions and bodies of the Union, in particular to the European Parliament". In its turn the EEAS may rely on these institutions for support and cooperation, yet only "as appropriate" and "where necessary".[808] This limited reciprocity, which is central to all the cooperation provisions of Article 3, is not the result of sloppy legal drafting. The *travaux préparatoires* indicate that attempts to introduce more balanced language were blocked in the negotiations.[809] Whereas it can indeed be argued that the constitutional – and inherently

[804] Article 3(1) EEAS Decision. This is reflected in the briefing requests handled by the EEAS: 243 of the 937 handled between January and September 2011 came from the HR, 67 from the European Council President, 125 from the Commission President and 235 from the Commissioner for Enlargement and ENP (Report by the High Representative to the European Parliament, the Council and the Commission, *The European External Action Service*, 22.12.2011, 6). Also in 2012 the EEAS prepared more than twice the number of briefings for the Commission than for the HR (EEAS Review (2013) op.cit. note 726, 8).
[805] B. Crowe, 'The European External Action Service: a Roadmap for Success', *Chatham House Report* (Chatham House, London, 2008) p. 19.
[806] Article 1(3) EEAS Decision.
[807] Article 3(1) EEAS Decision.
[808] Art. 3(4) and 4(5) EEAS Decision.
[809] See further: B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service' (2011) *Common Market Law Review* 48(2), 496-499.

reciprocal – duty of sincere cooperation of Article 4(3) TEU, allows "to fill the gaps of Article 3 EEAS",[810] this purposeful drafting, at least symbolically, serves as a reminder of the EEAS' subservient position.

Further insights on the EEAS' range of duties are scattered over various articles of the Decision. In essence, they accord the EEAS a role in both development programming and the planning and conduct of CFSP/CSDP initiatives. This turns the Service into the EU's chief arena for optimising the security-development linkage. Yet, the respective provisions are covered with a shroud of uncertainty and it seems as if the negotiating parties could only find unity within obscurity.

The EEAS' role in the reshuffled development programming cycle

Development cooperation is the only area where the Decision assigns the EEAS concrete policy-making responsibilities. The programming and management cycle of EU external assistance instruments consists of five phases: (1) strategic assessments and identification of general objectives in five to seven-year country or regional strategy papers (CSPs/RSPs); (2) multiannual allocation of aid resources based on the country's/region's needs, absorption capacity and reform commitment; (3) determination of priority sectors and the associated financial envelops in national and regional indicative programmes (NIPs/RIPs); (4) development of annual action programmes (AAPs); and finally (5) implementation of the external assistance programmes. Before the creation of the EEAS, the Commission managed this whole process for all development instruments. The first three strategic stages were conducted by the DGs where the respective geographic desks were located,[811] while AIDCO managed the two implementation phases.[812]

During the inter-institutional negotiations on the set-up of the EEAS considerable controversy arose regarding the allocation of responsibilities over these five phases.[813] Reconciling the various positions resulted in the complex arrangement of Article 9 EEAS Decision. Under the overall responsibility of the Commission, the EEAS is entrusted with the management of the strategic, multiannual steps – namely drawing up CSPs/RSPs, the aid allocations and the NIPs/RIPs – of the European Development Fund, European Neighbourhood Instrument, Partnership Instrument, European Instrument for Democracy and Human Rights, the Instrument covering Stability and Peace, the Instrument for Nuclear Safety Cooperation (NSCI) and the geographic programmes of the DCI (cf. *infra* 3.2.1. for an overview of the

[810] S. Blockmans and C. Hillion, 'EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service', *SIEPS 2013:1* (Swedish Institute for European Policy Studies, Stockholm, 2013) 42-43.
[811] DG DEV for the EDF, DG ELARG for the Western Balkans and the IPA and DG RELEX for the other developing countries that fall under the DCI and ENPI.
[812] Except for the IPA, which was managed by DG ELARG (see further: Woolcock (2012) op.cit. 647, 161-163).
[813] Blockmans and Hillion (2013) op.cit. note 810, 92-94.

scope and design of these instruments).[814] The thematic programmes of the latter are strangely decoupled to keep full competence with the responsible Commission services. The development of annual action programmes for the above instruments and their execution remains the responsibility of the Commission. Throughout the whole cycle "the High Representative and the EEAS shall work with the relevant members and services of the Commission" and "[all] proposals for decisions will be prepared by following the Commission's procedures and will be submitted to the Commission for adoption".[815] Also the changes in the basic regulations and the programming documents are to "be prepared jointly by the relevant services in the EEAS and in the Commission under the responsibility of the Commissioner responsible for [Development Policy/Neighbourhood Policy] and shall be submitted jointly with the High Representative for adoption by the Commission".[816]

These arrangements evidently meant a strong dismantlement of DG DEV, which saw a significant part of its work and all geographic desks move to the EEAS. What remained was the portfolio of an upgraded think-tank, delivering input to decision-makers that set the direction of development policy. It is in this light that the decision was taken to merge the latter with DG AIDCO, thereby creating DG EuropeAid Development and Cooperation (DG DEVCO). This was put into effect on 1 January 2011 when a great amount of its staff moved to the EEAS. Ten years after its split (cf. *supra* 2.2.2.) this again unifies policy-making and implementation in one institutional setting. Not only does this provide the Commission with a stronger institutional counterpart to the EEAS, it also ensures that the crux of its development expertise maintains geographic desks and thus their direct feel with the situation on the ground.

Another institutional reorganisation stemming from these changes is the creation of the Service for Foreign Policy Instruments (FPI). This is a body under the responsibility of the HR as Vice-President of the Commission, formally part of that institution but co-located with the EEAS.[817] It aims "to support the attainment of the objectives of the EU foreign and security policy as defined in Article 21 [TEU], in particular as regards peace and conflict prevention, and to project the EU's interests and image in the world".[818] This occurs through its involvement – in varying constellations – in the programming and management of operational expenditure resulting from the IcSP, the CFSP budget, the PI, anti-torture measures, communication and public diplomacy and election observation. The FPI moreover acts as Commission representative in CFSP/CSDP Council working parties to ensure that the relevant budgetary aspects are in line with the Treaty and the Financial Regulation. Its particular set-up serves to guarantee both the Commission's responsibility for budget execution and operational coherence

[814] Art. 9(1-3) EEAS Decision. The IPA, the Instrument for Humanitarian Aid and the financial assistance to Overseas Countries and Territories (OCTs) remain the responsibility of respectively DG ELARG, ECHO and DG DEVCO.
[815] Art. 9(3) EEAS Decision, second paragraph.
[816] Article 9(4-5) EEAS Decision.
[817] Art. 9(6) EEAS Decision.
[818] Service for Foreign Policy Instruments, *Management Plan* (European Commission, Brussels, 2014) 3.

with the EEAS as the Union's institutional core for the more traditional foreign policies (cf. *infra*). The fact that yet a new EU body – of around 120 staff – was to be erected to interlink the Commission with a service that was just created as inter-institutional intermediary, highlights the limitations of the EU institutional system. It had moreover significant consequences for the EEAS' capacity, as most conflict and security experts from former DG RELEX moved to the FPI rather than to the new Service.[819]

The complexity of these arrangements is vividly illustrated by the programming of the Instrument covering Stability and Peace, with varying arrangements governing its three components. The EEAS provides the political guidance of the non-programmable short-term component of Article 3 (assistance in situations of crisis). The FPI takes charge of the identification and appraisal of measures, in close consultation with the EEAS, as well as the implementation and evaluation. Programming for the strategic phases under Article 4 (long-term assistance for conflict prevention, peace-building and crisis preparedness) is conducted by the EEAS, with the definition and execution of AAPs done by the FPI. Article 5 (global and transregional threats) follows the general pattern of EEAS-DEVCO division of labour set out above. That this EU flagship instrument for approaching the security-development nexus necessitates such a complex construction agonisingly illustrates the poor adaptation of the EU's rigid institutional and constitutional system to the challenges at stake. It is moreover counterproductive for the IcSP key aim of better interlinking short and long-term approaches to preventing conflicts. The EEAS Review indirectly acknowledges these suboptimal arrangements. Yet, given "the Treaty responsibilities for the execution of the budget", it can only propose to transfer more financial programmes (such as the long-term IcSP components) from DEVCO to the FPI and explore "more efficient and closer working relations with the EEAS".[820]

All the above instruments are put forward in Article 9(2) of the Decision as the High Representative's central means to ensure "the unity, consistency and effectiveness of the Union's external action". It is rather ironic that this can only be achieved through particularly fragmented procedures. The shadowy provisions of Article 9 leave many questions open: how to establish reporting lines between the Commission, the EEAS and EU Delegations (which provide the crucial connection with the partner countries at each stage of the programming process, cf. *infra* 4.4.), who will set the agenda and how to deal with cases of disagreement? For instance, what will happen when the EEAS does not follow the Commission's general policy choices with regard to aid modalities? Consequently, HR Ashton and

[819] Only three staff members responsible for the IcSP eventually moved to the EEAS, leading the parliamentary rapporteurs to accuse the Commission of acting contrary to the quadrilogue agreement (see: N. Helwig, P. Ivan and H. Kostanyan, *The New EU Foreign Policy Architecture: Reviewing the First Two Years of the EEAS* (Centre for European Policy Studies, Brussels, 2013) 49).

[820] EEAS Review (2013) op.cit. note 726, 8-9. Herewith, she refuted the call from 14 Member States for "the full integration of the [FPI] into the work of the EEAS" (Foreign Affairs Ministries of Austria, Belgium, Denmark, Estonia, Finland, Germany, Italy, Latvia, Luxembourg, Netherlands, Poland, Slovakia, Spain, Sweden, *Non-paper: Strengthening the European External Action Service*, 01.02.2013).

Commissioner Piebalgs immediately announced to conclude a service-level arrangement to sort out remaining procedural gaps. The fact that it took until January 2012 before these so-called "Working Arrangements" could be adopted, highlights the delicacy of this process. In the end, it was the approaching renewal of the MFF that provided the strongest stimulus to conclude discussions.[821]

On a general level, the Working Arrangements specify that Commission services and EEAS "will perform their respective tasks throughout the programming and implementation cycle in full transparency, informing and consulting each other, sufficiently in advance, on initiatives or announcements that could have an impact on each other's areas of responsibility".[822] Further details are accurately summarised by Tannous in Box 11 below. Yet, even that simplified scheme cannot hide the complexity of these procedures, which the Court of Auditors evaluates as "less flexible and more demanding than the ones that existed when DG RELEX was in charge".[823] The language remains moreover open to diverging interpretations. By simply stating, for instance, that the strategic phases of the ENPI, EDF and DCI shall be undertaken by the "EEAS, in agreement with DEVCO",[824] considerable faith is put in the cooperative capacity of the responsible services. The potential breaking points along these various steps are not new, but could in the past at least be managed within a single institution. Tannous therefore calls it "a fault-prone copy of the pre-Lisbon situation".[825]

[821] In fact, if the implementation of aid programmes was to start in 2014, the first three planning phases had to be concluded by early 2013 already (I. Tannous, 'The Programming of EU's External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO' (2013) *European Foreign Affairs Review* 18(3), 345 and 348). Given that the respective Regulations establishing the 2014-2020 financial instruments were only adopted in March 2014, this scenario was soon beyond reach. Consequently, temporary mitigation measures had to be activated (see further: A. Herrero, G. Galeazzi and F. Krätke, 'Early Experiences in Programming EU Aid 2014-2020', *ECDPM Briefing Note No. 54* (European Centre for Development Policy Management, Maastricht, 2013) 6-7). To speed up the process, the Commission and EEAS formed joint negotiating teams. These functioned rather well but dissension emerged over organisational and leadership issues, and the EEAS was reproved for shirking responsibility on PCD to the Commission (UK House of Lords EU Committee, *The EU's External Action Service*, 11th Report of Session 2012-2013, 19.03.2013, paras 131-134).

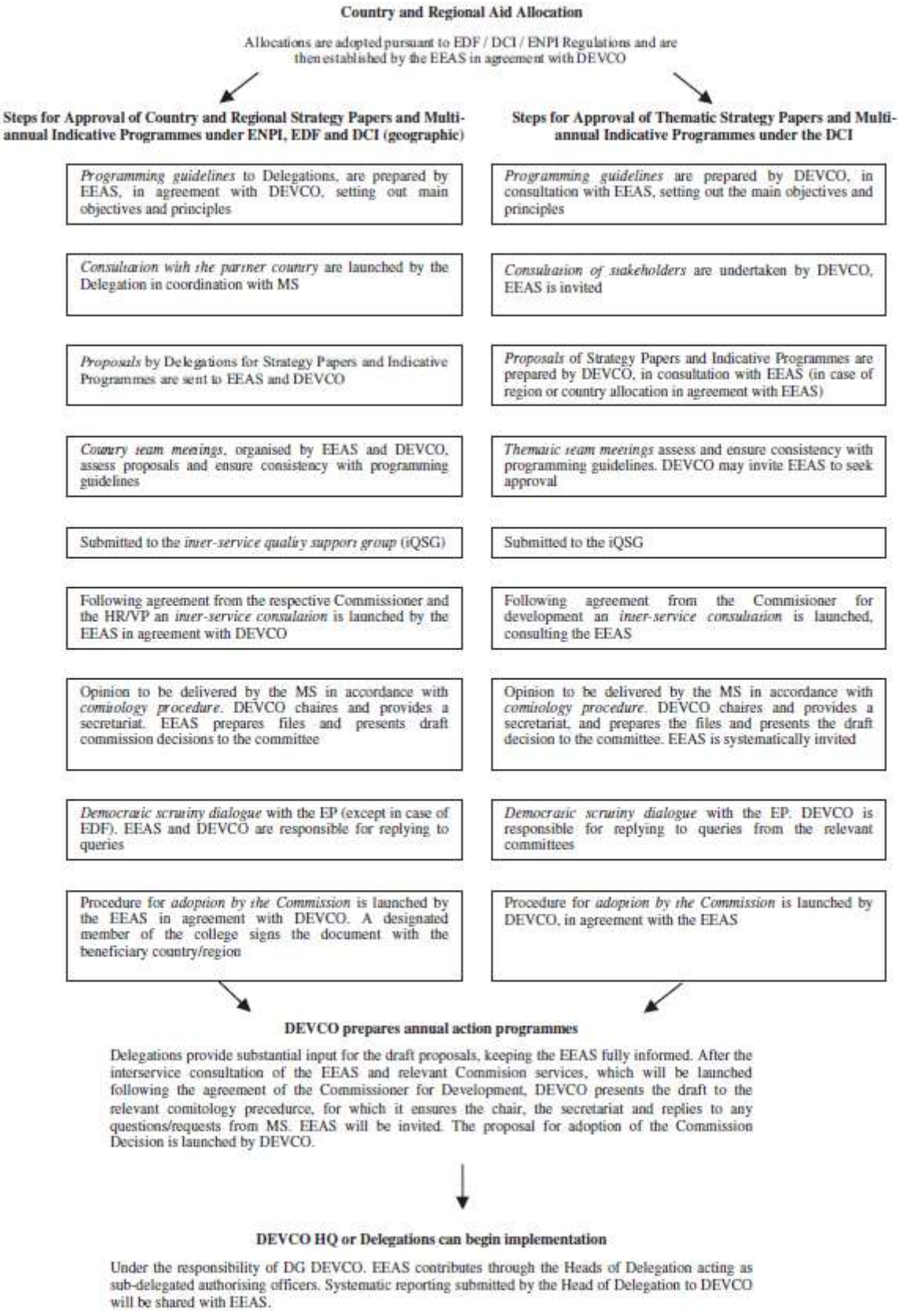
[822] Commission (SEC(2012) 48 final) Working Arrangements between Commission Services and the EEAS in Relation to External Relations Issues, 13.01.2012.

[823] ECA (2014) op.cit. note 723, para. 56.

[824] Commission (SEC(2012) 48 final) op.cit. note 822, 18-19.

[825] Tannous (2013) op.cit. note 821, 351.

Box 11: Programming Arrangements between Commission Services and the EEAS on EU financial assistance and cooperation for the multiannual financial framework



Source: I. Tannous, 'The Programming of EU's External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO' (2013) European Foreign Affairs Review 18(3), 349.

Although not an institution in the sense of Article 13 TEU, and thus not involved in formal decision-making, these arrangements accord the EEAS "quasi-institutional prerogatives" in development programming.[826] This aims to better integrate development policies into EU external action as a whole. In order to reconcile this drive for coherence with the principle of conferred powers, final authority and policy responsibility rests with the Commission.[827] This has given rise to arrangements that render constant inter-institutional cooperation not only necessary but also increasingly complicated, particularly regarding the fragmentation of the IcSP, the split between geographic and thematic DCI programming and the birth of yet a new EU institutional layer in the form of the FPI. A 2013 UK House of Lords report concludes that the EEAS, thus far, "appears to have brought no significant benefit to the EU's handling of … development issues".[828]

The key challenge for the future is thus to minimise the fragmentation of aid programming and maximise the potential for improved PCD. Two different approaches can be distinguished in proposals to remedy the current situation. On the one hand, the Parliament pleads – as welcomed by the HR[829] – for further strengthening the role of the EEAS in crafting the strategic orientation and contributing to the implementation of the external financing instruments.[830] On the other hand, many officials from the Commission, Council and European Council argue that current problems will not be solved by simply extending the powers of the EEAS. Given the Commission's long-standing experience and expertise, as well as its management of spending in related areas such as trade, they plead rather to improve coordination with the Commission.[831]

Doubts have indeed arisen on whether the EEAS is up to a (stronger) role in development policy. Cited problems include capacity constraints as well as a lack of interest in and knowledge of development issues and procedures, leading to a role that is below the one set out in the Working Arrangements. The EEAS itself gives the clearest proof hereof in its organogram, where development cooperation is conspicuous by its absence (cf. Annex). No dedicated leadership is provided and staff with development-related portfolios is scattered over various entities. One important hub is provided in the Development Cooperation Coordination division. It is tasked to support the HR in preparing development issues on the FAC agenda, coordinating EEAS input to DEVCO's proceedings and guiding

[826] Van Vooren (2011) op.cit. note 809, 494.
[827] M. Gatti, 'Coherence vs. Conferred Powers? The Case of the European External Action Service' in L.S. Rossi and F. Casolari (eds), *The EU after Lisbon: Amending or Coping with the Existing Treaties?* (Springer, Cham, 2014) 255-257.
[828] UK House of Lords (2013) op.cit. note 821, 5.
[829] High Representative Ashton (SPEECH/13/530) 'Statement on EEAS Review', address to the European Parliament, Strasbourg, 12.06.2013, 4.
[830] European Parliament (2012/2253(INI)) op.cit. note 746, para. L. While the Parliament does not extend much further on the issue, this appears a notable shift of faith in the EEAS, as it was initially no proponent of an autonomous service taking powers from the Commission (See for instance: E. Brok and G. Verhofstadt, *Non-paper on the EEAS*, 23.03.2010).
[831] See: J. Wouters, et al., *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities* (European Parliament DG for External Policies, Brussels, 2013) 48-49.

other EEAS divisions in upholding the EU's values and principles of development cooperation.[832] It moreover facilitates a monthly cross-departmental Development Cooperation Task Force, comprising staff from various geographic and thematic departments. It is in this regard opportune that the EEAS Review calls to strengthen the capacity of this lone development ranger.[833]

The EEAS' CFSP/CSDP footprint

The External Action Service is assigned to support the High Representative "in fulfilling his/her mandate to conduct the [CFSP] including the [CSDP], to contribute by his/her proposals to the development of that policy, which he/she shall carry out as mandated by the Council".[834] The nature and content of this seemingly vast task is not further defined in the EEAS Decision. Only a close reading reveals two indications on how the foreign service is to put flesh to the bones of this assignment. These are not placed in the rather empty vessel of Article 2, but counterintuitively in Article 4 on the 'Central administration of the EEAS'.

Firstly, Article 4(4) prescribes that the HR "shall designate the chairpersons of Council preparatory bodies that are chaired by a representative of the High Representative, including the chair of the [PSC]". Additionally, these include a number of thematic and all geographic and CSDP-related committees.[835] Of particular importance are the EEAS-designated chairs of the EUMC and PSC, as these are central organs where Member States ensure the day-to-day management of the CFSP/CSDP. In relation to these preparatory bodies the EEAS fulfils the traditional role of the GSC, consisting of administratively, procedurally and politically supporting and advising the chairs. This provides the Service considerable opportunity to leave a mark on policy-making. It is important that the chairs are no isolated figures, but directly linked to the respective geographic and thematic directorates, as provided in the EEAS organogram (cf. Annex). Even though the EEAS does not house the chairs of development bodies, the chairmanship over geographic working parties delivers key opportunities to enhance coherence between CFSP and development competences on a regional level. "[I]n the interest of policy coherence" the EEAS Review nonetheless appeals to extend its chairmanship to all FAC preparatory bodies.[836] Yet, even though Member States generally evaluate EEAS chairs positively, significant problems arise with regard to agenda-setting and planning.[837] The sometimes late submission and ill-preparation of documents deteriorates the quality of discussions.[838]

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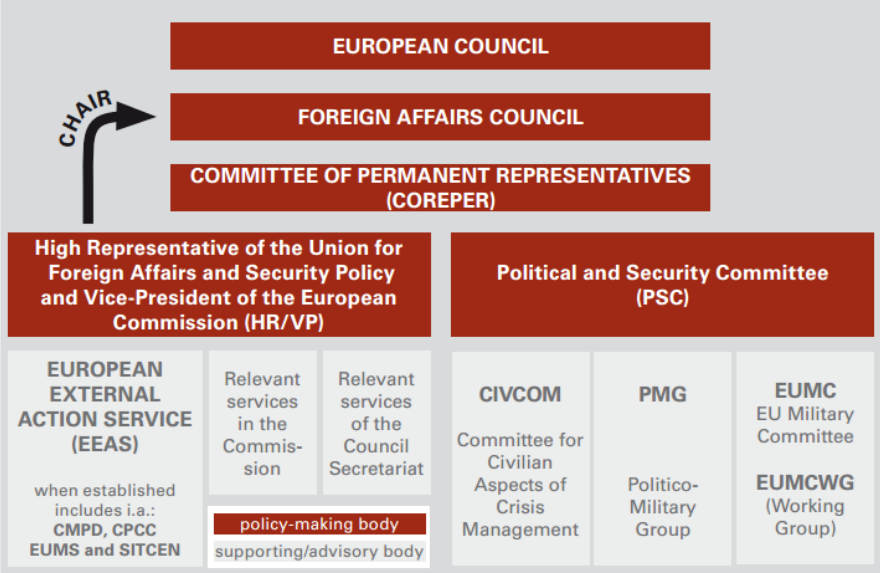
[832] J. van Seters and H. Klavert, 'EU Development Cooperation after the Lisbon Treaty: People, Institutions and Global Trends', *ECDPM Discussion Paper No. 123* (European Centre for Development Policy Management, Maastricht, 2011) 2.
[833] EEAS Review (2013) op.cit. note 726, 9.
[834] Art. 2(1) EEAS Decision.
[835] Council Decision (2009/908/EU) op.cit. note 733.
[836] EEAS Review (2013) op.cit. note 726, 6.
[837] Wouters et al. (2013) op.cit. note 831, 37-40.
[838] ECA (2014) op.cit. note 723, paras 65-67.

Box 12: CSDP crisis management structures



Source: *J. Rehrl and H.-B. Weisserth, Handbook CSDP (Austria Armed Forces/European Security and Defence College, Vienna/Brussels, 2010)* 39.

A *second* informative provision is that the CMPD, CPCC, EUMS and SitCen[839] swell the EEAS' ranks to assist the HR in conducting the CFSP. Unsurprisingly, this occurs "while respecting, in accordance with Article 40 TEU, the other competences of the Union".[840] Even though these operational entities have no decision-making role as such, their niche expertise and technical know-how directly feed into the proceedings of the European Council, the FAC, COREPER, and the PSC (cf. Box 12). This accords them considerable policy discretion, which could turn the EU's diplomatic corps into the keystone of EU civilian and military crisis management. There is however an important caveat. Whereas these bodies are nominally part of the EEAS, they are cocooned internally. Their distinctiveness is legally rooted in the EEAS Decision, with Article 4(3)(a) professing that the "specificities of these structures, as well as the particularities of their functions, recruitment and the status of the staff shall be respected". This is translated in physical terms by keeping crisis management staff in their secured premises of the Kortenberg building and the Royal Military School.

Rather than adapting these organically grown CFSP/CSDP crisis management bodies to their inclusion in the EEAS, new bodies have been set up to fulfil the needs and goals of the foreign service. From its earliest days this included the Crisis Response and Operational Coordination department (CROC) under the leadership of Managing Director Miozzo. As much as the absence of development cooperation in the EEAS organogram could be read as sign of limited engagement, the immediate inclusion of CROC paraded the crisis-oriented focus of the new foreign service. The same goes for the Security Policy and

[839] SitCen was subsequently refurbished and rebranded as EU Intelligence Analysis Centre (IntCen).
[840] Art. 4(3)(a) EEAS Decision.

Conflict Prevention directorate, which consists today of divisions on 'WMDs, conventional weapons and space', 'Conflict prevention, peace building and mediation', 'Security policy' and 'Sanctions policy'. Another key step was taken in July 2011 with the creation of the EU Situation Room (SITROOM), drawing together previously scattered resources. The SITROOM is placed in the CROC directorate and co-locates civilian Duty Officers and military Watchkeepers in a cost-saving and efficiency-gaining effort.[841] It aims to "provide worldwide monitoring, current situation awareness, and front line service for EU Delegations and CSDP Missions/operations, 24 hours a day, 7 days a week, the year around".[842]

Despite the obvious common ground with the CFSP/CSDP crisis management bodies, their division was – in addition to the legal and physical separation mentioned above – institutionalised in the first EEAS organogram. This foresaw no linkages, other than through the HR, between the CFSP bodies and the rest of the Service. This contributed to the perception that the two groups of security-oriented entities were direct competitors. In line with the call of Article 4(3) EEAS Decision to ensure "[f]ull coordination between all the structures of the EEAS", this separation was partly undone in continuously published amendments to the organogram. These directly attached the Security Policy and Conflict Prevention directorate to the EEAS Deputy Secretary-General (SG) for inter-institutional affairs and placed it under the common umbrella of 'Security Policy and CSDP Structures'. Importantly, the latter is no longer a separate island, but is brought under the political authority of the CROC Managing Director (MD). While these are highly relevant adaptations, the division of labour between the EEAS' various crisis and conflict-related entities is still to be illuminated. The confusion hampers coordination and leads to costly (both in resources and time) overlaps in areas such as crisis prevention, crisis response planning and SSR.[843] In this light the EEAS Review proposes to explore ways to make the expertise of EUMS military staff more widely and directly available to other departments, "without prejudice to [their] specific profile and administrative status".[844] It moreover calls to clarify reporting lines and better integrate the CSDP structures into the general operation of the EEAS.[845]

In sum, the EEAS mandate in the area of CFSP/CSDP is formally limited to 'supporting', 'assisting' and 'cooperating'. Nevertheless, by incorporating the crisis management bodies, housing the chairs of important FAC preparatory organs and taking over supporting tasks of the GSC, the foreign service is involved in all phases of foreign, security and defence policy-making. This ranges from the preparation

[841] P. Vimont, 'The European External Action Service and Complex Crises' in P. Pawlak and A. Ricci (eds), *Crisis Rooms: Towards a Global Network?* (EU Institute for Security Studies, Paris, 2014) 36.
[842] High Representative Press Release (A286/11) 'Catherine Ashton visits the new EU Situation Room', 17.07.2011.
[843] ECA (2014) op.cit. note 723, para. 32.
[844] EEAS Review (2013) op.cit. note 726, 6.
[845] Ibid., short-term recommendation 1, medium-term recommendation 3 (further on the possible timing and legal implications of these recommendations see: S. Duke, 'Reflections on the EEAS Review' (2014) *European Foreign Affairs Review* 19(1), 25-26.

over decision-making to implementation.[846] To make the most of this involvement, the capacity and flexibility of the CFSP crisis management entities could serve as a source of inspiration in preparing and supporting the work of the relevant FAC working parties. The way in which the HR-designated chairs are integrated into the service, on the other hand, forms a model for better connecting the crisis management bodies to other relevant EEAS entities.

4.3.2. Making use of the security-development network: mind the gap!

The EEAS is designed as a functionally autonomous body that has a hand in managing the whole EU security-development toolbox. Its multifarious composition of security and development-related entities, with staff originating from various diplomatic and institutional backgrounds, establishes the EU diplomatic corps as a security-development network. The model of a network, as opposed to the pre-EEAS approach of central coordination, provides a point of contact and channel of cooperation, enabling a constant and decentralised exchange of experience-based knowledge between all relevant actors. This stimulates problem-oriented cooperation and enables responsive coordination, adapted to the specificities of each policy field (cf. *infra* 6.1.). In the optimal scenario such a laboratory of integrated policy-making allows the EU to reduce duplication, eliminate areas of overlapping competences and diminish the risk of inter-institutional rivalry on the continuum of security and development policies.

Such a scenario will however not actualise without striking a blow. The EEAS interlinks competences but does in no way end the delimitation between them, nor has its creation diminished the Treaty powers of the traditional EU external actors. The remaining procedural and institutional gap lurks around every corner. For one thing, this submits the EEAS' effectiveness to the mercy of cooperation by EU institutions and Member States, which have attached strong safeguards to the coherence mandate of the EEAS. For another, fragmentation remains the other of the day, both in the Service's relations with other institutions as internally. While many of the above challenges lay beyond its own area of control, scaled-up EEAS leadership and policy guidance can come a significant way in reaping the potential of this security-development network.

A conditional coherence mandate

The Lisbon Treaty's integration-delimitation paradox resulted in a service on which all main policy actors agree that it should enhance coherence, yet not at the price of their own foreign policy

[846] As stressed in the EEAS Review "the Lisbon Treaty left CFSP intergovernmental and therefore subject to unanimity: in the absence of collective political will and agreement between Member States, this is a limiting factor on decision-making. The longer term perspective of the EEAS allows it to play an important role in policy formulation, brokering and implementation" (EEAS Review (2013) op.cit. note 726, 7).

prerogatives. For this purpose Member States and institutions put in place a number of safeguards to ensure that the EEAS does not become an "independent kingdom" outside their control.[847] This puts considerable strain on the EEAS' potential to pull together the various strands of EU foreign policy. The most important safeguard is that the EEAS is established as a "body" – not an institution – which is "functionally" – not organisationally or substantively – "autonomous" from the GSC and Commission.[848] Even though the term, which was floated in the *quadrilogue* negotiations, is not retained in the final Decision, this *de facto* designs the EEAS as a *sui generis* body.

The Treaty refers at various occasions to term 'body' but does not define what it means, nor can this be detracted from the way in which it is used. This unclear status has been a source of inherent contradictions and considerable confusion.[849] Whilst the only certainty seems that it is not an institution, it should nonetheless be treated as such in the context of the Staff Regulations.[850] The fact that it disposes of its own premises, a separate website and email addresses, signal a degree of independence. Yet, simultaneously its distinct terminology (e.g. MDs rather than DGs, a Chief Operating Officer and a Corporate Board) serves to emphasise precisely that it is not a full-fledged EU institution. The EEAS is accorded its own budget, governed by the standard discharge procedures.[851] However, more than scaling up its institutional posture, this was the result of intensive Parliamentary lobbying to ensure scrutiny over the EEAS. Further, operational expenditure remains within the Commission section of the budget, according it final control over all instruments and operations. Another challenge is that, in meeting all the different demands for support and cooperation, the EEAS must be "guided by the principle of cost-efficiency aiming towards budget neutrality".[852] This principle is applied very strictly,[853] meaning that the Commission and the GSC transferred foreign policy structures but not the respective support services. This obliges the EEAS to fall back on these institutions for many particularly costly aspects of setting up and managing an entirely new body of over 3,400 staff. This is arranged through pragmatic SLAs that provide short-term solutions, but do not fully address the EEAS' needs nor take into account the considerable savings that result from its establishment. The Commission for instance, without a plausible justification, continued to take charge of the security inspections in Delegations and the Council ended its support for maintaining secure information systems before an alternative was agreed.[854] This led the High Representative to raise the

[847] European Parliament (PV 21/10/2009 – 8) Debates on the institutional aspects of the creation of a European External Action Service, Strasbourg, 21.10.2009, intervention by Elmar Brok.
[848] Article 1(2) EEAS Decision. One might even wonder whether an autonomous service is no *contradiction in terminis*.
[849] Crowe therefore argued that a more straightforward solution would have been to establish the EEAS as an agency (Crowe (2008) op.cit. note 805, 21).
[850] Preamble, eighth indent EEAS Decision.
[851] Article 8(1) EEAS Decision.
[852] Preamble, 15th indent EEAS Decision.
[853] ECA (2014) op.cit. note 723, para. 21.
[854] EEAS Review (2013) op.cit. note 726, 10.

alarm in 2011 as to the "structural deficit" resulting from the Service's limited financial and administrative means.[855]

A final intrinsic contradiction is that the EEAS is entrusted with "the legal capacity necessary to perform its tasks and attain its objectives", but not with formal legal personality.[856] As a consequence, the extent to which the EEAS can defend and enforce its prerogatives before the EU Court of Justice is uncertain.[857] On the one hand, the language of Article 263 TFEU appears to indicate that the EEAS may be brought before the Court for the annulment of its actions. This provision indeed empowers the Court to "review the legality of acts of *bodies*, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties". The question is then whether the EEAS produces acts with these legal effects and has the capacity to act as a defendant. Given that the Service has functional autonomy, it should at least have standing before the CJEU in disputes concerning administrative measures. This is confirmed by a series of staff cases before the Civil Service Tribunal[858] as well as a case on the implementation of its budget.[859] As the EEAS does not have any decision-making autonomy, acts pertaining to the management of policies can arguably not be attributed to it, but rather to the institution maintaining the final say (for instance the Commission in the case of development programming). It is even more questionable whether the EEAS has *locus standi* to challenge (in)action of EU institutions or Member States damaging its administrative or policy prerogatives. Its *sui generis* status means that it would need to act as non-privileged applicant and it is not certain whether it would fulfil the particularly restraining conditions this entails.[860] Whereas the restriction to "any natural or legal person" can already be problematic given the EEAS' lack of formal legal personality, it might even be harder for the Service to proof direct and individual concern.[861] Also scenarios where either the Commission or the Council would step in for the EEAS in proceedings as privileged applicant are difficult to envisage. This could mean that one of these institutions would litigate against the other in defence of the EEAS. Not only does this risk to undermine the functional autonomy of the Service, it might also be divisive in political terms and put the accountability of the High Representative, as institutional bridge and patron of the EEAS, severely to the test.

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[855] High Representative (2011) see note 805, para. 32.

[856] Article 1(2) EEAS Decision. Gatti convincingly argues that the EEAS has *de facto* legal personality and that the absence of an explicit mention hereof should be seen as a political rather than a legal choice (Gatti (2014) op.cit. note 796, 668-671).

[857] For an elaborate analysis: Ibid., 664-681.

[858] Indeed Article 270 TFEU entrusts jurisdiction to the Court for all disputes "between the Union and its servants". See for instance: Case F-53-13, *Diamantopoulos v EEAS,* ECLI:EU:F:2014:22; Case F-154/12, *Locchi v EEAS,* ECLI:EU:F:2013:29; Case F-15/11, *Mariën v EEAS,* ECLI:EU:F:2011:144; Case F-64/12, *Martinez Erades v EEAS,* ECLI:EU:F:2012:154.

[859] Case C-501/13, *Page Protective Services v EEAS*, ECLI:EU:C:2014:2259.

[860] Article 263 TFEU, fourth indent.

[861] Gatti lists some limited examples of Commission measures affecting the EEAS' role in the legislative process, against which it might have chances to object before the Court. These include decisions authorising the compensation of certain administrative expenses incurred by the EEAS, acts implementing the Financial Regulation, Commission instructions to its officers in EU Delegations (cf. *infra* 4.4.2.) and changes to the Staff Regulation (Gatti (2014) op.cit. note 796, 672-674).

Two further textual safeguards symbolise the preoccupation of institutions and Member States with ensuring control over the future development of the foreign service. The first results from Article 2(1) EEAS Decision, stating that the EEAS' support to the HR in fulfilling her mandate as President of the FAC and Vice-President of the Commission shall be "without prejudice to the normal tasks" of respectively the GSC and the services of the Commission. What these normal tasks consist of "may be subject to variable interpretation especially since the very idea of normalcy has shifted dramatically in EU external relations with the introduction of the Lisbon Treaty and, in particular, the EEAS".[862] The GSC loses most of its external responsibilities to the EEAS and also the Commission DG DEVCO looks nothing like the former DG DEV. In the context of development programming it is for instance unclear what the practical implications are of a foreign service that has to work throughout the whole programming cycle with the relevant services of the Commission, while remaining at the same time without prejudice to their normal tasks. Given that it would be hard for anyone to argue that the post-Lisbon situation is business as usual, it appears that this lofty language rather serves the legal departments of the Commission and the GSC a basis to argue against the intrusion of the EEAS in what they consider their territory. Declarations 13 and 14 annexed to the Lisbon Treaty contain a remarkably similar, yet considerably more defensive statement on the part of Member States. These underline that the TEU provisions on CFSP, including "the establishment of an External Action Service do not affect the responsibilities of the Member States, as they currently exist" and "will not affect the existing legal basis, responsibilities and powers of each Member State in relation to the formulation and conduct of its foreign policy".[863]

The effectiveness of the EEAS in interconnecting the various dots of EU external action thus largely rests on the constant cooperation of the traditional EU external actors. A lot will depend on its capacity to find common ground with its numerous interlocutors and clear a path that steers between the 'normal tasks' of the Commission and the GSC as well as the Member States' foreign policy responsibilities 'as they currently exist'. There is moreover internal disagreement on whether the EEAS should take a pro-active policy-shaping approach or rather stick to its role of inter-institutional support hub. The former tends to be the preference of staff with a Commission background, whereas personnel transferred from the GSC and Member States have a more reserved attitude.[864]

[862] S. Duke, 'The European External Action Service', *DSEU Policy Paper 2* (The Diplomatic System of the European Union, 2010) 2.
[863] Declarations No. 13 and 14 annexed to the Treaty of Lisbon, op.cit. note 355.
[864] Wouters et al. (2013) op.cit. note 831, 26-27.

Addressing fragmentation: EEAS leadership and policy guidance

The centralisation of development and CFSP actors and instruments in the EEAS render the EU's commitment to the security-development nexus considerably more visible and thus prone to public scrutiny. However, the above discussed institutional protectionism, combined with the insulation of CFSP and CSDP competences, implicates that diffusion of policy responsibility remains the order of the day. Three main sources of fragmentation, complicating efforts to enhance external action synergies, can be distinguished. Failing to address these will not only render the EEAS' contribution to coherence delusional, it might also backfire on the credibility of the Union's entire external action system.

First, the creation of the Service has incited the conception and maintenance of parallel structures in the Commission and to a lesser extent the GSC. DG DEVCO in particular reacted with institutional counterparts for the EEAS, most outspoken in the creation of a unit for Fragility and Crisis Management (the first ever organisational entity in this area to be included in the Commission's development services).[865] Such bureaucratic parallelism lays at basis of considerable duplication, which is especially striking with regard to the crisis monitoring services across the institutions. The Court of Auditors denounced the existence of three separate situation monitoring entities within the EEAS, the Commission and the GSC,[866] whereas Boin, Ekengren and Rhinard count 84 different – and often incompatible – systems to collect, analyse, check and communicate information on unfolding crises.[867] Besides evident losses of efficiency and resources, this parallelism implies that coordination between structures with similar titles and task descriptions, "while increasingly necessary, became ever more tedious, shot through with contention and hampered by a mismatch between barely augmented staff resources and rhetorical political ambitions".[868]

In reaction to such complexities, a number of coordination mechanisms have been put in place within the EEAS, doing justice to its status of inter-institutional policy hub. A major innovation is the EEAS Crisis Response System (CRS), which contains the above mentioned SITROOM, the Crisis Management

[865] A. Sherriff, 'Is there a new impetus on the EU to deal with conflict and fragility in third countries? Part 2: recent policy developments', *ecdpm.org/talking-points*, 25.11.2011

[866] ECA (2014) op.cit. note 723, para. 56; in May 2013 the Commission created an Emergency Response Centre (ERC) and the GSC supports the implementation of Integrated Political Crisis Response arrangements (IPCR). The EEAS Review calls to co-locate the EEAS SITROOM with the ERC in order to generate savings and avoid duplication (EEAS Review (2013) op.cit. note 726, 5).

[867] A. Boin, M. Ekengren and M. Rhinard, 'Sensemaking in Crises: What Role for the EU?' in P. Pawlak and A. Ricci (eds), *Crisis Rooms: Towards a Global Network* (EU Institute for Security Studies, Paris, 2014) Annex 1. Strikingly, the EEAS itself has three different early warning systems, located in the Conflict Prevention, Peace-building and Mediation Instruments Division, EU INTCEN and the SITROOM, with incongruent reporting channels (H. Manchin, 'Overview of Crisis Rooms' in P. Pawlak and A. Ricci (eds), *Crisis Rooms: Towards a Global Network?* (EU Institute for Security Studies, Paris, 2014) 167-168). The Parliament therefore calls to carry out a systematic and in-depth audit aimed at identifying duplication and further developing the practice of joint technical and logistical services (European Parliament (2012/2253(INI)) op.cit. note 746, paras 10-11)

[868] D. Spence, 'The Early Days of the European External Action Service: A Practitioner's View' (2012) *The Hague Journal of Diplomacy* 7(1) 119.

Board and the Crisis Platform mechanism. The Board functions under the chairmanship of the HR or the EEAS' Executive SG. Responsible for ensuring consistent EU responses to natural or man-made crises around the globe, it can launch Crisis Platforms bringing together all the Union's competent services.[869] These Platforms serve to facilitate first-hand information exchange, formulate operational conclusions and promptly translate these into concrete action. This model soon proofed successful and was replicated in structures such as a Conflict Prevention Group, the SSR Informal Inter-Service Working Group, country team meetings and the Intelligence Steering Board.[870] While coordination clearly improved, these platforms do however nothing to address functional overlap. The Court of Auditors therefore found that this was still insufficient to realise the EEAS' full potential.[871] Moreover, protectionism occasionally gains the upper hand and has led these platforms to meet less often and be less inclusionary than initially envisaged. Another key problem is that the specialised units of DEVCO, EEAS and FPI on the security-development interface are insufficiently linked to geographic departments and especially higher-level decision-making.

Second, the EEAS' dual functions in the TFEU and CFSP realms entail a split accountability that may proof particularly demanding in practise. As a general rule the EEAS operates under the authority of the High Representative. In the words of EEAS MD for Africa Westcott, "Baroness Ashton is our boss and we are answerable to her, with her HR hat on, for the conduct of the EU's foreign policy, and, with her Vice-President's hat on, for the overall coherence of the EU's external action".[872] In the EEAS leadership this is indeed presented as an important asset:

> *Very much like our new EEAS building (sitting, Solomon-like, halfway between the two opposite sides of rue de la Loi), the Service is not the exclusive expression of the community method safeguarded (and cherished) by the Commission; nor of the intergovernmental method characterising the working of the Council. The EEAS encapsulates (and perhaps transcends) them both.*[873]

The extent to which this is workable depends on the EEAS' "chameleon"-capacity[874] to transform smoothly between its functioning as a GSC department when assisting the HR in conducting the CFSP and preparing the FAC, and as a Commission DG under TFEU responsibilities. With regard to development programming the EEAS Decision is clear and states that "all proposals for decisions will

[869] High Representative (2011) see note 805, 4.
[870] Moreover, in case of a major emergency the Commission and the EEAS will jointly draft an Integrated Situational Awareness and Analysis (ISAA).
[871] ECA (2014) op.cit. note 723, paras 51-54.
[872] N. Westcott (EEAS MD for Africa), 'A New Framework for European Relations with Africa', speech to the EUISS Conference on EU-Africa Foreign Policy after Lisbon, Brussels, 18.10.2011.
[873] D. O'Sullivan (former EEAS Chief Operating Officer), 'The EEAS, national foreign services and the future of European diplomacy', speech at the EPC Policy Dialogue, Brussels, 06.09.2012, 5.
[874] Blockmans and Hillion (2013) op.cit. note 793, 21.

be prepared by following the Commission's procedures".[875] Yet, also for other assignments such as the preparation of proposals for adoption by the college, Article 18(4) TEU – stating that the HR shall in this capacity "be bound by Commission procedures" – can be applied by extension to the EEAS. The latter is accorded the same rights and competences as any other Commission department and participates fully in the institution's inter-service consultations. When assisting the HR in her CFSP and FAC responsibilities, the EEAS is incorporated in the vertical chain of command running through the preparatory bodies and HR to the 28 Member States represented in the Council, and finally the European Council. This implicates that depending on whether EEAS staff is dealing with security or development-related issues they are answerable to different principals. This offers opportunities for better exploiting synergies, but simultaneously holds the risk of internalising old complexities of determining the often fuzzy boundary between development cooperation and CFSP/CSDP. If the associated difficulties are not overcome they could drag the Service to the core of future *SALW*-like legal disputes on competence delimitation (cf. *infra* 5.2.2.).

A *final* fragmentation challenge consists of reconciling the diverging working environments of development and CFSP/CSDP actors to build a common EEAS *esprit de corps*. Given that the Service is composed of transferred and seconded staff, it is no straightforward undertaking to ensure staff loyalty to the EEAS rather than their institutions of origin. The transfer *en bloc* of a great number of Commission and GSC entities has helped the foreign service to become operational quickly, but considerably obfuscates this process. The EEAS is faced with a constant challenge to ensure that the allogamy of Union and national, communitaurised and more intergovernmental, development and security-oriented staff, bodies and policies, forms a hybrid foreign service rather than a mere juxtaposition of distinct elements. Particularly in the early years, the internal quest for compromise among this wide variety of players, tended to divert valuable energy and time away from the EEAS' core tasks.[876]

The two main elements that lay at the basis of this fragmentation – i.e. institutional protectionism and the insulation of the CFSP/CSDP – are part of the reality that the EEAS has to deal with. There are nonetheless two key issues which the HR and EEAS management can address point-blank to address fragmentation and better exploit the potential of its security-development laboratory: internal leadership and policy guidance. These could help to soften the CFSP-TFEU delimitation and improve the EEAS' policy in- and output, which, in turn, can command more confidence of institutions and Members States in the role and potential of the EEAS.

[875] Art. 9(3) EEAS Decision, second paragraph.
[876] See for instance: A. Rettman, 'Staff leaving EU diplomatic service amid bad working conditions', *euobserver.com*, 30.09.2011

The *first* element is rather paradoxical. Despite having a particularly top-heavy structure, the EEAS falls short on leadership. Its pyramidal design largely results from the rule that one third of staff needs to come from Member States. The *en bloc* transfer of Commission and GSC departments occupied most management posts, meaning that additional high-ranking functions had to be generated to match the seniority of national diplomats. This led to duplicated layers of management (with Managing Directors and Directors sometimes in a one-to-one relationship),[877] diffused chains of command and opaque relationships between the EEAS' geographic and thematic entities.[878] Two structures were called into being to clarify the hierarchy and set the direction for the EEAS: the Corporate Board and the Political Affairs Department. The former oversees the daily work of the EEAS and consists of the HR, the Chief Operating Officer, the Executive Secretary General and two Deputy SGs – one for inter-institutional and another for political affairs. The latter holds responsibility over the Political Affairs department consisting of divisions for Policy Coordination, Strategic Planning and one with responsibility for preparing and chairing PSC, CIVCOM and PMG meetings. The Policy Coordination division is assigned to assist the High Representative "in her task of ensuring consistency of the Union's external action".[879] While this division is valued for its hands-on support and guidance, its exact role remains unclear to many of the EEAS top and lower-level staff.[880] The same holds true for the Corporate Board which has no formally enunciated task description. By guaranteeing the daily management of the Service, the Board aims to exempt the overburdened HR from its technical ins and outs. All the MDs report to the Corporate Board, which facilitates better coordination but runs the risk of sacrificing decision-making agility to quality assurance.[881] Furthermore, the fact that the HR still has 23 direct reporting lines[882] illustrates that the full potential for reducing her workload has not been realised. The EEAS Review therefore calls to streamline its top management structure, for one thing by merging the posts of Executive SG and Chief Operating Officer into a single Secretary General.[883] This has been picked up by HR Mogherini and a major reform of the EEAS' senior management and organisational structure is currently in the pipeline. The likely result will be a significantly simplified organogram, with a more lucid hierarchical structure running down from a reinforced Secretary-General.[884]

[877] There is for instance both a Managing Director and a Director for the Americas, as well as for North Africa, Middle East, Arabian Peninsula, Iran and Iraq (cf. Annex – EEAS organogram).
[878] In spite of ongoing efforts to gradually cut down on these posts, in 2014 still over 50% of all EEAS administrators were AD12 (Head of Unit-level) or above (European Parliament Resolution (A7-0199/2014) with observations forming an integral part of its Decision on discharge for implementation of the general EU budget for the financial year 2012, Section X – European External Action Service, 03.04.2014, para. 19).
[879] High Representative (12401/10 ADD 4) see note 791, p. 2.
[880] Interviews with EEAS officials in Addis Ababa and Brussels in June 2013 and May 2014.
[881] Wouters et al. (2013) op.cit. note 831, 22.
[882] ECA (2014) op.cit. note 723, para. 33.
[883] Medium-term recommendation 5 of the EEAS Review (2013) op.cit. note 726.
[884] N. Gros-Verheyde, 'L'organisation du service diplomatique européen revue et simplifiée', *Bruxelles2.eu Le Club*, 19.06.2015.

A *second* – related – issue that can be addressed is the level of policy guidance. The Corporate Board and Political Affairs department are there to ensure that the totality of EEAS activities contributes to the political objectives set by the HR. However, these remain generally vague and often boil down to blank calls for coherence and comprehensiveness. Even though the EEAS is said to be "uniquely well placed in the EU institutional framework to promote the strategic direction of the EU's external action",[885] the Court of Auditors finds that it favours ad hoc approaches.[886] This increases the chances of fragmented or counterproductive action. Departments and divisions plan their activities rather independently, which complicates internal fine-tuning as well as alignment with the Commission annual work programme or the 18-month agenda of the Presidency trios. Also this issue is likely to be addressed in the announced reorganisation of the EEAS, which could already be effectuated by September 2015.

In sum, as a central policy interlocutor with a heterogeneous composition the EEAS could finally put the rhetoric of coordination across the security-development nexus in practise. Its setting enables a decentralised and cross-fertilising exchange of experience-based knowledge in a network of security and development-oriented actors. Yet, as with the High Representative, the EEAS' design gives the impression of a halfway solution that is still in an experimental phase. In spite of all the faith put in this new body, its "hands are tied to the competences attributed to the political masters it is supposed to serve".[887] Consequently, the old challenges of delimitating CFSP and development cooperation seeped through in the EEAS' constellation. This causes considerable hurdles of duplication, coordination, accountability and institutional solidarity, which at present prevent the EEAS from collecting the full gains in terms of efficiency and coherence. Besides the challenges of delimitation there are also risks attached to increased integration of both policy fields. The development-related responsibilities of the EEAS have intensified the long-standing concern about the potential instrumentalisation of aid.[888] However, the fears that this would lead to an increased exposure to short-term political and economic pressures appear unfounded at this stage.[889] Ironically, this is less due to a commonality of objectives than to the limited interest of the EEAS to make its imprint on development cooperation.

[885] Ibid., 7.
[886] ECA (2014) op.cit. note 723, para. 25.
[887] S. Blockmans and M.-L. Laatsit, 'The European External Action Service: Enhancing Coherence in EU External Action' in P.J. Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (TMC Asser, The Hage, 2012) 157.
[888] For example: CONCORD, 'EEAS One Year On: "Work in progress" for poverty eradication' (European NGO Federation for Relief and Development, Brussels, 2012) 15p.
[889] Herrero, Galeazzi and Krätke (2013) op.cit. note 821, 13.

4.4. The Union Delegations[890]

The passing reference in the Lisbon Treaty, stating that "Union delegations in third countries and at international organisations shall represent the Union", does not do credit to the major break with past practice this causes.[891] Previously, external representation only occurred through Delegations of a single EU institution, the European Commission.[892] For the first time in the history of European integration, the EU now disposes of quasi-embassies that represent, implement and defend the entire range of EU competences abroad. These Delegations, which constitute the EU's eyes, ears and face on the ground, hold great potential. The Union's global role indeed depends on the acceptance of and relations with third countries and international organisations, two elements that are to a great extent developed in-country. In the most ambitious of terms, High Representative Ashton professed – in one of her first public statements after she took up the post – that these Delegations should form "a network that is the pride of Europe and the envy of the rest of the world … It should offer our citizens added value to what their countries already do, and give our partners around the world a trusted and reliable ally on European issues".[893] Despite setting the bar this high, the creation of EU Delegations passed rather unnoticed in scholarly and public debate. All efforts and eyes first turned to erecting the EEAS, of which the EU Delegations form an integral part. Only recently has attention started to shift to the field, as reflected in the greater focus on Delegations in the 2013 EEAS Review. Remarkably, this did not lay bare similar haggling and criticism. Rather to the contrary, while it is generally agreed that a lot of work remains to be done, EU Delegations are hailed as the "perhaps unintended"[894] but "most conspicuous"[895] success story of the new external action constellation.

A concise historical overview of the emergence and evolution of Commission Delegations will first contrast their legal framework to the practice on the ground. This aims to understand what kind of offices were exactly in place on the eve of the Lisbon Treaty's ratification (4.4.1.). A second section will analyse the changes introduced by the Lisbon Treaty and put flesh to the bones of the current Delegation's rather void primary law status (4.4.2.). A final part will then study whether these quasi-

[890] This article draws from the author's following paper: H. Merket, *From Commission to Union Delegations: A Legal-Institutionalist Analysis*, Paper presented at the conference 'European Union in International Affairs IV' (Brussels, 22-24.05.2014) 24p. Important insights on the functioning of these new diplomatic entities were obtained during a three-month period of participatory observation at the EU Delegation to Ethiopia, where the author worked as part of the Governance and Civil Society section.

[891] Article 221 TFEU.

[892] The two 'EU liaison offices' of the Council Secretariat in Geneva and New York were, even though physically separate, legally part of the Commission (Crowe (2008) op.cit. note 805, 22).

[893] C. Ashton, 'Quiet diplomacy will get our voice heard', *The Times*, 17.12.2009.

