

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Constitutional Affairs

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**Implementation of
the Lisbon Treaty
Improving Functioning of
the EU: Foreign Affairs**

IN-DEPTH ANALYSIS FOR THE AFCO COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

Implementation of the Lisbon Treaty
Improving Functioning of the EU:
Foreign Affairs

IN-DEPTH ANALYSIS

Abstract

Foreign Affairs as field of EU action has very distinctive constitutional qualities. Its external powers are broad, encompassing not only traditional foreign policy, but also development cooperation and number of sectoral policies such as trade, transport and environment. The report provides an analysis of the changes in the constitutional and institutional framework brought about by the Lisbon Treaty and assess the implementation of those changes including obstacles to further improvement of its implementation.

This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the AFCO Committee

AUTHOR

Professor Marise CREMONA

RESPONSIBLE ADMINISTRATOR

Mr Petr NOVAK
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@ep.europa.eu

LINGUISTIC VERSIONS

Original: EN

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Policy Departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny.

To contact the Policy Department or to subscribe to its monthly newsletter please write to: poldep-citizens@europarl.europa.eu

Manuscript completed in November 2015.
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This document is available on the Internet at:
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LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
AETR	Accord européen sur les transports routiers
AFSJ	Area of Freedom, Security and Justice
ASEAN	Association of South-East Asian Nations
CCP	Common Commercial Policy
CETA	Comprehensive Trade and Economic Agreement
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CSDP	Common Security and Defence Policy
DCFTA	Deep and Comprehensive Free Trade Agreement
EEA	European Economic Area Agreement
EEAS	European External Action Service
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
HR/VP	High Representative for Foreign Affairs and Security Policy
IPR	Intellectual Property Rights
MEP	Member of the European Parliament
MFN	Most Favoured Nation
MOU	Memorandum of Understanding
PNR	Passenger Name Records
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership

1. INTRODUCTION

Foreign affairs, as a field of EU action, has distinctive constitutional qualities. The Union has a mandate to engage in foreign relations and to establish relationships and partnerships with countries which can share its general objectives. Its external powers are broad, encompassing not only foreign policy in the traditional sense, but also development cooperation and sectoral policies such as trade, transport, energy and environment. As a result the Union's institutions have considerable discretion in formulating the strategic direction of policy, the European Council being identified as a key institution in this sense (Art 22 TEU). The institutional framework is there to ensure, first, that that strategic direction can be effectively developed and, second, that it can be effectively implemented.

The Union has a wide selection of instruments to use in its external action. This is one of its strengths. It is unlikely to fail for lack of competence *per se*. On the other hand, the Union's system of foreign affairs is highly complex, not only in terms of institutional balance but also in the role played by the Member States, which of course remain sovereign foreign policy actors in their own right. The competences and instruments are there, but ensuring that they are used in a way which is Treaty-compatible is often contentious, and articulating the Union's action with that of the Member States is always challenging.

Foreign affairs is among the policy fields most affected by the Lisbon treaty and poses specific challenges from a constitutional and institutional perspective. In the years since the coming into force of the Lisbon Treaty a significant number of cases relating to foreign affairs have been brought before the Court of Justice; the judgments of the Court, as well as evolving institutional practice, bear witness to the legal as well as political nature of these challenges.

The purpose of this report is:

- (i) to provide an in-depth analysis of the changes in the constitutional and institutional framework for foreign affairs policy- and decision-making brought about by the Lisbon Treaty;
- (ii) to assess the implementation of those changes, including obstacles to, and potential for further improving, effective implementation in the light of the challenges mentioned above; and
- (iii) to discuss possible future changes to the current constitutional framework.

2. THE EU'S FOREIGN AFFAIRS STRUCTURE UNDER THE LISBON TREATY

The Lisbon Treaty aimed to systematize and impose a rational structure on the Treaty provisions on foreign affairs;¹ it also to some extent codified the case law of the Court of Justice (CJEU) on EU external powers. That this rationalisation has been achieved only partially is hardly surprising. The most significant impacts are the following:

2.1 A single legal entity with a single legal personality: the EC and EU were merged into a single legal entity (Art 1(3) TEU) with a clearly defined legal personality (Art 47 TEU). The EU has taken over the EC's pre-existing international legal treaty obligations.²

2.2 An explicit external mandate: the European Community (EC) had developed its sense of external policy in an incremental way, reactive, closely linked to internal policy objectives and without a Treaty basis for an overall strategy. Throughout the history of the development of European Political Cooperation, the CFSP and now the CSDP, the emphasis has been on institutional and procedural evolution rather than the substantive policy agenda. The Lisbon Treaty for the first time gives the Union an explicit external mandate (Arts 3(5) and 21(1) TEU), operating alongside its internal mandate and based on its values and interests.

2.3 An external strategy: the Lisbon Treaty institutionalises the process of external strategy-formation. It *requires* the Union to develop a strategy, constitutionalises at least the outline of what that strategy might look like, and establishes an institutional framework. It does this in three ways:

- the European Council's formal Treaty-mandated strategic role now covers all external policy and not only the CFSP (Art 22 TEU);
- the external action elaborated by the Foreign Affairs Council on the basis of the strategy defined by the European Council is required to reflect a Treaty-defined set of objectives, priorities and principles (Art 21 TEU);
- the High Representative, assisted by the External Action Service, is to contribute to the development of the CFSP (Art 27 TEU) and is responsible for external relations policy within the Commission (Art 18(4) TEU).

2.4 Consolidation of external policy powers: the Treaty provisions on foreign affairs are gathered together in three sets of provisions:

- general provisions on external action (Arts 3(5), 21 and 22 TEU) which establish the EU's overall principles and objectives;
- specific provisions on the CFSP and CSDP (Arts 23 – 46 TEU);
- provisions on all other external policies, treaty-making, relations with international organisations and Union delegations, restrictive measures and solidarity (Arts 205 – 222 TEU).

¹ The term foreign affairs is used here to denote the full range of EU external action, including the common foreign and security policy and all external policies contained in the TFEU.

² This was achieved through a simple *note verbal* to the EU's treaty partners and has not caused any legal difficulty.

2.5 Increased role for the European Parliament: the Lisbon Treaty substantially enhanced the role of the European Parliament in the EU's treaty-making, by extending the consent requirement to all treaties where the ordinary legislative procedure applies to internal acts, and this is having a real impact. The major exception is the CFSP.

2.6 Partial depillarisation: the CFSP/CSDP is part of the EU's foreign affairs structures and subject to its general principles and objectives, while remaining subject to specific rules and procedures. The institutional specificities of the CFSP include:

- The CFSP is defined as a *sui generis* competence in Art 2(4) TFEU, characterised as neither exclusive, nor shared, nor supplementary. Declarations 13 & 14 affirm that the CFSP will not affect the responsibilities of the Member States for the formulation and conduct of their foreign policy; while bound by decisions taken and subject to the loyalty clause (Arts 4(3) and 24(3) TEU), they thus retain full competence to act.
- With two exceptions (Articles 40 TEU and 275 TFEU) the jurisdiction of the CJEU is excluded from CFSP provisions. The exceptions are however significant. For example, the CJEU may need to determine CFSP objectives in order to determine the correct legal basis of a Union act.³ In addition, as a derogation from the Court's general jurisdiction over the Treaties, the exclusion must be interpreted narrowly: thus the general Treaty provisions on treaty-making (Art 218 TFEU) are subject to the Court's jurisdiction even when applied to the CFSP.⁴
- Legislative acts may not be adopted in the area of CFSP.⁵
- Article 352 TFEU (the flexibility clause) does not apply to the CFSP.⁶
- CFSP decision-making procedures differ from those applicable to other Union policies in terms of the roles of the Commission (which has no right of initiative) and the European Parliament (which has no co-legislative power). Unanimity is still the rule for CSFP decision-making and as regards 'decisions with military implications or those in the area of defence' this cannot be changed by decision of the European Council (Art 48(7) TEU).

Article 40 TEU requires that CFSP and non-CFSP policies are not to 'affect' each other, thus protecting the specificity of both CFSP and non-CFSP powers. This replaces the former Art 47 TEU which established a clear Community priority.⁷ Despite this confirmation of the distinctive nature of the CFSP, the pre-Lisbon relationship between EC law and the CFSP⁸ has fundamentally changed. The specificity of the CFSP is now a derogation: the same rules apply throughout and across both treaties *unless* a specific exception is made.⁹ The 'specific rules and procedures' applied to the CFSP and referred to in Article 24(1) TEU do not put into question the single organisation (the EU), the single legal order, or its single legal personality. The chapter on the CFSP is included in the same Title as, and is subject to, the general principles governing the Union's external action, including the duty of cooperation:

³ C-130/10 *European Parliament v. Council* EU:C:2012:472.

