Developments

Delimitation of EU-Competences under the First and Second Pillar: A View Between *ECOWAS* and the Treaty of Lisbon

By Dominik Eisenhut[*]

A. Introduction

Since the European Union (EU) agreed upon the extension of its activities to the fields of foreign, security, and criminal policy in the Maastricht Treaty, the question of the delimitation of those new areas of EU competence towards the "classical" policies under the Treaty of the European Community (TEC) has been present. The broad and rather vague scope of the Common Foreign and Security Policy (CFSP) in the so-called second pillar of the EU and the area of political cooperation covered by the third pillar[1] presents several uncertainties. One such uncertainty is the relationship between the supranational legal order under the TEC and the more intergovernmental and diplomacy-based cooperation under the Treaty on the European Union (TEU). Although the EU was organized within a single institutional structure, the substantial differences with regard to voting procedures, competences of the European Court of Justice (ECJ) and the role of the European Commission rendered a clear separation of competences under the different pillars compulsory: CFSP remains beyond the jurisdiction of the ECJ; the Commission and the European Parliament have only marginal rights of participation; and the legal obligations under the second pillar cannot claim supremacy over national law or direct effect.

With regard to the question of separation of competences, Member States have, from the very beginning, been anxious to preserve the mere intergovernmentalism that governed the TEU in such sensitive political areas as security, foreign policy and police matters. They have opposed any attempt by the Commission or the ECJ to draw parallels between the hierarchically elevated and distinct EC law and the other EU policies, based on general principles of public international law.[2] However, over time the broad scope of the EU

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[1] The third pillar today covers intergovernmental cooperation in the field of police and judicial cooperation in criminal matters (Title VI of the TEU).

[2] *See* Antonio Missiroli, *European Security Policy: The Challenge of Coherence*, 6 EUR. FOREIGN AFF. REV. 177 (2001); Alan Dashwood, *External Relations Provisions of the Amsterdam Treaty*, 35 COMMON MKT. L. REV. 1019 (1998).

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intergovernmental pillars has created the questions as to which pillar is the right forum to adopt measures which contain elements of both regimes.[3] The ECJ had to decide on this very issue, first concerning the measures in the field of Justice and Home Affairs[4] and recently on the delimitation of EC development policy and CFSP.[5] Some areas of law have subsequently seen modifications of the Treaties in order to coincide competences under the different pillars. The most prominent example of this is the procedure for the adoption of sanctions by the EU, which requires a two-step approach as laid down in Article 301 TEC and Title V of the TEU.[6] The vast majority of possible overlaps, however, are still disputed. The dispute hinges, *inter alia*, around the interpretation of Article 47 of the EU Treaty. The uncertainty regarding this delimitation has proved to be a significant obstacle to establishing a coherent and effective EU policy approach in many areas of foreign, security and defence affairs.[7]

As a result of the ECJ's judgment in *Pupino*,[8] the academic discussion of such delimitation questions has primarily focused on the possible spill-over of EC law particularities into the second and third pillars. It is submitted, however, that the opposite question is just as important, if not even more so, especially concerning the CFSP of the second pillar. Specifically, the question is to what extent does the EU legal order prevent Member States from extending measures adopted under the second or third pillar into areas of law covered by the provisions of the TEC? Member States seem to be more tempted to act under the intergovernmental regime of CFSP, and its subdivision of European Security and Defence Policy, rather than applying related legal bases of the TEC. This tendency has become a persistent bone of contention, especially regarding EU foreign relations law. A recent example in a different area of law is the establishment of the European Defence

[3] *See* Christian Timmermans, *The Uneasy Relationship Between the Communities and the Second Union Pillar: Back to the Plan Fouchet?*, 1 LEGAL ISSUES OF THE EUROPEAN INTEGRATION 61 (1996); EILEEN DENZA, THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION 290 (2002).

[4] The former Title VI of the TEU contained provisions on Justice and Home Affairs. After the revision of the treaties at Nice in 2001, Title VI now deals with Police and Judicial Cooperation in Criminal Matters.

[5] *See* Case C-91/05, Commission v. Council, 2008 E.C.R I-3651 [hereinafter *ECOWAS* case].

[6] *See* Pascal Gauttier, *Horizontal Coherence and the External Competences of the European Union*, 10 EUROPEAN LAW JOURNAL 23, 30 (2004). Other special provisions have been adopted in the field of financing second and third pillar measures, Treaty Establishing the European Community, art. 269 (2), Dec. 29, 2006, 2006 O.J. (C 321E) 179 [hereinafter TEC], and sanctions against Member States. *See* TEC art. 309; Treaty on European Union, art. 7, Dec. 29, 2006, 2006 O.J. (C 321E) 12–13 [hereinafter TEU].

[7] See Panos Koutrakos, *Constitutional Idiosyncrasies and Political Realities: The Emerging Security and Defence Policy of the European Union*, 10 COLUM. J. EUR. L. 69 (2003) for the example of EU defence policy.

[8] Case C-105/03, Pupino, 2005 E.C.R. I-5285.

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Agency and its Code of Conduct on Defence Procurement.[9] Procurement and the facilitation of intra-Community trade—including in defence goods—clearly fall within the competences of the European Commission under the internal market provisions of the TEC. However, fearing the influence of the Commission and the ECJ in a politically sensitive area, the Member States nevertheless chose the second pillar in order to establish improved cooperation within the EU.[10]

This article will argue that these tendencies are contradictory to EU law, which protects the *acquis communautaire* under the TEC from encroachments of any kind, and therefore also from the adoption of impairing decisions in the field of CFSP. The ECJ has made this very clear in its judgment in *ECOWAS* of May 2008.[11] This judgment will subsequently be analysed, following an overview of the current legal framework for the delimitation of EU competences and its interpretation in earlier judgments.