[894] R. Balfour, 'Revolution from the periphery', *European Voice*, 25.07.2013.

[895] J. Wouters and B. Van Vooren, 'More clarity and cohesion required', ibid., 04.07.2013.

embassies are up to the tasks at issue and shed light on their potential with regard to the security-development nexus (4.4.3.).

4.4.1. The emergence of Commission Delegations: diplomacy by default

EU diplomacy is no recent phenomenon, but is in fact as old as the European integration project itself. Already in 1954 the European Coal and Steel Community opened a first Commission information office in Washington,[896] soon followed by an ECSC liaison office for Latin America and a first diplomatic mission in 1956 to London. The most important stimuli for expanding this network geographically were the Commission's role in trade negotiations and particularly aid programming. The highly technical nature of large EDF-funded projects, mainly targeted at infrastructure works, required on-the-spot presence of very specific expertise. This triggered the unfolding of an expansive web of EDF offices under the umbrella of a European Agency for Cooperation. These roots of European diplomacy were not based on any legal framework or blueprint, resulting in an internally heterogeneous design. The various offices did initially not even represent a single EU institution but three separate Commission DGs: press and information offices of the former DG Press, a number of diplomatic missions of DG External Relations and EDF offices of DG Development.

The Commission's network continued to evolve rapidly. Particularly DG RELEX Delegations tended to operate on the same footing with national diplomatic missions, requiring similar protection and privileges. Consequently, these Delegations sought and obtained, throughout the 1970s, full diplomatic recognition from their host country authorities, based on the privileges and immunities defined in the 1961 Vienna Convention on Diplomatic Relations (VCDR). Although the latter limits membership to states,[897] its regime was extended in the widest possible manner through bilateral establishment agreements.[898] EU Member States were presented with a *fait accompli* and saw this as an act of piracy by the Commission.[899] The recognition of the more technical development offices went less smoothly and, initially, these had to satisfy themselves with a formal mention of their existence in the 1975 Lomé Convention.[900]

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[896] Shortly after the inglorious demise of the European Defence Community (cf. *supra* 2.1.2.) Jean Monnet decided to open this ECSC information office to convince the US government that Europe's post-war project had not lost traction (European Commission, *Taking Europe to the World: 50 Years of the European Commission's External Service* (Office for Official Publications of the European Communities, Luxembourg, 2004) 11-12).

[897] Articles 48 and 50 Vienna Convention on Diplomatic Relations (VCDR), Vienna, UNTS vol. 500, p. 95, 18.04.1962.

[898] See further: R. Ambast and V. Tyagi, 'Ambassadors of Europe: An Insight into the Evolution of the European Union and International Diplomatic Law' (2008) *Studia Diplomatica* LXI(4), 173-189.

[899] V. Dimier and M. McGeever, 'Diplomats Without a Flag: The Institutionalization of the Delegations of the Commission in African, Caribbean and Pacific Countries' (2006) *Journal of Common Market Studies* 44(3), 496. It should also be noted that host countries were, for the sake of clarity, often demanding party for granting such status, the more so since they had already diplomatically recognised the Community by accrediting their own ambassadors in Brussels.

[900] Articles 26 and 31 ACP-EEC Convention of Lomé (1975) op.cit. note 151.

A next key moment for European diplomacy was the Commission's full association to the EPC in the 1981 London Report.[901] Whereas in Brussels this chiefly implied a silent seat at the EPC table, the involvement of its foreign network was considerably more intensive. Member States – particularly those with limited diplomatic resources – happily relied on the Delegations' expertise in EC policy, assisting presidencies as well as their institutional memory. This implied that all Commission offices became intimately involved with sensitive information in places where confidentiality and discretion were of the essence. One direct consequence was that the 1989 revision of the Lomé Convention provided that "the ACP States shall grant Commission Delegations privileges and immunities similar to those granted to diplomatic missions".[902] By the end of the 1980s the Commission, which was then essentially the executive arm of an economically-oriented international organisation, disposed of 89 Delegations around the globe, composed of 440 officials and 1440 local staff, which have from the outset played a critical role.[903]

This rising status was consolidated in the Treaty of Maastricht, according Commission Delegations primary law recognition. Given the Commission's determined exclusion from CFSP decision-making, it is puzzling that the only Treaty article mentioning these Delegations was part of the CFSP Chapter and accorded these bodies significant responsibilities. *Ex* Article 20 TEU stated that:

> *The diplomatic and consular missions of the Member States and the Commission delegations in third countries and international conferences, and their representations to international organisations, shall cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented.*
>
> *They shall step up cooperation by exchanging information, carrying out joint assessments and contributing to the implementation of the provisions referred to in Article 20 of the Treaty establishing the European Community.*[904]

As the CFSP is – per definition – largely put in practice abroad, the assignment to ensure, in cooperation with Member States, that its decisions are complied with and implemented, is potentially large and demanding. Not only is it therefore strange that the modalities of this role were in no way defined, this also entirely neglected their wide-ranging EC responsibilities.

Under the Prodi Commission, which took office in 1999, a radical reform of EU aid delivery was undertaken (cf. *supra* 4.1.). This included a large-scale deconcentration exercise, transferring

[901] London Report (1981) op.cit. note 160.
[902] Fourth ACP-EEC Convention (1989) op.cit. note 199, Annex LXXIII: Joint declaration relating to Protocol 3 on Commission Delegations.
[903] Commission (2004) op.cit. note 896, 34.
[904] *Ex* Article 20 TEC provided that every EU citizen in the territory of a third country shall be entitled to protection by the diplomatic and consular authorities of any Member State.

numerable posts from Brussels towards Delegations to shorten the lines of communication and improve the alignment of aid management with the local context.[905] As a sort of internal EU subsidiarity the Commission explained that: "[a]nything that can be better managed and decided on the spot, close to what is happening on the ground, should not be managed or decided in Brussels".[906] This gradual professionalisation and formalisation of Delegations in the 1990s and 2000s filled the regulatory void in which these bodies had been operating for so long, but simultaneously put a break on their autonomy, which had previously facilitated the mushrooming of their responsibilities.

Arguably, the Commission did not intend to become a diplomatic actor. Rather, being the only permanent EU presence *in situ*, its Delegations evolved by default and on demand to fulfil specific needs. Gradually charged with ever more responsibilities, they turned from centres of technical expertise into a "quasi-diplomatic service".[907] Consequently, its inclusion in the global diplomatic community – based on the rules and rights of the VCDR – became a necessary condition for their effective functioning.[908] Yet, "[a]cting without a clear foreign policy, without a head of state, with limited resources and without professional diplomats, the external delegations of the Commission [were] deprived of most of what traditionally unifies and consolidates foreign services".[909] Moreover, their legally unorthodox status gave rise to considerable confusion. In essence, these Delegations only represented the Commission, not the Community let alone the EU. Nonetheless, they were often perceived abroad as representatives of the whole Union,[910] and even presented as such by its leaders. Prodi and Patten – i.e. the patrons of the External Service – conveyed that "[t]hese diplomatic representations are essential to the promotion of [EU] interests and values around the world, and are in the front line in delivering EU external relations policy and action, from the [CFSP] through trade and development cooperation to scientific and technical relations".[911]

Member States, however, kept a close eye on this evolution. They activated a kind of 'diplomatic fire-alarm' to notify the Commission when Heads of Delegation (HoDs) trespassed their competences and

[905] Commission (COM(2000) 456 final) op.cit. note 301. Between 2001 and 2005 the Commission assigned around 1 500 additional staff to delegations (European Court of Auditors, 'Has the Devolution of the Commission's Management of External Assistance from its Headquarters to its Delegations Led to Improved Aid Delivery?', *Special Report No. 1* (ECA, Brussels, 2011) para. 40).
[906] Commission Communication (COM(2000) 814 final) op.cit. note 301, 20.
[907] Spence (2006) op.cit. note 249, 396.
[908] J. Wouters and S. duquet, 'Unus inter plures? The EEAS, the Vienna Convention and International Diplomatic Presence' in J. Bátora and D. Spence (eds), *European Diplomacy Post-Westphalia* (Palgrave Macmillan, Houndmills, forthcoming).
[909] M. Bruter, 'Diplomacy without a State: the External Delegations of the European Commission' (1999) *Journal of European Public Policy* 6(2), 192-193.
[910] Through a survey of Mexican media Bruter for instance found that in 73% of the cases the Commission Delegation was perceived as representing the EU or even Europe in general (M. Bruter, *Les Délégations Extérieures de la Commission Européenne: Un Outil Moderne de Diplomatie Communautaire?* (Institut d'Etudes Politiques, Bordeaux, 1996); reproduced in Bruter (1999) op.cit. note 909, 186-187).
[911] Commission (2004) op.cit. note 896, 3-4.

remind them of the boundaries to their radius of action.[912] The Commission was susceptible for such sensitivities, as illustrated by this note from May 1991 to its Delegates:

> *May I remind you – and ask you to remind your staff – of the need to exercise the greatest tact and discretion … above all in relation to diplomatic titles and diplomatic precedence. [You should not] seek to impose the title Ambassador. If an interlocutor fails to use this courtesy title, the Head of Delegation should not pursue the matter. He should discourage his own staff from referring to him as the Ambassador … In particular, the appellation 'Ambassador of the European Community' should be avoided. For the time being, Commission delegations remain Commission delegations – not Community delegations – even though they may in practice represent the Community on questions falling within areas of exclusive competence. One cannot expect the average diplomat in the street [sic] to understand such subtleties.*[913]

This could not prevent the Commission network from being criticised, particularly in UK Eurosceptic press, as illegal or created by stealth.[914] Even the former UK Foreign Secretary Straw disparaged these Delegations as "all sorts of odd-bods from the [EU] running all sorts of odd offices around the world".[915]

The manner in which these Delegations became diplomatic actors by matter-of-fact default also meant that they were not always suited or sufficiently equipped for the tasks at hand. Staffing levels were low and while training was gradually scaled-up it was still rudimentary compared to that of traditional career foreign services. Given the very limited number of staff with political profiles, the lack of secure communications lines and the restrained access to intelligence networks, the Commission Delegations were poorly equipped for the diplomatic culture of confidentiality. In essence, the approach of Delegations always stayed one of project management rather than diplomacy. This was particularly problematic with regard to their vaguely defined responsibilities under the CFSP. These involved providing regular political analysis, conducting joint evaluations with Member State embassies and contributing to policy-making. Further, Commission Delegations assisted in preparing visits of the CFSP High Representative and cooperated with EUSRs. As a herald of the creation of a double-hatted HR/Commission Vice-President, the functions of EUSR and Head of Commission Delegation were even combined in the Former Yugoslav Republic of Macedonia and to the African Union. Not seldom Commission Delegations were therefore seen in their host states as representing the policies of these CFSP actors and held accountable for their consequences. The emergence of CSDP missions provided

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[912] P. Duchâteau, 'La Chine et l'Europe' (2004) *Revue du Marché Commun et de l'Union Européenne* 474, 11.
[913] H. G. Krenzler, Note for the Attention of Heads of Delegation DG I*, Use of the Title Ambassador*, Brussels, 27.05.1991; quoted in Bruter (1999) op.cit. note 909, 190.
[914] For instance: D. Hannan, 'EU's "illegal" diplomatic corps is edging out our national embassies', *Daily Telegraph*, 20.03.2003; and X, 'Scandal of EU missions in paradise', *Sunday Express*, 14.01.1996.
[915] UK House of Commons Foreign Affairs Committee, *Minutes of Evidence from Examination of Witnesses*, 25.05.2004, Q59.

an even more remarkable extension to the Delegations' portfolio. In countries where a mission or operation was deployed, it was evident that it could not act in isolation from the Commission Delegation. Consequently, joint actions setting up the latter required "close coordination" between the Commission Delegation and the Head of Mission/Force Commander "without prejudice to the chain of command".[916] The implementation of this vague duty was left to the discretion of the personalities holding these posts and often remained rudimentary.

Prior to the Lisbon Treaty the EU did thus not lack diplomatic presence abroad. EUSRs acted as antennae for the CFSP (cf. *supra* 4.2.3.), the CSDP launched an increasing amount of missions and operations and the Commission Delegations continuously expanded their coverage and competences – albeit on shaky legal foundations. The relation and coordination between them was however diffused. In essence this implied that while EU institutions were increasingly striving for synergies across their various external policies – not the least those spanning its security and development competences – they lacked strong decentralised actors to translate these complex processes to the field.

4.4.2. Entangling the nature, composition and competences of EU Delegations

In the light of the shortcomings of the Commission's diplomatic structure, the idea of creating a genuine Union diplomatic system gradually matured in EU circles, with the Parliament as most active proponent.[917] At the European Convention a "large consensus" emerged to establish EU delegations/embassies, as well as an EU diplomatic academy (which did eventually not see the light of day).[918] The conviction, expressed in the *travaux préparatoires*, that these should arise from the Commission Delegations, was eventually not that straightforwardly expressed in the Lisbon Treaty, with Article 221 TFEU merely stating that:

> *1. Union delegations in third countries and at international organisations shall represent the Union.*
>
> *2. Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. They shall act in close cooperation with Member States' diplomatic and consular missions.*

Given that the Commission itself found that its network was "ideally placed to ensure the success of this ambitious and far-reaching proposal", the logical decision to build further on what already existed,

[916] For instance: Article 10(3) Joint Action (2005/355/CFSP) on the EU mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC), OJ L 112/20, 03.05.2005.
[917] See for instance: European Parliament Resolution (2000/2006(INI)) on a common Community diplomacy, 24.07.2000.
[918] European Convention (CONV 459/02) op.cit. note 371, para. 7.

was quickly taken.[919] With the insertion of this one Article, the Lisbon Treaty finally gives EU Delegations the legal recognition they had been missing for half a century. No longer can these offices be "expected to be models of secretion and self-effacement".[920] As a logical extension of the EU's single legal personality, the Delegations now represent the Union as a whole, across its entire range of competences. This is an important step forward, but in the absence of further Treaty guidance, it raises more questions than it answers. Besides the responsibility to represent the Union and act in close cooperation with Member States, Article 221 TFEU clarifies nothing in terms of the Delegations' general nature, role and composition. If the EEAS provisions of Article 27(3) TEU are considered meagre (cf. *infra* 4.3.), these at least call for a Council decision to establish its organisation and functioning. Despite the importance of creating Union Delegations, that more than ever insert the EU in the global diplomatic community and thus constitute one of the most visible Lisbon innovations for outside actors, their functioning is entirely left in the open.

As in the previous Treaty framework, it is again the CFSP Chapter that provides more information on the role of Delegations. In addition to the old tasks of cooperating with Member States' missions to ensure that CFSP positions and actions, as well as the provisions on consular protection, are complied with and implemented, two new specifications are introduced.[921] The first is mainly semantic but signals a stronger recognition of their role. The obligation of Member States' missions and Union Delegations to "step up cooperation by exchanging information and carrying out joint assessments" is no longer attached to the provisions on consular protection, but inserted as a separate provision, signalling a broader scope.[922] Second, Article 32 TEU expands the duty of Member States to "inform and consult one another within the Council on any matter of foreign and security policy of general interest" with an obligation to "determine a common approach". Member States' diplomatic missions and Union Delegations are subsequently tasked to cooperate and contribute to formulating and implementing this common approach. While this is a potentially heavy assignment, one should not forget that the Treaty leaves responsibility for compliance and enforcement under the CFSP entirely to Member States.

When the Lisbon Treaty entered into force, on 1 December 2009, it overnight transformed the Commission Delegations into Delegations of the Union. One month later a great number of them was

[919] Commission (2004) op.cit. note 896, 10.
[920] M. McGeever, *From Foreign Legion to Foreign Service – Evolution of the Status and Role of European Commission External Delegations 1976–1988*, Paper presented at the conference 'The EU as an External Actor: The Role of the Delegations of the European Commission, 1954–2004' (European University Institute, Florence, 13–14.11.2004), 26.
[921] Article 35 TEU.
[922] Following three and half years of thorough inter-institutional negotiations, a Council Directive operationalising these provisions on consular protection was finally adopted in 2015. It regulates the support EU citizens can receive from other Member States abroad as well as the conditions upon which EU Delegations can intervene (Council Directive (2015/637/EU) on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, OJ L106/1, 24.04.2015).

already accorded the "responsibility of representation and coordination on behalf of the EU", with transitory arrangements applicable in other places.[923] It took however another seven months before a first attempt was made to lift some of the shroud on their nature, role and composition. In the absence of any Treaty guidance, this was done through a separate Article 5 on Union Delegations in the EEAS Decision. A key issue that this elucidated, is their undefined nature in the Union's institutional architecture, by establishing them as an integral part of the EEAS.[924] This seemingly logical verdict was not self-evident and is even not fully in line with the letter of the Treaty. The EEAS is in strict legal terms established as a CFSP body in primary law (cf. *supra* 4.3.1.) while Delegations represent the Union as a whole. Other forms of institutional design were therefore conceivable. A possible set-up, suggested by Spence, was to divide the Union Delegations into a political/CFSP section headed by an ambassador representing the EU, and a technical project management service under a deputy ambassador responsible for other (TFEU) external policies.[925] In comparison to such fragmented design, the current unitary construction is certainly organisationally logical and in line with the Treaty's coherence rationale. Yet, it may "have resolved one set of institutional 'boundary' issues at the expense of creating another".[926] The fact that Union Delegations have a broader range of competences than their mother institution, the EEAS, leads to complex and potentially conflicting situations with regard to the composition of staff, chains of command and financial circuits.

First, EEAS staff occupies all posts of Head and Deputy HoD, support staff directly attached to them, as well as staff in political, information, public diplomacy and administration sections.[927] Additionally, Delegations comprise of Commission officials "where appropriate for the implementation of the Union budget and Union policies other than those under the remit of the EEAS".[928] This staff continues to figure on the establishment plan of their home DGs. As the Commission holds the (purse) strings of development programming, trade and enlargement policy, its officials largely outnumber those from the EEAS in most Delegations. In July 2013 there were about 5,460 staff working in Delegations, of which 3,500 were Commission officials and 1,960 EEAS personnel.[929] Of the latter group only 365 were AD-level officials, with the remainder being mainly local agents, but also contractual agents, assistants and SNE's.[930] Notably, the EEAS itself also consists of staff transferred from the Commission. This implies that there are two categories of staff with a Commission background working side by side:

[923] Council Note (17770/1/09) EU diplomatic representation in third countries: First half of 2010, 19.01.2010, para. 3.
[924] Article 1(4) EEAS Decision.
[925] Spence (2006) op.cit. note 249, 422.
[926] E. Hayes, 'EU Delegations: Europe's Link to the World' in K.E. Jørgensen and K.V. Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions* (Routledge, New York, 2013) 30.
[927] Annex to EEAS Decision.
[928] Article 5(2) EEAS Decision.
[929] EEAS Review (2013) op.cit. note 726, 14.
[930] For a detailed break-down of EEAS staff in Delegations, see: High Representative answer to parliamentary question (E-004218/2011) by Franziska Brantner (Verts/ALE) on VP/HR — Staffing of Union Delegations, 02.05.2011.

those temporarily transferred to the EEAS and those directly working on behalf of the Commission in the Delegations.

Second, authority over all staff "whatever their status, and for all its activities" is entrusted to the HoD.[931] The latter receives instructions from the HR – to whom she/he is accountable – and the EEAS, and is responsible for their execution. Also the Commission may, in areas where it exercises the powers conferred on it by the Treaties, issue instructions to Delegations "which shall be executed under the overall responsibility of the Head of Delegation".[932] These provisions left open a number of delicate questions that were further addressed in separate documents. The Commission-EEAS Working Arrangements specify that these instructions must be issued through the HoDs, copying the EEAS, who shall then call on the relevant staff to carry them out.[933] Yet, in practice HoDs and EEAS desk officers are not always informed. Particularly in relation to development cooperation problems have been reported with instructions that disregard local political considerations or priorities set by the EEAS,[934] putting "at risk the consistency of EU actions".[935] A Commission-EEAS SLA further prescribes that Commission staff in Delegations shall receive the necessary services from the EEAS – subject to at least the same standards of quality it accords to its own staff – in order to allow them to carry out their responsibilities.[936] In a provision that leans more towards mistrust than mutual agreement, "[t]he Commission can, on its own initiative, and after due notice, undertake on the spot visits to Delegations in order to satisfy itself that the present agreement is correctly implemented".[937]

Third, as only figure within an EU Delegation, its Head wears a dual Commission-EEAS hat. Arguably, this resulted more from practical necessity than purposeful design. Being EEAS officials, HoDs could otherwise not sign off the EU's aid instruments, which continue to be implemented by the Commission. Consequently, the latter had no other choice than sub-delegating its responsibility for budget appropriations and implementation to the HoDs.[938] When acting as sub-delegated authorising officers for such operational expenditure, the Heads "must apply the Commission rules and be subject to the same duties, obligations and accountability as any other sub-delegated authorising officer of the

[931] Article 2(2) EEAS Decision.
[932] Article 5(3) EEAS Decision.
[933] Commission (SEC(2012) 48 final) op.cit. note 822, 3.
[934] Wouters et al. (2013) op.cit. note 967, 66.
[935] ECA (2014) op.cit. note 846, para. 59.
[936] Article 2 Service Level Agreement between Commission services with staff in EU Delegations and the EEAS, Brussels, 20.12.2010 (hereafter: Commission-EEAS SLA). Annex I sets out which of these services shall be provided free of charge by the EEAS and which shall be charged to the Commission.
[937] Ibid., Article 9.
[938] Article 51 Regulation (1081/2010/EU/Euratom) op.cit. note 792. An initial design error prevented HoDs from processing the EDF, which is not part of the EU budget and thus not covered by the above Regulation. This was rather slovenly solved by passing this responsibility to the most senior Commission official in Delegation (T. Vogel, 'Heads of delegation to get authority for EDF money', *European Voice*, 10.03.2011).

Commission".[939] Adding to the complexity, the Delegations' administrative budget constitutes an entirely separate financial circuit for which the HoDs are accountable to the EEAS. In addition, the Commission continues to fund administrative costs relating to its own staff "through eight different directorates-general and three instruments".[940] The Working Arrangements acknowledge the potential for a "conflict of priorities", but provide no solution for such a scenario other than a vague prescription that the HoD will inform the Commission and EEAS, who "will take appropriate steps to remedy the situation".[941] This intricacy, of both line management and budget handling, risks to complicate the daily functioning of EU Delegations. Arguably, this was the price to pay for their comprehensive design that transcends the competence limitations existing at headquarters level.

Whereas the Delegations finally form part of a common EU external service, their central administration thus remains split. In the *Elti v EU Delegation to Montenegro* case the General Court reasoned that "the legal status of the Union Delegations is characterised by a two-fold organic and functional dependence with respect to the EEAS and the Commission".[942] This case concerned a decision taken by the Head of Delegation to reject a tender submitted by the applicant. The Court reasoned that the HoD acted as sub-delegated authorising officer of the Commission, meaning that the measure was attributable to the latter.[943] This illustrates how the current arrangements, influenced by Lisbon Treaty's integration-delimitation paradox, put the Head of Delegations in a particularly schizophrenic position. This is not only internally confusing, but also – and particularly – for third parties, whose faulty identification of the attributable party may imply the inadmissibility of their action.[944] While the HoD may have authority over all staff, the ultimate supervisors of Commission personnel in Delegations are located in their respective home DGs. This situation is not so dissimilar from many national embassies, which include personnel from various line ministries, but the proportion of this staff category is exceptionally large in EU Delegations. HoDs – as acknowledged by former EEAS Executive Secretary-General Vimont – "struggled to control [this] group of people".[945] Strangely, the idea of parallel universes within EU Delegations was strengthened by former HR Ashton, who explained their inadequate response to the Arab Spring as follows: "[r]emember that in most delegations the staff who are [EEAS] may be only one. The rest are Commission development people doing fantastic work, but they are not mine".[946] Not only is this statement remarkable because the HR

[939] Commission (SEC(2012) 48 final) note 822, 5.
[940] ECA (2014) op.cit. note 723, para. 57.
[941] Commission (SEC(2012) 48 final) note 822, 7.
[942] Case T-395/11 op.cit. note 793, para. 46. In a similar case on the former Commission Delegations, the Court came to the same conclusion (Case T-264/09, *Technoprocess v Commission and EU Delegation to Morocco,* ECLI:EU:T:2011:319, para. 70).
[943] Case T-395/11 op.cit. note 793, paras 62-64.
[944] Ibid., paras 73-75.
[945] UK House of Lords (2013) note 821, para 51.
[946] UK House of Lords (2011) op.cit. note 736, 6.

stands directly above the HoD who has authority over all staff, it moreover neglects her second hat as Commission Vice-President. The SLA acknowledges the not unlikely possibility of disputes in managing these complex staff relations, which are to be addressed at the Director-Generals level "with a view to finding an amicable solution".[947]

Union Delegations do not only stand at the service of the EEAS and the Commission, they "shall have the capacity to respond to the needs of other institutions of the Union, in particular the European Parliament".[948] This involves the responsibility for receiving, supporting and assisting a sizeable number of travelling officials and parliamentary missions.[949] In addition, Delegations "shall work in close cooperation and share information with the diplomatic services of the Member States".[950] Given that this sharing is formulated as a unilateral duty upon the Delegations, it is not entirely surprising that Member States' missions often stay passive receptors.[951] Yet, gradually, the tide is turning and Member States are jumping on the bandwagon of EU information exchange. On the one hand, this new tendency has a very practical cause, namely the unfolding of a secured transmission system, called ACID. The absence hereof severely complicated the interchange of intelligence.[952] On the other hand, reciprocity in such sensitive matters requires trust, something that is gradually growing, as the quality of the Delegations' reporting improves. The wide access to EU-made information and intelligence is one of the clearest added values the Delegations can provide, particularly to smaller Member States with a limited global presence.[953] It is therefore a significant deficiency that no unified reporting model has yet been put in place and great disparity exists in the way reports are being drafted and shared.[954]

The single most important extension of the Delegations' range of duties results from the Treaty-defined task to represent the Union. This has been interpreted as encompassing not only the demanding task of in-country coordination, but also the representative functions taken over from the rotating Presidency.[955] As a consequence, the whole range of EU coordination meetings, including the

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[947] Article 9 Commission-EEAS SLA, op.cit. note 936. If a dispute persists it shall be addressed according to the mediation and arbitration proceedings set out in Article 6 of the Commission-EEAS Framework SLA.
[948] Article 5(7) EEAS Decision.
[949] This leads some Delegation staff to complain that they are being turned into "travel agents" (interview Commission official in the EU Delegation to the African Union, July 2013).
[950] Article 5(9) EEAS Decision.
[951] Some among the EEAS staff in Delegations therefore proposed to make reporting conditional upon Member States' participation in information exchange. Vimont was however quick to point out that the EEAS was established as a 'service' and should not try to act differently (Interview with EEAS official at the EU Delegation to Ethiopia, June 2013).
[952] This is evidenced by the fact that most Delegation staff finds that the oral exchange of information occurs with much greater regularity (EEAS, Report of survey of EU Delegations Implementation of the Guidelines on Local Co-operation in third countries, Brussels, 13.05.2013, para. 2.22. (document on file with the author)).
[953] There are for instance about 53 countries where an EU Delegation is present and only one in four Member States have a diplomatic representation (K. Raik, 'Serving the Citizens? Consular Role of the EEAS Grows in Small Steps', *EPC Policy Brief* (European Policy Centre, Brussels, 2013) 45).
[954] F. Bicchi, 'The European External Action Service: A Pivotal Actor in EU Foreign Policy Communications' (2012) *The Hague Journal of Diplomacy* 7(1), 90. Bicchi's conclusion dates back to autumn 2011, yet the author's observations and conversations with Member States' diplomats in Addis Ababa and Brussels indicate that this problem partly persists.
[955] Articles 5(8) EEAS Decision.

typically monthly gatherings of Heads of Mission (HoMs), Deputy HoMs, Economic Counsellors, Development Counsellors, etc., are now chaired by EU Delegations and generally held at their premises (cf. *supra Box 10*, illustrating that this is the most unified level of EU representation). This holds the risk of losing the dynamism inserted by the alternating presidencies, but is undoubtedly beneficial for the continuity of the EU's approach. Disregarding some teething problems,[956] the HR assesses this transfer of responsibilities as "remarkably smoothly in bilateral delegations".[957] Third countries appreciate the clarity and simplification this brings, yielding considerable cost and time-savings. This gradually leads to a greater reliance upon the EU Delegations as preferred interlocutor, feeding back to their role and status. However, there are considerable variations between locations, partly dependent on interpersonal relations, the (geo)strategic importance of the respective country or topic (with the ease of coordination inversely proportional to the strategic importance due to increasing Member States' sensitivities),[958] as well as the background, experience and level of initiative of HoDs.[959] Beyond information and coordination, a number of practical cooperation modalities are emerging between Member States and EU Delegations. These include mechanisms for co-location (the so-called 'laptop diplomats'), sharing premises and joint contracting.[960] While often purely pragmatic, these provide important steps towards genuine diplomatic integration.

4.4.3. EU Delegations as quasi-embassies: are they up to the task?

EU Heads of Delegation as quasi-ambassadors

With their broad design and scope, EU Delegations constitute quasi-embassies that compared to their national counterparts only lack military, consular and cultural sections.[961] Considered as embassies for all practical diplomatic purposes,[962] the only voids in the almost complete applicability of the VCDR are

[956] The UK Minister of State Lidington, for instance, send out a public warning for competence creep by the new Union Delegations that "should not try to speak for member states despite their new powers" (A. Rettman, 'UK attacks Ashton over "ludicrous" budget proposal', *euobserver.com*, 25.05.2011). In Washington certain Member States did reportedly not show up for months in EU coordination meetings. In other places "EU Teams" were established, with the Head of Delegation working alongside the Presidency (P.M. Kaczynski, 'Swimming in Murky Waters: Challenges in Developing the EU's External Representation', *FIIA Briefing Paper 88* (Finnish Institute of International Affairs, Helsinki, 2011) 9-10).

[957] High Representative (2011) see note 805, para. 16. In multilateral Delegations the situation is more challenging "given the greater complexity of legal and competence issues" (Ibid., para 17). Precisely due to this specificity, the study of this last group of Delegations falls beyond the scope of this dissertation.

[958] These sensitivities also appear to incite Member States to increasingly outsource human rights issues to EU Delegations, in order to avoid souring their bilateral relations (R. Balfour, *The Role of EU Delegations in EU Human Rights Policy* (European Parliament DG for External Policies, Brussels, 2013) 14).

[959] R. Balfour and K. Raik, 'Equipping the European Union for the 21st century', *FIIA Report 36* (The Finnish Institute of International Affairs, Helsinki, 2013) 44.

[960] Merket (2014) op.cit. note 890, 17-18.

[961] M. Comelli and R. Matarazzo, 'Rehashed Commission Delegations or Real Embassies? EU Delegations Post-Lisbon', *IAI Working Papers 11/23* (Instituto Affari Internazionali, Rome, 2011) 4.

[962] Article 5(6) EEAS Decision prescribes that the HR "shall take the necessary measures to ensure that host States grant the Union delegations, their staff and their property, privileges and immunities equivalent to those referred to in the [VCDR]".

the lack of EU diplomatic passports and the complications with granting diplomatic asylum to persons in need.[963] This also implies that Heads of Delegation are required to act – and increasingly perceived – as quasi-ambassadors. Similar to standard diplomatic practice, third states are requested in an accreditation letter, signed by the Presidents of the European Council and Commission, to "give entire credence to all that he will communicate … in accordance with the instructions of the European Union".[964] Even the taboo on using the term 'ambassador' in reference to HoDs is gradually fading and the title is ever more frequently used in diplomatic correspondence. This reflects a growing appreciation for the role of EU Delegations within the global diplomatic community. Yet, the fact that in 2014, 70 out of 140 HoDs still had no security clearance to access classified information,[965] embarrassingly illustrates how the EU is not yet completely ready for and adapted to this new situation.

The ability of HoDs to deal with these increased responsibilities and expectations depends as much on their personality as on their background. Those transferred from national diplomatic services generally have more affiliation with diplomatic sensitivities, but may struggle with the Delegations' traditionally more administrative and technical tasks. This last element is claiming a disproportionately large share of their already dense schedules.[966] Since the transformation from Commission to EU Delegations, their Heads can no longer delegate the daily management of assistance programmes to their deputies or senior Commission staff, meaning that they can only themselves sign off on even the smallest transactions. This problem is acknowledged as one of "paramount importance" to be solved "in the shortest possible timescale".[967]

Given that Heads of Delegation now provide in-country leadership across the whole range of EU competences, including the CFSP, the question rises whether there is still value in and need for assigning EU Special Representatives. Indeed, the latter's tasks of information gathering and circulation, representation and coordination (cf. *supra* 4.2.3.) can now be assumed by HoDs. Nonetheless, a case can still be made for the EUSRs. In particular, HoDs can hardly match the clout and status emanating from such high-profile and inherently political postings. EUSRs can be appointed on an ad hoc basis, allowing the EU to materialise its concern for and commitment to certain crises. Moreover, seen that the mechanisms for cooperation and information-sharing between Delegations

For a template of an Establishment Agreement, see: P.J. Kuijper, et al., *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Actor* (Oxford University Press, Oxford, 2013) 51-52.

[963] J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?' (2012) *The Hague Journal of Diplomacy* 7(1) 38-48. The former is being solved through EU Laissez-Passer documents that are upgraded to meet modern diplomatic standards (interview EEAS official, September 2013), the latter is perhaps legally shaky but Wouters and Duquet argue that the difficulties are not unsurmountable.

[964] For a template of such a letter, see: Kuijper et al. (2013) op.cit. note 962, 56.

[965] ECA (2014) op.cit. note 723, reply by the EEAS para. 34(b).

[966] 46 % of the HoDs report to spend 50 % or more of their time on management/administrative tasks (Ibid., footnote 45).

[967] EEAS Review (2013) op.cit. note 726, 12. This could for instance be done by amending the Financial Regulation in order to allow for such tasks to be delegated to the Deputy HoD.

in the same region are fairly limited, EUSRs can fill an important void. The importance hereof is only rising in the light of the EU's increasingly regional approach to external challenges (cf. *infra* 6.2.). All this points to a clear need to clarify the relation and division of labour between HoDs and EUSRs, which is however nowhere addressed. EUSRs decide for themselves how to cooperate and coordinate with the relevant EEAS services, leading "to parallel lines of reporting and confusion about who [is] in charge".[968] Half of the HoDs surveyed by the Court of Auditors in 2014 indicate that they are insufficiently informed about the activities of EUSRs operating in their region.[969]

The EEAS Review acknowledges that EUSRs, "being housed in a separate building with a relationship primarily to the Member States through the PSC", have only limited contacts with Delegations.[970] It purports to solve this legal anomaly by integrating them more closely in the EEAS structures (cf. *supra* 4.2.3.). In this same light the 2014 Guidelines on appointment, mandate and financing of EUSRs call on them to "maintain close liaison with and provide regular briefings to Member States' diplomatic representations and Union delegations".[971] The latter, for their part, should make every effort to assist EUSRs in implementing their mandate. A more concrete suggestion has been to extend the practice of double-hatting HoDs and EUSRs, as it is currently done for Kosovo, Afghanistan and Bosnia and Herzegovina. Similar to the HR's hats, this represents "a 'personal union' of two functions that remain distinct, just as the competences falling, respectively, in the CFSP and in the [TFEU] basket remain separate".[972] Their staff is co-located in the Delegation, but remain divided in two distinct categories with their own chain of command. The benefits of this formula are widely acknowledged and include cost savings, efficiency gains and more financial leverage to raise the negotiating position of the EUSRs (and Union as a whole). Fouéré, the former double-hatted EUSR/HoD to Macedonia adds that:

> *our interlocutors, before I came, were not quite sure who they should speak to if they wanted to convey a message or they could perhaps misuse the fact that there were different actors. Now…they know exactly who to call, who to talk to and they know that person has a direct link with both the Council and the Commission and vice versa.*[973]

The European Parliament therefore pleads to double-hat EUSRs whenever possible.[974] Nonetheless, the extent to which this success formula can be replicated is limited. For one thing, there are a number of downsides, such as encumbering EUSRs with the huge administrative burden of managing a Delegation as well as the close supervision by the EEAS and Commission which might diminish their

[968] UK House of Lords (2013) op.cit. note 821, para. 75.
[969] ECA (2014) op.cit. note 723, para. 38.
[970] EEAS Review (2013) op.cit. note 726, 5.
[971] Council (7510/14) op.cit. note 752, 6.
[972] Grevi (2007) op.cit. note 506, 48.
[973] UK House of Lords (2006) op.cit. note 723, para. 94.
[974] European Parliament (2012/2253(INI)) op.cit. note 746, para. 9.

flexibility. Moreover, their sizeable task description entails the risk that one role takes primacy over the other. Yet, most importantly, this formula does not work for the majority of EUSRs with a focus transcending a single country or international organisation.

The permeation of politics in the Delegations' daily work

As put by an EEAS official in Delegation, since the Lisbon Treaty "politics is no longer a hobby that can be performed with relatively limited oversight from Brussels. It has become part and parcel of every aspect of our daily business, couched in a formal straightjacket under strict supervision from both headquarters and Member States".[975] The fact that Delegations are increasingly perceived as EU embassies strongly permeates their everyday functioning. Even though politics had evidently never been far away in policy and technical dialogues with partner authorities, the new situation requires all staff to execute their responsibilities in a more politically sensitive manner. Moreover, events such as the Arab Spring and the more recent turmoil in Ukraine, continue to confront the EU with the sobering fact that even purely economic policies cannot be implemented in isolation from the political context.

A key question is therefore to what extent Union Delegations are up to these new tasks and altered working environment. Rather problematically, the increased expectations on what they should deliver, particularly with regard to EU representation abroad and the CFSP, were not accompanied by a commensurate capacity expansion. Most Delegations have managed the transition without any additional resources, and 13 of them have no political section, with the HoD being the only AD-level official from the EEAS.[976] As long as the target of budget neutrality – which applies just as much to Delegations as to the EEAS – is not replaced with a more realistic focus on budgetary efficiency,[977] the EEAS' hands are tied. A small but significant contribution is the HR's commitment to continue the transfer of posts from headquarters to Delegations to cope with their heavy workload.[978] Other than that, Delegations must make do with what they have. Regrettably, this often consists of understaffed and resourced political sections, which partly consist of Commission staff that were re-hatted to the latter without appropriate training.[979] Notably, 49% of HoDs find the skills of their operational, finance, monitoring and auditing staff insufficient to carry out the tasks at issue.[980]

In a dubious sign of both team spirit and protectionism a joint Commission-HR Decision strives to cushion staff shortfalls by exceptionally allowing Commission personnel to contribute to the political work of Delegations. This is tolerated on three conditions: the staff member at issue should have the

[975] Interview EEAS official at the EU Delegation to Ethiopia, 06.07.2013.
[976] EEAS Review (2013) op.cit. note 726, 10.
[977] Wouters and Van Vooren (2013) op.cit. note 895.
[978] EEAS Review (2013) op.cit. note 726, 4.
[979] UK House of Lords (2013) op.cit. note 821, para.67.
[980] European Parliament (A7-0199/2014) op.cit. note 780, para. 31.

relevant expertise, the arrangement may not jeopardise the performance of his/her core tasks and it shall not exceed a "reasonable proportion of working time (indicatively no more than 20%)".[981] Fouéré calls this last requirement an "archaic" rule adding to a disjointed service.[982] On the other hand, some of these conditions may already be problematic as also the capacities of Commission staff members are regularly overstretched, preventing them from properly absorbing the relevant guidance and training.[983] Nonetheless, this practice is increasingly widespread, with considerable variations, as their use is at the discretion of HoDs. Moreover, in the light of the often fuzzy division of labour between political sections and the operational governance or civil society sections, interpersonal relations tend to matter more than any formal arrangement.[984]

A number of practical initiatives and practices aid to scale up diplomatic skills within Delegations. A first major contribution is delivered through staff transferred and seconded by Member States. This creates a win-win for exchanging knowledge, information and contacts. It may be further reinforced through the plans to re-launch a Diplomatic Exchange and Secondment Programme (DESP). This was initially created in 2007 to support the secondment of EU officials to national foreign ministries. Furthermore, Article 6(10) EEAS Decision makes staff rotation between Brussels and the field "in principle" an obligation for all EEAS staff, providing the basis for a genuine career foreign service. Finally, two specific staff categories contribute with targeted security expertise to the work of Delegations in fragile contexts. One the one hand, Regional Security Officers (RSOs) monitor the security situation, yet not primarily to deliver policy input but to guarantee the safety of EU staff.[985] On the other hand, personnel responsible for the implementation of the IcSP is closely involved in crisis response and prevention. They tend to have large grassroots networks and fulfil an important exploratory role in testing the ground for new security approaches. Yet, the convoluted EEAS-DEVCO-FPI division of labour over its short and long-term components (cf. *supra* 4.3.1.) creates fractured chains of command hampering their work.

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[981] Article 6(1) Joint Commission and High Representative Decision (JOIN(2012) 8 final) on Cooperation Mechanisms concerning the Management of Delegations of the EU, 28.03.2012. Even though only "indicative" the Commission in 2012 launched an audit to verify whether its staff in Delegations did not exceed this 20% limit.

[982] E. Fouéré, 'EU Delegations, EU Special Representatives and Common Security and Defence Policy Missions: Building a True Cooperative Relationship' in L.N. González Alonso (ed), *Between Autonomy and Cooperation: Shaping the Institutional Profile of the European External Action Service*, CLEER Working Papers 2014/6 (Centre for the Law of EU External Relations, The Hague, 2014) 47.

[983] A. Herrero and N. Keijzer, 'EU Support to Governance at a Critical Juncture: Will the New EU External Action Architecture Deliver Smarter Support to Governance in Partner Countries', *ECDPM Briefing Note No. 26* (European Centre for Development Policy Management, Maastricht, 2011) footnote 10.

[984] Given the staff limitations of the political section at the EU Delegation to Ethiopia, it was for instance easily agreed that the operational governance section would take the lead in the informal monitoring of the 2013 nation-wide local elections. Where staff relations are less fruitful such issues can be a source of considerable tension.

[985] These positions were initially piloted in Yemen, Libya, Libanon and Somalia and are currently expanded to cover mainly Middle-East and Maghreb countries.

The above efforts are however rather impromptu, and political expertise remains an area of concern for Delegations. This is most worrisome with regard to security issues, particularly relating to CSDP activity. While coordination with CSDP missions and operations has always been a requirement, the HoD is now expected to take the lead, often in cooperation with EUSRs (cf. *infra* 6.2.3.). The mandate of EUCAP Nestor, for instance, states that "[t]he Head of Mission shall, without prejudice to the chain of command, receive local political guidance from the Head of Union Delegation".[986] At least on the level of politics, this suggests some form of hierarchical relationship. Such guidance can however not be effective without sufficient understanding of CSDP specificities, as well as the security climate in which they operate; two elements that are often problematic or incomplete in Delegations.[987] As single most sensitive area of EU cooperation, the CSDP is moreover kept under strict surveillance of Member States. This is evidenced by the fact that Defence Attaché meetings are one of the very few in-country gatherings continuing to be chaired by the Presidency, with the Delegations' political officers only occasionally invited. CSDP Heads of Mission or Force Commanders, on the other hand, typically attend HoM meetings at the EU Delegation. The EEAS Review consequently pleads to improve the availability of security and military personnel.[988] For this purpose it commits to improve synergies between geographical experts in the EEAS Intelligence Centre and the relevant Delegations, as well as expand an initialled pilot programme of detaching security and military experts to Delegations.[989] Yet, HR Ashton added that, as resources are a key concern, changes will not occur overnight.[990] Recent promising practices are the appointment of liaison officers for CSDP missions and the co-location of CSDP staff in EU Delegations. These are demonstrating their value in mapping out potential for synergies.[991] Gros-Verheyde observes that this last staff category holds the potential of a valuable 'third way' between the scattering of Commission-managed contracts and the heavy requirements of putting CSDP missions/operations in place.[992] Pools of CSDP experts in EU Delegations could – building upon the latter's network – deliver important contributions in preparing or following up on missions/operations or carry out SSR advice and assistance tasks where a full-fledged mission is not necessary, desirable or conceivable.

The extremely diverse personnel in Delegations is guided by different chains of command, career paths and training opportunities. This holds the risk of magnifying the widely reported hurdles of creating a

[986] Article 6(7) Council Decision (2014/485/CFSP) op.cit. note 593.
[987] ECA (2014) op.cit. note 723, para. 42.
[988] EEAS Review (2013) op.cit. note 726, 6.
[989] This commitment of posting security attachés to Delegations was accelerated after the 2015 Paris and Verviers terrorist attacks by returned European jihadists.
[990] High Representative Ashton (SPEECH/13/530) op.cit. note 829, 5.
[991] EEAS Deputy Secretary-General (00407/14) op.cit. note 451, 3.
[992] N. Gros-Verheyde, 'Une certaine remise en ordre des missions et opérations de la PSDC … comme de l'OTAN ?', *Bruxelles2.eu*, 16.05.2015.

common *esprit de corps* in the EEAS. Nevertheless, after a transitory phase, relations are now overall reported to be constructive and staff generally values the "biodiversity" of their new working environment.[993] An important explanatory factor might be that these changes largely occurred out of spotlight, not the least due to the geographical distance from Brussels. This allowed them to gradually mature without every mishap or quarrel being magnified under the public microscope. Moreover, there is a strong feeling among staff in Delegations that they have to make this work in order to improve their standing vis-à-vis and influence on decision-making in Brussels. However, not everything in the garden is rosy and as noted in the EEAS Review there remains considerable room for improvement in resource management.[994] Substantial tensions arise over the fact that the Commission has duplicated the steering committee "EUDEL", managing contacts between EEAS and Commission on staff in Delegations,[995] with its own "COMDEL" to coordinate between various Commission services with staff abroad. In the words of the Court of Auditors "the existence of two separate bodies to deal with delegation-related matters complicates the working arrangements". [996] This remaining fragmentation is further illustrated by the fact that the Commission is pushing to have its own officials, rather than those of the EEAS, on the posts of deputy HoDs.[997]

If such growing pains can be further overcome, and with adequate staff and resource levels, Delegations offer unique opportunities to translate the widely-portrayed coherence rationale of the security-development nexus into needs-oriented and inclusionary action on the ground. Their wide networks, gathered mainly through implementing various aid programmes, allow them to act as antennae and monitor the local context "beyond the usual government-to-government diplomacy".[998] In fragile states these Delegations stand at "the crossroads between early warning, early action and long-term vision".[999] Contrary to the diffused political direction over the security-development nexus in Brussels between the HR, Commission and EEAS, Heads of Delegation are in an optimal position to provide unified leadership. Yet, these Delegations represent very specific microcosms of EU cooperation and coordination. As a consequence, the extent to which seconded Member State diplomats contribute to their political expertise, the interaction between the political and operations sections, the fine-tuning with EUSRs, CSDP and Member States activity as well as their impact on the ground, depends very much on interpersonal relations. Nonetheless, headquarters can steer these in

[993] D. Helly, et al., 'A closer look into EU's external action frontline: Framing the challenges ahead for EU Delegations', *ECDPM Briefing Note No. 62* (European Centre for Development Policy Management, Maastricht, 2014) 6-7; Wouters et al. (2013) op.cit. note 831, 64-65.
[994] EEAS Review (2013) op.cit. note 726, 11.
[995] Commission and High Representative (JOIN(2012) 8 final) op.cit. note 981995.
[996] ECA (2014) op.cit. note 723, para. 60.
[997] Interview with DEVCO official, September 2013.
[998] Balfour (2013) op.cit. note 894.
[999] D. Helly and G. Galeazzi, 'Planting Seeds and Breaking Eggs: EU Delegations Dealing with Peace and Security – the Sahel Case and beyond', *ECDPM Briefing Note No. 70* (European Centre for Development Policy Management, Maastricht, 2014) 2.

the right direction by providing better training and guidance on issues such as early warning, conflict prevention and crisis response.[1000]

Furthermore, in order to fully engage these comprehensive Delegations in comprehensive action, they need to be able to better feed into both EU decision-making and implementation.[1001] Rather to the contrary, staff in Delegations complain about top-down decisions that fail to take into account their input and advice.[1002] Not only does this undermine relations with and trust of their host authorities, businesses and civil society, it is also fails to fully exploit the potential for optimising the reality check of EU initiatives. A 2013 Parliament report in this light proposes to further devolve decision-making to Delegations and enable a more flexible use of resources.[1003] The EDF B-envelope for unforeseen needs (cf. *supra* 3.2.1.) proofs for instance still too cumbersome to activate. It can only be allocated after the government or any other relevant organisation of the country concerned submits a request, which will be assessed by the Delegation, subsequently forwarded to the EEAS for further examination, transmitted to DG DEVCO to check the availability of funds and the eligibility of the intervention, who then finally prepares an Implementing Decision in consultation with the EEAS. [1004] More deconcentration and flexibility will "require a change in the culture of the Commission from instructing and controlling Delegations to providing timely resources and support to do their work".[1005]

4.5. Conclusion

The commitment of the Union to fine-tune and cohere its policies spanning the nexus between development cooperation and CFSP, condemns EU institutions to close cooperation and coordination. Before the entry into force of the Lisbon Treaty, this applied particularly to the Council and Commission, ensuring the day-to-day functioning of these two policy areas in a love-hate affair. On the one hand, the Council's more politico-strategic role could not function effectively without the Commission's managerial responsibilities and *vice versa.* On the other hand, the diverging institutional balance under the EU's development and security competences led both institutions to closely watch that the other did not trespass on its conferred powers. A continuous stream of coordination efforts emerged, which

[1000] Relevant tools in this regard have already been developed, but need to be applied and used on a wider scale (Balfour (2013) op.cit. note 958, 2-3).
[1001] H. Maurer and K. Raik, 'Pioneers of a European Diplomatic System: EU Delegations in Moscow and Washington', *FIIA ANALYSIS - 1 May 2014* (Finish Institute of International Affairs, Helsinki, 2014) 15.
[1002] For instance with regard to the choice of priority sectors in aid programming (Wouters et al. (2013) op.cit. note 831, 67).
[1003] Gavas et al. (2013) op.cit. note 469, 7.
[1004] Commission (SEC(2012) 48 final) op.cit. note 822, 22.
[1005] Gavas et al. (2013) op.cit. note 469, 35. In this respect it is regrettable that budgetary cuts are limiting the number of travels from Brussels-based officials to Delegations. This risks to further widen the gap between decision-making and the local context.

was however generally judged as insufficient to maximise positive connections along the security-development interface.

Besides a constitutionally upgraded – but practically vague – duty of consistency, the Lisbon Treaty drafters put considerable confidence in an institutional servicing of the EU. This includes the creation of a triple-hatted High Representative, the establishment of an unprecedented European External Action Service and the refurbishing of Commission Delegation into genuine diplomatic Delegations of the Union. Whilst not drafted with the commitment to the security-development nexus in mind, the way in which these institutional novelties allow to guide, unite and integrate the EU's scattered security and development resources and policy actors, put them manifestly at the centre of this debate. Their potential for taking this nexus a considerable step forward is unmistakable, but not a given. The integration-delimitation paradox of the Lisbon Treaty meant that these innovations were bestowed with the highest of expectations for improving coherence, but not with the unconditional trust and competences to put this into effect.

Their new tasks and responsibilities did not diminish the formal powers of the traditional EU external actors, and arguably even augmented their sensitivity about them. Particularly regarding the HR and EEAS, this resulted in a certain feel of incompleteness as to their design. While the inherent aim of the HR's triple-hatted portfolio is to transcend institutional boundaries, she can only be as effective as the other institutions allow her to be. The EEAS is assigned to assist the HR in her extensive mandate, yet without a formal involvement in decision-making. The effectiveness of the Service to unite security and development approaches depends on its capacity to steer the tricky waters between various institutional interests and across competence rifts. The Union Delegations are much less affected by such half-hearted design and represent, without exceptions, the whole range of EU competences. In a rather short timeframe they have brought significant improvements to the implementation and coordination of EU external action, but lack the necessary resources to fully develop their new political and security dimension. Moreover, the fact that they have a broader scope than their mother institution, the EEAS, implies that they serve many masters, leading to complex lines of authority.

These three institutional innovations can undoubtedly offer many improvements for aligning development cooperation and CFSP initiatives. Whether their full potential is exploited will depend less on their legal design, which even though imperfect proffers sufficient opportunities, than on the political will to proceed. It requires a leap of faith to give up on institutional prerogatives and offer these bodies the necessary trust to develop joined-up action, which might eventually benefit them all. The fact that tensions arose from the earliest discussions on setting up the EEAS to the more recent division of labour on development programming is not illogical and could arise in any political system. "However, their impact is bound to be felt more acutely in a context within which institutional reform

is viewed as the main answer to increasing political influence on the international scene".[1006] A key mark of the success of these new institutions is therefore the extent to which inter-institutional turf wars on competence delimitation will "come to be regarded as an aberration of the Union's teenage years".[1007] This will be the subject of analysis in the following chapter.

[1006] Koutrakos (2013) op.cit. note 91, 56.
[1007] Dashwood (2011) op.cit. note 534, 48.

5. The security-development nexus on the judicial track

> *[C]'est une expérience éternelle, que tout home qui a du pouvoir est porté à en abuser; il va jusqu'à ce qu'il trouve des limites. … Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir.*
>
> Montesquieu, *De l'Esprit des Lois*, 1748

The two previous chapters focussed on the different approaches to issues of security and development on the level of policies and institutions. This was directed at understanding how these differences affect policy outcomes and inter-institutional relations, what obstacles and challenges result from them, which efforts are undertaken to transcend the latter, and how effective these are. These same questions will now be analysed along the track of the judiciary's approach to the security-development interface. As set out at length in the preceding chapters development cooperation and the CFSP(/CSDP) are governed by distinct legal regimes. The choice for one or the other legal basis determines which EU institutions are involved, to what degree, and whether the Court has full competence to review the act. The CJEU's standard refrain that the choice of the appropriate legal basis is not about mere practicalities but "has constitutional significance",[1008] is therefore all the more relevant along the CFSP-TFEU interface.

