

## THE INSIDE LOOKING OUT: CONSISTENCY AND DELIMITATION IN EU EXTERNAL RELATIONS

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### 1. Revisiting the pillar structure: the Union's legal system

The three-pillar structure of the European Union, placing the common foreign and security policy (CFSP) as well as the police and judicial cooperation in criminal matters (PJCC) in a separate second and third “pillar”, apart from the three European Communities in the first pillar, is often used as a justification for separate analyses of the three pillars. In the early days after the signing of the Treaty on European Union, the pillar-structure was the form in which the Union was perceived, and subsequently analysed by many authors. To this very day one can observe the existence of largely isolated EC, CFSP and PJCC research communities, in which research is frequently “content driven”, rather than the impetus being taken from legal institutional starting points. It cannot be denied that the Treaty on European Union indeed separates the three issue areas: the new policies can be found in separate titles (Titles V and VI respectively) of the Treaty, which are meant to “supplement” the European Communities (Art. 1 (ex A) TEU). At the same time, however, more recent literature points to the fact that the “bits and pieces” which together make up the entity which is referred to as the European Union, are more connected than many observers were willing to admit in the early days, and that the metaphor of the Greek temple may not be the best way of describing what the Union is about.<sup>1</sup>

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1. See e.g. von Bogdandy and Nettessheim, “Ex Pluribus Unum – Fusion of the European Communities into the European Union”, (1996) *EL Rev.*, 267 et seq.; Trüe, *Verleihung von Rechtspersönlichkeit and die Europäische Union und Verschmelzung zu einer einzigen Organisation – deklaratorisch oder konstitutiv?*, Universität des Saarlandes: Vorträge, Reden und Berichte aus dem Europa-Institut, No. 357 (Saarlandes, 1997); De Witte, “The pillar structure and the nature of the European Union: Greek temple or French gothic cathedral?”, in Heukels, Blokker, Brus (Eds.), *The European Union after Amsterdam* (1998), pp. 51–68; Curtin and Dekker, “The EU as a ‘layered’ international organization: Institutional unity in disguise”, in Craig and de Búrca (Eds.), *The Evolution of EU Law* (OUP, 1999), pp. 83–136; Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer

Almost ten years after the conclusion of the Treaty on European Union one may wish to take a fresh look at the structure of the European Union and in particular at the way in which the “pillars” interact. Over the past few years convincing arguments have been put forward pointing to the unity of the Union’s legal system. While many answers as to the legal structure of the Union can be found on the basis of an analysis of the delimitation of competences between the Union and its Member States,<sup>2</sup> this contribution will mainly focus on the Union’s competences to engage in legal relations with third States, and on a delimitation of these external competences. In doing so, this article will build on the conclusion drawn in recent legal analyses that the entry into force of the Treaty on European Union marked the coming into being of a new legal system, comprising a number of sub-systems (the different issue areas of the Union, as well as the sub-legal systems developed within the areas).<sup>3</sup> The norms in the TEU are not merely to be seen as a loose “set”, but indeed form a system with mutual dependencies.

In fact, the Union is increasingly regarded as a “unity” by the media (as well as by Union citizens) and by third States. As from the entry into force of the TEU, the label “European Union” seems to have replaced the “European Community”, regardless of the issue area at stake.<sup>4</sup> What we see here, however, is a reference to unity in a political sense. The present article is based on the idea that the Union can also be regarded as a *legal* unity.<sup>5</sup> Over the years, a large number of arguments have been put forward to promote this idea, a main argument being the “unity of institutions”. Specific support may

Law International, 1999); and recently von Bogdandy, “The legal case for unity: The European Union as a single organization with a single legal system”, 36 CML Rev. (1999), 887–910.

2. See e.g. Wessel, *op. cit. supra* note 1.

3. See e.g. Dörr, “Zur Rechtsnatur der Europäischen Union”, (1995) EuR, 334–348; Devroe and Wouters, *De Europese Unie. Het Verdrag van Maastricht en zijn uitvoering: analyse en perspectieven* (Leuven, 1996); Klabbers, “Presumptive personality: The European Union in international law” in Koskeniemi (Ed.), *International law Aspects of the European Union* (The Hague, 1998), pp. 231–253; Trüe, *op. cit. supra* note 1; Wessel, “The international legal status of the European Union”, (1997) *European Foreign Affairs Review* (hereafter: EFA Rev.), 109–130; De Witte, *op. cit. supra* note 1; and Curtin and Dekker, *op. cit. supra* note 1. Some authors have even argued that the existence of a Union legal system implies a *fusion* of the three pillars. See esp. the contributions of von Bogdandy, *op. cit. supra* note 1.

