

Competence to conduct a Common Foreign and Security Policy

Introduction

The preceding chapters offer an account of the EU's competences and objectives as regards external action, under the TFEU. The emphasis there was on the first concept, competences, rather than the second, objectives. The original EEC Treaty was sparsely worded as regards the objectives of the Community's external policies, and external action was quickly turned into a legal battleground over the location of the border between the Community's and the Member States' competences, in particular as regards treaty-making. With the amendments made by the Maastricht Treaty came more EC Treaty language on the objectives of external action, in particular concerning development co-operation, yet lawyers continued to focus on issues of the nature and delimitation of competences.

The Maastricht Treaty created the European Union, founded, according to Article 1, on the European Communities, but supplementing them by the policies and forms of co-operation established by that Treaty: a Common Foreign and Security Policy (CFSP) and Justice and Home Affairs. The CFSP in particular was of course a purely external policy, supplementing, to borrow from the TEU again, the external Community policies. Yet its denomination did not suggest a mere supplementary role. Rather, it suggested broad coverage, as nearly any form of external action could be brought within the terms 'foreign and security policy'. This raised difficult questions of the interrelationship between EC external policies and the CFSP. Those questions arose against the broader canvas of constitutional confusion over the nature of the EU, and its three pillars.¹ The Treaty of Lisbon has modified this pillar structure, yet it may be helpful to make some general observations about the past debates. The EC pillar was said to be supranational, with much majority voting, and a strong role for supranational institutions such as the Commission, the European Parliament, and the

¹ JHH Weiler, 'Neither Unity Nor Three Pillars—The Trinity Structure of the Treaty on European Union' in J Monar, W Ungerer, and W Wessels (eds), *The Maastricht Treaty on European Union* (European Interuniversity Press, 1993) 49; DM Curtin and I Dekker, 'The EU as a "Layered" International Organization: Institutional Unity in Disguise' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP, 1999) 83; 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* (Kluwer Law International, 1998) 51.

Court of Justice. Constitutionalism was the hallmark of its legal order, with direct effect and supremacy as the operating systems of such constitutionalism.² The EC was governed by Community law, a 'new legal order'.³ The second and third pillars, by contrast, were said to be intergovernmental in character, with unanimity as a rule and a much smaller role for the supranational institutions. Particularly as regards the CFSP, the Commission and the Parliament stood more or less at the sidelines, and the Court of Justice appeared to have no role whatsoever. *Community* law did not apply, and many commentators regarded the CFSP as a form of co-operation coming within the sphere of international law instead.⁴ The latter view was not uncontested, however. Increasingly the EU was looked at as a single organization, and EU law as a distinct, unified legal discipline, even if not all Community law principles and concepts might as such apply to the second and third pillars.⁵

The Lisbon Treaty has confirmed this trend towards greater unity. The EC has been abolished, and there is now a single EU. It is still governed by two treaties, the TEU and the TFEU, but that is an accident of the EU's constitutional history, rather than a matter of conscious design. The one EU has legal personality (Article 47 TEU), putting to an end debates about whether the EU, as distinct from the EC, had such personality. In the sphere of external action, this quest for unity is particularly prevalent, as is shown by the fact that there is an overall set of objectives for such external action (Articles 3(5) and 21(2) TEU), and great emphasis on ensuring consistency between the different areas (e.g. Article 21(3) TEU). Whereas previous Treaty versions attempted to arrive at such consistency through mere constitutional command (see old Article 3 TEU), the Treaty of Lisbon built an institutional bridge across the various areas of external action: the High Representative of the Union for Foreign Affairs and Security Policy (hereafter High Representative), assisted by the European External Action Service (EEAS).

However, the fact that the EU is more unified, in particular as regards external action, does not mean that its competence to conduct a CFSP can simply be analysed along the same lines as its other external competences (see Chapter 4). The Treaty of Lisbon has largely conserved the CFSP's intergovernmental traits. Decision-making continues to be in the hands of the Council, deciding by unanimity, and the Commission, the European Parliament, and the Court of Justice still have very limited roles to play. In a sense, the CFSP continues to be a pillar of its own, even if the pillar image

² Cf JHH Weiler, *The Constitution of Europe* (CUP, 1999) 221.

³ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁴ E Denza, *The Intergovernmental Pillars of the European Union* (OUP, 2002) 19; MR Eaton, 'Common Foreign and Security Policy' in D O'Keefe and P Twomey, *Legal Issues of the Maastricht Treaty* (Chancery Law, 1994) 222; I McLeod, ID Hendry, and S Hyett, *The External Relations of the European Communities* (OUP, 1996) 412; M Koskenniemi, 'International Law Aspects of the Common Foreign and Security Policy' in M Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International, 1998) 30.

⁵ A von Bogdandy, 'The Legal Case for Unity: the European Union as a Single Organization with a Single Legal System' (1999) 36 CML Rev 887; I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 CML Rev 703; CWA Timmermans, 'The Constitutionalization of the European Union' (2002) 21 YEL 1.

has now become very awkward indeed, as only two pillars remain standing, which conjures up a picture of decay and ruin rather than design and construction. Be that as it may, the conservation of this intergovernmental pillar produces some important questions of EU competence to conduct a CFSP. Those questions first pertain to the nature of that competence. It is clear from Article 2(4) TFEU that the EU's CFSP competence is neither exclusive nor shared, but rather in an undefined category of its own.⁶ The effects on national competence are therefore difficult to determine. But secondly, and more importantly, there are complex questions of scope, in particular in relation to other areas of external action. The decision that a particular measure, or the provisions of an international agreement, come within the scope of the CFSP means that the intergovernmental mechanisms of decision-making apply. The decision that such a measure or agreement pertains to other areas of external action, for example development co-operation, triggers supranational decision-making, involving the Commission and the Parliament, next to the Council. For internal action, it also determines the use of legal instruments such as directives and regulations, which are not available to the CFSP.

The focus of this chapter is therefore mostly on the scope of the CFSP, and its delimitation from other EU external policies. Although the Treaty of Lisbon introduces some important modifications in that respect, much of the analysis concerns the law as it has evolved under the previous versions of the TEU and of the EC Treaty. This evolutionary approach is arguably to be preferred, since the Lisbon Treaty innovations and modifications can only be understood and interpreted from an evolutionary perspective.

The structure of the analysis is as follows. The following section explores the Treaty language concerning the objectives of the CFSP, and the competences conferred upon the EU institutions to pursue those objectives, in contrast with other external competences. The chapter then further explores the delimitation of competences, on the basis of an analysis of the case law of the Court of Justice on (old) Article 47 TEU. That is followed by an attempt to interpret the new delimitation provision, (current) Article 40 TEU. From the issue of delimitation, the chapter moves to the concept of consistency between the various areas of external action.