Through its surveillance of competence boundaries the Court aims to guarantee the observance of two intertwined principles. A first is the institutional balance within the EU legal order. Its observance means that each institution "must exercise its powers with due regard for the powers of the other institutions [and] requires that it should be possible to penalize any breach of that rule which may occur".[1009] A second parameter is the principle of attributed powers. According to Article 13(2) TEU this implies that "[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". This can be seen as horizontal principle of conferral, while Article 5(2) TEU sets this out with regard to the vertical relation between the EU and Member States.[1010]

[1008] Opinion 2/00, *Cartagena Protocol*, ECLI:EU:C:2001:664, para. 5.
[1009] Case C-70/88, *European Parliament v Council*, ECLI:EU:C:1990:217, para. 22.
[1010] It provides that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein".

In the field of external action, Treaty objectives are defined in the broadest of terms. Combined with the naturally comprehensive nature of foreign policy, this means that the identification of the limits to competences is a particularly challenging and partly artificial endeavour.[1011] Nonetheless, the Court assigned itself – commendably – to ensure that "the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review".[1012] This unavoidably made this already partly artificial endeavour, essentially legalistic. EU debates on external action, more than focussing on the most efficient and effective organisation of policies, accord a significant amount of time and energy to identifying the outer-limits of competence areas. The above chapters demonstrated how such debates are all the more sensitive in the field of the security-development nexus, where divergences in institutional balance are particularly outspoken and delimitation is diffused. The fact that the CJEU has always been excluded from the CFSP, but nonetheless had to supervise its delimitation from the *ex* EC Treaty in line with old Article 47 TEU, did evidently not help to soften controversies. It was thus written in the stars that the identification of the security-development demarcation would be hard-fought, occasionally before the Court, with all that entails for the Union's credibility and its capacity to respond flexibly to global needs and crises.

The mainstreaming of the constitutional framework for EU external action by the Treaty of Lisbon (cf. *supra* Chapter 2.3.) can be read as an attempt to put an end to the destructive consequences of inter-institutional competence competition. The Court's traditional exclusion from the CFSP was moreover softened in three main ways. First, the Janus-face of Article 40 TEU entrusts the Court not only with guaranteeing the integrity of the TFEU but also of the CFSP, conclusively extending its interpretative command of the latter. Second, it is accorded jurisdiction to verify the legality of restrictive measures against natural or legal persons, irreversibly abolishing "the policy's conventional immunity from judicial supervision".[1013] Third, where the CJEU previously had only jurisdiction under the explicit and limited exceptions listed in *ex* Article 46 TEU, it is now generally competent except where derogations are overtly formulated. In line herewith, the Court's capacity to enforce the constitutional principles underlying the Union's legal order, such as transparency, sincere cooperation and consistency, have now been generalised.[1014]

Yet, as on the policy and institutional tracks, the integration-delimitation paradox causes the Lisbon Treaty reforms to hinge somewhere between these two extremes. Its strongest ever integration

[1011] Van Elsuwege (2013) op.cit. note 369, 125.
[1012] Case C-45/86, op.cit. note 111, para. 11.
[1013] Article 24(1) TEU and 275 TFEU; C. Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, Oxford, 2014) 48.
[1014] Ibid., 66-69.

rhetoric risks to complicate the conduct of EU external action, as it was accompanied by a strong – yet more concealed – delimitation along the CFSP-TFEU boundary. Much of the confusion surrounding this new constitutional framework boils down to the essential question of how to reconcile the clustered competence catalogue of Article 21 TEU with the mutual non-affectation clause of Article 40 TEU. In other words, how to tally the seclusion of the CFSP with the fact that its old objectives of preserving peace, preventing conflicts and strengthening international security have now become part of a unified external action framework that has to be effectuated by all the Union's external policies. Paradoxically, despite its continued exclusion from the CFSP, all eyes are now set on the CJEU to clarify the position of this competence in the Union's reformed constitutional constellation.

A first part of this chapter will elaborate on the Court's traditional approach to verify the choice of legal basis (5.1.). Browsing through the continuously evolving case law, the aim is to concisely re-construct its multi-pronged methodology and detect new or recurring trends. A second part will elaborate on how this methodology applied to former cross-pillar situations by focussing on the border area between CFSP and development cooperation (5.2.). The final part then undertakes to retrieve the relevance of this case law in the rehashed Lisbon architecture (5.3.).

5.1. The choice of legal basis methodology: producing order out of chaos

The Treaty does not set out a dedicated procedure for settling jurisdictional conflicts between institutions, nor does it define criteria for selecting appropriate legal bases. Such questions are left to the jurisprudence of the CJEU,[1015] which is restricted to solving the legal questions brought before it, typically in the form of actions for annulment or failure to act.[1016] Although ideally comprehensive, this implies that such procedures and criteria can only be developed on a case-by-case basis. Over the years, this evolved into a multi-pronged analysis governed by four main rules.[1017]

A multi-pronged analysis governed by four main rules

The *first* and predominant rule is that the choice of legal basis must rest on objective factors which are amenable to judicial review and "include in particular the aim and content of the measure".[1018] It may

[1015] Cremona accurately supports this constitutional choice to let the Treaty stay clear of such methodology, which is "rightly left open to the possibility of evolution and the important benefits of flexibility valued over a (probably unreal) certainty" (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) 41).
[1016] Respectively set out in Articles 263-264 and 265-266 TFEU.
[1017] A recent case on the legal basis for targeted sanctions provides a good example of how the Court brings these various elements together in a structured test: Case C-130/10, *Parliament v Council (targeted sanctions)*, ECLI:EU:C:2012:472, paras 42-45 (cf. *infra* 5.3.2.).
[1018] Case C-300/89, *Commission v Council (Titanium Dioxide),* ECLI:EU:C:1991:244, para. 10.

not depend simply on an institution's conviction as to the objective pursued,[1019] nor can previous practice "derogate from the rules laid down in the Treaty [or] create a precedent binding on the Community institutions".[1020] A *second* rule is the *lex specialis derogat legi generali*. This dictates that "if the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, that measure must be founded on such provision".[1021] A *third* rule of thumb is what one could call the principle of singularity or absorption theory. Laying the groundwork of its centre of gravity reasoning the Court has held that: "[i]f examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component".[1022] Only if a measure simultaneously pursues a number of objectives, or has several components, which are inseparably linked without one being incidental to the other, the measure must, by way of exception, be founded on the corresponding legal bases.[1023] This principle of singularity was carried over to external relations cases[1024] where it is arguably even more challenging to narrow measures down to one legal basis, due to the prevailing tendency of comprehensiveness. As an exception to the exception, the *fourth* rule finally prescribes that the combination of two or more legal bases is not possible where the procedures laid down for each of them are incompatible with each other (cf. *infra*).[1025]

While these rules are clear, their application is much less so. A lot can be attributed to the near impossible strive for complete objectivity. Even if, at face value, the Court adjudicates on the choice for one or the other legal basis, it is clear that this has important procedural consequences in terms of voting in the Council and the involvement of other institutions. Besides determining the power balance, this may in that manner also impact on the content of the eventual measure, turning this into a politically-charged affair.[1026] Given that the Court's rulings often create legal precedents reaching beyond the specific circumstances of the case at issue, such conflicts not seldom have a broader

[1019] Case C-45/86, op.cit. note 111, para. 11. Also "the fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are irrelevant" (Case C-269/97, *Commission v Council*, ECLI:EU:C:2000:183, para. 44).
[1020] Case C-131/86, *United Kingdom v Council*, ECLI:EU:C:1988:86, para. 29. See also: Opinion 1/94, *World Trade Organisation (WTO)*, ECLI:EU:C:1994:384, para. 104; Opinion 2/00 op.cit. note 1008, para. 41. When quoting case law we will keep the references to the *ex* Community. Yet, except when referring to the distinction with the CFSP, this can be read as 'Union', given that the latter has absorbed the Community (Article 1 TEU).
[1021] Case C-338/01, *Commission v Council,* ECLI:EU:C:2004:253, para. 60.
[1022] Case C-36/98, *Spain v Council,* ECLI:EU:C:2001:64, para. 59. This statement is based on a line of reasoning first developed in Case C-42/97, *Parliament v Council,* ECLI:EU:C:1999:81, paras 39-40.
[1023] See for instance: Case C-211/01, *Commission v Council*, ECLI:EU:C:2003:452, para. 40.
[1024] Case C-94/03, *Commission v Council (Rotterdam Convention),* ECLI:EU:C:2006:2, para. 35.
[1025] Case C-300/89, op.cit. note 1018, paras 17-21.
[1026] The Court acknowledged this in C-45/86 op.cit. note 111, para. 12.

undercoat of inter-institutional strive over the intensity and direction of EU integration as a whole.[1027] In this sense it is not surprising, but all the more challenging, that the Court wants to clear all suspicion of choosing sides. Its preference for a single legal basis does not make this any easier. As put by Advocate-General Tesauro:

> *this difficulty — or impossibility — of identifying the predominant component means that any analysis is certainly influenced, in a decisive manner, by considerations of a subjective nature and of an undoubtedly political nature, linked as they are with the differing voting procedures and rules associated with the legal bases in question. This leads to a situation of uncertainty which is irreconcilable with the principle repeatedly upheld by the Court whereby the choice of the legal basis for a measure must be amenable to judicial review.*[1028]

While it can clearly not depend on institutional preferences, case law indicates that this choice may not result from easily identifiable criteria either.[1029] In practice the Court often tends to confirm the legislature's choice, not least by (overly) relying on statements made in the preamble of the contested act, to determine its predominant aim and content.[1030] As formulated by Cremona: "[t]he author's conviction alone may not be enough, but when the author expresses that conviction in Preambular statement – especially one that adopts the Court's own phraseology – that will be accepted".[1031] In such a situation, Emiliou argues that everything will depend on the Court:

> *It will decide whether the measure falls within an area in which the Community has competence; it will formulate the objectives of the measure, and it will decide whether the legal basis of the latter corresponds to its objectives. All these questions involve so many imponderables that it will almost always be possible for the Court, if it wishes, to find grounds for upholding the measure.*[1032]

This does not mean that competence questions cannot be adequately addressed by the CJEU. It simply illustrates that the latter has considerable room of manoeuvre in this undertaking. This is most clearly demonstrated by cases where the Advocate-General and the CJEU conclude to a different legal

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[1027] H. Cullen and A. Charlesworth, 'Diplomacy by Other Means: the Use of Legal Basis Litigation as a Political Strategy by the European Parliament and the Member States' (1999) *Common Market Law Review* 36(6), 1243-1245.
[1028] Case C-300/89, *Commission v Council (Titanium Dioxide),* Opinion AG Tesauro, ECLI:EU:C:1991:115, para. 8.
[1029] P. Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals - Essays in European Law* (Hart Publishing, Portland, 2008) 183-184.
[1030] M. Klamert, 'Conflicts of Legal Basis: No Legality and No Basis but a Bright Future under the Lisbon Treaty?' (2010) *European Law Review* 35(4), 505. With regard to Article 114 TFEU, on the approximation of laws, Weatherill goes as far as arguing that the Court's case law has become a preambular "drafting guide" (S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) *German Law Journal* 12(3), 827-864).
[1031] M. Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, Oxford, 2014) 21-22.
[1032] N. Emiliou, 'Opening Pandora's Box: the Legal Basis of Community Measures before the Court of Justice' (1994) *European Law Review* 19(5), 499.

basis.[1033] Interpretation is inherent to adjudication. Therefore, the Court's case law would benefit from the acknowledgment that this can never result from a simple set of legal syllogisms.[1034]

Moreover, by regularly staying in the dark regarding the precise nature and implications of its approach, the Court puts spokes in its own wheels. For one thing, the centre of gravity methodology to determine the measure's predominant aim and content is often so unfathomable that the outcome has become difficult to predict.[1035] Even more confusing is that the Court typically states that the purported objective factors *in particular* include the aim and content of the measure, but issues vague and sometimes contradictory statements about the existence of other determining elements. Among others, this concerns the role of context,[1036] the interests of third parties,[1037] previous practice,[1038] formal defects[1039] and the nature of EU competences.[1040] These various elements of confusion do evidently not serve the Court's ultimate goal of objectivity.

'It's the procedure, stupid'

Another source of continuing confusion is the practical translation of the rule of procedural compatibility. This states that no combination of legal bases is possible "where the procedures laid down for each legal basis are incompatible with each other".[1041] Entangling what the Court means with this seemingly simple statement is no easy undertaking and represents in fact one of the most obscure lines of case law. The foundations hereof were laid in the meanwhile famous *titanium dioxide*

[1033] Compare for instance: Case C-91/05, op.cit. note 85 and Opinion AG Mengozzi, ECLI:EU:C:2007:528 ; or Case C-155/07, op.cit. note 295 and Opinion AG Kokott, ECLI:EU:C:2008:368.
[1034] Van Vooren (2012) op.cit. note 179, 144.
[1035] B. Van Vooren and R. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, Cambridge, 2014) 158-186.
[1036] In Opinion 2/00, concerning the Cartagena Protocol on Biosafety, the Court added the context in which a measure is adopted to the analysis. This was the 1992 UN Conference on Environment and Development (UNCED) (op.cit. note 1008, paras 24-28). Yet, this same Conference lay at the basis of the Rotterdam Convention, at issue in Case C-94/03, where this 'context' did not steer judicial review (Case C-94/03, op.cit. note 1024, para. 41).
[1037] After having determined in Opinion 1/78 that the division of powers within the EU "is a domestic question in which third parties have no need to intervene" (Opinion 1/78, op.cit. note 111, para. 35; see also Opinion 2/00, op.cit. note 1008, para. 17), the Court referred in *Rotterdam Convention* to the interests of third parties to decide on annulling the contested decision (Case C-94/03, op.cit. note 1024, para. 55).
[1038] Despite having consistently held that mere institutional practice cannot create binding legal precedents, the Court relied at several occasions on previous legislation and even mere policy statements to corroborate its judgments (See for instance: Case C-403/05, *Parliament v Commission (Philippines border management)*, ECLI:EU:C:2007:624, paras 57-58; Case C-91/05, op.cit. note 85, para. 66).
[1039] Whereas a purely formal procedural defect in adopting an act does not normally require the adoption of new a measure (for instance: Case C-491/01, *The Queen and the Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd (BAT),* ECLI:EU:C:2002:741, para. 98), this nonetheless led to annulment in the *Rotterdam Convention* case (Case C-94/03, op.cit. note 1024, paras 52-54).
[1040] Whereas the Court repeatedly holds that the choice of legal basis relates to the attribution/existence of competence, and not to its exclusive or shared nature (see for instance: Case C-495/03, *Commission v Ireland*, ECLI:EU:C:2006:345, para.93), in Opinion 1/08 it took into account the balance between *ex* EC and Member States powers to conclude that the centre of gravity did not apply there (Opinion 1/08, *GATS (General Agreement on Trade in Services),* ECLI:EU:C:2009:739, paras 135-141; see further: M. Cremona, 'Balancing Union and Member State interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy under the Treaty of Lisbon' (2010) *European Law Review* 35(5), 689-690).
[1041] Joined Cases C‑164/97 and C‑165/97, *Parliament v Council*, ECLI:EU:C:1999:99, para. 14.

judgment. Despite it often being referred to as a landmark precedent or even doctrine,[1042] it proofs difficult to pin down its precise implications for the jurisprudence on procedural compatibility. Too often has it been picked up by parties to support arguments that were never made, while an attentive reading clarifies what was really at issue.

The Court, after finding that the contested Directive, by means of its twofold aim and content, required recourse to both *ex* Article 100a (on establishing the internal market) and 130s (on environmental policy) EEC, considered that this specific combination was impossible here. This followed from the particular set up of the cooperation procedure (then Article 149 (2) EEC), required by Article 100a. That Article prescribed that the Council could act by QMV when accepting the Parliaments amendments to its position, whereas it had to secure unanimity when intending to reject them. Given that Article 130s required the Council in any event to act unanimously, their cumulative application "would divest the cooperation procedure of its very substance", which is to increase the involvement of the Parliament in the legislative process.[1043] The Court subsequently reiterated its statement that the latter's participation "reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly".[1044] However, it was not this finding that guided its conclusion. Rather, the Court decided that – given the procedural incompatibility – additional elements needed to be taken into account and therefore reopened the centre of gravity test. Based on a remarkably wide interpretation of internal market measures and the mainstreaming obligation of environmental protection, preference was eventually given to the former.[1045]

In spite of the absence of generalising statements in these very specific circumstances, as well as the near complete replacement of this cooperation procedure by the co-decision procedure two years later in the Maastricht Treaty,[1046] this ruling started to live a life of its own. It was often raked up as a proof of the Court's preference for procedures that increase the involvement of the Parliament.[1047] The Court, for its part, only referred occasionally and rather abstractly to this judgment, so that the 'doctrine' was initially not further developed.[1048] Some more details were unveiled in a 2004

[1042] R. Lauwaars and R. van Ooik, 'De Problematiek van de Dubbele Rechtsgrondslagen in het Europese Recht' (2010) *Sociaal-economische Wetgeving : Tijdschrift voor Europees en Economisch Recht* 58(7/8), 299-300.
[1043] Case C-300/89, op.cit. note 1018, paras 18-20.
[1044] Ibid. para. 20. This had already been clearly expressed in Case C-183/79, *Roquette Frères v Council,* ECLI:EU:C:1980:249, para. 33; and Case C-139/79, *Maizena v Council,* ECLI:EU:C:1980:250, para. 34.
[1045] Case C-300/89, op.cit. note 1018, paras 21-24; R. Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) *Common Market Law Review* 30(1), 95-96.
[1046] Respectively *ex* Articles 252 and 251 TEC (the first has been completely abandoned by the Lisbon Treaty, the latter is now called the ordinary legislative procedure and set out in Article 294 TFEU). The Economic and Monetary Union (EMU) was the only area where the cooperation procedure still applied after Maastricht.
[1047] See for instance: H. Somsen, 'Annotation Case C-300/69, Commission v. Council (Titanium Dioxide)' (1992) *Common Market Law Review* 29(1), 149-151 (sic.). Recently it was used by the Parliament as an argument to select the legal basis which "involves the Parliament more closely in the adoption of the act concerned" (Case C-490/10, *Parliament v Council*, ECLI:EU:C:2012:525, para.27).
[1048] For instance: Joined Cases C‑164/97 and C‑165/97, op.cit. note 1041, para. 14.

Commission v Council ruling. There the Court considered that, in line with *titanium dioxide*, legal bases cumulating QMV and unanimity in the Council are incompatible.[1049] It took a decade and half after *titanium dioxide* before the role of the Parliament in choosing legal bases received renewed judicial attention. This was in the form of an addendum attached to the Court's former phraseology, stating that combining legal bases is impossible, not solely when the procedures laid down for each legal basis are incompatible but also "where the use of two legal bases is liable to undermine the rights of the Parliament".[1050] This was not the case here, as a legal basis (*ex* Article 133 TEC) providing no role for the Parliament had to be added to a measure adopted according to a provision (*ex* Article 175(1) TEC) that gave the latter a consultative role.[1051]

In the 2008 *EIB* case the Court specified that a legal basis (*ex* Article 181a TEC) providing for the consultation of the Parliament could be combined with one (*ex* Article 179 TEC) prescribing co-decision, simply by applying the procedure that maximises the involvement of the Parliament.[1052] If any obstacle as to the varying involvement of the Parliament can be overcome by applying the most demanding procedure, one might wonder when cumulative legal bases can still 'be liable to undermine its rights'. Interestingly, Advocate General Kokott took a different perspective in the *EIB* case. She concluded to procedural incompatibility because applying the co-decision procedure of *ex* Article 179 TEC would impinge on the Council's right to be sole legislator under *ex* Article 181a TEC.[1053] Indeed, the respect for Member States' powers and their national majorities can equally be seen as 'reflecting a fundamental democratic principle'. The Court does however not seem to accord a similar importance to the role played by the Council, to the point of being even contradictory. Whilst having firmly determined in Case C-338/01 that a combined voting in the Council by qualified majority and unanimity was incompatible,[1054] this same combination was not considered problematic in the *Erasmus* case, where issues of procedural incompatibility were not even addressed.[1055] In the *Kadi and Al Barakaat* case the Court moreover saw no problem in cumulating *ex* Articles 60 and 301 EC, providing for QMV in the Council and no involvement of the Parliament, with *ex* Article 308 EC, assigning the Council to vote unanimously and consult the Parliament.[1056]

[1049] Case C-338/01, op.cit. note 1021, paras 56-58.

[1050] Case C-178/03, *Commission v Parliament and Council (Regulation implementing the Rotterdam Convention),* ECLI:EU:C:2006:4, para. 57.

[1051] Respectively current Articles 207 and 192 TFEU. The Advocate-General considered that this combination of legal bases was not possible (Ibid., Opinion AG Kokott, ECLI:EU:C:2005:312, para. 63).

[1052] Case C-155/07, op.cit. note 295, para. 79; respectively current Articles 212 and 209 TFEU.

[1053] Case C-155/07, Opinion AG Kokott, op.cit. note 1033, paras 89-90. She made a similar point in Case C-178/03 (Opinion AG Kokott, op.cit. note 1050, para. 61).

[1054] A reasoning which appears to be confirmed in C-94/03, op.cit. note 1024, para. 59.

[1055] Case C-242/87, *Commission v Council (Erasmus),* ECLI:EU:C:1989:217, para. 37. This concerned a combination of then Article 128 EEC (cf. *ex* Article 150 TEC and current 166 TFEU) and 235 EEC (*ex* Article 308 TEC and currently 352 TFEU).

[1056] Joined Cases C-402/05 and C-415/05, op.cit. note 349, paras 211-214. This increasingly tolerant judicial approach to procedural accumulation was confirmed in Opinion 1/08. There, the Court concluded to a combination of *ex* Articles 133(1),

The above enumeration of cases reveals that the accumulation of varying degrees of involvement of the Parliament does not pose unsurmountable obstacles and also the prohibition of combining different voting procedures in the Council shows cracks. This begs the question as to which procedural combinations could still lead to a conclusion of incompatibility. The 2009 *International Fund for Ireland (IFI)* case offered the CJEU the opportunity to finally settle the dust. This case involved a combination of the co-decision procedure (required by *ex* Article 159(3) TEC) with unanimity in the Council and consultation of the Parliament (under the flexibility clause of *ex* Article 308 TEC, current Article 352 TFEU). In the light of the above account, the Court's finding in this case that these procedures can be combined is not surprising. As if stating the obvious, it relies on the *Erasmus* and *Kadi* cases, to conclude that the "Community ought to have had recourse to both [legal bases] … while complying with the legislative procedures laid down therein, that is to say, both the 'co-decision' procedure referred to in Article 251 EC and the requirement that the Council should act unanimously".[1057]

With this statement the CJEU appears to complete an unpronounced "levelling-up rule", which it initiated one year earlier in the *EIB* case.[1058] This would imply that different procedures can be joined up by conceiving an ad hoc decision-making formula that maximises the involvement of all actors, i.e. the Member States in the Council by applying the most restrictive voting procedure and the Parliament. The Court did not clarify or justify this approach, which is regrettable given that it does not have an obvious ground in primary law.[1059] In the view of Advocate General Maduro it might even contradict it. A couple of months earlier, he reasoned that all cumulative legal basis should be prohibited because they alter "the institutional and democratic balance laid down by the Treaty".[1060] Even more puzzling is that this judgment of the Fourth Chamber appears to announce the death of *titanium dioxide* without even once referring to this otherwise omnipresent ruling. Although in no way hinted at by the Court, Vice-President Lenaerts explains that *IFI* does not mar the *titanium dioxide* line of case law, but

(5) and (6), 71 and 80(2) EC, in conjunction with Article 300(2) and (3) EC – cumulating QMV and unanimity in the Council as well as consultation and information of the Parliament (Opinion 1/08, op.cit. note 1040, final conclusion). A potential justification lies in the exceptional nature of *ex* Article 133(6)(2) and (3) TEC (see further: S. Adam and N. Lavranos, 'Annotation Opinion 1/08' (2010) *Common Market Law Review* 47(5), 1535-1536).

[1057] Case C-166/07, *Parliament v Council (International Fund for Ireland – IFI)*, ECLI:EU:C:2009:499, para. 69.

[1058] G. De Baere, 'From 'Don't Mention the Titanium Dioxide Judgment' to 'I Mentioned it Once, But I Think I Got Away with it All Right': Reflections on the Choice of Legal Basis in EU External Relations after the Legal Basis for Restrictive Measures Judgment' (2013) *Cambridge Yearbook of European Legal Studies* 15, 542.

[1059] This gives rise to uncertainty. For one thing, there is disagreement as to which procedure maximises the democratic role of the Parliament. Whereas Lauwaars and van Ooik argue that the new consent procedure of 352 TFEU gives the Parliament most power (Lauwaars and van Ooik (2010) op.cit. note 1042, 298-299), Corthaut disagrees and finds that the co-decision procedure better allows for every MEP to steer legislation (T. Corthaut, 'Case C-166/07, Parliament v. Council - Institutional Pragmatism or Constitutional Mayhem' (2011) *Common Market Law Review* 48(4), 1293-1294). It is moreover unclear how to approach the varying involvement of other actors, such as the EU's consultative bodies, under this rule (ibid., 1286-1287).

[1060] Case C-411/06, *Commission v Council (Basel Convention),* Opinion AG Maduro, ECLI:EU:C:2009:189, para. 6 and footnote 5. In certain cases the combination of legal bases could moreover go against the *ratio legis* of certain articles. In *Kadi*, for instance, the addition of *ex* Article 308 EC meant both the involvement of the Parliament and the need for unanimity in the Council, going against the need for speed of the traditional sanctions regime (De Baere (2013) op.cit. note 1058, 548-549).

forms a specific exception to it. It was the only conceivable solution to simultaneously preserve the principle of conferral and the political safeguards of federalism.[1061] This interpretation of the *IFI* case as a peculiar side-way, rather than the burial of *titanium dioxide,* is confirmed in the 2012 *targeted sanctions* case (cf. *infra* 5.3.2.).[1062]

In addition to these various obscurities, there is one thorny contradiction in the Court's general methodology. After first determining that two or more legal bases are on account of the aim and content of the measure necessary for its adoption, the conclusion of procedural incompatibility implies that one of them must nonetheless be chosen. Several parties have referred to *titanium dioxide* to then opt for the most democratic legal basis.[1063] Only recently did the Court decidedly rule out this misapprehension, confirming that "it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure".[1064] The argument of democracy thus only plays in levelling-up the procedure for cumulative legal bases, not in choosing between them. Consequently, in spite of all the strive for objectivity, the finding of incompatibility exposes the Court to criticisms of subjectivity by necessitating a choice between legal bases for which it had just determined that none is of itself sufficient to fully cover the measure at issue. Schaffrin therefore argues that "basing an act of a hybrid nature on a single legal basis only, infringes even more on the institutional balance and the letter of the Treaties than using both pertinent legal bases and then applying only the provision with the stricter procedure".[1065]

5.2. Drawing the legal boundary between development cooperation and the CFSP: development without borders?

The Court's general methodology for choosing appropriate legal bases is thus the product of longstanding but still incomplete jurisprudence. This sows the seeds of legal uncertainty and does not help to reduce the appetite for inter-institutional conflict. The pillarised CFSP required additional/different rules when choosing between a CFSP and non-CFSP legal basis. This section will

[1061] "Had the ECJ interpreted ex Article 159 EC broadly, the competences of the EU would have been expanded without the Member States having a right of veto, circumventing the political safeguards laid down in ex Article 308 EC. In the same way, had it relied on ex Article 308 EC alone, the EU would have expanded its competences whilst weakening the powers of the European Parliament" (K. Lenaerts, 'EU Federalism in 3-D' in E. Cloots and G. De Baere (eds), *Federalism in the European Union* (Hart Publishing, Oxford, 2012) 30-31.

[1062] S. Adam, et al., 'Chronique de Jurisprudence de l'Union: Les relations extérieures (1er janvier 2009 — 31 décembre 2012)' (2013) *Cahier de Droit Européen* 49(3), 840-842.

[1063] The Court had generated confusion in this regard in the *Kadi and Al-Barakaat* cases by taking account of the strengthened role for the Parliament in selecting the appropriate legal basis (Joined Cases C-402/05 and C-415/05, op.cit. note 349, paras 235-236); Advocate General Jääskinnen continues this reasoning in Case C‑270/12 (*United Kingdom v Parliament and Council,* ECLI:EU:C:2014:18, paras 58-59) which was however here not confirmed by the CJEU.

[1064] Case C-130/10, op.cit. note 1017, para. 80; see also: Case C-155/07, op.cit. note 295, para. 82.

[1065] D. Schaffrin, 'Dual Legal Bases in EC Environmental Law Revisited: Note on the Judgments of the European Court of Justice in the Cases C-94/03 and C-178/03' (2006) *Review of European Community & International Environmental Law* 15(3), 342.

disentangle this system and analyse what the above confusion meant for this particular interface. In a first instance it will be set out how the Court has gradually sketched a broad policy horizon for EU development cooperation, how it approached security aspects of EU legislation, and how *ex* Article 47 TEU entered the picture in cross-pillar situations (5.2.1.). This was put to the ultimate test in the 2008 *SALW* case, wherein the CJEU delivered a long-awaited blueprint for understanding the position of the CFSP in the EU legal order (5.2.2.). Even though this did not come with an expiration date, its relevance was soon questioned as the Lisbon Treaty significantly shakes up its legal foundations. This will be the subject of section 5.3.

5.2.1. Setting the scene: development and security objectives in EU litigation

Exploring the outer limits of development cooperation

The early litigation on development policy did not predict a bright and broad future. The focus was more on what development cooperation was not, rather than on what it actually constituted.[1066] Trade measures, such as tariff reductions or the establishment of international commodity funds, designed to contribute to the socio-economic advancement of developing countries, could be covered in their entirety by the CCP.[1067] The same was true for a banana import regime, which fell entirely under the common agricultural policy, despite its specific focus on the development of disadvantaged countries.[1068] This is not surprising given that these cases were decided at a time when development policy had no primary law status. On the eve of its formal recognition in the Maastricht Treaty, the Court clarified that development policy and humanitarian aid – the distinction between them then still unclear – are complementary competences. This implies that Member States can freely choose to enter "either collectively or individually, or even jointly with the Community" into international commitments.[1069] Notably, even the recruitment of EU institutions to carry out financial obligations resulting from such commitments, does in no way detract from the choice for either option.[1070]

The Maastricht codification then finally made it possible for the Court to revert to the Treaty when ruling on issues of development. It did so in all but restrictive terms. The first agreement adopted under this new title, namely the Cooperation Agreement between the EC and India on Partnership and Development, was immediately put to the test in the 1996 landmark *Portugal v Council* case. Portugal

[1066] S. Peers, 'Annotation on Case C-268/94, Portugal v Council' (1998) *Common Market Law Review* 35(2), 541. Notably, this could also be seen as strengthening European development policy vis-à-vis that of the Member States as it brought this area within the confines of exclusive Union competence (Broberg and Holdgaard (2014) op.cit. note 291, 10-20).
[1067] Case C-45/86 and Opinion 1/78 op.cit. note 111.
[1068] Case C-280/93, *Germany v Council (Banana Market)*, ECLI:EU:C:1994:367.
[1069] Case C-316/91, op.cit. note 210, para. 26; Joined Cases C-181/91 and C-248/91, op.cit. note 210, para. 16.
[1070] A. Ward, 'Community Development Aid and the Evolution of the Interinstitutional Law of the European Union' in A. Dashwood and C. Hillion (eds), *The General Law of E.C. External Relations* (Sweet & Maxwell, London, 2000) 47.

brought an action to annul the Decision concluding this agreement, among others targeting the so-called 'essential elements clause'. This read that "[r]espect for human rights and democratic principles is the basis for the cooperation between the Contracting Parties … and it constitutes an essential element of the Agreement" cf. *supra* 2.2.).[1071] The non-observance of such a clause forms a basis for suspending the agreement in line with Article 60 VCDR.[1072] Portugal argued that such an extensive purpose, with potentially wide-ranging consequences, could not simply be covered by the trade and development legal bases and required additional recourse to the flexibility clause of current Article 352 TFEU. The latter was, in its view, also necessary for the Agreement's provisions on intellectual property, drug control, energy, culture and tourism.

The CJEU built further on its Opinion 1/78, where it held that the characterisation of an agreement must be assessed "having regard to its essential objective rather than in terms of individual clauses of an altogether subsidiary or ancillary nature".[1073] It developed a two-phased methodology to determine whether or not certain provisions can fall within the scope of a Treaty characterised as development agreement.[1074] First, it has to be determined whether the subject-matter of specific clauses contributes to the general objectives of development cooperation as set out in the Treaty. If this condition is fulfilled, than a second step consists of assessing whether these clauses contain such extensive or concrete obligations that they in fact constitute distinct objectives. With regard to the agreement at issue, the Court held that the disputed provisions set out mere frameworks for cooperation, which do not "predetermine the allocation of spheres of competences between the Community and the Member States".[1075]

With this approach the Court sought to strike a balance between the constantly expanding notion of development (cf. *supra* Chapter 2) and the constitutional principle of conferred powers. According to the CJEU the wording of the Treaty's development objectives made clear that these are broad, in the sense that measures required for their pursuit can relate to a variety of specific matters. To require an additional legal basis whenever a development agreement "touches on a specific matter would in practice amount to rendering devoid of substance the competence and procedure prescribed in Article 130y" (current Article 209 TFEU).[1076] It hereby indicated that an effective development policy is

[1071] Article 1(1) Cooperation Agreement between the European Community and the Republic of India on partnership and development, OJ L223/24, 27.08.1994.
[1072] Op.cit. note 897.
[1073] Opinion 1/78, op.cit. note 111, para. 56.
[1074] Case C-268/94, op.cit. note 374, paras 37-48; S. Peers, 'Fragmentation or Evasion in the Community's Development Policy? The Impact of Portugal v. Council' in A. Dashwood and C. Hillion (eds), *The General Law of E.C. External Relations* (Sweet & Maxwell, London, 2000) 102-103.
[1075] Case C-268/94, op.cit. note 374, para. 47.
[1076] Ibid., paras 37-38. In this light, Portugal also argued that the reversion to a CCP legal basis for this agreement was redundant. However, the Court dismissed this question given that the illicit addition of this legal basis could in any case only constitute a formal defect (paras 78-80).

inclusive and must attempt to remove as many obstacles to development as possible. Its evolutionary interpretation of developmental aims is counterbalanced by ensuring that ancillary objectives do not raise extensive or concrete obligations. Indeed, "[t]he mere inclusion of provisions for cooperation in a specific field does not therefore necessarily imply a general power such as to lay down the basis of a competence to undertake any kind of cooperation action in that field".[1077]

In 2007 the Court prudently approached the strained territorial dispute between security and development in the *Philippines border management* case. Herein, the Parliament successfully sought the annulment of a Commission Decision (not published in the OJ) approving a project to secure the Philippines' borders. This was adopted as part of its implementing powers under the Regulation on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America (ALA Regulation).[1078] The project was targeted at the optimisation of border management methods, the creation of a system of information technology, the verification of identity papers and the training of relevant staff. It was part of the Commission's answer to a request from the Council to take appropriate measures under its external programmes and instruments in the light of the 9/11 attacks and the resulting international fight against terrorism.[1079] The Parliament argued that this exceeded the scope of the ALA Regulation, which contained no express mention of such activities, and that the fight against terrorism did in any case not come within the Community's general powers. The Commission, on the other hand, argued that the Decision was not merely about counter-terrorism, but also contained measures to control the trafficking of drugs and human beings. It held that these contribute to creating conditions more conducive to economic development and investment, which are central objectives of the ALA Regulation.

None of the parties, nor the Advocate General and the Court, sought to deny the potential of this project to contribute to the interrelated challenges of poverty and instability. Building upon the *Portugal v Council* reasoning, Advocate General Kokott contended that measures relating to internal security and stability may be based on development powers in so far as "the essential object of those measures is the economic and social development of developing countries and the campaign against poverty".[1080] As in that landmark case, she adhered to an evolutionary concept of development, which might – as suggested by the reference to the broader objectives of the UN and other international organisations in *ex* Article 177(3) TEC (current Article 208(2) TFEU) – change over time under influence

[1077] Ibid., para. 47.
[1078] Council Regulation (443/92/EEC) on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America, OJ L52/1, 25.02.1992.
[1079] This is clear from the third recital of the contested Decision, stating that "the overall objective of the proposed project is to assist in the implementation of the UNSCR 1373 (2001) in the fight against terrorism and international crime" (Case C-403/05, op.cit. note 1038, para. 18).
[1080] Case C-403/05, *Parliament v Commission (Philippines border management)*, Opinion AG Kokott, ECLI:EU:C:2007:290, para. 87.

of the international context. Also the Court acknowledged the existence of this link, albeit in more cautious terms. Basing itself on the European Consensus on Development, it affirmed 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".[1081]

Yet, both Kokott and the Court were careful to distinguish the undisputed existence of this security-development nexus, from the question at issue: whether the implementing powers of the Commission fell within the scope of the ALA Regulation. The latter had been adopted in 1992, right before the Maastricht Treaty introduced a development assistance title, and was therefore still based on the flexibility clause (cf. *supra* 2.1.). It is important to note that the Commission's 2002 proposal to adapt this Regulation to the new Treaty framework and the expanding notion of development – amongst others by introducing a focus on counter-terrorism – was never accepted.[1082] In the end, the ALA Regulation was in December 2006, rather shortly before this judgment was issued, replaced by the DCI Regulation.[1083] The policy framework at issue was thus already outdated by the time of the ruling. This significantly limits its contribution to understanding the judicial approach to the meanwhile overhauled approach to the security-development link. Rather, this link formed the background as a changed contextual circumstance, and the Court's main focus was on ensuring the responsiveness hereto by an established policy framework.

On this point a considerably more restrictive approach was taken. This should however not be seen as an obstinate blindness for the hampering consequences of an overly stringent interpretation of conferred powers on keeping up with the interrelated challenges of foreign policy.[1084] The openness to an evolutionary interpretation of the EU's "collective power" may not automatically extend to the "distribution of institutional powers".[1085] The Court has consistently held that the Commission can take all necessary measures for the implementation of given legislation, yet only to the extent that this is foreseen in the basic act and limited to its essential general aims.[1086] Indeed, just as Treaty provisions should not be precise policy prescriptions that leave no room for legislators, neither should the latter "try to turn legislative acts into quasi-constitutional mandates".[1087]

[1081] Case C-403/05, op.cit. note 1038, para. 57. In this regard, the Court also referred to the then freshly adopted IfS and DCI.
[1082] Commission Communication (COM(2002) 340 final) on a Proposal for a Regulation concerning Community cooperation with Asian and Latin American countries and amending Council Regulation 2258/96/EC, 02.07.2002.
[1083] It is telling that this new Regulation in no way refers to the objective of counterterrorism, but does provide for assistance in the area of border management (Regulation (1905/2006/EC) op.cit. note 554).
[1084] M. Cremona, 'Annotation on Case C-403/05 Parliament v Commission' (2008) *Common Market Law Review* 45(6), 1738.
[1085] Case C-403/05, Opinion AG Kokott, op.cit. note 1080, para. 86.
[1086] See to that effect: Case C-478/93, *Netherlands v Commission,* ECLI:EU:C:1995:324, paras 30-31; Case C‑159/96, *Portugal v Commission*, ECLI:EU:C:1998:550, paras 40-41. This reference to essential elements is now codified in Article 290(1) TFEU.
[1087] Cremona (2008) op.cit. note 1084, 1740.

The Court was thus essentially restrained to interpreting the objectives of the (outdated) ALA Regulation, which made no mention of internal stability and security. As to the Commission's argument that its Decision constituted an act of capacity-building, which was explicitly mentioned in the Regulation, the Court replied that this did not constitute an end in itself. Such measures require the existence of a direct link, not "a mere hypothetical side-effect",[1088] to the Regulation's objectives of strengthening investment and development. This was considered all the more necessary "[s]ince all cooperation, by the very fact of the funding to be applied, is, as a rule, likely to have an impact on the economic situation of the country concerned".[1089] Without demonstrating a direct connection to the Regulation's socio-economic objectives, the Commission Decision could not rashly set its aims on improving internal security and stability.

While the security-development connection thus formed the background to this ruling, there were only limited hints as to the judicial approach towards it. The ruling did not mean that the Commission's implementing powers in the field of development cooperation could per definition not engage in areas as border management. Rather, the CJEU emphasised that such powers require an appropriate legal basis, and may never form a *carte blanche* to eliminate any obstacles to the achievement of that policy's objectives. A more enlightening elucidation of the division of competences along the security-development nexus would have to await the outcome of the *SALW* case. This first ruling on the CFSP at once concerned its relation to development cooperation (cf. *infra* 5.2.2.). It was preceded by a number of rulings that shed light on the permissibility of non-CFSP legislation to touch upon political and security aspects of foreign policy, as well as on the first and third pillar interface. These two lines of case line will be concisely introduced in the next two subsections.

The place of security objectives in EU legislation

As was the case for aims of a developmental nature, it was again Opinion 1/78 providing a first indication of the Court's approach. It firmly established that a measure's security objectives are insufficient to bring its subject outside the scope of the then all-mighty CCP.[1090] This was confirmed and further extended in a number of dual goods cases, establishing that both the military applications of such products and their security-related aims can legitimately be covered by the EU's trade competences.[1091] This holds a notable parallel to *Portugal v Council*, in the sense that commercial policy can tackle foreign policy objectives as long as its essential aims are of a commercial nature. The

[1088] Case C-403/05, Opinion AG Kokott, op.cit. note 1080, para. 94.
[1089] Case C-403/05, op.cit. note 1038, para. 66.
[1090] Opinion 1/78 op.cit. note 111, para. 49.
[1091] Respectively Case C-83/94, *Leifer and Others*, ECLI:EU:C:1995:329 , para. 11; and Case C-70/94, *Werner v Bundesrepublik Deutschland*, ECLI:EU:C:1995:328, para. 10. For an extensive annotation: I. Govaere, 'Annotation Case C-70/94, *Werner v. Germany* and Case C-83/94, *Leifer and Others*' (1997) *Common Market Law Review* 34(4) 1019-1037.

Centro-Com case subsequently determined that even the Member States' retained foreign and security competences (under the then EPC) did not mean a blank check for tackling security-related objectives.[1092] These "must be exercised in a manner consistent with Community law".[1093] This moreover provided a first indication that the Court would not be stopped by its exclusion from the CFSP to protect the integrity of the EC legal order.

A decade later, in its 2006 *PNR* judgment, the Court indicated – although not in so many words – that the protection of the *acquis* is not without limits either. This case concerned the conclusion of an Agreement between the EC and the United States on the transfer of Passenger Name Records. It followed the passing of US legislation, in the aftermath of the 9/11 events, obliging all airlines operating to, from or through its territory to provide electronic access to such data. The Parliament put forth a series of arguments pleading for the annulment of two decisions: a Commission Decision which – in line with its implementing powers under Article 25(6) of the Data Protection Directive – found that the US provided an adequate level of protection and a Council Decision allowing for the conclusion of the EC-US agreement.[1094] In a remarkably terse and formalistic judgment, the Court simply ruled that the transfer of PNR data constituted "processing operations concerning public security and the activities of the State in areas of criminal law".[1095] This trespassed the limits of Article 3(2) of the Data Protection Directive, which specifically excludes the processing of data relating to activities provided for under the second and third pillars.

Reminiscent of the *Philippines border management* ruling, this (appropriately) formalistic approach – closely centred on the wording of the Data Protection Directive – does not allow for much generalisation. Nonetheless some prudent conclusions can be drawn, along two rather contradictory lines. On the one hand, in line with the 'direct connection' required in the above case, *PNR* might be indicative of a raised threshold as to when security-related objectives could be fulfilled through (former) first pillar means. On the other hand, it also means that the integrity of the then second and third pillars were unevenly protected. Rather than through direct scrutiny in the light of *ex* Titles V and VI of the TEU, the latter were only shielded by default, i.e. if and when it could be established that *ex*

[1092] I. Govaere, 'External Competence: What's in a Name? The Difficult Conciliation between Dynamism of the ECJ and Dynamics of European Integration' in P. Demaret, I. Govaere and D. Hanf (eds), *30 Years of European Legal Studies at the College of Europe* (P.I.E.-Peter Lang, Brussels, 2005) 474.

[1093] Case C-124/95, *The Queen, ex parte Centro-Com v HM Treasury and Bank of England*, ECLI:EU:C:1997:8, para. 25. Without explicitly referring to it, this case reflects the rationale inherent to the duty of loyal cooperation (for more details on this duty see: Van Elsuwege and Merket (2012) op.cit. note 354, 38-40).

[1094] Commission Decision (2004/535/EC) on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the US Bureau of Customs and Border Protection, OJ L235/11, 06.07.2004; Council Decision (2004/496/EC) on the conclusion of an Agreement between the EC and the US on the processing and transfer of PNR data by Air Carriers to the US Department of Homeland Security, Bureau of Customs and Border Protection, OJ L 183/93, 20.05.2004.

[1095] Joined Cases C-317/04 and C-318/04, *Parliament v Council (PNR)*, ECLI:EU:C:2006:346, paras 54-70; M. Mendez, 'Passenger Name Record Agreement: European Court of Justice' (2007) *European Constitutional Law Review* 3(1), 140-143.

EC action trespassed against the principle of conferral.[1096] The CJEU did indeed not act upon the Advocate General's implicit invitation to rule in terms of the choice of legal basis and no aim and content test was undertaken.[1097] Only indirectly and implicitly did the Court's annulment of the Decisions at issue clear the path for adopting a new agreement[1098] based on the CFSP and *ex* PJCC Treaty provisions.[1099]

Choosing legal bases across the old pillars: ex Article 47 TEU enters the picture

If cases on the choice of legal basis are generally contentious, this was even more so in the former cross-pillar situations given the complexity of delimitating 'separate but integrated legal orders'. The stakes are evidently much higher when the Court's test not only serves to determine the appropriate Treaty provision(s) on which an action is based, but also – and essentially – the applicable legal order. A number of cases concerning the interface between the first and third pillar clarified that *ex* Article 47 TEU had to be added to the traditional analysis, but left several essential questions regarding the practical effect hereof unanswered.

Ex Article 47 TEU first appeared in a 1998 case on a*irport transit visas*. Whilst not raised by any of the parties, it was Advocate General Fennelly who raked it up and introduced the by now well-known language of encroachment. He stated that this Article was introduced into the Treaty "with the very purpose of ensuring that, in exercising their powers under Titles V and VI of that Treaty, the Council and the Member States do not *encroach* on the powers attributed to the Community".[1100] This implied that the Court could adjudicate on acts purporting to be adopted under the third pillar, "in order to determine whether or not they deal with matters which more properly fall within the Community sphere of competence".[1101] The Court concurred on both its jurisdiction and the notion of encroachment, but failed to specify under which conditions the latter occurred.[1102] It appeared to indicate that the Community was protected from encroachment even when acting under concurrent or shared powers.[1103] This would mean that the requirement, under *ex* Article 47, that nothing in the

[1096] Hillion (2014a) op.cit. note 1013, 59.
[1097] G. Gilmore and J. Rijpma, 'Annotation Joined Cases C-317/04 and C-318/04, Parliament v. Council and Commission' (2007) *Common Market Law Review* 44(4), 1081.
[1098] Council Decision (2006/729/CFSP/JHA) on the signing, on behalf of the EU, of an Agreement between the EU and the USA on the processing and transfer of PNR data by air carriers to the US Department of Homeland Security, OJ L298/27, 27.10.2006.
[1099] Two other cases dealing with the place of security objectives in EC legislation, namely *Kadi and Al Barakaat* and *Data Retention*, were decided after the *SALW* ruling, and will accordingly be dealt with at the end of the next section.
[1100] Case C-170/96, *Commission v Council (airport transit visas)*, Opinion AG Fennelly, ECLI:EU:C:1998:43, para. 8 (emphasis added).
[1101] Ibid., para. 11.
[1102] Case C-170/96, *Commission v Council (airport transit visas)*, ECLI:EU:C:1998:219, para. 16.
[1103] M.-G. Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) *International and Comparative Law Quarterly* 55(1), 91.

TEU shall affect the EC Treaties, imposed a "substitution effect"[1104] implicating that "if something *can* be done via the EC, it *must* be done via the EC".[1105]

Advocate General Ruiz-Jarabo Colomer seemed to confirm this view in the *environmental penalties* case. "[B]y virtue of the primacy of Community law, established in Article 47 EU", he expressed that the existence of any legal basis for the Community to intervene in a matter, had the effect of "cancelling out the powers of the Union".[1106] The Court, however, in this judgment as well as in the subsequent s*hip-source pollution* case, applied its powers of scrutiny concisely, precluding generalising conclusions on the exact modalities wherein encroachment occurs. Briskly emphasising their predominantly environmental – rather than criminal law – character, the Court decided to annul the PJCC acts before it.[1107] This approach avoided the tricky issue of how to reconcile the centre of gravity reasoning with the strict delimitation imposed by *ex* Article 47 TEU. In essence, what if the examination of a PJCC measure revealed that it pursued a twofold purpose or had a twofold component? If the EC-component was merely incidental, would the strict seclusion of the PJCC nonetheless require the entire act to be annulled? And when none of these components was incidental, how to answer the question of procedural compatibility?

The debate on the effect of *ex* Article 47 TEU thus remained open. The above cross-pillar cases already indicated that this Article installed more than a 'conflict avoidance rule' to ensure Member States' compliance with EC Treaty obligations in exercising their powers under the TEU.[1108] This was in fact the approach taken in the *Centro-Com* litigation, exhuming the spirit of the duty of loyal cooperation. Three other possibilities remained. The *first* is the above mentioned 'substitution effect', stating that what could that should be done via the EC. In this view, the nature of competences is irrelevant, thereby imposing a fixed boundary between EC and CFSP competences. A *second* possibility is to interpret *ex* Article 47 as a 'moving boundary' that extends the *ERTA*-effect from EC-Member States to EC-EU relations.[1109] This establishes a rule of primacy or hierarchy, yet only in the case of conflicting activity. This is presupposed under exclusive competences. However, in areas covered by shared or complementary powers, the CFSP could simultaneously strive for the fulfilment of security-related

[1104] Dashwood (2008) op.cit. note 217, 82.
[1105] S. Weatherill, 'Safeguarding the Acquis Communautaire' in T. Heukels, N. Blokker and M. Brus (eds), *The European Union after Amsterdam* (Kluwer Law International, The Hague, 1998) 159-160.
[1106] Case C-176/03, *Commission v Council (environmental penalties)*, Opinion AG Ruiz-Jarabo Colomer, ECLI:EU:C:2005:311, paras 26-27.
[1107] Case C-176/03, *Commission v Council (environmental penalties)*, ECLI:EU:C:2005:542, paras 46-51; Case C-440/05, *Commission v Council (ship-source pollution)*, ECLI:EU:C:2007:625, paras 66-74.
[1108] Cremona (2008) op.cit. note 1015, 43.
[1109] This effect refers to the statement of the Court that "each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules" (Case 22/70, *Commission v Council (European Road Transport Agreement - ERTA)*, ECLI:EU:C:1971:32, para. 17).

objectives as along as the Community had not enacted specific rules. A *third* and final interpretation of Article 47 consists of "abandoning the a priori hierarchical inferiority of the CFSP" in favour of a context and competence-specific delimitation rule.[1110] In this reasoning, the Court, in delimitating EC and CFSP competences, should take maximum effectiveness as a guiding principle, and counterbalance the protection of the *acquis* with the principle of conferral and the CFSP's Treaty objectives.[1111]

5.2.2. The *SALW* case: security and development geared up for the perfect storm

The *SALW* case was a welcome occasion to finally clarify the position of the CFSP in the EU legal order, as well as to shed more light on the judicial approach to the security-development nexus. A lot can be said about the contentious choices made in this ruling, and particularly its unworldly schism from and harmful impact on the reality of EU policies on the interface between security and development. Yet, from a purely legal point of view, the Court's detailed analysis came a significant way in answering some of the above questions regarding cross-pillar litigation. The judgment was however delivered on the eve of the Lisbon Treaty's entry into force, without specifying whether it was a dying scream of the soon to be dissolved Community or would remain relevant after the collapse of the pillar walls.

Facts and background

The Commission, with the support of the Parliament, plead for the annulment of Council Decision 2004/833/CFSP (hereafter: ECOWAS Decision), implementing Joint Action 2002/589/CFSP (hereafter: SALW Joint Action) by setting out the details of an EU contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons. In addition, the Commission asked to declare illegal and inapplicable the SALW Joint Action on the EU's contribution to combating the destabilising accumulation and spread of SALW.[1112] The latter establishes an EU programme to build consensus in the relevant regional and international fora on SALW control. It list principles and measures, supported through EU financial and technical assistance, to exact commitments, establish and maintain national inventories and restrictive weapons legislation, assist in controlling and eliminating surplus small arms, and promote confidence-building. The ECOWAS Decision implements this Joint Action by means of a financial contribution to and technical assistance in setting up a Light Weapons Unit within the

[1110] B. Van Vooren, 'EU-EC External Competences after the Small Arms Judgment' (2009) *European Foreign Affairs Review* 14(1) 14-15, 16-17.
[1111] Dashwood (2008) op.cit. note 217, 97-98.
[1112] Council Decision (2004/833/CFSP) implementing Joint Action 2002/589/CFSP with a view to an EU contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons, OJ L359/65, 04.12.2004; Joint Action (2002/589/CFSP) on the EU's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP, OJ L191/1, 19.07.2002.

ECOWAS Technical Secretariat and convert the Moratorium on SALW into a Convention between ECOWAS Member States.

