

COMPETENCE DISTRIBUTION IN EU EXTERNAL RELATIONS AFTER *ECOWAS*: CLARIFICATION OR CONTINUED FUZZINESS?

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1. Introduction

The Treaty on European Union crafted in the early 1990s envisaged the newly established Common Foreign and Security Policy (Title V TEU on CFSP), as well as the cooperation in the area of Justice and Home Affairs (Title VI TEU on JHA), as “policies and forms of cooperation” that “supplemented” the European Communities (Art. A TEU). In the ensuing composite European construction, the preservation of the *acquis communautaire* was to be paramount (Art. 2 TEU), and the European Court of Justice was given jurisdiction to see to it that the new Treaty would in no way harm Community competence (Art. 47 TEU).¹

In the years that followed, it became obvious that a watertight separation of the different EU policy fields was not workable. Indeed, the practice of decision-making revealed the “fuzziness” of the borders between the Union’s three “pillars”; a fuzziness which may have been anticipated by the treaty drafters when they foresaw that the Union should be served by a single institutional framework to ensure the consistency and the continuity of the different EU activities.² To be sure, the TEU entrusts the Council and the Commission with a duty to cooperate to guarantee the “consistency of (the Union’s) external activities as a whole in the context of its external relations, security, economic and development policies”, and to “ensure the implementation of these policies, each in accordance with its respective powers”.³

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1. Art. 47 TEU provides that “nothing in [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them”. On the interpretation of the *acquis communautaire*, see e.g. Weatherill, ‘Safeguarding the *acquis communautaire*’ in Heukels, Blokker and Brus (Eds.), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law International, The Hague, 1998), 153; or Curti Gialdino, ‘Some Reflections on the *Acquis Communautaire*’, 32 CML Rev. (1995), 1089.

2. Art. 5 TEU.

3. Art. 3 TEU.

The European Court of Justice has also played its part in tackling that fuzziness. Increasingly called upon to adjudicate on the distribution of powers between the EU and the EC, the ECJ has been articulating, in the garb of the constitutional Court of the EU,⁴ a jurisprudence to clarify the boundaries between the Community and the non-Community pillars of the Union. The fuzziness of horizontal competence distribution intrinsic to the EU constitutional order, and the ensuing quest for coherence in the Union's (external) activities, have thus been addressed in two complementary, albeit partly antithetical, fashions: cooperation between EU political institutions, and competence clarification by the Court of Justice.

The *ECOWAS* (Economic Community of West African States) case, which this contribution discusses, offers a glaring example of the possible tension between these two approaches.⁵ The case provided the first opportunity for the Court of Justice to speak out on a legal base conflict between the first (EC) and second (CFSP) pillars,⁶ and to shed some light on the distribution of competence between the EC and the EU *qua* CFSP.⁷ In the event, the Grand Chamber of the Court found, unexpectedly for some and notably for the Advocate General, that by using a CFSP Decision on the EU support to ECOWAS in the fight against the proliferation of small arms and light weapons (SALW), the Council had encroached upon the EC competence in the field of development cooperation, thus violating the provisions of Article 47 TEU. In doing so, the Court bolstered the Community method in the development of the EU external action, and circumscribed the operation of the CFSP form of cooperation therein. In that, the *ECOWAS* pronouncement is a milestone in the case law of the Court of Justice on EU external competence, on the functioning of the EU system of external relations and, more generally, on the present and future constitutional architecture of the Union.⁸

4. See more extensively Wessel, "The Dynamics of the European Union Legal Order: Towards Institutional and Normative Unity", (2009) *EUConst*, (forthcoming); and Curtin and Wessel, "Rechtseenheid van de Europese Unie? De rol van het Hof van Justitie als constitutionele rechter", (2008) *SEW*, 371–378.

5. Case C-91/05, *Commission v. Council* ("ECOWAS" or "Small Arms and Light Weapons"), Grand Chamber Judgment of 20 May 2008, nyr.

6. The Court has in the past only been asked to test the compatibility of Third pillar measures with Art. 47 TEU: Case C-170/96, *Commission v. Council (Airport transit visas)*, [1998] ECR I-2763, paras. 15–16; Case C-176/03, *Commission v. Council (Environmental penalties)*, [2005] ECR I-7879; Case C-440/05, *Commission v. Council (Ship Source Pollution)*, [2007] ECR I-1657; further, see Hillion and Wessel, "Restraining external competences of EU Member States under CFSP", in Cremona and de Witte (Eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, Oxford, 2008), pp. 79–121.

7. In Cases T-349/99, *Miskovic* and T-350/99, *Karic*, the CFI missed the opportunity when the Council amended the decision challenged by two individuals who had been refused visas on the basis of a CFSP act.

8. See also Hoffmeister, "Entwicklungszusammenarbeit und andere Politikbereiche", (2008) *EuR Beiheft* 2, 55–101

2. Facts and background

In 2005, the Commission challenged the legality of two acts which the Council adopted in the context of Title V TEU, namely a CFSP Joint Action (2002/589/CFSP) “on the European Union’s contribution to combating the destabilizing accumulation and spread of small arms and light weapons”, and the implementing decision (2004/833/CFSP) “with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons”. The Joint Action laid down the general EU policy in combating the proliferation of small arms and light weapons, while the 2004 Decision was one of its specific applications, here to the ECOWAS, by supporting the latter in its fight against such proliferation.

Although the Commission did not protest at the time the Joint Action was adopted in 2002, the subsequent Council Decision relating to ECOWAS was seen as a step too far. Seemingly the Council crossed a boundary and thus violated any understanding it may have had with the Commission on competence division in the area of development cooperation and security. Indeed, the Commission was preparing a proposal to finance operations in the field of conflict resolution and peace-building, and a considerable part of these finances was earmarked for the ECOWAS project to control light weapons.⁹ The initiative of the Commission was envisaged as an implementation of the Cotonou Agreement concluded between the EC and its Member States, and a group of African, Caribbean and Pacific States on 23 June 2000, which came into force on 1 April 2003.¹⁰

Possible Commission and/or Community involvement in the field was indeed envisaged by the CFSP Joint Action of 2002. Hence, Article 8 “The Council notes that the Commission intends to direct its action towards achieving the objectives and the priorities of this Joint Action, where appropriate by pertinent Community measures.” Indeed, Art. 1(1) stipulated that:

“The Council and the Commission shall be responsible for ensuring the consistency of the Union’s activities in the field of small arms, in particular with regard to its development policies. For this purpose, Member States and the Commission shall submit any relevant information to the relevant Council bodies. The Council and the Commission shall ensure implementation of their respective action, each in accordance with its powers.”

9. See Opinion of A.G. Mengozzi in *ECOWAS* para 23.

10. O.J. 2000, L 317/3; on behalf of the Community signed by the Council; Decision 2003/159/EC of the Council of 19 Dec. 2002 (O.J. 2003, L 65/27).

Moreover, Article 3 of the ECOWAS Decision endowed the Commission with a specific task:

“The Commission shall be entrusted with the financial implementation of this Decision. To that end, it shall conclude a financing agreement with ECOWAS on the conditions for use of the European Union contribution, which shall take the form of a grant. Amongst other things, this grant shall cover, over a period of 12 months, salaries, travel expenses, supplies and equipment necessary for setting up the Light Weapons Unit within the ECOWAS Technical Secretariat and converting the Moratorium into a Convention on small arms and light weapons between the ECOWAS Member States.”

In the discussion of the proposed ECOWAS Decision at Coreper level, the Commission suggested that the underlying Joint Action should not have been adopted, and that the whole project should have been financed out of the European Development Fund in the framework of the Cotonou Agreement. The Commission further contended that the Joint Action fell under the Community’s development policy, protected by Article 47 TEU.¹¹ On 21 February 2005, it eventually requested the Court to annul the ECOWAS Decision and to declare illegal, and hence inapplicable, the 2002 Joint Action.

As defendant, the Council was supported by numerous Member States, namely Spain, France, the Netherlands, Sweden, Denmark and the United Kingdom. While there was no objection to the Court’s jurisdiction to review the CFSP Decision for the purpose of ascertaining whether it had encroached upon Community powers, the Council, the Spanish and UK governments nevertheless submitted that the Court had no jurisdiction to consider the plea of illegality of the 2002 Joint Action on the basis of Article 241 EC. As to the main action, the Council and the intervening Member States argued that the fight against accumulation and proliferation of small arms and light weapons did not fall within the Community competences; Article 47 TEU could not therefore be infringed.