CFSP objectives and competences

Scope

The TEU and TFEU, as amended by the Treaty of Lisbon, are extremely short as regards the scope and nature of the EU's competence to conduct a CFSP. The scope

⁶ J-C Piris, *The Lisbon Treaty—A Legal and Political Analysis* (CUP, 2010) 77; S Griller, 'External Relations' in B de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (RSCAS, 2003) 141–2; G De Baere, *Constitutional Principles of EU External Relations* (OUP, 2008) 109–12.

of the EU's competence in CFSP matters is not particularly well-defined. Article 24(1) TEU provides:

The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

As can be seen, there are two elements to this definition. On the one hand, the CFSP covers all areas of foreign policy; on the other, it extends to all questions relating to the EU's security. The former element is not further defined in the TFEU. The latter, by contrast, forms the object of an entire section, with the heading 'Provisions on the Common Security and Defence Policy' (hereafter, CSDP). According to Article 42(1) TEU, the CSDP shall provide the EU with an operational capacity drawing on civilian and military assets, which may be used on missions outside the EU for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the UN Charter. This is elaborated in Article 43(1) TEU, which provides that the tasks referred to in Article 42(1):

Shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.

Article 42(2) TEU further provides that the CSDP shall include the progressive framing of a common EU defence policy, which will lead to a common defence, when the European Council, acting unanimously, so decides.⁷

There is thus a great contrast between the relatively precise and detailed description of the scope and content of the security and defence element of the CFSP, and the totally undefined foreign policy element. The previous version of the TEU was different in this respect, in the sense that it set out a specific set of CFSP objectives,⁸ which could be called in aid of determining the scope of 'all areas of foreign policy'. The Treaty of Lisbon has replaced these specific CFSP objectives with a set of over-all objectives for EU external action. Article 21(2) TFEU provides:

⁷ On the CSDP, see Piris (n 6 above) 265–79.

⁸ See old Art 11(1) TEU:

The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;
- to strengthen the security of the Union 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, including those on external borders;
- to promote international co-operation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

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

In the literature it is often indicated that this means that the scope of the CFSP can no longer be determined by reference to the objectives pursued.⁹ Such statements need to be qualified, however. Objectives (d) to (g) clearly refer to other areas of external action, i.e. development co-operation, trade, environmental protection, and humanitarian aid. Objective (c), on the other hand, concerning the preservation of peace, the prevention of conflicts, and the strengthening of international security, is clearly at the heart of the CFSP. Objectives (a), (b), and (h), lastly, are more of a cross-sectoral nature.

Those are the objectives and subject matter of the CFSP. In terms of powers to achieve those objectives, the TEU enumerates and defines a number of instruments. The CFSP mainly operates by way of decisions, which may concern either 'action to be undertaken by the Union' (previously called Joint Actions), or 'positions to be taken by the Union' (previously called Common Positions) (Article 25 TEU). As already mentioned, the adoption of legislative acts is excluded, but the EU may conclude international agreements concerning CFSP matters (Article 37 TEU). This enumeration of instruments does not assist much with the determination of the scope of the CFSP. Indeed it is useful to contrast the CFSP instruments with what would normally be regarded as instruments of a full-blown foreign policy. Keukeleire distinguishes diplomatic, military, and economic and financial

⁹ 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* (Hart Publishing, 2008) 47.

instruments.¹⁰ Decisions on positions to be taken by the EU, and to some extent actions to be undertaken, come within the category of diplomatic instruments. The EU also has some military instruments. The use of economic and financial instruments for foreign policy purposes, however, appears to be largely a matter for external action under the TFEU, as that Treaty provides for a common commercial policy, a development co-operation policy, and other co-operation policies, and a common monetary policy for the Eurozone.¹¹

It is likewise interesting to contrast the scope of the CFSP, as outlined in the TEU provisions, with the basic constitutional powers which would be required for a European foreign policy 'worthy of its name', in the approach of an eminent international relations scholar.¹² Those powers would need to extend to war and peace; raising armed forces; treaty-making; regulation of commerce (sanctions); external borders (immigration); cession or acquisition of territory. Again it is clear that the CFSP does not come anywhere near covering all that, but that a number of those powers are present within the TFEU. In that sense the notion 'all areas of foreign policy' is deceptive. Clearly, there are important areas of what in the practice of a state would be called foreign policy, which are not within the scope of the CFSP, but within that of external action under the TFEU. The delimitation between the CFSP competences and other EU external action competences is therefore crucial.

The objectives of the CFSP, as previously outlined in (old) Article 11(1) TEU,¹³ and now part of the EU's overall external action objectives, also merit brief further comment.¹⁴ Keukeleire pointed out that those objectives are in the nature of underlying policy principles rather than precise operational objectives. This led him to contrast the 'common' foreign and security policy with common policies under the (then) EC Treaty, which were much more precisely defined. The result was that the CFSP threatened to be squeezed between Community external competences and national competences.¹⁵ Koskenniemi has been critical of the CFSP objectives, arguing that they were meaningless abstract principles, which laid down no substantive priorities for Union foreign policy. He has pointed out that, as always with open-ended standards, power was transferred from the legislators to the executive.¹⁶ It is indeed possible to read the CFSP provisions as the continuation of executive dominance over foreign affairs, as it exists in at least a number of Member States. Such a reading may be

¹⁰ S Keukeleire, *Het buitenlands beleid van de Europese Unie* (Kluwer, 1998) 34–8.

¹¹ For a 'full' concept of EU foreign policy, see S Keukeleire and J MacNaughtan, *The Foreign Policy of the European Union* (Palgrave Macmillan, 2008) ch 1.

¹² C Hill, 'The Capability-Expectations Gap, or Conceptualizing Europe's International Role' (1993) 31 *JCMS* 316.

¹³ n 8 above.

¹⁴ For a detailed analysis see R Wessel, *The European Union's Foreign and Security Policy—A Legal Institutional Perspective* (Kluwer Law International, 1999) 56–70.

¹⁵ Keukeleire (n 10 above) 154.

¹⁶ Koskenniemi (n 4 above) 28.

more interesting than the traditional approach of contrasting intergovernmentalism and supranationalism, and of explaining the intergovernmental character of the CFSP by national sovereignty concerns.

The objectives of EU external action do have a positive dimension as well. They project and constitutionalize, at least to some degree, certain core values of the EU. As such they may develop into a strong guiding force for EU external action.

Nature of the competences

Article 2(4) TFEU provides that the Union shall have competence, in accordance with the provisions of the TEU, to define and implement a common foreign and security policy, including the progressive framing of a defence policy. The nature of that competence is not clarified, in contrast with the preceding paragraphs of Article 2, which define exclusive and shared competences. It has always been clear of course that the CFSP is not an exclusive competence, but the concept of shared or concurrent competence has been applied to it.¹⁷ The Treaty drafters nevertheless chose not to define CFSP competence as shared with the Member States. One reason for this may be that shared competences are described as having a pre-emptive effect. Article 2(2) TFEU provides, *inter alia*, that, in areas of shared competence, the Member States shall exercise their competence to the extent that the Union has not exercised its competence. The same provision also defines such competence as authorizing both the EU and the Member States to legislate and adopt legally binding acts. Article 24(1) TEU, however, excludes the adoption of legislative acts within the scope of the CFSP. In that sense, too, the CFSP is not a shared competence. It is not an area of general law-making, or normative action, where EU acts have a pre-emptive effect on national competence.