The Commission argued that such project ought rather to have been conducted through the EDF under the Cotonou Agreement. Article 11(3) hereof explicitly provides for the fight against the "excessive and uncontrolled spread, illegal trafficking and accumulation of small arms and light weapons" (cf. *supra* 2.2.2.). The Commission held that this Article integrates the entire campaign against the proliferation of SALW into Community development cooperation policy, thereby denying the CFSP any role in this field. [1113] In diametrical opposition, the Council, supported by six intervening Member States, considered that "the campaign against the proliferation of small arms and light weapons does not fall within Community competences in the field of development cooperation policy or within any other Community competences". [1114] These forceful statements pass by the fact that both development cooperation and the CFSP have a long tradition of engaging in the fight against weapon proliferation.[1115] They are moreover downright dishonest. All Member States are party to the Cotonou Agreement and had therefore explicitly endorsed the financing of SALW control by the EDF. Article 9(1) of the ECOWAS Joint Action moreover stated that:

> *The Council and the Commission shall be responsible for ensuring the consistency of the Union's activities in the field of small arms, in particular with regard to its development policies. For this purpose, Member States and the Commission shall submit any relevant information to the relevant Council bodies. The Council and the Commission shall ensure implementation of their respective action, each in accordance with its powers.*[1116]

Also the Commission is not free from blame. The contested Joint Action had already been in force for two and a half years when the Commission lodged its appeal, and in fact repealed a similar Joint Action from 1999. Nonetheless, it had never proclaimed any disagreement and had not protested against the earlier and similar implementation of the SALW Joint Action in other regions.[1117]

So, why then this challenge and why now? While both the complaint and the Court's reasoning were framed entirely around general competence delimitation between the EC and the CFSP, it appears that

[1113] Case C-91/05, op.cit. note 85, para. 38. Notably, the Commission modified its position throughout the course of the proceedings and later admitted that certain aspects of SALW control may be better covered by the CFSP (Case C-91/05, Opinion AG Mengozzi, op.cit. note 1033, para. 140-142).
[1114] Case C-91/05, op.cit. note 85, paras 42 and 45.
[1115] For an elaborate analysis: P. Koutrakos, 'The Non-proliferation Policy of the European Union' in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Hart Publishing, Oxford, 2011) 249-272.
[1116] Similar provisions were included in Article 4(2) of the ECOWAS Decision as well as in the 2006 EU SALW Strategy (Council Note (5319/06) EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition, 13.01.2006, para. 19).
[1117] The Council and the French Government list these as part of their arguments (Case C-91/05, op.cit. note 85, para. 53).

the real issue was of a much more practical nature. The Commission had been supporting ECOWAS' fight against SALW proliferation for a number of years by funding local programmes and initiatives of the United Nations Development Programme (UNDP).[1118] A regional support strategy and RIP, co-signed by the Commission and ECOWAS/West-African Economic and Monetary Union (WAEMU) on 19 February 2003, provided for EDF support to UN priority measures under the action plan to implement a moratorium on the import, export and production of small arms. In this context the Commission, on the request of ECOWAS, had in 2004 started preparing a financing proposal for conflict prevention and peace-building, of which it stated that the bulk would be allocated to the ECOWAS Small Arms Control Programme.[1119] In the eyes of the Commission, the contested Council Decision thus concerned a unilateral choice to intervene with its ongoing activities, thereby undermining the widely portrayed Cotonou principles of partnership and local ownership. Not only did this unsolicitedly alter the cooperative method, the Commission would moreover be charged with the financial implementation thereof.[1120] In this light, it would have been more credible – and arguably less harmful with an eye to policy coherence – if the Commission had only contested this specific Council Decision and had not argued that the entire Joint Action infringed the non-affectation clause of *ex* Article 47 TEU. This turned its comprehensible practical concerns into a conflict that reflected a fundamental difference regarding the structure of the Union.[1121] Indeed, "[a]n overly strict interpretation of that non-affectation clause could render the CFSP an empty shell; while an exceedingly unrestricted interpretation could open up an escape route from the legal principles applicable to the Member States in their relationship with the Community".[1122]

The SALW ruling: legal advance, …

The Court's judgment had four main components. In a first step it clarified its jurisprudence under *ex* Article 47 TEU. Second, it explained the actual effect of this clause, specifically in relation to the nature of competences. Third, the CJEU theoretically and rather abstractly combined this clarified effect with the traditional centre-of-gravity test. The final and most extensive component then applied this methodology to the specific circumstances at issue.

First, regarding the Court's competence, the Council (with the support of Spain and the UK) somewhat surprisingly argued that it had no jurisdiction to rule on a plea of illegality brought against a CFSP

[1118] B. Nivet, 'Security by Proxy? The EU and (Sub-)Regional Organisations: the Case of ECOWAS', *ISS Occasional Paper n° 63* (EU Institute for Security Studies, Paris, 2006) 26.
[1119] Case C-91/05, op.cit. note 85, paras 5-7.
[1120] Article 3 ECOWAS Decision.
[1121] Case C-91/05, Opinion AG Mengozzi, op.cit. note 1033, para. 84.
[1122] Van Vooren (2009a) op.cit. note 1110, 7.

act.[1123] The CJEU countered this by simply extending its reasoning from the earlier cross-pillar cases. Namely, it was tasked "to ensure that acts which, according to the Council, fall within the scope of Title V of the Treaty on European Union *and which, by their nature, are capable of having legal effects*, do not encroach upon the powers conferred by the EC Treaty on the Community".[1124] The italicised fragment was added to the Court's previous statements on its jurisdiction, without any explanation regarding its meaning or relevance. This evidently provided food for speculation as to the possible implications hereof. Yet, all argumentation that this would limit the effect of *ex* Article 47 TEU fell foul of its strict wording that *nothing* in the TEU *shall affect* the Community Treaties.[1125]

Second, with regard to the effect of *ex* Article 47 TEU, the Commission and Parliament took the view that this established a fixed boundary (or substitution effect). Although Member States in an area of shared competence retained the power to act individually or collectively by themselves as long as the EC had not exercised its competence, they argued that the same could not be said for the Union in the light of *ex* Article 47. In other words, any CFSP act that could properly have been adopted on the basis of the EC Treaty, constituted an encroachment thereof. The Council naturally opposed this view and submitted that Article 47 aimed "to protect the balance of powers established by the Treaties and cannot be interpreted as aiming to protect the competences conferred upon the Community to the detriment of those enjoyed by the Union".[1126] From this it followed that it was necessary to take account of the complementary character of the competence conferred on the EC in the field of development cooperation. Any other interpretation, it was held, would deprive the CFSP of practical effect and undermine "the coexistence of the Union and the Community as integrated but distinct legal orders and also the constitutional architecture formed by the three 'pillars' as a whole".[1127]

Dashwood, both as academic and intervening agent for the UK, argued that both the substitution and moving boundary effects – set out above – could not occur with regard to the delimitation between the EC and CFSP. First, substitution was held to be impossible given that the EC-CFSP relationship was one of clear and intended demarcation and was not characterised by an identity of objectives. This was contrary to the first and third pillar, sharing the ulterior target of establishing an area of freedom, security and justice. In his view, the tasks of the Community were of a purely socio-economic nature, with not a single Treaty indication that action by the Community in the domain of foreign and security

[1123] Case C-91/05, op.cit. note 85, para. 30. Notably, on two occasions, the CFI had already allowed individuals to challenge a CFSP Common Position on measures to combat terrorism, insofar as it concerned a possible infringement of *ex* Article 47 TEU (Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council (OMPI),* ECLI:EU:T:2006:384, para. 56; Case T-299/04, *Selmani v Council and Commission (Selmani)*, ECLI:EU:T:2005:404, para. 56.
[1124] Case C-91/05, op.cit. note 85, para. 33 (emphasis added).
[1125] See further on this discussion: C. Hillion and R.A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?'' (2009) *Common Market Law Review* 46(2), 565.
[1126] Case C-91/05, op.cit. note 85, para. 43.
[1127] Ibid., para. 46 and 48.

policy was contemplated. The assignment of development cooperation to contribute to consolidating democracy, the rule of law, human rights and fundamental freedoms, "is not a free-standing competence but rather a consideration that must inform Community policy in pursuing the socio-economic objectives of the envisaged cooperation".[1128] Second, also the chance that the CFSP would enter an area covered by common EC rules was held to be non-existent. The UK argued that both the CFSP's own powers and the Community competences with which it was likely to interact were of a non-pre-emptive nature.[1129] Consequently, there was "no race to occupy the field" as the exercise of one competence could not prevent initiatives under the other.[1130] Yet, the specific circumstances of this case provide the strongest illustration that this last view does not entirely reflect reality (cf. *infra*).

In essence, this dispute thus boiled down to diverging views on the EU's constitutional structure. The Commission adhered to a triangular model in which the Union possesses its own competences which are not merely equivalent to the collective exercise of Member States' retained powers. The Council, and particularly the UK government upheld a dualist model equating EU and collective Member States' competences.[1131] The Court followed the Commission's view, noting that Article 47 TEU does in no way distinguish according to the distribution of competences that are protected against encroachment by the TEU. Given that this protection "relates to the attribution and, thus, the very existence of that competence, and not its exclusive or shared nature", it is "unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences".[1132] This ultimately took away all doubt and established *ex* Article 47 TEU as a fixed boundary imposing a substitution effect. In the words of Advocate General Mengozzi: "Article 47 EU aims to keep watertight, so to speak, the primacy of Community action under the EC Treaty over actions undertaken on the basis of Title V and/or Title VI of the EU Treaty, so that if an action could be undertaken on the basis of the EC Treaty, it must be undertaken by virtue of that Treaty".[1133]

The CFSP was hereby established as a residual competence category covering "all areas of foreign and security policy" with the exclusion of those external policies falling within EC competence.[1134] This conclusion is in line with the system of the Treaties, particularly as set out in Articles 1, 2, 3 and 47 TEU (cf. *supra* 2.1.1.). However, making light of the nature of competences is more debatable. Only just

[1128] Dashwood (2008) op.cit. note 217, 83-84.
[1129] Case C-91/05, op.cit. note 85, para. 44.
[1130] Dashwood (2008) op.cit. note 217, 94.
[1131] This would equate the *SALW* situation with the one at issue in the Bangladesh and EDF cases, where Member States could, in an area of shared or complementary competence, freely choose to enter into international commitments, either collectively or individually, or even jointly with the Community (op.cit. note 210 and 1069; Hillion and Wessel (2009) op.cit. note 1125, 572).
[1132] Case C-91/05, op.cit. note 85, paras 60 and 62.
[1133] Case C-91/05, Opinion AG Mengozzi, op.cit. note 1033, para. 116; see also Case C-91/05, op.cit. note 85, para. 60.
[1134] In the Advocate General's view this was borne by the explicit provision of a constitutional bridge for economic sanctions under *ex* Articles 60 and 301 EC (Case C-91/05, Opinion AG Mengozzi, op.cit. note 1033, paras 117-123).

had the Court imposed this fixed boundary, to make it waver again by combining this with the traditional centre of gravity reasoning in the *third* step of its analysis. Contrasting with the immobility of the pillar boundary, this introduced a sort of *de minimis* rule in "a delicate operation that runs the risk of transplantation rejection''.[1135] Determining the centre of gravity across integrated but separate legal orders required clear rules on how and where the threshold would be set, which were however only abstractly elaborated. Building on *Portugal v Council*, *Philippines border management* and a number of policy statements such as the European Consensus on Development (cf. *infra*), the Court started by establishing the Treaty provisions on development in particularly broad terms. It argued that these should not be limited to measures directly related to the campaign against poverty. Nonetheless, it is necessary for a measure – such as one combating the proliferation of SALW – in order to fall within EC development policy that it contributes to the pursuit of that policy's socio-economic objectives. "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".[1136] Notably, at no point in this case did the Court undertake a similar analysis of CFSP objectives, further emphasising the unequal protection offered by *ex* Article 47 TEU.

The traditional centre of gravity test was thus transplanted from the Community to cross-pillar situations, yet with a different outcome. Whereas the CJEU had previously held that a measure having several non-incidental objectives or components could exceptionally be based on various corresponding legal bases, such a solution was considered impossible under *ex* Article 47 TEU.[1137] Whereas the Court did not waste much words on this finding, the fact that it did not rely on the *titanium dioxide* line of case law suggests that it ruled out this possibility as a principle.[1138] Advocate General Mengozzi was more elaborate, arguing that it seemed "particularly difficult, if not impossible as the law of the European Union stands at present, to contemplate recourse to a dual legal basis without breaching Article 47 EU". [1139] He subsequently expounded on the various procedural incompatibilities between the legal provisions on development cooperation and CFSP. In a later case on *Data Retention*, Advocate General Bot added that "[a]lthough it is regrettable, the constitutional architecture consisting of three pillars nevertheless requires that the areas of action be split up. The priority in this context is to guarantee legal certainty by clarifying as far as possible the respective

[1135] Hillion and Wessel (2009) op.cit. note 1125, 576 and 574.
[1136] Case C-91/05, op.cit. note 85, paras 72.
[1137] Ibid., paras 75-76.
[1138] This appeared to shut the door to cross-pillar international agreements as well, even if this had in the past not produced major problems. Parts falling under different pillars were simply negotiated under different procedures and concluded by separate decisions. See further: R.A. Wessel, 'Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements' in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford, Hart Publishing, 2010) 30-54.
[1139] Case C-91/05, Opinion AG Mengozzi, op.cit. note 1033, para. 176 and footnote 76.

boundaries between the spheres of action covered by the different pillars" (cf. *infra*).[1140] Yet, the legal certainty that followed from applying first pillar methodology to a cross-pillar situation can be questioned. This is most clearly illustrated by the conflicting outcomes reached by the Advocate General and the Court in the *SALW* case.

This brings us to the *fourth* and final step of the Court's analysis, where this methodology was applied to the specific circumstances of the case. With regard to the *aim* of the contested decision, the Court first noted that Joint Action 1999/34/CFSP, the predecessor to the contested Joint Action, in the first recital to its preamble placed the fight against SALW in the dual perspective of preserving peace and safeguarding development.[1141] A second argument was that the contested Joint Action does not exclude the possibility of being implemented through *ex* Community actions. Indeed, Article 8 thereof "notes that the Commission intends to direct its action towards achieving the objectives and the priorities of this Joint Action, where appropriate by pertinent Community measures". Yet, it is probably useful to reiterate that this language – typical for CFSP acts – resulted from a compromise between the Council and the Commission to reconcile the ideally broad nature of CFSP acts with the respect for *ex* Article 47 TEU (cf. *supra* 3.2.2.).[1142] It is rather ironic, and arguably counterproductive, that it formed the subject here of an argument that would lead to the annulment of a CFSP joint action. Turning to the contested Decision, the Court again relied on its preamble stating that the spread of SALW reduces the prospects for sustainable development. It could therefore not be inferred "that in comparison with its objectives of preserving peace and strengthening international security its concern to eliminate or reduce obstacles to the development of the countries concerned is purely incidental".[1143] In this manner, the Court basically established the presence of an objective of removing an obstacle to development as sufficient to bring it within the reach of that competence, thereby laying the undefined centre of gravity threshold very low.

The *content* of the ECOWAS Decision consisted of financial and technical assistance. The Commission argued that these are instruments typically used in the context of development aid, whereas the Council held that Article 47 EU does not preclude the CFSP from using the same instruments as those employed by the Community.[1144] The Court disagreed with the Commission, contending that financial and technical assistance is neutral content, in the sense that "it is only in the light of the aims that they

[1140] Case C-301/06, *Ireland v Parliament and Council (Data Retention)*, Opinion AG Bot, ECLI:EU:C:2008:558, para. 108.
[1141] Case C-91/05, op.cit. note 85, para. 85. Remarkably, it disregarded the fact that the repealing and contested Joint Action no longer makes any such statement.
[1142] Council-Commission (5194/95) op.cit. note 582
[1143] Case C-91/05, op.cit. note 85, para. 96.
[1144] Ibid., paras 40 and 53.

pursue that a financial contribution or technical assistance can be regarded as falling within the scope of the CFSP or of Community development cooperation policy".[1145]

From this analysis of its aim and content, the CJEU concluded that the contested Decision contained two components, neither of which could be considered incidental to the other. It proceeded to cut this Gordian knot by applying the "simple, if brutal, solution" of *ex* Article 47 TEU.[1146] This meant that the Council had committed an infringement "by adopting the contested decision on the basis of Title V of the EU Treaty, since that decision also falls within development cooperation policy".[1147] The ECOWAS Decision consequently had to be annulled. In what was arguably the weakest element of its judgment, the Court then found it unnecessary to examine the plea as to the alleged illegality of the contested Joint Action, given that the Decision had to be annulled on its own defects. The lack of any further explanation opened the floor to estimated guesses as to Court's reasons, if any. It has been interpreted – with some goodwill – as a sort of pragmatic blank leaving room for a constructive *modus vivendi* between the pillars.[1148] Reminding of its *Portugal v Council* construction, the Court hereby indicated that the SALW Joint Action could be implemented by both CFSP and EC activity.[1149] This would allow a CFSP measure, which subject matter contributes to this area's Treaty objectives, to relate to other fields of policy as long as this does not impose extensive obligations. While sitting uncomfortably with the Court's otherwise strict interpretation of *ex* Article 47 TEU, this could explain the enigmatic addition that only acts 'which, by their nature, are capable of having legal effects' could encroach on EC competences (cf. *supra*). It can indeed be argued that the Joint Action itself was not directly intended to have legal effect, only through its implementation, among others by the annulled Decision.

The *SALW* ruling was a stark reminder that, before the era of the Lisbon Treaty, the EU was made up of separate legal orders. These might to a certain extent have been integrated – as the CJEU used the overall Union legal order as interpretative framework – yet always placed delimitation above arguments of consistency and effectiveness. This judgment has therefore rightly been called "a pause if not a setback in the developing unity of the EU legal order".[1150] On the other hand, the Court's prohibition of cross-pillar legal bases and preference for the first pillar had the benefit of clarity and concrete support in the Treaty (even though this clarity was partly eroded by the Court's refusal to examine the legality of the SALW Joint Action). The same could not be said for the traditional centre

[1145] Ibid., para. 104.
[1146] Dashwood (2011) op.cit. note 534, 47.
[1147] Case C-91/05, op.cit. note 85, para. 109.
[1148] P. Van Elsuwege, 'On the Boundaries between the European Union's First Pillar and Second Pillar: a Comment on the ECOWAS Judgment of the European Court of Justice' (2009) *Columbia Journal of European Law* 15(3), 543.
[1149] B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil' (2009) *European Foreign Affairs Review* 14(2) 236-239.
[1150] Hillion and Wessel (2009) op.cit. note 1125, 582.

of gravity test, where big question marks remain as to which procedures can be combined and how to choose between two non-incidental yet procedurally incompatible legal bases.

… political setback?

The gained legal clarity came at a significant cost, paid largely in terms of policy consistency. In this author's view it was not so much the annulment of the ECOWAS Decision that was problematic, but the way in which the Court arrived at this conclusion. In itself, the strict delimitation was in line with the Court's obligation to guarantee the integrity of the EC legal order under *ex* Article 47 TEU. However, if such an imposed boundary is unclear or negates the relevance of the CFSP, it provokes legal uncertainty, thereby undermining inter-institutional trust and future policy consistency. Arguably, the Court failed to convince on both accounts.

First, the line drawn by the Court was insufficiently clear. In corroborating its finding that "certain measures aiming to prevent fragility in developing countries … can contribute to the elimination or reduction of obstacles to [their] economic and social development", the CJEU entered particularly shaky territory.[1151] It did this by reverting to various policy statements, including a Council resolution on small arms, the 2006 EU strategy to combat illicit accumulation and trafficking of SALW and the European Consensus on Development.[1152] The Court had always refused to be influenced by previous practice, and if "this is the case with formal legal acts provided for in the Treaties, it should a fortiori be the case with informal acts".[1153] Relying on such statements to delineate competences overlooks that these are not drawn up for such purpose, but aim to reconcile various institutional interests and respond flexibly to evolving global challenges.[1154] Although it could be argued that the CJEU in this manner seeks to better understand institutional intentions and thus reduce judicial discretion,[1155] this is a very delicate and unpredictable exercise. An entirely objective selection and analysis of the numerous documents constantly issued by EU institutions is simply impossible and accusations of partiality are never far away. One might for instance wonder why the Court does not refer to the European Security Strategy, which could have supported a more CFSP-friendly view. The ad hoc nature of such an approach moreover makes it nearly impossible to predict how and where the threshold will be set by the Court for other measures in the grey area between EC (development cooperation) and

[1151] Case C-91/05, op.cit. note 85, para. 68.
[1152] Ibid., paras 88-92.
[1153] J. Heliskoski, 'Small Arms and Light Weapons within the Union's Pillar Structure: an Analysis of Article 47 of the EU Treaty' (2008) *European Law Review* 33(6), 910.
[1154] Koutrakos (2011a) op.cit. note 90, 605.
[1155] Cremona (2014) op.cit. note 1031, 15; Eeckhout (2011) op.cit. note 113, 182-183.

CFSP. The Court has thus "neither produced principles clear and consistent in their application, nor avoided the danger of rendering its role increasingly politicised".[1156]

Another aspect of the judicial approach harming legal certainty, inter-institutional trust and policy consistency was the overreliance on preambular statements of intent. As accurately noted by Mengozzi, the mere expression in a preamble that the accumulation of SALW reduces development prospects "does not mean that the contested decision seeks to support a project that aims directly and/or mainly to improve … social and economic conditions".[1157] By attaching considerable weight to such statements the Court clears the path for "legislative hazard" by inviting legislators to draft preambles as to match their preferred legal basis.[1158] Two Council Decisions that were adopted after the *SALW* ruling illustrate that this is not just a theory. No longer explicitly implementing the SALW Joint Action, but conducted in the framework of the EU SALW Strategy, these provide comparable assistance to combat the spread of SALW in the Western Balkans and South East Europe. The Council appears to have learned its lesson and clearly framed these decisions in the context of the European Security Strategy and typical CFSP objectives such as effective multilateralism.[1159] Instead of referring to the risks for sustainable development, the preambles only stress that SALW proliferation "fuelled insecurity …, exacerbating conflict in the region and undermining post-conflict peace building, thus posing a serious threat to peace and security".

Second, by ruling out the relevance of the nature of competences, and thus finding it unnecessary to examine whether the measure obstructed the exercise of EC competence, the CJEU negated much of the CFSP's relevance. An important question is therefore whether another judicial approach was conceivable that, while conserving the integrity of the *acquis*, delimitates rather than subordinates responsibilities in a constitutional framework of interlocking systems for foreign policy-making. One suggestion that has been put forward consisted of attaching greater value to the principle of conferred powers as a counterweight to the protection of the *acquis*. This allows a better balance of competences by "drawing the outer limits of … legal bases in a way which would ensure that the conditions for their application do not become irrelevant".[1160] Mengozzi, in fact, instigated such an approach and relied for that purpose on the *Portugal v Council* litigation.[1161] Contradicting the attempt of the Commission

[1156] Koutrakos (2011b) op.cit. note 1115, 271.
[1157] Case C-91/05, Opinion AG Mengozzi, op.cit. note 1033, para. 205.
[1158] Klamert (2010) op.cit. note 1030, 505.
[1159] Third recital of the preamble to Council Decision (2010/179/CFSP) in support of SEESAC arms control activities in the Western Balkans, in the framework of the EU SALW Strategy, OJ L80/48, 26.03.2010; first and second recital of the preamble to Council Decision (2013/730/CFSP) in support of SEESAC disarmament and arms control activities in South East Europe in the framework of the EU SALW Strategy, OJ L332/19, 11.12.2013.
[1160] Koutrakos (2008a) op.cit. note 1029, 183-185; who made this observation with regard to litigation on the trade-environment delimitation.
[1161] Case C-91/05, Opinion AG Mengozzi, op.cit. note 1033, para. 161.

and Parliament to exploit the rationale of the security-development nexus in their advantage,[1162] Mengozzi held that:

> *such a connection cannot lead to including in the scope of development cooperation measures which would lead to disregarding the distribution of competences in the framework of the pillar architecture of the European Union. It would be erroneous and excessive to consider that any measure which fosters the economic and social development of a developing country falls within the competence of the Community pursuant to Title XX of the EC Treaty.*[1163]

While he came to the same conclusion as the Court with regard to the neutral content of the Decision, Mengozzi found that its aim related "mainly, if not exclusively" to security.[1164] Any encroachment on EC competences was therefore precluded.

Besides more attention for a balance of competences, there was arguably another – less abstract – alternative for the Court to avoid much of the political fallout that resulted from its judgment. If the CJEU would not have refused to examine whether the measure obstructed the exercise by the Community of its competences, it could have found good and solid arguments to rule the way it did. As set out above, the ECOWAS Decision unilaterally altered the cooperative method hitherto undertaken by the Commission as part of the Community's development assistance. This conflicted with the provision in Article 7(2) of the SALW Joint Action that the assistance provided by the Council thereunder should be without prejudice to the operation of the Community. As such, this could arguably have provided sufficient ground for the Court to rule that the contested Decision had to be annulled. Such an approach relates to the second of the above set out Article 47-effects, namely that of a moving boundary establishing priority in case of inconsistency, but otherwise permitting overlap.[1165] Disregarding the nature of competence, rules out all arguments of effectiveness and consistency and "implies that adjudicating the EU-EC boundary is tied exclusively to interpretative breadth given to TEU-TEC objectives, and whether or not one has been pursued primarily or rather incidentally".[1166] It moreover ignores the fact that the CFSP and development cooperation have since long been operating, generally unproblematic although not always in the most effective manner, along each other in similar areas of activity on the security-development interface (cf. supra 3.2.).

Not only did EU institutions in this case ridicule their grotesque commitments to the security-development nexus, also the approach taken by the Court was counterproductive to this endeavour.

[1162] Case C-91/05, op.cit. note 85, para. 37.
[1163] Case C-91/05, Opinion AG Mengozzi, op.cit. note 1033, para. 170.
[1164] Ibid., para. 175.
[1165] M. Cremona, 'External Relations and External Competence of the European Union: the Emergence of an Integrated Policy' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford, 2011) 265-266.
[1166] Van Vooren (2009a) op.cit. note 1110, 18.

Half a year after the adoption of the ambitious Conclusions on Security and Development, this ruling had the effect of discouraging the Council from including cross-references to development issues in future legislation. Rather than expressing a commitment to enhance policy consistency, these could now easily be seen as infringing *ex* Article 47 TEU. A counterfactual analysis of how Council decisions would have been drafted in case of a different outcome in the *SALW* ruling is of course pure speculation. Nonetheless, a comparison of joint actions setting up CSDP missions and operations right before and after this case indicate that such an effect – at least to a certain extent – manifested itself. The Joint Actions of 4 and 12 February 2008 setting up, respectively, a CSDP SSR mission in Guinea-Bissau and a Rule of Law Mission in Kosovo, refer explicitly to the need to ensure consistency with "the external activities of the Community"[1167] and to SSR as being "essential for the stability and sustainable development".[1168] It is remarkable that the two other CSDP missions, drawn up in that same year but after the *SALW* judgment, namely the counter-piracy operation off the Somali coast and the Monitoring Mission in Georgia, no longer include references to development or EC competences of any kind.[1169]

Another interesting passage is the negotiation on a new IfS Regulation throughout 2006, in the midst of the *SALW* proceedings. The IfS was enabled to tackle the impact of the illicit use of firearms on the civilian population, but the Council vetoed a Commission proposal to include support for measures tackling the proliferation of SALW.[1170] That this was out of fear for steering the Court's judgment in a certain direction is clear from the following Council-Commission gentlemen's agreement:

> *nothing in this Regulation shall be construed as prejudging positions taken in Case 91/05. Until such time as the Court of Justice rules on that case the Commission will not seek to take measures under Article 3(2)(i). The Council and Commission agree that in the context of the review of the Regulation establishing an instrument for stability provided for in Article 25 of that Regulation, the scope of Article 3(2)(i) will be revised as necessary, on the basis of a Commission proposal, in the light of the judgment of the Court of Justice in Case C-91/05.*[1171]

[1167] Article 17 Joint Action (2008/124/CFSP) on the EU Rule of Law Mission in Kosovo (EULEX KOSOVO), OJ L042/92, 16.02.2008.
[1168] Second recital Joint Action (2008/112/CFSP) on the EU mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU), OJ L040/11, 14.02.2008.
[1169] Joint Action (2008/736/CFSP) on the EU Monitoring Mission in Georgia, EUMM Georgia, OJ L248/26, 17.09.2008; Joint Action (2008/851/CFSP) on an EU military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L301/33, 12.11.2008.
[1170] Article 3(2)(i) IfS Regulation, op.cit. note 539; Commission (COM(2004) 630 final) op.cit. note 535, 15. It is noteworthy that the types of activity the IfS could support under this provision were explicitly limited to "the framework of Community cooperation policies" and much more clearly defined than any other issues falling under this Regulation.
[1171] Joint Council and Commission Statement (14010/06) on the proposal for a Regulation of the European Parliament and of the Council establishing an instrument for stability, 27.11.2006.

In line with this agreement and the outcome of the case, the Commission proposed in 2009 to amend the IfS Regulation to explicitly include SALW control.[1172] Reflecting the tensions that followed this controversial judgment, this was not picked up by the Council and the Regulation remained unaltered. This illustrates how the judgment precipitately turned the choice of legal basis into a zero sum game of competence delimitation, all the more since OECD Member States (including 19 of the then 25 EU Members) had already in 2005 agreed to list SALW control as Official Development Aid.[1173] Another indication of underlying tensions is that only the first Progress Report of June 2006 on the implementation of the EU SALW Strategy referred to relevant activities of development assistance and the EDF, whereupon such elements were never again mentioned.[1174]

Two rulings adopted in the immediate aftermath of the *SALW* case confirmed the potential of EC measures to contribute to the fulfilment of security objectives, thereby highlighting the struggle for ensuring unity across pillar walls. *First*, in the *Kadi and Al Barakaat* case the CJEU held that the Community could use its powers to enact targeted sanctions, which – while serving Community objectives – are directed at the CFSP aim of guaranteeing international peace and security.[1175] Interestingly, in this appeal case the CJEU overruled the approach taken by the General Court, which – relying on the (then still unjudiciable) duty of consistency – had allowed the use of the flexibility clause to directly achieve CFSP objectives. The latter had taken this approach to extend the EC-CFSP bridge of *ex* Articles 60 and 301 EC from economic to targeted sanctions, arguing that action taken hereunder by the Community is "in actual fact action by the Union".[1176] In more nuanced terms, the appeal judgment pointed out that the flexibility clause could be used, but only insofar as it builds upon the "implicit underlying objective" of this bridge to implement actions decided under the CFSP through the efficient use of a Community instrument.[1177] Rejecting any direct connection between the EC flexibility clause and the CFSP might be indicative of the fact that the Court's strong focus on protecting the EC legal order was not without limits. The CJEU signposted that it would not accept the CFSP to be entirely devoid of substance by an over-expansive interpretation of EC competences.[1178]

Second, in the *Data Retention* case, Ireland aimed to protect third pillar powers against intrusion by the Community. For this purpose it issued an action for annulment of a Directive that laid down rules

[1172] Commission Communication (COM(2009) 195 final) Proposal for a Regulation amending Regulation 1717/2006/EC establishing an Instrument for Stability, 21.04.2009.
[1173] Development Assistance Committee (DAC) High Level Meeting, OECD, Paris 02-03.03.2005.
[1174] Council Note (10538/06) First Progress Report on the implementation of the EU SALW Strategy, 14.06.2006, 2-8.
[1175] Joined Cases C-402/05 and C-415/05, op.cit. note 349, paras 197-403.
[1176] Case T-306/01, op.cit. note 243, paras 161-162.
[1177] Joined Cases C-402/05 and C-415/05, op.cit. note 349, paras 226-227.
[1178] P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, Oxford, 2011) 329; M. Brkan, 'The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future' in P.J. Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (TMC Asser, The Hague, 2012) 106-107.

on the processing of personal data in order to protect the rights of individuals, while ensuring the free movement of those data in the EU.[1179] Ireland found that its sole or, at least, the main or predominant objective was to facilitate the investigation, detection and prosecution of crime, including terrorism. Confirming its role as protector of the *acquis*, the Court held that such a security objective is insufficient to take a directive, harmonising national measures in order to ensure the functioning of the internal market, out of the first pillar realm.[1180] The threshold determining the centre of gravity was even less defined here than in the *SALW* ruling. In no way did the CJEU clarify whether such a security objective could only be ancillary or even predominant.[1181]

By no means was the judicial approach towards EU external action – and the security-development nexus more specifically – thus entirely enlightened when the Court was confronted with the significantly overhauled constitutional framework of the Lisbon Treaty. It was predicted – and probably hoped – by critics of the *SALW* judgment that its significance would be short-lived in view of these substantial modifications.[1182] The extent to which the Court's methodology-under-construction can gradually be further developed or requires a radical servicing, forms the focus of analysis in the last section of this chapter.

5.3. In search for a new methodology under the Lisbon Treaty system

The constitutional changes brought about by the Treaty of Lisbon gave the legal foundations of the *SALW* ruling a significant shaking. This casts doubts on the remaining relevance of two central elements of the Court's approach, namely the centre of gravity test and the hierarchical delimitation of the CFSP. A key question is therefore what remains of the Court's established methodology. A theoretical examination (5.3.1.) will be followed by an analysis of several recent rulings that provide a first glimpse of the Court's post-Lisbon approach to inter-institutional conflicts on development cooperation and the CFSP (5.3.2.).

[1179] Directive (2006/24/EC) on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L105/54, 13.04.2006.
[1180] Case C-301/06, *Ireland v Parliament and Council (Data Retention)*, ECLI:EU:C:2009:68, paras 80-94 ; E. Herlin-Karnell, 'Annotation Case C-301/06, Ireland v Parliament and Council' (2009) *Common Market Law Review* 46(5), 1674-1676.
[1181] S. Poli, 'The Legal Basis of Internal Market Measures With a Security Dimension: Comment on Case C301/06' (2010) *European Constitutional Law Review* 6(1), 150-151.
[1182] See for instance: Dashwood (2008) op.cit. note 217, 99.

5.3.1. Constitutional changes casting doubt on the *SALW* approach

The difficult marriage of Articles 21 and 40 TEU

First, Article 21 TEU obscures the traditional centre of gravity test. It expresses a duty for EU institutions to interlink and integrate various external policies and objectives, but gives no clues on how this is to be operationalised. The elephant in the room is of course how this corresponds to the principle of conferral. The silence of Article 21 TEU on this issue is all the more striking given that its equivalent in the TFEU (which excludes the CFSP as only external EU competence) states that the "Union shall ensure consistency between its policies and activities, taking all its objectives into account and *in accordance with the principle of conferral of powers*".[1183] Further adding to the confusion on this pledge for TEU-TFEU integration is that the CFSP, again as the only external competence, has been deprived of its own specific objectives. It only maintains the general and misleading coverage of 'all areas of foreign policy and all question relating to the Union's security' (cf. *supra* 2.3.2.).

The advancement of consistency in the new Treaty system thus appears to have inflated the shroud of ambiguity over the choice of legal basis. Now that the Union is expressly tasked to pursue the entire range of external objectives in all the different areas of external action, one may indeed wonder what remains of the aim-part of the centre of gravity test. In this regard, Van Vooren argues that Article 21 TEU "ought to be interpreted as a non-competence-specific and non-power-conferring statement of the need to integrate objectives into specific policies with particular legal bases".[1184] The recurring provision in the Treaties that specific competences shall be carried out within the framework of the principles and objectives of the Union's external action supports this view.[1185] This bears resemblance to the cross-sectional mainstreaming clauses tasking the Union to take certain issues into account in all its activities.[1186] Already in *titanium dioxide* the Court reasoned that such provisions do not alter the division of competences.[1187] Relying on the wording of *Portugal v Council*, it could thus be argued that Article 21 TEU expresses the idea that specific components of a given measure do not constitute an infringement as long as these (1) contribute to the general objectives of the competence under which the act is adopted and (2) do not impose extensive and concrete obligations beyond those objectives.

Article 40 TEU deprives the Court of the *second* key component of its *SALW* methodology, namely the 'simple but brutal solution' to prioritise an equally important TFEU over CFSP legal basis. It has been

[1183] Article 7 TFEU (emphasis added).
[1184] Van Vooren (2009b) op.cit. note 1149, 245.
[1185] See: Articles 24(2) TEU, 208(1), 212(1) and 214(1) TFEU.
[1186] The Lisbon Treaty considerably augments the use of such clauses, now including gender equality, employment, social protection, health, anti-discrimination, environmental protection, animal welfare and consumer protection (see: Articles 8-13 TFEU).
[1187] Case C-300/89, op.cit. note 1018, para. 22.

argued that its new two-way-street can simply be seen as a fusion of two of the Court's previous functions, namely protecting the integrity of the *acquis* under *ex* Article 47 TEU and ensuring that no EC measure infringes on the conferral of powers under proceedings for annulment.[1188] In this view, the *PNR* and *Data Retention* cases demonstrated that before the Lisbon Treaty there was no legal obstacle for the Council and/or Member States to challenge a Community act on the ground that it ought to have been adopted under the second or third pillar.[1189] The ambiguity that Article 40 TEU casts on the CFSP-TFEU conflict rule would then be its only addition to the pre-Lisbon situation. In *Data Retention*, Advocate General Bot indeed confirmed that the method to be used to verify "whether a measure was correctly adopted on the basis of the EC Treaty and not that of the EU Treaty" was identical to that applied in the other direction, under *ex* Article 47 TEU.[1190] Yet, paradoxically, in substantiating this argument, he indirectly exposed a key difference. In his assessment, the question is whether – having regard to the centre of gravity of the Data Retention Directive – "the adoption under the EU Treaty of the measures contained in that directive [would] have amounted to an infringement of Article 47 EU".[1191] Notably, the question was thus not whether the contested EC directive in itself infringed *ex* Article 47 TEU. This is a key difference. For one thing, this meant that second and third pillar measures were merely protected by default. Only when it could first be established that the Community was incompetent to adopt a given measure, was recourse to a CFSP legal basis implicitly and noncommittally enabled. For another, the EC-biased Article 47 TEU did not require, or maybe even allow, the CJEU to interpret CFSP provisions, as illustrated by the notable circumvention hereof in the *SALW* ruling (cf. *supra* 5.2.2.).

Article 40 TEU makes an end to both shortcomings. Rather than only protecting the EC Treaty from being affected by the TEU as such, it is now targeted at ensuring that neither the implementation of the CFSP nor of TFEU policies affects "the application of the procedures and the extent of the powers of the institutions" laid down by the TFEU/TEU. As a consequence, it can no longer be sufficient for the Court to merely ensure that a TFEU act that is alleged to infringe Article 40 TEU respects the principle of conferral. This in itself cannot rule out an infringement of the CFSP's procedures and institutional balance as prescribed by the second paragraph of that Article. Hillion convincingly argues that the Court should instead "actively examine whether a specific CFSP procedure exists for adopting the act in question, and if so determine whether such procedure ought to have been followed either in

[1188] Current Article 263 TFEU; A. Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press, Oxford, 2009) 153.
[1189] Joined Cases C-317/04 and C-318/04, op.cit. note 1095; Case C-301/06, op.cit. note 1180; V. Kronenberger, 'Coherence and Consistency of the EU's Action in International Crisis Management: the Role of the European Court of Justice' in S. Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (TMC Asser, The Hague, 2008) 210-211.
[1190] Case C-301/06, Opinion AG Bot, op.cit. note 1140, para. 77.
[1191] Ibid., para. 78; compare on this issue: Case C-301/06, op.cit. note 1180, paras 75-79.

combination with, or rather than the TFEU procedure altogether".[1192] This can of course only work if the Court has interpretative powers over CFSP provisions, which must arguably be seen as indirectly accorded under Article 40 TEU.

In the light of the above, the daunting task of giving effect simultaneously to the provisions of Articles 21 and 40 TEU are evident. Nonetheless, the Treaty remains uncomfortably silent and does not provide a single hint as to their possible reconciliation. If it was in the Maastricht era already "difficult to live up to the requirements of consistency and delimitation at the same time",[1193] this is all the more true today in the light of the current constitutional integration-delimitation paradox. It is difficult not to see Article 40 TEU as the Treaty drafters' answer to the Court's ever more controversial fixation on the integrity of the *ex* EC legal order. Does this then mean that, despite all the talk of greater external action coherence, the "water-shed" of *ex* Article 47 TEU is simply "vested with a second layer of protection"?[1194] It has in this regard been argued that the only way to make sense of Article 40 TEU is that it forecloses the application of the absorption theory, implying that it precludes any inclusion of CFSP components in a TFEU act, and *vice versa*.[1195] The problem is then that this entirely negates the aim of the Lisbon Treaty to infuse more unity into the EU external action system as a whole. This aim is confirmed by Article 218(3) TFEU, which appears to make the centre of gravity test indispensable for international agreements relating to both CFSP and TFEU competences (cf. *infra* 5.3.2.).

Interpreting Article 40 TEU as providing the watertight delimitation with mutual lines of defence moreover ignores that its language is no longer about separating Treaties, but about respecting the appropriate procedures and institutional powers. While the strict demarcation of *ex* Article 47 TEU did indeed not fit easily with the centre of gravity reasoning, the new delimitation rule is significantly more in line with this general choice of legal basis methodology. In a way, Article 40 TEU can therefore even be seen as codifying – albeit with a new Janus-head – the cross-pillar approach taken in the *SALW* ruling. Yet, based on its *effet utile*, it cannot be a simple reaffirmation of the principle of conferred powers either, which is already covered in Article 5 TEU. Taken together, the levelling out of the delimitation rule and the new scrutiny powers over the reinforced duty of consistency, clear the path for the Court to enforce the 'balance of competences', which was vainly proposed by the Advocate General in the *SALW* case. To keep the integration-delimitation paradox of the Lisbon Treaty from turning into a stalemate, it must be read as a call to steer a middle course between the remaining

[1192] Hillion (2014a) op.cit. note 1013, 60.
[1193] R.A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' (2000) *Common Market Law Review* 37(5), 1168-1169.
[1194] Heliskoski (2008) op.cit. note 1153, 912.
[1195] For instance: S. Adam, 'The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era' in I. Govaere, et al. (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff, Leiden, 2014) 80.

delimitation of the CFSP as separate legal subsystem and the need for effective external action to be coherent. Just as the need for consistency cannot provide an argument to abandon the delimitation imposed by Article 40 TEU, also the latter cannot neglect the need for consistency. If the *SALW* case were ruled today, the Court thus disposes of good arguments to counterbalance the CFSP's seclusion with the principles of conferral and consistency in a manner that does not negate its relevance.

Ways out of the blind alley

What if the Court would in an *SALW*-like case on CFSP-TFEU delimitation again conclude that both components are non-incidental and inseparable? The abandonment of hierarchy in the Treaty strips the Court of its knife to cut the Gordian knot. A number of ways out are imaginable, but it is yet unclear how they would operate. A *first* possibility consists of giving concrete effect to the now judiciable duty of consistency. It is however unclear whether this duty is fully and practically enforceable or represents a sort of working philosophy. One suggestion for operationalising consistency is that it could mean for the relationship between policy areas and initiatives, what the duty of loyal cooperation means for the relationship between and among EU institutions and Member States.[1196] The latter is set out in Article 4(3) TEU:

> *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
>
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*

Article 13(2) TEU confirms that these obligations apply equally to EU institutions. Building further on the landmark *ERTA* ruling, the Court has attached ever more concrete legal and procedural obligations to this loyalty principle.[1197] These are no end in itself, but – as is clear from the wording of Article 4(3) TEU – aim to ensure the attainment of the EU's objectives, and – as the Court repeatedly emphasises – "the requirement of unity in the international representation of the [Union]".[1198] In essence, the decisive criterion applied by the Court in ruling whether or not individual Member State or institutional action is allowed, is not so much the nature of the EU competence at stake, but its impact on the

[1196] For a more detailed account of this view: Van Elsuwege and Merket (2012) op.cit. note 354, 43-45.
[1197] For a critical account of this line of case law: A. Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) *European Law Review* 36(4), 524-541.
[1198] See: Opinion 2/91, *ILO*, ECLI:EU:C:1991:490, para. 36; Opinion 1/94, op.cit. note 1020, para. 106.

consistency of EU external action.[1199] In other words, such individual action is excluded when it is liable to have negative consequences for the Union. If we now translate this rationale from the context of the EU's international representation to the interaction of policy areas and initiatives, we arrive at the moving boundary effect proposed above as an alternative approach in the *SALW* case. The duty of consistency could then work as a rule of primacy or hierarchy in case of conflicting activity. This gives leverage to the argument that the ECOWAS Decision, by unilaterally altering the cooperative method, was inconsistent with ongoing development activity and thus ran counter the unity of EU external action (cf. *supra* 5.2.2.).

A *second* way out of the blind alley created by the relinquishment of hierarchy in Article 40 TEU could be to re-evaluate the possibility of combining a CFSP legal basis with other Union competences. The fundamental ban in this regard was broken, after the entry into force of the Lisbon Treaty, by the accession of the EU to the Treaty of Amity and Cooperation in Southeast Asia. The Council Decision regulating this accession was adopted on the joint legal bases of Articles 37 TEU (CFSP), 209 TFEU (development cooperation) and 212 TFEU (financial and technical cooperation with third countries). In line with the levelling-up scenario (cf. *supra* 5.1.), an ad hoc procedure was applied combining unanimity in the Council with the consent of the Parliament.[1200] Notably, the deliberate choice in the Treaty to exclude the Parliament from CFSP affairs was thus not less surmountable than the procedural choices made for other policy areas. This is in line with the unified procedure of Article 218 TFEU.

However, crucial reservations arise when extending this new take towards other types of (non-) legislative acts. The exclusion of the CJEU from the CFSP – and the doubtful application of several constitutional principles resulting from this – arguably requires that it must be possible to determine for each provision of a given act whether or not if falls under CFSP competence. In the case of international agreements this may be possible because, even if these are adopted under a single Council decision, they are generally compartmentalised in character. Indeed, in the Amity Treaty the CFSP legal basis clearly relates to a distinct chapter on the 'pacific settlement of disputes'. One may therefore wonder whether such treaties, because of their more easily distinguishable compartments, form an exception to the judicial rule of singularity (cf. *supra* 5.1.). Among others, this stipulates that an act's objectives must be 'indissociably linked' for it to be based on all corresponding legal bases. Article 218 TFEU indeed pleads against the application of this rule, which would require that implementing decisions of international agreements are split along the lines of their legal bases. Yet, it is questionable whether this reasoning can be extended to unilateral EU acts. Article 40 TEU

[1199] G. De Baere, '"O, Where is Faith? O, Where is Loyalty?" Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the light of the PFOS Case' (2011) *European Law Review* 36(3), 417-18.
[1200] Council Decision (2012/308/CFSP) on the accession of the EU to the Treaty of Amity and Cooperation in Southeast Asia, OJ L154/1, 15.06.2012.

empowers the Court to distinguish the applicable legal regime as per their CFSP or TFEU components. If these can be discerned, the Court customarily requires the measure to be split along those lines. Yet, in the light of the interrelated nature of external relations, it is not unlikely that the various components of a unilateral EU act transcend a singular objective or competence boundary. This could mean that the Court is unable to determine which components of a measure are governed by the CFSP legal regime and which fall under the TFEU. Allowing a combined CFSP-TFEU legal basis in such a scenario would obscure the constitutional limits to the Court's jurisdiction, and is therefore unlikely to be accepted.

A *third* possible way out of the deadlock is to apply the *lex specialis derogat legi generali* rule. It has been argued that the Court, in applying its centre of gravity test, may take the view that the CFSP, as *lex generalis*, can only serve as legal basis if no other external competence is applicable.[1201] Yet, in the light of the broad drafting of many TFEU external policies, the chance of finding a more specific competence is rather likely. This risks therefore to simply re-endorse the *SALW* methodology, going against the explicitly abandoned subordination of the CFSP.[1202] Craig nonetheless expects a latent subordination to occur given that "the presumption that 'normal' EU law should predominate is deeply ingrained in the judicial psyche and will not easily be shifted".[1203] The Court's preference for measures it can adjudicate on is not unlikely and finds support in the EU's commitment to the rule of law and the TEU preamble putting forth an ever closer Union as ultimate objective.[1204] It is indeed almost a truism to refer to the Court of Justice "as the motor of integration within the European Union legal order".[1205]

A *final* possibility for the Court to overcome this 'catch-22 situation' is to accord more weight to the content-prong of the centre of gravity test. This can compensate for the decreased chance that CJEU concludes that a measure pursues distinct objectives in the light of Article 21 TEU. Already in the *SALW* ruling, the Court reasoned that there "may be some measures, such as the grant of political support for a moratorium or even the collection and destruction of weapons" which fall rather under the CFSP radar.[1206] Also the Commission in its argumentation appeared to draw a line between political actions covered by the CFSP, such as the deployment of military or policy missions to disarm local militia or the dismantlement of weapon producing factories, and technical and financial support for local initiatives falling under EC development cooperation.[1207] These rules of thumb remind of the criteria

[1201] M. Cremona, 'Coherence Through Law: What difference Will the Treaty of Lisbon Make?' (2008) *Hamburg Review of Social Sciences* 3(1) 33.
[1202] C. Hillion, 'Cohérence et Action Extérieure de L'Union' in E. Neframi (ed), *Objectifs et Compétences de l'Union Européenne* (Brussels, Bruylant, 2012) 245-247.
[1203] P. Craig, *The Lisbon Treaty : Law, Politics, and Treaty Reform* (Oxford University Press, Oxford, 2010) 415-416.
[1204] Cardwell (2013) op.cit. note 382, 451-452.
[1205] Cremona (2014) op.cit. note 1031, 15.
[1206] Case C-91/05, op.cit. note 85, para. 105.
[1207] Case C-91/05, Opinion AG Mengozzi, op.cit. note 1172, para. 142.

that were deducted from the mishmash of programmes and initiatives approaching the nexus in section 3.2.3. Yet, the *SALW* case also indicated that it is not always easy or possible to determine which content typically relates to what competence. The setting up of a technical secretariat, according to the CJEU, could for instance be undertaken by both development cooperation and the CFSP. Paradoxically then, while this approach is meant to unburden the aim-part of the test, it can only work for content that is closely related to certain objectives, bringing us back to square one.[1208]

The Lisbon Treaty, by casting doubt on traditional judicial methodologies in the area of external action, causes considerable ambiguity that leaves the judiciary a wide spectrum of choice. All eyes are thus on the Court to understand how it will settle the constitutional dust regarding the choice of legal basis in EU external action, and particularly the position of the CFSP therein. Ironically therefore, "in asking the Court to protect the specificity of the CFSP, the authors of the Treaty may paradoxically have eroded it, by entrenching the policy and its governance further in the EU constitutional order, characterised by the authority of a powerful judicature".[1209]

5.3.2. Preliminary indications from post-Lisbon litigation

In the absence of a worthy follower to the *SALW*-case in a post-Lisbon setting, analysts grasp in the dark on how the Court will seek to equilibrate the integration-delimitation paradox on the CFSP-TFEU crossing point. Three recent rulings nonetheless give some preliminary indications, namely on the *targeted sanctions*, *Philippines Partnership and Cooperation Agreement (PCA)* and *Mauritius* (*Pirate Transfer Agreement)* cases. Without aiming to annotate the full scope and details of these judgments, this section seeks to extract elements and general tendencies that are relevant for and shed light on the judicial approach to the new EU external action architecture, and the position of CFSP and development cooperation therein.

The targeted sanctions case

The 2012 *targeted sanctions* case concerned the appropriate legal basis for restrictive measures directed against natural or legal persons, a practice of ever-growing importance in EU external action. It forms the CJEU's post-Lisbon answer to the *Kadi*-episode, which initiated a process of judicialisation in the CFSP domain.[1210] The procedurally intricate and legally moot construction endorsed therein, requiring recourse to *ex* Articles 60, 301 and 308 EC for adopting sanctions against persons and entities

[1208] Notably, in the IFI case – on the eve of the entry into force of the Lisbon Treaty – Advocate General Bot suggested exactly the opposite. Tilting the balance towards the aim-prong, he argued that "it would be more coherent for two Community initiatives that pursue similar aims to form part of the same Community policy" (Case C-166/07, Opinion AG Bot*, Parliament v Council (IFI)*, ECLI:EU:C:2009:213, para. 98).
[1209] Hillion (2014a) op.cit. note 1013, 70.
[1210] Case C-130/10, op.cit. note 1017.

associated with Usama bin Laden, Al-Qaeda and the Taliban, cried out for a Treaty revision. However, in their efforts to provide a more firm and complete legal basis, the Treaty drafters paradoxically generated new confusion by including two disconnected but overlapping provisions without specifying a task division.

As part of the Treaty Title on the Area of Freedom, Security and Justice (AFSJ) Article 75 TFEU enables the Council and Parliament, in accordance with the ordinary legislative procedure, to prevent and combat terrorism by laying down a framework for administrative measures regarding capital movements and payments owned or held by natural or legal persons, groups or non-State entities. Article 215 TFEU, on the other hand, is the formal successor to *ex* Article 301 EC. It provides for the necessary measures to give effect to a CFSP decision on the interruption or reduction of economic and financial relations with one or more third countries, as well as restrictive measures against natural or legal persons and groups. The latter shall be adopted by the Council acting by a qualified majority on a joint proposal from the High Representative and the Commission. The fact that the Parliament only has to be informed hereof led one observer to call this article the "dinosaur of intergovernmentalism in the TFEU".[1211] In addition, the flexibility clause of Article 352 TFEU now explicitly specifies that it "cannot serve as a basis for attaining objectives pertaining to the [CFSP] and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph [TEU]" (cf. *supra* 5.2.2.).

The contours of these provisions were immediately put to the test as the 2008 *Kadi and Al Barakaat* ruling required a revision of Regulation 881/2002/EC as to allow persons targeted by sanctions to have "a reasonable opportunity of putting [their] case to the competent authorities".[1212] This led to the adoption, under Article 215 TFEU, of a new Regulation 1286/2009/EU that introduced a listing procedure. It provides listed persons or entities of the reasons hereof, as instructed by the UN Security Council sanctions committee, and guarantees their fundamental rights of defence.[1213] Unsurprisingly, in the light of its exclusion under Article 215, the Parliament submitted a plea for annulment, arguing that the measure should instead have been adopted pursuant to Article 75 TFEU. The Czech Republic, France, Sweden as well as the Commission acted in support of the Council. The *targeted sanctions* ruling is key for the light it sheds on the new sanctions regime,[1214] but also – and more relevant to this research – for the insights it provides on the Treaty's reorganisation of external action legal bases and

[1211] A. Ott, 'Case Note on Case C-130/10, Parliament v. Council' (2012) *Maastricht Journal in European and Comparative Law* 19(4), 589.
[1212] Joined Cases C-402/05 and C-415/05, op.cit. note 349, paras 368-376.
[1213] Council Regulation (1286/2009/EU) amending Regulation 881/2002/EC imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L346/42, 23.12.2009.
[1214] This element will not be set out at length as it does not fall directly within the scope of this dissertation. For a complete annotation of the *targeted sanctions* case: L. Potvin-Solis, 'Le Rattachement des Mesures Restrictives de Lutte contre le Terrorimse International à la PESC: des Implications Institutionelles et Juridictionnelles Contrastées' (2012) *Revue des Affaires Européennes* 19(3), 681-689; De Baere (2013) op.cit. note 1058, 537-562.

the validation of the Court's scrutiny powers in this regard. Albeit not its key focus, this concerned the first ruling relating to the depillarised CFSP.