⁴ C-658/11 *European Parliament v. Council*, EU:C:2014:2025, paras 69-74.

⁵ Articles 24(1) and 31(1) TEU and Declaration 41.

⁶ See also Declaration 41. Note that Art 352(4) refers to 'attaining objectives pertaining to' the CFSP, although as the Treaties now stand no specific CFSP objectives are identified.

⁷ C-91/05 *Commission v. Council* EU:C:2008:288.

⁸ The 'coexistence of the Union and the Community as integrated but separate legal orders', supported by the 'constitutional architecture of the pillars'; Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat International Foundation v. Council* EU:C:2008:461, para 202.

⁹ For an illustration of the practical consequences of this change, see below at 4.3.

it is part of that external action and part of the same legal system, albeit with a different institutional balance and decision-making procedures. The separation is not, as formerly, between Treaties, but between policy sectors. The institutional differentiation emphasises the importance of policy coherence.

2.7 An emphasis on coherence: bringing together the different elements of EU external action into a coherent¹⁰ framework was one of the priorities of the Lisbon Treaty. Procedural coherence has been enhanced by consolidating the procedures for EU treaty-making into one provision (Art 218 TFEU).¹¹ Substantive policy coherence (both between external policies and between external and internal policies) is emphasised and is a joint responsibility of the Council, Commission and High Representative (HR/VP) (Arts 18(4) and 21(3) TEU; Art 7 TFEU) as well as the Member States (Arts 4(3) and 24(3) TEU). The general external objectives contribute to policy coherence but it is in the institutional framework for policy-making that a solution must be found. The key to this framework, according to the Lisbon Treaty, is the European External Action Service (EEAS) which is given the task of assisting the HR/VP.¹²

¹⁰ Note that the English language versions of the Treaties use the word *consistency*; however other language versions use a term that is closer in meaning to coherence, and in practice this is the way the term is understood.

¹¹ See further Chapter 4 below.

¹² Art 27(3) TEU and Council Decision 2010/42/EU establishing the organisation and functioning of the European External Action Service, OJ 2010 L201/30.

3. POLICY COMPETENCE IN FOREIGN AFFAIRS

Does the EU have the external powers it needs? The EU is an organisation which only possesses powers conferred on it, expressly or impliedly through the constituent Treaties.¹³ On the other hand, the EU's external powers are now so extensive that it is hard to imagine a field which falls outside them. On only two occasions has the European Court of Justice declared that an international treaty fell outside EC competence. The first was when it held that the EC lacked competence to accede to the European Convention on Human Rights,¹⁴ a deficit now remedied by Article 6 TEU.¹⁵ The second concerned the treaty with the USA on the collection of airline passenger name records (PNR); although the treaty fell outside EC competence it clearly fell within EU (Third Pillar) treaty-making powers and was re-negotiated on that basis. As a result of the Lisbon Treaty the distinction between EC and EU no longer exists and this particular lack of competence has therefore also disappeared.

3.1. Express External Policy Competences

The original Treaty of Rome contained only two express external competences: external commercial (trade) policy and the ability to conclude Association agreements. These were both used to cover a wide range of external activity, in ways which still shape their current use today. For example, both trade and Association powers were, and continue to be, used for purposes of development cooperation.¹⁶

The EU now possesses a range of potentially very extensive external powers: the common commercial policy (CCP); Association agreements; development cooperation; other economic, financial and technical cooperation; humanitarian aid; the common foreign and security policy (CFSP). To these we should add the power to adopt restrictive economic and financial measures against third countries, individuals and groups. In addition to these explicitly external policies, sectoral policies may contain express provision for external action and where they do not, external powers may be implied.

3.1.1. Common Commercial Policy

The importance of the common commercial policy for the Union and its exclusive nature has meant that from early days disputes have occurred over its scope and the purposes for which it might be used. The prevailing approach – endorsed by the CJEU – is functional: an act falls within the CCP 'if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on

¹³ '[The] principle of conferred powers must be respected in both the internal action and the international action of the Community. The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them'. Opinion 2/94, EU:C:1996:140, paras 24-25. Both express and implied powers are here referred to as 'specific powers': that is, derived from a specific provision of the Treaty, as distinct from the unspecific or residual power contained in what is now Article 352 TFEU.

¹⁴ Opinion 2/94, EU:C:1996:140.

¹⁵ In the recent Opinion 2/13, EU:C:2014:2454, the Court found that a proposed treaty of accession to the European Convention on Human Rights was incompatible with the EU Treaties, but this was not on the ground of lack of competence.

¹⁶ In the case of trade, via both the generalised system of preferences and the UNCTAD-based commodity agreements; in the case of Association, via the Yaoundé and then the Lomé and Cotonou Conventions.

trade'.¹⁷ As long as there is a direct effect on trade, a CCP measure may be designed to achieve purposes which go beyond those of trade policy, to include development,¹⁸ environmental protection,¹⁹ the expression of political disapproval,²⁰ or the promotion of human rights.²¹

In the post-Lisbon period, following the expansion of CCP exclusive competence to cover trade in services, the commercial aspects of intellectual property and foreign direct investment, attention has been focused on the relationship between CCP competence and powers based on the EU's internal market competence. The CJEU has adopted an approach which emphasises the effect on trade with third countries rather than the existence of internal sectoral legislation. Thus an international agreement covering regulatory aspects of services falls within the CCP as long as it is designed to effect trade in services between the EU and third countries.²² The EU's external competence in the field of services is no longer limited to ensuring the completion of the internal market, but includes the opening up of third country markets to EU service-suppliers.

A similar approach was adopted by the CJEU in defining the 'commercial aspects of intellectual property' in Art 207 TFEU. It covers the whole of the TRIPS agreement since as an integral part of the WTO system the TRIPS has a 'specific link to international trade'.²³ The Court rejected the argument that those parts of TRIPS which deal with the substance of IPR fall rather within the scope of the internal market. The objective of those rules in TRIPS, it says, is the liberalisation of international trade and not the harmonisation of national laws.

Thus it is clear that as long as external trade is affected CCP powers may be used for international agreements covering not only market access but also the regulation of trade in goods and services.

The exact scope of application of the CCP to foreign direct investment (FDI) has not yet been clarified by the CJEU and is contested. Traditionally investment agreements include provisions on market access and on post-establishment treatment. The latter typically includes national treatment, MFN, fair and equitable treatment (FET), repatriation of profits /transfer of payments and compensation for expropriation. The two main points of disagreement on the application of the CCP to FDI relate to (a) portfolio investment and (b) post-establishment treatment.

(a) EU law and practice to date has followed the traditional distinction between direct investment and portfolio investment,²⁴ which would suggest that portfolio investment is not covered by Art 207 TFEU. If so, then definitions of investment included in (e.g.) the CETA would not be completely covered by exclusive CCP competence but would fall at least partially within the EU's (shared) external competence relating to the movement of capital.

¹⁷ C-414/11 *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v. DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, EU:C:2013:520, para 51.

¹⁸ Case 45/86 *Commission v. Council* EU:C:1987:163.

¹⁹ C-62/88 *Greece v. Council* EU:C:1990:153.

²⁰ In 1982 it was agreed for the first time to use the CCP competence, Article 113 EEC (now Article 207 TFEU) as the legal basis for a Community instrument imposing economic sanctions – by reducing quotas – against the Soviet Union as a reaction to the imposition of martial law in Poland: Regulation 596/82/EEC OJ 1982 L 72/15. See also case C-124/95 *R v HM Treasury and Bank of England ex parte Centro-Com* EU:C:1997:8.

²¹ For example, the positive and negative human rights-related conditionality introduced into the EU's Generalised System of Preferences from 1994.

²² C-137/12 *Commission v. Council*, EU:C:2013:675.

²³ C-414/11 *Daiichi Sankyo Co. Ltd*, EU:C:2013:520.

²⁴ E.g. Council Directive 88/361/EEC OJ 1988 L 178/5, Annex I; C-171/08 *Commission v. Portugal*, EU:C:2010:412, para 49.

However it is certainly not excluded that the CJEU would take a broader view of FDI in Art 207.

(b) Although the argument may be made that the CCP is primarily concerned with liberalising market access, it has in fact been accepted since 1994 that the CCP may also cover regulatory barriers to trade,²⁵ and following the two post-Lisbon Treaty rulings already mentioned²⁶ it would be difficult to contend that post-establishment treatment is wholly excluded from the CCP since such provisions clearly have a 'specific link' to international trade. Arguably Article 345 TFEU precludes EU competence over provisions on expropriation in an investment agreement;²⁷ however the scope of this provision is also disputed (it has not, for example, prevented the adoption of measures harmonising intellectual property rights) and Member States are required to exercise their competence as regards property ownership in compliance with EU law, including the free movement of capital.²⁸

This uncertainty over FDI apart, the expansion in scope of the CCP provides a firmer basis for the EU's new generation of Deep and Comprehensive Free Trade Agreements (DCFTA). However this legal position must be nuanced by practice. Given that they may be inserted into Association agreements, and given the importance and often high political salience of DCFTAs such as CETA and TTIP, they are likely in practice to be concluded as mixed agreements.