The parties also disagreed on the function of Article 47 TEU, and on the distribution of competence between the EC and the EU it is meant to guarantee. The Commission, supported by the Parliament, considered that Article 47 TEU establishes a

“‘fixed’ boundary between the competences of the Community and those of the Union. Hence in areas of shared competence, while Member States retain their ability to act by themselves, individually or collectively, to the extent that the Community has not exercised its competence, the same cannot be said for the Union. Under Article 47 TEU, the EU does not enjoy the

11. See Opinion of A.G. Mengozzi, para 23.

same complementary competence, but must respect the powers attributed to the Community, whether exclusive or not, even if they have not been exercised.”(para 36)

Accordingly, there is an “encroachment upon Community competences whenever an act is adopted, in the framework of the CFSP, which could properly have been adopted on the basis on the EC Treaty.”¹²

By contrast, the Council’s view of Article 47 TEU was that it aims to guard the balance of powers established by the Treaties, and not to protect the competences conferred upon the Community to the detriment of those enjoyed by the Union. Hence, Article 47 does not establish a fixed boundary between Community and Union competences. Instead, one must take account of the nature of the power conferred on the Community in the sector concerned, *in casu* the complementary character of Community competence in the field of development cooperation, when determining whether the provisions of Article 47 TEU have been infringed. The United Kingdom further contended that “in order to regard a measure based on the EU Treaty as contrary to Article 47 EU, it is necessary, first, that the Community be competent to adopt a measure having the same purpose and the same content. Second, the measure based on the EU Treaty must encroach on a competence conferred upon the Community by preventing or limiting the exercise of that competence, thus creating a pre-emptive effect on Community competence”; an effect which, according to the UK, was impossible in an area such as development cooperation, given that the Community has “concurrent competences”.¹³

3. Opinion of AG Mengozzi: 1–0 for the CFSP

3.1. *Jurisdiction of the Court*

For Advocate General Mengozzi there is no doubt that the Commission’s application for annulment of the CFSP Decision, for the purpose of determining whether Article 47 TEU has been infringed by the Council, is admissible. More debatable however is the admissibility of the plea of illegality of the 2002 Joint Action. The Opinion thus devotes considerable attention to that point, looking at two essential issues in turn: first, whether a plea of illegality raised by a “privileged applicant” is admissible, and second whether it is possible to plead the illegality of a CFSP Joint Action. On the first issue, Mengozzi considers

12. Para 36 of the judgment.

13. Para 44.

that Article 241 EC “undoubtedly gives privileged applicants the right to invoke, as a collateral challenge, the illegality of a regulation ‘of a legislative nature’ even when they could have challenged it directly within the period laid down in the fifth paragraph of Article 230 EC” (para 54). As regards the second point, the Advocate General takes the view that:

“If the contested Joint Action is of a legislative or general nature within the meaning of the Court’s case-law and therefore resembles a regulation for the purpose of Article 241 EC, the Commission, like any party, may use the method laid down by that provision to mount a collateral challenge to the Council’s power to adopt that act. On the other hand, if the contested Joint Action were to be reclassified as a decision addressed to the Commission, the Commission would be barred from pleading its illegality.” (para 62).

Examining the characteristics of the Joint Action, the Advocate General finds that the Joint Action has “in no way... the character of a decision” addressed to the Commission. It rather has a general nature, a view which had not been otherwise challenged by the defendant. Advocate General Mengozzi thus considers that the Commission’s plea of illegality is admissible.

3.2. *Interpretation and scope of Article 47 TEU*

Turning to the interpretation of Article 47 TEU, Mengozzi AG emphasizes the importance of the unity of the Union’s legal order. Indeed, his Opinion devotes considerable space to clearing up the structure of the Union and the position of the CFSP therein. What generally transpires from his approach is indeed the sense that a holistic reading of the EU Treaty is called for, and not one that views the CFSP in disconnection from all the rest. In this sense, he specifically states that the provisions of Title V of the EU Treaty “cannot be read in isolation, but must be interpreted in the light of the common and final provisions of that Treaty, which refer to the EU as a ‘façade’ of the three pillars.” (para 119). In virtually every respect (interpreting the plea of illegality, types of Union/Community competence and their inter-relationship with the second pillar, the principle of pre-emption and the function of Art. 47 TEU), the approach he takes in his Opinion is to a considerable extent one of assimilation of the second pillar both with the provisions of the first pillar and by analogy also with the provisions of the third pillar. In addition, considerable emphasis is placed on ensuring the “overall coherence of the provisions of the EU Treaty” (para 122).

Yet, in Mengozzi’s words: “Article 47 EU ... appears to rest on the presumption that all the competences given to the Community, irrespective of the distribution that exists between the Community and the Member States, deserve

to be protected against any encroachment on the part of the European Union by adopting a measure based on Titles V and/or VI of the EU Treaty” (para 98). Hence, while recognizing the quality of the UK argument on the nature of Community competence, he opines that action by the Union on the basis of the second pillar differs from a collective action by the Member States, referring to earlier case law to substantiate his point.¹⁴ Article 47 is only intended to prevent an infringement of the *acquis communautaire* by Union law, and not to deny Member States their (individual or collective) external competences, an argument which incidentally had already been made by the Commission in the *Ship Source Pollution* case.

3.3. SALW and EC competence

However, in the end the key question is whether the Council, in adopting the ECOWAS Decision on a CFSP legal basis, impinged on the Community’s competences. The Advocate General therefore turns to the substantive assessment of the impugned measure, along the lines previously indicated by the Court.¹⁵ There, the Advocate General acknowledges that while many topics may be brought under the heading of development cooperation, in the end the objectives of the contested Decision are decisive:

“... if the two aims of the measure are indissociably linked, without one being secondary and indirect in relation to the other, the special nature of the relationship between the European Union and the Community should lead to priority being given to the Community legal basis because, in the context of that relationship, it seems to me particularly difficult, if not impossible as the law of the European Union stands at present, to contemplate recourse to a dual legal basis without breaching Article 47 EU.” (para 176)

In casu, the decision is about financial and technical assistance, a topic that would perhaps usually fall under the competences of the Commission, as it

14. In particular *Commission v. Council (Airport transit visas)* cited *supra* note 6; *Commission v. Council (Environmental penalties)*, cited *supra* note 6.

15. See in this respect, e.g. judgment in Case C-300/89, *Commission v. Council (Titanium Dioxide)*, [1991] ECR I-2867, para 10: “It must first be observed that in the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution’s conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.... Those factors include in particular the aim and content of the measure.” More extensively on this issue: Van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Kluwer, Deventer, 1999); see also Koutrakos, “Legal Basis and Delimitation of Competence in EU External Relations”, in Cremona and de Witte, *op. cit. supra* note 6, p. 171.

itself argued, but which in the opinion of the Advocate General, and depending on the objectives of the decision, could also fall under the CFSP. Indeed, Mengozzi suggests that “in themselves, financial contributions and technical assistance are neutral and ... it is only in the light of the aims they pursue that they can fall within the scope of development cooperation or of the CFSP”.¹⁶

While acknowledging that security is a necessary condition for development, he nevertheless opines, on the basis of his earlier findings,¹⁷ that the contested decision “pursues, at least principally, the objectives set out in Article 11(1) EU, in particular those of preserving peace and strengthening international security”¹⁸ The principal objectives of the decision are not therefore related to development cooperation, which in turn means that no Community competence has been encroached upon in violation of Article 47 TEU.

4. The Judgment of the Court: Security *and* Development Cooperation

4.1. The Court’s jurisdiction under Article 47 TEU

On the plea of illegality of the 2002 Joint Action, the Court of Justice recalls that following Article 46(f) TEU, the provisions of the EC Treaty concerning the powers of the Court and the exercise of those powers are applicable to Article 47 TEU. Referring to its earlier case law,¹⁹ it points out that, according to Article 47 TEU, “none of the provisions of the EC Treaty” is to be affected by a provision of the TEU, and adds that: “It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title V of the (TEU) and which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the EC Treaty on the Community”. The Court holds that it has jurisdiction to consider the action for annulment under Article 230 EC and “in that context, to consider the pleas invoked in accordance with Article 241 EC in so far as they allege an infringement of Article 47 EU”.

16. Para 211.

17. He had already established that the ECOWAS decision aims “in a practical and direct way, to support the efforts of ECOWAS to combat the insecurity that would follow from a new accumulation of small arms and light weapons in West Africa”, and that “the purpose of the contested decision appears to be mainly, if not exclusively, related to security”, see paras. 204–205 of his Opinion.

18. Para 213.

19. *Commission v. Council (Environmental penalties)* cited *supra* note 6; *Commission v. Council (Ship Source Pollution)* cited *supra* note 6.

4.2. *The question of EU encroachment of Community competence*

On the merits of the case, the Court of Justice addresses several points in turn. First, it looks at the application of Article 47 TEU; second, it explores the “demarcation of the areas of Community development cooperation policy and the CFSP respectively”; third, it establishes the aim of the contested decision, and then its content.

4.2.1. *Application of Article 47 TEU*

Before verifying whether the provisions of the contested decision “affect competences enjoyed by the Community under the EC Treaty”, the Court establishes that the function of Article 47 TEU is to “maintain and build upon the *acquis communautaire*”, “in accordance with the fifth indent of Article 2 EU and the first paragraph of Article 3 EU”. On this basis, and brushing aside the arguments of the Council and the UK Government, the judges opine that the nature of the Community competence is of no relevance in determining whether the Community competence has been encroached upon:

“a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of Article 47 EU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences. It is apparent from the case-law of the Court that, if it is established that the provisions of a measure adopted under Titles V or VI of the EU Treaty, on account of both their aim and their content, have 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 basis of the EC Treaty, the Court must find that those provisions infringe Article 47 EU.” (para 60)

4.2.2. *Demarcation between Community development cooperation policy and CFSP*

The Court’s analysis of the demarcation between EC development policy and the CFSP starts by stating the former’s broad objectives. In the words of the Court, the Treaty provisions (Arts. 177–181 EC)

“refer not only to the sustainable economic and social development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms, in compliance also with commitments in the context of the United Nations and other international organizations.” (para 65)

The Court further relies on “The European Consensus [on Development]”, a Joint Statement of the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, to substantiate the proposition that “there can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the Community’s new development policy necessarily proceed via the promotion of democracy and respect for human rights” (para 66).

Having suggested that the Community development policy should not be understood restrictively, the Court emphasizes that a measure will fall within the ambit of this policy if “it contributes to the pursuit of [its] economic and social development objectives”. Relying on “a number of documents emanating from the Union institutions and from the European Council”, the Court opines that certain measures adopted to combat the proliferation of small arms and light weapons “can contribute to the elimination or reduction of obstacles to the economic and social development of those countries”. This reliance on the “practice” established by the institutions is, incidentally, something the Court previously refrained from doing in external relations cases, at least as explicitly.