The Court starts by observing that "Articles 75 TFEU and 215 TFEU relate to different European Union policies that pursue objectives which, although complementary, do not have the same scope".[1215] It argues that the delicate combination of *ex* Articles 60, 301 and 308 EC is now consolidated and mirrored in Article 215 TFEU. The context and tenor of Article 75 TFEU is different and "simply refers to the definition, for the purpose of preventing terrorism …, of a framework for administrative measures with regard to capital movements and payments" when this is necessary to achieve the objectives of the AFSJ.[1216] In subsequently arguing whether or not Article 215 TFEU could fully cover the contested Regulation, particularly given its silence on counterterrorism, emphasis was put on the explicit bridge it provides towards decisions taken under the CFSP. Yet, the inexact scope of that last competence caused trouble for the judiciary. In the absence of specific primary law objectives, Advocate-General Bot proposed to detract Article 21(2)(a) to (c) from the common listing as these "are in essence the same as those assigned to the CFSP under [ex] Article 11(1) TEU".[1217] This path dependency-approach is useful, and perhaps unavoidable, but is of course not fully in line with the letter and spirit of the Treaty. It moreover represents a partly distorted reality. In fact, under the previous Treaty framework the CFSP already shared the aim of Article 21(2)(b) to support democracy, the rule of law and human rights with EU development cooperation[1218] as well as financial and technical cooperation with third countries.

The Court circumvents this delicate question and simply reiterates that the objectives of preserving peace, preventing conflicts and strengthening international security, set out in Article 21(2)(c) TEU, are part of the general provisions on EU external action. Whereas this implies that these are to be targeted under all external competences, the Court makes clear that the scope of the CFSP in the new legal order is a broad one. In line with Article 24(1) TEU it covers "all areas of foreign policy and all questions relating to the Union's security".[1219] Remarkably, for lack of much Treaty guidance on the CFSP, the Court then turns to the CSDP which forms an inherent part of the former but is not at all at issue in this case. It reverts to Article 43(1) TEU affirming that CSDP activity "may contribute to the fight against terrorism". This might set a potentially contentious precedent as it goes against the indefinite nature of CFSP provisions, which arguably results from determined Treaty drafting (cf. *supra* 2.3.2.). Where its avoidance of interpreting CFSP provisions led to subordination in the *SALW* ruling, the Court feels

[1215] Case C-130/10, op.cit. note 1017, para. 66.
[1216] Ibid., para.54.
[1217] Case C-130/10, *Parliament v Council (targeted sanctions)*, Opinion AG Bot, ECLI:EU:C:2012:50, para. 63.
[1218] This was in clear terms acknowledged by the Court in both *Portugal v Council* (Case C-268/94, op.cit. note, paras 23-27) and *Philippines border management* (Case C-403/05, op.cit. note 1038, paras 56-57).
[1219] Case C-130/10, op.cit. note 1017, para. 62.

less restricted by the current constitutional framework and even uses these TEU provisions to expand the scope of Article 215 TFEU:

> *Given that terrorism constitutes a threat to peace and international security, the object of actions undertaken in the sphere of the CFSP, and the measures taken in order to give effect to that policy in the Union's external actions, in particular, restrictive measures for the purpose of Article 215(2) TFEU, can be to combat terrorism.*

While acknowledging that combating terrorism and its financing can also be undertaken as part of the AFSJ, the CJEU exposes a number of arguments why the contested Regulation was rightly adopted under Article 215 TFEU. This includes (again) a preambular reference to the aim of maintaining international peace and security, the fact that it is similar to previous Regulation 881/2002/EC and the relation of the contested act to a CFSP decision on restrictive measures that moreover establishes a system of interaction between the Security Council and the Union.[1220] Basing such action on Article 75 TFEU would render Article 215 TFEU "largely redundant".[1221] Safeguarding the *effet utile* of Article 215 in this manner indirectly preserves the integrity of the CFSP, as well as its practical significance given that sanctions represent a considerable portion of its current activity.[1222]

The fact that this ruling only indirectly relates to the CFSP precludes much generalisation. Nonetheless, it contains a number of indications confirming that the Lisbon Treaty struck down its narrow pillar walls. The specific powers the CFSP is accorded in the fight against terrorism make it unlikely that the CJEU would in future cases approach the CFSP restrictively as *lex generalis*. A passage on procedural compatibility moreover confirms that the judicial approach towards the CFSP has been considerably normalised. While it still rules out the possibility of a joint CFSP-TFEU legal basis, this is no longer according to the dogmatic *SALW* ban, but in so far as the respective procedures are incompatible.[1223] Contrary to the ordinary legislative procedure applicable under Article 75 TFEU, Article 215(2) TFEU entails the mere information of the Parliament and moreover requires a previous decision in the CFSP. This last element is not as such problematic for the CJEU, but the fact that this calls for unanimous voting in the Council acting alone, makes that these differences are such as to render those procedures incompatible. Strikingly however, the Court discusses these procedural issues in its preliminary observations, even before examining the aim and content of the measure that would eventually lead

[1220] Ibid., paras 67-78.
[1221] Ibid., para. 84.
[1222] This risks to be to the detriment of the external dimension of the AFSJ. By failing to specify whether the enumerated factors justifying recourse to Article 215 TFEU are cumulative or individually sufficient, the Court ambiguously left open what remains of the AFSJ's security component (I. Bosse-Platière, 'La Cour Confirme le Rattachement de la Lutte Contre le Terrorisme Internationale et son Financement à la PESC' (2013) *Revue Trimestrielle de Droit Européen* 2013(2), 119). This question resurfaces in the *Mauritius Pirate Transfer Agreement* case discussed below.
[1223] Case C-130/10, op.cit. note 1017, paras 47-49.

to the conclusion of the single basis of Article 215 TFEU. This reflection therefore seems to serve the sole purpose of reviving the ostracised *titanium dioxide* legacy. In contrast to the series of cases suggesting that no procedural differences are too big to be overcome (cf. *supra* 5.1.), the CJEU opines here that the *titanium dioxide* approach, for which if finds questionable validation in Case C-178/03 with regard to the co-decision procedure, "is still valid, after the entry into force of the Treaty of Lisbon, in the context of the ordinary legislative procedure".[1224]

The Court moreover confirms its singularity rule, implicating that various components of an act must be "indissociably linked" for it to be adopted on the multiple corresponding legal bases.[1225] Above it was argued that such intrinsic inseparability between a CFSP and TFEU aim or content would sit uncomfortably with the exclusion of jurisdiction over part of the legal act. On the other hand, a fundamental ban on joining up such legal bases could be seen as colliding with Article 218 TFEU as well as 21 TEU. Consequently, the Court had to maintain its objection on different grounds. It finds a solution in no longer submitting the CFSP to separate rules of delimitation, but applying its general methodology regarding the choice of legal basis. However, the CJEU fails to go the whole way in this approach. In responding to the Parliament's argument that, since the entry into force of the Lisbon Treaty, the EU can adopt "measures concerning fundamental rights only under the ordinary legislative procedure or with the consent of the Parliament",[1226] it submits the CFSP to a special treatment. It first reasons that "it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure".[1227] While this would arguably have been sufficient to counter the Parliament's position, it goes on to argue that the procedural differences between Articles 75 and 215 TFEU "is the result of the choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union's action under the CFSP".[1228] While constitutional choices had not prevented the application of the levelling-up scenario for other competences, this can thus not be extended towards the CFSP.

This could in fact be seen as the message of Article 40 TEU.[1229] Yet, the Court turns down the invitation of both the Council and the Advocate General to draw in this provision.[1230] Apparently, it did not (yet) want to put itself in a position of having to clarify its interpretation of this thorny constitutional rule. Nonetheless, between the lines of the ruling's predominant focus on targeted sanctions, the Court's

[1224] Ibid., para. 46.
[1225] Ibid., para. 36.
[1226] Ibid., para. 29.
[1227] Ibid., para. 80.
[1228] Ibid., para. 82. Notably, this so-called constitutional choice had not caused any troubles in allowing the Parliament's consent for signing the Amity Treaty with Southeast Asia (cf. *supra* 5.3.1.).
[1229] Van Elsuwege (2013) op.cit. note 369, 122.
[1230] Case C-130/10, op.cit. note 1017, para. 41; Case C-130/10, Opinion AG Bot, op.cit. note 1215, para. 67. According to Bosse-Platière the Court's silence confirms the limited relevance of this mutual non-affectation clause (Bosse-Platière (2013) op.cit. note 1222, 119).

refusal to interpret the CFSP restrictively as well as its interest in and interpretative jurisdiction over various CFSP and CSDP provisions (that were not invoked by any of the parties) convey the rationale of this provision.[1231] Moreover, the fact that the Court can now assuredly look both ways of the CFSP-TFEU boundary, appeared to mean that it was no longer deterred by its jurisdictional restrictions to enforce constitutional principles across the whole Union legal order.[1232] It noted that "the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union … [and thus] bears also on Union measures giving effect to resolutions of the Security Council".[1233]

On the whole, the judiciary displays a balance between protecting the specificity of the CFSP, as required by the unrecorded second paragraph of Article 40 TEU, and respecting the limits of its own jurisdiction. Key questions that were not posed in this case relate to the balance between the upgraded duty of consistency and the incontestable delimitation ensuing from the principle of conferral. In other words, how to reconcile the increasingly multi-faceted nature of legal instruments, with the need to ensure that no Treaty competences become nugatory. Certain aspects of the judicial approach hereto are laid bare in the *Philippines PCA* and the *Mauritius Pirate Transfer Agreement* cases, both litigated in June 2014. Centred on the choice of legal basis, these cases – again particularly relevant for analysing the judicial approach towards the security-development nexus – respectively saw the Commission defending the development cooperation foundation of one agreement and the Parliament contesting the CFSP basis of another.

The Philippines PCA case

The case on the Framework Agreement on Partnership and Cooperation between the EU and the Republic of the Philippines deals with the nature and scope of EU development policy after the entry into force of the Lisbon Treaty. The agreement forms part of a new generation of PCAs, negotiated throughout the past decade with countries from the Association of Southeast Asian Nations (ASEAN). Partnership and cooperation are established in the broadest of terms, ranging from trade and investment, through justice, migration, transport, tourism, culture and fisheries to combating terrorism and crime.[1234] The Commission had initially proposed to adopt this agreement pursuant to Articles 207 and 209 TFEU, respectively on CCP and development cooperation. It contested the addition by the Council of Articles 79(3), 91, 100 and 191(4) TFEU, dealing with readmission, transport

[1231] C. Hillion, 'Fighting Terrorism Through the Common Foreign and Security Policy' in I. Govaere and S. Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Nijhoff, Leiden, 2014) 86.
[1232] Hillion (2014a) op.cit. note 1013, 66-69.
[1233] Case C-130/10, op.cit. note 1017, paras 83-84.
[1234] Framework Agreement on partnership and cooperation between the EU and its member states, of the one part, and the Republic of the Philippines, of the other part, (Council, 15616/10) 21.01.2011 (hereafter EU-Philippines PCA).

and environment.[1235] For this purpose it submitted a plea for annulling the implementing Decision, arguing that even though the agreement covers a wide range of sectors, it pursues the single objective of development cooperation. Only the trade part could in its view not be seen as merely incidental.[1236] The Court is hereby presented with a constitutional dilemma.[1237] On the one hand, an inflation of legal bases could harm the effectiveness of EU development cooperation. It would moreover be contrary to the intentions of Article 209 TFEU empowering the Union to conclude "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". On the other hand, such goals of comprehensiveness may not undermine the Treaties' institutional balance and decision-making arrangements.

In a rather terse ruling, the Court commences by confirming, and in fact even expanding, the wide notion of development under the current Treaty framework. The primary focus on the eradication of poverty in Article 208 TFEU is not perceived as limiting its scope to measures directly targeted at this purpose. The first paragraph of that Article indeed prescribes that it shall be conducted within the framework of the principles and objectives of EU external action. The Court deduces from this that development cooperation shall also pursue the objectives referred to in Article 21(2) TEU, such as that of fostering the sustainable economic, social and environmental development of developing countries.[1238] This indicates that Article 21 TEU does not serve to detract from the division of competences as it stood before the entry into force of the Lisbon Treaty. However, further extrapolating this reasoning could also serve to undermine the principle of conferral. It is indeed unclear on what basis the CJEU determines which objectives of that general framework might be pursued under which competences and to what extent. This is even more tenuous in the light of the support found for this broad view in the blanket European Consensus on Development as well as the 2006 DCI Regulation.[1239] This creates the awkward impression that rather than the significant Treaty changes, two pre-Lisbon documents determine the scope of today's development policy.

To determine whether certain specific provisions of the PCA fall within this broadly defined scope, the Court rakes up its *Portugal v Council* methodology (cf. *supra* 5.2.1.).[1240] It thereby rejects the Council's argument that this methodology is not transposable on account of the evolution of cooperation agreements, which are today more comprehensive in scope and binding in their consequences. For

[1235] Council Decision (2012/272/EU) on the signing, on behalf of the Union, of the Framework Agreement on Partnership and Cooperation between EU and its Member States, of the one part, and the Republic of the Philippines, of the other part, OJ L134/3, 24.05.2012.
[1236] Case C-377/12, *Commission v Council (Philippines PCA),* ECLI:EU:C:2014:1903, paras 16-17.
[1237] M. Broberg and R. Holdgaard, 'Demarcating the Union's Development Cooperation Policy after Lisbon: Commission v. Council (Philippines PCFA)' (2015) *Common Market Law Review* 52(2), 561.
[1238] Case C-377/12, op.cit. note 1236, para. 37.
[1239] See particularly ibid., paras 42-55.
[1240] Case C-377/12, op.cit. note 1236, para. 38; Case C-268/94, op.cit. note 374.

the Council this implies that it is no longer possible to determine which fields of activity prevail or are merely incidental, let alone that these agreements can be reduced to development cooperation alone.[1241] Therefore, it is not the Court's approach on a 1994 EC-India Agreement on Partnership and Development that should apply, but rather its classic centre-of-gravity case law. The Court, to the contrary, finds that far from casting doubt on its findings in *Portugal v Council*, that evolution corresponds to an increase in the objectives of development cooperation, again reflecting the vision set out in the European Consensus.[1242] The *Portugal v Council* methodology then merely represents the other side of the same coin in determining the appropriate legal basis of a Union measure. As put by Advocate General Mengozzi, the characterisation of an agreement

> *must be determined having regard to its essential object – principal or predominant to repeat the terms used in the case-law cited by the Council – and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from – and thus not of a secondary or indirect nature – those of development cooperation.*[1243]

Arguably, however, there is potential for contradiction between both methodologies.[1244] Whereas classically, the Court focusses on the scope of a measure's aim and content, in *Portugal v Council* it based itself on the nature of obligations that stem from an agreement's objectives. Equating both might cause confusion. What if a measure imposes concrete obligations under a component that is merely incidental? Does the outcome of the test remain unaltered or will the nature of obligations count as an extra criterion nonetheless necessitating an additional legal basis?[1245]

After this rather doctrinal enunciation, the CJEU turns to the analysis of the Philippines PCA. That agreement does not contain any reference to development in its title and development cooperation, rather than being a transversal component, forms the subject of a single Article 29. Nevertheless, the Court sees the Commission's characterisation of the PCA as development agreement confirmed in its general focus and preamble. To substantiate this finding it cherry-picks, among the panoply of areas mentioned, those preambular references that support its claim.[1246] More solid evidence is found in the

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[1241] Case C-377/12, op.cit. note 1236, paras 24 and 41. This is according to the Council corroborated by the fact that "obligations contained in the PCA will continue to apply even after the objectives related to development have been attained" (Case 377/12, *Commission v Council (Philippines PCA),* Opinion AG Mengozzi, ECLI:EU:C:2014:29, para. 23).
[1242] Case C-377/12, op.cit. note 1236, para. 42.
[1243] Case 377/12, Opinion AG Mengozzi, op.cit. note 1241, para. 27.
[1244] L. Ankersmit, 'The boundaries of the development cooperation legal basis: what to make of the Court's "centre of gravity" test?', *europeanlawblog.eu*, 13.06.2014.
[1245] As put by the Council, "[a]s the most limited obligation could lead to a wide development of the external relations with the third country party to the framework agreement, the criterion proposed by the Commission that an obligation must be extensive in order to constitute an objective distinct from those of the development cooperation cannot be accepted" (Case C-377/12, op.cit. note 1236, para. 25).
[1246] Case C-377/12, op.cit. note 1236, para. 46.

recurring references to regional development throughout the PCA. Moreover, in the agreement's general principles the parties "confirm their commitment to promoting sustainable development, cooperating to address the challenges of climate change and to contributing to the internationally agreed development goals, including those contained in the Millennium Development Goals".[1247]

Advocate General Mengozzi attaches an accurate call for vigilance, especially because the determination of the appropriate legal basis has constitutional significance. He cautions that development cooperation is defined so broadly at EU level that it can become difficult to demonstrate that, alongside the large number of sectors it encompasses, there are still objectives distinct from and inseparably linked to those pursued under its scope.[1248] He contends that the EU's relationship with developing countries

> *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.*[1249]

Even though Mengozzi is thus not entirely at ease with the continuous expansion of the notion of development, this nonetheless drives him to conclude that the PCA's provisions on transport and environment do not trespass against that notion as it currently stands. This conclusion results from the *Portugal v Council* test, which the Court applies rather more tersely.[1250] Although clearly broader than the EC-India agreement, it finds that these provisions and their aims "are integrated into the development policy defined in the European Consensus", included in the DCI Regulation and linked in the PCA itself to developmental objectives.[1251] Moreover, they do not set out concrete policy prescriptions. While this conclusion is rather unsurprising in the light of earlier case law, the extension of this reasoning to the provisions on readmission is more contentious. In Article 26(3) of the Philippines PCA, the parties pledge to readmit any of their nationals upon request, without undue delay once nationality has been established and due process carried out. The fourth paragraph expresses a commitment "to conclude as soon as possible an agreement for the admission/readmission of their

[1247] Article 1 EU-Philippines PCA.
[1248] Case 377/12, Opinion AG Mengozzi, op.cit. note 1241, para. 29.
[1249] Ibid., para. 43.
[1250] Case C-377/12, op.cit. note 1236, paras 48-59; Case 377/12, Opinion AG Mengozzi, op.cit. note 1241, paras 46-77.
[1251] Case C-377/12, op.cit. note 1236, paras 49-51.

nationals". The Court cannot get round the observation that this establishes a binding commitment.[1252] Also according to Mengozzi, it marks a change in wording from merely listing aims towards signalling "a clear and unambiguous obligation and specifically [anticipating] the results to be achieved … and the instruments to be used subsequently in order to attain a clearly defined legal objective".[1253] He adds that this contributes more to EU interests than to advancing development objectives. It is therefore all the more striking that the Advocate General nonetheless arrives at the conclusion that this does not require the inclusion of a separate legal basis. In a remarkable contortion performance, he finds unconvincing evidence in the simple fact that this binding commitment results from a political deal that would not have existed "without the overall cooperation put in place by the PCA".[1254] This implies that the objective of readmission "is not autonomous, and is thus of a *secondary* or *indirect* nature".[1255]

The Court does not follow this strange reasoning, but instead opts to narrow the meaning of what constitute concrete obligations in the sense of *Portugal v Council*. The obligation in the PCA to adopt a readmission agreement is in its view not problematic. To the contrary, the fact that such an agreement will be much more comprehensive and concrete serves to illustrate the limited commitment imposed by the PCA's provisions.[1256] A legally binding commitment must in this reasoning thus only be seen as a concrete obligation if no further implementation is required. As no limits are set, this approach could have a particularly expansive impact on the scope of future development agreements.

The narrowing of the concept of a 'concrete obligation' in any case meant yet another widening of the elastic notion of development policy. This not only relates to the breadth of policy areas it can cover, but now also the depth of cooperation. Arguably, this judgment means that agreements adopted pursuant to Article 209(2) TFEU can attach significantly more conditions and obligations, "without this entailing institutional complications on the EU end".[1257] The Court hereby solves the constitutional dilemma between the need for multi-faceted instruments and the principle of conferral, rather more in the benefit of the former. Broberg and Holdgaard argue that this does not provide sufficient guarantees against competence creep as the CJEU failed to univocally clarify "*why* the provisions in the PCFA concerning readmission are not sufficiently 'concrete' to warrant their own legal basis, and *how much more* concretization can be allowed before an additional legal basis is necessary".[1258]

[1252] Ibid., para. 57.
[1253] Case 377/12, Opinion AG Mengozzi, op.cit. note 1241, para. 67.
[1254] Ibid., para. 72.
[1255] Ibid.
[1256] Case C-377/12, op.cit. note 1236, para. 58.
[1257] S. Peers, 'The CJEU enhances the EU's role as an external actor', *eulawanalysis.blogspot.com*, 11.06.2014. In a similar fashion, this ruling implies a narrowing of the impact of opt-ins (of the UK and Ireland) and opt-outs (of Denmark) in the AFSJ concerning readmission, which would otherwise require agreements to be adopted subject to separate decisions.
[1258] Broberg and Holdgaard (2015) op.cit. note 1237, 566.

The Mauritius Pirate Transfer Agreement case

Contrary to the long judicial silence on the CFSP prior to the Lisbon Treaty, it took less than two years after the *targeted sanctions* judgment before the Court was again presented with an inter-institutional dispute involving the CFSP. Despite the Treaty's clear message that the CJEU has no "jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions",[1259] this represents another ironic illustration of how policy-makers are nonetheless driven towards the judiciary for enlightening the legal nature of that competence. The Parliament, aiming at further judicial confirmation of its upgraded external powers, brought this case against the Council. At dispute was Council Decision 2011/640/CFSP on the signing and conclusion of the agreement between the EU and the Republic of Mauritius regarding the conditions of transfer of suspected pirates captured by the CSDP naval operation Atalanta.[1260] Contesting its lack of involvement, the Parliament plead to annul this Decision.

Background and context: tying legal to operational deterrence of piracy

Before going deeper into the details of this ruling, it is interesting to extend a bit more on the Agreement and its context. The Transfer Agreement relates to the EU's first naval operation EUNAVFOR Atalanta. The latter was erected in reply to a 2008 UNSC call to tackle the rising human and economic costs of piracy in the Indian Ocean by joining forces in protecting international shipping (particularly vessels of the AU Mission in Somalia (AMISOM) and World Food Programme ships delivering humanitarian aid to Somalia).[1261] The high-profile CSDP operation Atalanta, still running at the time of writing, aims to deter, prevent and repress acts of piracy and armed robbery off the Somali coast (cf. *infra* 6.2.2.). While the exact constellation varies, Atalanta typically consists of four to seven combat vessels, two auxiliary ships and three to four military patrol aircraft.

This security dimension can however not work without legal deterrence of piracy, and thus a well-functioning law enforcement and judicial component.[1262] Article 12 of the Atalanta Joint Action in this regard regulates the transfer of persons arrested and detained with a view to their prosecution. On the basis of Somalia's acceptance of their jurisdiction, this can either be to the vessel state which took them captive or "if that State cannot, or does not wish to exercise its jurisdiction" to any state

[1259] Article 275 TFEU. The exceptions are of course the monitoring of compliance with Article 40 TEU and the review of the legality of targeted sanctions.
[1260] Council Decision (2011/640/CFSP) on the signing and conclusion of the Agreement between the EU and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ L 254/1, 30.09.2011.
[1261] UNSC Resolution (S/RES/1814) 5893rd meeting, 15.05.2008.
[1262] I. Bosse-Platière, 'Le Volet Judiciaire de la Lutte contre la Piraterie Maritime en Somalie: Les Accords de Transfert Conclus par l'Union Européenne avec des États Tiers' in V. Cattoir-Jonville and J. Saison (eds), *Les Différentes Facettes du Concept Juridique de Sécurité — Mélanges en l'Honneur du Professeur Pierre-André Lecocq* (Université Nord Lille 2, Lille, 2011) 101.

accepting to take on this task. That last option is only allowed if the conditions for transfer have been agreed with that third state in a manner consistent with relevant international law, particularly in order to guarantee that no one shall be subjected to the death penalty, torture or any cruel, inhuman or degrading treatment.[1263] For that purpose the EU concludes transfer agreements with third states in Somalia's neighbourhood. Besides Mauritius, these have been concluded with Kenya, the Seychelles and Tanzania.[1264] Since the start of operation Atalanta, over 130 pirates have been transferred in this manner, including 79 to Kenya, 42 to the Seychelles and 12 to Mauritius.[1265]

These transfer agreements are an answer to two key EU concerns in the legal deterrence of piracy. *First*, there is a self-interest motivation of EU Member States (or third States participating in Atalanta) that are generally reluctant to try suspects and detain convicted pirates themselves due to a range of legal and practical difficulties. Even though piracy has for centuries been a crime of universal jurisdiction, the fight against it is plagued by uncertainty, inconsistency and legal voids.[1266] All relevant UNSC resolutions trigger the 'bazooka' of Chapter VII of the UN Charter to use "all necessary means" in countering piracy, but give limited to no guidelines on how to assign jurisdiction and enforce law.[1267] This is further complicated by the multinationality of piracy situations, where the suspected pirates, the rescuers, the attacked vessel crew, the ship flag, cargo and destination not seldom belong to as many states. In the absence of EU-wide criminal procedures, the prosecution of piracy suspects captured by Atalanta necessarily takes place in a national context. Many countries joining this fight against piracy did initially not think the complexity hereof through in legal terms. They either lacked the appropriate laws to label piracy as a criminal offence or the necessary procedures for prosecution.[1268] The amalgamation of differing domestic legislation moreover causes considerable fragmentation and inconsistency.[1269] Denmark and Germany, for instance, can only try suspected pirates that threaten their national interests or the safety of their citizens, while a French naval vessel

[1263] Article 12(2) Joint Action (2008/581/CFSP) op.cit. note 1169.
[1264] Kenya terminated the agreement after domestic criticism of European neo-colonialism. This decision was partially reversed following an EU promise of further financial assistance and currently Kenya accepts suspects on a case-by-case basis.
[1265] R. Gosalbo Bono and S. Boelaert, 'The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects' in P. Koutrakos and A. Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, Oxford, 2014) 125. The twelve piracy suspects prosecuted by Mauritius were *nota bene* released in November 2014 due to insufficient evidence.
[1266] For an extensive analysis: T. Treves, 'Piracy and the International Law of the Sea' in D. Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar, Cheltenham, 2013) 152-159.
[1267] At most, they call upon all States involved "to cooperate in determining jurisdiction and in the investigation and prosecution of all persons responsible for acts of piracy and armed robbery off the coast of Somalia"; UNSC Resolution (S/RES/2184) 7309th meeting, 12.11.2014, para. 17.
[1268] UN Report of the Special Adviser to the Secretary-General (S/2011/30) on Legal Issues Related to Piracy off the Coast of Somalia, 25.01.2011, 18-27. For instance, in 2008 a Danish warship had to release seized piracy suspects after an unsuccessful six-day quest for any means to sue them (D. Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) *International and Comparative Law Quarterly* 59(1), 142).
[1269] D. Helly, 'Lessons from Atalanta and EU counter-piracy policies', *EUISS Seminar Report* (EU Institute for Security Studies, Paris, 2011) 14p.; Gosalbo Bono and Boelaert (2014) op.cit. note 1265, 113-116.

can apprehend any suspected pirate but is reliant upon a judicial authority to arrest and detain them.[1270] Furthermore, navies are generally not well accustomed to the exigencies of law enforcement. An especially heavy challenge consists of collecting evidentiary proof for criminal charges at sea,[1271] while simultaneously guaranteeing the safety of seafarers.[1272] In spite of these particular intricacies, the European Court of Human Rights (ECtHR), in a 2010 ruling, indicated that even the high seas form no exception to the legal guarantees of judicial protection, such as access to a lawyer, communication with the family and judicial supervision of detention.[1273]

This judicial complexity resulted in a catch-and-release practice whereby piracy suspects were deprived by the EU's naval force of their equipment, weapons and vessels, before being "dumped back on the beaches of Somalia".[1274] In 2012, former EUNAVFOR Commander Major General Buster Howes, noted that 87 % of the suspected pirates arrested by European naval forces were released due to a lack of capacity to prosecute them.[1275] The European Parliament identified this as the key hitch in countering piracy, because impunity undermines deterrence as well as the credibility of patrolling nations.[1276] Or in the words of Osiro, "[t]he lack of legal preparedness before dispatching the naval forces is nothing short of dereliction by the international community and exposes the pirates to human rights violations".[1277]

When suspected pirates are eventually prosecuted in and by an EU Member State, obstacles continue to arise. These involve the logistical, legal and financial burden of transporting and trying pirate suspects, the low chance of conviction (given the difficulty of collecting evidence at sea and in Somalia), the suspicion that acquitted Somalis will subsequently claim asylum,[1278] linguistic complications and a mutual culture shock. This complexity is painfully illustrated by a German trial against 10 Somalis caught by the Dutch marine in April 2009 after an attempted hijack of the MV Taipan.[1279] This longest

[1270] D. Osiro, 'Somali Pirates Have Rights Too: Judicial Consequences and Human Rights Concerns', *ISS Paper 224* (Institute for Security Studies, Pretoria, 2011) footnote 62.
[1271] This is all the more complex given that pirates constitute a sort of hybrid between criminals and combatants (see further: D. Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combatants or Criminals' (2010) *Melbourne Journal of International Law* 11(1), 141-153.
[1272] L. McKay, 'Piracy off the Coast of Somalia: Towards a Domestic Legal Response to an International Concern' in R. Sharamo and B. Mesfin (eds), *Regional Security in the post-Cold War Horn of Africa* (Institute for Security Studies, Pretoria, 2011) 227-229.
[1273] Case *Medvedyev and others v France* (Application No. 3394/03) European Court of Human Rights, 29.03.2010; annotated by D. Guilfoyle, 'Current Legal Developments European Court of Human Rights: Mevedyev and Others v. France' (2010) *The International Journal of Marine and Coastal Law* 25(3), 437-442.
[1274] A. Denselow, 'Seychelles cells: The Somali pirates 'jailed in paradise'', *bbc.com*, 18.05.2013; X, 'Russia frees Somali pirates captured in Gulf of Aden', ibid., 07.05.2010.
[1275] UK House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, Tenth Report of Session 2010–2012, 05.01.2012, para. 96.
[1276] European Parliament Resolution (2011/2962(RSP)) on Maritime Piracy, 10.05.2012, para. 10.
[1277] Osiro (2011) op.cit. note 1270, 1.
[1278] The UK even instructed its naval vessels to avoid capturing pirates because they could potentially claim asylum once on board (Ibid., footnote 64)
[1279] Markedly, even though the shipping company, the ship's flag as well as it crew were Germans, Germany only accepted to issue arrest warrants after the Dutch had threatened to release the would-be kidnappers (M. Gebauer, H. Knaup and M.

trial in German post-war history lasted almost two years, with 105 days of proceedings, and had its total price tag estimated at between EUR 7 and 10 million. Lakotta colourfully describes the absurdity of this "expensive farce":

> *dark-skinned men in T-shirts … had trouble providing exact answers to the judge's questions, replying that they were born "under a tree" or "during the rainy season." They were homesick. One pirate hoped for a quick execution; another suffered from depression. There were suicide attempts … the public prosecutors in Hamburg called for a total of 81 years in prison divided among the 10 defendants. But for what purpose? Deterrence? Resocialization? … And in which society would the pirates be resocialized after their prison sentences, in Somalia or Germany? The latter is more likely … This April, the court had to release the three youngest defendants since they had already been held in custody for two years. They are now attending school [in Germany].*[1280]

The above enunciation of challenges and obstacles explains the EU's interest in concluding transfer agreements.[1281] Trying suspects in countries closer to Somalia contributes to the foreseeability and accessibility of law.[1282] However, it raises important concerns as to the often dire human rights situation in those justice and penal systems. This is a *second* key issue that the EU's transfer agreements aim to address. Extensive provisions seek to guarantee the respect for global human rights norms regarding the treatment, prosecution and trial of transferred persons. This normative dimension covers issues such as adequate accommodation, nourishment, medical treatment and judicial protection. In this manner, these agreements "make a notable effort to balance the requirements of practical expediency with the perspective of third states while complying with ECtHR case law".[1283] EU transfer agreements include a capacity-building component targeted at preventing inadequate resources, legislation and capacity from damaging the human rights situation. It provides for financial and technical assistance in revising legislation, training investigators and prosecutors, investigative and judicial procedures, as well as storing and handing-over evidence. Nevertheless,

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Rosenbach, 'Caught Red-Handed: First Trial of Somali Pirates Poses Headache for Germany', *spiegel.de International*, 20.04.2010). The argument of the German government that it was acting under the control of Atalanta so that the transfer should be attributed to the latter, was notably rejected by the Court (Landgericht Hamburg (Az. 603 KLs 17/10) 19.11.2012).

[1280] B. Lakotta, 'An Expensive Farce: Germany's Somali Pirate Trial Is Pointless', spiegel.de International, 12.09.2012.

[1281] The UNSG proposal to establish an international pirate tribunal was dismissed as too costly and judicially burdensome (see: UN Report of the Secretary-General (S/2011/360) on the modalities for the establishment of specialized Somali anti-piracy courts, 15.06.2011).

[1282] While Somali pirates should certainly be aware of their wrongdoing, they can hardly estimate the judicial consequence of their actions under German criminal law.

[1283] D. Thym, 'Transfer Agreements for Pirates Concluded by the EU - a Case Study on the Human Rights Accountability of the Common Security and Defence Policy' in P. Koutrakos and A. Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, Oxford, 2014) 174.

significant problems remain in these countries and this practice has been criticised as an EU evasion strategy for not having to tackle hands-on its human rights obligations.[1284]

Turning back to the *Mauritius Pirate Transfer Agreement* case, it is in no way any of this substance that was contested by the Parliament. Rather, it opposed the manner in which it was concluded by the Council, submitting two pleas in law. One is mainly semantic and focusses on the procedures for concluding international agreements as set out in Article 218(6) TFEU. The second plea contests its lack of involvement and claims an infringement of the requirement of parliamentary scrutiny as set out in Article 218(10) TFEU.

The first plea: Article 218 TFEU and the division of external competences

The wording of Article 218 TFEU is the point of departure in the first plea. Its provisions constitute a key Lisbon innovation establishing a single albeit internally differentiated procedure for adopting international agreements. Viewed as one of the positive Treaty contributions to external action comprehensiveness, this could however only be achieved by glossing over the difficulties resulting from the CFSP's seclusion. Inter-institutional divergences of interpretation were therefore written in the stars.[1285] In this first plea, the Parliament focussed on the difference in wording between the 3rd and 6th paragraph of Article 218 TFEU. With regard to the opening of negotiations this provides that the High Representative, instead of the Commission, shall submit recommendations to the Council "where the agreement envisaged relates *exclusively or principally* to the [CFSP]".[1286] Obtaining the consent of the Parliament for its conclusion, on the other hand, is excluded "where agreements relate *exclusively* to the [CFSP]".[1287] Since that last provision is formulated as an exception, it should in the Parliament's view "be interpreted narrowly, so that if an agreement relates not only to the CFSP but also to other policies of the European Union, the Parliament should be involved in the procedure for concluding that agreement".[1288]

According to the Parliament, the Agreement contains, besides the CFSP, three other components: police cooperation, judicial cooperation in criminal matters and development cooperation. In addition to listing all elements which it considers to fall under those competences, the Parliament pinpointed the provision in the EU-Mauritius Agreement providing that the relevant EUNAVFOR tasks may after

[1284] Particularly, Kenya's justice system falls short on many international human rights indicators. It has been accused of extrajudicial killings, torture and partial courts (Osiro (2011) op.cit. note 1270, 1-2). In 2011, a Cologne Court found Germany guilty of violating the prohibition of torture, inhuman and degrading treatment by transferring Somali pirates to Kenya after their arrest by a German frigate in the framework of Atalanta (Verwaltungsgericht Köln (25 K 4280/09) 25. Kammer, 11.11.2011).
[1285] Van Elsuwege (2013) op.cit. note 369, 123-124.
[1286] Article 218(3) TFEU (emphasis added).
[1287] Article 218(6) TFEU (emphasis added).
[1288] Case C-658/11, *Parliament v Council (Mauritius Pirate Transfer Agreement)*, ECLI:EU:C:2014:2025, para. 24.

the termination of the operation be executed by administrative authorities.[1289] This, it held, "rules out the possibility that those tasks might be of a military nature".[1290] The Council countered that the exclusivity rule of Article 218(3) TFEU must be determined solely in the light of the agreement's substantive legal basis, in this case Article 37 TEU. Sweden and the UK added that the Parliament's interpretation "by which the scope of application of CFSP procedures is restricted, to the benefit of the procedures laid down by the FEU Treaty, would fall foul of Article 40 TEU".[1291]

Rather puzzlingly, the Parliament's arguments on the police, judicial and development components of the Agreement, did not lead it to challenge the CFSP legal basis of the implementing Decision.[1292] It merely argued that "it is sufficient for one of those components to be present in the Agreement, even in a secondary or incidental manner, for the obligation to obtain the consent of the Parliament to be applicable".[1293] With this arguably ill-considered attempt to stretch its powers, the Parliament pushed the Court towards a formalistic clarification of Article 218 TFEU, which cuts the corner of assessing the agreement's content or the legal status of the CFSP. As none of the parties contested the CFSP legal basis of the implementing Council Decision, the Court saw no need in verifying its appropriateness. Furthermore, the manner in which the Parliament formulated its plea implicitly asked the CJEU to overrule some decades of case law on the choice of legal basis.[1294] It would result in breaking the link between the substantive choice of legal basis and the associated procedures.[1295] Unsurprisingly therefore, the Court elucidates that its case law stipulating that it is the substantive legal basis that determines the procedure to be followed in adopting a measure, and not *vice versa,* also applies to the conclusion of international agreements.[1296]

In elucidating Article 218 TFEU the Court relies on earlier litigation wherein it held that the interpretation of EU law provisions not only depends on their wording but also on their objectives and the context in which they occur.[1297] It argues that the different wording of Article 218(3) and (6) reflects different stages in concluding an international agreement, respectively submitting recommendations

[1289] Article 11(5) Agreement between the EU and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, signed at Port Louis, Mauritius, OJ L254/3 30.09.2011 (hereafter: EU- Mauritius Pirate Transfer Agreement).
[1290] Ibid., para. 26.
[1291] Ibid., para. 42.
[1292] The Parliament, rather unconvincingly, adjusted its position at the hearing, after an enquiry of the Court, arguing that the contested decision should nonetheless have been founded also on Articles 82, 87 and 209 TFEU (Case C-658/11, *Parliament v Council*, Opinion AG Bot, ECLI:EU:C:2014:41, para. 40).
[1293] Ibid., para. 16.
[1294] C. Matera and R.A. Wessel, 'Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements' (2014) *Revista de Derecho Comunitario Europeo* 49(4), 1053.
[1295] A.D. Casteleiro, 'Four Cases for 2015 (II). Article 40 TEU and Pirates Transfer Agreements ', *Durham European Law Institute delilawblog.wordpress.com*, 21.01.2015.
[1296] Case C-658/11, op.cit. note 1288, para. 57.
[1297] Ibid., para. 51, referring to Case C-466/07, *Klarenberg,* EU:C:2009:85, para. 37; Case C-84/12, *Koushkaki*, EU:C:2013:862, para. 34.

to open negotiations and adopting a Council decision to conclude such agreements. Precisely because of the all-encompassing nature of that Article, the procedure to be followed must take account of the institutional balance laid down for each specific competence in the Treaty. The differentiated involvement of the Parliament is in this view "designed to reflect externally the division of powers between institutions that applies internally".[1298] Reminiscent of the *in foro interno, in foro externo* principle, the Court thus establishes symmetry by equalling the method to determine the procedural and substantive legal basis, even if this means limiting the democratic scrutiny of the Parliament. It justifies this approach on the basis of legal certainty and consistency. The Parliament's interpretation could imply that two agreements with a substantive CFSP legal basis, have to be concluded following different procedural rules based on an unpredictable 'exclusivity test'. It would moreover leave no room for exclusive CFSP agreements nor would the exclusion to the Parliament's consent ever materialise.[1299] This leads the Court to the conclusion that the first plea is unfounded as the contested decision could be adopted without the consent or consultation of the Parliament.[1300]

As typically befits an Advocate-General, Bot did not limit himself to what was strictly necessary in view of the Parliament's plea. He opens his opinion with a number of informative reflections on the post-Lisbon delimitation of external competences, which are worth citing in the light of the questions raised by this research. Bot notes that despite the depillarisation, the delimitation of competences is a particularly delicate task when the objective of security is at stake: "the well-recognised interrelationship with development and human rights means that it would very often be possible to argue that measures taken in one of these three areas will also have some effect on the other two areas".[1301] Article 21 TEU "encourages the Council to integrate aspects relating to other Union policies into the CFSP measures which it adopts", but does "not nullify the particularities of each of the Union's policies, just as their complementarity does not nullify the specific nature of each policy".[1302] It stems from Article 40 TEU that setting clear criteria to define the scope of the CFSP "represents a certain constitutional challenge".[1303] In the light of Article 21 TEU, he argues, it will be "rare that an agreement concluded in the field of the CFSP does not concern other Union policies, at least indirectly".[1304] Consequently a centre of gravity test is essential and Bot goes on to examine whether the appropriate legal basis of the implementing Decision is actually and solely Article 37 TEU.[1305] Bot's train of thought

[1298] Case C-658/11, op.cit. note 1288, para. 55.
[1299] Editorial, 'Inter-institutional Disputes and Treaty-making' (2014) *European Law Review* 39(5), 599.
[1300] Case C-658/11, op.cit. note 1288, para. 62.
[1301] Ibid., paras 3 and 23.
[1302] Ibid., para. 24.
[1303] Ibid., para. 5.
[1304] Ibid., para. 22.
[1305] Ibid., para. 35.

is instructive and – in the light of the Court's terseness – interesting to analyse in more detail. While the conclusions he draws are reasonable, his arguments fail to convince on a number of points.

In his view, the aim and content of the Decision and Agreement cannot ignore the broader context in which these are adopted.[1306] This leads him to emphasise not only the security objectives of the Atalanta Joint Action, but also the threat to international peace and security expressed in the various UNSC piracy resolutions. While the latter form indeed part of the enabling framework for operation Atalanta, the deduction that this empowers the CFSP as such to take all necessary measures is not entirely convincing. When turning to the analysis of the content, the Advocate General reiterates that the CFSP legal basis of the Atalanta Joint Action was never called into question. He therefore sees no reason why the implementation hereof by the EU-Mauritius Agreement, defining the modalities for the transfer and the treatment of the persons concerned, should fall outside the scope of the CFSP.[1307] This, he argues, is in line with Article 28(1) TEU enabling the Council to lay down conditions for the implementation of CFSP operational action. Bot does not accord much importance to the nature of arrangements under the Agreement. It suffices that the Joint Action would be of no practical effect without the latter, to conclude that it is intrinsically linked to operation Atalanta.[1308] It is indisputable that the lack of continuity between operational and legal activity would reduce the deterrent effect of the EU naval operation to almost nothing. However, such practical arguments cannot serve to avoid analysing whether the Union's division of competences is respected. This was most clearly substantiated by the Court in Opinion 1/94, where it held that problems arising in the implementation "cannot modify the answer to the question of competence, that being a prior issue".[1309]

Bot's analysis of the Agreement's aim again focalises on the overarching Joint Action and its objective of protecting international security off the Somali coast as well as promoting stability and peace in the region, while having due regard to human rights. He classifies these as CFSP objectives by reverting to his earlier approach in the *targeted sanctions* case of picking those elements from Article 21(2) TEU that fit this claim. Whilst recognising that "none of them are expressly attributed to the CFSP", he now even extends this list of alleged CFSP-specific aims with paragraph (h), namely the promotion of an international system based on stronger multilateral cooperation and good governance.[1310] The fact that this is a newly phrased objective of the Lisbon Treaty does not stop Bot from substantiating this view by reference to the old Article 11 TEU.[1311] Further, in the absence of much Treaty guidance, the

[1306] Ibid., para. 42.
[1307] Ibid., para. 57.
[1308] Ibid., paras 74-75.
[1309] Opinion 1/94, op.cit. note 1020, para. 107.
[1310] Case C-658/11, Opinion AG Bot, op.cit. note 1292, paras 84-87.
[1311] The risk that this path dependency approach sets contra legem precedents is clear from the Council's argument that "[a]ccording to Article 21(2)(b) TEU, the promotion of human rights in third countries is an objective that falls within the CFSP" (Case C-658/11, op.cit. note 1288, para. 33).

Advocate General finds substantive support in the *targeted sanctions* case for attaching the objective of preserving international peace and security to the CFSP. In addition, reference is again made to the Treaty's CSDP provisions, which is more reasonable here in the light of the evident links with a CSDP operation. The Parliament contends that it "does not see how the tasks of the representatives of the Union and EUNAVFOR under the Agreement … could fall under any of the specific CSDP tasks referred to in Articles 42 TEU and 43 TEU".[1312] The Advocate General simply counters that he thinks those provisions are broad enough as "one of the important characteristics of the CSDP … is that it is not limited to the use of military means, in that provision is also made for the use of civilian means, in particular in crisis management tasks".[1313] This 'civilian' label, introduced by the Lisbon Treaty, is however not further circumscribed, which might give the impression of a blank check for further expanding the scope of the CSDP.

In rejecting the argument that the agreement contains a development cooperation component – which was arguably not a particularly steadfast claim –, Advocate General Bot simultaneously confirms and contradicts the *Philippines PCA* case. On the one hand, he approves the view that the Lisbon Treaty increases the tolerance for incidental effects that do not alter the choice of legal basis. On the other hand, he agrees with the Council that Article 208(1) TFEU "refocused the scope of development cooperation with the result that the key element of the Union's development policy is poverty reduction and eradication".[1314] He suggests a narrowing of development cooperation that clashes directly with the Court's confirmation of that policy's broad scope in *Philippines PCA*. Strikingly, while the CJEU corroborated that wide notion in reference to the integration logic of Article 21 TEU, Advocate General Bot now relies on that same duty of consistency to conclude to a narrowing, as it implies that "other policies, such as the CFSP, must … take account of the objectives of development cooperation and may therefore contribute to those objectives".[1315]

On a final note, the Advocate General's inclusion of the context in his analysis of the contested Decision is a welcome addition to deal with the partly disarmed aim and content test. Yet, this may not relieve the judiciary of analysing the measure at issue in full detail. Examining the provisions of the Mauritius Agreement more extensively, would arguable have led to the same conclusion that their CFSP basis does not trespass against the Union's division of competences. It is noteworthy in this regard that the Parliament might have had better chances at bringing the victory home by contesting the legal basis of operation Atalanta itself. It could indeed be argued that the Agreement does not add any new

[1312] Case C-658/11, Opinion AG Bot, op.cit. note 1292, para. 96.
[1313] Ibid., para. 98.
[1314] Ibid., para. 126.
[1315] Compare on that point ibid. and Case C-377/12, op.cit. note 1236, paras 36-37.

judicial powers to the Atalanta Joint Action.[1316] In successive revisions of the latter, the Council progressively handed new powers to the EU's naval force, including the collection of the suspects' private belongings and personal data such as fingerprints, as well as the transmission hereof to Interpol. Contrary to the Advocate General's claim that Atalanta follows the practice of various CSDP SSR missions that were not regarded as relating to the AFSJ, Erkeles therefore argues that the Union has never before enjoyed such pervasive judicial and criminal law powers in the CFSP area.[1317] This did not once lead to a reconsideration of the Joint Action's legal basis. Contrasting with Atalanta's pervasive powers, the contested Agreement then only defines the conditions of transferring suspects and their property and data, and specifies how Mauritius – not the EU – shall treat them.

Second plea: the Parliamentary right to scrutiny

By its second plea the Parliament claimed a procedural infringement because the Council had failed to inform it "immediately and fully" at all stages of the negotiations and conclusion of the EU-Mauritius Agreement, as Article 218(10) TFEU requires. The Council had not send the Parliament the text of the contested Decision and the Agreement until three months after their adoption and 17 days after their publication in the Official Journal. The Council countered this in two ways. First, it asserted that, since the contested Decision falls exclusively under the CFSP, the CJEU does not have jurisdiction to rule on its legality. Second, the Council found the period within which the Parliament was informed reasonable, given that it included the summer break.

Not more than six short paragraphs does the Court need to reject the Council's arguments with regard to its jurisdiction.[1318] On the one hand, the CJEU stresses that the exclusion of its powers of control under Articles 24(1) TEU and 275 TFEU constitutes a derogation from the rule of general jurisdiction, which must therefore be interpreted narrowly. On the other hand, the procedure of Article 218 TFEU is of general application to all international agreements concluded by the EU in all policy fields, including the CFSP. It can therefore not "be argued that the scope of the limitation, goes so far as to preclude the Court from having jurisdiction to interpret and apply a provision such as Article 218 TFEU which does not fall within the CFSP, even though it lays down the procedure on the basis of which an act falling within the CFSP has been adopted".[1319] In its terseness the Court failed to unambiguously

[1316] L. Erkelens, 'Institutional and Legal Aspects of the EU's Judicial Policy to Fighting Piracy off the Coast of Somalia', *CLEER Working Papers 2014/4* (Centre for the Law of EU External Relations, The Hague, 2014) 46-47.
[1317] Case C-658/11, Opinion AG Bot, op.cit. note 1292, para. 105; Erkelens (2014) op.cit. note 1316, 40-44.
[1318] Case C-658/11, op.cit. note 1288, paras 69-74.
[1319] Ibid., para. 73. This is corroborated by Article 218(11) establishing the *ex ante* judicial control of agreements in general terms. Contrary to the distinct treatment of the CFSP with regard to procedures and the involvement of the Parliament in the remainder of the Article, no exceptions are attached here.

specify the limits to its jurisdiction.[1320] This is regrettable as its argument has merit, but the line it walks is a fine one and deserves clarification. For instance, does this imply that the judiciary is empowered to verify whether specific CFSP components of agreements are in line with the Treaty or with other international commitments – even when agreements relate exclusively to the CFSP? Whereas the exhaustive list of Article 24(1) TEU pleads against this, Article 40 TEU can at the very least be seen as authorising the Court to check the compatibility with the EU's division of competences.[1321] The Court's confirmation of its jurisdiction provides preliminary evidence for the prediction that the Lisbon Treaty initiated a shift of perspective whereby its exclusion from the CFSP is interpreted ever more narrowly.[1322] One might indeed wonder whether the finding that the distinct nature of the CFSP does not preclude the CJEU *a priori* from verifying the correct application of general provisions, has consequences for other principles of EU law.

With regard to Parliamentary scrutiny, the Advocate General contends that the Court's review of an exclusive CFSP agreement, as the one at issue, must take account of the specific nature of that competence's rules and procedures. This means that the provision of information to the Parliament must differ according to whether or not an agreement relates exclusively to the CFSP. In other words, where the Parliament's consultation or consent is not required, the Council can legitimately be expected to provide it less quickly and in less detail with information. This reasoning leads him to the objectionable conclusion that even if "it would have been more in keeping with the spirit of Article 218(10) TFEU if the Parliament had been informed before the publication of the contested decision and the Agreement in the *Official Journal*", the three-month delay was sufficiently 'immediate'.[1323] The Court takes a diametrically opposed approach. It argues that it is precisely because of the exclusion of the Parliament's scrutiny powers over the CFSP, that the information requirement applies to any procedure for concluding an international agreement. If the Parliament is not immediately and fully informed, it is deprived of its only option "to make known its views as regards, in particular, the correct legal basis for the act concerned".[1324] If important questions such as the human rights protection of piracy suspects and the judicial track record of the countries where they are likely to be prosecuted,

[1320] Also in Opinion 2/13 on the EU's accession to the European Convention on Human Rights (ECHR) the Court kept us guessing as regards the exact scope of its jurisdiction under the CFSP. The Court found it suffice to say that it had "not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters". The fact that "certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice … is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone". Empowering the ECtHR to rule on the compatibility with the ECHR of such acts would entrust their judicial review exclusively to a non-EU body. It had already held in Opinion 1/09 (*Patent Court,* ECLI:EU:C:2011:123, paras 78, 80 and 89) that such a construction is inadmissible. Consequently, the EU's accession agreement was considered incompatible with EU law (Opinion 2/13, *ECHR,* ECLI:EU:C:2014:2454, paras 249-257).

[1321] See further: Hillion (2014) op.cit. note 1013, 55-57.

[1322] A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Hart Publishing, Oxford, 2012) 264.

[1323] Case C-658/11, Opinion AG Bot, op.cit. note 1292, para. 126.

[1324] Case C-658/11, op.cit. note 1288, para. 86.

are due to the EU's constitutional construction not subject to parliamentary scrutiny, they should at least be a matter of timely public debate in the Parliament.

The *Mauritius* case, by its very nature of distinguishing CFSP from TFEU aspects of foreign policy, could at first sight be seen as a pre-eminent Article 40 TEU scenario. Yet, all those who had therefore been rubbing their hands in glee when this case was announced, can be nothing but disappointed with the outcome. Again, the judiciary managed to steer around one of the most disputed Treaty provisions. This can to a great extent be attributed to the Parliament's ambiguous challenge. Nonetheless, the underlying logic of Article 40 TEU, putting the CFSP on par with TFEU competences, is again latently echoed. The Court's nuanced approach of instituting internal-external symmetry in its interpretation of Article 218 TFEU, indeed contrasts sharply with the rigid isolation of the CFSP established in the *SALW* ruling. In line with the language of Article 40 TEU the delimitation is established in purely procedural terms. This more normalised position for the CFSP within the EU legal order, is reflected in the CJEU's contention that even exclusive CFSP agreements cannot be entirely exempt from judicial and democratic scrutiny.

Only a more categorical legal action can steer the Court to rule on the merits of CFSP-TFEU delimitation, and possibly even verify an infringement of Article 40 TEU. A pending action by the Parliament suggests that it has learned its lessons from the *Mauritius* case. This time, it challenges the adoption of a similar Agreement with Tanzania on the transfer of pirates captured by operation Atalanta. [1325] In what appears a violation of the principle of sincere cooperation, the High Representative signed this agreement while the above case was still pending.[1326] While much of this challenge seems a *déjà-vu*, there is one important difference. Rather than simply claiming its consent on the basis of the non-exclusive CFSP nature of the Agreement, the Parliament now explicitly holds that the latter has full-fledged components of judicial cooperation in criminal matters and police cooperation. Therefore, it "should have been concluded under the substantive legal bases of Articles 37 TEU and 82 and 87 TFEU" (hereby dropping its somewhat less realistic assertion to a development cooperation dimension).