The second part of this article will focus on the changes brought by the Lisbon Treaty of December 2007. Although the pillar structure of the EU will be demolished and terminological differences between supranational and intergovernmental policies will vanish, important differences between CFSP measures and other forms of action will remain valid under the new TEU and the Treaty on the Functioning of the European Union.[12] Unfortunately, the delimitation of these alternative legal bases will become even more obscure under the Lisbon Treaty than under the current legal order. This is because Article 47 TEU is going to be replaced by the more ambiguous Article 40 of the Lisbon Treaty. It is argued, however, that the prerogative of "supranational" EU law has to persist after the Lisbon Treaty has entered into force.

[9] Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, 2004 O.J. (L 245) 17. *See EU* SECURITY AND DEFENCE – CORE DOCUMENTS 361 (2005) (Nicole Gnesotto ed., 2005) (reproducing a summary of the Code of Conduct, adopted in November 2005).

[10] For a thorough analysis see Martin Trybus, *The New European Defence Agency: A Contribution to a Common European Security and Defence Policy and a Challenge to the Community acquis?*, 43 COMMON MKT. L. REV. 667 (2006)

[11] *ECOWAS* case, *supra* note 5. *See also* Joni Heliskoski, *Small Arms and Light Weapons within the Union's pillar structure: An Analysis of Article 47 of the EU Treaty*, 33 EUR. L. REV. 898 (2008); Ronald van Ooik, *Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences*, 4 EUR. CONST. L. REV. 399 (2008) (providing an analysis of the case).

[12] *See* Panos Koutrakos, *Primary Law and Policy in EU External Relations – Moving Away from the Big Picture,* 33 EUR. L. REV. 666 (2008).

B. Current Delimitation of Competences under the First and Second Pillar of the "Greek Temple"

I. Primary Law

At first glance, the delimitation of first and second pillar measures appears to be very clear. The EU, based on the principle of conferred powers laid down in Article 5 TEC, can only act if certain competences are specifically attributed to it. The separation of CFSP and "supranational" measures should come by itself, depending on which conferred competence is used as a legal basis. If the competence attributed to the EU falls within Title V of the TEU, the measure has to be adopted within the intergovernmental framework of the TEU. Likewise, if the action is based on a TEC provision, one would think that the supranational EC law would apply. This separation is also reflected in Article 5 TEU, which clearly distinguishes between competences attributed to the EU under the TEU and the TEC, respectively.

In practice, however, this distinction is far from being clear. First of all, the competences conferred to the EU in the field of foreign, security and defence policy in Articles 11 (1) and 17 (1) TEU are general in nature, covering "all areas of foreign and security policy" and "all questions relating to the security of the Union, including the progressive framing of a common defence policy." This scope of authority is hardly suited to draw a clear line between CFSP measures and those based on the TEC.[13] In principle CFSP covers everything in the field of foreign relations.[14] At the same time, a vast range of EC policies contain elements of external action, such as trade, development or economic cooperation.[15] The same holds true in the area of defence policy, in which all industry-related aspects of this policy are principally covered by the internal market provisions of the TEC.[16] Consequently, a delimitation of competences merely according to the relevant legal bases seems futile.

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[13] *See* Ramses Wessel, *The Inside Looking Out: Consistency and Delimitation in EC External Relations*, 37 COMMON MKT. L. REV. 1135 (2000); Birgit Weidel, *Regulation or Common Position – The Impact of the Pillar Structure on External Policy*, *in* EXTERNAL ECONOMIC RELATIONS AND FOREIGN POLICY IN THE EUROPEAN UNION 50 (Stefan Griller & Birgit Weidel eds., 2002); *cf.* Alan Dashwood, *The Law and Practice of CFSP Joint Actions*, *in* EU FOREIGN RELATIONS LAW – THE CONSTITUTIONAL PRINCIPLES 71 (Marise Cremona & Bruno de Witte eds., 2008) (providing a different view).

[14] *See* PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION 141 (2004) (explaining the scope of Article 11 TEU).

[15] *See* TEC arts. 133, 177, 181(a).

[16] At least in theory, the defence industrial policy of the Member States is subject to, e.g., EC procurement law, merger control, state aid and free movement of goods. Only exceptionally can the States invoke Article 296 TEC. *See* Panos Koutrakos, *Security and Defence Policy within the Context of EU External Relations*, *in* EUROPEAN SECURITY LAW 249 (Martin Trybus & Nigel White eds., 2007); Dominik Eisenhut, *The Special Security Exemption of Article 296 EC: Time for a New Notion of "Essential Security Interests"?*, 33 EUR. L. REV. 577 (2008) (providing an analysis of the role of EC law in this field).

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The overlapping of certain objectives and legal bases is unavoidable as the "[p]ractice has refused to be forced into the straightjacket of Treaty provisions." [17]

As an alternative idea for determining the legal basis of a "hybrid" measure between the first and second pillars, one could argue for the drawing on multiple legal bases, in case the objectives of the measure are covered by different provisions. This solution, however, has to be rejected as well. As was mentioned earlier, the first and second pillars of the Union do not share the same legal nature. CFSP is organised strictly on an intergovernmental basis, with very limited majority voting, no power of initiative of the Commission and no direct effect or primacy. The EC legal order, on the other hand, transcends public international law and distributes powers differently: the European Parliament has a say and the ECJ surveys the correct application of EC law, just to name two important idiosyncrasies. This being said, it is clear that a certain measure with inter-pillar implications cannot be based on multiple provisions in both pillars.[18] This would lead to a mixture of legal regimes and make the applicable decision-making process and the legal nature of the adopted measure obscure, to say the least. Further, the adoption of such a measure would be impractical. Thus, there is no way around a delimitation of first and second pillar measures leading to a hierarchical relation between the two concurring legal regimes. The broad and imprecise scope of the CFSP makes it necessary to establish a clear boundary between Article 11 and 17 TEU on the one hand and the concurring legal bases in the TEC on the other.