The above does not of course mean that Member States are not legally bound by decisions adopted under the CFSP. The CFSP does not present itself, through the Treaty language, as an *à la carte* form of co-operation, merely ad hoc and optional. Article 24(1) TFEU provides that the Union's competence shall cover *all* areas of foreign policy and *all* questions relating to the Union's security. Article 24(3) TEU instructs the Member States to support the policy *actively* and *unreservedly* in a spirit of loyalty and mutual solidarity, and to comply with the Union's action in this area. Decisions on operational action shall commit the Member States in the positions they adopt and in the conduct of their activity (Article 28(2) TEU). Member States shall also ensure that their national policies conform to the Union's positions (Article 29 TEU). They shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach (Article 32 TEU). In international organizations and at international conferences the Member States shall co-ordinate

¹⁷ E.g. R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 CML Rev 364.

their action, and uphold the Union's positions (Article 34(1) TEU). Member States which are members of the UN Security Council will concert and keep the other Member States and the High Representative fully informed, and will, in the execution of their functions, defend the positions and interests of the Union, without prejudice to their responsibilities under the provisions of the UN Charter (Article 34(2) TEU).

Those provisions impose strong discipline as regards respect for, implementation of, and participation in, the CFSP by the Member States. As such the Treaty language ought to be sufficient for the construction of a meaningful CFSP. The actual policy, however, is often regarded as insufficient, unsatisfactory, and ineffective. Part of the reason may lie in the absence of enforcement mechanisms for the various duties and obligations which the TEU imposes. In contrast to the position under the TFEU, no EU institution or Member State can be brought before the Court of Justice for non-compliance. The supervision is merely political.

Delimitation of TEU and TFEU competences

Article 47 TEU, pre-Lisbon

The above discussion shows that the scope and nature of the EU's powers under the CFSP do not lend themselves to strict legal analysis, because of the open texture of the Treaty provisions and the lack of authoritative interpretation through case law. However, when it comes to the interaction between the CFSP and the EU's other external policies and powers one can hardly be satisfied with some general reflections. It matters a lot whether a decision is taken under the TEU or the TFEU: decision-making procedures are different, parliamentary and judicial scrutiny is different, and so are the legal effects of the decisions.

The paradox of the relationship between the CFSP and other EU external action—indeed, one could say the original sin of overall EU external action—is that the CFSP *supplements* the TFEU with a less integrated policy,¹⁸ and yet is intended to cover *all areas* of foreign and security policy. But commercial policy, development co-operation policy, etc. are of course also forms of foreign policy. As Koskenniemi points out, everyone agrees that it is difficult to separate foreign policy from other aspects of policy and that the most credible conception of security is the comprehensive one.¹⁹ This original sin of EU external action produces many effects. Within the supranational context of other EU policies it creates concerns about contamination by the CFSP. Those concerns have an obvious institutional dimension: as the Council is the central CFSP institution, with only limited roles for the

¹⁸ Although it must be noted that the Treaty of Lisbon has deleted the notion, in (old) Art 1 TEU, of the CFSP supplementing other policies.

¹⁹ Koskenniemi (n 4 above) 36.

Commission and the Parliament, the latter institutions do not like to see certain types of decisions effectively transferred to the second pillar.²⁰ Moreover, there has been concern that CFSP decisions, taken unanimously under intergovernmental procedures, could contain instructions for the other EU policies, and could be seen as hierarchically superior.²¹ Those concerns were present at the inception of the pillar structure. Accordingly, the TEU contained a number of provisions which were aimed at avoiding undue interference with (then) EC policies. Article 2 TEU provided that one of the Union's objectives was 'to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of co-operation 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'. It thus appeared to foreshadow a gradual integration of the pillars. The central provision on the matter was (old) Article 47 TEU:

Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European 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 provision was clearly intended to protect the *acquis communautaire*, and to prevent intergovernmental contamination of supranational decision-making. To vary the pillar image, Article 47 TEU aimed to compartmentalize the Community, on the one hand, and the CFSP (as well as Police and Judicial Co-operation in Criminal Matters (PJCCM)), on the other.

That was not, however, the entire Treaty picture, because the drafters also realized that, at least at a political level, the CFSP needed to be co-ordinated with external Community policies. Article 3, second paragraph, TEU provided that the Union had to ensure the consistency of its external activities as a whole in the context of its external relations, security, economic, and development policies.

In one particular area, that of economic and financial sanctions, the connection between CFSP and EC decisions was clarified in the EC Treaty itself. Article 301 EC provided:²²

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

²⁰ See e.g. Commission, *Report on the Operation of the Treaty on European Union* (EC Commission, May 1995), as reported by G Edwards, 'Common Foreign and Security Policy' (1994) 14 YEL 545.

²¹ CWA Timmermans, 'The Uneasy Relationship between the Communities and the Second Union Pillar: Back to the "Plan Fouchet"?' (1996/1) LIEI 61.

²² See also Art 60 EC.

That provision illustrated the constitutional and institutional complexity of the interaction between the pillars. Common positions or joint actions on economic sanctions were adopted by the Council, acting unanimously, and did not require a Commission proposal or initiative. Nevertheless, the Commission then needed to make a proposal for an EC regulation, which the Council could adopt by qualified majority. The Council could not act without such a proposal. As long as the Council and the Commission co-operated and agreed, there were no problems, but there was nothing in the Treaties which regulated disagreement, other than the general provision on the obligation of inter-institutional co-operation in Article 3 TEU.²³

The Court of Justice did not have jurisdiction over the Second Pillar, with the exception, however, of (old) Article 47 TEU. In the light of the concerns over the relationship between the pillars, it comes as no surprise that the Court was asked to decide when measures adopted under the (then) Second and Third Pillars 'affected', in the words of Article 47, the EC Treaty.²⁴ After a series of judgments which concerned the First and the Third Pillar,²⁵ the Court was finally asked to rule in a case involving the delimitation of CFSP and EC competences. *Small Arms and Light Weapons* (hereafter, *SALW*) concerned a Council decision implementing a joint action with a view to an EU contribution to ECOWAS in the framework of that organization's Moratorium on Small Arms and Light Weapons.²⁶ Although (old) Article 47 TEU has been substantially amended by the Treaty of Lisbon, the judgment continues to be important for delimiting CFSP competences from those in other areas of external action.

The facts can be summarized as follows. In 2002 the Council adopted a CFSP joint action on the EU's contribution to combating the destabilizing accumulation and spread of small arms and light weapons.²⁷ It provided, *inter alia*, for financial and technical assistance to programmes and projects which made a direct contribution to its objectives. Problems with the accumulation and spread of small arms and light weapons are of course particularly prevalent in certain African countries.

²³ On economic sanctions see further Ch 12.

²⁴ See also A Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences' in A Dashwood and M Maresceau, *Law and Practice of EU External Relations* (CUP, 2008) 70; D Curtin, *Executive Power of the European Union—Law, Practices, and the Living Constitution* (OUP, 2009) 179–94.

²⁵ Case C-170/96 *Commission v. Council (Airport Transit Visas)* [1998] ECR I-2763; Case C-176/03 *Commission v. Council (Environmental Penalties)* [2005] ECR I-7879; and Case C-440/05 *Commission v. Council (Shipsource Pollution)* [2007] ECR I-9097.