5.4. Conclusion

The navelgazing albeit necessary process of matching different claims to competence and power not seldom confuses insiders and alienates outsiders. Confined to interpreting law in the cases brought before it, the Court's choice of legal basis methodology is inevitably ad hoc and legalistic. This resulted

[1325] Case C-263/14, *Parliament v Council (Tanzania Pirate Transfer Agreement*) action brought on 28 May 2014, pending.
[1326] A. Ott, 'The Legal Bases for International Agreements Post-Lisbon: Of Pirates and the Philippines' (2014) *Maastricht Journal in European and Comparative Law* 21(4), 751-752

in a process fraught with uncertainties of which the outcome is often difficult to predict. The Court's clarification of whether and how this methodology applied to former cross-pillar situations was long time coming. The 2008 *SALW* ruling had the advantage of clarity but the considerable downside of going against a decade of policy efforts to smoothen divergences across the security-development interface. On the one hand, the approach, relying on the so-called hierarchical delimitation clause of old Article 47 TEU, was ruthlessly but clearly to prioritise *ex* Community over CFSP competences. On the other hand, this sobering view from Luxembourg revealed a picture that was rather different from the political emphasis of the security-development nexus on guaranteeing the most effective policy outcome. The judiciary's eagerness to safeguard the *acquis* made light of other principles, not the least that of consistency, and arguably even conferred powers. In earlier cases on development cooperation, that policy had been delimited through a meticulous test verifying the contribution to its objectives and the nature of obligations stemming therefrom (*Portugal v Council*) or the existence of a 'direct link' to that policy's socio-economic objectives (*Philippines border management*). Yet, stated bluntly, in interaction with the CFSP the removal of a hypothetical obstacle to development was suddenly sufficient to bring a measure under that policy's remit.

Whereas a less counterproductive alternative to the Court's *SALW* argumentation was conceivable (in essence by not disregarding the nature of competences), the outcome would likely have been the same. *Ex* Article 47 TEU clearly obstructed the development of a fully integrated foreign policy. The Lisbon Treaty places considerably more emphasis on such integration. Yet, its reinforced rationale of policy consistency does not detract from the CFSP's specific nature. Article 40 TEU now puts the CFSP on an equal footing with TFEU external competences, but this does not mean that the delimitation between them is just another legal basis question. As long as the CFSP is subject to a special legal regime, special rules of delimitation will be necessary. The Council-European Council institutional duopoly over the CFSP's provisions moreover means that the ultimate possibility for the Parliament and the Commission to challenge their interpretation is to claim procedural or substantive infringements before the Court. Recent practice indeed confirms that "the Lisbon Treaty merely established a new terrain within which the Union's institutions are no less keen to protect their prerogatives than they were under the previous constitutional arrangements".[1327]

A key question is thus if and how the Lisbon Treaty changes the judicial approach and whether integrated foreign policy-making is any more possible in the reformed constitutional order. Confronted with a new *SALW* scenario, Articles 40 and 21 TEU appear to deprive the CJEU of the two key elements of its approach: respectively the single-edged sword of delimitation and the aim-prong of the centre

[1327] Editorial (2014) op.cit. note 1299, 560.

of gravity test. It therefore becomes increasingly difficult to distinguish CFSP from TFEU components in EU legislation, and determine the respective weight these are accorded. Four trajectories out of this blind alley were put forth, one more convincing than the other: joining-up CFSP and TFEU legal bases, applying a *lex specialis/generalis* methodology, putting more emphasis on the content-arm of the centre of gravity test and operationalising the Court's new jurisdiction over the duty of consistency. Whilst no full-fledged inter-institutional disputes on CFSP-TFEU delimitation – and still less on the security-development nexus –, three recent cases allow to draw some preliminary conclusions on how this integration-delimitation paradox might be settled along the judicial track. These are the *targeted sanctions*, *Philippines PCA* and *Mauritius Pirate Transfer Agreement* cases.

As regards the *first* option of combining CFSP and TFEU legal bases, the Court does no longer dogmatically shut the door, but at least procedurally significant obstacles still make this an unlikely option for unilateral measures (in the light of the unified procedure of Article 218 TFEU, this is arguably less so for measures adopting international agreements). *Second*, the specific competences attached by the Court to the CFSP in fighting terrorism (and indirectly in the legal deterrence of piracy) also render the – arguably *contra legem* – option of framing this competence as *lex generalis* implausible. *Thirdly*, the three rulings indicate that the horizontal external action objectives of Article 21 TEU detract less from the traditional aim and content test than often projected in literature. Whereas this makes the suggestion of putting more emphasis on the content-prong of the analysis perhaps less necessary, the judicial approach towards the absence of specific CFSP objectives remains obscured. In this sense, the *Portugal v Council* test (arguably without its extension in *Philippines PCA*), focussing on both the width and depth of the respective obligations, offers the best prospects for respecting the Union's division of competences. *Finally*, the duty of consistency appears to receive the strongest upgrade in litigation, albeit not (yet) in the form of enforceable rights and obligations. Particularly the *Philippines PCA* ruling indicates that Article 21 TEU indeed raises the threshold of when the Court's centre-of gravity reasoning will conclude that additional objectives of a certain measure are central rather than incidental.[1328] At first sight, this appears beneficial for integrated foreign policy making. However, the argument of consistency was used both to widen the notion of development in *Philippines PCA* as well as to narrow it again in favour of the CFSP by the Advocate General in the *Mauritius* case. One may therefore wonder whether the new jurisdiction over that open-ended duty does not allow the judiciary too much room for interpretation.

The widened notions of development cooperation and CFSP moreover amplify the chances for overlap and perhaps new inter-institutional tensions. In *Philippines PCA* the Court unmistakably confirmed the

[1328] Van Vooren (2009b) op.cit. note 1149, 246.

broad legal nature of development cooperation, showing itself subservient to the rhythm set by policy evolutions and the international context. With regard to the CFSP, the indirect link to its objectives in *targeted sanctions* and the Court's formalistic approach in the *Mauritius* case, meant that these rulings were rendered in a very specific legal context. This makes it impossible to draw broad lessons on the judicial approach to the CFSP in a post-Lisbon setting. Nonetheless, some prudent conclusions are possible. The Court's reasoning in these cases reflects the underlying rationale of Article 40 TEU, in the sense that the CFSP is treated less inferior and more normalised. The CFSP is assigned specific competences, and the Court no longer submits it to an entirely distinct regime but applies its general methodology. Nevertheless, these provisions were not once invoked by the Court and its take on the CFSP-TFEU boundary remains unpredictable. The question may therefore be posed whether Article 40 TEU is not a double-blunt rather than double-edged sword in the hands of the Court. Are its provisions of any practical use or do they simply serve to conceptually emphasise how the Lisbon Treaty replaced the complete insulation of the CFSP with a more balanced system wherein the constitutional differences between the CFSP and TFEU may not undermine each other's relevance? Hopefully, the pending case on the *Tanzania Pirate Transfer Agreement* will provide more clarity in this regard.

On a final note, in none of the above cases did the parties disagree on the substance of the measures at issue. All agree that targeted sanctions against people associated with Usama bin Laden, Al-Qaeda and the Taliban are necessary. None of the EU institutions doubts that comprehensive cooperation with a developing country like the Philippines is to the benefit of both parties. No one questions that piracy must be fought and piracy suspects should be tried in correspondence with international human rights obligations. Only the legal bases of these measures were disputed. This plainly illustrates that as long as EU institutions cannot sort out their internal differences, this will be to detriment of their consensually agreed external objectives and erode their global credibility. The Court has at present not managed to curb the appetite for inter-institutional arm-wrestling. The next chapter will examine whether recent policy evolutions are more successful in burying the hatchet in the field of the security-development nexus.

6. Making the puzzle fit: recent policy evolutions

> *Strategy is a system of expedients; it is more than a mere scholarly discipline. It is the translation of knowledge to practical life, the improvement of the original leading thought in accordance with continually changing situations.*
>
> Helmuth von Moltke the Elder, *On Strategy*, 1871

In Chapter 3 it was discussed how the policy guidance of EU institutions on the security-development nexus fell short on effectively aligning the myriad of valuable efforts undertaken by the EU's separate – and internally fragmented – development cooperation and CFSP/CSDP communities. While the coherence challenges are of a very practical nature, the policy answer remained principally declaratory and generic. The two subsequent chapters demonstrated how many of the policy-making obstacles result from the bipolarity of the EU's institutional and constitutional design. The Treaty of Lisbon undertook to cure this 'borderline personality disorder' by scaling up efforts and obligations to cohere the CFSP with the other strands of EU external action. This brought institutional design and primary law more in line with the commitment to enhance the nexus between EU security and development policies. However, as the CFSP remains legally secluded, this gave rise to an integration-delimitation paradox that essentially requires political craft to be overcome. As noted in the EEAS review "[t]here is no shortage of building blocks for comprehensive and effective EU external policies".[1329] Yet, only accurate policy backing can put them into place. In this light, the focus of this chapter is on whether and how recent policy evolutions fulfil this need and succeed in providing the much-needed strategic guidance.

According to former High Representative Ashton, "[a] central aim of the Lisbon treaty is to strengthen the EU's capacity to develop a long-term EU strategic framework in the area of external relations".[1330] The European Council in particular is entrusted with the identification of "the strategic interests and objectives of the Union".[1331] However, the EU's track record when it comes to strategy-making is rather mixed. Enlargement – arguably the EU's most successful external strategy – was never labelled or devised as such, the CFSP common strategies suffered an inglorious demise, and the European Security

[1329] EEAS Review (2013) op.cit. note 726, 7.
[1330] Ibid.
[1331] Article 22 TEU.

Strategy has been criticised as overly reactive, declaratory and by now out of date.[1332] Following a period of teething troubles, the Lisbon Treaty's institutional novelties appear to start signing up to their integrative mandates. This gives rise to a new momentum in which the so-called comprehensive approach is the talk of the town. The latter tends to absorb the previous focus on the security-development nexus within a wider external action methodology.

The first section will explore what is new about the current endeavour at comprehensiveness and whether it has better prospects to succeed (6.1.). A second section will look at the practical translation of such a comprehensive approach in the form of regional strategies developed by the EEAS (6.2.). The focus will specifically be on the EU Strategic Framework for the Horn of Africa. These recent evolutions illustrate how the Lisbon Treaty has indeed incited strategic thinking, but paradoxically this does not occur on the basis of the Treaty article that was specifically designed for this purpose. A final section will therefore analyse the unexploited potential of Article 22 TEU (6.3.).

6.1. The EU's comprehensive approach: *plus ça change, plus c'est la même chose?*

No one doubts that more comprehensiveness would benefit the EU's external efforts. The main question is how to put this into practice. In order to understand whether the comprehensive approach is more than a new buzz-word, the first section will expound on several recent initiatives on the security-development interface that aim to adapt the EU policy machinery to the new institutional framework of the Lisbon Treaty (6.1.1.). The initiation of these efforts predates the enforcement of the comprehensive approach, but they are embraced by the latter and their success will depend on its progress. In the second section it will be studied how this comprehensive approach is designed and presented by EU institutions (6.1.2.). The focus will be on its added value, potential and challenges for the future of the security-development nexus.

6.1.1. Run-up: adapting EU policy-making on the security-development interface to its new institutional bedding

The discourse on the comprehensive approach emerged early in the new millennium when military circles of the international community started conjuring up ways to deploy peacekeepers in broader post-conflict stabilisation and win 'hearts and minds' for military action.[1333] The notion gradually

[1332] The ESS' outdated design is clear from its first sentence that would be an unlikely opener in the current climate: "Europe has never been so prosperous, so secure nor so free" (ESS (2003) op.cit. note 78).
[1333] One of the first manifestations hereof was the creation by the US government in 2002 of provincial reconstruction teams (PRTs) in Afghanistan, consisting of military officers, diplomats and reconstruction experts.

broadened and was increasingly directed at the long-term, under diverse labels such as whole-of-government approach, integrated approach, *réponse globale*, counterinsurgence (COIN), etc. While there is no universally accepted definition, the comprehensive approach generally conveys "the need to adjust measures for conflict management and post-conflict recovery to complex security situations and fragile environments by bridging policy and institutional gaps, reconciling dilemmas posed by involving military and civilian actors, and formulating common objectives and more integrated strategies".[1334]

Also in the EU the idea initially gained traction in debates on better fine-tuning the military and civilian components of the CSDP (cf. the discussion on CMCO and CIMIC *supra* 3.1.1.). After the entry into force of the Lisbon Treaty the talk on the comprehensive approach got renewed impetus. It was further broadened in reply to and incited by the extended mandate of the High Representative and the institutional melting pot of the EEAS. Arguably, this also reflected a desire to start with a clean sheet in the new constitutional setting. Indeed, for many among the EU staff the concept of a security-development nexus had become too negatively associated with inter-institutional strive.[1335] This partly explains the dried up political support for the long-announced Action Plan on Security, Fragility and Development (cf. *supra* 3.1.1.). A first draft hereof was finalised in 2010, and while not revolutionary it reportedly contained worthy ideas to increase the effectiveness of aid and simplify procedures.[1336] Its shelving did however not stop EEAS, DEVCO and Delegation officials from applying its spirit and even realising the most sensible policy ideas. A first such innovation was the development and institutionalisation of an EU early warning system (EWS). By linking up open source analysis and internal staff assessments, this new system aims to identify countries at risk of violent conflict and monitor EU actions to address this. For this purpose an Early Warning and Conflict Analysis Team has been established within the Conflict prevention, Peace building and Mediation Instruments Division of the EEAS. EU Delegations take the lead in short and long-term risk assessments, which are currently piloted in the Sahel and Central Asia. It holds considerable potential to increase the EU's preventive capacity and is increasing the conflict awareness among EU staff.[1337]

A related evolution is the scaling up of conflict analysis across the EEAS and Commission services. An interesting EEAS-Commission guidance note, from November 2013, aims to enhance the conflict

[1334] V. Hauck and C. Rocca, *Gaps Between Comprehensive Approaches of the EU and EU Member States: Scoping Study* (European Centre for Development Policy Management, Maastricht, 2014) 18-19.
[1335] Keukeleire and Raube (2013) op.cit. note 452, 567-568.
[1336] M. Furness, 'Let's Get Comprehensive: European Union Engagement in Fragile and Conflict-Affected Countries', *DIE Discussion Paper 5/2014* (German Development Institute, Berlin, 2014) 9-10.
[1337] A. Brown and E. Hefer, *Our Collective Interest: Why Europe's Problems Need Global Solutions and Global Problems Need European Action* (European Think Tanks Group, London, 2014) 31.

sensitivity of staff working in fragile and/or conflict-affected countries. Putting aside criticism of a naive 'all good things go together' notion of the security-development nexus, it departs from:

> *the idea that all EU action in a conflict affected setting can, and is likely to, have an impact on the conflict. Well-meaning support for reform or infrastructure can increase dependency, power and patronage of certain groups, and have a negative impact on coping mechanisms. Similarly, the failure to respond with timely political and/or development support to a peace accord due to, for example, concerns over fiduciary risk in a still fragile situation or misinterpretation of the situation due to lack of political insight could push a country to relapse into conflict that could have been prevented.*[1338]

Outlined as the basis of a comprehensive approach to crises situations, the note sets forth an approach to conflict analysis that is context-specific, yet systematic, and jointly owned by all relevant EU actors. This can be generated by two frameworks: a light-touch Conflict Analysis Tool currently piloted by the EEAS and a conflict sensitive political economy analysis developed by DG DEVCO. The former is a collaborative process, including interactive conflict analysis workshops, that enables a broad range of EU staff to participate and thus own its results. The second is a more in-depth study of the conflict context, causes, actors, dynamics, existing and planned responses as well as key gaps and opportunities. These frameworks of analysis should assist the EU in making better-informed strategic and operational choices that are goal rather than instrument-driven. They are designed as the basis for a continuous adaptation of aid allocations, but also CFSP action and CSDP missions/operations, to changing needs and circumstances, and for a reinforced compatibility between them. The note gives a concrete and instructive example of how this might look in practice (see Box 13).

A connected EEAS-Commission note strives to raise staff awareness on how to address conflict prevention, peace-building and security issues under external cooperation instruments, "while respecting the primary, specific objective of each policy and instrument".[1339] Similarly, the basic assumption is that:

> *Some long-term external cooperation projects and programmes, funded by international donors, have been entirely lost or their impact has been seriously undercut for having neglected and/or underestimated the security-development context. In some cases, goodfaith cooperation projects have unintentionally contributed to exacerbate community, ethnic or religious rivalries, leading*

[1338] EEAS and Commission, *Guidance Note on the Use of Conflict Analysis in Support of EU External Action*, 2013, 1 <http://capacity4dev.ec.europa.eu/public-fragility/document/guidance-note-conflict-analysis-support-eu-external-action>.
[1339] EEAS and Commission, *Addressing Conflict Prevention, Peace-Building and Security Issues under External Cooperation instruments*, 2013, 2 <http://capacity4dev.ec.europa.eu/public-fragility/document/addressing-conflict-prevention-peace-building-and-security-issues-under-external-cooperatio>; see also: Commission (2014) op.cit. note 485, 124p.

even to violence, simply because basic principles of conflict-sensitivity were not applied in the design or the implementation of the project.[1340]

Box 13: Examples of linking conflict analysis to comprehensive EU external action

Key conflict dynamics emerging from conflict analysis and corresponding strategic goal for EU Action	**Domains of EU External Action**		
	Political Dialogue / Diplomacy	**External assistance**	**CSDP Action**
Issue: One geographic and ethnic grouping has privileged access to education – undermining structural stability and being a source of grievance and conflict **Objective**: Structural stability is promoted by supporting equal access to education	EU HoD addresses very sensitive political blockages to education reform informally with Head of State	• Education is proposed and agreed as focal sector; • Geographic distribution of access to education forms part of EU policy dialogue with Ministry of Education • EU programming with Ministry of Education seeks to promote more equitable access to education	[Not applicable]
Issue: Citizen's do not feel safe and are directly targeted by the security sector (police/army/judiciary) which is a proximate cause of conflict **Objective**: Effective access of citizens to justice and security services is improved	• EU HoD enquires about windows of opportunity to engage in security sector reform with Ministers of Justice and Interior [and Defence in case of a military CSDP engagement]; • Outputs of complementary but sensitive civil society measures to EU supported justice and security sector reform are regularly discussed with both ministries	• Within the Governance focal sector, citizen access to justice is noted as priority area; • EU support to civil society to promote access to justice and security services is programmed as part of wider justice reform and complements SSR mission.	Options for a CSDP mission with SSR mandate are developed for consideration by PSC, with subsequent follow-up as decided
Issue: Political mobilisation is undertaken on very polarised identity grounds – has led to difficulties and violence in the past transfers of power – elections have been a trigger of conflict **Objective**: The recurrence of electoral violence is prevented after the next election in 2 year's time	• EU HoD with other EU HoMs have robust private dialogue with President and Heads of Political Parties on political polarisation and incitement to violence • Dialogue with National Election Commission and police, media about what capacity/incentives they need to acquire to prevent rumour and acts of organised or random violence; • Accurate reporting of political issues before, after and during elections	• Governance focal area has strong conflict prevention focus going beyond elections to entire electoral cycle 2 years before national elections; • Programming supports community reconciliation, mediation • Policy dialogue by HoO follows up on technical aspects of political dialogue with election commission etc.	[if so decided and/or at request of the UN a CSDP military mission could be fielded to support (confidence in) security around the actual elections]

EEAS and Commission, Guidance note on the use of Conflict analysis in support of EU external action, 2013, 10.

[1340] Ibid., 2-3.

The note takes a bottom-up approach stimulating staff to aspire an optimal mix of EU policies and tools and ensure that short-term crisis management activity under the IcSP, APF and civilian CSDP missions is not abruptly interrupted when crisis contexts end. The note describes how external assistance can contribute to security-related issues such as DDR, mine action, mediation,[1341] transitional justice and support to parliaments and elections. Markedly, also in the symbolic/problem dossier of SALW it appears that the Lisbon Treaty's inter-institutional bridges start bearing fruit. In line with the Commission's argumentation (as well as the Court's initial indications) in the *SALW* case,[1342] the Commission and EEAS agree on a preliminary division of labour regarding SALW control: "issues having a primarily military/security dimension need to be addressed under the CFSP budget; our external cooperation instruments can however address all other dimensions of SALW at country level such as the legal and regulatory frameworks, institutional capacity-building, including some trade-related aspects (e.g. import/export controls, border controls), awareness raising, survey activities, etc.".[1343] Evidently, grey zones remain and deciding what constitutes a 'primarily military/security dimension' can arguably only be done on a case-by-case basis, putting the onus on inter-institutional trust and cooperation. Noteworthy in this regard is that – contrary to the inter-institutional deadlock in trying to amend the IfS Regulation following the *SALW* case – the die was finally cast on including SALW control under the scope of the IcSP (cf. *supra* 3.2.1. and 5.2.2.). Yet, this is limited to measures "within the framework of Union cooperation policies and their objectives",[1344] which still leaves open many questions as to the division of labour with the CFSP/CSDP.

A final evolution relating to the emerging comprehensive approach is the review of the EU's Crisis Management Procedures (CMP). This was requested by the FAC in December 2011 in order to adapt the old CSDP procedures to their new institutional bedding.[1345] The key substantive innovation of the new procedures precedes the adoption of the Crisis Management Concept (CMC) and consists of drafting a Political Framework for Crisis Approach (PFCA).[1346] In the spirit of the strategic approach taken towards the Sahel and the Horn of Africa (cf. *infra* 6.2.), this serves to deliver a proactive and comprehensive policy response articulating the nature of the crisis, whether and how the EU should react and through which instruments. This process is guided by the EEAS Crisis Management Board, possibly through the activation of a Crisis Platform. Further relevant changes to the CMP involve the reduction of political decisions required in the CSDP planning cycle, the better streamlining of civilian

[1341] A notable novelty in this regard was the launch, in May 2014, of the European Institute of Peace (EIP) as "a flexible and external tool in support of Europe's peace efforts, complementing the set of instruments at the EU's disposal in mediation and dialogue (EIP Press Release*, '*Launch of the European Institute of Peace', Brussels, 12.05.2014).
[1342] Respectively, op.cit. note 1207 and 1206.
[1343] EEAS and Commission (2013b) op.cit. note 1339, 7.
[1344] Article 3(2)(j) IcSP Regulation
[1345] Council Conclusions on CSDP, 3130th Foreign Affairs Council meeting, Brussels, 01.12.2011, para. 31.
[1346] Council (7660/2/13) Suggestions for crisis management procedures for CSDP crisis management operations, 18.06.2013.

and military processes (which remains however hampered by the different chains of command and financial arrangements) and an alignment of strategic and operational planning through the early involvement of operational planning teams as well as a force sensing exercise to sound out Member States' interest in participating and contributing.[1347] A related indication of the regained inter-institutional trust is that all Council Decisions setting up CSDP missions/operations now include a standard phrase stating that the High Representative "shall ensure the consistency of the implementation of this Decision with the Union's external action as a whole, including the Union's development programmes".[1348] Such language was not conceivable prior to the entry into force of the Lisbon Treaty, and certainly not in the aftermath of the *SALW* ruling.

The above innovations are still in their early days and need deepening. The early warning system and conflict analysis should become more standardised and ingrained in the daily work of Commission and EEAS officials at headquarters and Delegation level. The new CMP require an enhanced commitment of Member States to exploit their integrative potential. Notably, these changes simultaneously precede and form an inherent part of the new focus on the comprehensive approach and their success will therefore depend on the progress achieved with the latter.

6.1.2. The comprehensive approach to what?

In EU policy debate of the early 2010s, references to the comprehensive approach increasingly became the antonym of and remedy against the bogey of 'silo mentality'.[1349] In the course of 2012, when the EEAS was fully up and running, the time was considered ripe for establishing an inter-institutional working group to draft a joint Commission-High Representative Communication on the comprehensive approach. This group was composed of EEAS officials from the Corporate Board, CROC and CSDP structures such as CMPD, EUMS and CPCC, as well as Commission staff from DEVCO, ECHO, FPI and the General Secretariat.[1350] Then High Representative Ashton set the bar high purporting that "[w]e cannot succeed without this comprehensive approach – it is simply not enough to chase and deter pirates, not enough to try and do development when there is no security, not enough to try and provide economic support without a stable government... – and that is what the existence of the EEAS allows us to do – uniquely".[1351]

[1347] See further: A. Mattelaer, 'The Empty Promise of Comprehensive Planning in EU Crisis Management' (2013) *European Foreign Affairs Review* 18(4), 133-136.
[1348] Article 14(1) Council Decision (2012/389/CFSP) op.cit. note 593
[1349] See for instance: High Representative Ashton (SPEECH/13/530) op.cit.note 829, 1.
[1350] Commission officials from Trade and Home Affairs had also been invited but did not show up. ECHO, from its part, mainly participated to ensure that humanitarian aid was not politicised (Mattelaer (2013) op.cit. note 1347, 136).
[1351] High Representative Ashton, Speech at the annual meeting with Heads of Delegations, Brussels, 03.09.2012.

What followed was a politically charged exchange process, followed by broad inter-service consultations and negotiations with Member States. This essentially revolved around three major issues.[1352] First, the scope of the comprehensive approach: should it be targeted specifically at crisis management, the entire conflict cycle or external action as a whole? An excessively wide scope could devoid the comprehensive approach of practical meaning, whereas a narrow focus could fail to unlock the EU's full potential. Second, the level of policy integration: should the comprehensive approach be limited to improved information exchange or extend to joint programming, implementation and monitoring of EU instruments? Third, the extent of formalisation of procedures and structures: should this approach follow a standardised process or rely on flexible mechanisms? Detailing out the whole system could get the comprehensive approach lost in a bureaucratised straightjacket, while past practice with the security-development nexus has shown that an overtly noncommittal approach is unlikely to bear much progress. These are all sensitive and complex questions that forestalled a smooth decision process.

The Joint Communication and Council Conclusions on the Comprehensive Approach

Ultimately, on 11 December 2013, the Joint Communication saw the light of day. It contains the High Representative's and Commission's common understanding of and full commitment to 'the EU's comprehensive approach to external conflict and crises'. They argue that rising global challenges – both in number and complexity – as well as the pressure on economic and financial resources, make the case for a comprehensive approach stronger than ever. Their understanding covers "all stages of the cycle of conflict or other external crises; through early warning and preparedness, conflict prevention, crisis response and management to early recovery, stabilisation and peace-building in order to help countries getting back on track towards sustainable long-term development".[1353] The comprehensive approach is not put forth as an entirely new concept, but one of which the ideas and principles have yet to become systematically applied across all areas of EU external action. For this purpose the Communication proposes eight central measures – or rather guiding principles – each supported by a number of concrete actions, which actually embed many of the above policy evolutions on the security-development interface.

[1352] C.V. Rasmussen, 'Linking Instruments in Development and Foreign Policy: Comprehensive Approaches in the EU', *DIIS Report 2013:21* (Danish Institute for International Studies, Copenhagen, 2013) 8.
[1353] Commission and High Representative Joint Communication (JOIN(2013) 30 final) The EU's comprehensive approach to external conflicts and crises, 11.12.2013.

Box 14: The way forward for a comprehensive approach to conflict and crisis situations – Eight measures in the Joint Communication

1. A **shared analysis** should set out the EU's understanding of the causes of a potential conflict, its key actors and dynamics, and the risks of EU (non-)action. For this purpose combined situational awareness and analysis capacity should be improved by better interlinking the dedicated facilities across EU institutions, strengthening anticipatory and transparent information-sharing among EU actors in Brussels and in the field, and further developing and systematically implementing the conflict analysis methodology.
2. A **common strategic vision** on the direction for EU engagement across institutions and with Member States should be defined. As much as possible this should be set out in overarching strategic documents with regard to a country or region, while EU and Member States objectives and priorities should be specified in Joint Framework Documents (JFDs).
3. A constant and high priority for all EU diplomatic engagement is to **focus on prevention**. This builds upon the new EU early warning system as well as those of the Member States, and the translation of conflict analysis into specific preventive measures.
4. EU crisis response should **mobilise the different strengths and capacities of the EU**. In order to guarantee the optimal sequencing of available instruments, the Crisis Platform mechanism should be used more systematically, the cooperation between the various EU emergency response systems improved and the capacity for rapid deployment of joint (EEAS, Commission and Member States) field missions scaled up.
5. A **commitment to the long-term** is essential to address the root causes of conflict and build peaceful, resilient societies. Coordination as well as pooling and sharing systems among EU stakeholders should maximise synergies across short and long-term measures. Conflict analysis and flexibility mechanisms should be systematically included in all aid programming. Stock should therefore be taken of lessons learned and feed back into the comprehensive approach cycle.
6. Positive effects should be maximised and negative effects avoided by better **linking EU internal and external policies and actions**. The High Representative, working closely with the Commission President, should ensure strategic and operational coherence across all policy fields, including energy security, environmental protection and climate change, migration, enlargement, counter-terrorism, organised crime and global economic governance. The external effects of internal policies should as much as possible be part of

the analytical crisis framework, and awareness should be raised about their impact and effect.

7. As main executive arm of the comprehensive approach **better use should be made of EU Delegations**. Full advantage is to be taken of the role of the Head of Delegation in delivering and coordinating EU dialogue, action and support across the full policy spectrum. This requires an appropriate breadth of security expertise in Delegations, which should be strengthened, including through rapid temporary staff reinforcements in crisis situations.
8. In responding to complex global challenges the EU should **work in partnership** with and take full account of other international and regional actors as well as major international NGOs, civil society, think-tanks, academia and public and private actors.

While these measures and principles are no complete novelties, the High Representative and Commission lay a number of fresh emphases. One is the importance attached to process rather than grand rhetoric. Along the model of the Crisis Platforms, shared analysis should inform a comprehensive approach that eventually feeds into complementary engagement. The comprehensive approach "is a joint undertaking and its success a shared responsibility for the EU institutions as well as for Member States"; it should be "based on the full respect of the different competence and respective added value of the EU's institutions, as well as of the Member States, as set out in the Treaties". [1354] Another key element is the attention for context. Acknowledging that there are "no blue-prints or off-the-shelf solutions", the Communication introduces a flexible and informed policy design that leaves more room for adaption '*en route*'.[1355] This goes along with a shift of the centre of gravity towards EU Delegations, which should receive more discretion in influencing policy design and implementation.

This focus on process and context is key. Comprehensiveness is not an end in itself but aspires the greatest possible and most sustainable impact of the EU's efforts for peace and development. This is nothing new, but EU policy-makers have long tried to approach this with predetermined checklists and political slogans of coherence writ large. This passes by the fact that change is generally non-linear, indirect, multi-dimensional and incremental, making it hard to capture in long-term policy planning.[1356] This is even more so for the complex causal relations between insecurity and poverty in fragile situations (cf. *supra* 1.1.2.). Furthermore, coherence and complementarity are context-specific, meaning that they cannot be enforced but must be operationalised.[1357] This is all the more true for

[1354] Ibid., 12 and 4. Puzzlingly, the Communication subsequently lists policy documents such as the European Consensus on Humanitarian Aid and on Development, rather than the relevant Treaty provisions.
[1355] Ibid., 4.
[1356] P. Vernon, 'Blog: How peace gets stronger in society', *philvernon.net*, 28.01.2015.
[1357] C. de Coning and K. Friis, 'Coherence and Coordination: The Limits of the Comprehensive Approach' (2011) *Journal of International Peacekeeping* 15(2), 271-272.

interaction with the CSDP, which is a "moving target" with a scope that evolves in parallel with the challenges it addresses.[1358] Rather than a visionary strategy, *a priori* detailing all steps and procedures, a genuine comprehensive approach therefore constitutes an adaptive and step-by-step policy process that constantly assesses its impact and recalculates progress. This can be achieved by putting in place processes that enable and stimulate continuous interaction, information exchange and mutual learning between all relevant EU stakeholders. Such a design is essential because "[t]here is rarely enough information to make decisions and choices with full confidence. It is often necessary to engage in a more complex process whereby analysis and assessment is continuous to allow adjustment when circumstances change and/or new information and insight comes to light".[1359] This does not imply that a general policy framework is irrelevant, it may simply not be seen as a final destination fixating a single vision. In this sense it is key that the underlying aim of the Communication is to systematise policy processes, mechanisms and attitudes. The strengthened appreciation for EU Delegations moreover enables a feedback loop between policy formulation and implementation, which would however have benefited from a more explicit mention.

The Joint Communication thus contains the seeds of a more responsive policy process, but insufficiently pins down the comprehensive approach as a concept, or specifies which purpose it serves exactly. The High Representative and Commission blow hot and cold over the focus of the comprehensive approach. The title suggests that this is on crisis management, but conflict prevention is a key component, while it establishes "guiding principles for EU external action across all areas" and intends to "make determined progress towards better, stronger and faster EU external action" as a whole.[1360] The question is therefore when and where the comprehensive approach will and can be activated. Political and organisational realism – taking into account the EU's and Member States' capacity constraints – dictates that its efforts are likely to be hijacked by crises and conflict situations, regardless of the focus on prevention.[1361]

Another non-negligible shortcoming is that the comprehensive approach is presented as if it emerged in a vacuum. The Communication does not sufficiently explain whether and how 'the' comprehensive approach differs from the need for 'a' comprehensive deployment of all its instruments, which the EU has put forth as an objective for over a decade. In other words, is the comprehensive approach yet another all-purpose word for efforts that increase coherence, a kind of philosophy, or a new and single methodology? No mention is made of earlier attempts to gear the different strands of EU external

[1358] S. Stroß, *One Goal, Many Paths: The Promotion of Policy Coherence for Development in EU Policy Formulation* (epubli, Berlin, 2014) 164-166. This is confirmed and illustrated by the non-exhaustive list of Petersberg tasks in Article 43(1) TEU.
[1359] Commission (2014) op.cit. note 485, 47.
[1360] Commission and High Representative (JOIN(2013) 30 final) op.cit. note 1353, 2 and 12.
[1361] F. Faria, 'What EU Comprehensive Approach? Challenges for the EU action plan and beyond', *ECDPM Briefing Note No. 71* (European Centre for Development Policy Management, Maastricht, 2014) 10.

action towards crisis management and conflict prevention. Given that the "EU's track record in seeking agreement and implementing comprehensive approaches is a long history of unfinished business, postponed priorities and failed attempts",[1362] it would not have been redundant to explain how the focus and why the prospects should be better now. The security-development nexus is established as "a key underlying principle",[1363] but it is not clear what this implies and the proposed approach is both wider and more confined. On the one hand, reminding of the PCD rationale, the Joint Communication advocates a broad message of 'policy coherence for conflict prevention and crisis management' by ensuring that all internal and external policies support this aim. Yet, in contrast to the rationale of the security-development nexus, this comprehensiveness does not serve the objectives of poverty eradication themselves. An even more striking absentee is the CSDP, which is only referred to in passing. Reportedly, this results from Member States' pressure not to subdue their control over the military dimension to this comprehensive logic.[1364] Yet, this void leaves an important scar on the so-called comprehensiveness. Paradoxically, while the approach emerged out of civil-military coordination, efforts to draw in more policy areas for the sake of comprehensiveness resulted in the renunciation of these roots.

The May 2014 FAC Conclusions on the EU's comprehensive approach, while significantly more sparing in detail, contain a number of relevant clarifications.[1365] First, they welcome – not endorse – the Joint Communication as an important step in the ongoing process of cohering security and development and strengthening conflict prevention.[1366] At least implicitly, the Council places the comprehensive approach within the context of earlier integrative policy attempts. Moreover, it "stresses that the comprehensive approach is both a general working method and a set of concrete measures and processes to improve how the EU, based on a common strategic vision and drawing on its wide array of existing tools and instruments, collectively can develop, embed and deliver more coherent and more effective policies, working practices, actions and results."[1367] The title of the Conclusions 'on the EU's comprehensive approach' – and thus in contrast to the Communication not specifically on external conflicts and crises – indicates that its principles are relevant for the broad spectrum of EU external action. Yet, "[t]he need for such a comprehensive approach is most acute in crisis and conflict situations and in fragile states, enabling a rapid and effective EU response, including through conflict

[1362] Ibid., 1.
[1363] Commission and High Representative (JOIN(2013) 30 final) op.cit. note 1353, 4.
[1364] Hauck and Rocca (2014) op.cit. note 1334, 44.
[1365] The Conclusions are based on the recommendations provided by five Council preparatory bodies, namely the Development Committee, the EUMC, CIVCOM, PMG and the Committee on Humanitarian Aid and Food Aid (COHAFA) (Faria (2014) op.cit. note 1361, footnote 18).
[1366] Council Conclusions on the EU's comprehensive approach, 3312th FAC meeting, Brussels 12.05.2014, para. 1.
[1367] Ibid., para. 2.

prevention".[1368] The Council then goes on to pick and stress certain aspects of the Communication, particularly the 'comprehensive analysis-approach-action chain'. It reiterates how early, coordinated and shared analysis of conflict dynamics forms the starting point for determining comprehensive strategic objectives and a common vision that enables better, earlier and more systematic action as well as a smooth transition between the various components of EU external action.

With their limited attention for the CSDP, these Conclusions latently confirm the Member States' resistance to its full-blown integration. However, a number of policy initiatives indicate that this does not prevent more practical initiatives to align this competence area with the comprehensive approach. For one thing, the November 2014 Council Conclusions on CSDP adopt a considerably more context-sensitive penchant.[1369] Furthermore, the annual CSDP Lessons Report identifies, as one of the five key lessons, that the comprehensive approach improves the efficiency and sustainability of mission results.[1370] It is drawn up by the recently established Lessons Management Group (LMG) for the CSDP, composed of representatives from CMPD, EUMS, CPCC, INTCEN, Security Policy and Conflict Prevention, CROC, CivCom, EUMC and PMG, relevant geographic and thematic departments, as well as the Commission's DG DEVCO, ECHO and FPI. This broadly owned report calls to increase the CSDP's liaisons with other instruments and policies from the planning to the implementation phase. Building on the inclusive approach between EEAS crisis management structures and the Commission in adopting CMCs, it calls to scale up institutional integration in the fact-finding/technical assessment missions (FFM/TAM). Better coordinated visits would help to end the "unacceptable strain on the receiving host nation, causing confusion and some ambiguity of intent. [It] would show the EU in a better light, save money and favour more comprehensive planning".[1371] Appraising the EU Delegations as key asset in gathering first-hand intelligence and scanning the EU's activity gamut for overlaps and synergies, the report appeals to reinforce informal coordination or formal liaison mechanisms with CSDP missions.

Given that EU coordination is often about deconflicting,[1372] the Joint Communication and Council Conclusions represent important progress on the politically sensitive dossier of aligning security and development. They contain the roots of an innovative methodology that is more in line with the Union's new constitutional and institutional framework as well as the challenges of fine-tuning the EU's fragmented toolbox. However, no concrete or decisive changes to EU decision-making are proposed that go the whole way with this comprehensive approach. Painful choices are avoided and

[1368] Ibid.
[1369] Council Conclusions on CSDP, 3346th FAC meeting, Brussels, 18.11.2014, para. 6.
[1370] The first such report was adopted in 2014: EEAS Deputy Secretary-General (00407/14) op.cit. note 451).
[1371] Ibid., 3.
[1372] Mattelaer (2013) op.cit. note 1347, 139.

"its shortness and broad orientation could be taken as a meal serving anybody's taste – or at least one that they could all digest".[1373] The Parliament regrets that the Joint Communication "relies more on existing processes rather than trying to explore new concrete ways to facilitate institutional and practical cooperation".[1374] Arnaud Danjean, former chair of the European Parliament's subcommittee on Security and Defence, is even more critical: "*Mme Ashton vend une approche globale où tous les instruments sont également utiles et respectables avec une réticence à favoriser l'un d'entre eux de façon plastique selon les crises. Il y a un côté non-choix qui est pénalisant à terme*".[1375]

The way ahead

On the positive side, the comprehensive approach leaves room for improvement. The Communication does not present itself as a policy bible, but rather provides a starting point, acknowledging that "work is not over".[1376] Also the Council commits itself to reinforcing its efforts and calls on the High Representative and Commission

> *to immediately commence work to present an action plan to Member States before the end of the first quarter of 2015. This action plan should outline how key actions set out in the Joint Communication and these Council Conclusions, in close cooperation with EU Member States, and based on concrete country and regional cases, will be taken forward, implemented and reported, with identified lead structures. This action plan will be regularly reviewed and progress will be assessed with a view to regular progress reports, the first one to be delivered in 2015.*[1377]

Notably, this time, it did not become another ghost action plan haunting EU corridors.[1378] The Action Plan was published, as announced, in April 2015. Its preparation was guided by important principles, reflecting the key dynamics of this approach. *First*, reiterating the process-prong, it emphasises that "the comprehensive approach is first and foremost a general working method and a way of doing things more effectively together that should influence and permeate all EU external action".[1379] As such, it cannot be a complete list of actions and the focus in the Action Plan is on a selected number of key issues. This includes better CSDP-development cooperation transition strategies, rapid deployment of joint field missions and capacity-building in support of security and development (cf. *infra* on 'Train and Equip'). *Second*, in line with the focus on context, the plan departs from the idea

[1373] V. Hauck and A. Sherriff, 'Important Progress, but Real EU Comprehensiveness Is Still Ahead of Us', *ecdpm.org/talking-points*, 20.12.2013.
[1374] European Parliament (2013/2146(INI)) op.cit. note 84, para. 10.
[1375] Merelle (2014) op.cit. note 604.
[1376] Commission and High Representative (JOIN(2013) 30 final) op.cit. note 1353, 12.
[1377] Council (2014) op.cit. note 1366, para. 17.
[1378] A. Sherriff and V. Hauck, 'Will the Action Plan to Implement the EU's Comprehensive Approach Have Any Bite?', *ecdpm.org/talking-points*, 23.05.2014.
[1379] Commission and High Representative Joint Staff Working Document (SWD(2015) 85 final) Taking forward the EU's Comprehensive Approach to external conflict and crises: Action Plan 2015, 10.05.2015, 3.

that “the best testing opportunity for a comprehensive approach is on the ground”.[1380] Consequently, a limited number of country and regional cases are identified that represent the spectrum of conflict prevention opportunities, crisis and post-crisis situations. These are the Sahel, Central America, Afghanistan and Somalia. *Third*, the Action Plan stresses that its implementation is a joint responsibility of the EEAS, Commission services and Member States.

While the Plan does not have much bite in terms of concrete measures and commitments, its main value lies in focussing and streamlining efforts along both its process and context dimension. As the comprehensive approach itself, it is not presented as a final policy blueprint, but rather as a starting point for targeting future activity at a number of issues and areas. Notably, it is also portrayed as an annual plan, so that priorities can change over the years, enabling a flexible and responsive approach. These ongoing efforts should continue the new tendency of going beyond politically correct, yet abstract, calls for coherence and take realism as a guiding principle. As former EEAS Chief Operating Officer O’Sullivan put it: “[w]e are not going to see a dramatic shift to an integrated foreign policy for many decades”.[1381] Inordinate expectations might therefore backfire on the whole process. For this purpose the right balance should be sought between the comprehensiveness and effectiveness of the approach.[1382] The EU cannot and should not aim at uniformising working cultures, methods and styles across EU policy communities into some sort of *pensée unique*.[1383] The delimitation of competences, and particularly of the CFSP, is written in the EU’s DNA. Assimilation or full-blown integration can thus impossibly be the aim of the comprehensive approach. Rather, the existing diversity should be exploited in the best possible manner. This cannot be achieved by means of a top-down master plan or more bureaucratisation, but should emerge from a bottom-up ‘networked’ way of working.[1384]

This is essentially what the institutional innovations of the Lisbon Treaty provide and facilitate. The High Representative, EEAS and EU Delegations help to take away the blinkers between policy areas and actors. Within the Commission this is reflected in the new policy filtering and steering role for High Representative Mogherini as Vice-President responsible for external relations (cf. *supra* 4.2.2.). As part of the EEAS, the Crisis Platforms can be seen as the institutional translation of the comprehensive approach. By uniting, on an ad hoc basis, all competent EU actors in response to an emerging or potential crisis, these form a key network that can determine the appropriate mix of EU instruments and responses for any specific situation. If the comprehensive approach is to make a real difference, such structures ought to be expanded, systematised and also oriented towards conflict prevention.

[1380] Ibid.
[1381] A. Willis, 'Integrated EU foreign policy is "decades away", says EEAS official', *euobserver.com*, 21.06.2011.
[1382] M. Drent, L. Landman and D. Zandee, 'The EU as a Security Provider', *Clingendael Report* (Netherlands Institute of International Relations, The Hague, 2014) 15.
[1383] Faria (2014) op.cit. note 1361, 15.
[1384] Drent, Landman and Zandee (2014) op.cit. note 1382, 10.

This will require an intensive process of comprehensive change management, within the overarching policy framework of the Joint Communication and Council Conclusions. Made-to-measure comprehensive approaches are needed, continuously adapted to the specific needs and requirements of the respective country, region or situation. While there is increasing consensus on the need for such approaches, their operationalisation still raises numerous questions. Continued efforts should therefore translate the comprehensive approach in operational and procedural terms to the intra and inter-service functioning at all administrative levels of the Commission, EEAS and EU Delegations. If this again founders at the rocks of inter-institutional zero sum games, the comprehensive approach is at risk of becoming another rhetorical coherence device.

A key question in this regard is whether this comprehensive approach offers an appropriate and worthy replacement to the EU's focus on the security-development nexus and its forgotten action plans. The nexus is established as a key underlying principle, but it is worrying that the inclusion of both development cooperation and the CSDP is only lukewarm in the Joint Communication as well as the Council Conclusions. Development policy is solely approached to the extent that it can contribute to conflict prevention and particularly crisis management, with no mention of its primary aim of eradicating poverty. The CSDP is left largely outside this framework, out of the Member States' fear to defer this competence to the dynamics of the new approach. The candid concerns of the destructive vicious cycle of poverty and instability meanwhile remain, and can only be genuinely addressed if both policy areas are whole-heartedly embraced by the comprehensive approach. It is in this regard promising that the 2015 Action Plan announces to tackle both dimension more thoroughly.

This is moreover acknowledged in the April 2015 Commission and High Representative Joint Communication on 'Capacity building in support of security and development – Enabling partners to prevent and manage crises'. It departs from the observation that while the security-development nexus underlies the comprehensive approach, key gaps remain in practice and must be addressed by strengthening the latter.[1385] The specific gap at issue here is the fact that CSDP training is too often hampered by a lack of partner country equipment. External financing instruments can and do occasionally step in, but face two important shortcomings. A *first* is related to the scope of this arsenal: "there is currently no EU budget instrument designed to provide a comprehensive financing to security capacity building in partner countries, in particular its military component".[1386] Under the EU budget, expenditure with defence or military implications is explicitly ruled out.[1387] Moreover, under the 2014-

[1385] Commission and High Representative Joint Communication (JOIN(2015) 17 final) Capacity building in support of security and development - Enabling partners to prevent and manage crises, 28.04.2015, 2.
[1386] Ibid. 8.
[1387] Article 41(2) TEU.

2020 MFF, development instruments should at least count 90% of their spending as ODA.[1388] EU instruments are not in principle excluded from financing security sector capacity-building, but – regardless of whether the beneficiary is civilian or military – this is subject to a case-by-case exception. As the APF is not part of the EU budget, it holds considerable potential "to 'bridge' the gap between CSDP and various development instruments when attempting to comprehensively address security-development nexus issues".[1389] Nonetheless, it also faces considerable restrictions regarding military or defence funding (cf. *supra* 3.2.1.). An additional shortcoming is its exclusively regional focus, which does not allow to provide support at the national level.[1390] To tackle these deficiencies, the Commission and High Representative come up with a number of concrete proposals under the 'Train and Equip' header, to be addressed by the June 2015 European Council. These include adapting the APF, establishing a key facility to link peace, security and development in the framework of one or more existing instruments, considering the extension of the Athena mechanism to address capacity-building or creating a dedicated instrument for security sector capacity-building. A *second* essential shortcoming of the EU's instrumentarium is the insufficient exploitation of common ground with CSDP activity, due to limited coordination and interaction. In this regard the Joint Communication calls to develop (1) an EU-wide strategic framework for SSR, shared by CSDP and development cooperation policy and drawing on lessons learnt in terms of the transition from CSDP to other instruments; (2) a shared evaluation, monitoring and results framework for security capacity building, irrespective of the policy framework under which they are conducted; (3) and a dedicated risk management methodology.

The comprehensive approach has been coined a "strategic document in disguise".[1391] A key question is therefore whether it represents the proclaimed "long-term EU strategic framework in the area of external relations"?[1392] After the entry into force of the Lisbon Treaty, the call for a new European Security Strategy, adapted to the radically changed internal and external context of the EU, rose significantly in magnitude. There exists some consensus within EU institutions that the effectiveness of EU external action would benefit from more strategic guidance. In this regard it has been argued that only a consensual, broadly supported and comprehensive strategy can enable a more proactive policy guiding and agenda-setting role for the High Representative and 'her' EEAS.[1393] However, not everyone sees the benefit hereof. The predominant view from the Commission and the EEAS was for

[1388] Presidency Conclusions, *The Multi-Annual Financial Framework*, European Council, Brussels, 08.02.2013, para. 95.
[1389] Commission and High Representative Joint Communication (JOIN(2015) 17 final) op.cit. note 1385, 7.
[1390] To deal with this shortcoming the EUTM training compound is for instance formally portrayed as AMISOM facility, allowing the APF to provide capacity-building support.
[1391] A. Missiroli, 'EU Strategies: A Very Short Introduction' in EUISS (ed), *Strategy Matter: EU Key Documents (2003-2014)* (EU Institute for Security Studies, Paris, 2014) v.
[1392] EEAS Review (2013) op.cit. note 726, 7.
[1393] See for instance: S. Biscop, 'A New External Action Service Needs a New European Security Strategy', *Security Policy Brief* (Egmont Institute, Brussels, 2011) 5p.

some time that the bickering over wording in the light of national sensitivities would cost more energy than it adds in value. They perceived the smaller scale, tailor-made and policy-specific design of the comprehensive approach as a more promising way ahead.[1394] "We don't need a new European security strategy: we have the comprehensive approach"; with these words former High Representative Ashton declared the discussions closed at the 2013 EUISS annual conference.[1395] Her successor took however a diametrically opposed view and lobbied the Member States to launch a process of strategic reflection:

> *We need to stop jumping from crisis to crisis, and to start looking at the complete picture. We need to start thinking in a strategic way. … Amid the current global chaos, a new strategy will give us hopefully a sense of direction, an ability to make choices and to prioritise. … After the Lisbon Treaty we have the tools we need. … But our foreign policy can sometimes be disconnected. We need to connect the dots.*[1396]

At their informal Riga gathering in February 2015, EU Defence ministers gave High Representative Mogherini a mandate to start preparing this exercise. This inclusive reflection– which was recently rebranded as 'Strategic Review' in order not to pre-empt the discussions[1397] – will undoubtedly be instructive for both EU insiders and outsiders. If we see how often the 2003 ESS is still cited in policy and academic debate, such a document can provide an important framework of reference for a significant time to come. However, its potential importance should not be overestimated either. As noted by Gros-Verheyde: "la stratégie européenne de sécurité a rarement servi de base à une action ultérieure ni n'a jamais empêché d'ailleurs d'inscrire des orientations nouvelles. Par exemple, le risque de piraterie n'est pas inscrit. Il n'a pas empêché le déclenchement d'une opération au large de la Somalie".[1398] Biscop accurately counters that

> *strategy does not aim to predict anything in the first place. The point of strategy, rather, is to help the decision-maker define a course of action when, per definition, unpredictable events occur … The first rule of strategy-making therefore could be stated quite simply as: know thyself. Know your interests, and know your values … your values will determine which kind of society you want to build and preserve, and that will in turn determine which conditions need to be fulfilled for that to be possible: your vital interests. Your values will further determine which types of instruments are deemed morally acceptable to put to use to that end ... The more straightforward the decision-making system, the less necessary it is to codify strategy. A state where in the end the strategy is*

[1394] Wouters et al. (2013) op.cit. note 831, 28.
[1395] Quoted in D. Helly and G. Galeazzi, 'Avant la lettre? The EU's comprehensive approach (to crises) in the Sahel', *ECDPM Briefing Note No. 75* (European Centre for Development Policy Management, Maastricht, 2015) 1.
[1396] High Representative Mogherini (SPEECH/150224_03) Chatham House, London, 24.02.2015. See also: High Representative Mogherini, *Speech at the Munich Security Conference*, Munich, 08.02.2015.
[1397] Conclusions, 3382nd FAC meeting, Luxembourg, 20.04.2015.
[1398] N. Gros-Verheyde, 'En route pour une nouvelle stratégie', *Bruxelles2.eu Le Club*, 19.02.2015.

what the president says that it is, can operate on the basis of an implicit strategy. Vice versa, a complex multi-layered foreign policy actor such as the EU has much more need of an explicit strategy.[1399]

The comprehensive approach and a new European Security Strategy can indeed be complementary and even mutually reinforcing. As put in the 2015 Action Plan on the comprehensive approach, the latter "is not about 'what to do', but more about 'how to do it' and how to make best use of the EU's collective resources and instruments, with a particular focus on conflict and crisis situations".[1400] A Security Strategy could then provide the overarching framework within which this methodology is applied, by shedding light on what kind of actor the EU wants to be and where its priorities lay. Notably, former EEAS Executive Secretary-General Vimont questions whether such an "overall strategy is well suited for the realities of the world we are living in today, with its constant acceleration and increased interaction. A strategic approach, more focused on the regions fraught with crisis (Horn of Africa, Sahel, etc.) or on the urgent thematic challenges (cyber security, terrorism, etc.), that could also be updated on a more regular basis, may be the right way to proceed as we witness an ever-complex global world in permanent turmoil".[1401] This will be discussed in the next section, focussing on the specific example of the Horn of Africa.