4. See e.g. Koenig and Pechstein, *Die Europäische Union: Der Vertrag von Maastricht* (Tübingen, 1995), at p. 22: “Jedenfalls im nichtjuristischen Sprachgebrauch hat sich sehr rasch eine Redeweise verbreitet, die den Begriff der ‘Europäischen Union’ im Sinne einer eigenständigen Einheit verwendet, welche die bisherigen Gemeinschaften vollständig ersetzt hat”.

5. See also Dekker and Wessel, “The European Union and the concept of flexibility: proliferation of legal systems within international organizations” in Blokker and Schermers (Eds.), *Proliferation of International Organizations* (Kluwer Law International, 2000, forthcoming). Cf. also Dörr, *op. cit. supra* note 3, at 336: “eine eigenrechtliche Einheit”; and De Witte, *op. cit. supra* note 1, at 59: “a unified international organization”.

be found in the Union-wide competences of the Court of Justice, underlining that the Court is the ultimate arbiter to decide where the line of demarcation between the Union's issue-areas lies.<sup>6</sup>

When the Union is qualified as a legal unity that is capable of acting within the international legal system, this implies that its external policy be consistent in the sense that it does not “blow hot and cold at the same time”. In other words: the internal unity should also “be worn on the outside”. In their legal relations with the Union, third parties must be able to rely on the fact that they have one counterpart only. This brings us to the ways in which potential conflicts between norms in the Union's legal system are to be solved, as well as to the question whether a hierarchy of norms exists. Conflicts between norms exist when the intended result of two or more norms is contradictory. Typical situations in this respect arise when the conflicting provisions are given in different manners or by different bodies or at different times.<sup>7</sup> “Hierarchy”, in its most abstract form and in a legal context, describes a relationship among several existing norms. The function of hierarchy in a legal system is reflected by the words of Bieber and Salomé: “A relatively simple purpose of hierarchy seeks to resolve conflicts between competing norms which would apply to the same situation but which would lead to different consequences . . . . A second, more sophisticated function of hierarchy consists, in fact, in the guarantee that norms are adopted and remain within the scope of the fundamental principles of a given legal order”.<sup>8</sup> In general, it seems fair to say that most conflicts never become visible, because they are resolved through a (pragmatic or principled) interpretation that can rely on a consensus between the actors involved.<sup>9</sup> In cases where a conflict cannot be avoided through interpretation, the “principles of precedence” traditionally apply.<sup>10</sup> For the source of these principles – which are mostly derived from arguments related

6. See *infra*; and Curtin and Van Ooik, “Een Hof van Justitie van de Europese Unie?”, (1999) SEW, 24–38.

7. Malt, “Methods for the solution of conflicts between rules in a system of positive law” in Brouwer, Hol, Soeteman, Van der Velden, De Wild (Eds.), *Coherence and Conflict in Law* (Kluwer, 1992), pp. 201–226, 203.

8. Bieber and Salomé, “Hierarchy of norms in European law”, 33 CML Rev. (1996), 907–930, 909.

9. Cf. Malt, *op. cit. supra* note 7, at 202.

10. These “principles of preference” are usually referred to as: the *lex posterior* principle: *lex posterior derogat legi priori* (a later provision overrules an earlier one); the *lex specialis* principle: *lex specialis derogat legi generali* (a more special provision overrules a general one); the *lex superior* principle: *lex superior derogat legi inferiori* (a provision with higher rank overrules a provision with lower rank). Sometimes a fourth principle is added to this list: *lex posterior generalis non derogat legi priori speciali* (if a later general norm is incompatible with an earlier but less general norm, one must apply the earlier and less general norm). See esp. on an analysis of these principles: Malt, *op. cit. supra* note 7; Peczenik, “Legal collision of norms and moral consideration” in Brouwer et al. (Eds.), *op. cit. supra* note 7, p. 182.

to logical consistency and coherence in law – I refer to specific literature on that topic.<sup>11</sup> It is asserted here that with the help of these general principles, possible conflicts between different EU norms may only be solved in the event that they have not been resolved through rules on the hierarchy between norms provided by the TEU itself. Section 3 will therefore deal with the explicit rules on delimitation in the EU legal system, but before we come to that point, the question of the existence of external capacities of the Union needs to be addressed.