²⁶ Case C-91/05 *Commission v. Council (SALW)* [2008] ECR I-3651. The decision is published in [2004] OJ L359/65. ECOWAS stands for Economic Community of West African States. For comment see also B Van Vooren, 'EU-EC External Competences after the Small Arms Judgment' (2009) 14 EFA Rev 7 and 'The Small Arms Judgment in an Age of Constitutional Turmoil' (2009) 14 EFA Rev 231; A Dashwood, 'The Law and Practice of CFSP Joint Actions', in M Cremona and B De Witte (n 9 above) 65–77; G De Baere, *Constitutional Principles of EU External Relations* (OUP, 2008) 283–94; C Hillion and R Wessel, 'Competence Distribution in EU External Relations after *Ecowas*: Clarification or Continued Fuzziness?' (2009) 46 CML Rev 551.

²⁷ Joint Action 2002/589/CFSP [2002] OJ L191/1.

It is therefore not surprising that the Cotonou Agreement, between the EC and its Member States and ACP countries, also referred to such problems. Article 11 of the Agreement, concerning 'Peace-building policies, conflict prevention and resolution', provided for activities addressing, *inter alia*, 'an excessive and uncontrolled spread, illegal trafficking and accumulation of small arms and light weapons' (see paragraph 3). On that basis, in 2004 the Commission had started to prepare a financing proposal in support of the efforts of ECOWAS to implement a UN moratorium on the import, export, and production of small arms. At the end of 2004, the Council adopted the contested decision, based on the joint action and on (then) Article 23(2) TEU.²⁸ The decision provided for a financial contribution and technical assistance to set up the Light Weapons Unit within the ECOWAS Technical Secretariat and to convert the UN moratorium into a convention on small arms and light weapons between the ECOWAS member States. The Commission, however, did not agree with the adoption of the Decision within the CFSP framework. It made a declaration, expressing its view that the joint action should not have been adopted and the project ought to have been financed from the Ninth European Development Fund under the Cotonou Agreement. It further claimed that the joint action fell within the shared competences on which Community development policy and the Cotonou Agreement were based, and that such shared competences were just as much protected by (old) Article 47 TEU as the areas of exclusive competence. The Commission subsequently brought an action for the annulment of the Decision, in which it also claimed that the Joint Action was inapplicable, because of its illegality, pursuant to (current) Article 277 TFEU.

Advocate General Mengozzi started his analysis concerning the application of (old) Article 47 TEU by setting out the arguments of the Commission and the Parliament, the Council, and the UK government. The Commission and the Parliament contended that Article 47 aimed to protect the Community's competences as against the activity of the EU based on the TEU by establishing a 'fixed' boundary between the respective competences. In order to delimit the competences of the EC and of the EU, recourse could not be had to the principle of pre-emption. Even if, in an area of shared competence, the Member States retained the competence to act by themselves, whether individually or collectively, to the extent that the Community had not yet exercised its competence, the same could not be said for the EU which, under (old) Article 47 TEU, had to respect the competences of the Community, whether exclusive or not, even if they had not been exercised. The Council, by contrast, submitted that (old) Article 47 aimed to maintain the balance of powers established by the Treaties and could not be interpreted as aiming to protect the competences of the Community to the detriment of those conferred upon the EU. (Old) Article 47 did not prevent the adoption of measures in the framework of the CFSP which used the same instruments as those used by the

²⁸ Council Decision 2004/833 [2004] OJ L359/65.

Community in the framework of development co-operation, where those measures did not aim to achieve the objectives of development co-operation but those arising from the CFSP. The United Kingdom, lastly, contended that two conditions had to be fulfilled for (old) Article 47 to be violated. First, the Community had to be competent to adopt a measure having the same purpose and the same content as the challenged measure. Secondly, the measure based on the TEU had to encroach on a competence conferred upon the Community by preventing or limiting the exercise of that competence. Such a pre-emptive effect was impossible in the area of development co-operation, where the Community had only concurrent competences.²⁹

Analysing those submissions, Mengozzi AG effectively sided with the Commission and the Parliament. He pointed out that the function of (old) Article 47 TEU was to protect the competences which the EC Treaty conferred on the Community. This was not limited to exclusive EC competences, but extended to all the competences given to the Community, which deserved to be protected against any encroachment on the part of the EU. The nature of the EC competence and the distribution of competences between the EC and the Member States was immaterial for the purpose of applying (old) Article 47 TEU. The Advocate General was further of the opinion that the distribution of spheres of competence between the Community and the Member States had to be distinguished from the distribution of competence between the Community and the Second and Third Pillars. Whereas the Member States were in principle free to act in an area such as development co-operation, action of the EU within the framework of the Second and Third Pillars was in principle excluded because adequate competences were provided for by the EC Treaty, irrespective of the nature of those competences (exclusive, shared, or concurrent). Echoing a concept referred to in the first edition of this book,³⁰ the Advocate General stated that (old) Article 47 TEU aimed to keep watertight, so to speak, the primacy of Community action under the EC Treaty over actions undertaken under the TEU, so that if an action *could* be undertaken on the basis of the EC Treaty, it *must* be undertaken by virtue of that Treaty. It was a matter of protecting the Community's areas of activity, so that the EU had to refrain from interfering in those areas by using forms of co-operation less integrated than those provided for by the EC Treaty. In the final analysis, the CFSP covered 'all areas of foreign and security policy', with the exception of the forms of foreign policy which fell within the competence of the Community, such as the common commercial policy or the development co-operation policy, irrespective of the distribution of competences between the Member States and the Community. This approach appeared to be the only one which ensured the overall coherence of the provisions of the TEU.³¹

²⁹ *SALW* (n 26 above) Opinion of Mengozzi AG, paras 75–83.

³⁰ P Eeckhout, *External Relations of the European Union—Legal and Constitutional Foundations* (OUP, 2004) 126.

³¹ *SALW* (n 26 above) Opinion of Mengozzi AG, paras 92–122.

As regards the substance of the action, the Advocate General did not, however, accept the Commission's submissions. He analysed the scope of the EC's competences in matters of development co-operation. He then considered that, where a measure was likely to fall within the scope of the aims of the CFSP and also to contribute to the social and economic aims of the Community development co-operation policy, it was necessary to seek the measure's main aim in order to secure a balance between the observance of (old) Article 47 TEU and of (old) Article 5 EC (on the principle of conferral). If an EU action pursued the main aim of preserving peace and strengthening international security (and *a fortiori* if that was the exclusive aim) while at the same time contributing indirectly to the social and economic development of developing countries, any encroachment on the Community's competences was precluded. On the other hand, if the two aims were indissociably linked, without one being secondary and indirect in relation to the other, priority had to be given to the Community legal basis because it seemed particularly difficult, if not impossible as the law stood, to contemplate recourse to a dual legal basis without breaching (old) Article 47 TEU.³²

The Advocate General then established, on the basis of an analysis which need not be summarized here, that the purpose of the contested decision appeared to be mainly, if not exclusively, related to security. The objective of sustainable development appeared rather remote and, in any case, indirect and secondary by comparison with that of preserving the regional security of the Member States of ECOWAS. The content of the decision did not modify that finding, as a financial contribution and technical assistance were instruments which could equally be employed for CFSP and development co-operation purposes.³³ Accordingly, the Advocate General was of the opinion that the action had to be dismissed.