The link between combating the proliferation of small arms and light weapons and development policy having been established, the Court however holds that a concrete measure aiming to combat such proliferation may be adopted by the Community under its development cooperation policy “only if that measure, by virtue both of its aim and its content, falls within the scope of the competences conferred by the EC Treaty on the Community in that field”. That would not be the case if such a measure, even if it contributes to the economic and social development of the developing country, had as its main purpose the implementation of the CFSP. “It follows that measures combating the proliferation of small arms and light weapons do not fall within the competences conferred on the Community in the field of development cooperation policy if, on account of their main aim or component, they are part of the pursuit of the CFSP.” (para 72)

The Court of Justice then recalls its traditional “centre of gravity” case law, whereby a measure having a twofold aim or twofold component has as a legal basis that required by the main aim or component. In case a measure has several objectives or components, without one being incidental to the other, the measure could exceptionally be based on several legal bases. This “solution” is however found to be “impossible” in cases of measures having objectives or components relating to different pillars, in view of the provisions of Article 47 TEU. In effect, “Since Article 47 TEU precludes 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 cannot have recourse to a

legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community.”²⁰

4.2.3. *Aim and content of the contested decision*

In the light of these general considerations, the Court turns to the specifics of the case at hand. Here, it may have been expected it would place emphasis on the “peace and security” nature of the ECOWAS decision. After all, the contested measures (both JA and decision) were found by the AG to deal “mainly, if not exclusively” with security. Had this been the case, the Council’s preference for a CFSP legal basis would have been justified.

Indeed, the Court does recognize the “peace and security” – and thus the CFSP – dimension of the ECOWAS Decision, and more generally of the fight against the spread of small arms and light weapons (SALW). Hence, at para 95, the judges hold that:

“Contrary to what is submitted by the Commission and the Parliament, it cannot be denied that the contested decision, to the extent that it aims to prevent further accumulation of small arms and light weapons in West Africa capable of destabilizing that region, forms part of a general perspective of preserving peace and strengthening international security.”

However, the contested decision is *also* found to relate to development cooperation. The dual dimension of the contested Decision is notably substantiated by the connections between the fight against the proliferation of SALW and the economic and social development of the countries concerned, which were expressly made by the EU institutions, notably in the preamble of the initial Joint Action of which the contested 2002 Joint Action is the successor. Hence, “from the outset”, the EU fight against proliferation of SALW has been placed within the “dual perspective” of preservation of peace and international security on the one hand, and safeguarding development perspective on the other.²¹

Looking at the 2002 Joint Action, the Court further opines that the fact that it is a CFSP instrument does not automatically entail implementation by measures which pursue CFSP objectives.²² Indeed, the Joint Action foresaw that its objectives could be implemented both by the EU *qua* CFSP and by the Community, on the basis of its own competence:

“the contested joint action which the contested decision aims to implement does not itself exclude the possibility that the objective of the campaign against the proliferation of small arms and light weapons can be achieved

20. Para 77.

21. Para 85.

22. Para 84.

by Community measures, when it refers, in Articles 8 and 9, to the Commission's intention to direct its action towards achieving that objective, where appropriate by pertinent Community measures, and to the obligation of the Council and the Commission to ensure the consistency of the Union's activities in the field of small arms, in particular with regard to its development policies, and to ensure implementation of their respective action, each in accordance with its powers." (para 107)

Indeed, numerous EU documents examined by the Court also envisage that the Joint Action objectives be implemented both by the Community development policy and by the CFSP. Indeed, these documents insist on the need to ensure consistency, coherence and complementarity of the Union's various activities in the field of small arms, particularly between the CFSP and EC development policy.

Having thereby substantiated that the EU fight against proliferation of SALW can be achieved both by EC development policy and CFSP means, the Court checks whether the contested decision pursues development objectives. For this, it essentially looks at the Preamble of the contested decision, and finds that it pursues several objectives, and notably the "specific goal of strengthening the capacities of a group of African developing countries to combat a phenomenon which, according to recital 1 in the preamble to the decision, constitutes an obstacle to the sustainable development of those countries".²³ While the impugned measure "forms part of a general perspective of preserving peace and strengthening international security", it cannot be inferred that "in comparison with its [peace and security] objectives, its concern to eliminate or reduce obstacles to the development of the countries concerned is purely incidental". "It follows that the contested decision pursues a number of objectives, falling within the CFSP and development cooperation policy respectively, without one of those objectives being incidental to the other".²⁴

The Court's findings are confirmed by its subsequent analysis of the content of the Decision. The latter foresees financial contribution and technical assistance to set up a Light Weapons Unit within the ECOWAS Technical Secretariat and to convert into a convention the existing moratorium between the Member States of that organization concerning SALW. It also entrusts the Commission with the financial implementation of the Decision, while the Union technical assistance involves provision of expertise on the drafting of the convention. The Court follows the AG's contention that these elements are competence-neutral and that they do not in themselves determine whether the content of the measure relates more to CFSP or development:

23. Para 98.

24. Para 99.

“While there may be some measures, such as the grant of political support for a moratorium or even the collection and destruction of weapons, which fall rather within action to preserve peace and strengthen international security or to promote international cooperation, being CFSP objectives stated in Article 11(1) EU, the decision to make funds available and to give technical assistance to a group of developing countries in order to draft a convention is capable of falling both under development cooperation policy and the CFSP.” (para 105)

In view of the aim of the contested decision, the Court finds that the decision to make funds available and to give technical assistance to a group of developing countries in order to draft a convention “is capable of falling both under development cooperation policy and the CFSP”. Added to the established possibility to implement the objective of the campaign both by CFSP and Community measures, the Court opines that “it follows ... that, taking account of its aim and its content, the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP.”²⁵

Given that “Article 47 EU precludes 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 Court concludes that the Council infringed Article 47 TEU by adopting the contested Decision on the basis of Title V TEU and therefore annuls that Decision.

5. Lessons from the *ECOWAS* Case

The *ECOWAS* pronouncement is significant at least for the following reasons. First, it articulates the Court of Justice’s jurisdiction under Article 47 TEU, and further spells out the function of that provision in the distribution of competence between the EC and the EU. Second, it sheds a new light on the boundaries between the CFSP and the Community external competence and policies, and on the relationship between the Union and its Member States. In this respect, it seeks to establish that in the EU legal order in general, and within the EU system of external relations in particular, the principles governing the vertical division of powers differ from those underpinning the horizontal distribution of competence. Third, it clarifies the rules for choosing between EC and EU legal bases. Fourth, it gives some insight into the interactions between various constitutional principles governing that system, and notably the preservation of the *acquis communautaire*, the principles of attributed

25. Para 108.

powers and of consistency. Finally, it raises questions about the possible interpretation and application of the revamped formulation of Article 47 TEU envisaged by the Treaty of Lisbon, in the new Article 40 TEU.

5.1. *The Court's jurisdiction under Article 47 TEU*

5.1.1. *Jurisdiction to review acts capable of having legal effects*

In *ECOWAS*, the EU judicature was for the first time called upon to review the legality of a CFSP decision in order to determine whether it had been adopted in breach of Article 47 TEU.²⁶ As pointed out before, none of the parties opposed the Court's jurisdiction for that particular purpose, and in the event, the Court confirmed its competence, albeit under a somewhat rephrased mandate. Having referred to the terminology it introduced in the previous case law as regards the function of Article 47 TEU, and its task thereunder, the Court adds an element to which its judicial control would seem to be subject. At paragraph 33 of the ruling, it recalls that it is its "task ... to ensure that acts which, according to the Council, fall within the scope of Title V (TEU) ... and which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the EC Treaty on the Community" (emphasis added). Apart from the fact that this is the first time the Court clearly indicates that CFSP acts may have legal effects, the Court's reference to the *nature* of the measure, and in particular to its capacity to have legal effects, is a new element in the application of Article 47 TEU, which raises questions as to its potential implications, particularly in view of the Court's silence as regards the meaning of that phrase.

First, it may be wondered whether the Court's requirement that the contested act is "capable of having legal effects" has been added in the present case because the latter deals for the first time with the EC/CFSP demarcation, while previous Article 47 case law concerned the EC/JHA-PJCCM boundaries. The possible additional requirement for the Court's Article 47-based jurisdiction in relation to CFSP acts specifically, could perhaps be explained by the fact that many CFSP measures are thought not to have legal effects, but are rather seen as being of a more declaratory nature, and as such may be presumed not to affect the horizontal competence distribution within the EU.²⁷ In hindsight, various elements seem to militate against such an interpretation. First, the Court suggests elsewhere in the judgment that statements made therein on

26. On the Court's jurisdiction in the CFSP field, see Garbagnati Ketvel, "The jurisdiction of the European Court of Justice in respect of the Common Foreign and Security Policy", (2006) ICLQ, 77.

27. Further: Dashwood, "The Law and Practice of CFSP Joint Actions", in Cremona and de Witte, op. cit. *supra* note 6, p. 53.

the application of Article 47 TEU are of a general nature, rather than being directed at CFSP instruments only.²⁸ Second, the Court has since confirmed the relevance of that phrase also in relation to Title VI of the TEU. Hence in its recent *Ireland v Council and Parliament* pronouncement, the Court, citing *ECOWAS*, held at paragraph 77, that “It is the task of the Court to ensure that acts which, according to one party, fall within the scope of Title VI of the Treaty on European Union and which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the EC Treaty on the Community”.²⁹ Third, a distinction in its review of CFSP acts and PJCCM measures under Article 47 TEU would appear to be at odds with the provisions of that Article.

If the Court, as it is argued, did not intend to introduce a substantive distinction between CFSP and PJCCM acts for the purpose of Article 47 TEU, it would nonetheless be establishing a new criterion for the application of that provision more generally, an addition that is equally at odds with what the Treaty stipulates. Making the Court’s jurisdiction under Article 47 TEU subject to the impugned act being capable of having legal effect, would introduce a restriction on the application of Article 47 TEU, which is difficult to reconcile with the open formulation of that provision which refers to “*nothing* in the EU Treaty” (emphasis added), i.e. whether capable of having legal effects or not.