## 2. The external capacities of the Union

### 2.1. *Personality, capacity, and competence*

Before it becomes necessary to worry about a delimitation of the competences of the Union in external relations, it should be established that the Union as such indeed has external competences in other areas than those covered by the Communities. The assertion of the Union's international identity (as put forward by Art. 2 TEU) is predominantly inward looking. As far as CFSP is concerned, the cooperation appears first and foremost to be directed at organizing "relations between Member States and between their peoples" and the Union was established by the High Contracting Parties "among themselves". In fact, these sentences in Article 1 TEU hint at a purely "internal" definition of the Union's tasks,<sup>12</sup> underlining the popular picture of a European Union that is either inactive or ineffective in its dealings with third States or other international entities. On the other hand, it is obvious that there is not much sense in a common foreign and security policy without an external dimension, and it is not at all peculiar for the external relations of international organizations to be bound to take their impetus from their internal priorities and activities.<sup>13</sup> Indeed, a common foreign policy is not a goal in itself, but is obviously meant to result in an "external" dimension as well. Although less evident, the same increasingly holds true for police and judicial cooperation.<sup>14</sup>

Over the past few years, a separate line of literature has revealed the Union's status as a legal person.<sup>15</sup> Despite an explicit provision in the Draft Treaty

11. See esp. Malt op. cit. *supra* note 7 and Peczenik op. cit. *supra* note 10.

12. See also Cremona, "The European Union as an international actor: The issues of flexibility and linkage", (1998) EFA Rev., 67–94, 68.

13. Cremona, *ibid.* at 69.

14. See e.g. the Tampere Conclusions of the European Council, 15–16 Oct. 1999, part D, on a stronger external action in the field of Justice and Home Affairs.

15. It may be recalled that, in the early days in particular, it was generally maintained that the Union lacks legal personality. See e.g. Everling, "Reflections on the structure of the European

produced by the Irish Presidency in December 1996 that “The European Union shall have legal personality”,<sup>16</sup> no reference to this status can be found in the final text of the TEU adopted at Amsterdam. It was clear from the Irish Draft that there was not yet consensus on the final formulation, despite the conviction of some Member States that the Union must be regarded as a legal person.<sup>17</sup> However, the fact that the reference to the legal personality of the Union was removed in the final text cannot be used to decide *conclusively* that the Member States in the end withheld that personality from the Union. It could also be argued that no consensus could be reached on explicitly referring to the legal status of the Union in the Treaty.<sup>18</sup>

It is asserted here that whenever a treaty purports to establish a new entity, this entity is to be regarded as a “legal person”. A legal person is conceived as an entity that is, *in principle*, capable of acting both *vis-à-vis* its own Member States and *vis-à-vis* other international legal persons, like third States. Contrary to the way in which it is dealt with in most studies, the concept of legal personality does not find its primary value in the explanation of

Union”, 29 CML Rev. (1992), 1053–1077; Curtin, “The constitutional structure of the Union: A Europe of bits and pieces”, 30 CML Rev. (1993), 17–69; Schermers and Blokker, *International Institutional Law* (Kluwer, 1995), Besselink, “Tussen supranationaliteit en soevereiniteit: over het niet-communautaire recht van de Europese Unie” in Besselink, Hins, Jans, De Reede, Van der Vlies, *Europese Unie en nationale soevereiniteit* (Deventer, 1997), or Neuwahl, “A partner with a troubled personality: EU treaty-making in matters of CFSP and JHA after Amsterdam”, (1998) EFA Rev., 177–197.

16. *The European Union Today and Tomorrow, Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future. A General Outline for a Draft Revision of the Treaties*, Document CONF 2500/96, Brussels, 5 Dec. 1996, Chapt. 13. More extensively on this topic: Neuwahl, *op. cit. supra* note 15.

17. Illustrative in this respect is the Report of the Italian Presidency presented to the European Council in June 1996, in which the legal personality of the Union was acknowledged. The Report is reproduced in European Parliament Intergovernmental Task Force, *White Paper on the 1996 Intergovernmental Conference, Vol. 1, Official Texts of the European Union Institutions*, at 64.