3.1.2. Association Agreements, Development Cooperation, General Economic, Financial and Technical Cooperation and Humanitarian Assistance

Association agreements (Art 217 TFEU) were one of the original EU external competences and they have proved to be a flexible instrument, encompassing all fields covered by the EU Treaties and allowing a number of different templates to be developed. The Association relationship pre-supposes long-term, 'special, privileged links with a non-member country which must, at least to a certain extent, take part in the [Union] system',²⁹ but may be used for a variety of purposes: as pre-accession instruments; for long-term close integration without membership; to structure the EU's relations with its neighbours; for development; or as a basis for inter-regional relations. In practice important Association agreements are concluded as mixed agreements. Although they are mostly bilateral, there are also important plurilateral examples (e.g. Cotonou Convention, European Economic Area Agreement). The most recent Association agreements with the neighbourhood countries (Georgia, Moldova, Ukraine) include substantial provisions on the CFSP, alongside the 'deep and comprehensive free trade agreement' (DCFTA).

Art 212 TFEU provides a legal basis for cooperation (economic, financial or technical) with third countries that falls outside development cooperation. It thus provides an alternative to Association for broad horizontal agreements, removing the need for multiple legal bases and the use of Art 352 TFEU.³⁰ It has also been used to conclude specific Protocols to both Partnership and Cooperation and Association Agreements, such as Protocols on the

²⁵ Opinion 1/94 EU:C:1994:384.

²⁶ C-414/11 *Daiichi Sankyo Co. Ltd* and C-137/12 *Commission v. Council*.

²⁷ Art 345: 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.'

²⁸ Case 182/83 *Fearon*, EU:C:1984:335; C-452/01 *Ospelt*, EU:C:2003:493, para 24.

²⁹ Case 12/86 *Demirel*, EU:C:1987:400, para 9.

³⁰ E.g. Art 212 is the legal basis for signing the Framework Agreement with the Republic of Korea, Council Decision 2013/40/EU of 10 May 2010 OJ 2013 L 20/1.

participation of a third country in EU programmes, or Protocols on the accession of new EU Member States.³¹

Prior to the introduction of a specific competence for development cooperation both CCP and Association agreement competences were used to achieve the EU's development objectives, and these are still in use today. Development cooperation as a distinct competence (Art 209 TFEU) has primarily been used for financial instruments, but more recently its potential as a basis for the conclusion of wide-ranging development agreements has begun to be exploited.³² Examples include the agreements with Iraq,³³ with the countries of Central America,³⁴ and with the Philippines.³⁵ Following a legal challenge to the decision concluding the latter agreement, it is clear that Art 209 TFEU can be used as a single legal basis for agreements covering a wide range of sectoral commitments, as long as these are not so substantial as to constitute objectives distinct from the primary development cooperation legal basis.³⁶

A new legal base for Union action on humanitarian assistance (Art 214 TFEU) was introduced by the Lisbon Treaty. It was used to conclude the Food Assistance Convention in 2012. The Food Aid Convention of 1999, to which the EU was also a party, had earlier been concluded on the basis of development cooperation powers.

3.1.3. The Common Foreign and Security Policy

CFSP competence, according to Art 24 TEU, 'shall cover all areas of foreign policy and all questions relating to the Union's security'. The Lisbon treaty replaced the former CFSP joint actions and common positions with simple 'decisions' but the type of instrument has not in practice altered, since CFSP decisions may both provide for operational action (Art 28 TEU) and define the Union's approach to a particular issue (Art 29 TEU).

Whereas the CFSP as a whole has a wide scope, the CSDP has both a specific objective – 'the progressive framing of a common defence policy' – and specific tasks. There are two types of task. *The first* type is external to the EU including peacekeeping and conflict prevention – the 'Petersberg tasks'.³⁷ *The second* type of task is within the EU: aid and assistance to a Member State that is the victim of armed aggression on its territory.³⁸ All these tasks may contribute to the fight against terrorism within and outside the EU. Thus the tasks of the CSDP include both the security of the EU and its Member States, and security in the broader international context.

³¹ E.g. the Protocol to the Euro-Mediterranean Agreement with the Republic of Tunisia on a Framework Agreement on the participation of the Republic of Tunisia in Union programmes, Council Decision 2015/575/EU, OJ 2015 L 96/1.

³² Earlier more limited examples are the agreements with India of 1994, with Laos of 1997, with Cambodia of 1999 and with Pakistan of 2004.

³³ Council Decision 2012/418/EU OJ 2012 L 204/18.

³⁴ The Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama: Council Decisions 2014/210/EU and 2014/211/EU OJ 2014 L 111/2.

³⁵ Council Decision 2012/272/EU OJ 2012 L 134/3.

³⁶ C-377/12 *Commission v. Council*, EU:C:2014:1903.

³⁷ 'missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter' (Art 42(1) TEU) and '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 stabilisation.' (Art 43(1) TEU).

³⁸ Article 42(7) TEU. The CSDP structures may also be used in the implementation of the 'Solidarity Clause' (Article 222 TFEU): 'The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States ...'.

The Union's power to enter into agreements in the field of CFSP has existed since the Treaty of Amsterdam, and is now reproduced in Art 37 TEU. In practice it is used mainly for agreements relating to specific CFSP actions, such as status of forces agreements with third countries hosting EU military missions, and agreements on the involvement of third countries in EU military and civilian missions. However it was recently used for the 'political' (foreign and security policy) dimension of the Association Agreement with Ukraine, and although rather a special case this gives an indication of its potential.

The Lisbon Treaty made a significant change by incorporating the procedure for concluding CFSP / CSDP agreements into the general procedural provision, Art 218 TFEU, while including some specific rules, in particular concerning the role of the HR/VP and the powers of the European Parliament. In the absence of a specific derogation the general procedural rules are applicable.³⁹

A number of changes introduced by the Lisbon Treaty make drawing the boundary between CFSP and non-CFSP external action both necessary and more difficult.

- The removal of the pre-Lisbon preference for Community powers.
- The scope of the CFSP itself is cast very broadly ('all areas of foreign policy and all questions relating to the Union's security'). The limits to this competence lie more in the instruments available (no legislative instruments) than in policy substance.
- There are no objectives *specific to the CFSP*: CFSP action is governed by the list of general principles and objectives of EU external action found in Art 21 TEU.
- CFSP decision-making is still rather different from TFEU external action, especially in excluding the Parliament from a formal role in concluding agreements which are 'exclusively CFSP'.

In one recent case the Court was willing to accept without question the institutions' own characterization of the agreement as in substance a CFSP agreement, simply because there was no institutional disagreement on the matter.⁴⁰ This is significant because the Court's jurisdiction to determine the boundary between the CFSP and other competences, so as to give effect to Article 40 TEU, is an important part of its jurisdiction in relation to the CFSP (Art 275 TFEU). It demonstrates that the Court sees the distinction as essentially concerned with the balance of institutional power rather than an expression of a fundamental division between types of Union competence.

As far as international agreements are concerned, although a combined legal basis would be possible in theory⁴¹ – and has occasionally been used in practice⁴² – the Court has a strong preference for a single legal basis where possible. Where autonomous acts are concerned, at least where the TFEU would require the ordinary legislative procedure (e.g. financial instruments), the Court has taken the view that CFSP and TFEU legal bases are incompatible and cannot be combined.⁴³

One consequence, given the security dimension of the CFSP, is the risk of marginalizing the external dimension of those parts of the AFSJ which deal with security, including police

³⁹ C-658/11 *European Parliament v. Council*, EU:C:2014:2025.

⁴⁰ C-658/11 *European Parliament v. Council*, EU:C:2014:2025.

⁴¹ AG Bot in C-658/11 *European Parliament v. Council*.

⁴² The Treaty of Amity and Cooperation with the ASEAN member states; the decision in 2014 on the signature and provisional application of parts of the EU-Ukraine Association Agreement.

⁴³ C-130/10 *European Parliament v. Council*.

cooperation. A number of recent instruments, all adopted on the basis of CFSP powers, illustrate the point: the counter-terrorism asset-freezing regulation;⁴⁴ agreements with third countries over the transfer and trial of suspected pirates;⁴⁵ asset-freezing measures against individuals wanted for criminal trial in Egypt for misappropriation of public funds.⁴⁶ After case C-130/10, it is difficult to see what external action, if any, could be adopted under Art 75 TFEU.