That reading of the Court’s re-phrasing, if correct, would also impact on the meaning of “affect” for the purpose of Article 47 TEU. Under the *ECOWAS* formulation, the impugned EU measure must be capable of having legal effect for the Community powers to be “affected”, and thus for a breach of Article 47 TEU to be warranted. This is hinted at by para 60 where the Court holds that “a measure *having legal effects* adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of Article 47 EU whenever it could have been adopted on the basis of the EC Treaty ...”³⁰

Hence, if the EU adopts an all-encompassing policy document that is not “capable of having legal effect” – whatever that means – it may do so on the basis of the TEU (CFSP, PJCCM titles, or Final Provisions) without this amounting to “encroachment” of EC powers outlawed by Article 47 TEU.

The notion of EU acts “capable of having legal effect” that “affect” the Community *acquis* in violation of Article 47 TEU recalls the Court’s case law in other areas of EC (external relations) law. Hence, according to the *AETR* doctrine,³¹ Member States are precluded from entering into international

28. See in this regard para 60 of the judgment.

29. Case C-301/06, *Ireland v. Council and Parliament*, judgment of 10 Feb. 2009, nyr.

30. Emphasis added. Note that the Court refers here not to acts “capable of having legal effect” but to “acts having legal effects”.

31. Case 22/70, *Commission v. Council (AETR)*, [1971] ECR 263.

commitments which may affect Community rules. As the Court recalled in the *Open Skies* judgments:

“In the area of external relations, the Court has held that the Community’s tasks and the objectives of the Treaty would be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules adopted by the Community or of altering their scope (see Opinion 2/91, paragraph 11, and also, to that effect, the *AETR* judgment, paragraphs 21 and 22).”³²

While the Court evokes here “international commitments containing rules capable of affecting rules adopted by the Community”, it is noteworthy that it does not explicitly require that those should be “capable of having legal effect” for the *AETR* pre-emptive effect to be activated. Indeed, the excerpt above is preceded by a paragraph containing a reminder of the basis of the *AETR* effect, namely Article 10 EC, whereby Member States should “abstain from any measure which could jeopardize the attainment of the objectives of the Treaty”. The Court’s case law relating to Article 10 demonstrates that *measures* capable of falling foul of the obligations derived therefrom are not necessarily acts having (or capable of having) legal effect.³³ It may thus be wondered whether the notion of “affects” that triggers an “Article 47 (or *ECOWAS*) effect” (EC competence rather than EU competence) corresponds entirely, in terms of the nature of measures that would be caught, with the notion of “affects” which activates the *AETR* effect (EC competence rather than Member States competence).

The *ECOWAS* reference to “acts (capable of) having legal effects” also relates more generally to the Court’s case law on acts that can be subject to judicial review. Indeed, at first sight *ECOWAS* may be read as the Court’s attempt to ensure coherence in the exercise of its judicial control over acts of EU institutions across the board, i.e. whether acting in the EC or in EU contexts. Such coherence seems to be required by the provisions of Article 46 TEU, according to which: “The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty: ... (f) Articles 46 to 53”. That the Court is seeking a coherent approach

32. Case C-467/98 *Commission v. Denmark* (*Open Skies*) [2002] ECR I-9519, paras. 110–111; see also Case C-523/04, *Commission v. the Netherlands*, [2007] ECR I-3267, paras. 74–75.

33. See in this respect the Court’s judgment in Case 45/07, *Commission v. Greece (IMO)*, judgment of 12 Feb. 2009, esp. paras. 20–23 also AG Maduro’s Opinion of 10 July 2008 in case C-205/06 *Commission v. Austria* and Case C-249/06 *Commission v. Sweden*.

in exercising judicial review is also testified by earlier case law. Hence, in the *Segi* case, the Court of Justice opined that it would have jurisdiction in the context of the PJCCM “in respect of all measures adopted by the Council, whatever their nature or form, *which are intended to have legal effects in relation to third parties*” (emphasis added),³⁴ referring by analogy to its *AETR* judgment, which established that “an action for annulment must ... be available in the case of all measures adopted by the institutions, whatever their nature or form, *which are intended to have legal effects*” (emphasis added).³⁵ Both in *AETR* and *Segi*, the Court thus made it clear that it would control all acts that are “intended” to have legal effects (“*qui visent à produire des effets de droit*” in French). Interestingly however, the Court in *ECOWAS* opined that it can review, for the purpose of Article 47 TEU, acts “capable” of having such effect (“*actes qui sont susceptibles de produire des effets juridiques*” in the French version), thus suggesting a differentiation in the “reviewability” of acts depending on whether the Court is asked to perform a classical judicial review, or whether it should specifically control whether Article 47 TEU has been infringed by the adoption of the contested act. In particular, the phrase “capable of having legal effects” entails a wider category of reviewable acts, than the notion “intended to have legal effects”, which is both possibly more restrictive, and more subjective. The latter element is also more difficult to prove than “capable of”, which arguably relates to the possible effects of the acts, rather than the intention of the institution that adopted it. In short, the Court would have a wider jurisdiction in terms of acts it can control under Article 47 TEU, than under Article 35 TEU, or under Article 230 EC. If that distinction is intended, some explanation would have been welcome, particularly considering that it moves away from a strict reading of Article 46 TEU, recalled above.

So far, it has been suggested that the Court’s resolve in *ECOWAS* to control only acts “(capable of) having legal effect” may restrict its Article 47-jurisdiction when compared to previous case law. The argument could however be turned on its head, if approached from a different viewpoint. The notion that its jurisdiction is warranted if EU acts are capable of having legal effect could also translate the Court’s intention to *widen* the application of Article 47 TEU to *any* EU act having such effect, whatever the institution that enacted it. Put differently, the application of Article 47 would be determined by the nature of the impugned act (*viz.* legal *v.* non-legal), and by the fact that it was adopted in the context of the EU, rather than by the institution that adopted it. The Court would thus instil (and build upon) its *Les Verts* jurisprudence in the application

34. Cases C-355/04 P, *Segi and Others v. Council* [2007] ECR I-1657, para 53.

35. Case 22/70, *Commission v. Council (ERTA)* [1971] ECR 263, see also Case C-57/95, *France v. Commission*, [1997] ECR I-1627.

of Article 47 TEU,³⁶ whereby despite the silence of the Treaty, acts of the European Parliament having legal effect could be challenged under old Article 173 EEC (the so-called *légitimation passive*), even if, at the time, the EP was not mentioned among the institutions that could be brought to the Court of Justice. The Court relied notably on the notion that the Community is based on the rule of law, “inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty”. That notion, conspicuously recalled in the Court’s *Kadi* judgment,³⁷ could well support the proposition that any EU acts capable of having legal effects, whatever the institution that has adopted them, should be subject to judicial review for the purpose of controlling their compatibility with the provisions of Article 47 TEU. If that reading were correct, acts which the European Council may adopt on the basis of Title V, viz. Common Strategies, or any other EU acts capable of having legal effect, could thus be subject to review in the light of Article 47 TEU.³⁸ This interpretation would indeed correspond to the increasing involvement of the European Council in EU law-making and foreshadow the provisions of the Lisbon Treaty which foresee that the European Council may be brought before the Court of Justice.³⁹

Does the Court’s recurrent reference to acts “which, according to the Council, fall within the scope of title V” (or VI), challenge that proposition?⁴⁰ Does it suggest that only acts of the Council, capable of having legal effect, may be subject to judicial review under Article 47 TEU. Arguably the answer should be negative. The phrase “according to the Council” is a statement of fact, namely that all measures which the Court reviewed hitherto under Article 47 TEU were adopted by the Council. This in itself does not mean that only such acts can be reviewed. Indeed, it may be argued that the allusion to acts which, “according to the Council” should be based on Title V or VI, precisely indicate that it does not restrict its Article 47-control to acts of the Council. This seems to be confirmed by the broad formulation chosen by the Court in para 61: “... the infringement of Article 47 EU arises from the fact that a

36. Case 294/83, *Parti Ecologiste ‘Les Verts’ v. European Parliament* [1986] ECR 1339. The application of that jurisprudence to the context of Art. 47 TEU is made legally possible, if not required, by the provisions of Art. 46 TEU.

37. See Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, judgment of 3 Sept. 2008, nyr, at para 281.

38. Further on Common Strategies, Hillion, “Common Strategies and the Interface between EC External Relations and the CFSP: Lessons of the Partnership between the EU and Russia”, in Dashwood and Hillion (Eds.), *The General Law of EC External Relations* (Sweet & Maxwell, London, 2000), p. 287.

39. See Art. 269 TEU (Lisbon).

40. The French version appears to be more specific than the English version of the judgment. Para 33 reads “actes dont le conseil prétend qu’ils relèvent du titre V”; while para 56 reads: “actes dont le conseil soutient qu’ils relèvent”.

measure having legal effects *adopted by the Union on the basis of the EU Treaty* could have been adopted by the Community” (emphasis added).⁴¹

There is a last point worth mentioning in relation to the Court’s new formulation of the conditions of application of Article 47 TEU. While it insists on the act being capable of having legal effect for it to be reviewed, at no point in the judgment does the Court actually apply the test, either to the contested decision, or to the Joint Action. Should one therefore assume that the contested *decision*, because of its form, is presumed to meet the requirement? If that were true, the Court would be departing from its previous case law whereby the label of the act does not matter as much as its content for determining its nature.⁴²

5.1.2. *The Court’s jurisdiction with respect to the plea of illegality*

While there was no opposition to the Court’s jurisdiction to review CFSP acts following an action brought under Article 230 EC for the purpose of Article 47 TEU, there were objections to its competence to review the legality of the Joint Action through the procedure set out in Article 241 EC. While it decided not to examine the Commission’s plea of illegality (para 111) given its annulment of the *ECOWAS* decision, the Court nevertheless confirmed its jurisdiction, in the context of an action for annulment brought under Article 230 EC, “to consider the pleas invoked in accordance with Article 241 EC in so far as they allege an infringement of Article 47 EU” (para 34). The Court of Justice thereby suggests that privileged applicants are not “barred from pleading the illegality of an act the annulment of which could have been sought directly by an action under Article 230 EC”, as contended by the Council, as well as the Spanish and UK governments (para 32).