18. A similar conclusion is drawn by Blokker and Heukels, “The European Union: Historical origins and institutional challenges” in Heukels et al., *op. cit. supra* note 1, at 37. See also the statement made by British Prime Minister Tony Blair to the House of Commons on 18 June 1997: “. . . others wanted to give the EU *explicit* legal personality across all pillars. At our insistence, this was removed” (emphasis added). This seems to confirm the assertion made by De Witte, *op. cit. supra* note 1, at 63, that the “lack of consensus is, apparently, due to the ‘word-fetishism’ displayed once more by the British delegation, but [that] the subjective intention to withhold legal personality does not exclude that legal personality may have been implicitly granted . . .”. Cf. also Seidl-Hohenveldern and Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (Köln, 1996), p. 11: “Das Fehlen ausdrücklicher Bestimmungen über die *Rechtspersönlichkeit* der EU im Völkerrecht und im innerstaatlichen Recht ist kein Grund, diese der EU zu verweigern. Sie kann solche vielmehr kraft *implied powers* . . . genießen. Im übrigen entspricht es dem Willen der Mitgliedstaaten, der EU einen ‘einheitlichen institutionellen Rahmen zu geben’ . . .”

what international organizations may do on the international scene, but rather in the ability to indicate the distinction from their Member States. Thus, legal personality is first and foremost a concept that can be used whenever international institutional law deals with the form of cooperation between the participating States.<sup>19</sup> This implies that whenever there is an international legal entity, it is a legal person. Legal personality is nothing more (or less) than independent existence within the international legal system. There would not be any use in speaking of an international legal entity if it did not exist under international law. One consequence of this line of reasoning is that there is not much sense in speaking of a “partial legal personality” of international organizations; neither can we say that a particular international entity “to some extent” possesses legal personality.

Bekker defined legal personality as “the concrete exercise of, or at least the potential ability to exercise, certain rights and the fulfilment of certain obligations”.<sup>20</sup> The distinction between *legal personality* and *legal capacity* is illuminating in this respect: the first concerns a *quality*, the second is an *asset*. Where international personality thus means not much more than being a subject of public international law,<sup>21</sup> capacity is concerned with “what the entity is potentially entitled to *do*”.<sup>22</sup> The rather formal approach is apparent in the work of a number of other authors as well, who have stressed that “the concept of personality does not say anything about the qualities of the person” and that “it is a mistake to jump to the conclusion that an organization has personality and then to deduce specific capacities from an *a priori* conception of the concomitants of personality”.<sup>23</sup> Nevertheless, it is not so interesting merely to decide on an entity’s legal personality. The practical value of the possession of legal personality can be found in the fact that the entity has the

19. In that respect one may probably see it as the legal counterpart of the concept of supranationalism used in political science.

20. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Dordrecht, 1994), p. 53.

21. In German: *Rechtspersönlichkeit*. See Bekker, op. cit. *supra* note 20, at 60, and Schermers and Blokker, op. cit. *supra* note 15, at 975. Cf. also Hafner, “The Amsterdam Treaty and the treaty-making power of the European Union: Some critical comments” in Hafner et al. (Eds.), *Liber Amicorum Professor Seidl-Hohenveldern ? In Honour of his 80th Birthday* (Kluwer, 1998) at p. 259: “As such, the organization becomes a fundamental structural element of the international order”.

22. In German: *Rechtsfähigkeit*. The definition of legal personality as having a standing under international law seems also to have been the basis for the following remarks made by the International Court of Justice in the *Reparation for Injuries* case: “Has the organization such a nature as involves the capacity to bring an international claim? . . . In other words, does the Organization possess international personality?” The Court continued: “. . . what it does mean is that it is a subject of international law and capable of possessing international rights and duties . . .”. *Reparation case* at 179.