The basis for such delimitation is to be found in EU primary law itself. Article 47 of the TEU limits the effects of the TEU on the EC legal order insofar as "nothing in this Treaty shall affect the Treaties establishing the European Communities." The provision clearly implies a priority of the TEC competences over the second and third pillar. Technically, the provision is necessary to abrogate the rule of *lex posterior* in public international law, which would let the more recent TEU prevail over the provisions of the TEC.[19] It is widely recognized that the pre-eminence laid down in Article 47 TEU does not only cover the TEC provisions themselves, but the *acquis communautaire* as a whole.[20] This is emphasized in Article 2 (1) indent 5 TEU, which obliges the EU to "to maintain in full the *acquis communautaire*."

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[17] Ramses Wessel, *Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the new Constitution for Europe*, *in* THE EUROPEAN UNION – AN ONGOING PROCESS OF INTEGRATION 123 (Jaap de Zwaan, Jan Jans & Frans Nelissen eds., 2004).

[18] *See ECOWAS* case, *supra* note 5, at paras. 76–78.

[19] *See* Vienna Convention on the Law of Treaties art. 30(3), May 23, 1969, 115 U.N.T.S. 331.

[20] DENZA, *supra* note 3, at 289; Hans Krück, *Selbständigkeit der Verträge*, *in* 6 KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT (Hans von der Groeben & Jürgen Schwarze eds, 2003), margin number 7, with further references.

The primacy of the supranational regime of the TEC is further indicated in Article 3 TEU, which states that the EU should pursue its objectives "respecting and building upon the *acquis communautaire*."[21] Moreover, Article 10 (2) TEC can be invoked in order to reason for the primacy of EC law. The provision obliges the Member States to "abstain from any measure which could jeopardize the attainment of the objectives of this Treaty." Thus, if a measure could have been taken on the basis of the TEC, its adoption under CFSP provisions would harm the objects of the TEC and Member States would therefore infringe their obligations under this Treaty. Finally, Article 46 (f) TEU provides for the exceptional competence of the ECJ as far as the application of Article 47 TEU is concerned. Hence, the Court has the competence to "police the boundaries" between the different pillars of the EU.

These legal provisions, seen in the abstract, seem to contain a concise framework for the delimitation of concurring competences under intergovernmental or supranational EU law. However, the actual choice of the right legal basis for the adoption of a measure with implications for both pillars has proven to be controversial and has required clarification by the ECJ. The case law of the Court in this matter will be examined subsequently.

II. From Airport Transit Visa to ECOWAS: Delimitation of Competences by the European Court of Justice

In 1998 the Court first decided a matter concerning the delimitation of first and third pillar measures.[22] The Commission had initiated proceedings under Article 230 TEC with the aim of reaching the annulment of Council Joint Action 96/197/JAI[23] on airport transit arrangements. In its view the arrangement ought to have been taken on the legal basis of former Article 100c TEC[24] under the EC's competence for the "approximation of laws" under Chapter 3 of the TEC as amended in Maastricht. Although the ECJ dismissed the claim of the Commission and decided in favour of the legality of the Joint Action, it nevertheless asserted its authority to review such intergovernmental measures under the third pillar on the basis of Article 46 (1)(f) TEU, as far as the interpretation of Article 47 TEC was concerned. With respect to the delimitation of first and third pillar measures, the court held that:

[21] *See* Timmermans, *supra* note 3, at 67.

[22] Case C-170/96, Commission v. Council, 1998 E.C.R. I-2763 [hereinafter *Airport Transit Visa* case].

[23] EC Joint Action 96/197/JAI of 4 March 1996, 1996 O.J. (L 63) 8.

[24] Article 100 c of the TEC as amended by the Treaty of Maastricht concerned EC immigration policy and provided as follows: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States. […]."

> [i]n accordance with Article L [now Article 46] of the Treaty on European Union, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers apply to Article M of the Treaty on European Union. . . . It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of . . . the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community.[25]

In this regard the ECJ found that, despite its principal exclusion from CFSP and Justice and Home Affairs, it was competent to interpret measures adopted under the TEU as far as this was necessary to determine whether such a measure had to be adopted under TEC provisions instead. The reasoning of the ECJ was as brief as it was straightforward: because of the duty of the Court to protect the *acquis communautaire,* as required by Article 47 TEU, its competence under Article 46(1)(f) TEU extended to the examination of measures adopted under Title VI TEU.[26]

This interpretation of the standard of review under Article 46(1)(f) and 47 TEU was upheld by the ECJ in a further judgment regarding the appropriate legal basis in the TEC or the provisions of the TEU concerning third pillar measures.[27] This time the Commission opposed a Framework Decision[28] adopted by the Council under Title VI of the TEU as a criminal law instrument by which Member States were compelled to adopt certain provisions regarding environmental crimes in their national criminal laws. The ECJ annulled the Framework Decision, stating that the measure could have been adopted under Article 175 TEC instead, which provides the legal basis for EC measures in the field of environmental policy. According to the ECJ, the concurrence of competences had to be decided in favour of the supranational legal order in light of Article 47 TEU.[29] Since the ruling of the ECJ in *Environmental Crimes*,[30] the primacy of TEC provisions over concurring

[25] *Airport Transit Visa* case, *supra* note 22, at paras. 15–16.