We have therefore in the CFSP (i) a legal basis for agreements of potentially very broad scope; (ii) the removal by Article 40 TEU of any preference for using non-CFSP competences; (iii) a willingness on the part of the Court to accept the institutions' own categorization of an agreement as belonging to the CFSP; and (iv) a preference for a single legal basis for international agreements reflecting its predominant purpose. As a result, where the Council opts for a CFSP legal basis for an international agreement, that decision will be hard to challenge. The current position is problematic. The Court has recently said 'the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves'.⁴⁷

3.2. The External Dimension of Sectoral Policies

In addition to the above external policy competences, the Union's external powers may be used to further its sectoral policies, in fields such as environment, energy, transport and fisheries. Some sectoral competence-conferring provisions of the Treaties explicitly include treaty-making powers.⁴⁸ Others do not, and yet external powers may be implied. Since the landmark decision of 1971 in *AETR*,⁴⁹ the evolution of implied powers - treaty-making powers implied from an internal competence - has been one of the defining features of EU external relations law. Despite the growth of express external powers, implied powers are still important in some sectoral fields, notably transport, energy, migration, private international law and criminal judicial and police cooperation.

Do we need explicit external powers for every policy field? Although this might be more transparent, and although the distinction between sectoral policies where external powers are explicit (e.g. environment) and those where they are not (e.g. energy) appears arbitrary, it is not necessary as a matter of law or practice. Art 216 (1) TFEU makes it clear that external powers do exist where they are needed. Reflecting the case law on implied external powers, Article 216(1) does not create a new substantive legal basis for the conclusion of international agreements. As Advocate General Kokott rightly says, 'Article 216(1) TFEU must not be confused with a general conferral of powers on the Union institutions for external action. On the contrary, an external competence can only ever be inferred from that rule in conjunction with the provisions of the Treaties, objectives of the Union, legal acts and rules of Union law mentioned in it.'⁵⁰ A substantive provision in the Treaties is thus still required as a legal basis for an international agreement based on implied powers.

Although AG Kokott has proposed that, where implied external powers are relied on, Art 216(1) TFEU should be included as a legal basis alongside the substantive legal basis to

⁴⁴ C-130/10 *European Parliament v. Council*, EU:C:2012:472.

⁴⁵ C-658/11 *European Parliament v. Council*, EU:C:2014:2025.

⁴⁶ C-220/14P *Ahmed Abdelaziz Ezz v. Council*, judgment of 5 March 2015.

⁴⁷ C-28/12 *Commission v. Council*, judgment of 28 April 2015, para 42.

⁴⁸ E.g. Art 191(4) TFEU, on environmental protection.

⁴⁹ Case 22/70 *Commission v. Council (AETR)* EU:C:1971:32.

⁵⁰ C-81/13 *UK v. Council*, judgment of 18 December 2014, opinion of AG Kokott, para 102.

demonstrate clearly the link between the internal competence and the implied external power,⁵¹ neither the practice of the institutions nor the judgments of the Court have (so far) followed this approach.⁵² For example, agreements in the field of environmental policy have been concluded on the basis of Art 192 TFEU; the concluding decision may mention that the agreement 'contributes to the achievement of the objectives of the environmental policy of the Union', reflecting the terms of Art 216(1), but that provision is not included among its legal bases.⁵³ One reason for this practice may be the very close alignment of wording between Art 216(1) TFEU and Art 3(2) TFEU (exclusive external powers). This near-overlap in wording was an unfortunate outcome of the Lisbon Treaty, and it may have the effect of discouraging any reference to Art 216(1) lest it be inferred that Art 3(2) also applies. However the reluctance to make reference to Art 216(1) does not carry any decision-making or other consequences.

As the foregoing demonstrates, the EU is unlikely to be faced by a lack of external competence. Constitutional and institutional difficulties in carrying out an effective foreign policy lie elsewhere.

3.3. Coherence between external and internal policies

The Treaties require coherence both between different areas of external action, and between external policies and other policies; the Union's general external objectives are to be respected not only in all its external action but also in the development and implementation of the external aspects of its other policies.⁵⁴ What does this mean in practice and how may it be ensured? Coherence is a concept which has different levels of meaning. It includes consistency, i.e. compatibility or an absence of contradiction. It also implies a degree of synergy, of complementarity between policy actions, so that the Union's external and internal policies not only do not obstruct, but actually enhance each other. Policy coherence also entails clarity, both as to the Union's objectives in adopting a particular measure, and as to the powers on which the action is based.⁵⁵

There are obvious links between the EU's internal and implied external powers. The conclusion of an international agreement may be 'necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties', or, again following Art 216(1) TFEU, the external power may arise from the existence of internal rules which establish their own specific objectives. In this way, the external treaty-making power will be put at the service of achieving the objectives of the internally-focused competence, such as (for example) the internal market or the EU's energy policy. On the other hand, the Treaty of Lisbon makes it clear that treaty-making powers implied from internal competences must also pursue the general external objectives of the Union as established in Art 21 TEU. Thus as far as sectoral implied external powers are concerned,

⁵¹ C-137/12 *Commission v. Council*, EU:C:2013:675, opinion of AG Kokott, paras 44-45.

⁵² E.g. Decision 2011/708/EU on the signing and provisional application of an air transport agreement, based on Art 100(2) TFEU and Art 218 TFEU.

⁵³ See for example Council Decision 2013/86/EU of 12 February 2013 on the conclusion on behalf of the European Union of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, OJ 2013 L46/1. See also Council Decision 2013/5/EU of 17 December 2012 on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil, OJ 2013 L4/13.

⁵⁴ Art 21(3) TEU.

⁵⁵ The English-language version of the Treaties refers simply to 'consistency' rather than coherence, e.g. in Art 21(3) TEU, thus suggesting a narrower meaning. Other language versions use the equivalent of coherence (e.g. cohérence, coerenza, Kohärenz). In practice the term is used to refer to coherence in its broader sense.

the need for a reciprocal coherence between internal and external objectives is built into the structure of the Treaty.

Coherence may be enhanced if not guaranteed by rules as well as by institutional structures. Rules of hierarchy enforced by the Court ensure consistency between primary and secondary law, but no formal hierarchy is established in the Treaties between different provisions of primary law; nor is a formal hierarchy established between different Union objectives. However trade agreements must be 'compatible' with internal Union policies and rules (Art 207(3) TFEU). In addition, certain key Union objectives must be taken into account in implementing all Union policies, e.g. environmental protection and sustainable development (Art 11 TFEU), and development cooperation, in particular poverty reduction (Art 208(1) TFEU).

These provisions put the onus of ensuring coherence in external policy on the policy-making and legislative institutions: the Commission, Council, assisted by the High Representative (Art 21(3) TEU). The EEAS is to assist the HR in carrying out her mandate, including ensuring coherence / consistency (Arts 18(4) and 27 TEU).⁵⁶ The Parliament is not given an explicit role in ensuring coherence, but in practice as co-legislator and in exercising its powers of assent to international agreements, the Parliament too contributes to enhancing policy coherence.

Two aspects of internal / external coherence may be highlighted here.

The first concerns the tension that exists between on the one hand the need to reflect a range of different policy objectives in the EU's external instruments and on the other the Court's approach to the use of legal basis. The Court has adopted a clear position on legal basis which may be summarised as follows:

- Choice of legal basis should be based on objective factors amenable to judicial review, and is not simply a matter of institutional choice.
- The relevant factors are the aim or purpose, and the content of the agreement. The Court will look at the legal act or agreement to determine both these, and will focus on the aim of an agreement itself rather than the putative aims of the EU in concluding the agreement.
- Where possible a single legal basis should be chosen which represents the main or predominant purpose of the act or agreement. Subsidiary purposes do not need to be reflected in a separate legal basis.
- A dual (or more) legal basis for an act or agreement is thus unusual; it is necessary where (i) there is more than one main or predominant purpose, and neither can be regarded as subsidiary, and (ii) the two legal bases proposed are not incompatible.

Choice of legal basis may arise in two different contexts:

First, there may be a choice between two single legal bases for a particular measure or agreement. It is matter of deciding which one expresses the predominant purpose of the measure.

Second, an agreement may contain a number of different elements and the question is whether one general legal basis (such as development cooperation or CFSP) which all agree is appropriate, can be used alone or whether additional legal bases are required. Here the approach will be to determine whether a specific element (a) can be included under the primary legal basis (e.g. whether a particular clause serves the purposes of development

⁵⁶ Council Decision 2010/42/EU establishing the organisation and functioning of the European External Action Service, OJ 2010 L201/30, Art 3(1).

cooperation), and (b) whether it imposes specific obligations on a particular matter such that those obligations in fact constitute objectives distinct from those of the primary legal basis. Thus in the *Philippines* case the Court referred to 'obligations so extensive that they may be considered to constitute objectives distinct from those of development cooperation that are neither secondary nor indirect in relation to the latter objectives.'⁵⁷ It is a matter of weighing the objectives and content of the specific clause against the agreement as a whole.