23. Detter, *Law-Making by International Organizations* (Stockholm, 1965), p. 21; and O’Connell, *International Law*, Vol. 1 (London, 1970), p. 109.

required status to have certain categories of rights, which enable it to manifest itself on the international plane and to enter into relationships with other subjects of international law, traditionally referred to as the right of intercourse.<sup>24</sup> It is the capacities of the entity that ultimately reveal the “independent” position of a legal person. Thus, international legal persons may have a capacity to bring international claims, they may have international procedural capacity (for instance to start a procedure before an international court), treaty-making capacity, the right to establish diplomatic relations or the right to recognize other subjects of international law.<sup>25</sup> International capacities are thus to be seen as *general competences* of an international entity. However, the international legal capacity of entities other than States is never comprehensive; it exists only in relation to the *specific competences* attributed to them by the founding States.<sup>26</sup> These specific competences are concerned with “what a given international organization, being a subject of law endowed with the potential capacity to act, is specifically empowered to do”;<sup>27</sup> it is subject to the

24. Cf. Rama-Montaldo, “International legal personality and implied powers of international organizations”, (1997) BYIL, 111–155, 124 and 134; Oppenheim, *International Law* (London, 1967), p. 216. This must have been the reason for De Witte, *op. cit. supra* note 1, at 62, also to assert that “[l]egal personality should be held to refer only to the capacity of the European Union to act as a subject of international law, that is, to conclude treaties and conduct diplomatic relations with third states and other international organizations”. It seems important to recall that international organizations as independent legal persons are not by definition bound to the same international legal obligations as their Member States. Apart from *ius cogens*, international organizations too can only be bound on the basis of their own free will.

25. Bekker, *op. cit. supra* note 20, at 63–64; Brownlie, *Principles of Public International Law* (Oxford, 1990), at pp. 683–689. While the “will approach” in particular would stress that the existence of any of these capacities would depend on their express or implied inclusion in the constituting treaty, Rama-Montaldo, *op. cit. supra* note 24, at 139–140, asserted that some general capacities seem to follow from the entity’s recognized standing in international law: 1 the right to express its will through the different legal ways found in the international order for producing legal effects on the international plane; and 2 rights which enable the organization to manifest itself as a distinct entity and make possible relations with other international persons. While at first sight these capacities indeed seem necessary to make any sense of the concept of legal personality, the problem is that the categories are so broad that any distinction between personality and capacity would disappear. Therefore, for a theoretical analysis, the more formal approach seems the most helpful, since it enables one to unravel further elements.

26. Or by another legal entity of which the legal person is an agency. Cf. Brownlie, *op. cit. supra* note 25, at 65. In a somewhat different manner, Weiler, *The Constitution of Europe* (Cambridge, 1999), at p. 137, made a distinction between *competence*, *power*, and *capacity*. In his analysis of federal States and international treaties, Weiler looked at the extent to which the internal division of *competences* between the central authority and constituent Member States affects the ability of the federal government to secure the implementation of treaty obligations; the extent to which the division of internal competences affects the treaty *powers* of the federal government; and the extent to which the non-unitary character of the federal State affects the international *capacity* of the federation or the Member States.

27. Bekker, *op. cit. supra* note 20, at 71. While Bekker does not refer to capacities as *general competences*, his analysis seems to amount to the same thing. To clarify the distinction

organization's specific functions and purposes. Hence, the European Union, for instance, would only be competent to exercise its capacities in relation to the functions and purposes ascribed to it by the Treaty on European Union.

So, labelling the Union as a legal person does not automatically allow us to draw conclusions as to its legal capacities. It is these capacities in particular that define the Union's potential "to assert its identity on the international scene" (Article 2 TEU), and that raise questions concerning the delimitation *vis-à-vis* the competences of the EC.

## 2.2. External capacities of the Union

In one case, an international capacity of the Union quite explicitly follows from a Treaty provision. The Amsterdam Treaty introduced the possibility for the Council to conclude international agreements. Article 24 TEU provides: "When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this Title, the Council, acting unanimously, may authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency." This general competence exists with regard to both CFSP and PJCC issues (see Arts. 24 and 38 TEU). It has been argued that such agreements are concluded by the Council not on behalf of the Union but on behalf of the Member States.<sup>28</sup> However, more convincing arguments point towards the conclusion that Article 24 indeed establishes a competence of the Council, thereby implying a treaty-making capacity of the Union.<sup>29</sup>

To date, the Union has not *explicitly* entered into any international agreements which would prove its possession of international capacities.<sup>30</sup> Nev-

between *personality*, *capacity* and *competence*, Bekker used the International Tin Council as an example: although the ITC, being endowed with *personality*, may have the general *capacity* to contract, it is only *competent* to contract with respect to tin.