One could argue that, as a privileged applicant, the Commission had the chance to challenge the original Joint Action within two months of its adoption by the Council.⁴³ In particular, in view of the fact that the Commission indicated, during the discussions on the draft *ECOWAS* Decision, that it always had problems with the underlying Joint Action, the current action appears quite late. The reason for the Commission not to initiate proceedings in 2002 may be explained by the fact that potential misunderstandings only occurred after the entry into force of the Cotonou Agreement in 2003 and the adoption of the *ECOWAS* Decision in 2004.

41. This broad formulation is used again by the Court in its judgment in Case C-301/06, *Ireland v. Council and Parliament*, cited *supra* note 29, at para 77.

42. See e.g. *Les Verts*, cited *supra* note 36.

43. Cf. also Van Ooik, “Cross-Pillar Litigation before the ECJ: Demarcation of Community and Union Competences”, (2008) *EuConst*, 399–419. See also Case C-188/92, *TWD* [1994] ECR I-833, para 17.

More generally, the Court points out in *ECOWAS* that “it follows from Article 46(f) EU that the provisions of the EC Treaty concerning the powers of the Court and the exercise of those powers are applicable to Article 47 TEU”. In other words, all judicial procedures envisaged by the EC Treaty, and not only that of Article 230 EC, could be used for the purpose of ensuring that the provisions of Article 47 TEU are complied with.⁴⁴ This clarification by the Court could have far-reaching ramifications for the EU judiciary, but also for Member States’ courts in the context of Article 47 TEU. In particular, it may be contended that Article 234 EC could be used to challenge the validity of a CFSP measure in the context of national proceedings, e.g. against a Member State measure implementing a CFSP measure, on the ground that the latter violates the provisions of Article 47 TEU. In practical terms, a national court could raise a preliminary question to the Court of Justice for the purpose of checking whether a CFSP act, capable of having legal effect, may be declared invalid given its possible infringement of the provisions of Article 47 TEU. In accordance with the *Foto Frost* jurisprudence which, following Article 46 TEU applies *mutatis mutandis*, the national court would not itself be in a position to declare the CFSP act invalid.⁴⁵ Only the Court of Justice could, if a violation of Article 47 TEU was established. If that involvement of national courts in the operation of Article 47 TEU were thus possible, CFSP as well as PJCCM acts capable of having legal effect could be declared inapplicable following this kind of recourse. In this respect, it may be wondered whether EU antiterrorism measures in relation to “home grown” terrorist organizations, which so far have been adopted through PJCCM (and /or CFSP) acts could be challenged on the basis that they should have been adopted on the basis of the EC Treaty, following the *Kadi* judgment.⁴⁶

In view of the provisions of Article 46 TEU, other EC judicial procedures could equally be involved for monitoring compliance with Article 47 TEU. As has been suggested elsewhere, the Court of Justice could for instance be asked to determine whether an envisaged external agreement, negotiated following the procedure of Article 24 TEU, could be subject to an opinion on the basis of the procedure foreseen in Article 300(6) EC, specifically to determine

44. It should be noted that the Court does not give a full account here of the provisions of Art. 46. The latter refers not only to the EC Treaty and also to the EAEC Treaty, thus rendering the jurisdiction of the Court in the context of Art. 47 TEU in particular, more complicated to envisage.

45. Case 314/85, *Foto-Frost*, [1987] ECR 4199.

46. E.g. Cases such as T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council*, [2006] ECR II-4665, and more recently Case T-284/08, *People’s Mojahedin Organization of Iran v. Council*, judgment of 4 Dec. 2008, nyr.

whether its conclusion on the basis of Article 24 TEU would infringe Article 47 TEU.⁴⁷

On the whole, the Court is confirming that its jurisdiction in the context of the operation of Article 47 TEU is not limited to actions based on Article 230 EC, and thus restricted to the two months time limit. On the contrary, it is as wide as that envisaged by, and exercised in the context of the EC Treaty. In other words, the complete system of judicial remedies which the Court forcefully put forward in its recent *Kadi* judgment is as complete in the context of Article 47 TEU.⁴⁸

A final question ought to be raised. One wonders why the Court, having established that it could in principle do it, did not in the end examine the plea of illegality of the contested Joint Action. The Court mentions merely that “[a]s the decision must be annulled because of its own defects, it is not necessary to examine the plea as to the alleged illegality of the contested joint action”. The “as” used by the Court here suggests that there is a causal link between the annulment of the Decision, and its own decision not to examine the Joint Action. This alleged causal link, which is the only element of explanation the Court provides for not testing the validity of the Joint Action by reference to Article 47, fails to convince and triggers questions about the consistency of the reasoning.⁴⁹ Could it be that the Court assumes that the Joint Action is not capable of having legal effect and thus falls outside the application of Article 47 TEU? This too may be unconvincing in view of the aim and content of Joint Actions in general,⁵⁰ and of this one in particular, as indeed suggested by the AG’s analysis. In any event, a proper analysis to that effect would be welcome, all the more that it would have clarified the test for establishing that an act is “capable of having legal effect”. Reasons of procedural economy, or the Court’s reluctance to hold two CFSP measures unlawful in one go, which would have made its ruling even more unpalatable for the Member States, may also be part of the explanation.

5.2. *The rules on competence distribution within the EU*

In the distribution of powers between the EC and Member States, both the *scope* of Community competence and its *nature* are important for determining

47. Further on this point, Hillion, “The Limits to Member States Discretion in EU Enlargement Negotiations” (2007) *EuConst*, 269.

48. On the impact of *Kadi*, see the recent ECJ judgment in C-47/07, *Masdar*, 16 Dec. 2008, nyr.

49. Further on this question, see Van Vooren, “EU/EC External competences after the Small Arms Judgment” *EFA Rev.* (2009), 7.

50. Art. 301 EC implies that Joint Actions can have legal effects. Further on Joint Actions, see Dashwood, *op. cit. supra* note 27.

who is in charge.⁵¹ In particular, the Court of Justice has recognized that in areas where the Community *shares* powers with the Member States, *viz* development cooperation, Member States “are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community”.⁵² Similarly the Court has acknowledged that since the Community does not have exclusive competence in the field of humanitarian aid, “Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it.”⁵³ The Court thus admits that in those areas, measures of the Member States and of the Community’s acts may co-exist.

Inspired by this case law, the United Kingdom, and to some extent the Council, defended a “dualist” model in *ECOWAS*, in which the boundary between the competences of the Community and those of the European Union is envisaged in the same fashion as the border between Community and Member States powers. As the AG puts it:

“according to that approach, an action of the European Union under Title V of the EU Treaty pursuing one of the objectives laid down in Article 11(1) EU, including the preservation of peace and the strengthening of international security, would *never* encroach on the competences of the Community in the area of development cooperation, even if that action had a similar content to the action of the Community, because, like its Member States, the Union would be exercising concurrent competences with those of the Community, thus rendering recourse to Article 47 EU pointless” (emphasis added).⁵⁴

The Commission, by contrast, argued that the relation between the Community and the Union cannot be equated with the relation between the Community and the Member States. In this model, termed by the AG “triangular”,⁵⁵ the Union possesses and exercises its own competences which are not merely equivalent to the collective exercise of the competences retained by the Member States.

In the event, the Court disagreed with the UK contention: “the question whether the provisions of ... a measure adopted by the Union fall within the

51. See e.g. Opinion 1/03, *Lugano Convention* [2006] ECR I-1145. Further, see Holdgaard, *External Relations Law of the European Community – Legal Reasoning and Legal Discourses* (Wolters Kluwer, 2008), particularly Part I; Koutrakos, *op. cit. supra* note 15; Dashwood and Heliskoski, “The Classic Authorities Revisited”, in Dashwood and Hillion, *op. cit. supra* note 38.

52. Case C-316/91, *European Parliament v. Council (EDF)*, [1994] ECR I-625, para 26.

53. Joined Cases C-181 & 248/91, *European Parliament v. Council and Commission (Bangladesh)*, [1993] ECR I-3685.

54. Para 86, Opinion.

55. Para 85, Opinion.

competence of the Community relates to the attribution and, thus, the very existence of that competence, and not its exclusive or shared nature” (para 62). It thus made it clear that the nature of Community competence has no relevance in determining the distribution of powers between the Community and the Union. In contrast to the division of external competences between the EC and its Member States, the boundary between the pillars does not move to the extent that the Community makes more use of its (external) competences. Consequently, if the Community does not act in a field in which it has shared competence, only the Member States may act therein, not the Union. In particular, while Member States may lawfully act, including within the Council, alongside the Community, in the area of development cooperation, the Council of the EU, acting as such, viz. instead of the Member States acting collectively, is by contrast precluded from acting in that area on the basis of e.g. Title V TEU.

Accordingly, if there is a political will of the Member States to act at EU level, then it should first be ascertained whether the Community is empowered by the Treaty to take the desired action. It is only if it has no competence in the field concerned that the possibility for the EU to act via other decision-making procedures, i.e. Title V and/or VI TEU, arises. In other words, there is no *horizontal* subsidiarity (i.e. between the EC and the EU) in the EU legal order. The Court thereby suggests that the horizontal (EU-EC) and the vertical (Member States – EC/U) distribution of competence within the EU legal order differ in terms of principles, thus appearing here to follow the “fixed boundaries” approach advocated by the Commission.

The Court finds support for this principled interpretation of Article 47 TEU in the provisions of Articles 2 (5th indent) and 3(1) TEU.⁵⁶ Article 2 stipulates that the Union has among its objectives:

“– to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.”

While Article 3(1) TEU foresees that:

“The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.”