An international agreement, more than a piece of secondary law, may contain a number of different elements under one umbrella (such as association). This approach to legal basis requires the decision-maker to identify a predominant purpose, and the complexity of an international agreement may not be reflected in the resulting choice. It has the effect of rendering somewhat invisible the ancillary or secondary objectives, and of insisting that they are ancillary. A hierarchy is thus created, not by the Treaty but by the legislator. It could be argued that this makes it more difficult to achieve coherence, in the sense of giving appropriate weight to different policy objectives. Thus, for example, although trade agreements should be compatible with internal policy objectives including particular regulatory choices, and should take account of environmental protection, the decision concluding a trade agreement will not normally include an environmental or internal market legal basis. These objectives are rendered invisible.

But this critique needs to be qualified. First, the Court's approach accurately reflects the reason for establishing legal basis. Legal basis is necessary to ground competence to act. It is not intended to be a kind of description of the content of a measure, or of all the objectives it seeks to achieve; normally this is the function of a Preamble. So only those legal bases should be included which are necessary and sufficient to ground competence. Second, although the use of a single legal basis may subsume sectoral elements of an agreement, we are here talking about the *conclusion*, not the *implementation* of the agreement. It is well-established that the implementation of specific obligations in the agreement may require a different, sectoral, legal basis. Third, the Court's approach, by requiring only one legal basis wherever possible, leads to greater decision-making simplicity, and this in itself is a component of coherence.

The second aspect of internal / external coherence relates to the relationship between 'internal' concept of security found in the Area of Freedom, Security and Justice (AFSJ) and security as contained within the CFSP. The difference between 'internal' and 'external' security is not defined, nor is it obvious, e.g. in the context of counter-terrorism, and it is accepted that they are interdependent.⁵⁸ The need to differentiate between them might seem in itself to create obstacles to coherence. However the difference is important because the AFSJ is covered by the ordinary legislative procedure and the Parliament therefore has a right to consent to all treaties, whereas CFSP treaties do not even require the Parliament to be consulted. For example, the latest EU-USA and EU-Australia agreements on PNR, involving cooperation with law-enforcement agencies for purposes of counter-terrorism, have been based on AFSJ legal bases;⁵⁹ whereas the agreement with Mauritius on the transfer and trial of suspected pirates, involving EU police assistance in the investigation and prosecution of offences, was held to be correctly categorised as CFSP.⁶⁰ There is a need to establish a workable and pragmatic basis for the distinction, so as to enable consistent legal basis decisions.

⁵⁷ Case C-377/12, para 59.

⁵⁸ Internal Security Strategy for the European Union: "Towards a European Security Model", European Council 25-26 March 2010, Council doc. 7120/10, p.16.

⁵⁹ Council Decision 2012/381/EU OJ 2012 L 186/3; Council Decision 2012/472/EU OJ 2012 L 215/4, both based on Articles Article 82(1)(d) and Article 87(2)(a) TFEU in conjunction with Article 218(6)(a) TFEU.

⁶⁰ C-658/11 *European Parliament v Council*. The European Parliament has also challenged another similar agreement with Tanzania: case C-263/14, pending.

One solution, consistent with current practice, would be to categorise as falling within the CFSP concept of security actions which either directly implement UN Security Council resolutions or are conducted under a UN Security Council mandate.

4. ASSESSING THE INSTITUTIONAL AND PROCEDURAL FRAMEWORK

4.1. Policy and Decision-making Procedures

4.1.1. Coordination and Representation

Coordination (the establishment of a joint position and adherence to that position) should be distinguished from representation (presenting a coordinated position) in international organisations and fora. The obligation of coordination now appears explicitly in the context of the CFSP (Art 34 TEU), but it can be argued that it exists in all fields of EU external relations, based on the duty of sincere cooperation, whether competence is exclusive or shared. The former Art 116 EEC, repealed by the Treaty of Maastricht, which required Member States to proceed by common action in international organisations of an economic character, was in practice little used and was not relied on by the Court of Justice in developing its position on the duty of cooperation.⁶¹

The Lisbon Treaty emphasises the representational role of the Commission (Art 17 TEU⁶²), while potentially strengthening the HR/VP through the creation of the EEAS. The apparent disappearance of the rotating Presidency in foreign affairs caused unforeseen problems in managing the representation of joint EU / Member State common positions in areas of shared competence, especially in multilateral organisations and negotiation frameworks. The rotating Presidency had played a useful role in this regard. A political agreement in Council in October 2011⁶³ helped to defuse some of the tensions that had built up but the outcome is lacking in clarity.

The European Parliament passed a Resolution in 2011 on the EU in multilateral organisations which focused in particular on the difficulty of establishing an effective EU presence in organisations where it could only be represented by its Member States.⁶⁴

There is a tension between the Member States' right, in exercising their own powers, to determine how their collective position should be (re)presented, and the requirements of unity in the Union's external representation, which is ultimately based on the duty of sincere cooperation (Art 4(3) TEU).⁶⁵ It must be recognised that the solution in each case depends not only on the EU Member States but also on the EU's partners. However the current position, with more-or-less ad hoc solutions found in each case risks unedifying disputes which damage the effective international presence of the Union.

Consideration might be given to the addition of a new Treaty provision which would provide a clear basis for the duty of coordination and (possibly also) representation in international fora; however it is not clear that such a provision would add legally to the obligations already present in Arts 4(3) and 24(3) TEU, and its drafting and application would be likely to give rise to difficult questions on delimitation of competence.

4.1.2 Policy Making and Strategic Direction

⁶¹ R Frid, *The Relations Between the EC and International Organisations – Legal Theory and Practice*, Kluwer Law International 1995, 133-135.

⁶² 'With the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union's external representation' (Art 17(1) TEU).

⁶³ General Arrangements for EU Statements in multilateral organisations, 22 October 2011, doc. 15901/11.

⁶⁴ European Parliament resolution of 11 May 2011 on the EU as a global actor: its role in multilateral organisations (2010/2298(INI)) P7_TA(2011)0229, OJ 2012 C 377 E66.

⁶⁵ C-246/2007 *Commission v Sweden* ECLI:EU:C:2010:203.

The roles of the Commission, the EEAS, the European Parliament and the Council in proposing policy direction and setting policy priorities could be reconsidered. The current system is a rather unsatisfactory combination of the historical Commission right of initiative, Council practice in developing strategy through Council Conclusions and Guidelines on specific topics, and the attempt to graft onto this a strategic policy service in the form of the EEAS under the leadership of the High Representative.

The EEAS had a difficult start. There are signs that it is operating more smoothly now and relations with the Commission are better, witnessed by more joint communications, but improvement is still needed. The perceived absence of pro-active and strategic thinking from the EEAS has started to be addressed.⁶⁶ The articulation of the relationship between EEAS and Commission still needs work, and identified issues include the lack of EEAS expertise on the external dimension of internal policies, such as climate change and energy security, thereby making coordination with Commission sectoral DGs more difficult.⁶⁷

Parliamentary resolutions in response to formal consultation, and own-initiative resolutions and reports are important, but this does not mean that there might not be room for institutionalized Parliamentary involvement in shaping policy priorities beyond these recognised procedures, e.g. the discussion and political endorsement, alongside the Council, of EEAS (or Joint Commission / EEAS) strategy papers. Guidelines on issues of importance to the EU such as compliance with International Humanitarian Law or the death penalty⁶⁸ could also be adopted as joint Parliament – Council instruments, rather than simply Council documents.

The European Consensus on Development, which was jointly adopted by the Council, Commission, Member States and European Parliament, has been influential and the Court has used it to determine the objectives and thus proper scope of EU development policy. There may be more scope for the joint adoption of strategic statements in other appropriate cases.

4.2. Negotiating and Concluding Treaties

The procedural rules for negotiating and concluding treaties are, with two exceptions, concentrated in one Article, Art 218 TFEU. The exceptions are (i) the existence of a separate set of procedural rules for the conclusion of exchange rate and monetary agreements in Art 219 TFEU, involving the participation of the European Central Bank; (ii) the 'specific provisions' laid down in Art 207 for trade & investment agreements, operating alongside the general rules of Art 218, which in practice means (a) that the Commission will always be the negotiator for trade agreements, and (b) in some circumstances decisions must be taken unanimously.

Art 218 'constitutes, as regards the conclusion of international treaties, an autonomous and general provision of constitutional scope'. It covers all agreements between the EU and third countries or international organisations. This is interpreted to include 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation'. It thus covers treaties, conventions, MOUs, exchanges of letters etc.

⁶⁶ The first stage in a strategic reflection launched by the HR/VP, a paper on 'The European Union in a Changing Global Environment', was published in June 2015, with a view to producing a global strategy by June 2016.

⁶⁷ See European Court of Auditors, Special Report 'The Establishment of the European External Action Service', 2014/11.