The Court basically followed the Opinion of the Advocate General as regards the interpretation of (old) Article 47 TEU, but not as regards the substance. Concerning the former, the Court considered it necessary to determine whether the provisions of the contested decision affected competences enjoyed by the Community under the EC Treaty, on the ground that they could have been adopted on the basis of the Treaty. (Old) Article 47 TEU aimed to maintain and build on the *acquis communautaire*. A measure having legal effects adopted under (old) Title V of the TEU affected the provisions of the EC Treaty within the meaning of (old) Article 47 TEU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevented or limited the exercise by the Community of its competences. If it was established that the provisions of a measure adopted under the TEU, on account of both their aim and their content, had as their main purpose the implementation of a policy conferred by the EC Treaty on the Community, and if they could properly have been adopted on the

³² Ibid, paras 173–176.

³³ Ibid, paras 204–211.

basis of the EC Treaty, the Court had to find that those provisions infringed (old) Article 47 TEU. It was not relevant whether in an area such as development co-operation—which did not fall within the exclusive competence of the Community and in which, therefore, the Member States were not precluded from exercising, individually or collectively, their competences—such a measure could have been adopted by the Member States in the exercise of their competences. Moreover, the question of whether the provisions of such a measure fell within the competence of the Community related to the attribution and, thus, the very existence of that competence, and not its exclusive or shared nature. It was therefore necessary to determine whether the contested decision infringed (old) Article 47 TEU inasmuch as it could have been adopted on the basis of the provisions of the EC Treaty.³⁴

The Court then recalled that the objectives of EC development co-operation policy were broad, and established, on the basis of a number of documents from the EU institutions, that certain measures aiming to prevent fragility in developing countries, including those adopted in order to combat the proliferation of small arms and light weapons, could contribute to the elimination or reduction of obstacles to the economic and social development of those countries. Nevertheless, a concrete measure aiming to combat such proliferation could be adopted by the Community under its development co-operation policy only if that measure, by virtue of its aims and its content, fell within the scope of the competences conferred upon the Community. That was not the case if such a measure, even if it contributed to the economic and social development of the developing country, had as its main purpose the implementation of the CFSP. The Court then referred to the principles emanating from its case law on the delimitation of legal bases in the EC Treaty. If examination of a measure revealed that it pursued a twofold aim or that it had a twofold component, and if one of those was identifiable as the main one, whereas the other was merely incidental, the measure had to be based on a single legal basis, namely that required by the main aim or component. It followed that measures combating the proliferation of small arms and light weapons did not fall within the competences of the Community in the field of development co-operation if, on account of their main aim or component, they were part of the pursuit of the CFSP. With regard to a measure which simultaneously pursued a number of objectives or which had several components, without one being incidental to the other, the Court had held that such a measure had to be founded, exceptionally, on the various corresponding legal bases. However, and this was a crucial finding by the Court, under (old) Article 47 TEU, such a solution was impossible with regard to the delimitation of EU and EC competences. Since (old) Article 47 precluded the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union could not have recourse to a legal basis falling within the

³⁴ Ibid, paras 58–63 of the judgment.

CFSP in order to adopt provisions which also fell within a competence conferred by the EC Treaty on the Community.³⁵

The Court then carried out an extensive analysis of the aims and content of the contested decision. As regards the aim, it first established that it could not be inferred from the joint action on which the decision was based that the implementation of the campaign against the proliferation of small arms and light weapons which the joint action set out would necessarily take the form of measures which pursued CFSP objectives, such as the preservation of peace and the strengthening of international security, rather than objectives of Community development policy. It therefore had to be examined whether the decision itself had to be regarded as a measure which pursued objectives falling within Community development co-operation policy. The Court established that it could not be denied that the decision formed part of a general perspective of preserving peace and strengthening international security. None the less, it could not be inferred from the decision 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 was purely incidental. The contested decision had the specific goal of strengthening the capacities of a group of African developing countries to combat a phenomenon which, according to the preamble to the decision, constituted an obstacle to the sustainable development of those countries. It followed that the decision pursued a number of objectives, falling within the CFSP and development co-operation policy respectively, without one of those objectives being incidental to the other.³⁶

As regards the content of the decision, the Court agreed with the Advocate General that it was only in the light of the aims that they pursued that a financial contribution or technical assistance could be regarded as falling within the scope of the CFSP or of Community development co-operation policy. While there could be measures, such as the grant of political support for a moratorium or even the collection and destruction of weapons, which fell rather within action to preserve peace and strengthen international security or to promote international co-operation, being CFSP objectives, the decision to make funds available and to give technical assistance to a group of developing countries in order to draft a convention was capable of falling both under development co-operation policy and the CFSP.³⁷

The Court concluded that the contested decision contained two components, neither of which could be considered to be incidental to the other, one falling within Community development co-operation policy and the other within the CFSP. This meant that (old) Article 47 TEU had been infringed and that the decision had to be annulled.³⁸

The *SALW* judgment established three important principles. First, (old) Article 47 TEU protected all EC competences, be they exclusive or shared. If, having regard to the aim and content of an act, it could have been adopted under the EC

³⁵ Ibid, paras 64–77.

³⁶ Ibid, paras 79–99.

³⁷ Ibid, paras 100–105.

³⁸ Ibid, paras 108–110.

Treaty, it was impossible to adopt it under the TEU. Whether or not the Member States were capable of adopting the act, individually or collectively, because it came only within the shared competences of the EC, was irrelevant. This meant that the Member States could not act collectively under the CFSP in cases where they were entitled to act collectively, outside the EU framework. The CFSP could thus cover all areas of foreign and security policy, but where the EC Treaty conferred upon the Community competence for a specific form of foreign policy, such as commercial policy and development co-operation, those competences took precedence. They were, one could say, *lex specialis*. However, as *lex specialis* they were not to be interpreted narrowly, but rather on their own terms, in no way confined by the TEU provisions on the CFSP.

Secondly, the only qualification to this first principle was that, as in other areas of external action, the delimitation of the respective competences had to be done focusing on the main purpose or component of the measure in issue. This meant that the EU could adopt CFSP measures with an incidental effect on trade, development co-operation, or other EC matters. It also meant that there could be cases, like *SALW*, where there were two purposes or components, neither of which was incidental to the other.

In the latter cases, the third principle came into play: in contrast with other external competences, the Court as a matter of principle excluded recourse to a dual legal basis in such cases. (Old) Article 47 TEU simply precluded such a dual legal basis. The Court did not further elaborate on the reasons for this finding. Mengozzi AG drew attention in a footnote to the incompatibility of the decision-making processes under, respectively, the TEU and the EC Treaty.³⁹ Clearly, this rejection of a dual legal basis may make it more difficult to pursue a coherent EU external policy, since it precludes the use of all-encompassing legal instruments, having both foreign policy and other EU policy dimensions.

It remains to be seen whether, after the entry into force of the Treaty of Lisbon, those principles continue to be valid.

Article 40 TEU, post-Lisbon

The legal relationship between the CFSP and other forms of EU external action is substantially modified by the Treaty of Lisbon. (Current) Article 40 TEU, which replaces (old) Article 47 TEU, provides:

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.

³⁹ Ibid, Opinion of Mengozzi AG, footnote 76.

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.

As can be seen, this provision not only protects EU competences under the TFEU (former EC competences), but also works the other way round, to protect CFSP competences. It therefore appears to introduce a more balanced approach to questions of delimitation. Furthermore, the new provision does not generally preclude that one Treaty affect the other, but refers, more specifically, to the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the various EU competences.