It is the first time that the Court explicitly, and in the authors’ view rightly, refers to those Common Provisions of the TEU when interpreting and apply-

56. This connection was reiterated since then in Case C-301/06, *Ireland v. Council and Parliament*, cited *supra* note 29 at para 76.

ing Article 47 TEU. It is indeed the normative perspective set out by the reference to “respect” and “building upon the *acquis*” that can explain and support the Court’s approach to Article 47 TEU, and particularly its view that the nature of Community competence is irrelevant when determining whether that provision has been violated.⁵⁷

5.3. *The choice of legal basis between Title V and the EC Treaty*

The Court’s traditional case law to ascertain the correct legal basis of a measure is essentially based on the centre of gravity test.⁵⁸ In *ECOWAS*, the Court transposes that EC-related jurisprudence to the EC-EU context, a delicate operation that runs the risk of “transplantation rejection”. Indeed, while that case law has also allowed, on an exceptional basis, that a measure having several objectives of equivalent importance may be based on multiple legal bases, it is found to be unpractical in the context of measures having a cross-pillar dimension, as Article 47 TEU makes it impossible for the Union to intervene in areas where the Community has competence to act.

In view of the Court’s finding in *ECOWAS*, various scenarios can now be mooted as regards the form and legal basis of measures relating both to the CFSP and the EC objectives. First, if the measure mainly concerns, in terms of aim and content, an area of Community competence, only the Community can adopt the measure. This means that the EC may act also in pursuance of CFSP objectives, although only incidentally. This is arguably in line with the Court case law, as notably articulated in the *Portugal v. Council* judgment,⁵⁹ provided the conditions identified therein are satisfied.⁶⁰

Second, if the measure is both about EC and CFSP matters, without one being incidental to the other, the measure will have to be based on the EC Treaty. That proposition stems from paragraphs 75–77, and 108–109 of the *ECOWAS* judgment. This suggests that cross-pillar instruments (EC-EU), including external agreements,⁶¹ are in principle precluded. Instead, the Court

57. Further, Hillion, *The Evolving System of EU External Relations as Evidenced in the EU Partnerships with Russia and Ukraine* (Leiden, 2005).

58. See recently: Case C-155/07, *Parliament v. Council*, judgment of 6 Nov. 2008, nyr.

59. In Case C-268/94, *Portuguese Republic v. Council*, [1997] ECR I-7281.

60. At para 39, the Court held that “the fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterization of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses, *provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation*” (emphasis added). Further Hillion, *op. cit. supra* note 57, pp. 54 et seq.

61. So far the only example that can be thought of is the Schengen association agreement with Switzerland, although this agreement does not fully amount to a doubly mixed agreement

indicates that the EU elements of the measures should be assimilated to the EC elements. It may however be wondered, in the light of the previous Article 47 case law, whether the Council should, where possible in practice, extract the non-EC elements from the rest of the dual instrument and include them in a measure to be adopted as an EU act. Hence in the *Ship Source Pollution* case,⁶² the Court found that the provisions related to the harmonization of criminal sanctions could not be included in an EC instrument, thereby protecting the powers of the EU on the basis of the third pillar.⁶³ Such an extraction seems indeed to be required by the above mentioned *Portugal v. Council* case law,⁶⁴ and more generally by the principle of attributed powers (see below at 5.4.1), as strongly recalled in the *Kadi* judgment.

Third, if the Community dimension of the instrument is ancillary, the Court suggests at paras 71–72 that the EU would be in a position to adopt that instrument on the basis of the TEU:

“... a concrete measure aiming to combat the proliferation of small arms and light weapons may be adopted by the Community under its development cooperation policy only if that measure, by virtue both of its aim and its content, falls within the scope of the competences conferred by the EC Treaty on the Community in that field.

That is not the case if such a measure, even if it contributes to the economic and social development of the developing country, has as its main purpose the implementation of the CFSP.”

In other words, a CFSP measure mainly purported to implement the CFSP, while incidentally contributing to the economic and social development of a developing country, could allegedly be adopted as an EU act, despite its Community dimension. In other words, the Court appears to accept that in certain circumstances the EU may intervene in EC spheres of competence. This comes close to a similar situation in the third pillar context, where – irrespective of the main purpose of Article 47 – the Court has decided that there may be situations in which the Community encroaches upon competences of the *Union* in

as its conclusion was based on two decisions (one EC, one JHA). A similar construction has been debated for the 2006 Cooperation Agreement with Thailand. In the end, however, the agreement was concluded as a traditional Community/Member State mixed agreement; see Thym, “Die völkerrechtlichen Verträge der Europäischen Union,” (2006) *ZaöRV*, 48. The debate returned in relation to the EU’s accession to the ASEAN Treaty of Amity and Cooperation. See further Wessel, “Cross-Pillar Mixity: Combining competences in the conclusion of EU international agreements”, in Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited* (Hart Publishing, Oxford, 2009, forthcoming).

62. *Commission v. Council (Ship Source Pollution)* *supra* note 6.

63. *Ibid.*, paras. 70–71.

64. See in this respect the Court’s finding in Case 301/06, *Ireland v. Council and Parliament*, cited *supra* note 29, esp. para 83.

other pillars. In the *PNR* case, the Court held that the EU-US agreement on Passenger Name Records should not have been based on Article 95 EC (internal market) but, implicitly, on Title VI of the TEU.⁶⁵ Hence, in determining the “centre of gravity” of a Community instrument, the Court is no longer restricted to the legal bases offered by the Community treaty itself, but it is compelled to use the overall Union legal order as the interpretative framework.

As an application of the classic centre of gravity doctrine, this is unsurprising. However, in view of the Court’s strict interpretation of Article 47 TEU examined earlier, that proposition seems problematic. Had the Court adhered to its strict interpretation, a CFSP act essentially aimed at implementing the CFSP, and which nevertheless contributes to the economic and social development of the developing country, would be found to affect, albeit to a lesser extent, the competence of the Community in violation of Article 47 TEU. In that case, the Community ought at least to take part in the adoption of the act (and possibly lead to the adoption of a cross-pillar measure), if not adopt a separate instrument dealing specifically with those EC aspects, to ensure compliance with Article 47 TEU. It may be recalled that in the *Environmental Sanctions* case, the Court annulled the Framework Decision because some of its provisions, on account of both their aim and content, had as their main purpose the protection of the environment, and could thus have been properly adopted on the basis of Article 175 EC. In particular, the Court found that seven articles (Arts. 1 to 7) of the impugned measures related to environmental protection. Since the Framework Decision was indivisible, it was annulled. Indeed, in view of Article 47 TEU it would be ironic that the Court would protect the EU powers under Title VI as it did in the *Ship Source Pollution* case, and not do the same with Community competence.⁶⁶

It becomes clear that the centre of gravity doctrine and the Court’s interpretation of Article 47 TEU are difficult to combine. Arguably, in acknowledging the possibility for the EU to adopt measures that can incidentally relate to Community objectives, it nuances its interpretation of Article 47 and moves away from the “fixed boundary approach” advocated by the Commission. Indeed, it is as if the Court introduced a *de minimis* rule in the application of Article 47 TEU.

In the light of the foregoing, it is crucial to know where the threshold (i.e. the moment the Community aspect stops being incidental) is going to be set, and what the criteria are to establish that it is reached. More generally, further clarification is needed on the detailed application of the centre of gravity

65. Joined Cases C-317 & 318/04, *European Parliament v. Council (PNR)*, [2006] ECR I-4721.

66. See also Heliskoski, “Small Arms and Light Weapons within the Union’s Pillar Structure: An Analysis of Article 47 of the EU Treaty”, 33 *EL Rev.* (2008), 898. Van Ooik, *op. cit. supra* note 43.

doctrine to the specific context of the EC-EU distribution of powers. For instance, should the Court examine the content or objective of each and every provision as it has partly done in the past to determine whether they should be included in an EC or EU instrument? Or should the Court look at the overall measure to determine its main thrust? On this point, the *ECOWAS* ruling is not very expansive, if not cryptic. It appears that essentially two recitals of the contested decision, as well as the connection made by several EU policy documents between the fight against the proliferation of SALW and development, were taken by the Court as key evidence of the dual component of the contested decision, in addition to the acceptance in the Joint Action that it could be implemented by EC and CFSP measures. While it is noteworthy that the Court no longer refrains from relying on “practice” in external relations cases (see above), it is on this rather thin basis that it could establish that in essence the objective of development is not merely incidental in the fight against the proliferation of small arms and light weapons.

One may wonder why the Court did not adopt a similar approach in its *Ship Source Pollution* pronouncement. In that case, the European judges considered that some aspects of the measure could not be integrated in the Community measure given the lack of Community competence to harmonize criminal law, a competence with which, by contrast, the EU is endowed on the basis of Title VI of the TEU. Could it not be suggested that the harmonization of criminal rules in this particular case was also a means to achieve the EC objectives of the measure, and further that the measure was equally about harmonization of criminal rules as it was about Community objectives?⁶⁷

Another indication that the Court is toning down its strict application of Article 47 TEU is the following. In *ECOWAS* the Court points to the possibility (or even necessity) for CFSP joint actions not to be implemented by other CFSP instruments, but also by Community decisions. The contested decision was based on a CFSP joint action and the Court concludes “that the objectives of the contested joint action can be implemented both by the Union, under Title V of the EU Treaty, and by the Community, under its development cooperation policy” (par. 88). But, would the *acquis communautaire* not be affected this way too? After all, the Court quite clearly admits that Community policy may find its basis in a CFSP measure. This would lead to Community legislation that is not (primarily) based on the Community Treaty, but on secondary EU (CFSP) law/rule. This notion comes close to what the Court of First Instance referred to in the *Yusuf* and *Kadi* cases, that “Under Articles 60 EC

67. Similarly, it could be argued that the PNR agreement was not only about peace, security, and fight against terrorism, as held by the Court. Could it not be contended that the well-functioning of the internal market was not merely incidental in this case? See *European Parliament v. Council (PNR)*, *supra* note 65.

and 301 EC, action by the Community is therefore in actual fact action by the Union, the implementation of which finds its footing on the Community pillar after the Council has adopted a common position or a joint action under the CFSP”,⁶⁸ a notion which interestingly was bluntly rejected by the Court of Justice on appeal in *Kadi*. In *ECOWAS*, the Court thus appears to admit that the relationship between Union and Community objectives ought to be seen in a broader perspective – as could already be established on the basis of previous case law – in the sense that it may be necessary to give effect to the CFSP through Community law.