⁶⁸ See EU Guidelines on promoting compliance with International Humanitarian Law (IHL), Council doc. 16841/09; EU Guidelines on the Death Penalty, Council doc. 8416/13.

The generic term used in the Article is 'agreement'. It also covers the adoption of unilateral acts which are intended to form part of an agreement, such as a decision on the acceptance of the accession of new parties to an international convention, and a unilateral 'offer' to a third country which was intended to become binding on acceptance by that third country.

Although Art 218 provides a common procedural framework, there are points in the procedure where the rules will differ according to the substantive legal basis (i.e. the subject matter), in particular rules concerning voting in the Council and the role of the European Parliament. The procedure involves close interaction between the institutions, governed by the obligation of sincere inter-institutional cooperation (Art 13(2) TEU).⁶⁹

The initial proposal to enter into negotiations is made to the Council by the Commission, or (for agreements relating 'exclusively or principally' to the common foreign and security policy) by the High Representative for Foreign Affairs and Security Policy.

The Council adopts a decision authorizing the opening of negotiations which may be accompanied by more or less detailed directives ('negotiating directives'⁷⁰). The Council appoints the negotiator, or the head of the negotiating team. This will often simply be the Commission, but may be the High Representative, depending on the content of the agreement. A special committee may be appointed by the Council; this has a consultative role in the negotiations, it cannot be empowered to adopt specific negotiating positions intended to be binding on the negotiator.⁷¹

The Council adopts a decision authorizing signature and possibly provisional application of the agreement (Art 218(5) TFEU). The Council also adopts the decision concluding the agreement on behalf of the Union (Art 218(6) TFEU). This decision will render the agreement a part of EU law, binding on the institutions and the Member States (whether or not the latter are parties) as a matter of EU law (Art 216(2) TFEU). The Council normally acts by qualified majority vote for both signature and conclusion, but in some cases unanimity is required, in particular where unanimity is required by the field in question (substantive legal basis), for Association Agreements (Art 218(8) TFEU) and for some trade agreements (Art 207(4) TFEU).

There may be occasions when the Member States conclude a treaty *on behalf of* the EU. If a proposed treaty falls within the EU's exclusive competence, but the EU is not able to become a party then the EU (via a Council decision) may authorise the Member States to conclude the agreement on behalf of the Union. This gives rise to legal obligations within EU law but does not affect the legal position in international law.

A simplified procedure governs the adoption of decisions on the Union's position in bodies set up by an agreement, where that body will adopt acts having legal effects (Art 218(9) TFEU), i.e. a qualified majority vote in Council on a proposal from the Commission or High Representative, even where the substantive legal basis requires unanimity,⁷² and with no formal role for the Parliament other than the general injunction to keep the Parliament fully informed at all stages. This procedure also covers situations where the Member States are parties to an international agreement but the Union is not, as long as the decision adopted

⁶⁹ C-425/13 *Commission v. Council*, ECLI:EU:C:2015:483, para 64.

⁷⁰ The term 'negotiating mandate' is quite often used, but has been argued to be incorrect and misleading: see AG Wathelet's opinion in C-425/13 *Commission v. Council*, ECLI:EU:C:2015:174, at paras 157-163.

⁷¹ Art 218 (4) TFEU. C-425/13 *Commission v. Council*, ECLI:EU:C:2015:483, paras 85-93.

⁷² Thus the possibility of requiring unanimity under Article 218(8) has been held, without much explanation, not to apply to this procedure: C-81/13 *UK v. Council*, para 66.

under that provision relates to a 'position of the Union'.⁷³ A substantive legal basis will be required for such decisions,⁷⁴ but although this legal basis may be important in determining whether competence is exclusive or shared, it does not affect the decision-making procedure established by Art 218(9). The advantages of a simplified procedure in such cases are clear, but the important decision-making powers of such bodies, and the fact that their decisions will have legal effects and may be directly effective, suggests that the current balance may not be right.⁷⁵

Mixed agreements (to which both the EU and Member States are party) are a reality but there is no special provision for them in the Treaty rules on negotiation and conclusion of international agreements. The Lisbon Treaty did however introduce more flexibility into the concept of the Union's 'negotiating team' in Art 218(3) TFEU which could potentially be used in (at least some) cases of mixity. At present ad hoc arrangements may be made, normally via Council Conclusions, and some practice has emerged, e.g. for the negotiation of mixed multilateral environmental agreements, combining the Commission and the Presidency. Use could be made of Art 218(3) TFEU to formalise the appointment of a joint EU – Member State negotiating team (note: the Union's 'negotiator', who proposes signature and conclusion of the agreement by the Union, would have to be either the Commission or the HR/VP).

Such flexibility is less easy when it comes to the decision authorising signature or conclusion of the agreement. In a recent judgment the CJEU has held that a so-called 'hybrid' decision on the signature of a mixed agreement, combining into one instrument a Council decision and a decision of the representatives of the Member States meeting in Council, was in breach of the Treaty. While acknowledging the duty of close cooperation between EU and Member States in the context of mixed agreements, the Court held that 'that principle cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU.'⁷⁶ The hybrid decision resulted in the Member States participating in a decision which should have been for the Council alone, according to Art 218(5), and in the use of a procedure which did not respect the voting rules set out in Art 218(8). Two separate decisions should have been adopted.

4.3. The Role of the European Parliament in Foreign Affairs

The European Parliament must give consent to the conclusion of what is now the majority of international agreements, most importantly agreements 'covering fields' to which the ordinary legislative procedure applies (this includes trade & investment) and Association Agreements (Art 218(6) TFEU). In other cases the Parliament must be consulted. The only exception is for agreements 'relating exclusively' to the CFSP, where there is no formal requirement to consult the Parliament, and this covers all agreements whose sole substantive legal basis is the CFSP.⁷⁷

The Parliament has used its power of consent to reinforce its role in the negotiation of treaties, and in two high-profile cases (the agreement with the USA on the transfer of financial data for the purposes of the terrorist finance tracking programme, and the Anti-

⁷³ C-399/12 *Germany v. Council*, judgment of 7 October 2014.

⁷⁴ C-370/07 *Commission v. Council*, EU:C:2009:590.

⁷⁵ One may contrast the internal legislative implementation of an international agreement, which will require its own legal basis with appropriate decision-making procedures.

⁷⁶ C-28/12 *Commission v Council*, judgment of 28 April 2015, para 55.

⁷⁷ C-658/11 *European Parliament v. Council*, EU:C:2014:2025.

Counterfeiting Trade Agreement) it has rejected a proposed treaty. Nonetheless, this is a blunt weapon and of limited use by itself, especially for treaties which are regulatory or quasi-legislative in substance whether bilateral (such as TTIP) or multilateral (such as Kyoto). A take-it-or-leave-it consent procedure at the end of a negotiation is no substitute for involvement in shaping the content of such an agreement; hence the importance of practice which involves the Parliament more closely in the actual negotiation.

The Parliament also has the right to be 'immediately and fully informed' at all stages of the procedure (Art 218(10) FEU). This has proved important:

- Despite the lack of a formal role for Parliament in the conclusion of CFSP treaties, the obligation to inform the Parliament still applies, and because this rule 'is an expression of the democratic principles on which the European Union is founded' it is an essential procedural requirement the breach of which requires annulment of the measure.
- In the 2010 inter-institutional agreement between Parliament and Commission,⁷⁸ the Commission undertook to 'facilitate the inclusion of a delegation of Members of the European Parliament as observers in Union delegations [in international conferences], so that it may be immediately and fully informed about the conference proceedings'. MEPs do not directly participate in negotiations but where possible are to be included in delegations with observer status. Thus the right to be kept informed has been used as a basis to expand the Parliament's involvement in treaty negotiations, which according to Art 218 appeared limited to the conclusion of the treaty.
- The impact of the changed institutional balance has been felt more widely, in particular through the willingness of the Commission to be increasingly open about major and high profile negotiations (such as TTIP) and even to publish the negotiating mandate. This trend is likely to continue.

4.4. Flexibility Mechanisms and Differentiation

4.4.1. Formal and informal flexibility in foreign affairs

Enhanced cooperation (Art 20 TEU and Arts 326-334 TFEU) may in principle be used in all fields of non-exclusive external competence, but in practice it is unlikely to be frequently employed. This is in part because in such fields the Member States, as sovereign States, may continue to engage in their own external action (subject to the duty of sincere cooperation) and there is no need for a formal Treaty procedure authorising a sub-group of Member States to adopt external instruments.⁷⁹ In the field of development cooperation, for example, Member States may decide to act collectively, even using the EU institutions to assist in doing so.⁸⁰

⁷⁸ Framework Agreement on relations between the European Parliament and the European Commission OJ 2010 L 304/47.

⁷⁹ In contrast such authorisation may well be used in a field of exclusive competence.