The amendment of this provision is not the only significant modification. The current Treaties no longer contain provisions such as (old) Articles 1 to 3 TEU. (Old) Article 1 provided that the Union was founded on the Communities, *supplemented* by the policies and forms of cooperation (i.e. CFSP and PJCCM) established by the TEU. (Old) Article 2 TEU provided that one of the objectives of the EU was 'to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of co-operation 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'. (Old) Article 3 referred to the EU's single institutional framework which had to respect and build upon the *acquis communautaire*.

Also relevant, no doubt, are the attempts to create a more integrated legal framework for external action. The CFSP is no longer characterized by a set of objectives of its own, as referred to above; instead, Articles 3(5) and 21 TEU list and describe the EU's objectives for its external action as a whole. There is also an attempt to institutionalize this integrated framework by creating the double-hatted position of the High Representative, served by the External Action Service.

Against that revised Treaty background, what is one to make of the new Article 40 TEU? Which of the principles established by the Court in *SALW*, if any, continue to be valid?

It is clear that on the basis of Article 40 the Court can in future be asked to review, not just whether a CFSP act ought to have been adopted under other EU competences, provided for by the TFEU, but also whether an act adopted under the TFEU is in reality a CFSP act. That in itself does not, however, mean the withdrawal of the principle that a CFSP act which could have been adopted, in the light of its aim and content, under the (current) TFEU, violates (current) Article 40 TEU—i.e. the first principle emanating from *SALW*. If anything, (current) Article 40 TEU is more specific in that respect. The implementation of the CFSP may not affect the TFEU procedures and the powers of the institutions under the TFEU for the exercise of TFEU competences. The facts of *SALW* clearly come within those terms: as the contested decision also had an aim and component of development co-operation, for that purpose the relevant procedures under (current) Articles 208

to 211 TFEU should have been employed, involving all three EU political institutions, the Commission, the Parliament, and the Council, under the ordinary legislative procedure. It is difficult to see any basis for a more restrictive reading of (current) Article 40 TEU, for example along the lines suggested by the Council and the UK Government in *SALW*.

It is true of course that the new provision also protects the CFSP. On a first reading that may lead one to think that the CFSP is no longer purely supplementary, and that, as was mentioned, some kind of more 'balanced' approach is required for the delimitation of competences; an approach requiring, in some cases, that TFEU competences give way to the CFSP. There are, however, two difficulties with such an argument.

First, the scope of the CFSP continues to be as ill-defined as before. Indeed, some commentators point out that the absence of specific CFSP objectives in the TEU make it even more difficult to define that scope.⁴⁰ That is probably exaggerated, as it is clear that the CFSP continues to be focused on questions of peace and international security. Nevertheless, those aims are very broad—does not development aid or free trade also contribute to peace and international security?—and so is the reference in Article 24(1) TEU to 'all areas of foreign policy'—which again could easily be seen to encompass development co-operation and trade. Yet it is clear that one of the purposes of (new) Article 40 TEU is to safeguard the EU's competences in those specific matters, and the applicable decision-making procedures and involvement of the various institutions. Again, the better view is that the relationship between the CFSP and other competences is in the nature of *lex generalis* and *lex specialis*.⁴¹ That means that an analysis of whether (current) Article 40 TEU is violated, because a CFSP act affects TFEU procedures and competences, will need to be conducted along the lines of *SALW*.

Secondly, the Court's approach in *SALW* effectively introduced a balanced delimitation, by applying the test of the main purpose or component. It so happened that in the case at hand the Court found two indissociably linked purposes and components, but the Court also expressly recognized that a CFSP act could, in principle, incidentally affect non-CFSP matters such as development co-operation.⁴² Of course, that also means that a non-CFSP act, adopted under the TFEU, may incidentally affect the CFSP. It is not clear what methodology to applying (current) Article 40 TEU would constitute a more balanced approach.

In *SALW* the Court focused nearly exclusively on the aims of the contested decision, as its content—financial support and technical co-operation—could equally come within the scope of the CFSP as within that of development co-operation. There is of course an element of subjectivity, so to speak, in determining the aims

⁴⁰ Herrmann (n 9 above).

⁴¹ See above, and also M Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process' in Dashwood and Maresceau (n 24 above) 46.

⁴² *SALW* (n 26 above) paras 73–74.

of a measure. The institutions adopting the measure will often have considerable discretion in determining, and expressing, those aims. It is clear that the Court in *SALW* sought to reduce the scope for such discretion by analysing a whole series of political documents and statements, to support the conclusion that the decision had both development and CFSP aims. That approach carries the risk that, in practice, it will often have to be concluded that a measure has more than one aim, in particular after the entry into force of the Treaty of Lisbon. Since there is now a unified set of objectives for EU external action, the institutions will often, in their policy-making, refer to several objectives. Indeed, they are required to do so (see e.g. Article 205 TFEU). Such multiplicity of objectives will not make the task of delimiting the CFSP and other external competences any easier. Moreover, the objectives of the CFSP are so broadly defined—‘preserve peace, prevent conflicts and strengthen international security’ (Article 21(2)(c) TEU)—that many acts can be seen to pursue them.

Of course, there will be cases where it is not just the aim of the measure which matters, but also its content.⁴³ In that respect, the current version of the TEU introduces an interesting concept: it twice confirms that, within the framework of the CFSP, ‘the adoption of legislative acts shall be excluded’ (Articles 24(1) and 31(1) TEU). This is a puzzling provision. The concept of a legislative act is defined, in purely formal terms, in Article 289 TFEU. That provision distinguishes between the ordinary legislative procedure, and special legislative procedures. Articles 24(1) and 31(1) TEU could therefore simply be read as meaning that CFSP acts are not adopted under those procedures. However, such a reading suggests that these provisions are wholly superfluous: it is clear from Article 31 TEU, and other relevant TEU provisions, that CFSP acts (decisions) are taken by the European Council or the Council, acting alone. The CFSP is without doubt subject to specific procedures of its own, and there was therefore no need to indicate that legislative acts are excluded to confirm this. A more effective interpretation of the exclusion of legislative acts would need to focus on a substantive concept of legislative act. Such an interpretation would mean that general normative action is excluded within the framework of the CFSP. That exclusion is supported by the reference, in Articles 25 and 31 TEU, to ‘decisions’ as the legal instruments for the implementation of the CFSP. Pursuant to Article 288 TFEU, decisions stand in contrast to regulations and directives. The reason for the exclusion of legislative acts could be found in the EU’s democratic principles (Articles 9 to 12 TEU), which provide that the functioning of the Union is founded on representative democracy (Article 10(1) TEU), and that the citizens are directly represented at Union level in the European Parliament (Article 10(2) TEU). Under the TFEU, virtually no general normative acts can be adopted without the involvement of the European Parliament, but CFSP decision-making excludes the Parliament,

⁴³ See further Herrmann (n 9 above) 40–3.

except for its mere consultation (Article 36 TEU). From that perspective, it would therefore make sense to prefer a substantive interpretation of the exclusion of legislative acts: one which precludes the European Council and the Council from using the CFSP for the purpose of normative action. That would equally make sense from a perspective of judicial review and scrutiny. CFSP acts are not within the jurisdiction of the Court of Justice (Article 275 TFEU), an exclusion which is less objectionable in a Union governed by the rule of law if the CFSP were interpreted as not permitting general normative action. In Chapter 11 the exclusion of legislative acts is further explored. At this point, suffice it to conclude that, pursuant to Article 40 TEU, the Court could be asked what that exclusion involves, since it is clear that legislative acts can be adopted under the TFEU, and since this is a question concerning the powers of the institutions and the procedures for exercising competences.