[26] *Id.* at para. 17; *see also* 1998 E.C.R. I-2763, para. 11 (statement of AG Fennelly) ("I consider that the Court may interpret acts purporting to be adopted under Title VI of the Treaty on European Union, in order to determine whether or not they deal with matters which more properly fall within the Community sphere of competence as determined by Article M.").

[27] Case C-176/03, Commission v. Council, 2005 E.C.R. I-7879 [hereinafter *Environmental Crimes* case].

[28] EC Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, O.J. 2003 L 29/55.

[29] *Airport Transit Visa* case, *supra* note 22, at para. 53.

[30] *Environmental Crimes* case, *supra* note 27.

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possible legal bases in the TEU can be perceived as established case law, at least relative to the delimitation of first and third pillar measures.[31]

Until recently this case law on the delimitation of first and third pillar measures remained the only indication of the Court's opinion on corresponding questions regarding measures adopted in the field of foreign, security and defence policy. Only in 2005 did the European Commission initiate an annulment procedure regarding a measure under Title V of the TEU, based on an alleged infringement of Article 47 TEU.[32]

1. The Dispute in ECOWAS

The contested Decision[33] implemented a CFSP Joint Action on combating the destabilizing accumulation and spread of small arms and light weapons.[34] It included the commitment of the EU to contribute to the efforts of the Economic Community of West African States (ECOWAS) to prevent the accumulation of such weapons. As for its legal basis, the Decision referred to the Joint Action in conjunction with Article 23(2) TEU, which provides for the implementation of Joint Actions in the field of foreign and security policy. The funding of these contributions was assured through the CFSP budget.

At the adoption of the Decision, the Commission already opposed the Joint Action and the Decision of the Council and its financing under CSFP.[35] In its view the measure should have been taken on the basis of the TEC's Title XX on development cooperation instead. Moreover, according to the Commission, the EC was competent on the basis of Article 11(3) of the *Cotonou*-agreement, which specifically mentioned the struggle against the accumulation of small arms and light weapons as a relevant activity.[36] On this basis funding would have been available under the 9th European Development Fund. The Commission held the view that the Joint Action fell within the competences of the Community and therefore, according to Article 47 TEU, ought to have been taken on the basis of these competences. Even though the actions in question concerned a field of

[31] *See* Case C-440/05, Commission v. Council, 2007 E.C.R. I-9097 (discussing criminal law-measures under Title VI TEU on the one hand and action under Title V TEC (Transport) on the other); s*ee also* Christoph Herrmann, *Much Ado about Pluto? The 'Unity of the Legal Order of the European Union' Revisited*, 5 EUI WORKING PAPERS RSCAS 6 (2007); EECKHOUT, *supra* note 14, at 148.

[32] *ECOWAS* case, *supra* note 5, at para. 23.

[33] EC Decision 2004/833/CFSP of 2 December 2004, 2004 O.J. (L 359) 65.

[34] EC Joint Action 1999/34/CFSP of 17 December 1998, 1999 O.J. (L 9) 1.

[35] EC Council Document No. 15236/04 PESC 1039 of 25 November 2004.

[36] The *Cotonou*-agreement of 23 June 2000, 2000 O.J. (L 317) 1, replaced the former *Lomé*-agreements and is an instrument of EU development policy within the framework of its association policy under Art. 310 TEC, concerning states in Africa, the Caribbean and the Pacific.

shared competences, the Commission argued that any competence attributable to the Community excluded action under the second pillar.[37]

Based on this legal opinion, the Commission, supported by the European Parliament, brought an action for annulment under Article 230 TEC to the ECJ and claimed the annulations of both the Decision and the relevant parts of the Joint Action. The Council, supported by several Member States, asked the Court to dismiss the application as unfounded as far as the Decision was concerned. Regarding the Joint Action, it contended that the claim was inadmissible and requested, in the alternative, its rejection as unfounded. In its view, the EC was not competent for the action taken to combat the proliferation of small arms and light weapons.[38] Furthermore, with respect to the Joint Action, the action was seen to be inadmissible in the first place because it required the ruling on the legality of a measure falling within the CFSP, and therefore constituted an infringement of Article 46 TEU.[39]

2. The Judgment of the ECJ

On the question of jurisdiction, the Court was very brief. It simply restated its reasoning in *Airport Transit Visa* and *Environmental Crimes*, arguing that it was competent to review measures under the second and third pillars insofar as this was necessary for it to protect the *acquis communautaire*. The Court held that this was envisaged in Article 46(f) TEU, and Article 47 TEU.[40]

As to the question of an infringement of Article 47 TEU, it started out with an examination of the purpose and meaning of this provision in general. Going even further than the already far-reaching conclusions of the Advocate General in the case,[41] it held that:

> [i]n providing that nothing in the EU Treaty is to affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them, Article 47 EU aims, in accordance with the fifth indent of Article 2 EU and the first

[37] *ECOWAS* case, *supra* note 5, at para. 23.

[38] *Id*. at paras. 42–55.

[39] *Id.* at para. 30.

[40] *Id.* at paras. 31–34.

[41] *Id.* at paras. 98, 176 (Opinion of AG Mengozzi).