6.2. Regional translations of the comprehensive approach: the example of the EU's Strategic Framework for the Horn of Africa

EU institutions, and particularly the EEAS in its strive for legitimacy, did not await their colleagues to settle on the comprehensive approach, before trying its concrete application with regard to specific themes and regions. This resulted in regional strategic frameworks for the Sahel, the Horn of Africa, the African Great Lakes and the Gulf of Guinea, as well as thematic strategies on maritime security and cybersecurity.[1402] This practice does not follow any predetermined template or agenda. Consequently, all of them are rather different in form, design and approach. The Council Conclusions on the comprehensive approach welcome "the continued proactive preparation of such regional and thematic strategies to frame the EU's comprehensive response to new political developments and challenges".[1403] Also the Joint Communication holds that its organising principles have already proofed

[1399] S. Biscop, 'Strategy: what is it good for?', *europeangeostrategy.org*, 08.04.2015.
[1400] Commission and High Representative (SWD(2015)85) op.cit. note 1379, 2.
[1401] D. Fiott, 'Interview with Pierre Vimont', *europeangeostrategy.org*, 17.11.2013.
[1402] EEAS, Strategy for Security and Development in the Sahel, 26.9.2011; Council (2011b) Strategic Framework for the Horn of Africa, op.cit. note 88; Commission and High Representative Joint Communication (JOIN(2013) 23 final) A Strategic Framework for the Great Lakes Region, 19.06.2013; Council, EU Strategy on the Gulf of Guinea, 3324th FAC meeting, 17.03.2014; Council (11205/14) European Union Maritime Security Strategy, 24.06.2014.
[1403] Council (2014) op.cit. note 1366, para. 5.

their success in the Horn of Africa, the Sahel and the Great Lakes region.[1404] Oddly therefore these regional and thematic translations thus simultaneously precede and give effect to the comprehensive approach

In the light of the remaining uncertainties surrounding the implementation of the latter, it is interesting to analyse what these so-called success stories mean for operationalising the EU's enhanced and comprehensive focus on process and context. The Horn of Africa is certainly the most cited example by EU officials of the potential and benefits of the comprehensive approach.[1405] In what follows the EU's 2011 Strategic Framework for this region will therefore be examined. The aim is not to give a complete overview of the EU's activities in this crisis-torn area, nor to set out a full-fledged empirical analysis of the impact and effectiveness of its security and development efforts. Rather, this section will analyse how the Strategic Framework impacts on the EU's policies towards the Horn of Africa and what this tells us about the comprehensive approach and its impact on the security-development nexus. A first section on the challenges plaguing this region and the emergence of EU strategic thinking in this regard (6.2.1.), will be followed by an overview of the main modalities of the 2011 Strategic Framework (6.2.2.). Focussing on the specific cases of South Sudan and fighting piracy off the Somali coast, a final section will analyse to what extent this enables comprehensive action and coordination (6.2.3.).

6.2.1. The Horn of Africa: a region in need of a comprehensive EU strategy

The EU defines the Horn of Africa geographically as the member countries of the Intergovernmental Authority for Development (IGAD), namely Djibouti, Eritrea (although suspended since 2007), Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda. It has been described as "the most conflicted corner of the world since the end of the Second World War", home to some of the poorest countries on earth that fill the bottom ranks of all major development indicators.[1406] Most regimes have their roots in resistance movements and changes of government rarely occur in a peaceful manner. State power in these autocracies is generally rooted in ethnic loyalties, implying a winner-takes-all of wealth, resources, prestige and prerogatives of office. This raises the stakes of political control dangerously high.[1407] Using force to achieve political goals is therefore not uncommon, both internally and in the

[1404] Commission and High Representative (JOIN(2013) 30 final) op.cit. note 1353, 2.
[1405] See for instance: D. O'Sullivan, 'Guest Editorial: The EU's External Action: Moving to the Frontline' (2014) *European Foreign Affairs Review* 19(3), 331; CMPD Director W. Stevens, *From Comprehensive Approach to Comprehensive Action - Horn of Africa: A Case in Point*, Brussels, 2012; and J. Jenny, 'The Growing Role of Conflict Prevention in Support of the EU's Efforts in Peacebuilding and Statebuilding' (2015) *ECDPM GREAT Insights* 4(1), 6.
[1406] Amb. D. H. Shinn, *Horn of Africa: Priorities and Recommendations*, Hearing before the UK House Subcommittee on State and Foreign Operations, Committee on Appropriations, 12.03.2009.
[1407] B. Mesfin, 'The Horn of Africa Security Complex' in R. Sharamo and B. Mesfin (eds), *Regional Security in the post-Cold War Horn of Africa* (Institute for Security Studies, Pretoria, 2011) 11-12.

relations among the countries of the region. Decades of conflict have left deep marks on inter-state relations, characterised by mutual and deep-ranging rivalry, mistrust and suspicion. Prospects are gloomy with Somalia and Sudan hosting some of the deadliest wars in recent history, South-Sudan a failed state upon birth wedged in a devastating spiral of violence, Ethiopia and Eritrea caught in protracted border conflict, tensions intensifying between Kenya and Somalia, and terrorist attacks on the rise against both local and foreign targets. Regional competition over scarce natural resources and pasturage moreover imply that countries often prey upon each other's instability. At worst they advance their foreign policy interests through proxy forces. In this manner, Ethiopia and Eritrea have played a particularly destructive role in Somalia, pushing it into ever deeper misery. All these complex conflicts cut across porous state borders and defy easy analysis.

The local population obviously suffers most from this history of violence. Around 10 million of them are internally displaced or seeking refuge.[1408] Malnutrition and diseases are skyrocketing because of extreme weather conditions such as droughts, flooding and hurricanes. Schooling is low and economic opportunities limited. Many of the Horn's citizens experience the state as an instrument of power and even oppression, rather than a service provider.[1409] Despite the unmistakable needs in the education and health sector – exacerbated by an unsustainably high birth rate – military spending eats up a disproportionally high share of governments' spending. This militarisation, in turn, heightens the threat perception in a region awash with weaponry from past and ongoing conflicts. This lay at the basis of an explosive societal security situation, stirred up by the systematic exclusion of large communities from resources and representation along ethnic, religious or clan fault-lines. Combined with the lack of cross-border transport networks, inadequate infrastructure and the shortage of capital and skilled labour, this does not help to make the region an attractive (foreign) investment destination. In recent years, Kenya, Ethiopia and Uganda have nonetheless managed to realise a significant economic growth, but this remains on a rather low economic base and vulnerable to shocks.[1410]

This short exposition on the tangled stability and development challenges in the Horn Africa, which continuously corrode the relevance of state borders, illustrates why many authors approach it as ultimate example of what Buzan has famously coined a 'regional security complex'.[1411] This is defined as "a group of states whose primary security concerns link together sufficiently closely that their

[1408] OCHA, *Eastern Africa: Displaced Populations Report (Issue 17, 1 April - 30 September 2014)* (UN Office for the Coordination of Humanitarian Affairs, Nairobi, 2014) 21p.
[1409] S. Healy, 'Lost Opportunities in the Horn of Africa: How Conflicts Connect and Peace Agreements Unravel', *Horn of Africa Group Report* (Chatham House, London, 2008) 38-40.
[1410] Soliman, Vines and Mosley (2012) op.cit. note 552, 11-13.
[1411] See for instance: C.N. Odock, 'Geo-Politics, Security Threats and Regional Integration in the Horn of Africa: A Global Security Perspective' (2013) *European Journal of Globalization and Development Research* 7(1), 402-424; Mesfin (2011) op.cit. note 1407.

national securities cannot realistically be considered apart from one another".[1412] In the Horn of Africa, "[t]he ways in which 'amity and enmity' are constructed among the players has a rich history. Without grasping this, external players are liable to be baffled by the conflicts that repeatedly erupt and fuel one another".[1413] Even though the idea that the Horn of Africa should be approached holistically is widely shared among researchers and policy-makers, studies that unravel the regional security and development dynamics remain scarce. EU institutions acknowledge these interrelated challenges and since long approach the Horn of Africa as a unity, expressing concern regarding its shared humanitarian and human rights crises.[1414] Initially, this did not result in much concrete guidance of or direction over its separate, mainly development and humanitarian, policies towards the individual countries of that region. It was only in the mid-2000s that the ball of a more strategic EU approach towards the Horn of Africa started rolling. Unsurprisingly, this coincided with a rising threat perception posed to global security by the rapid spread of religious extremism and terrorism incited by the region's instability and fragile state structures.[1415] The most fertile breeding grounds, or even safe heavens, are Somalia, which was plunged into a chaotic internal conflict after the 1991 collapse of the dictatorial Barre regime,[1416] and Sudan where a still ongoing armed onslaught broke out in the Darfur region in 2003.

In a process that would eventually take over five years, the Commission was the first to take up the pen in late 2006 to draft an 'EU regional political partnership for peace, security and development in the Horn of Africa'. This portrayed the Horn explicitly as facing "not a series of separate conflicts, but a regional system of insecurity in which conflicts and political crisis, feed into and fuel one another". Given that it is both "one of the most conflict-prone regions in the world as well as one of the poorest",[1417] the Commission saw the Horn as a test case for the security-development nexus and thus the application of the then recently adopted EU-Africa Strategy.[1418] It proposed a work programme to address the mutually destructive connections between insecurity, poverty and governance, as well as a number of initiatives to improve coordination, flexibility and responsiveness of the EU's policy

[1412] B. Buzan, *People, States and Fear: The National Security Problem in International Relations* (Wheatsheaf Books, New York, 1983) 106. This does evidently not mean that the Horn of Africa is an isolated security complex, as also other states – and particularly Yemen, Libya and Egypt – have an impact on (and are of course affected by) the region's conflict dynamics.
[1413] Healy (2008) op.cit. note 1409, 41.
[1414] See for instance: EPC Statement (1986) op.cit. note 189; EPC Statement concerning the Horn of Africa, Dublin, 20.02.1990.
[1415] Particularly the fact that some of the perpetrators of the 2005 London bombings originated from the Horn of Africa served as wake-up call.
[1416] This chaos was stirred up by the so-called "Somali syndrome", referring to the withdrawal in 1995 of the international community "from involvement in peacekeeping efforts in Somalia owing to the complexity of this conflict as well as the 'allergy' of Somali fighting factions towards external interveners" (M.T. Wakengela, 'Keeping an Elusive Peace: AMISOM and the Quest for Peace in Somalia' in R. Sharamo and B. Mesfin (eds), *Regional Security in the post-Cold War Horn of Africa* (Institute for Security Studies, Pretoria, 2011) 377).
[1417] Commission Communication (COM(2006) 601 final) Strategy for Africa: An EU regional political partnership for peace, security and development in the Horn of Africa, Brussels, 20.10.2006, 4.
[1418] Presidency Conclusions, European Council, Brussels, 15-16.12.2005, para. 7.

spectrum.[1419] Yet, this all remained rather general, with few specific instruments – let alone potential for synergy between them – mentioned. Moreover, as the emphasis was on tools within the Commission's reach, the CFSP and CSDP were not included. One very concrete result of this partnership was the launch in 2007, together with the IGAD countries, of the Horn of Africa Initiative (HOIA), supporting regional interconnectivity in transport, energy, water and food security.[1420]

It took the Council another three years to come up with a first "building block" of an integrative strategy, entitled 'An EU Policy on the Horn of Africa: towards a comprehensive EU strategy'.[1421] It explicitly built upon and is complementary to the 2006 Commission Communication. Without providing a specific timeframe, the Council expressed that both documents "will lay at the basis for an operational strategy for EU relations with the Horn of Africa".[1422] It lay out a number of worthy principles to facilitate a coherent, holistic, timely and flexible EU response that takes account of the unavoidable spillovers between the various countries. Yet, their elaboration was left to the strategic framework itself. The Council evidently drew in the CFSP and CSDP, but unfortunately this came at the expense of pushing back the aims of development and poverty eradication, which did not even make it as one of the four key challenges and priorities for the EU's approach towards the region.[1423]

The protracted call for a comprehensive approach was considerably intensified by the surge in piracy attacks off the Somali coast in the late 2000s. Particularly the highjacking of WFP vessels shipping humanitarian relief to Somalia caused international outrage. Besides worsening the decay of Somalia, the Somali pirates caused considerable damage to the international economy in the form of ransom payments, increasing insurance premiums and hazard payments to crew, costs of shipping delays and lost revenues, on-board protection teams, etc. In 2010, the annual cost of Somali piracy was estimated at between USD 4.9 and 8.3 billion,[1424] or – according to former High Representative Ashton – "more than 40 times the EU's annual aid to Somalia".[1425] In addition there is evidently the human cost in terms of lost lives, threats to personal safety and traumas for hostages and their families.

This piracy problem has tightly-knit poverty and instability causes. The insecurity and lack of economic opportunities drives young Somalis into piracy. They feel trapped in a do-or-die situation as

[1419] The Parliament validated this message and extended it with a number of country-specific measures (European Parliament Resolution (2006/2291(INI)) on the Horn of Africa: EU Regional political partnership for peace, security and development, 10.05.2007).
[1420] Besides funding from the EDF, the EU-Africa Infrastructure Trust Fund, EIB and the African Development Bank, EUR 165 million was specifically accorded to the HOAI.
[1421] Council (17383/09) An EU Policy on the Horn of Africa – towards a comprehensive EU strategy, Brussels, 10.12.2009, 2.
[1422] Ibid., 4.
[1423] These consisted of mediation and dialogue for conflict prevention and resolution; monitoring the implementation of peace agreements; elections and political process for democratic transformation; economic integration, climate change, transboundary waterways and sustainable livelihoods.
[1424] X, *The Economic Cost of Piracy: Pirate Ransoms and Livelihoods of the Cost off Somalia* (Geopolicity, Dubai, 2010) 21p.
[1425] C. Ashton, 'Stop the pirates, help the Horn of Africa', *European Voice*, 23.02.2012

"[p]ractically all options that might improve their livelihoods carry the risk of death, that is, fleeing as refugees to live in overstretched refugee camps; migrating by sea in appalling conditions; being recruited into militias, or engaging in piratical acts".[1426] In turn, the fact that they are dragged away from the scarce legal economic activities, corrodes local social and political structures, accelerates corruption, drives up food prices in pirate strongholds, scales up local violence and leads to the well-known delays and restraints in the delivery of humanitarian aid.[1427] These complex root causes moreover mean that policies addressing them can easily yield counterproductive results. For one thing, counter-piracy efforts risk to undermine social cohesion. Pirates were, certainly in the beginning, viewed positively by many Somalians because their ransom income fed back into the local economy. Furthermore, many of them have their origins in protecting Somali waters from illegal fishing and toxic waste dumping by, among others, European companies.[1428] For another, post-conflict stabilisation efforts can play into the cards of pirates. The growing stability combined with absence of strong state structures in coastal areas of, for instance, the Puntland region, has allowed pirates to moor highjacked vessels in all tranquillity while awaiting ransom payments.[1429]

Piracy is thus a complex and primarily land-based problem requiring a contextual and multi-pronged approach. In the words of Jean Ping, the former Chair of the AU Commission, "pirates were not born in the ocean and they don't live there. They come from Somalia. If you want sustainable peace you have to go where they came from, which is on land".[1430] Nevertheless, the EU's initial response was limited to the sea. A Naval Coordination Cell (EU NAVCO)[1431] managed by the EUMS was soon followed by the full-fledged naval force EUNAVFOR – operation Atalanta in late 2008. In its first years of operation this largest CSDP military operation outside Europe, with nearly 2000 troops involved and cooperating with several multinational maritime coalitions,[1432] did not manage to change the tide on piracy. The scaled-up naval presence shifted the pirates' operating territory from the Gulf of Aden to the Indian Ocean, an area as large as Europe. Additionally, the militarisation of the seas incited more violent behaviour among pirates, putting seafarer's lives even more at risk. Without tackling the

[1426] Osiro (2011) op.cit. note 1270, 4.
[1427] H.-G. Ehrhart and K. Petretto, 'The EU and Somalia: Counter-Piracy and the Question of a Comprehensive Approach', *Study for The Greens/European Free Alliance* (Hamburg, 2012) 9.
[1428] Testament to these origins are the names of various pirates fleets such as 'National Volunteer Coastguard of Somalia' or 'Somali Marines' (I. Tharoor, 'How Somalia's Fishermen Became Pirates', *Time.com*, 18.04.2009). A report by the Marine Resources Assessment Group estimates Somalia's economic loss due to illegal fishing at USD 95 million per year (Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries (MRAG, London, 2005) 166-167).
[1429] Q.-T. Do, *The Pirates of Somalia : Ending the Threat, Rebuilding a Nation* (World Bank, Washington, 2013) 109.
[1430] X, 'Ping Says AU Effectively Tackling Toughest Economic and Political Problems Facing the Continent', *allAfrica.com*, 19.10.2009.
[1431] Joint Action (2008/749/CFSP) on the EU military coordination action in support of UN Security Council Resolution 1816 (2008) (EU NAVCO), OJ L252/39, 20.09.2008.
[1432] Besides Atalanta the main actors are NATO's Operation Ocean Shield and three Combined Task Forces (CTF-150, CTF-151 and CTF-152) in the context of the global war on terror. These cooperate in Shared Awareness and Deconfliction (SHADE) and are coordinated by the Contact Group on Piracy of the Somali Coast.

development as well as security sector dimension of the Somali piracy problem, it became increasingly clear that Atalanta could "only reach an 'end date' but not an 'end state'".[1433] The EU aimed to silence criticasters[1434] regarding its expensive naval presence[1435] by scaling up efforts to settle minds on a comprehensive approach for the Horn of Africa.

6.2.2. The EU Strategic Framework for the Horn of Africa…

The then newly established EEAS took the lead in protracted discussions with the Commission, Council and Member States. A lengthy and rather academic document in combination with a commitment to draft a more concrete action plan could not convince Member States.[1436] Five years of strategic discussions were consequently thinned out to a nine-page Strategic Framework for the Horn Africa, endorsed in an annex to the November 2011 Council Conclusions. It is guided by the ESS, the Joint Africa-Europe Strategy and the 2009 Council Policy on the Horn (notably not the 2006 Communication, or the ECD to which the latter extensively refers). The Framework – in curiously prudent terms – "proposes a number of ways the EU can pursue this strategic approach".[1437] It provides a sort of chapeau that can be further developed and implemented through various "action plans".[1438] The EU does not attempt to conceal that its long-term commitment not only ensues from a desire to support the welfare of the people in the Horn of Africa. It is also rooted in the region's geo-strategic importance, the growing challenge of instability to regional but also global security and the need to protect European citizens from emanating threats and risks resulting from terrorism, piracy, arms proliferation and migration. The Framework affirms that, in these countries, addressing the interlocked challenges of insecurity, poverty, recurrent drought and conflict, as well as their root causes and drivers, necessitates a regional perspective.[1439] The vast and intricate challenges the region faces are however only succinctly analysed and illuminated. The reasons for this are arguably less technical than political, and to a great extent result from discord among Member States regarding priorities and wording.[1440]

[1433] A. Weber, 'EU Naval Operation in the Gulf of Aden (EUNAVFOR Atalanta): Problem Unsolved, Piracy Increasing, Causes Remain' in M. Asseburg and R. Kempin (eds), *The EU as a Strategic Actor in the Realm of Security and Defence? A Systematic Assessment of ESDP Missions and Operations* (German Institute for International and Security Affairs, Berlin, 2009) 70.
[1434] See for instance: P. Heinlein, 'Somali Minister Mocks International Anti-Piracy Efforts', *Voice of America*, 06.04.2010.
[1435] Given the variable participation of navies and the split between common costs and costs bared by participating Member States, it is difficult to get a clear view on Atalanta's finances. Yet, the total expense of the international naval presence in the Indian Ocean has been estimated at around USD 2 billion per year (A. Bowden, 'The Economic Costs of Maritime Piracy', *Working Paper* (One Earth Future Foundation, Denver, 2010) 16).
[1436] S. Blockmans, 'The European External Action Service One Year On: First Signs of Strengths and Weaknesses', *CLEER Working Papers 2012/2* (Centre for the Law of EU External Relations, The Hague, 2012) 24.
[1437] Council (2011b) op.cit. note 88, 4.
[1438] Council Conclusions on the Horn of Africa, 3124th FAC meeting, Brussels, 14.11.2011, para. 1.
[1439] Council (2011b) op.cit. note 88, 4.
[1440] It has been argued that this is the main reason why the Ethiopia-Eritrea conflict, i.e. "the most important regional fault-line", is only mentioned in passing (Soliman, Vines and Mosley (2012) op.cit. note 552, 26).

The Strategic Framework sets out five main working areas: (1) assist all countries in the region to *build robust, democratic and accountable political structures* that contribute to human security and empowerment; (2) *resolve and prevent conflicts*, including those that are ongoing particularly in Somalia, Sudan and South Sudan, latent conflicts between countries such as Ethiopia and Eritrea, as well as internal state tensions resulting from impunity or ethnic, clan or regional grievance and/or access to power; (3) *mitigate the effects of insecurity in the region* that ensue from piracy, terrorism, organised crime or irregular migration; (4) *reduce poverty and support economic growth and prosperity* of all countries and people in the region; and (5) *support political and economic regional cooperation* by bolstering the role of regional economic communities (RECs). With this outline the Strategic Framework thus establishes a better security-development balance than both the 2006 Commission Communication and the 2009 Council policy. It moreover assigns Council bodies to conduct regular reviews of the implementation of the Framework, a first of which was submitted by the High Representative to the PSC in January 2013 (cf. *infra*).

The main relevance of this document does not lie in the nature of the activities proposed under those five titles, as these largely list ongoing efforts. Its importance emanates from the fact that all these elements are brought together in a comprehensive strategy that is directed at making the EU's engagement "more effective through consistent, coherent and complementary use of its instruments, reinforcement of its political coordination, and by focusing more clearly on the underlying challenges of the region".[1441] Yet again, the message is clear, the methodology rather less. With regard to operationalising the comprehensiveness only two issues are specified. First, the HR, EEAS, EUSR, EU Delegations in the region, Commission and Member States are assigned to "work together to implement this framework".[1442] Second and more promising is the approval by the Council of the High Representative's proposal to appoint an EUSR for the Horn of Africa to enhance the coherence, quality, impact and visibility of the EU's multifaceted action in the region (cf. *infra*).

How then to evaluate this Strategic Framework and its impact on uprooting the interlocked security and development challenges in the Horn? This is not straightforward as the Framework itself does not stipulate its own role in coordinating, cohering and guiding EU policies. It is clear from its language that it does not superimpose a new framework of cooperation laying out objectives, directions and restrictions that EU policies and actors ought to respect. Rather, it is a descriptive document explaining and communicating the importance the EU attaches to the Horn of Africa and what type of actor the

[1441] Council (2011b) op.cit. note 88, 8.
[1442] Ibid., 4.

EU wants to be.[1443] It represents and reflects a move from empiric, ad hoc and often isolated policy-making towards a coherent whole-of-EU approach.[1444] As explained by an EEAS official its point

> *is not to mix all these policies into one minestrone. It is purely to de-compartmentalize [decloisonner] these policies, to keep their specificities and their channels of intervention, but to try and facilitate horizontal synergies across these instruments so that one policy does not hinder another, that a sequential instrument in a crisis does not hamper ulterior interventions of another kind, and to free the potential synergies across sectors.*[1445]

This language clearly frames the Horn Strategy within the philosophy of the comprehensive approach. Yet, this is an *ex post* exercise and the reverse chronological order, whereby the different regional and thematic strategies flow from the motherboard of the comprehensive approach, would have been more ideal. A key question is therefore to what extent the Strategic Framework corresponds with the rationale of the comprehensive approach. When looking at the eight key measures that make up the latter (cf. *supra* 6.1.2.) we see that these are not all present in the Horn Strategy. Only the focus on prevention (measure 3), the mobilisation of the different strengths and capacities of the Union (4), the commitment to the long-term (5) and working in partnership (8) are at least implicitly included. The idea of a shared inter and intra-institutional analysis (1) informing a common strategic vision (2) is limited to the genesis of the Strategic Framework itself, but nothing evidences that this should also underlie its implementation. Finally, the improved linkage of internal and external policies (6) as well as the better use of EU Delegations (7) are completely absent. It is particularly striking how EU Delegations, as main executive arm of the comprehensive approach, are only once mentioned in passing. What is then the added value of the comprehensive approach for EU policies in the Horn of Africa, which are apparently governed by their own framework? A teleological reading of both documents makes clear that they serve distinct but complementary purposes. The main focus of the Strategic Framework is on the specific security and development challenges, needs and policy responses for that region. The comprehensive approach, for its part, is more methodological in nature and sets out a sort of check-list that should inform specific regional and thematic strategies (cf. *supra* 6.1.2. for the discussion on the complementarity of the comprehensive approach and a possible new ESS). The extent to which this translates into comprehensive action in the Horn of Africa forms the subject of the next section.

[1443] X, 'The EU Comprehensive Approach towards Somalia', *FOI Memo 4067* (Swedish Defence Research Agency, Helsinki, 2012) 4.

[1444] C. Egger, 'Une "Stratégie Globale"? Atouts et Limites de la Stratégie de l'UE pour la Corne de l'Afrique' in M. de Langlois (ed), *Approche Globale et Union Européenne: Le Cas de la Corne de l'Afrique* (L'Institut de Recherche Stratégique de l'École Militaire, Paris, 2014) 55-68.

[1445] Quoted in: T. Henökl and C. Webersik, 'The Impact of Institutional Change on Foreign Policy-Making: The Case of the EU Horn of Africa Strategy' (2014) *European Foreign Affairs Review* 19(4), 527-528.

6.2.3. … as a basis for comprehensive action?

In the light of the deep-rooted challenges plaguing this region, it is not surprising that the EU's long-term engagement in the Horn of Africa converts in the application of the whole arsenal of EU development cooperation and CFSP/CSDP instruments. In the current multiannual financial cycle (2014-2020) the EU has already committed around EUR 3 billion in development cooperation to the region.[1446] The bulk hereof is provided through the 11th EDF, mainly in the form of bilateral funding, but also through regional support to IGAD, the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Indian Ocean Commission (IOC). Other instruments evidently include the IcSP (supporting a wide range of activities in the Horn including early recovery after drought, post-electoral stability and capacity-building), the EIDHR (providing assistance for transitional justice, election observation, etc.), the APF (funding various African-led PSOs, high-level mediation and civil society engagement in peace negotiations) and the DCI (providing thematic support in areas such as food security; non-state actors and local authorities in development; sustainable management of natural resources; and migration and asylum).

The region is moreover home to one of the largest concentrations of CSDP activity in the world. In addition to the recently closed EUAVSEC South Sudan, advancing aviation security in the country, this includes three 'firsts': the first CSDP naval operation Atalanta, the first CSDP military training operation EUTM Somalia and the first mission with a regional approach EUCAP Nestor. Moreover, no less than three EUSRs were deployed to the Horn of Africa in recent years. Besides the still active EUSR for the Horn, this comprised the recently ended mandates of the EUSR to Sudan and South Sudan as well as to the African Union. All of this emphasises both the daunting security and development challenges that this region faces and the EU's commitment to address them. For the purpose of this research it is interesting to analyse to what extent the Strategic Framework affects the coordination and comprehensiveness of this instrumentarium. A full-scale analysis of the multitude of EU actions in the Horn falls beyond the scope of this exploratory chapter.[1447] Rather, we will scan through EU coordination in the two most cited examples by the EU of how it is giving effect to this Strategic Framework, namely the comprehensive approaches to South Sudan and fighting piracy.

The comprehensive approach to South Sudan

As youngest country in the world, South Sudan provides the most lucid case for starting afresh in putting the Strategic Framework in action. Box 6 (cf. *supra* 3.2.1.) already gave the example of how the

[1446] Commission Press Release (IP/14/1203) 'EU confirms support to Horn of Africa ahead of highlevel visit of international organisations to the region', Brussels, 27.11.2014.
[1447] For a completer overview of EU engagement in the Horn see: Soliman, Vines and Mosley (2012) op.cit. note 552, 16-43.

EU deployed its aid in a complementary manner in order to smoothen the birth of the Republic of South Sudan. This did not prevent instability from gaining the upper hand, with the eruption of fighting in the contested Southern Kordofan and Blue Nile states as well as inter-communal clashes, leading to large-scale human suffering, civilian casualties, displacement and a refugee exodus.[1448] Against this background of rising insecurity, the High Representative convened an inter-service task force for Sudan, comprising of the EEAS geographic desk, CMPD, CPCC, DG DEVCO and ECHO. This grouping introduced the comprehensive approach to Sudan and South Sudan, approved by the Council in June 2011.[1449] This was subsequently reoriented to South Sudan specifically, in a strategic undertaking that requires exploiting the diversity of EU instruments.

To avoid the further pauperisation of an already suffering population, development assistance is continued in the areas of agriculture, health and the rule of law (over EUR 300 million for 2011-2014). As part of the comprehensive approach, this includes new measures to guarantee rapid, equitable and non-discriminatory access and ensure that basic services and food assistance are not diverted to armed groups. In this same reasoning, a State Building Contract is suspended and its envelop reallocated to immediate educational, health and resilience needs.[1450] The IcSP's short-term component targets crisis response capabilities in both Sudans with a total budget of EUR 23.5 million, including efforts to improve cross-border conflict prevention and peace-building. Further, over EUR 7 million is mobilised from the APF to support IGAD in its mediation efforts, set up a platform for peace talks as well as a monitoring and verification mechanism. On the part of the CFSP, the EU decided on an arms embargo and targeted sanctions on military leaders that spoil the peace process and commit human rights violations.[1451] In cooperation with Member States, it supports the IGAD-led peace process and undertakes efforts to refocus the mandate of the UN Mission in South Sudan (UNMISS) with a priority on the protection of civilians. In June 2012, a CSDP mission, advanced by the EEAS, was launched to assist and advise the authorities of South Sudan in establishing an aviation security organisation and strengthen security at Juba International Airport. Yet, one year later – even before it achieved full operationality – it was closed in all discretion. Essentially, the mission failed to ensure the necessary buy-in from EU Member States, with none of them stepping up to defend the otherwise usual prolongation of the mission,[1452] as well as the South Sudanese authorities. In view of the latter's precarious financial accounts, the finalisation of the new airport terminal and the recruitment of

[1448] D.R. Marsden, 'The EU and the Sudans' (2012) *Shanghai Institute for International Studies* (Winter Issue), 15-18.
[1449] Council Conclusions on Sudan, 3101st FAC meeting, Luxembourg, 20.06.2011, para. 8.
[1450] EEAS (140710/01) Fact Sheet: The EU and South Sudan, 10.07.2014, 3-4.
[1451] Council Decision (2014/449/CFSP) concerning restrictive measures in view of the situation in South Sudan, OJ L 203/100, 11.07.2014.
[1452] N. Gros-Verheyde, 'On ferme!', *Bruxelles2.eu Le Club*, 07.11.2013.

airport staff – at which the EU's support was targeted – were delayed. This made it impossible for EUAVSEC to achieve its objectives.[1453]

This unfortunate experience is testament to the fact that even the existence of a comprehensive strategic approach is no guarantee to effectiveness. The merit of this specific approach is that it has brought together the various EU institutions and bodies and geared their efforts towards a common vision. A key challenge, particularly on the ground, remains to coordinate the plethora of actions. A central role in this regard was accorded to the meanwhile ended function of the EU Special Representative for Sudan and South Sudan, Rosalind Marsden. Although coherence was one of the keywords in her mandate, the executive dimension focussed mainly on CFSP tasks such as mediating and facilitating the adoption of a comprehensive, inclusive and durable peace agreement between the Sudans.[1454] This evidently put an important strain on comprehensive coordination. Her functions are now taken over by the EUSR for the Horn of Africa (cf. *infra).*

The comprehensive approach to fighting piracy

As discussed above, the counter-piracy band-aid of operation Atalanta can never provide a sustainable solution without tackling the root causes of this problem. In this light, the EU first launched EUTM Somalia in April 2010.[1455] This operation has since trained over 4,000 soldiers from the Somali National Army (SNA), initially in Uganda and since January 2014 – when the improved security situation allowed it – in a compound at Mogadishu International Airport. Various amendments[1456] to its mandate have gradually shifted its focus from training towards formation (training the trainers, mentoring, strategic counselling) and assistance aimed at strengthening the Transitional Federal Government (TFG) and the institutions of Somalia.[1457] Important in this regard was the adoption, in Brussels in September 2013, of the Somali Compact, based on the principles and objectives of the Busan New Deal for Engagement in Fragile States (cf. *supra* 3.1.1.). Among others, this Compact sets out the foundations of the Somali security sector by clarifying the tasks of the Defence, Interior and Justice Ministries.[1458] These are evidently all crucial efforts in allowing the TFG to gain back control over the whole Somali territory from pirates, extremists and terrorists. Yet, EUTM Somalia struggles with issues of oversight over the

[1453] L.-F. Andrianarijaona, 'Focus on EUAVSEC South Sudan one year on', *ISIS CSDP Note* (International Security Information Service, Brussels, 2013) 3.
[1454] Article 3 Council Decision (2012/325/CFSP) extending the mandate of the EU Special Representative for Sudan and South Sudan, OJ L165/49, 26.06.2012.
[1455] Council Decision (2010/96/CFSP) on an EU military mission to contribute to the training of Somali security forces, OJ L44/16, 19.02.2010.
[1456] For the most recent amendment see: Council Decision (2015/441/CFSP) amending and extending Decision 2010/96/CFSP on an EU military mission to contribute to the training of Somali security forces, OJ L72/37, 17.03.2015.
[1457] The reverse order would arguably, and theoretically, have been more beneficial as the trained soldiers had only the most fragile security structures to operate in (Ehrhart and Petretto (2012) op.cit. note 1427, 43).
[1458] The Federal Republic of Somalia, *The Somali Compact*, Brussels, 16.09.2013.

reintegration and recruitment of soldiers conducted by AMISOM, lack of logistical equipment, uniforms and barracks for the SNA in the light of the UN embargo and the EU's own shortcomings in this regard, and the difficulty of training an army that is at war against Al-Shabaab.

A third CSDP mission, EUCAP Nestor, was launched in July 2012 and is targeted at (1) enhancing the capacity of primarily Somalia but also Djibouti, Kenya and the Seychelles to exert effective maritime governance over their coastline, internal waters, territorial seas and exclusive economic zones; (2) supporting these states in taking ownership of the fight against piracy in accordance with the rule of law and human rights standards; (3) strengthening regional cooperation and coordination of maritime security; and (4) making a targeted and specific contribution to ongoing international efforts.[1459] The aim is to allow these countries to cover the whole counter-piracy process, from crime to court. Following a rather sluggish start, related to difficulties with guaranteeing local political buy-in, safeguarding support structures and reconciling a military leadership style with the exigencies of mainly civilian tasks, the mission is now gaining momentum.[1460] Its network has been set up and the around 100 staff work in close cooperation with the maritime security sector in each host country. The main tasks consist of advising, mentoring and training the respective coast guard, navy, civilian coastal and maritime police, prosecutors and judges.

With this design, Atalanta, EUTM Somalia and EUCAP Nestor form a sort of triptych, reflected in the parallel extension of their mandates until December 2016.[1461] Since 2012, an impressive drop in piracy has been realised, but the fear remains that pirates will take over the Indian Ocean as soon as Atalanta retreats.[1462] In this sense, it is often argued that the other two CSDP missions serve as 'exit strategy' for their sister mission Atalanta, by empowering Somalia and other coastal states to take the fight against piracy in own hands.[1463] Yet, to this picture one should add a number of Commission-managed projects. Particularly EUCAP Nestor entered an area crowded by various EU development initiatives.

First, a four-year Programme to Promote Regional Maritime Security (MASE) was launched in 2013, worth EUR 37.5 million funded by the EDF. In general terms, it aims to strengthen the capacity of the Eastern and Southern Africa and Western Indian Ocean region (ESA-IO) in the implementation of the Regional Strategy and Action Plan against Piracy and for Maritime Security. Second, a number of

[1459] Article 3 Council Decision (2014/485/CFSP) op.cit. note 593.
[1460] Tejpar and Zetterlund (2013) op.cit. note 618, 17-28.
[1461] Respectively, Article 16(3) Council Decision (2014/827/CFSP) amending Joint Action 2008/851/CFSP on an EU military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L335/19, 22.11.2014; Article 12(2) Council Decision (2015/441/CFSP) op.cit. note 1456; and Article 16(2) Council Decision (2014/485/CFSP) op.cit. note 593.
[1462] The EU's naval operation is certainly not the only reason for this drop in piracy. Former Operation Commander Potts cites the following additional grounds: deployment of armed private security guards on board ships, better management practices by shipping companies, pre-emptive action by combined navies in the region and a change of mentality among Somalians that are now far less toleratant of pirates (F. Gardner, 'Somali piracy: A broken business model?', *bbc.com*, 29.11.2012).
[1463] See for instance: Tejpar and Zetterlund (2013) op.cit. note 618, 39-41.

related actions are funded by the Critical Maritime Routes (CMR) programme that forms part of the IcSP's long-term component. These include MARSIC, enhancing Maritime Security and Safety through Information-Sharing and Capacity-Building among States in the Horn of Africa/Western Indian Ocean (EUR 6 million 2010-2015); CRIMARIO (Critical Maritime Routes in the Indian Ocean – EUR 5.5 million 2013-2016) with similar objectives as MARSIC but a broader geographic focus; CRIMLEA (Law Enforcement Capacity-Building in East Africa – EUR 3.6 million 2011-2017) supporting and assisting law enforcement agencies in the region in combatting maritime piracy and robbery through effective investigations; and CRIMSON (CMR Monitoring, Support and Evaluation Mechanism – EUR 1 million 2012-2014) coordinating and cohering the EU's various initiatives on this issue. The DCI, for its part, funded a project on responding to migrants' needs and ensuring maritime security in Yemen, which addressed border and migration issues with a maritime dimension in the Gulf of Aden (EUR 2 million 2010-2011). Finally, in 2010 the Commission launched a Pilot Project on Piracy, Maritime Awareness and Risks (PMAR) implemented by the European Commission's Joint Research Centre. It explores the use of civilian technical and affordable tools to obtain real-time maritime situational awareness.[1464]

This plethora of initiatives is designed to embrace the many aspects of this complex problem, but makes it hard to identify a specific set of aims or distinct rationale for EUCAP Nestor.[1465] In the spirit of the Strategic Framework, the EUCAP Nestor Decision therefore calls on the Head of Mission to coordinate closely, not only with EUNAVFOR Atalanta and EUTM Somalia, but also with the Maritime Security Project and the CMR Programme.[1466] At headquarters-level this resulted in regular cooperation meetings between DEVCO and CMPD, but a proper project-level coordination mechanism is still to be established. Ad hoc cooperation occurs on various levels, and while generally constructive it is rather complicated. Nestor's Head of Mission admitted "qu'on travaille parfois mieux avec des organisations des Nations Unies — comme avec l'UNODC aux Seychelles — qu'avec les collègues de la Devco. C'est un paradoxe. Mais il commence à y avoir une prise de conscience".[1467] The difficulties most cited by EU officials are the lack of transparency and knowledge of all the numerous projects with diverging budget cycles as well as the insufficient capacity of EU Delegations in the region for coordination.[1468] Furthermore, the ultimate exit strategy for Atalanta evidently lies in tackling the root causes of the piracy problem on land. The above complications pale before Somalia's immense security and development harms, which the EU – together with the international community writ large – struggles to address.

[1464] T. Behr, et al., *The Maritime Dimension of CSDP: Geostrategic Maritime Challenges and their Implications for the European Union* (European Parliament DG for External Policies, Brussels, 2013) 73.
[1465] European Parliament Report (2014/2220(INI)) on the implementation of the CSDP, 19.03.2015, para. 19.
[1466] Article 14(5) Council Decision (2012/389/CFSP) op.cit. note 593.
[1467] N. Gros-Verheyde, 'Objectif : Somalie (Etienne de Poncins/Eucap Nestor)', *Bruxelles2.eu Le Club*, 24.11.2014.
[1468] Tejpar and Zetterlund (2013) op.cit. note 618, 30-33.

Contrary to the comprehensive approach to South Sudan, the above efforts did not result from a clearly defined and forward-looking plan. Rather, the EU's diverse arsenal is being interlaced *ex ante* to form a coherent whole. While this significantly complicates coordination and is all but (cost-) efficient, the advantage of this approach is that this is not imposed from the top but results from a bottom-up process that takes close account of contextual factors. Notable landmarks herein are the EEAS-Commission Joint Staff Working Document on an Integrated EU approach to Security and Rule of Law in Somalia and the EEAS-Commission Discussion Paper for the EU's approach in post-transition Somalia.[1469] The 2015 Action Plan on the comprehensive approach includes Somalia as one of the geographical target areas and proposes to take this bottom-up process further by focussing on four key dimensions. These consist of developing shared analysis among EU actors and Member States based on a better common understanding and situational awareness on the ground, launching the process of defining a common EU strategic vision, providing ad hoc thematic support to conceptualisation, identification and formulation of new interventions and continuing engagement with the African Union.[1470]

The challenge of regional coordination

In both of the above cases a comprehensive approach offers EU actors a shared frame of reference to steer their policies and positions towards common goals. The High Representative and EEAS provide political leadership – or at least guidance – at policy-making level, but a key challenge remains to translate this to coordinated action on the ground. While EU officials are generally key experts in their specific area, they not seldom lack information and awareness on the complete picture of the EU's instruments and their potential. In this regard, EU Delegations can play a vital coordinating role on the national level, but often fall short on (security) expertise and capacity (cf. *supra* 4.4.).[1471] Most importantly, they are not designed for inter-country or regional coordination. Information and awareness-sharing occurs on a regular basis between Delegations in the Horn, for instance in the form of occasional regional HoDs meetings, but this is certainly not their core business. The EU Delegation to Kenya is a bit of an exception because it also hosts the EU Delegation to Somalia, since its closure in 1993 due to security concerns. The latter's Head, Michele Cervone d'Urso, is simultaneously EU Special

[1469] EEAS-Commission Joint Staff Working Document (SWD(2013) 277 final) on an Integrated EU approach to Security and Rule of Law in Somalia, Brussels, 12.07.2013; EEAS-Commission (PSC 03/13) Discussion Paper for the EU's approach in post-transition Somalia, Brussels, 11.01.2013.
[1470] Commission and High Representative (SWD(2015) 85 final) op.cit. note 1379, 9.
[1471] Alexander Rondos, EUSR for the Horn, therefore pleads to accord EU Delegations more flexibility in managing funds and less restrictions by administrative and accounting regulations (Soliman, Vines and Mosley (2012) op.cit. note 552, 25).

Envoy to Somalia.[1472] Two key EU actors do take a regional perspective to coordination: the EU Special Representative for the Horn and the EU Operations Centre (OPCEN).

First, based on the objectives set out in the 2011 Strategic Framework, the EUSR's mandate is "to contribute actively to regional and international efforts to achieve peaceful co-existence and lasting peace, security and development within and among the countries in the region".[1473] The position is held by Alexander Rondos, a Greek national with extensive experience in the region and privileged points of entry with various governments. He has a team of six people in Brussels and nine co-located in the different EU Delegations. Revealing the capacity limits that go along with a regionally comprehensive approach, the Council asked the EUSR to give initial priority to Somalia and to the regional dimensions of the conflict, as well as to piracy.[1474] The underlying idea is also that progress in this epicentre of the regional security system is a precondition for realising any other objectives.[1475] This focus was extended in 2013, after the abolishment of a separate EUSR for the Sudans, with contributing to "the peaceful coexistence of Sudan and South Sudan as two viable and prosperous states with robust and accountable political structures".[1476] There are two other key aspects to his mandate, namely the resolution of current and prevention of potential conflicts as well as the support of regional political, security and economic cooperation.

This scope does not fully reflect the various aspects of the Strategic Framework to which the EUSR is to give effect. A key void is the dimension of 'poverty reduction, economic growth and prosperity', the fourth working area under the Framework. The only explicit link to development cooperation in the entire mandate is that the EUSR shall report on "the political aspects of relevant Union development projects, in coordination with the Union delegations".[1477] Arguably this bias stems from the fact that the Special Representative is a *de jure* CFSP actor (cf. *supra* 4.2.3). He reports to the High Representative, the PSC and, as necessary, to Council working parties, but has no formal links to the Commission, EEAS or EU Delegations besides the vague obligation to "work in close coordination".[1478] It is moreover remarkable that enhancing the quality, intensity, impact and visibility of the Union's

[1472] Three field offices – in Hargeisa (Somaliland), Garowe (Puntland) and Mogadishu – liaise with Somali authorities, civil society and business, oversee the implementation of EU-funded projects and keep the Delegation abreast of all political and security-related developments.
[1473] Article 2 Article 12(2) Council Decision (2013/527/CFSP) amending and extending the mandate of the EU Special Representative for the Horn of Africa, OJ L284/23, 26.10.2013.
[1474] Article 1 Council Decision (2011/819/CFSP) appointing the EU Special Representative for the Horn of Africa, OJ L327/62, 09.12.2011.
[1475] L. Barry, 'European Security in the 21st Century: the EU's Comprehensive Approach ', *IIEA European Security and Defence Series* (The Institute of International and European Affairs, Dublin, 2012) 9.
[1476] Article 2(2)(b) Council Decision (2013/527/CFSP) op.cit. note 1473. Previously there had been some confusion as to the precise delimitation of and cooperation between these two separate EUSR mandates, even though they established a generally positive working relationship (Soliman, Vines and Mosley (2012) op.cit. note 552, 31-32).
[1477] Article 11 Council Decision (2013/527/CFSP) op.cit. note 1473.
[1478] Articles 4(3) and 11 Ibid.

multifaceted engagement in the Horn is part of the EUSR's key policy objectives, while his 'contribution' to the strive for unity, consistency and effectiveness is included in a separate Article 12 on coordination. This serves as another reminder that the EUSR is primarily a CFSP actor, who is just as any EU body bound to ensure coherence, but not specifically empowered for comprehensive coordination.

The fact that the EUSR coordinates EU activity in parallel with the Heads of EU Delegation, without any form of hierarchy or task division between them, is a source of particular confusion.[1479] This is highlighted by the mandates of CSDP missions and operations. The Decision on EUCAP Nestor, provides that "[t]he Head of Mission shall, without prejudice to the chain of command, receive local political guidance from the Head of Union Delegation", the former EUAVSEC mission assigned this same task to "the EUSR, in close coordination with the Head of Union Delegation",[1480] while the Decisions on EUNAVFOR Atalanta and EUTM Somalia do not refer to political guidance or coordination of any kind. Whereas generally they work well in tandem, there is some antagonism with regard to Rondos' more privileged access to several governments that is occasionally perceived as undermining their own diplomatic endeavours.[1481] In the case of Somalia, where the bulk of the EUSR's efforts are concentrated, the regional-national axis of dividing labour does moreover not offer any clarification. The mandates of the EUSR and the Special Envoy overlap in their entirety and the fact that these do not overtly collide rests solely on their complementary personalities.

Second, the Brussels-based EU Operation Centre, which had been ready for use since 2007 (cf. *supra* 4.1.2.), was activated for the first time in March 2012 to strengthen civil-military synergies, facilitate information exchange and improve coordination between the three CSDP missions in the Horn of Africa. In addition to providing support to the operational planning and conduct of Operation Atalanta, EUTM Somalia and EUCAP Nestor, the OPCEN supports the CMPD in its strategic planning and facilitates interaction between CSDP activity and Brussels-based structures. "[I]n the context of the Strategic Framework for the Horn of Africa and in liaison with the [EUSR]", this aims at enhancing efficiency, coherence and synergies.[1482] The Centre has however no command responsibility[1483] and fulfils these tasks in a purely supporting capacity, "without prejudice to the respective military and

[1479] E. Daniel, 'Le Représentant Spécial de l'UE pour la Corne de l'Afrique' in M. de Langlois (ed), *Approche Globale et Union Européenne: Le Cas de la Corne de l'Afrique* (L'Institut de Recherche Stratégique de l'École Militaire, Paris, 2014) 120.
[1480] Respectively, Article 6(7) Council Decision (2014/485/CFSP) op.cit. note 593; and Article 6(7) Council Decision (2012/312/CFSP) on the EU Aviation Security CSDP Mission in South Sudan (EUAVSEC-South Sudan), OJ L158/17, 19.06.2012.
[1481] Several interviews with EEAS and Commission staff at the EU Delegations to Ethiopia and the AU, June-July 2013.
[1482] Article 2 Council Decision (2012/173/CFSP) on the activation of the EU Operations Centre for the CSDP missions and operations in the Horn of Africa, OJ L89/66, 27.03.2012.
[1483] This was considered a step too far for the UK (UK House of Lords EU Committee, *European Defence Capabilities: lessons from the past, signposts for the future*, 31st Report of Session 2010-2012, 04.05.2012, para. 136).

civilian chains of command of the missions and operation".[1484] This evidently limits its influence and some officials were initially rather sceptic about the added value of this newcomer.[1485]

Nonetheless, the EU OPCEN has in two main ways proofed to be of considerable significance in building multi-agency awareness of EU actions. *First*, it supports and establishes several interaction and coordination mechanisms. Of key importance is the bi-weekly CSDP Horn of Africa Coordination Platform for information exchange, interaction and discussion among the EEAS CSDP structures.[1486] Topics for instance include the possibility of a common CSDP compound or the provision of fused CSDP mission intelligence.[1487] It also supports more ad hoc mechanisms such as joint planning sessions between EUTM Somalia and Operation Atalanta on the development of a contingency plan for potential staff evacuation. *Second*, the EU OPCEN plays an important role in gathering and distributing information. The EUOPCEN Weekly Executive HoA CSDP Summary has become a key source of evidence – confirmed by its continuously expanding distribution – on executive CSDP activities in the Horn and forthcoming interactions between missions/operations. The various coordination mechanisms are brought together in a web-based 'Synergies and Coordination Portal for the Horn of Africa' (SCOPE), where EU institutions, Member States and third parties can register their projects and programmes. This allows to minimise the risk of gaps or duplication and maximise synergies.

Yet, OPCEN struggles with limited capacity. It has only 16 Brussels-based staff positions, of which three are not manned. A crucial shortcoming is that the Centre "shall cover all military expertise" but lacks civilian know-how, despite the fact that one of the three CSDP deployments it is designed to support is civilian.[1488] In the light of the Strategic Framework it is evidently not beneficial that linkages with Commission-managed projects are not formally covered by OPCEN's mandate. In practice, the Centre nonetheless commits itself to seeking, expanding and exploiting "[o]pportunities to facilitate productive interaction through the growing relationships and routine involvement with the Commission structures involved in the [Horn]".[1489] This manifests itself in various forms. For one thing, OPCEN facilitates an annual workshop of CSDP, EEAS, EU Delegations and Commission services to operationalise the comprehensive approach in the Horn of Africa. This has evolved from a rather basic acquaintance among the different participants and their areas of activity, through exchanging ideas with regard to their various efforts in the areas of maritime security and the rule of law, towards

[1484] Article 1(2) Council Decision (2012/173/CFSP) op.cit. note 1482.
[1485] Tejpar and Zetterlund (2013) op.cit. note 618, 34-36.
[1486] Noteworthy is that the OPCEN acts as secretariat of the Capacity Building Coordination Group, which forms part of the global Contact Group on Piracy off the Coast of Somalia.
[1487] EEAS (01710/14) Six Monthly Report of the EU Operations Centre (EU OPCEN): 18 March 2014-17 September 2014, Brussels, 19.03.2014, paras. 4.5-4.12.
[1488] Article 4(2) Council Decision (2012/173/CFSP) op.cit. note 1482. Its only civilian official (a coastguard officer) recently left the Centre, seriously diminishing its scope of expertise (Council Note (13424/14) op.cit. note 1487, para.6.1.).
[1489] Council Note (13424/14) op.cit. note 1487, para. 1.5.

coming to coordinated plans in these fields. Further, a liaison officer from DG DEVCO is assigned on a permanent basis to work part time at the OPCEN. This creates a mutually beneficial relationship "to cultivate a better understanding, grow expertise and to facilitate greater coordinated planning and action … with the various units within DEVCO".[1490]

In the light of the above, it is clear that both the EUSR for the Horn of Africa and the Operations Centre make important strides in coordinating the implementation of the Strategic Framework on the ground. Yet, neither of them is able to cover the full picture as both are essentially targeted at the CFSP and CSDP. The development cooperation component is coordinated in the various countries of the Horn by the respective Union Delegation, but remains without much comprehensive guidance on a regional level. A significant external obstacle to this approach, acknowledged in the Strategic Framework, is that "[t]he region lacks a regional organisation effective enough to mediate disputes and foster cooperation".[1491] For practical reasons the Inter-Governmental Authority for Development, as building block of the African Peace and Security Architecture, was chosen as vehicle for cooperation. IGAD is developing its role in mediation and conflict prevention, but remains weak in structures, poor in capacities and conflicted in organisation. Even in the field of trade, the organisation was unable to take the lead and the EU is negotiating EPAs with the IGAD member countries through two different regional organisations, namely the East African Community (EAC) and Eastern and Southern Africa (ESA). This fragmentation does evidently not benefit a comprehensive approach. Consequently, the EU is spearheading efforts "by regular meetings of Horn Ambassadors in Brussels to build effective multilateral cooperation without regard for institutional/organisational affiliations and differences".[1492]

Strategic Framework or 'strategic formalism'?[1493]

In January 2013, one year on in the Strategic Framework for the Horn of Africa, the High Representative submitted a rather positive progress report, prepared jointly by EEAS and Commission services, in coordination with the EUSR for the Horn of Africa and the former EUSR for Sudan and South Sudan. The report found that it had "improved coherence of tools and instruments in the region".[1494] As its analysis of the underlying drivers of conflicts and the risks to development was considered still pertinent, the Framework remains relevant "and allows for the necessary adjustment on the policy

[1490] Ibid., Annex para. 2(j).
[1491] Council (2011b) op.cit. note 88, 5.
[1492] High Representative Ashton, Implementation Review of the Horn of Africa Strategic Framework, Brussels, 11.01.2013, 16.
[1493] M.G.A. Viceré, 'Strategic Formalism or Formalised Strategy? Features and Limits of the New EU "Process-Oriented Comprehensive Approach" to External Conflicts and Crises' (2014) *Conflict, Security & Development* 14(5), 651-663.
[1494] High Representative (2013) op.cit. note 1492, 6.

action level".[1495] The Council agrees that CSDP missions and operations and Commission-managed programmes in the Horn are "seeing the impact of a more effective Comprehensive Approach through shared planning and action where it has been possible, and all actors in the region seem to have developed a genuine thirst for even greater synergies".[1496]

Other actors are rather more critical and highlight a number of areas for improvement. In the words of the Parliament the so-called Strategic Framework for the Horn is "more of an ex-post empirical and pragmatic achievement rather than a well-designed and planned strategy".[1497] It insists that regional strategies should clearly define EU objectives and priorities and better link these to specific timeframes and tasks divisions. In this same light, Pirozzi wonders whether the Strategic Framework is not "more a reverse engineering exercise, consisting in the development of a conceptual umbrella aimed at providing ex post coherence to a number of different and often non-aligned activities conducted by the EU in crisis theatres".[1498] Indeed, as the Commission itself has put it: "coordination must occur during the planning stage. If coordination arrangements are not set in advance of the implementation stage, it is, at worst, too late or at best, much more difficult to bring disparate processes together".[1499]

The Horn Strategy provides a 'framework' for regional action but does not give many clues on how to act regionally. For that purpose the Framework relies on the adoption of more specific action plans and sub-strategies, such as "the EU Comprehensive Approach to South Sudan, the development of Action Plans to counter Terrorism and conduct Counter-Piracy actions, discussion paper for the EU's approach in post transition Somalia and the Supporting the Horn of Africa's Resilience (SHARE) initiative to strategically build resilience to food insecurity and malnutrition".[1500] However, this reveals a rather eclectic whole, with various disconnected strategies that, taken together, do not substitute for a comprehensive approach.[1501] The EEAS in this regard states that it misses an all-inclusive campaign plan as well as a political sponsor to take it forward.[1502] This is particularly problematic with regard to development cooperation, which risks to be left behind in regional strategic thinking. Yet, also with regard to the CSDP there is "a whiff of formalism" in the Strategic Framework and more

[1495] Ibid., 21.
[1496] Council (13424/14) op.cit. note 1487, para. 3.1.
[1497] European Parliament (2013/2146(INI)) op.cit. note 84, para. 38.
[1498] N. Pirozzi, 'The EU's Comprehensive Approach to Crisis Management', *DCAF EU Crisis Management Papers Series* (Centre for Security, Development and the Rule of Law, Brussels, 2014) 15.
[1499] Commission (2014) op.cit. note 485, 18.
[1500] High Representative (2013b) op.cit. note 1492, 3.
[1501] B. Van Ginkel, 'EU Governance of the Threat of Piracy off the Coast of Somalia' in I. Govaere and S. Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Nijhoff, Leiden, 2014) 348.
[1502] EEAS (00557/13) Six Month Report on the EU Operations Centre (EU OPCEN): 22 September 2012 – 14 March 2013, Brussels, 19.03.2013, para. 2.5.

efforts need to be made to integrate it from the outset – not just abstractly, but in concrete terms – in political analysis and the definition of objectives and priorities.[1503]

In order to better incorporate the CSDP and development dimension it is arguably not necessary or useful to adopt a new Strategic Framework, particularly because prescriptive approaches have limited use in fast-changing contexts of fragility and conflict. Read in combination with the principles of the comprehensive approach, the Framework offers a valuable frame of reference to direct the EU's multi-pronged policies towards commonly agreed objectives. Rather the context and process-focus of the comprehensive approach need to be better translated into action on the ground. This could follow the lead of the Regional Action Plan implementing the EU Strategy for Security and Development in the Sahel. [1504] This was adopted in March 2013 in order to ensure that the whole EU policy toolbox works together to reach the commonly agreed objectives. On a more practical level, this will require, on the one hand, an increased capacity of EU Delegations (particularly in the security realm) to better feed into policy formulation and steer implementation. On the other hand, the regional linkages between Delegations, as well as their fine-tuning with CSDP activity, require a stronger Special Representative that draws the whole EU policy spectrum towards the objectives of the Strategic Framework. For this purpose the EUSR should be allowed to act less as a strict CFSP actor and more as a regional delegate of the triple-hatted High Representative. Only in this manner can upstream action on the security-development nexus be improved, "operating a policy shift from reactive-centric approaches to a more adequate and efficient prevention-focused approach".[1505]

6.3. Legally anchoring comprehensive strategies: the unexploited potential of Article 22 TEU

Whereas the actors and competences that the above comprehensive frameworks aim to cohere are clearly rooted in and restricted by primary law, the frameworks themselves have no formal legal basis. All are soft-law documents laying down rules of conduct which have not been attributed binding legal force. This does however not render them legally irrelevant as they are aimed at instigating practical as well as (indirect) legal effects.[1506] Soft law documents "are integral to a policy-making process that requires 'written markers' reflecting policy consensus at a given moment in time, without, however, requiring legal-binding effect to ensure compliance as substantive policy work moves forward".[1507] Yet,

[1503] Koutrakos (2013) op.cit. note 91, 181.
[1504] Commission and High Representative Joint Staff Working Document (SWD(2015) 61 final) EU Sahel Strategy: Regional Action Plan, 13.03.2015.
[1505] European Parliament (2013/2146(INI)) op.cit. note 84, para. 39.
[1506] Senden (2004) op.cit. note 317, 112. A clear example are the multiple references by the CJEU to the European Security Strategy and European Consensus on Development to support - and arguably even guide – its rulings (cf. *supra* Chapter 5).
[1507] Van Vooren (2012) op.cit. note 179, 211.

this practice passes by the fact that the Lisbon Treaty introduced a legal basis, specifically designed for such comprehensive strategy-making: Article 22 TEU.