A final question concerning Article 40 TEU is whether a dual legal basis continues to be excluded, and whether therefore the third principle emanating from *SALW* remains in place. Can acts with a dual purpose or component, one within the scope of the CFSP, the other within that of a TFEU competence, ever be adopted on a dual legal basis? At least for one type of act, i.e. international agreements concluded by the EU, the provisions of the TFEU suggest that this is conceivable.⁴⁴ Article 218 TFEU contains procedural provisions on the conclusion of agreements, which apply to both CFSP agreements and to other agreements. Under Article 218(3), it is respectively the Commission or the High Representative which makes recommendations to the Council for the opening of negotiations; the High Representative has this power 'where the agreement envisaged relates exclusively or principally to the common foreign and security policy'. Furthermore, Article 218(6) TFEU sets out the procedure for concluding the agreement, and provides for the involvement of the European Parliament 'except where agreements relate exclusively to the common foreign and security policy'. Those provisions strongly suggest that an agreement may contain provisions coming within the scope of the CFSP as well as other provisions. Indeed, it would be rather nonsensical if, notwithstanding all the attempts to create a unified legal framework for EU external action, the EU would not be capable of concluding an agreement with a third country which contains elements of foreign policy as well as other forms of co-operation, or provisions on trade, or the environment, etc. If, none the less, the Court were to decide that Article 40 TEU does not permit a dual legal basis for the conclusion of an agreement, at least the agreement itself should continue to be unified, and the institutions could simply conclude it by way of two decisions, one concerning the CFSP elements, and the other for the other provisions.

⁴⁴ See also RA 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* (Hart Publishing, 2010) 30.

However, also for autonomous EU acts, a case can be made for allowing a dual legal basis, in the TEU and the TFEU, where an act has a twofold purpose or component. Unfortunately, the Court did not, in *SALW*, clarify why a dual legal basis is excluded, other than by referring to (old) Article 47 TEU. As was mentioned, Mengozzi AG was more specific, and considered that the respective CFSP and EC procedures were incompatible. There is indeed long-standing case law of the Court of Justice on when different procedures for decision-making can and cannot be combined, and on when an act can or cannot be adopted on a dual legal basis in the light of these differences. In the 1991 *Titanium Dioxide* case the Court had established that it was not possible to combine the so-called co-operation procedure (the predecessor to the current ordinary legislative procedure, but not yet involving full co-decision by the Parliament) with a procedure requiring unanimity in the Council, because that would divest the co-operation procedure (involving a qualified majority in the Council) of its substance.⁴⁵ However, more recent case law has become substantially more liberal in this respect. In *International Fund for Ireland* the Court considered that (old) Articles 159 and 308 EC should have formed the legal basis of the act in issue, notwithstanding the fact that the former article provided for the co-decision procedure and the latter for unanimity.⁴⁶ Similarly, in *Kadi and Al Barakaat* the Court accepted the combined application of (old) Articles 60, 301, and 308 EC, notwithstanding the fact that the first two articles provided for decision-making by qualified majority, without involving the Parliament, whereas Article 308 EC provided for unanimity and consultation of the Parliament.⁴⁷ In the light of this more liberal case law, the question can at least be raised of whether there are genuinely huge obstacles to an act being based on, say, both the CFSP provisions in the TEU, and Article 209 TFEU on development co-operation, which provides for the ordinary legislative procedure. As in *International Fund for Ireland*, that procedure would simply need to be combined with unanimity in the Council.

If, however, a dual legal basis continues to be excluded, how should the institutions proceed in the case of an act with a dual purpose or component (like the decision on small arms and light weapons)? Which procedure ought to be followed? It must be emphasized that the Court did not state in *SALW* that the EC procedure was to be preferred. It simply annulled the CFSP act, without indicating how the institutions should have proceeded. Now that Article 40 TEU also protects the CFSP method of decision-making, it is difficult to contend that the TFEU procedures should take precedence over those of the CFSP. The only solution appears to be for the act to be split in two: one with a main or predominant CFSP purpose

⁴⁵ Case C-300/89 *Commission v. Council (Titanium Dioxide)* [1991] ECR I-2867, para 18.

⁴⁶ Case C-166/07 *European Parliament v. Council (International Fund for Ireland)* [2009] ECR I-7135, para 69.

⁴⁷ Joined Cases C-402 and 415/05P *Kadi and Al Barakaat v. Council and Commission* [2008] ECR I-6351, paras 235-236. For further analysis of the issue of dual legal basis, see RH Lauwaars and RH van Ooik, 'De problematiek van de dubbele rechtsgrondslagen in het Europese recht' (2010) 58 SEW 293.

or component; the other with a main or predominant TFEU purpose of component. How that should work in the case of an act with a single content and a dual purpose, such as the financial support and technical co-operation of the *SALW* decision, remains a mystery.

It may finally be noted that specific cross-pillar issues arise in the area of sanctions, or what the Treaties now call 'restrictive measures' (Article 215 TFEU). Those issues are best examined separately, in Chapter 12. The reader is, however, referred to that analysis for the purpose of completing the picture of the interaction between CFSP and TFEU competences.

Consistency

Ever since the inception of the pillar structure, there has been a need for strong language, like that used in (old) Article 3 TEU, one of the first provisions of that Treaty, indicating the drafters' concern that that structure may obstruct coherent and consistent external action.⁴⁸ After the amendments by the Treaty of Lisbon, consistency as regards external action no longer occupies such a prominent position in the TEU. However, the concept has by no means been abandoned. Article 21(3), second sentence, TEU provides:

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.

At one level the emphasis on consistency is what could be expected in the light of the broad scope of EU external action. Globalization has led to the ever-growing importance and sophistication of external policies, thereby inevitably involving a variety of institutional actors; and in individual States, too, there are mechanisms and procedures for ensuring consistency so as to overcome policy fragmentation and inconsistencies. Nevertheless, within States consistency would rarely be raised to the constitutional level, as has been the case in the EU. The fact that consistency is such a high-level concern is no doubt related to the pillar structure itself, and the tension between intergovernmentalism and supranationalism, particularly at institutional level. The CFSP, to recall the main relevant features again, is dominated by the Council acting unanimously. Under the TFEU, the Commission and the Parliament occupy a much more central role. Unavoidably, the pillar structure created inter-institutional tension in the conduct of EU external relations. From an institutional perspective it matters a lot whether a particular policy is located in the TFEU or is pursued as a CFSP matter. As we have seen, it is difficult to delimit competences between the pillars, because

⁴⁸ See e.g. 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* (OUP, 2008) 10.

the issues are complex and the overall set-up inherently paradoxical, and because the Court has but limited jurisdiction. One could therefore say that the constitutional emphasis on consistency is something of a subterfuge, an attempt to cover up inter-institutional strife, to throw a constitutional blanket on the struggles between the Council and the Commission, not to mention the Parliament.