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> paragraph of Article 3 EU, to maintain and build on the acquis communautaire.[42]

The Court went on to deduce from this statement that:

> a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of Article 47 TEU whenever it could have been adopted on the basis of the EC Treaty.[43]

It clearly rejected the view of the Council that this was not the case with regard to shared competences (as in the field of development policy) of the EC and the Member States, because the latter could have acted outside of the EU altogether instead of taking a measure under Title V of the TEU. It concluded that Article 47 TEU was infringed whenever a measure was taken under the CSFP provisions in an area in which the EC held competences, regardless of their shared or exclusive character.[44] Based on this finding, it contented itself to establish the competence of the EC for measures of combating the accumulation of small arms and light weapons on the basis of the *Cotonou*-agreement and EC development policy in general and held that this competence of the EC made an alternative CSFP measure illegal. It therefore annulled the Decision 2004/833/CFSP on the financial contributions to ECOWAS.[45]

3. Analysis

The findings of the ECJ are worth further consideration in several respects. First, the decision raises questions of coherence with regard to the relationship of competences under CFSP and the TEC. As illustrated above, the Court deemed every measure under CFSP invalid, which could have been taken on the basis of TEC competences. At the same time, in order to determine whether a certain measure that touches upon aspects of both CFSP and TEC provisions falls within the competences of the Community, the ECJ referred to the "main purpose"[46] of the measure. This necessarily implies that a measure that has its main purpose in the field of CFSP, but also contains elements referable to Community policies, could legally be taken under Title V of the TEU. This result, however, is hardly

[42] *Id.* at para. 59.

[43] *Id.* at para. 60.

[44] *Id.* at para. 62.

[45] The Court did not annul the relevant Title II of Council Joint Action 2002/589/CFSP, because, as the Decision was illegal because of its own defects, this was not necessary in order to meet the Commission's aim. *Id.* at para. 111.

[46] *Id.* at para. 72.

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compatible with the statement of the ECJ referred to above, according to which every measure which *could* be taken under the TEC *had* to be taken on the Community level. Otherwise such a measure would, in the view of the Court, infringe at least in part upon Article 47 TEU.

An explanation for this inconsistency might be found by thinking of practical examples for the delimitation constructed by the ECJ. In practice, even if a measure is clearly based on foreign policy or security considerations and therefore adopted under Title V of the TEU, it will be very difficult to exclude the possibility that such a measure might touch upon supranational competences attributed to the Community in the TEC. A vast majority of CFSP measures will contain at least some element of commercial or development policies, humanitarian aid or other EC policies. It is therefore understandable that the ECJ wanted to preserve the legality of such CFSP measures and therefore referred to the main purpose of these measures in order to determine whether TEC competences are infringed. From a dogmatic point of view, however, the delimitation on the basis of an *absolute* prerogative of the TEC and, at the same time, the reference to the "main purpose" of a measure, remains inconsistent. Moreover, the facts in the *ECOWAS* case themselves show the difficulties in determining when the main purpose of a measure is related to foreign or security policy goals. The contested Decision on the contributions to ECOWAS was predominantly motivated by security considerations. Only parenthetically did it mention the importance of the reduction of light arms and small weapons for the development of the region.[47] Hence, one could easily argue (and the Advocate General in the case did indeed[48]) that the Decision had as its main purpose a CFSP goal and was therefore rightly adopted under Title V of the TEU.

Secondly, it is remarkable that the ECJ refused to make any distinction between the different types of competences conferred on the EC, as far as the delimitation of first and second pillar measures are concerned. From this it follows that although Member States are able to act outside the EU altogether on their own or jointly in the field of shared competences, they would not be able to act within the framework of the CFSP. They either have to use the supranational Community framework of the EU or refrain from acting within the EU at all. At first sight, one might think that such a limitation of the possible action within the framework of the EU is against the idea of streamlining European foreign

[47] *See* Council Decision 2004/833/CFSP of 2 December 2004, 2004 O.J. (L 359) 65, Preamble para. (1). This is also expressed by Article 4(2) of the Decision, which establishes an obligation to monitor the consistency of the activities of the Union in the field of small arms and light weapons with regard to its development policies. This section demonstrates that development is only a secondary aim of the Decision, which primarily concerns security policy.

[48] *See ECOWAS* case, *supra* note 5, at paras. 177–195 (Opinion of AG Mengozzi).

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policy through action under CFSP. The approach of the ECJ is nevertheless convincing.[49] It is in accordance with the obligation in Article 10(2) TEC, mentioned above. By giving preference to EC competences over concurring competences under the TEU, the EU legal order obliges Member States to use Community competences whenever possible. If they instead use provisions of the intergovernmental pillars, they disregard the institutional structure of the EU and thereby "jeopardise the attainment of the objectives of the [EC] Treaty."[50] The exclusion of CFSP action in the field of EC competences in particular does not touch upon the principle of conferred powers. Member States are still free to act outside the EU. The exclusion of CFSP measures only limits the Council in its activities, which is not protected by the principle of conferred powers as contained in Article 5 TEC.

The third observation is more of political than of legal nature. As will be demonstrated, the delimitation of CFSP and supranational competences of the EU will become even less clear under the Treaty of Lisbon. The very forceful argument for the primacy of the EC competences of the EU in *ECOWAS* could be interpreted as an early warning of the ECJ not to blur the boundaries between the different integrational layers of the EU. In a recent case, which was an appeal against the judgment of the Court of First Instance (CFI) in the *Kadi* case, the ECJ further elaborated on the delimitation of competences between the first and second pillars.[51] In its judgment, the Court quashed the decision of the CFI and, *inter alia*, emphasized the separation of supranational and intergovernmental competences. In the context of the question of the right legal basis for "targeted" sanctions against individuals, the ECJ stated that the legal basis for EC action under Article 308 TEC cannot be connected to CFSP policy objectives enshrined in Title V of the TEU.[52] Exemptions to this rule had to be explicitly contained in the treaties, as being the case in Article 301 TEC. In this context, the Court emphasized

> the coexistence of the Union and the Community as integrated but separate legal orders. And the constitutional architecture of the pillars . . . constitute

[49] *See* Christophe Hillion & Ramses Wessel, *Restraining External Competences of EU Member States under CFSP* in EU FOREIGN RELATIONS LAW – THE CONSTITUTIONAL PRINCIPLES 116 (Marise Cremona & Bruno de Witte eds., 2008) (writing prior to the *ECOWAS* judgment).