⁸⁰ Joined cases C-181/91 and C-248/91 *European Parliament v Council and Commission*, ECLI:EU:C:1993:271.

When it comes to international agreements, the position is more complex, since unless the Union is a party, it will not be bound.⁸¹ We can however find examples of mixed agreements concluded by the Union and some Member States only. Where multilateral conventions are concluded as mixed agreements in areas of shared competence, the Convention may not be ratified by all Member States.⁸² In the field of migration, the Union and groups of Member States have entered into 'Mobility Partnerships' with certain third countries; these are a form of non-binding agreement containing commitments on the side of the Union and each participating Member State, as well as the third country.⁸³

There are, therefore, different types of flexibility available which do not involve enhanced cooperation in the sense of Art 20 TEU. One example of the use of enhanced cooperation in an external context is the Regulation on unitary patent protection,⁸⁴ in which enhanced cooperation is not used to engage in external action per se, but rather operates in conjunction with an international agreement, the European Patent Convention, by granting uniform protection in the participating Member States to patents granted under the EPC. This type of 'enhanced implementation' of an international agreement by some Member States through a Union instrument is perhaps unlikely to be used frequently but this example shows it is possible in theory.

4.4.2. The use of flexibility in CFSP and CSDP: unused potential?

How useful could enhanced cooperation be for the EU in the CFSP?

The Lisbon Treaty removed two substantial restrictions to the use of enhanced cooperation in the field of CFSP. First, the important restriction whereby enhanced cooperation could only be used to implement a CFSP joint action or common position disappeared, giving greater flexibility in its use. The change signals that enhanced cooperation could be used to establish a new line of policy in CFSP, not merely an implementation of already defined goals. Second, the exception for military and defence matters was removed and enhanced cooperation may now operate throughout the CFSP and CSDP.

However, the procedure for its use in CFSP/CSDP was tightened. The decision of the Council to authorise enhanced cooperation must be taken unanimously, instead of by QMV,⁸⁵ and it will be possible for the authorising decision to lay down conditions of participation.⁸⁶

The fact that enhanced cooperation has not yet been used in the CFSP may suggest either that it is not filling an unmet need or that the preconditions and limitations on its use are too strict. It is striking, on the other hand, that other forms of flexibility were already a feature of the Union's security and defence policy and that the Lisbon Treaty formalized some pre-existing practices as well as introducing new possibilities. Moreover these forms of flexibility operate precisely within the military and defence sphere. These developments

⁸¹ With the exception of a very small group of agreements in fields of exclusive competence where the principle of functional succession has been held to apply: e.g. the GATT in joined cases 21-24/72 *International Fruit Company*, ECLI:EU:C:1972:115.

⁸² In contrast, where a mixed agreement is essentially bilateral in form (e.g. an Association Agreement), the Union will not conclude the agreement until it has been ratified by all Member States; for this reason a decision on signature may be accompanied by a decision on provisional application.

⁸³ European Commission, *Mobility Partnerships as a tool of the Global Approach to Migration*. SEC (2009) 1240. For an example, see Joint Declaration on a Mobility Partnership between the European Union and the Republic of Moldova, 21 May 2008, Council doc. 9460/08 ADD 1.

⁸⁴ Regulation 1257/2012/ EU of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ 2012 L 361, p. 1).

⁸⁵ Article 329 TFEU.

⁸⁶ Article 328(1) TFEU.

suggest that flexibility may be inherent in the development of a common security and defence policy, for two reasons. First, the differences between the Member States in relation to their international defence commitments, what the current Treaty calls 'the specific character of the security and defence policy of certain Member States' (Article 17(1) TEU). Second, the requirement that a fully-fledged CSDP imposes in terms of significant commitments as regards operational capacity.

We can identify three examples of this type of operational flexibility: (i) the European Defence Agency;⁸⁷ (ii) entrusting implementation of CFSP tasks to specific Member States; and (iii) permanent structured cooperation.

One form of flexibility offers a less dramatic solution than enhanced cooperation within the CFSP: the possibility of constructive or qualified abstention under Article 31(1) TEU. The provision allows a Member State to qualify an abstention to a vote in Council, the effect of which will be that while the Member State accepts that the decision in question will commit the Union, it will not bind that State. Mutual solidarity requires the other Member States to respect this position, while the abstaining State must refrain from action likely to conflict with or impede the Union's action. This compromise solution allows a Member State to withdraw from a policy decision without impeding the formation of a consensus, while attempting to ensure – most important for the CFSP – that the dissenting Member State will not actively seek to undermine the Union's position. However, if at least one third of Member States qualify their abstention in this way, the Council decision cannot be taken; thus the same proportion of Member States may act as a 'blocking minority' in these cases and to the authorisation of enhanced cooperation.

Constructive abstention was used by Cyprus in February 2008 in relation to the adoption of the EU Joint Action establishing Eulex Kosovo.⁸⁸ The existence of this form of flexibility is in reality probably sufficient to prevent the type of decision-making *impasse* in the CFSP that enhanced cooperation seems designed to avoid. Although there is no good reason to exclude the CFSP from the possibility of enhanced cooperation it is perhaps unlikely to be used in practice, at least for this purpose.

What about the use of enhanced cooperation to establish deeper integration or new policy initiatives within the framework of Union objectives and competences? Within the context of the development of foreign policy, a new policy initiative by a limited number of Member States will lose the impact of a Union policy. It also poses difficulties in that the Union's foreign policy positions with respect to countries, regions or serious issues such as non-proliferation or terrorism inform not only CFSP activity but also other Union policies. A common position adopted under enhanced cooperation by a limited number of Member States would not have that effect. The Union's foreign policy derives such strength as it has from the process of consensus building rather than reaching a decision at any cost.

On the other hand, the very different positions of the Member States with respect to defence (permanent members of the UN Security Council, members of NATO, nuclear and non-nuclear powers, neutral States) means that any common security and defence policy will have to respect and accommodate those differences. The kinds of operational flexibility developed in EU security and defence policy and enhanced by the Lisbon Treaty, are highly practical. Deeper integration with respect to armaments is managed incrementally and

⁸⁷ Council Decision 2011/411/CFSP of 12 July 2011 defining the statute, seat and operational rules of the European Defence Agency OJ 2011 L 183/16.

⁸⁸ Council doc. CM 448/08, 4 February 2008. Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ L 42/92.

differentially through the EDA. Civilian and military missions require the involvement of Member State capacities and assets and inevitably not all Member States take part in every mission. Permanent structured cooperation would take this further by establishing in advance a coalition of willing and able Member States who will be ready to take on missions, for example at the request of the United Nations Security Council.

These forms of practical and operational flexibility do not threaten the unity of the Union's CFSP or CSDP. The provisions on enhanced cooperation, particularly those that bind it into the Union's institutional framework and which limit its scope to the Union's competences, are not likely to pose a serious threat to unity either. But they may not be as effective – in terms of taking forward integration and policy-making at different speeds and reflecting different capacities – as alternative forms of flexibility.

Treaty amendment does not seem a priority here. Nor do I think that enhanced cooperation is really a missed opportunity in either the CFSP or CSDP. Not in the CSDP because other mechanisms for flexibility are sufficient. And not in the CFSP because constructive abstention serves the purpose, and its lack of use demonstrates the importance for CFSP of a fully unanimous Union position. For this reason I would not recommend the broader introduction of QMV into CFSP either. However a serious intent to develop the Union's CSDP would include as a priority the effective implementation of permanent structured cooperation.

4.4.3. The opt-outs and their effects on external policy

Some differentiation in foreign policy inevitably flows from the position of some Member States, which are not bound by particular policies. Denmark, for example, does not participate in the CSDP. The 'opt-outs' for Denmark, UK and Ireland in Justice and Home Affairs are more complicated in effect. The UK and Ireland may choose to opt-in to specific measures, but Denmark may not. This leads to some complexity: thus Denmark did not participate in the Council decision concluding the second Lugano Convention on jurisdiction and enforcement of judgments,⁸⁹ even though it was held to fall within exclusive competence,⁹⁰ but is nonetheless a party to the Convention in its own right.⁹¹

It has also created difficulty in the selection of legal basis: if an Association or a development agreement contains provisions relating to the AFSJ, under which circumstances will the UK / Ireland opt-out (Protocol 21) apply? The UK has taken the view that it should apply whenever there is significant JHA content. The Commission and Council have supported a reading which would limit its application to cases where a JHA legal basis is used. Given the Court's approach to legal basis (a single legal basis wherever possible, reflecting the main or predominant purpose of the instrument) this means that the Protocol does not apply where there is a subsidiary or incidental JHA element. It seems that the Court supports this reading,⁹² although the UK government has taken the position

⁸⁹ Council Decision 2009/430/EC on the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 2009 L 147/1.