28. See esp. Neuwahl, *op. cit. supra* note 15; Timmermans, "Het Verdrag van Amsterdam. Enkele inleidende kanttekeningen", (1997) SEW, 344–350, 346; Cremona, "External relations and external competence: The emergence of an integrated policy" in Craig and De Búrca (Eds.), *op. cit. supra* note 1, pp. 137–175, 168; and Van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Kluwer, 1999), at p. 370. Cf. also De Zwaan, "Community Dimensions of the Second Pillar" in Heukels et al., *op. cit. supra* note 1, at 182, who seems to recognize that this is a legal capacity of the *Union*, but nevertheless denies the existence of a "formal legal personality". It has even been argued that Art. 24 agreements are "not legally binding" and not to be viewed as treaties; see the opinion of the Dutch Government in the documents of the Second Chamber, TK 1997–1998, 25 922 (R 1613), no. 5, at 51.

29. See for an evaluation of these arguments Wessel, *op. cit. supra* note 1, 260–264.

30. *Contra* Ress, "Ist die Europäische Union eine juristische Person?", (1995) EuR, 27–40, 33, who seems to regard the Accession Treaties with the new Member States as treaties concluded by the Union on the basis of Art. O TEU (now Art. 49). However, regardless of the

ertheless, legal analysis over the past few years has revealed that a number of documents could in fact qualify for the status of an international agreement, or at least imply legal obligations for the Union. Examples include the 1993 document on the “Relations between the Union and the WEU”,<sup>31</sup> the *Memorandum of Understanding on the European Union Administration of Mostar* (MoU)<sup>32</sup> and the “Exchange of Letters” between the European Union, on the one hand, and Norway, Austria, Finland and Sweden, on the other.<sup>33</sup> Finally, legal effects were also intended when the EU Presidency signed, as one of the “witnesses”, the *General Framework Agreement for Peace in Bosnia and Herzegovina* (the “Dayton Agreement”), albeit that in this case it was clear from the text that the Union itself was not to be considered a party. A comparable situation concerned the EU’s witnessing of the signing of the Protocol Concerning Elections (Annex II) in the *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*.<sup>34</sup> The Protocol provides that security issues relating to international observers be dealt with within the framework of the trilateral Palestinian-Israeli-EU forum and provides *inter alia*: “The European Union will act as the coordinator for the activity of observer delegations” (Article V(4)); and “The European Union will only bear . . . liability in relation to members of the coordinating body and to the European Union observers and only to the extent that it explicitly agrees to do so” (Appendix 2(8) to Annex II). This latter provision in particular reveals the Union’s acceptance of a possible future liability on the basis of the Agreement and thus of its standing under international law.

Apart from explicit capacities, the purposes and functions may be an indication of existing *implied powers*, or more accurately in this respect of implied legal capacities. The TEU indeed reveals the existence of a number of specific competences implying more general international capacities on the part of the Union. The distinction between the Union and its Member States and the individual competences of the Union to “implement a policy”, to “pursue objectives”, to “engage in an external and security policy”, to “request” another international organization, to “have a position” and to “take action” (see the previous section) seem to indicate the existence of a number of legal

competences of the Institutions in this area, the final agreements are concluded between the Member States of the Union and the new State; the Union as such is not mentioned as a party.

31. Annex IV of Chapter IV of the document on the implementation of the Maastricht Treaty, Brussels European Council, 29 Oct. 1993, Conclusions of the Presidency. Also published as Document 1412 of the Assembly of the Western European Union, 8 April 1994.

32. Signed in Geneva on 5 July 1994.

33. See Klabbbers, *op. cit. supra* note 3, 250. The text of the Letters can be found in O.J. 1994, C 241/399.

34. Concluded in Washington on 28 Sept. 1995. The Interim Agreement is partly reproduced in 36 ILM 551 (1997). See also Paasivirta, “The European Union: From an aggregate of states to a legal person?”, *Hofstra Law & Policy Symposium* (1997), 37–59, 55.

capacities on the part of the Union. With regard to the purposes of the Union, Article 2 states that the Union is to assert its identity on the international scene. An international capacity seems to be necessary in order to be able to attain this objective.<sup>35</sup> The CFSP objective in Article 11 “to safeguard the common values, fundamental interests, independence and integrity of the Union” is striking in this respect. The fact that in the final version of this provision the word “independence” was explicitly linked to the European Union indicates an intention of the States to confirm the separate status of the Union in international law, and its status as an autonomous entity. Another objective in Article 11 is phrased as “to strengthen the security of the Union in all ways”. In this objective it is again implied that there is a difference between the security of the Union and the security of the Member States. The 1992 version even explicitly referred to “the security of the Union and its Member States”.