[50] TEC art. 10(2).

[51] Joint Cases C-402/05 and C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation, Judgment of 3 September 2008 [hereinafter *Kadi* case]. *See* Takis Tridimas & Jose Gutierrez-Fons, *International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?*, 32 FORDHAM INT'L L.J. 667 (2009) (analyzing the judgment of the ECJ in *Kadi*).

[52] *Kadi* case, *supra* note 51, at para. 197. This understanding of Article 308 is reflected in the corresponding provision of the consolidated TFEU, which, in Article 352 (4), expressly excludes the evocation of CFSP objective with regard to that legal basis. *See* Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, art. 352 (4), May 9, 2008, 2008 O.J. (C 115) 1, 196.

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> considerations of an institutional kind militating against any extension of the bridge to articles of the EC Treaty other than those with which it explicitly creates a link.[53]

Arguably, by this finding the ECJ aimed at preventing the multiplication of interlinkages between the supranational and intergovernmental of EU policies. Whereas in *ECOWAS* the ECJ primarily relied on the notion of primacy of the *acquis communautaire* and the possibility to include CFSP objectives in overriding EC measures, the finding in *Kadi* concerning the exclusion of CFSP objectives as legitimisation for supranational measures seems, at first sight, contradictory. However, what the ECJ wanted to say, in the view of the author, is that CFSP objectives may well be (subordinary) aims of the EC measures, but such measures must not be used to pursue CFSP aims in the first place. This understanding, it is submitted, is in accordance with Article 47 TEC and the *rationale* of the pillar architecture.

The fear of a "blurring of the boundaries" between intergovernmental and supranational EU competences has been expressed earlier by Members of the Court.[54] It is this fear, in my view, that has, at least to some extent, motivated the ECJ to be as explicit with regard to the primacy of EC supranational competences over CFSP legal bases. This fear is now more valid than ever, particularly in the light of the new delimitation as provided in the Treaty of Lisbon.

C. After Lisbon: New Escape Routes into Intergovernmentalism?

Unlike the Constitutional Treaty of 2004, the Reform Treaty of Lisbon preserves the dualistic structure of EU primary law, based on a modified TEU and a new Treaty on the Functioning of the European Union (TFEU), which basically contains the provisions of the former TEC. Moreover, the separate procedures with regard to decisions taken under the TFEU on the one hand and the CFSP provisions of the TEU on the other hand remain in place. In the area of CFSP, the jurisdiction of the ECJ continues to be largely excluded, the role of the Commission and the European Parliament remain insignificant and the decision procedures still require unanimity. Furthermore, direct effect and primacy in the national legal order cannot be invoked with regard to acts in the framework of CFSP. To sum up, CFSP action continues to be qualitatively different from other legal measures of the EU. Therefore, it is submitted, the distinction between supranational TFEU law (the former Community competences, plus the former third pillar of the TEU) and intergovernmental cooperation in the field of CFSP remains valid, although the EU in the future disposes of a single legal personality. The abolition of the terminological distinction between EC and EU

[53] *Kadi* case, *supra* note 51, at para. 202.

[54] Timmermans, *supra* note 3.

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law cannot conceal this ongoing dualism.[55] Therefore, the delimitation of CFSP and other EU competences will not cease to be of great importance under the new Treaty regime. It is argued that, due to the supersession of important provisions of the hitherto treaties, this distinction will become more opaque than before the reform of 2007.

I. The New Legal Framework

The most basic modification through the Reform Treaty regarding the delimitation of competences is the future equal footing of TEU and TFEU as the two sources of EU primary law. The policies under the TEU no longer "supplement"[56] the former EC competences, but reside on the same level.[57] In addition, the TEU no longer contains the requirement to "maintain in full the *acquis communautaire*," as hitherto enshrined in Article 2 (1) TEU. Moreover, Article 47 TEU is replaced by the new Article 40 TEU, which provides for the mutual non-affection of the two treaties.[58] Like Article 47 TEU in its old version, the observance of Article 40 can be scrutinized by the ECJ.[59] Further, and also relevant in our context, the imperative of consistency will be contained in Article 21 (3) TEU. Finally, according to Article 7 of TFEU, it also explicitly covers the supranational policies of the EU.

In relation to the competences of the EU under the CFSP, Article 24(1) and 42(1) TEU continue to capture all aspects of foreign and security policy and a vast range of defence-related matters. Despite the single legal framework of the EU, these competences remain outside the general provisions on competence in Articles 3 to 6 of the TFEU. Article 3(6) of TEU merely states that the EU "shall pursue its objectives by appropriate means

[55] *See* Editorial Comments, *The CFSP under the EU Constitutional Treaty – Issues of Depillarisation*, 42 COMMON MKT. L. REV. 325 (2005); KOUTRAKOS, *supra* note 12, at 669. It has already been tried to find new terminological differentiations between CFSP and supranational law, speaking of "partial differentiation," Bruno de Witte, *The Constitutional Law of External Relations*, *in* A CONSTITUTION FOR THE EUROPEAN UNION 163 (Ingolf Pernice & Miguel Poiares Maduro eds., 2004), or "structural differentiation." Alan Dashwood, *The Relationship Between the Member States and the European Union / European Community*, 41 COMMON MKT. L. REV. 355, 363 (2004).