The inter-institutional dimension of the consistency requirement could be seen in the text of (old) Article 3, second paragraph, TEU, where the Council and the Commission were made responsible for ensuring consistency and an obligation of co-operation was imposed on them. However, the Treaty did not spell out any specific consequences of that obligation. It did not, in particular, resolve the issue of hierarchy between the pillars. As the CFSP covered all areas of foreign and security policy, thus projecting an EU role in general international politics, it was in the nature of things that certain CFSP decisions set policies with ramifications for EC external action. The question therefore arose of whether CFSP decisions could contain legally binding instructions for EC action. Nuttall reported that this question crystallized in 1994, on the occasion of deciding upon common positions concerning Rwanda and Ukraine.⁴⁹ The Council had in mind combining action under both the First and Second Pillars, but the Commission strongly objected to the fact that this combined approach was exclusively defined under the CFSP. The Council legal service took the view that it had not been the intention to exclude matters of EC competence from the CFSP provisions, but admitted that the Commission could not be obliged to act by a decision taken under those provisions, which would impair its autonomy under the EC Treaty. The Commission legal service contested the view that CFSP provisions could apply to EC matters, and denied that the Commission could be reduced to a body for implementing CFSP policy. In its view, common positions were addressed to the Member States and not the Commission. The dilemma was partially resolved when in March 1995 the Council noted an operational guide (*mode d'emploi*) on common positions.⁵⁰ This *mode d'emploi* provided that common positions committed the Union as a whole, and respected the consistency of the Union's external activities in accordance with (old) Article 3 TEU; they could thus refer to the Union's external activities as a whole, but had to preserve the powers specific to each institution, including the Commission's power of initiative.⁵¹

The Commission's position was understandable, and appeared correct in so far as CFSP decisions attempted to interfere with the Commission's right of initiative under the EC Treaty. If, however, consistency is to be meaningful, some degree of political superiority of the CFSP over other external policies seems unavoidable. It is doubtful whether such superiority risks undermining the supranational character of (now) TFEU decision-making. In the absence of the CFSP, international politics would not

⁴⁹ S Nuttall, *European Foreign Policy* (OUP, 2000) 263–4.

⁵⁰ The *mode d'emploi* was not published. See for a description R Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' (2000) 37 CML Rev 1154–5.

⁵¹ See also Timmermans (n 21 above) 63–4.

disappear, and Member State governments, present in the Council, would also decide on certain external policies from a broader political perspective. For example, one could hardly imagine potential negotiations on trade with Iran not being affected by high international politics. The benefit of the CFSP is that it makes that dimension visible, and subject to a formal process of deliberation. Once such deliberation has taken place, the Member States are bound by its conclusions, including when they act within the TFEU framework. That may actually be helpful, rather than detrimental, for effective EU decision-making. Of course there is the tension between unanimous CFSP decision-making and the TFEU ordinary legislative procedure. But it may be something of an illusion to think that, in the absence of a CFSP with the more onerous unanimity requirement, TFEU decision-making on sensitive external policies would be less fractured and more effective. From that perspective it makes little sense to focus too closely on the question of whether CFSP decisions can impose legally binding obligations on the institutions, acting under the TFEU.⁵²

The Treaty of Lisbon attempted to find further institutional answers to the consistency conundrum by introducing the double-hatted position of High Representative of the Union for Foreign Affairs and Security Policy. According to Article 18(2) TEU, the High Representative on the one hand conducts the Union's CFSP. Pursuant to Article 18(4) TEU, the High Representative shall also be one of the Vice-Presidents of the Commission, 'responsible within the Commission for responsibilities incumbent on it in external relations and for co-ordinating other aspects of the Union's external action'. The High Representative is expressly mandated to 'ensure the consistency of the Union's external action' (Article 18(4) TEU), though, as we have seen, Article 21(3) TEU also instructs the Commission and the Council, 'assisted by the High Representative', to ensure consistency. The High Representative is in turn assisted by the European External Action Service (EEAS), which at the time of writing is in the process of being set up. The EEAS comprises officials from the Council's General Secretariat and from the Commission, as well as staff seconded from national diplomatic services of the Member States (Article 27(3) TEU). Again, this shows an attempt at institutional integration. It confirms the fact that the consistency concept is mainly aimed at avoiding inter-institutional tension.

Whether these institutional reforms will achieve that goal remains to be seen. The institutional integration is by no means complete, since important areas of external action such as trade and development co-operation continue to be managed by specific Commissioners and Commission departments, and not by the High Representative and the EEAS. Moreover, the High Representative has not been given any legal tools to overcome inter-institutional strife. EU competences for the CFSP and for other areas of external action still have to be delimited. The roles of the Commission and the Parliament in the conduct of the CFSP remain restricted. The High Representative, so it seems, can only use political tools to produce a better consensus among the institutions.

⁵² A negative reply is given by Wessel (n 50 above) 1156, as regards the pre-Lisbon legal position.

Conclusions

Several general conclusions can be drawn from this chapter's analysis of the EU's CFSP competences.

The sphere of action of the CFSP is defined in the broadest terms, as encompassing all areas of foreign and security policy. Whereas before Lisbon the CFSP was governed by its own set of objectives, that is no longer the case, which has made the task of defining the scope of this policy even more difficult than before. A lot of different activities are undertaken within the framework of this policy, but increasingly it appears that its specificity is concentrated in security and defence matters, where the TEU clarifies the kind of activities which the EU is destined to undertake. Another important strand of the CFSP is the policy on sanctions ('restrictive measures'), analysed in Chapter 12.

If the CFSP were to exist in isolation, its broad definition, indeed its lack of real definition, would not necessarily raise many issues. However, the CFSP is constitutionally juxtaposed to other EU external policies, by virtue of Article 40 TEU. The Court polices the boundaries between the CFSP and competences and policies under the TFEU. Its judgment in *SALW* continues to be relevant, even if Article 40 TEU looks both ways, in contrast to (old) Article 47 TEU. Thus, the CFSP may not trespass on TFEU external action territory. As the latter continues to expand, the CFSP may indeed shrink to security and defence policy. Its vocation to cover all areas of foreign and security policy is thus much qualified: there should be a footnote to the Treaty stating that this provision applies only in so far as there is no other EU external competence.

The way in which the Court policed the borders between the EC Treaty and the TEU also confirmed that there is a unified concept of EU law, and the Treaty of Lisbon has sealed that development. The TEU and the TFEU are organically linked, and competences therefore have to be allocated. A development co-operation measure, for example, cannot be taken under the CFSP. The institutional provisions of the Lisbon Treaty wholly confirm this unified concept, by creating the position of the High Representative and the EEAS. It is to be hoped that this will lead to the better co-ordination and greater effectiveness of external policies. There will, however, still be scope for institutional turf battles. The High Representative may unify the external action administration, but decision-making procedures remain different (e.g. unanimity in CFSP matters) and so does the role of the various institutions.

This chapter concludes the analysis of the legal and constitutional foundations of the EU's external competences and objectives. One must again draw attention to the broad overall scope of such competences. There appear to be virtually no significant areas of international law-making in which the EU cannot participate.