According to Article 12, these objectives shall be pursued by *the Union*. The Member States *as such* are thus put in a less active role; the institutions of the Union are responsible for achieving the objectives, the Member States shall support the *Union's* policy (Art. 11(2) TEU). Indeed, an international capacity to act seems to follow from these formulations. After all, *the Union* shall decide on Common Strategies and adopt Joint Actions and Common Positions. Other indications of existing international capacities on the basis of specific competences may be found in Article 17(3), Article 18(1) and (2). In fact, the very situation that the Union as such can be represented on the international plane – whether it is through Presidential declarations, *démarches*, statements in international organizations and conferences, or political dialogues – calls for the Presidency to be regarded as an agent of a legal person with international capacities.<sup>36</sup> The same holds true for other “agents” acting on behalf of the Union, like electoral units for monitoring elections<sup>37</sup> and appointed special envoys to supervise the implementation of measures on the spot.<sup>38</sup> The assertion of the identity of the Union on the international scene and a capacity to act is furthermore reflected in its Declarations and in some Decisions. Some decisions seem to imply an autonomous international role of

35. Also Dörr, op. cit. *supra* note 3, at 339.

36. Cf. Trübe, op. cit. *supra* note 1, at 45: “Art. J.5 Abs. 1 EUV [now Art. 18; RAW] kann daher nur so verstanden werden, daß die EU selbst vertreten wird, und dazu muß die EU ein Rechtssubjekt sein”.

37. See e.g. Council Decisions 93/604/CFSP (Russian Parliamentary elections); 93/678/CFSP (South Africa); 96/406/CFSP (Bosnia and Herzegovina); 96/656/CFSP and 97/875/CFSP (Zaire/Congo).

38. See e.g. Council Decisions 96/250/CFSP (African Great Lakes); 96/676/CFSP (Middle East); and 98/289/CFSP (Palestinian Authority).

the Union.<sup>39</sup> That the Union cannot only have “international commitments”, but that it even regards itself as a guarantor of the overall international legal system follows from the Common Position on Cuba, in which United States laws are criticized because they “affect or are likely to affect the established legal order”.<sup>40</sup>

In the other areas of the Union, arguments may be derived from Article 17 EC, which established a “Citizenship of the *Union*”<sup>41</sup> – which, apart from other things, marks a new phase in the diplomatic protection of the citizens of Union Member States – as well as from the competence of the Council to conclude international agreements on PJCC issues. A competence of the Union (acting through the Council) may also be discovered in relation to agreements concluded between Europol and third States. Unanimous Council decisions are needed to determine the third States or non-European Union related bodies with which agreements are to be negotiated as well as for the final conclusion of the agreement.<sup>42</sup> Finally, one may point to the obligation of Member States to defend Union PJCC decisions within international organizations and at international conferences (Art. 37 TEU).

### 3. Delimitation of external competences

#### 3.1. *The criteria for delimitation*

The provision in Article 2 that the Union is “to assert its identity on the international scene, *in particular* through the implementation of a common foreign and security policy”,<sup>43</sup> leaves open the possibility of the Union acting outside the CFSP framework in its external relations. The objectives of the other two parts of the Union indeed imply a role for the Union regarding the external dimension of those issue areas as well, and it seems too simplistic to distinguish between a European Community in charge of external commercial policy and a CFSP dealing with foreign policy.<sup>44</sup> The overlapping of certain objectives is thus unavoidable. Apart from the Common Commercial Policy, which in itself is not always clearly separated from political

39. Council Regulation (EC) No. 3381/94 of 19 Dec. 1994, O.J. 1994, L 367, emphasis added. Cf. Dörr, *op. cit. supra* note 3, at 334.

40. Common Position 2 Dec. 1996. See also Cremona, *op. cit. supra* note 12, at 93.

41. Ress, *op. cit. supra* note 30, at 34, and Lecheler, “Der Rechtscharakter der ‘Europäischen Union’” in Ipsen, Rengeling, Mössner, Weber (Eds.), *Verfassungsrecht im Wandel* (Köln, 1995), pp. 383–393, 389.