[56] TEU Former art. 1(3).

[57] TEU art. 1(3) sentence 2 as amended in Lisbon: "Those two Treaties shall have the same legal value."

[58] TEU art. 40 in its amended version reads as follows: "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."

[59] TEU art. 24 (1); TFEU art. 275.

commensurate with the competences which are conferred upon it in the Treaties." Hence, their placement into the systematic structure of the EU remains unclear.[60]

For the most part, Article 40 TEU, as amended by the Treaty of Lisbon, raises questions with regard to the future delimitation of competences. Lacking a unidirectional statement for the primacy of supranational EU law over CFSP legal bases, the provision is likely to pose a threat to the integrity of the *acquis communautaire*. The inconclusive delimitation might seduce Member States to adopt measures based on CFSP provisions, which would usually fall within the supranational competences of the EU. Being largely independent from Commission, ECJ and European Parliament within this former second pillar, the "escape into intergovernmentalism" continues to be attractive in sensitive policy fields such as foreign, security and defence policies.[61]

Article 40 TEU takes up the notion of the former Article 47 TEU in paragraph 1 and requests that the implementation of CFSP "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." However, a problem arises in the second paragraph, which reads as follows:

> 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.

By virtue of this second paragraph, the primacy given by the TEU in its old version to the supranational legal bases will not be replicated under the new treaties.[62] By the reversed obligation not to affect CFSP procedures and powers through measures based on the TFEU, the clear prerogative of the latter, as stated in Article 47 TEU, is abolished. Indeed, in theory, the two paragraphs make sense, as they aim to separate two distinct legal regimes. However, as has been shown above, the distinction of CFSP and supranational competences is not clear-cut. In future, delimitations of measures affecting both regimes

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[60] *See* Marise Cremona, *A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty*, EUI WORKING PAPER LAW NO. 30, 17 (2006) (regarding the equivalent provisions of the Constitutional Treaty).

[61] See WESSEL *supra* note 17, at 133 for examples of "PESCialisation" of the TEC-policies within the current legal framework.

[62] *See* Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617, 626 (2008); *but see* PANOS KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW 494 (2006) (contending that Article 40 contains the ratio of former TEU art. 47).

will face a double obligation "not to affect" CFSP provisions and the TFEU, an obligation which will prove to be untenable. Appropriately, the provision has been denoted as a "hushed reverberant sound" of the old Article 47 TEU.[63] The uncertainty regarding this question of delimitation is further increased by the deletion of the supplementary role of the TEU vis-à-vis the TFEU in the former version of Article 1(3) TEU, which is replaced by a passage in the amended version, stating the "same legal value" of the two treaties.

To sum up, the new legal framework will make it easier for Member States to legitimise action under CFSP provisions that simultaneously affect the competences attributed to the EU on the supranational level in the TFEU. However, subsequently it will be argued that, notwithstanding the ambiguous wording in the consolidated treaties, the primacy of supranational law must prevail. The importance of the internal market, systematic considerations and the principle of consistency do not allow a "blurring of the boundaries" between CFSP and other EU policies.

II. Preserving Primacy: The Case for Comprehensive Supremacy of Supranational Competences under the Treaty of Lisbon

Alan Dashwood has argued that the legal point of view taken by the ECJ in *ECOWAS* will become undefendable under the new legal order established by the Treaty of Lisbon. In his view, the new Article 40 of TEU will abolish the primacy of "Community" competences over intergovernmental CFSP competences.[64] I do not share this view. If one regards the aim and purpose of Article 40 TEU and reads it in the context of the overall treaty structure, the *rationale* of the *ECOWAS* judgment will remain tenable under the new Treaty regime.

The legal basis of CFSP or supranational provisions of EU primary law continues to be the starting point for the delimitation of competences under the consolidated treaties. It has been shown, however, that in most cases the choice of the appropriate legal basis is far from being clear. Unambiguous determinations are only possible relative to exclusive competences of the EU, for example in the field of commercial policy.[65] With respect to any other type of competences, a hierarchy of concerned legal bases has to be established. It is submitted that two main arguments make the case for a continuing primacy of supranational legal bases.

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[63] "Leiser Nachhall" (Translation by the Author); *see* CHRISTOPH HERRMANN (together with STEFAN OHLER & RUDOLF STREINZ), DER VERTRAG VON LISSABON ZUR REFORM DER EU 117 (2008).

[64] Dashwood, *supra* note 13, at 77.

[65] *See* TFEU art. 3(1); *see also* Alan Dashwood, *The Limits of European Community Powers*, 21 EUR. L. REV. 113 (1996) (discussing the scope of exclusive competences).

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1. Systematic Considerations

The first argument can be drawn from a cross-treaty interpretation of the TEU and the TFEU. This notion of comprehensive inter-treaty interpretation is also reflected in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. From a systematic point of view, one recognizes an important difference between competences of the EU attributed under the TEU and the TFEU. The EU Treaty contains wide and rather imprecise competences for the EU in the field of foreign, security and defence policy, whereas the provisions of the TFEU on competence are of a much narrower and more concrete nature. Also, they are of a different legal quality than CFSP competences, having direct effect and primacy over national law. Therefore, it can be argued that the competences in the TFEU have to be perceived as *leges speciales* in relation to the general provisions in the TEU.[66] They then would have to be exclusively applied whenever a measure falls within their scope.