5.4. *ECOWAS and the principles underpinning the Union system of external relations*

5.4.1. *Preservation of the *acquis* vs. attribution of powers*

The Court’s views of the scope of Community development cooperation policy, combined with its interpretation of Article 47 TEU beg the question of whether in the end the CFSP becomes a residual EU policy, while EC powers are by contrast being (over)stretched in defiance of the principle of attributed powers (Art. 5 EC). The UK Government had indeed argued that “were an incidental effect on the objectives of a Community competence sufficient to bring the matter under that competence, there would be no longer any limits to the scope of Community competence, thus undermining the principle of attributed powers” (para 48).

At one level, the answer may be in the affirmative. In constitutional terms, the Court holds that the Union *qua* CFSP may in principle only act in areas where the Community has no competence. Moreover, in substantive terms, the broad judicial understanding of EC development cooperation reduces almost mathematically the possibility for the Union to act *qua* CFSP. It allows the Community to intervene in fields, such as arms control, which at first sight and as acknowledged both by the AG and the Court, belong to the CFSP. The Court suggests that provided there is a link between a measure and a Community objective, the limitations of the Treaty on development cooperation, and the competence of the Union become irrelevant: development cooperation may be used by the Community to act in areas which the TEU recognizes as being part of the CFSP.⁶⁹ As a result, Title V appears to be shrinking, all the

68. Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3353; and T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, [2005] ECR II-3649; para 161 of *Yusuf*.

69. The approach recalls the Court’s *Tobacco Advertising* case law where it was found that the Community is able to adopt common rules on the basis of Art. 95 EC which may have an impact on areas such as public health, despite restrictions to Community competence foreseen by the Treaty in the latter field, if those rules do improve the functioning of the internal market;

more so, as the number of foreign policy instruments adopted in the context of Title VI is increasing. Given this new form of “competence creep”,⁷⁰ it is not excluded that the Commission will in the future ask the Court to examine other types of CFSP measures, to determine whether they could be viewed as equally related to development cooperation (Art. 177 EC) or indeed to cooperation based on Article 181a EC (economic, technical and financial cooperation with third states). For example, the Court may be invited to examine CFSP measures on border assistance, rule of law, or security sector reforms missions.

What thus looks like a victory for the Commission, and for the Community method, might turn out to be a *pyrrhic victory*. The Court’s wide definition of the EC development cooperation does not *ipso facto* entail more Community international presence in the field. The Community remains subject to political decision of the Member States via the Council, which arguably cannot be forced to act at Community level, e.g. by way of an Article 232 EC action, in an area of complementary powers. In addition, Member States may prefer to refrain from acting *qua* EU Council on the basis of Title V or VI, for fear of being brought to the Court of Justice, and ultimately leading to further transfer of power to the Community, preferring instead to act collectively or on their own. In other words, the judgment may not necessarily mean that the Community will become more active in those borderline policy issues,⁷¹ while potentially dissuading CFSP (if not ESDP) action in general.

The tension between Article 47 TEU, as applied by the Court in *ECOWAS*, and the principle of attributed powers should not be exaggerated, however. The Court appears to admit that a CFSP instrument such as a Joint Action can have a comprehensive scope, in that it can lead to both CFSP and EC implementing measures. Indeed, the Court’s insistence that its jurisdiction under Article 47 TEU should concern acts that are capable of having legal effects supports the view that the CFSP acts may still be comprehensive, in line with the CFSP definition envisaged in Article 11 TEU, provided they remain incapable of having legal effect. Put differently, while foreign policy declaratory

see Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419, see also Case 301/06, *Ireland v. Council and Parliament*, cited *supra* note 29.

70. On this notion, see Weatherill, “Competence creep and competence control” 23 YEL (2004), 1–55.

71. Unless the Commission can put money on the table, as it did in relation to de-mining, and which led to the Member States’ accepting that the measure be adopted on the basis of the EC Treaty. The Council and the Member States may then have to pay the price for their pragmatism. Having sometimes chosen the legal basis of an EU measure on the basis of financial considerations, viz. De-mining or EUBAM, Member States created precedents now relied on by the Commission for other similar types of measures, even if, as the Court says, institutional practice does not entail that this practice is legal.

acts may cover all aspects of foreign policy, their practical implementation by way of measures capable of having legal effect has to comply with the principle enshrined in Articles 47, 2 and 3 TEU. The Court's approach thereby confirms the practice inaugurated by the European Council when adopting Common Strategies; the latter have all contained a Declaration to the effect that the Common Strategy ought to be implemented in due observance of the distribution of powers envisaged by the TEU.⁷² Furthermore, as discussed above, the Court's combination of Article 47 TEU and the centre of gravity test may open the way for CFSP measures including those capable of having legal effect to include EC aspects, albeit incidentally.

5.4.2. *Preservation of the *acquis* vs. principle of consistency*

In *ECOWAS*, the Council's insertion in EU measures of express connections between different EU external activities, viz. development and security, in line with the requirement of consistency enshrined in Article 3 TEU, eventually led to a competence battle. In particular, the Commission, and subsequently the Court, invoked the fact that EU instruments link the fight against proliferation of SALW to development, and include consistency clauses to substantiate the development dimension of SALW policy, and thus establish the Community power to act in the field.⁷³ It may be feared that, as a consequence, the Council will in the future simply refrain from inserting such references and clauses in EU measures in order to make them "EC competence-free", and prevent any ambiguity which could lead to competence squabbling with the Commission. If this turns out to be true, the *ECOWAS* ruling will not have contributed to strengthening the consistency and coherence of the EU external action,⁷⁴ or at least the visibility of such coherence. Of course, the Council's insertions of consistency clauses and references to Community policies in EU acts have not always been so beneficial to the Community, nor are they always competence-

72. See e.g. the "European Council Declaration On the Common Strategy on Russia", O.J. 1999, L 157.

73. The Court's approach may not sit easily with its subsequent *Kadi* approach as regards the Community competence in the field of individual sanctions: in *Kadi*, the Court made it clear that the requirement of consistency derived from Art. 3 TEU cannot be a basis for widening the competence of the Community. In *ECOWAS*, the Court relies on references to Community activities, made in compliance with the duty of consistency enshrined in Art. 3 TEU, to connect the measure to an EC objective, and widen the scope of EC powers possibly to cover CFSP matters.

74. A point also forcefully made by Heliskoski, *op. cit. supra* note 66. Further on notions of consistency and coherence, see Hillion, "Tous Pour Un, Un Pour Tous! Coherence in the External Relations of the European Union" in Cremona (Ed.), *Developments in EU External Relations Law*, Collected Courses of the Academy of European Law (OUP, 2008), pp. 10–36. See more generally: de Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, Oxford, 2008).

neutral. As has been suggested, the Commission's monopoly of initiative in the EC context may have suffered as a result of occasionally too intrusive or directing Council references to Community activities.⁷⁵

More generally, while *ECOWAS* may entail some clarification in the distribution of competence between the Community and the Union, this comes at the price of further fragmentation (horizontal and vertical) of the EU external action. This, admittedly, partly stems from the current Treaty bias towards division of competence (Art. 47 TEU), and conversely a requirement of consistency that is legally, if not normatively weak (Art. 3 TEU): in contrast to Article 47 TEU, the provisions of Article 3 TEU are not enforceable before the Court. In adjudicating on EC-EU interactions, the Court thus gives more weight to the former than to the latter, and this despite, or perhaps because of, the reference to Article 3 TEU.⁷⁶ The Treaty of Lisbon would change the situation by making the revised version of the consistency provisions subject to the Court's jurisdiction, thus possibly re-equilibrating competence and coherence concerns in the Court's case law. Just as the duty of cooperation has helped protect and promote the Community interest based on Article 10 EC,⁷⁷ the duty of cooperation to ensure the coherence of the EU external action could lead to various procedural obligations binding institutions.

Another lesson of *ECOWAS* is that it is either the Community or the Member States that should act in areas of EC shared powers, not the Union. The Court's judgment may thus be understood as a boost to old mixity; which the Commission has ironically favoured lest the EU, acting instead of the Member States, prevents the Community from being involved in areas of Member States competence in the context of mixed agreements, which would be taken over by the EU.⁷⁸ In the same vein and as suggested earlier, the judgment may be taken as an invitation made to the Member States not to act through EU institutions, because such action may lead to the acknowledgment of a

75. See in this respect, Timmermans, "The Uneasy Relationship between the Communities and the Second Pillar: Back to the 'Plan Fouchet'", (1996) LIEI, 61–70; Kuijper, "Of Mixity and Double Hatting – EU External Relations Law Explained" (Vossiuspers UvA, Amsterdam, 2008).

76. On the Court of Justice and consistency, see Kronenberger "Coherence and consistency of the EU's action in international crisis management: the role of the European Court of Justice" in Blockmans (Ed.), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague, 2008), pp. 199–211.

77. See Case C-266/03, *Commission v. Luxembourg*, [2005] ECR I-4805, and Case C-433/03 *Commission v. Germany* [2005] ECR I-6985, and Case C-459/03, *Commission v. Ireland (Mox Plant)*, [2006] ECR I-4635. Further, Cremona, "Defending the Community interest: The duties of cooperation and compliance" in Cremona and de Witte op. cit. *supra* note 6, p. 125.