Box 15: Article 22 TEU

1. On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.

2. The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.

Article 22 TEU empowers the European Council to adopt decisions on the strategic interests and objectives of the Union. These are designed to encompass the entirety of CFSP and TFEU aspects of the EU's relations with regard to a certain country, region or theme. Such European Council decisions can subsequently be implemented through various distinct measures according to the procedural arrangements provided in the Treaties. Notably, this accords the European Council concrete operational competence, beyond its generally declaratory role. The adoption of implementing CFSP decisions can moreover be taken by QMV, instead of the general rule of unanimity applicable in this policy field. As only EU legal instrument that can – and has an explicit mandate to – encompass both CFSP and TFEU aspects of the Union's external action, Article 22 TEU seems a perfect fit for addressing the security-development nexus. Before trying to understand why its potential has not (yet) been exploited (6.3.2.), the roots, structure and added value of this instrument will be unravelled (6.3.1.).

6.3.1. Article 22 TEU: origins, design and relevance

Whilst not explicit, the lay-out of these European Council decisions irrefutably recycles the concept of the former common strategies. This CFSP instrument was introduced by the Treaty of Amsterdam in

order to improve the coherence and effectiveness of EU external action, but soon fell into disuse.[1508] The only three such strategies ever adopted (on Russia, Ukraine and the Mediterranean region)[1509] failed to add value or impact on the development and implementation of EU policies.[1510] This mainly resulted from two procedural flaws or concerns. On the one hand, the common strategies' purpose of comprehensiveness conflicted with the strictly CFSP legal nature of this instrument as well as the EU's then still pillarised constitutional structure. Consequently, concerns about the intergovernmental contamination of the Community were never far away.[1511] On the other hand, the fear to be outvoted in implementing measures adopted by qualified majority made Member States reluctant to fully commit. In the words of then CFSP High Representative Solana this "resulted in a 'Christmas tree' approach based on the 'lowest common denominator'".[1512] Common strategies were so carefully drafted to stay clear of infringing *ex* Article 47 TEU and so thoroughly negotiated among Member States that they did "not contain real priorities or posteriorities and [became] little more than inventories of existing policies and activities".[1513] It proofed vain hope that a single policy instrument would be able to iron out all the difficulties of the EU's fragmented external action constellation. Koutrakos even argues that the predominant purpose of the common strategies was to enhance the appearance of coherence in order "to assuage concerns over the potential undermining implications of the functioning of the second pillar alongside the Community legal framework".[1514]

Despite the inglorious demise of the common strategies, Article 22 TEU is not a mere relic of the past, but a deliberate endeavour to breathe new life into this old instrument.[1515] Rebranded as 'Decisions of the European Council on the strategic interests and objectives of the Union', this refurbished tool now firmly draws the card of comprehensiveness. This is clear from a number of changes and additions. *First*, its provisions are taken out of the CFSP chapter and added to the 'General Provisions on the Union's External Action'. This is no mere cosmetic change but serves to rectify the constitutionally

[1508] *Ex* Art 13(2) TEU.
[1509] Common Strategy (1999/414/CFSP) on Russia, OJ L157/1, 24.06.1999; Common Strategy (1999/877/CFSP) on Ukraine, OJ L331/1, 23.12.1999; Common Strategy (2000/458/CFSP) on the Mediterranean region, OJ L183/5, 22.07.2000.
[1510] 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) 219.
[1511] J. Monar and W. Wessels, *The European Union after the Treaty of Amsterdam* (Continuum, London, 2001) 254. The preparatory work on the first CS on Russia immediately led to the Commission voicing its opposition against potential legal obligations imposed upon it (J.-M. Dumond and P. Setton, *La Politique Etrangère et de Sécurité Commune (PESC)* (La Documentation Française, Paris, 1999) 93) and the Parliament lamenting its lack of involvement (European Parliament (A4-0219/99) Report containing a proposal for a European Parliament recommendation to the Council on the common strategy towards the Russian Federation, 22.04.1999).
[1512] Secretary-General/High Representative (14871/00) Report on the Common Strategies, 21.12.2000, paras 10.
[1513] Ibid. para. 21.
[1514] P. Koutrakos, *EU International Relations Law* (Hart, Oxford, 2006) 399.
[1515] This appears to be confirmed by the External Action Working Group of the IGC, acknowledging that while it had not lived up to expectations, the common strategy instrument was a concrete and operational tool to ensure that all instruments of EU external action, regardless of their nature, are used in a manner consistent with that strategy. In this regard, the idea surfaced to create a new type of joint initiative by the High Representative and the Commission, aimed at integrating the various elements of EU external action (European Convention (CONV 459/02) op.cit. note 371, para. 47).

questionable nature of the former common strategies. These changes were done without any reference to this predecessor, which may reflect a desire to start with a clean sheet. However, it gives rise to confusion and might explain why this curious resurrection has received so limited policy and scholarly attention.

Second, Article 22 TEU takes away all ambiguity regarding the comprehensive nature of these European Council decisions and unmistakably states that they shall (not 'may') relate to the CFSP and to other areas of EU external action. The European Council's identification and definition of strategic interests, objectives and general guidelines for the CFSP specifically, has another legal basis, namely Article 26(1) TEU. In other words, decisions on the basis of Article 22 TEU shall be comprehensive or shall not be. This is further corroborated by its first paragraph, rooting such decisions firmly in the external action principles and objectives of Article 21 TEU.[1516] In this manner, these European Council decisions serve as a key bridge between that abstract catalogue of principles and objectives and action-oriented decision-making. The fact that this connection is made at the highest institutional level moreover accords these decisions considerable political weight.

A *third* key novelty is that Article 22(2) TEU enables the High Representative, for the CFSP, and the Commission, for other areas of external action, to submit joint proposals to the Council for such strategic decisions. This serves to ensure broader institutional buy-in and encourages them to produce a coherent policy plan. Yet, this model procedure is merely a possibility, the only obligation for the European Council being to act "unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area".[1517] This could mean that separate initiatives linked to different aspects of external policy are only shallowly bound together by the Council, which is evidently no guarantee for the goal of improved consistency.[1518] The adoption of such high-level strategic and legally binding decisions would evidently benefit from wider institutional preparation.

A *fourth* and related change is that Article 22 TEU now makes it explicit that these strategic decisions of the European Council shall be implemented through various distinct measures in accordance with the procedures provided for in the Treaties. This promotes a "cascade-like" sequence of implementing measures that all serve the broader strategic interests and objectives defined by the European

[1516] A more symbolic but nonetheless significant change is that instead of adopting common strategies "in areas where the Member States have important interests in common" (*ex* Article 13(2) TEU), these European Council decision now focus on the interests and objectives 'of the Union'.
[1517] Article 22(1) TEU.
[1518] S. Oeter, 'Identification of EU Interests and Objectives in the External Action Area: Competent Authorities and Instruments' in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer-Verlag, Berlin, 2013) 895-896.

Council.[1519] As mentioned, the exception to adopt CFSP implementing measures by QMV remains, as well as the Member States' escape clause to block it.[1520] Although neither of these provisions was ever invoked, it is noteworthy that the restraining potential of the latter is slightly softened. Instead of 'important', Member States now have to cite 'vital' and stated reasons of national policy. Furthermore, rather than simply referring the contested issue to the European Council for a decision by unanimity, the High Representative is accorded a mediating task and shall first try to seek a solution acceptable to all Member States.

Finally and crucially, the Lisbon Treaty provides a considerably more solid constitutional framework for strategic European Council decisions that span the legal divide between CFSP and TFEU external competences. Attempts at comprehensive policy planning no longer run up against the EU's pillar walls. However, as repeatedly mentioned, the Treaty's leap towards coherence did not make an end to the constitutional delimitation of the CFSP, resulting in an integration-delimitation paradox. The main innovation of Article 22 TEU is that it formulates an interesting answer to this paradox. In line with Article 21 TEU, these European Council decisions function as high-level policy umbrellas grouping together and interlinking the various CFSP and TFEU objectives, principles, competences, instruments and actors with relevance to a certain country, region or theme. In the spirit of Article 40 TEU, these strategic frameworks can subsequently be broken down in various distinct CFSP and TFEU measures that serve the shared objectives and principles, whilst staying clear of 'the application of the procedures and the extent of the powers of the institutions laid down' by the Treaties for the TFEU/CFSP. This two-phased construction allows the European Council to cope with the decades-old challenge of simultaneously living up to the requirements of consistency and delimitation. It offers an alternative to the complexity, or even impossibility, of combining CFSP and TFEU legal bases. The idea is to allow general CFSP-TFEU interlinkages at the strategic policy-making level as long as the respective implementing measures live up to the requirements of Article 40 TEU and respect the principle of conferral. Reminiscent of the *Portugal v Council* construction, this in a way provides a basis in law for the Court's reasoning in the *SALW* case to annul the implementing ECOWAS Decision but not the encompassing SALW Joint Action (cf. *supra* 5.2.2.).

This interpretation of Article 22 TEU is however not explicit in its wording. There is nothing that prescribes the European Council how to draft such decisions and the level of detail is left to its discretion. Its assignment to define "the means to be made available by the Union and the Member States" even suggests a far-going interference with the operationalisation of EU external action. Yet,

[1519] H.-J. Cremer, 'Art. 22: Festlegung der Strategischen Interessen und Ziele für das auswärtige Handeln der Union' in C. Calliess and M. Ruffert (eds), *EUV/AEUV - Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar* (Verlag C.H. Beck, Munich, 2006) para. 5.
[1520] Article 31(2) TEU.

an *effet utile* reading of Article 22 TEU and the broader TEU and TFEU constitutional framework indicates that this cannot have been the purpose. If no room of manoeuvre would be left to the other EU institutions in implementing these European Council decisions, this would severely encroach on their prerogatives under both the TEU and TFEU.[1521] Too much detail would moreover be counterproductive as implementing measures can more flexibly capitalise on rapidly changing circumstances. Arguably, this provision should therefore be interpreted as emphasising that the European Council's determination of the Union's strategic interests and objectives should bear in mind the (limited) range of means available to the EU and Member States.[1522] In other words, these European Council decisions should be no policy prescriptions but rather offer comprehensive frameworks of reference gearing the EU's policy arsenal towards a common purpose.

6.3.2. The untapped potential of Article 22 TEU

In the course of 2010, then European Council President Van Rompuy instigated this institution to take up its reinforced strategic role. This led the European Council to acknowledge that bringing "Europe's true weight to bear internationally […] requires a clear identification of its strategic interests and objectives".[1523] It thereby called for "a more integrated approach, ensuring that all relevant EU and national instruments and policies are fully and coherently mobilised, consistent with the provisions of the Treaties, in support of the European Union's strategic interests".[1524] This did however not lead it to consider the use of Article 22 TEU, the legal instrument specifically designed for addressing these issues.[1525] A short-term recommendation formulated by the High Representative in the EEAS Review is for the latter to "present medium-term strategies for specific regions or thematic issues in line with the established policy priorities, for discussion in the Council according to an agreed timetable. These strategies could also foster more joined-up discussions … at different levels within the Council (European Council, Ministerial meetings, PSC, working groups)".[1526] Notably, HR Ashton added that it could therefore "be useful to reflect on a new basis for EU strategies or policies to be adopted jointly

[1521] Eeckhout notably questions whether these European Council decisions have binding force for EU institutions acting under the TFEU and states that this is left to the duty of consistency (Eeckhout (2011) op.cit. note 113, 476).
[1522] Oeter (2013) op.cit. note 1518, 888-889. The old common strategies are indicative of how this might look in practice. One standard formula provided that the Council, Commission and Member States shall "review, according to their competencies and capacities, existing actions, programmes, instruments, and policies [...] and acts implementing it, to ensure their consistency with this Common Strategy, and where there are inconsistencies, make the necessary adjustments at the earliest review date". They were moreover assigned to "make full and appropriate use of existing instruments and means as well as all relevant EU and Member States' programmes, and to this end shall develop and maintain an indicative inventory of the resources of the Union, the Community and Member States through which this Common Strategy will be implemented" (see for instance: Common Strategy on the Mediterranean region (2000/458/CFSP) op.cit. note 1509, para. 28).
[1523] Presidency Conclusions on Relations with Strategic Partners, European Council, Brussels 12.11.2010, para. 3.
[1524] Ibid., Annex I, para. a.
[1525] Interview with EU official at the Legal Service of the Council, Brussels,February 13.
[1526] EEAS Review (2013) op.cit. note 726, 16.

by Member States, the EEAS and the Commission".[1527] The Legal Service of the Council in this regard pointed to Article 22 TEU, and particularly the possibility of joint High Representative-Commission proposals for such European Council decisions.[1528]

Particularly the various thematic and regional strategies adopted since the entry into force of the Lisbon Treaty, fit the Article 22 structure of inclusive documents setting out the EU's strategic interests and objectives as a frame of reference for ongoing and future activity. Nonetheless, in all these cases a soft-law trajectory was chosen. At present, not a single European Council decision of this kind has yet been adopted. Whereas the curious resurrection of the old common strategies suggests that the Treaty drafters saw a future for this instrument in the new external action constellation, this innovative piece of constitutional design did apparently not correspond to any pressing political needs. This points to a general observation with regard to constitutional reorganisation: it can try to remove existing obstacles to effective and coherent action, but the eventual decisions will continue to depend on political considerations.

Adopting such strategic frameworks as European Council decisions pursuant to Article 22 TEU would accord them considerably more political weight, authority and durability. There is an important difference between policy statements in the conclusions of European Council meetings and these Article 22 TEU decisions. The concrete and binding legal status of the latter would incite a completely different – and significantly more complex – legal drafting process, in search of language that is less prone to ambiguities and more straightforward in setting out markers for EU activity. It could streamline the current ad hoc practice of strategy-making and result in more predictability and coherence. However, these exact advantages could just as well discourage EU institutions and Member States from having recourse to Article 22 TEU. Adopting strategic frameworks in an annex to Council Conclusions, a (Joint) Communication or an EEAS paper – as it is currently done – can be more attractive for reasons of pragmatism, flexibility, speed and simplicity. It might also lead to a better policy outcome. For one thing, the legally binding nature of European Council decisions requires careful drafting in order to ensure that it is in line with all legal requirements and does not infringe on any institutional prerogatives or conferred powers. In the light of this complexity, policy-makers facing limited staff and financial resources might opt to spend these rather on policy implementation. For another, "a choice for hard law may lead to 'soft contents'".[1529] As the experience with the former common strategies demonstrated, legal documents may become so thoroughly negotiated that they are nothing more than open-ended shopping lists of wishes and desires without concrete added value. In this sense, the

[1527] Ibid., 7.
[1528] Council Legal Service (14458/13) op.cit. note 739, 4.
[1529] Van Vooren (2012) op.cit. note 179, 214.

current informal strategy-making practice may offer better prospects for transcending the lowest common denominator.

At present the weighing of these various advantages and disadvantages has led policy-makers to opt for the soft law track in designing strategic framework documents.[1530] In short, the desire for flexibility prevails over the need for legal clarity. Yet, the EEAS Review indicates that the need for more joined-up strategy-making among EU institutions might bring Article 22 TEU to the negotiating table.

6.4. Conclusion

After some years of mainly institutional and procedural navelgazing following the reshuffling of the EU's external action cards by the Lisbon Treaty, we are currently witnessing a change of tide with revived efforts to clarify and determine the content of the Union's external role. For one thing, the security-development nexus is now approached as part of the broader framework of the comprehensive approach, as set out in the 2013 Joint Communication and 2014 Council Conclusions. Reconciling the exigencies of integration and delimitation, it is designed as both a general working method and a set of concrete measures to improve how the EU moves from shared analysis, to a common and comprehensive approach that can finally be turned in complementary all-of-EU action. Particularly the new focus on process and context is key. It indicates a tendency to move away from pre-determined off-the-shelf solutions or politically correct but vague calls for coherence. This is replaced by a gradual systematisation of mechanisms that stimulate continuous interaction between all relevant stakeholders in order to arrive at made-to-measure comprehensive approaches continuously adapted to the specific needs of any given situation.

These efforts are still in an early – rather experimental – stage and the following years will be crucial to see how EU institutions and Member States carry them through. In essence, the approach needs to be better translated in operational and procedural terms to the intra and inter-service functioning at all EU administrative levels. In theory, the methodology of the comprehensive approach allows to tackle 'the underlying principle' of the security-development nexus. However, this is currently hampered by the half-hearted inclusion of the aims of development cooperation and particularly the CSDP. This is acknowledged by all involved parties,[1531] but so far the courage to go the whole way with the new approach is still lacking. Essential in this regard is that the Commission and High

[1530] The Council's Public Information Service answered the author's question as to the untapped potential of Article 22 TEU as follows: "[a]t present there is no recommendation from the Council for such a decision to be taken by the European Council. The European Council does, however, address the strategic interests and objectives of the Union in its conclusions, as the need arises" (correspondence on file with the author).

[1531] See in this regard Commission and High Representative (JOIN(2015) 17 final) op.cit. note 1385; and Council (2014) op.cit. note 1369, para. 6.

Representative call, in unmistakable terms, on the European Council "to provide further political commitment and guidance on better addressing the security-development nexus".[1532]

The EU is testing the operationalisation of its new approach on a regional and thematic level through various comprehensive strategies. This chapter focussed on the 2011 EU Strategic Framework for the Horn of Africa. Rather confusingly, it simultaneously precedes and gives effect to the comprehensive approach. While more fine-tuning is needed, both can form a complementary whole, with the comprehensive approach determining the processes and working methods required to give optimal effect to the various tools that implement the interests, values and priorities set out in the Strategic Framework. The latter has however not (yet) been a game changer for better linking and aligning security and development responses. The key challenge remains to translate the context and process-focus of the comprehensive approach in inclusive action on the ground. On a national level this will require an increased (security) capacity of EU Delegations to better feed into policy formulation and steer implementation. To interlink this to the regional level, the guidance of the EUSR should increasingly expand from only the CFSP to the whole and comprehensive EU policy spectrum, and particularly development cooperation.

Such lessons need to be taken into account in the ongoing debate on a new European Security Strategy. Indeed, a lot can be and is done in the name of such frameworks, strategies, the comprehensive approach, the security-development nexus or whatever the label attached to it. However, as famously put by Michael Porter: "the essence of strategy is choosing what not to do".[1533] Or in the words of the Commission: "[a] comprehensive approach does not mean that everything must be done. Critical path thinking is needed. This assessment needs to answer the question of 'what is a priority when everything is a priority?' and resist the temptation to overburden national counterparts with too many agendas in the face of limited capacity and narrow political space".[1534] The operation of selecting and prioritising interests not only "involves the taking of value-judgments, but – if happening in a heterogeneous collective – requires processes of negotiation and compromise-building".[1535]

The Lisbon Treaty offers a model trajectory for such an endeavour in the form of Article 22 TEU. It empowers the European Council to adopt umbrella decisions defining the EU's strategic interests and objectives. As only EU legal instrument these can and must cover both the relevant CFSP and TFEU dimensions. Such decisions can be based on a joint and integrative proposal from the Commission and High Representative, ensuring broad institutional buy-in and more coherent policy planning. In this manner, Article 22 TEU formulates a unique answer to the integration-delimitation paradox with

[1532] Commission and High Representative (JOIN(2015) 17 final) op.cit. note 1385, 11.
[1533] M.E. Porter, 'What is Strategy?' (1996) *Harvard Business Review* 89 (November-December), 61-78.
[1534] Commission (2014) op.cit. note 485, 11.
[1535] Oeter (2013) op.cit. note 1518, 883.

significant potential for addressing the security-development nexus. The European Council decisions interlink CFSP and TFEU competences at strategic level in the spirit of Article 21 TEU, while their implementation can follow a 'cascade-like' trajectory through various distinct measures that share these same interests and objectives whilst respecting the Article 40 TEU exigencies. This new provision, inspired by the old common strategies, has however not once been used in practice, as the political preferences for flexibility currently prevail over those for legal clarity.

7. Conclusions

> *While in recent years many countries have moved out of poverty, it is striking that one in three of the world's poor are living in a fragile or conflict-affected situation. Consider this: if we fail to act, and act decisively, by 2018 that figure will be one in two. The Arab Spring, setbacks in Mali, South Sudan and the Central African Republic and, most recently, renewed conflict in the Middle East show that the legacy of conflict and fragility cannot be erased over night. Long-term, targeted engagement is the only solution in these situations.*
>
> European Commission, *Operating in Situations of Conflict and Fragility: An EU Staff Handbook*, 2014

EU development and security competences have travelled long and peculiar roads in the EU's evolving legal order(s). The near complete separation between these two policy areas without legal basis in the Rome Treaty framework, evolved into ever rising interaction in the 'integrated but separate legal orders' of the Maastricht era. This encapsulated both policies in two separate pillars, connected through a practically political duty of consistency, as well as the shared/overlapping objective of developing and consolidating democracy, the rule of law and human rights. It was in this setting that the rising awareness about the destructive vicious cycle of poverty and instability in fragile states, led EU institutions to progressively commit to enhancing coherence across the so-called security-development nexus. However, attempts at inter-competence and inter-institutional coherence not seldom ran up against the EU's pillar walls.

The Lisbon Treaty brings the EU's constitutional framework significantly more in line with such integrative policy design. The unification of the legal order, the judicialised duty of consistency over a fused list of external action principles and objectives set out in Article 21 TEU and the new institutional bridging functions, all read as a leap towards comprehensive external policy-making. Yet, while it is clear that the CFSP no longer forms part of an entirely separate legal system, it is still insulated within the new unified legal order, as reflected in the mutual non-affectation clause of Article 40 TEU. This presents policy-makers, EU institutions and the judiciary with a genuine integration-delimitation paradox. While all the public rhetoric focusses on coherence and comprehensiveness, the underlying legal framework is still in delimitation mode. The Treaty gives no indications on how to get out of this fix, putting the onus on political, institutional and judicial craftsmanship.

These gradual constitutional changes followed the rhythm of pragmatics rather than grand design, successively adding new layers and subsystems; new dividing lines and bridges across them. The complex system that ensued, sets out the legal boundaries within which the rising commitment to the

security-development nexus has matured. While the challenges of insecurity, fragility, poverty and development are ruthlessly cross-cutting, the Union's means to cut across the competence boundaries between them are regulated and restricted by primary law. This makes efforts to align and integrate EU security and development policies legally complex as it requires difficult choices of legal basis between divided policy toolboxes. At the same time, it raises administrative challenges as these choices have to be made across very distinct policy-making communities. These are moreover politically sensitive as they affect the division of competences and balance of power between EU institutions. This research held the EU's discourse on and efforts for enhancing the security-development nexus up to the reality check of the Union's evolving constitutional structure. The analysis was conducted along the three tracks of policy-making, institutional design and relations and the delimitation of competences by the judiciary. This simultaneously served to better understand the practical impact of Treaty reform in the area of EU external action and get a more complete picture of the scale, usefulness and effectiveness of this particular policy commitment.

On the *policy track*, the CFSP-TFEU rift lies at the basis of two separate sets of instruments tackling challenges on the security-development interface. These divided development cooperation and CFSP/CSDP toolboxes were driven into the grey area between them on tiptoes and gradually converged towards the core of the security-development interface. The overall picture reveals an impressive amalgam of tools and practices spanning the continuum of development and security encounters. At present, both arsenals assuredly address objectives of conflict prevention, crisis management, reconciliation and post-conflict reconstruction. However, the desultory manner in which they emerged has come to blur the logic of what distinguishes development cooperation and CFSP. This gives rise to substantial concerns of fragmentation, duplication, voids and inter-institutional competence quarrels.

For a long time, the EU's answer to these complications was mainly conceptual. A plethora of concepts has been mobilised by EU institutions to try and make sense of the devastating security and development challenges in many conflict-affected states. Fragility, conflict prevention, crisis management, root causes of conflict, human security, and the overarching security-development nexus, all had their go at the destructive vicious cycle of poverty and instability. While the EU is making great strides in tempering these destructive forces, such notions fail to systematise good and determinately rule out bad practices. Moreover, the proliferation of terminology, definitions and classifications incites a conceptual chaos. At its worst, this conceptualisation serves as an instrument of power maximisation rather than output optimisation. At the end of the day, considerable faith is therefore often put in a rather generic call for more coherence. Even though this is broadly taken into account by EU practitioners, it can hardly be said to help them in making concrete policy choices. Despite the strong evidence that security and development policies could be just as harmful as

supportive to each other's objectives, this policy rhetoric often reads as an automatic 'all good things go together' mantra. It relies more on intuition than primary law regulation, thereby underexposing the intricacies of this commitment. The result is an under-exploitation of the potential that lays in the Union's diverse foreign policy system.

Now that the dust of the Lisbon Treaty's constitutional and institutional reconstruction is gradually settling, a notable shift from conceptualising to operationalising the security-development link reveals itself. Whilst still in its infancy – and thus defying conclusive analysis – the security-development nexus now appears to be approached as part of the wider comprehensive approach to EU external action. This is presented as a working method rather than yet another explanatory notion. Particularly promising, in both the 2013 Joint Communication and the 2014 Council Conclusions on the comprehensive approach, is the focus on systematising inclusive policy-making processes and incorporating contextual factors from design to implementation. Concepts are important – particularly for a multi-layered actor like the EU – to clarify challenges, objectives and approaches in a consensual manner, but they do not provide detailed guidance or instructions. As change is generally non-linear, indirect, multi-dimensional and incremental, a coherent approach cannot be enforced through grand rhetoric, predetermined checklists or long-term political slogans. It must be operationalised, and this is where the comprehensive approach can add important value. Moving away from off-the-shelf solutions, this is set to systematise mechanisms and processes that enable a 'comprehensive analysis-approach-action chain'. In other words, a scenario is designed wherein shared and inclusive analysis of a given situation feeds into a comprehensive policy vision that informs and guides made-to-measure comprehensive action continuously adapted to the respective needs and requirements.

While this working method in theory allows a better targeting of challenges at the security-development interface, its design falls short on both dimensions. The CSDP is currently shielded by Member States from the dynamics of this approach, while development cooperation is mainly approached in instrumental terms. The focus is on the contribution the latter can deliver to conflict prevention and crisis management, passing by the considerable opportunities of this approach for better realising this policy's socio-economic objectives. Moreover, to capitalise on the full potential of this approach, further efforts are needed to translate this focus on process and context to the functioning and organisation of EU institutions, as well as the relations between them.

A rising legislative challenge lays in reconciling this trend of comprehensively approaching security and development challenges – as also embodied in the increasing number of regional and thematic strategies – with the requirements of CFSP-TFEU delimitation. In other words, how to live up to the demands of intertwining policies, while simultaneously ensuring – in line with Article 40 TEU – that the 'implementation of CFSP/TFEU competences 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 TFEU/CFSP competences'. The key to solving this problem lies in the language of this Treaty provision itself. It is indeed only in the implementation of policies that this mutual non-affectation clause applies. At politico-strategic level, nothing prevents CFSP and development competences from forming part of a single external strategy or policy framework. A unique mechanism to live up to these contrasting demands of the integration-delimitation paradox is included in Article 22 TEU. This empowers the European Council to adopt umbrella decisions interlinking both CFSP and TFEU components of the EU's strategic interests and objectives with regard to any theme, region or country. Like the branches of a pedigree, the implementation of these European Council decisions can subsequently take the form of various distinct measures that live up to the exigencies of delimitation. This innovative piece of constitutional design has however not once been used in practice. Clearly, the benefits of soft law flexibility are currently valued higher by EU policy-makers than those of legal clarity.

On the *institutional track,* the coherence rationale of the security-development nexus, combined with the EU's bipartite and internally fragmented instrumentarium, condemn EU policy actors to close cooperation. Traditionally this applied in essence to the Commission and the Council (between 1999 and 2009 assisted by a CFSP High Representative), relying respectively on each other's managerial and politico-strategic responsibilities in the day-to-day management of development cooperation and CFSP/CSDP. They turn out to be cool lovers and their cooperation simultaneously serves to keep a close eye on the other's foreign policy prerogatives. This evidently relates to the diverging institutional balance, which is considerably more in favour of the Council under the CFSP, and more beneficial to the Commission in development programming. As on the policy track, this situation resulted in two dense structures, with the associated challenges of fragmentation, duplication and overlap. Unified leadership over this bipolar architecture or cross-institutional policy guidance regarding the security-development nexus generally falls short of the expectations raised by the grotesque policy rationale of coherence.

Besides scaling up this rationale as a constitutional principle, the Lisbon Treaty fortifies it through institutional bridging functions that span the CFSP-TFEU divide. The triple-hatted High Representative, the institutional melting pot of the EEAS and the comprehensive EU Delegations open windows of opportunity for pooling, intertwining and directing the EU's scattered security and development resources, actors and policies. This puts them manifestly at the centre of the debate on the security-development nexus. The HR, with one foot in the Commission, another in the Council and even a seat at the European Council's table, is ideally positioned to provide the much-needed leadership over this nexus. The EEAS, as inter-institutional support hub, has an important role to play in gradually breaking up silo behaviour and moulding EU minds towards more unified approaches and actions on commonly

agreed goals. The Union Delegations, as the EU's eyes, ears and voice abroad, allow to better inform policy design and steer comprehensive implementation – ideally with a feedback loop between both contributions. In sum, if working well in tandem, the HR, EEAS and EU Delegations could in principle provide unified leadership and policy guidance over the security-development nexus from policy assessment through design to implementation.

Yet, the integration-delimitation paradox on the institutional track implicates that the realisation of this potential is all but a given. The traditional institutions fully subscribe to the coherence portfolios of these institutional innovations, but simultaneously ensured that they remain at the helm of EU external action and even the exercise of their new mandates. This leads to complex lines of authority and reporting as well as disjointed, and particularly challenging, loyalty obligations. Consequently, these institutional bridging functions are bestowed with the highest of expectations to unify the Union's external voice, but lack the unconditional resources, room of manoeuvre and trust to put this into effect. Their quest for coherence across development cooperation and CFSP/CSDP drives them into the murky waters of competence rifts and diverging institutional interests. The effectiveness hereof depends less on the legal design of their functions – which even though imperfect holds considerable potential – than on the political will to proceed. Getting the most out of their mandates will require a leap of faith by EU institutions and Member States, away from the often sclerotic obsession with prerogatives and entitlements. These new bodies, on their part, will also have to overcome internal divergences and sign up unreservedly to their integrative portfolios. That these changes are gradually bearing fruit and permeating previously isolated entities across the security-development divide, is evidenced by the recent advancements with the comprehensive approach.

On the *judicial track*, the Court approaches development cooperation – ever since it was accorded a Treaty basis – as a broad and multifaceted policy. Central in this regard is its 1996 *Portugal v Council* ruling. Herein the Court established that development cooperation agreements could embrace various distinct components as long as these contribute to its central objectives and do not impose extensive or concrete obligations beyond that. In the 2007 *Philippines border management* case it further specified that this contribution to socio-economic development objectives should be in the form of a direct – non-hypothetical – link. In the light of the security-development nexus, a key question is of course how this broad scope of development cooperation affects CFSP competences, and where the judiciary draws the line. The *SALW* ruling, i.e. the first – and pre-Lisbon only – case on the CFSP, at once concerned this relationship with development policy, high-lighting simultaneously the fuzzy competence boundary and the inter-institutional haggling over it. To its traditional centre-of-gravity test, the CJEU added *ex* Article 47 TEU stating that nothing in the TEU shall affect the TEC. From this it deducted two things. On the one hand, a CFSP act infringed this provision if it could, by means of its

aim and content, have been adopted on an EC legal basis. On the other hand, a combination of CFSP and EC legal bases was principally ruled out. Compared to the often confusing line of legal basis case law, the choice here was clearly to prioritise the EC framework over the CFSP. Yet, the manner in which the Court reached its conclusion in the *SALW* case had the effect of discouraging any CFSP-EC policy rapprochement, while doing little to clarify the judicial approach towards other activities in the security-development grey area.

This judgment was delivered on the eve of the Lisbon Treaty's ratification, which immediately casted doubt on its remaining relevance. Articles 21 and 40 TEU, the two centre pieces of the new external action framework, appear to deprive the CJEU of the two key elements in its *SALW* approach, namely the aim-prong of the centre of gravity test and the single-edged sword of delimitation. An essential question is therefore to what extent this methodology still stands and whether integrated foreign policy-making is any more possible in the rehashed external action constellation. In the absence of a full-fledged inter-institutional case on CFSP-TFEU delimitation, three recent cases were scanned on possible indications of how the Court would settle today's integration-delimitation paradox: the *targeted sanctions*, *Philippines PCA* and *Mauritius Pirate Transfer Agreement* rulings.

With regard to Article 21 TEU, the three rulings indicate that the horizontal external action objectives detract less from the centre of gravity test – as well as the pre-Lisbon division of competences – than often projected in literature. *Philippines PCA* clarifies that development cooperation's primary objective of eradicating poverty, as it is now set out in Article 208(1) TFEU, does not diminish the multi-faceted nature of this policy area. The fused listing of Article 21 TEU arguably even reinforces it. Also the absence of specific CFSP objectives in the TEU did not prevent the Court from assigning (at least implicitly) concrete powers to this competence in both *targeted sanctions* and *Mauritius*. Notably, the strengthened duty of consistency in Article 21(3) TEU made a stronger entry into EU litigation. Particularly in the *Philippines PCA* case, the CJEU demonstrated how this increases the tolerance for comprehensive measures to incidentally relate to other components of EU external action. This message is also embedded in the Court's rejection, in the *Mauritius* ruling, of the Parliament's strict interpretation of 'agreements that relate exclusively to the CFSP'. Such reasoning seems beneficial to coherence and could bring case law in line with the comprehensive policy approach towards security and development challenges. This should however be carefully balanced with the principle of conferred powers. The risks hereof are clear when comparing the Court's approach in *Philippines PCA* with that of Advocate General Bot in *Mauritius.* Whereas the former reverted to Article 21 TEU to confirm the broad scope of development cooperation, the latter used these same provisions to narrow it again in favour of the CFSP. One might therefore wonder whether this open-ended duty of consistency does not offer the judiciary too much room for interpretation.

With regard to Article 40 TEU, the conclusions of this research are rather more preliminary as the *targeted sanctions* and *Mauritius* rulings only relate indirectly to CFSP-TFEU delimitation. The Court's reasoning in these cases reflects the rationale of these Treaty provisions, in the sense that the CFSP is approached as both less inferior and more normalised compared to the pre-Lisbon situation. For one thing, the CFSP is bestowed with specific competences in fighting piracy (although only latently) and terrorism, making it rather unlikely that this policy area will in future cases be interpreted restrictively as *lex generalis*. For another, the Court no longer submits the CFSP to a special regime of delimitation but applies its general methodology with regard to procedural compatibility as well as determining the procedure to be followed in concluding international agreements. In spite of this, its delimitation provisions were not once invoked by the EU judiciary, posing the question whether Article 40 TEU is not a double-blunt rather than a double-edged sword. In other words, can these provisions guide the Court in making concrete judicial choices or does their main purpose lay in putting constitutional emphasis on the need to respect the essentially different inter-institutional balance between the CFSP and TFEU legal regimes? A pending case on the *Tanzania Pirate Transfer Agreement* may help to answer this question. In the light of the above, it seems that both the duty of consistency and the scope of the CFSP, which were in peril in the aftermath of the *SALW* ruling, are scaled-up in EU litigation. The judicial approach towards specific activities across the security-development nexus remains however unpredictable.

In sum, the EU's commitment to enhance the security-development nexus has incited an impressive activation of instruments, expansion of institutions and unceasing embracement of new spheres of action. However, largely due to the decades-old constitutional insulation of the CFSP, this is not the result of a unified endeavour, but of separate and often independent development cooperation and CFSP/CSDP efforts. Both are treated very differently on the policy, institutional and judicial tracks, leading to considerable fragmentation, duplication and inter-institutional tensions, in turn, causing missed opportunities for exploiting cross-competence synergies. Little by little, the Lisbon Treaty's changes to the EU's external action architecture are bringing the three tracks more in line with the coherence exigencies of the security-development nexus, whilst ensuring that the CFSP remains a separate category of EU cooperation. The comprehensive mandates of the High Representative, EEAS and EU Delegations over CFSP/CSDP and development cooperation are steadily giving rise to more comprehensive policy frameworks and guidance. Also the respective development and security instruments are gradually becoming more sensitive to security and development challenges, allowing for a better mix of the available tools. While it is still too early to confidently assess whether and how this affects the security-development interface on the judicial track, the Court continues to show itself susceptible to policy evolutions and contextual factors. In essence, the integration-delimitation

paradox implies that the last word with regard to the enhancement of coherence between development cooperation and CFSP/CSDP was not said with the entry into force of the Lisbon Treaty. Its drafters ensured that the balance with delimitation would develop on its own pace, instigated by interwoven evolutions along the three above tracks. If the current trends endure, this could gradually flatten out many differences between the policy, institutional and legal regimes of CFSP and development cooperation. This will however change nothing to the Treaty-rooted delimitation itself, which will continue to challenge EU policy-makers and the judiciary, and require them to come up with innovative solutions.

The remaining challenges and sore spots of the security-development nexus are well-known, also by EU institutions, and were illustrated in this research through the focus on the Union's policy approach towards the Horn of Africa. These include an unsatisfactory understanding of security-development connections and the context-specific means to address them; the insufficient in-house circulation of information, assessments, intelligence and expertise; the need for more training of CFSP/CSDP and development actors on respectively development and security challenges, as well as the EU's policy arsenal to tackle them; the rigidity of procedures that collides with the need for creativity and speed in crisis situations; the underperformance with regard to joint situation and risk assessment, programming and reporting; and the need to strengthen coordination mechanisms in Brussel as well as to reinforce in-country coordination by EU Delegations and Special Representatives. Whilst anything but perfect, the current constitutional framework holds sufficient untapped potential to tackle these shortcomings. What is needed especially is continued political will, trust and courage to reap this.

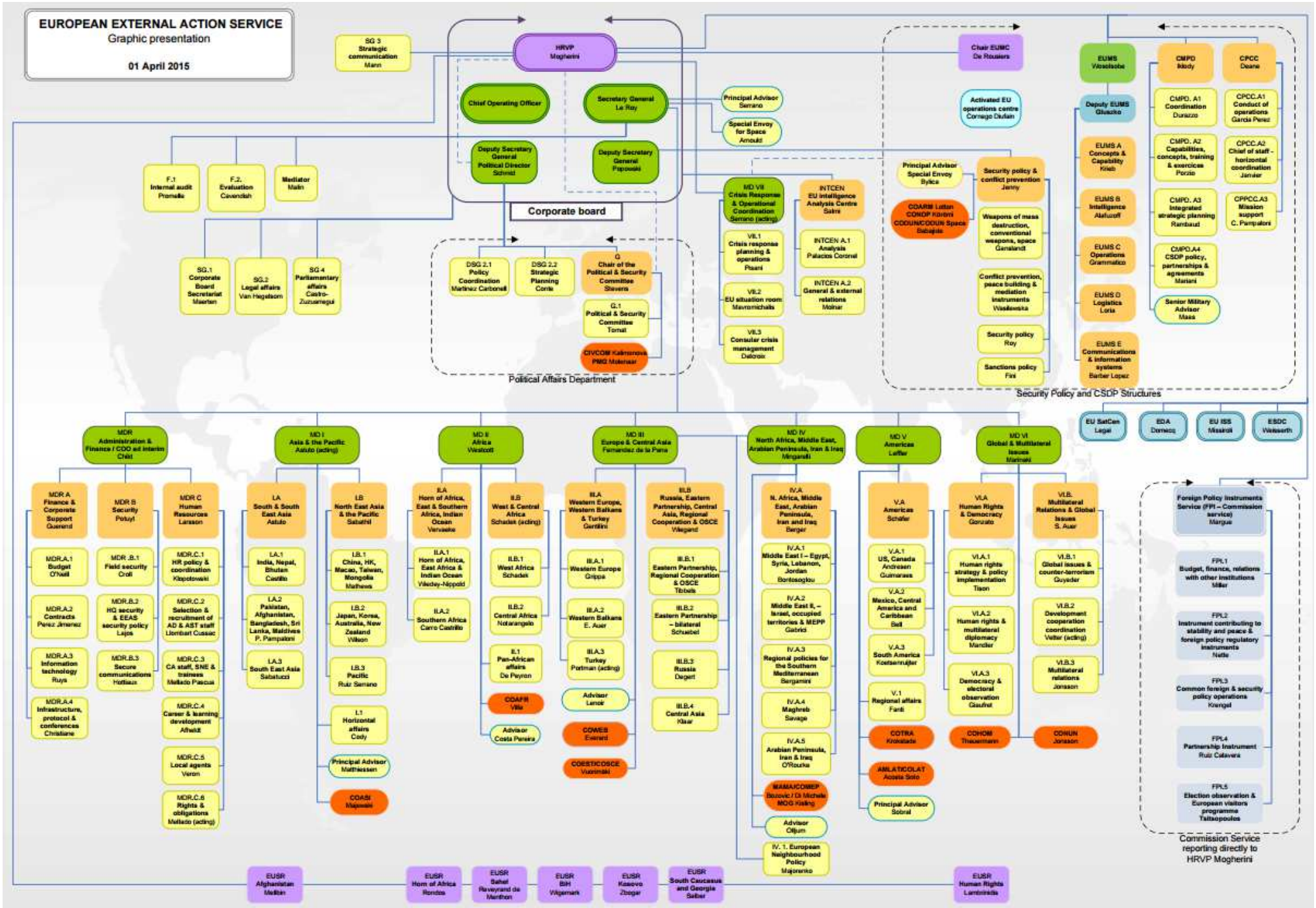
Annex

EEAS organogram (<http://eeas.europa.eu/background/docs/organisation_en.pdf> last accessed on 11.06.2015).

EUROPEAN EXTERNAL ACTION SERVICE

Graphic presentation

01 April 2015



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Summary

The long-standing commitment of the European Union to integrate and fine-tune its policies across the security-development nexus, aims to end the devastating vicious cycle of insecurity and poverty in fragile states. This research holds this pledge up to the mirror of the EU's underlying constitutional framework. Ever since its creation, the EU Treaty system submits the Common Foreign and Security Policy (CFSP) – which includes the Common Security and Defence Policy (CSDP) – to special rules of delimitation. These essentially serve to shield the CFSP from the general dynamic of European integration. The result is a line of fracture that cuts across the EU's efforts, instruments and policy communities striving to enhance the security-development nexus, thereby complicating a coherent and unified approach. The Lisbon Treaty (i.e. the most recent round of EU constitutional engineering) brings this constitutional architecture significantly more in line with such an integrative policy commitment. It strongly draws the coherence card and includes the sovereignty-sensitive CFSP in an undoubtedly unified legal order. However, it does not make an end to its special treatment. The Treaty's strongest ever call for cohering the CFSP with the EU's other external policies, combined with this continued legal delimitation, therefore poses a genuine integration-delimitation paradox. The Treaty stays clear of establishing, or even suggesting, coping mechanisms, thereby putting the onus on decision-makers, EU institutions and the judiciary.

By comparing and contrasting the EU's political discourse and efforts to enhance the security-development nexus, with the limits and possibilities of its evolving constitutional structure, this research aims to get a clearer picture of both dimensions. On the one hand, this is targeted at better understanding the practical implications of Treaty reform in EU external action. On the other hand, this approach is necessary to unravel the full scope, effectiveness and challenges of this policy commitment. This analysis is conducted along three main tracks: the policy track of formulating political approaches and the legislative design of legal instruments, the institutional track of cooperation and coordination across policy communities, and the judicial track of delineating competences by the EU Court of Justice. Along each of these three tracks four key questions are posed: (1) what are the differences between development cooperation and CFSP/CSDP in policy/legislative, institutional and judicial terms; (2) what obstacles and challenges result from these differences; (3) which efforts are taken to transcend them and maximise positive connections between both policy fields; and (4) how effective are these efforts in getting the maximum out of the EU's machinery?

This analysis found that the EU's commitment to the security-development nexus is more than mere rhetoric and has incited an impressive activation of instruments, expansion of institutions and

unceasing embracement of new spheres of action. Largely resulting from the decades-old seclusion of the CFSP, this is however not the result of a unified endeavour, but of separate and often independent development cooperation and CFSP/CSDP efforts. These are treated very differently on the policy, institutional and judicial tracks, leading to considerable fragmentation, duplication, inter-institutional tensions and missed opportunities for cross-competence synergies. The Lisbon Treaty's changes to the EU's external action architecture are clearly more than mere window dressing and steadily bring the three tracks in line with the coherence exigencies of the security-development nexus. The integration-delimitation paradox poses significant challenges for EU policy-makers, institutions and the CJEU, but also leaves them considerable discretion to come up with innovative solutions, adapted to the peculiar EU external action architecture. While a truly unified Treaty system would evidently make the implementation of the security-development nexus more straightforward, the Lisbon Treaty proffers sufficient unexploited potential to address the remaining challenges of fragmentation, duplication, coordination and cooperation.

Samenvatting

Sinds eind de jaren negentig verbindt de Europese Unie zich er in toenemende mate toe om haar activiteiten die de 'nexus' tussen veiligheid en ontwikkeling omspannen beter te integreren en op elkaar af te stemmen. Dit is er op gericht een einde te maken aan de alles vernielende vicieuze cirkel van onveiligheid en armoede in fragiele landen. Dit onderzoek houdt deze verbintenis de spiegel voor van het onderliggende EU constitutionele kader. Dit laatste onderwerpt ontwikkelingssamenwerking en het Gemeenschappelijk Buitenlands- en Veiligheidsbeleid (GBVB) – inclusief het Gemeenschappelijk Veiligheids- en Defensiebeleid (GVDB) – aan in wezen verschillende juridische regimes. In essentie is dit erop gericht het GBVB af te schermen van de algemene Europese integratiedynamiek. Het gevolg is een juridische breuklijn die snijdt doorheen de inspanningen, instrumenten en beleidsmakers die deze 'nexus' benaderen, en bijgevolg een eengemaakte en coherente aanpak bemoeilijkt. Het Verdrag van Lissabon (i.e. de meest recente constitutionele hervorming van de Unie) brengt dit systeem meer in lijn met een dergelijk pleidooi voor beleidsintegratie. Het stroomlijnt het verdragskader voor externe betrekkingen met een sterk leidmotief van coherentie. Hoewel het soevereiniteits-gevoelige GBVB wordt opgenomen in deze overduidelijk eengemaakte rechtsorde, blijft het onderworpen aan bijzondere afbakeningsregels en specifieke procedures. Het Lissabon Verdrag, met haar gelijktijdige pleidooien voor de integratie en afbakening van het GBVB in het externe beleid van de EU, creëert zo een inherente paradox. Zelf formuleert het geen indicaties of mechanismen om hiermee om te gaan en legt zo de verantwoordelijkheid bij EU beleidsmakers, instellingen en het rechtswezen.

Door de politieke retoriek en de inspanningen van de EU betreffende de 'veiligheids-ontwikkelingsnexus' te vergelijken en contrasteren met de beperkingen en mogelijkheden van haar evoluerende constitutionele structuur, tracht dit onderzoek een beter beeld te krijgen van beide dimensies. Aan de ene kant is dit erop gericht de praktische implicaties van verdragshervormingen met betrekking tot het externe optreden van de Unie beter te begrijpen. Aan de andere kant is dit noodzakelijk om complete inzichten te verwerven in de omvang, doeltreffendheid en uitdagingen van deze beleidsverbintenis. Deze analyse gebeurt op drie sporen: het beleidsspoor van politieke retoriek en het wetgevende ontwerp van financiële en juridische instrumenten, het institutionele spoor van samenwerking en coördinatie tussen de relevante EU instellingen, en het rechterlijke spoor van bevoegdheidsverdeling door het EU Hof van Justitie. Op elk van deze drie sporen worden vier vragen onderzocht: (1) wat zijn de verschillen tussen ontwikkelingssamenwerking en GBVB/GVDB in termen van beleid, instituties en rechtspraak; (2) welke obstakels en uitdagingen vloeien hieruit voort; (3)

welke inspanningen worden ondernomen om deze te overstijgen en synergiën te creëren; en (4) hoe doeltreffend zijn deze inspanningen om het onderste uit het diverse EU beleidsarsenaal te halen?

Hieruit werd geconcludeerd dat het engagement van de EU om de 'veiligheids-ontwikkelingsnexus' te optimaliseren meer is dan goede retoriek. Het leidde tot een indrukwekkende ontplooiing van instrumenten, expansie van instellingen en een onophoudend aanboren van nieuwe actiedomeinen. De constitutionele breuklijn zorgt er echter voor dat dit niet het resultaat is van een eengemaakte inspanning, maar eerder van gescheiden en vaak onafhankelijke initiatieven binnen respectievelijk ontwikkelingssamenwerking en GBVB/GVDB. Deze worden bijzonder verschillend behandeld op het beleids-, institutionele en judiciële spoor, wat leidt tot fragmentatie, duplicatie, inter-institutionele spanningen en gemiste kansen om onderling versterkende effecten te genereren. De veranderingen van het Lissabon Verdrag zijn in dit verband meer dan een pleister op een houten been. Ze brengen de drie sporen stelselmatig tot een grotere samenhang tussen veiligheids- en ontwikkelingsbeleid. De constitutionele 'integratie-afscheidingsparadox' betekent dat de wijdverspreide boodschap van coherentie halfslachtig blijft, maar laat EU beleidsmakers, instituties en het Hof ook voldoende ruimte om met creatieve oplossingen voor de dag te komen. Hoewel een volledig eengemaakt kader voor EU extern optreden de implementatie van dit beleidsengagement vanzelfsprekend meer rechtlijnig zou maken, biedt het Verdrag van Lissabon voldoende potentieel om de blijvende uitdagingen van fragmentatie, duplicatie, samenwerking en coördinatie aan te pakken.