2. The Principle of Consistency

Second, the principle of consistency, laid down in Articles 21(3) TEU and Article 7 TFEU, argues for the ongoing primacy of supranational legal bases in the EU's action. The disputed question under the current legal framework as to whether this principle, only contained in Article 3 of the TEU, is also valid for the policies pursued under the TEC will become obsolete under the new provisions of the Treaty of Lisbon.[67] The consolidated Treaty versions will contain a clear statement in favour of its comprehensive applicability. Firstly, Article 21 (3) paragraph 2 covers consistency with respect to external action of the EU:

> 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.

Then, in Article 7, the TFEU extends the principle to all other areas of EU activity:

> The Union shall ensure consistency between its policies and activities, taking all of its objectives into account

[66] *See* HERRMANN, *supra* note 31, at 15.

[67] See Matthias Pechstein, *Das Kohärenzgebot als entscheidende Integrationsnorm der Europäischen Union*, EUROPARECHT 247 (1995) and Peter-Christian Müller-Graff, *Einheit und Kohärenz der Vertragsziele von EG und EU*, EUROPARECHT Beiheft 2, 67 (1998) for the dispute regarding the current provisions.

> and in accordance with the principle of conferral of powers.

Read in combination, the two Articles establish an obligation to act consistently throughout the whole range of EU activities, regardless of whether the action was taken within the intergovernmental or the supranational framework of the EU. CFSP action must be consistent with, for example, development policy or the action of the Commission regarding the internal market, and *vice versa*.

On first sight, this analysis may be perceived as putting the supranational and intergovernmental EU competences on the same level and therefore making the case for reciprocal and equitable observance. In the authors view, however, the principle of consistency supports the argument for an ongoing primacy of supranational competences. Consistency can be described as the requirement of coherent, unambiguous action of an entity, in this case the EU.[68] Expanding on its literal meaning, consistency in European law contains a positive obligation to adjust one's action to the actions of other actors within the same entity. The notion implies that consistent action achieves more than the freedom from contradictions. It requires that the EU's policy, viewed as a whole, engenders more than the "sum of its parts." This notion is better expressed in other treaty languages, using the equivalent of the English word "coherence" (French: cohérence, German: Kohärenz).[69] *Missiroli* has expressed this to the point:

> Consistency in law means the absence of contradiction, coherence also implies positive connections: the former is about compatibility and making good sense, the latter more about synergy and making good sense.[70]

On the basis of such a wide understanding of consistency, whenever an action touching upon different fields of competence is to be taken, the way in which the action brings about the largest added value for the EU as a whole should be considered. This maximum of positive effect is usually achieved if a measure can be taken on the basis of the supranational, i.e. TFEU, provisions of EU law. Here, the influence of the European Parliament, the Commission, and the ECJ is strongest. Legal acts based on Article 288 TFEU (which replaces the former Article 249 TEC) have direct effect and primacy over national

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[68] PECHSTEIN, *supra* note 67, at 251.

[69] *See* Gauttier, *supra* note 6; Christian Tietje, *The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy*, 2 EUR. FOREIGN AFF. REV. 211 (1997); *see also* KIRSTEN SIEMS, DAS KOHÄRENZGEBOT IN DER EUROPÄISCHEN UNION UND SEINE JUSTITIABILITÄT 21 (1999) (providing an in depth-analysis).

[70] Antonio Missiroli, *Coherence, Effectiveness and Flexibility for CFSP/ESDP*, *in* EUROPEAS FERNE STREITMACHT 124 (Erich Reiter, Reinhardt Rummel & Peter Schmidt eds., 2002).

law. Therefore the interest of the EU as such is central and Member States are less influential than under the largely intergovernmental procedures of CFSP. This leads to the conclusion that consistency requires supranational action, wherever an applicable legal basis can be found.

D. Conclusion

Reaching out into fields traditionally at the core of national policy and perceived as expression of the Member States national sovereignty, the advancement of foreign, security and defence policy within the EU has created new challenges both to the Member States' national constitutional systems and to the *acquis communautaire*. The latter is now, in an increasing range of competences, faced with an alternative forum of action for the Member States, in which they are much more master of their own acts than under supranational TEC (and future TFEU) provisions. The appropriate delimitation of those CFSP competences and the "classical" supranational legal bases, however, substantially limits the possibility of Member States to use the intergovernmental forum of CFSP instead of TEC provisions.

It has been shown that the delimitation of competences between the first and second pillars cannot simply be achieved by the choice of the "right" legal basis. Measures regularly cover aspects subject to competences under both pillars. As CFSP and TEC measures are fundamentally distinct in their legal quality, the evocation of multiple legal bases is not a way out of the delimitation problem. Instead, a clear delimitation can be drawn under the terms of Article 47 TEU, which gives primacy to the supranational legal bases of the TEC. Whenever a measure can be based on the supranational competences of the EU, the measure has to be based on these competences. The ECJ has made this very clear in its recent judgment in *ECOWAS*. The rationale behind its reasoning is the duty to protect the *acquis communautaire*, enshrined in the TEU and especially in Article 47 thereof.

Furthermore, it was argued that the *rationale* of *ECOWAS* is still valid under the post-Lisbon Treaties. Although the new legal framework, and in particular Article 40 TEU, may make it more tempting for Member States than before to "escape into intergovernmentalism," CFSP legal bases continue to be supplementary to legal bases in the TFEU. Despite the ambiguity of Article 40 of TEU, the principle of consistency and teleological considerations make the case for ongoing primacy of supranational competences.

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