78. Cf. Wessel, op. cit. *supra* note 61.

Community power: if the EU is neither able to adopt a CFSP/PJCCM instrument, nor to conclude an agreement on the ground that this instrument relates equally to EC objectives, then Member States may prefer to act instead of the Union, alongside, or perhaps more worryingly from the European integration view point, *instead* of the Community in areas of complementary competence. While Article 47 TEU has a pre-emptive effect on the EU external action in favour of the Community, it does not force the Community to act.

More generally, the *ECOWAS* judgment could be seen as a pause if not a setback in the developing unity of the EU legal order, seemingly at work in recent jurisprudential developments. Hence, in judgments such as *Pupino*, *Segi*, *Advocaten voor de Wereld*,⁷⁹ the Court of Justice suggested that the EU was developing as a legal order, based on some common key principles, admittedly partly imported from the EC legal order. In *ECOWAS* and indeed in *Kadi*, the Court appears to suggest, almost anachronistically, that if there is a “new legal order”, that is and remains the EC. It is symptomatic that in *Kadi*, a textbook example of a cross-pillar case, the Court consistently refers to the “Community legal order”, to the “very foundations of the Community” and “constitutional principles of the EC Treaty” (emphasis added), notably when referring to the importance of fundamental rights, whose protection is called for in Article 6 TEU. In this light, is *ECOWAS* to be read as a halt in the judicial process of unification of the proverbial Union of “bits and pieces”?⁸⁰ Or should it be looked at as a further illustration of the Court’s unfettered concern for the integrity of the EC legal order?

5.5. *ECOWAS and the Treaty of Lisbon*

Decided prior to a possible entry into force of the Lisbon Treaty, the *ECOWAS* judgment is likely to colour the latter’s interpretation. To begin with, the jurisprudence it encapsulates could last, at least insofar as the open definition of development cooperation is concerned. Arguably, nothing in the Lisbon Treaty could force the Court to retreat to a more restrictive definition once, and because, the new Treaty enters into force.

But there is another possible lasting effect of *ECOWAS*. Given the difficulty, in the new Treaty, to discern specific CFSP objectives as distinct from those of EU external action, in view of their inclusion in one single Treaty provision, the Court may have to return to the pre-Lisbon law and case law to determine

79. Case C-105/03, *Pupino*, [2005] ECR I-5285, Cases C-355/04 P, *Segi and Others v. Council*, [2007] ECR I-1657, Case C-303/05, *Advocaten voor de Wereld*, [2007] ECR I-3633. More extensively: Wessel, *op. cit. supra* note 4.

80. Curtin, “The Constitutional Structure of the Union: A Europe of Bits and Pieces”, (1993) CML Rev., 17–69.

what is a CFSP objective, and what is not.⁸¹ Indeed, the distinction will still matter a great deal in the new treaty configuration, given the remaining basic differences between the EU general procedures and the CFSP's which the Treaty foresees, as well as the reformulated version of Article 47 TEU that it contains. According to post-Lisbon Article 40 TEU:

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

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

The new Article 40 would thus not only protect the *acquis communautaire*, but also the “CFSP *acquis*” both in terms of procedure and powers. The way the Court decided in *ECOWAS*, particularly the EC assimilation approach, would in principle be more difficult to contemplate in the post-Lisbon context, which seems to do away with the current TEU bias towards the Community *acquis*. It could however be argued that such bias does not entirely disappear in the new dispensation. In particular, the Preamble of the new TEU starts by referring to “a new stage in the process of European integration undertaken with the establishment of the European Communities”, thus suggesting that integration remains the goal, and that the process of integration builds upon the Communities. Moreover, new Article 1 TEU still emphasizes that the “Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe”, indicating that it may be difficult for the Court, at the very least, to adopt a retrograde jurisprudence as far as the EU supranational features and scope of competence are concerned.

Even if a certain bias towards the supranational method was still conceivable, the blurred distinction between the objectives would nonetheless remain a factor of ambiguity in the future EU/CFSP competence adjudication. Unless the Court uses its pre-Lisbon (policy) definitions, it will be difficult for it to apply its centre of gravity doctrine in order to determine whether the objectives and/or content of a particular action relate more specifically to the CFSP or to the more external action objectives of the Union. The Court may thus have to work out additional tools for determining on a case-by-case basis

81. Further on the Court's post-Lisbon jurisdiction in the field CFSP: Hinarejos, “Judicial control of CFSP in the Constitution: A cherry worth picking?” (2006) YEL, 363. More generally: Jacqué, “Le traité de Lisbonne: Une vue cavalière”, (2008) RTDE, 439.

whether a measure ought to be adopted as a CFSP act or as an EU measure. In adjudicating on “cross-sector” legal basis,⁸² the Court could for instance build upon the EC legal basis case law, whereby a possible greater role of the European Parliament in the decision-making has become one factor that may be relevant for choosing a specific legal basis of an act, as notably recalled in *Kadi*.⁸³ Moreover, elements such as the fundamental requirement of judicial protection (also strongly emphasized in *Kadi*, and consolidated in Art. 47 of the Charter of Fundamental Rights – which would then have become binding), or indeed the duty of consistency which, as pointed out above, would become subject to the Court’s jurisdiction in the new constellation, could become significant grounds for determining who – out of the EU *qua* CFSP or the EU through its general external powers – would be entitled to act in a particular instance.

6. Conclusion

In the *ECOWAS* judgment, the Court preserves the *acquis communautaire* in the classic manner. Even more, the trend towards a more equal position of the CFSP (with its provisional peak in the new Art. 40 after Lisbon) seems to have been halted now that it is being envisaged that parts of the foreign and security policy be based on Community law once the latter allows for this, or be dealt with by the Member States acting individually or collectively. And, in view of the (established) scope of development policy, this should not be too difficult. The wide interpretation of development policy may not just have an effect on the *effet utile* of CFSP, but also on the consistency of EU external relations in general. *ECOWAS* may have taught the Council to be more scrupulous with references to Community measures or tasks in its CFSP (and PJCCM) decisions, it may have warned Member States that allowing the Union to act through CFSP may be harmful in areas where they enjoy a shared competence, and it may trigger the Commission to come up with additional claims in other borderline areas. *ECOWAS* may thus prevent the smooth operation of a system of external relations where cooperation is more important and rewarding in terms of output, than competence competition.

82. See Timmermans’ chapter in Hillion and Koutrakos, *op. cit. supra* note 61.

83. At para 235 of the *Kadi* case (*supra* note 37), the ECJ held that: “adding Article 308 EC to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles 60 EC and 301 EC, no role is provided for that institution”. See also Case C-300/89, *Commission v. Council (Titanium dioxide)*, [1991] ECR I-2867.

At the same time, the Court could have provided more clarity, as *ECOWAS* reveals not only the interactions but also the potential conflicts between the principles underpinning the EU system of external relations. Whereas Article 47 seems to have been used by the Court in a dogmatic manner, it also indicated that a CFSP measure may not be precluded even if it has an effect on the *acquis communautaire*, for instance by contributing to the economic and social development of a developing country. Together with the notion of CFSP acts (partly) being implemented by Community measures, this enhances the “fuzziness” surrounding the rules and principles related to the division of external competences.

The same holds true for the introduction of what seems to be a new test as regards the Court’s jurisdiction to ensure compliance with Article 47 TEU. The notion that only “acts capable of having legal effects” may trigger the application of Article 47 may entail a restriction on the one hand, but also a possible widening of the Court’s jurisdiction to include acts of the European Council. Other case law reveals that the term “acts capable of having legal effects” was not introduced in relation to CFSP acts in particular, but that it has a wider meaning. This allows us to conclude that there are several routes to test the compatibility of an act with the provisions of Article 47 TEU, including not only Articles 230 EC and 241 EC, but perhaps also Article 234 EC.

What is next? For understandable reasons the Court did not decide to partially annul the *ECOWAS* Decision. Given the limited content of the Decision, it would be hard to establish which part could have been saved. This is not to say that the choice for a CFSP legal basis was completely wrong. After all, the Court argues that “it must be concluded that the Council has infringed Article 47 EU by adopting the contested decision on the basis of Title V of the EU Treaty, even though it *also* falls within development cooperation policy.” (para 109).⁸⁴ The “centre of gravity” check did not point to either of the pillars, in which case a Community legal basis should be used. This seems to offer the solution: the new Decision will need to have Article 179 EC as its legal basis, alongside the original CFSP joint action.

Did the Court have a choice? We think it did. While – as rightfully implied by the Court – a dual legal basis is difficult because of the diverging decision-making procedures and instruments, a *linkage* between CFSP and EC decisions – by way of a mutual reference – is not impossible. It would have been more obvious if the Court had concluded that although this is CFSP territory, parts of it are to be implemented on the basis of ongoing or planned Community policies. The decision itself already hinted in this direction and it remains unclear to what extent the *ECOWAS* Decision would actually have restricted

84. Emphasis added.

the Commission in its actions. Leaving a large part of the implementation to the Commission would also explain the continued existence of the 2002 basic Joint Action on the “European Union’s contribution to combating the destabilizing accumulation and spread of small arms and light weapons”. This Decision was not reviewed by the Court in view of the Commission’s plea of illegality. Linking decisions from different pillars to assure consistency in external policies is known from the legal regimes on economic sanctions and anti-terrorism policies. A mutual reference could thus underline the CFSP’s right of existence.

Clearly, the jurisprudence on the EC v. EU competence is a work in progress that needs fine tuning, even if it may be overtaken by events. While the possible entry into force of the Lisbon Treaty will change the very basis of that jurisprudence, the specific legal bases and decision-making procedures for CFSP decisions, their “non-legislative” nature and the newly drafted Article 40 TEU (replacing current Art. 47) will result in a continued, albeit perhaps new, fuzziness in competence distribution within the EU system of external relations.