⁹⁰ Opinion 1/03 ECLI:EU:C:2006:81.

⁹¹ Denmark implements the Brussels I Regulation by virtue of an agreement concluded between Denmark and the EU: Council Decision 2006/325/EC concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 2006 L 120/22.

⁹² In case C-137/12, for example, the Court held at paras 73-74 that 'Protocol (No 21) ... and Protocol (No 22) ... are not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested decision. Indeed, it is the legal basis for a measure – the appropriateness or otherwise of which falls to be assessed ... on the basis of objective factors such as main or predominant purpose of the measure and its content – which determines the protocols to be applied, and not vice versa.' See also case C-81/13 at para 37.

that it is not yet finally settled and this has led to repeat litigation over choice of legal basis.⁹³

The uncertainty over the application of the Protocol in the case of international agreements may impact on the EU's relations with third states. When the agreement to amend Annex II of the EU-Swiss Free Movement of Persons agreement to bring it into line with new internal EU rules on social security was negotiated, the UK, taking the view that the Protocol applied, declared that it would not exercise its right to opt-in to the agreement but would instead negotiate a different agreement with Switzerland on social security. After some disagreement between Commission and Council, a decision was adopted on the basis of Art 79(2)(b) TFEU, an AFSJ legal basis which would allow the possibility of an opt-out by the UK. Since this solution was not acceptable to Switzerland, the Commission presented a proposal for a new Decision which was adopted by QMV on the legal basis of Article 48 TFEU.⁹⁴ The sequence of events thus illustrates the reaction of a third country to a proposal to amend an existing mixed agreement in such a way as to create a differential application of the agreement among the EU Member States.

In other cases the opt-out is accepted by the third country. The case of the Association Agreement with Ukraine provides an example. Two concluding decisions needed to be adopted so as to accommodate the opt-out, with one decision based on Art 217 TFEU covering all of the agreement except one specific provision on the treatment of Ukrainian nationals legally employed in a Member State, and another decision based on Art 79 TFEU applying only to that provision, which does not bind the UK or Ireland. These Member States are thus bound by that provision of the Association Agreement, as a matter of international law, as a result of their participation in the mixed agreement, but not as a matter of EU law.

This differentiation is of course perfectly legal, but creates uncertainty for third countries and carries over the internal EU differentiation into the external sphere with a corresponding negative effect on the unity of the EU vis a vis third states.

⁹³ E.g. cases C-431/11; C-81/13; C-656/11; C-377/12.

⁹⁴ The Decision was unsuccessfully challenged by the UK in case C-656/11, ECLI:EU:C:2014:97.

5. ADJUSTING THE CONSTITUTIONAL FRAMEWORK

Building on the previous analysis, a number of conclusions and recommendations follow. An initial comment should be made. The EU Treaties already contain a substantial constitutional framework for EU external action, especially in the matter of institutional provisions. Solutions to many of the identified difficulties does not lie in adding more constitutional law, but rather in improving practice, inter alia through improved inter-institutional coordination and agreements, and in a few cases through amendment of existing Treaty provisions. As we have seen in practice, new constitutional provisions are likely to provoke new problems and more litigation. The Treaties are of course much harder to amend than other softer forms of institutional reform and are therefore less suitable for experientially-based change. In what follows, then, recommendations for new Treaty provisions are minimal. This is not because Treaty reform is seen as unrealistic but rather because Treaty reform is not necessarily the best way to achieve the desired result.

External competence

1. The current range of substantive treaty-making powers is broad enough to cover the EU's foreign policy and external action needs.
2. Consideration could be given to the insertion of an express external power for JHA (in addition to the two current express powers in relation to asylum and readmission agreements) and energy, but this would only make express what is currently clearly implied. Given the tendency towards wide-ranging agreements coupled with the Court's approach to legal basis, these new powers would be used primarily for sectoral agreements.

The CFSP and its relation to other external powers

3. Amending the Treaty in an attempt to delimit in general terms the scope of the CFSP would be difficult, if only because there is no accepted meaning of the term, and would simply lead to more disputes. However, a consistent and clearly specified practice would not require Treaty amendment and would provide adequate certainty. For example, it would be consistent with current practice to categorise as falling within the CFSP concept of security actions which either directly implement UN Security Council resolutions or are conducted under a UN Security Council mandate.
4. However in one case the boundary should be defined. The scope of Art 75 TFEU, on measures concerned with terrorist financing, needs to be clarified in the light of the alternative legal basis combining a CFSP decision with Art 215 TFEU. It is recommended that the distinction should be functional rather than based on an attempted policy distinction or typology of restrictive measure. Art 75 TFEU should be used to define the general framework for counter-terrorism asset-freezing measures directed at individuals, including those designed to implement UN Security Council Resolutions, and including provision for review. A CFSP decision adopted together with Art 215 TFEU should then be used to adopt the lists identifying the individual persons affected. The ordinary legislative procedure would thus be used to establish the overall legal framework under Art 75 TFEU; whereas the decision to target a particular individual would be the result of a CFSP decision, implemented via a Council Regulation based on Art 215 TFEU. This recommendation does not need Treaty amendment, but would be consistent with the Treaties as they stand.

5. A more general reform would converge to a greater extent than the Lisbon Treaty the decision-making process for CFSP and TFEU external action. A distinction could be made between framework and operational CFSP decisions and agreements, thereby allowing greater Parliamentary involvement in adopting framework decisions. This and the following two recommendations would make the CFSP / non-CFSP boundary less significant.
6. The possibility of a joint CFSP and non-CFSP legal basis for international agreements is possible and a Treaty amendment is not strictly necessary. If decision-making converged, a joint legal basis for autonomous acts could also be possible.
7. The role of the CJEU in relation to the CFSP is currently limited. The recommendation is to extend the jurisdiction of the Court so as to include, at least, the possibility of judicial review of all CFSP acts and decisions. Full jurisdiction, including the possibility of enforcement actions for failure to comply with CFSP obligations, is not essential.

Representation, policy-making and the negotiation of international agreements

8. The absence of clear rules on representation in cases of shared competence has created difficulty, insofar as ad hoc solutions need to be agreed. It is difficult, since the Member States are by definition exercising their own powers, to require a particular form of representation of a collective view. The Treaty could make it explicit that the Member States may choose to request the Commission, and/or the HR and/or the rotating Presidency to express the common position of the Member States, without prejudice to issues of competence. This would simply be a consolidation of current practice, and arguably is best left outside the Treaties, as a 'soft' agreement.
9. The possibility of adopting joint Council – European Parliament strategic statements and positions on specific, especially systemic, issues should be considered. No Treaty amendment would be required since the statements would not carry formal legal effect. They would nevertheless be a way of involving the Parliament in giving strategic direction to EU external policy.
10. An appreciable number of EU external agreements now contain a regulatory dimension and the contrast between a treaty negotiation and the ordinary legislative procedure is striking: how can meaningful democratic participation be achieved given the necessities of treaty negotiation? The TTIP innovations, encouraging a wider civil society debate, are clearly a step forward, but some more innovative thinking is needed. A full discussion of the mandate for such agreements in the European Parliament would be an improvement and would not – given the type of agreement – jeopardize the EU's negotiating position (impliedly recognised by the decision to release the mandate and some negotiating positions on regulatory issues for the TTIP).
11. This points to a more general recommendation: the need to adjust the practice of negotiation of external agreements to their content, and to allow maximum transparency wherever possible. Confidentiality, while sometimes necessary, does not need to be the default position and is often damaging.
12. There may be a need to reconsider the simplified procedure for adopting decisions establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, given the sometimes policy-significant content of such decisions.

Consideration should be given to an amendment to Art 218 to the effect that Art 218(8) applies in such cases, as well as to whether the Parliament should be involved in such decisions (at least via a consultation process) where its consent would be required under the relevant substantive legal basis.

13. Consideration could be given as to whether specific procedures available for the negotiation and conclusion of mixed agreements might be inserted into the Treaty, including the adoption of a hybrid decision for the signature of mixed agreements. However, in general, the practice of negotiation and conclusion of mixed agreements has developed pragmatically and incrementally, allowing adjustment to the needs of different negotiation scenarios (including the position of negotiation partners) and it might be felt that there is no need, and it might be damaging, to set the current practice in stone via Treaty amendment.

Flexibility and Differentiation

14. Progress in establishing Permanent Structured Cooperation in the CSDP has been minimal. This is a constructive form of flexibility which is important for the development of a robust and effective CSDP.
15. An amendment to Protocol 21 is needed to make clear exactly when the Protocol applies, including in the case of international agreements, such as Association and development agreements, which may well carry JHA content without a specific JHA legal basis.

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ISBN 978-92-823-8364-3 (paper)
ISBN 978-92-823-8363-6 (pdf)

doi: 10.2861/320829 (paper)
doi: 10.2861/551810 (pdf)