42. See Council Act (1999/C 26/04) of 3 Nov. 1998, O.J. 1999, C 26.

43. Emphasis added.

44. Cf. Keukeleire, *Het buitenlands beleid van de Europese Unie* (Kluwer, 1998), at p. 99.

foreign policy, some areas are in particular potentially problematic in this respect; they include development cooperation (Title XX EC), the policy with regard to the environment (Title XIX; “promoting measures at international level to deal with regional or worldwide environmental problems”), and visas, asylum, immigration policies (Title IV). Moreover, the Community will “foster cooperation with third countries and the competent international organizations” in the sphere of education and vocational training (Title XI), culture (Title XII), public health (Title XIII), and it will promote “cooperation in the field of Community research, technological development and demonstration with third countries and international organizations” (Title XVIII).

Regarding police and judicial cooperation, the external dimension is less obvious, but is nevertheless present in policies concerning the external border of the Union, international organized crime, trafficking in persons and offences against children, illicit drug or arms trafficking, corruption and fraud (Cf. Art. 29 TEU).<sup>45</sup> International security agreements frequently deal with migration issues, and internal security threats (terrorism, ordinary crime) are increasingly linked up with “new” external security threats (asylum seekers and immigrants). In addition, internal and external security issues are linked through the rules on visas in the sense that it was agreed that “foreign policy considerations” shall be taken into account.<sup>46</sup> In the fields of visa policy, fraud, drugs and data protection, the PJCC policies already overlapped with Community legislation, while overlapping on global drug trafficking and imported terrorism occurred between PJCC and CFSP.<sup>47</sup> In addition, the European Police Office (Europol) engages in relations with third States, causing possible overlaps with both Community and CFSP policies.<sup>48</sup>

These overlaps call for a delimitation of competences. Article 1 TEU presents CFSP and PJCC (“the policies and forms of cooperation established by this Treaty”) as being *supplementary* to the European Communities. The

45. Before the entry into force of the TEU, some matters were discussed in the framework of EPC that afterwards found their way into the Cooperation on Justice and Home Affairs (CJHA). These matters included: the international conventions concerning the transfer of sentenced persons, the prohibition of double jeopardy and the abolition of the legalization of documents between the Member States. See Neuwahl, “Foreign and security policy and the implementation of the requirement of ‘consistency’ under the Treaty of European Union” in O’Keeffe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (London, 1994), at p. 233.

46. See Den Boer, “Wearing the inside out: European policy cooperation between internal and external security”, (1997) *EFA Rev.*, 491–508, at 492–494. Cf. the Declaration on Article 73j(2)(b) of the Treaty establishing the European Community, adopted by the Amsterdam IGC.

47. See Den Boer, *Taming the Third Pillar: Improving the Management of Justice and Home Affairs Cooperation in the EU* (Maastricht, 1998), at p. 25. To tackle the problem of overlap, the EU initiated some horizontal working programmes, like the Madrid Working Programme on Drugs, adopted by the Council on 15 and 16 Dec. 1995.

48. See the “Draft Model Agreement with Third States”, (1998) *Statewatch*, 5, 20–21.

opinion that this provision implies the principle of “EC first”, seems to be supported by Article 2 in which the maintenance of and respect for the *acquis communautaire*<sup>49</sup> is highlighted. The repetition of this provision in Article 3 – the provision on the Union’s single institutional framework – only makes sense if it is seen in relation to the chosen structure of the Union. The explicit reference to the “continuity of the activities” in Article 3 underlines the importance attached to the *acquis communautaire*.<sup>50</sup> In fact, both Articles 2 and 3 even go beyond the mere preservation of the *acquis communautaire* and demand its further development.<sup>51</sup> The 1992 TEU even stated that by using the procedure of Article N(2) (on the revision of the Treaty in 1996) the objective of the Union was to consider to what extent the policies and forms of cooperation in CFSP and CJHA should be revised in order to meet this end. These provisions leave no doubt as to the fact that the development of CFSP and PJCC should not only respect the *acquis communautaire*, but that it should even be at its service. On the basis of these provisions, one is led to conclude that, in general, any indistinctiveness in case of overlapping CFSP, PJCC and EC objectives should always be solved to the benefit of the last.<sup>52</sup> This is moreover confirmed by Article 47 TEU which plainly provides

49. Despite the various references to the *acquis communautaire*, the Treaty nowhere defines this notion. This French term is not even commonly used in the Union; it is only used in the French, English and Dutch versions of the Treaty. The other translations use expressions in their own language (e.g. Spanish: “acervo comunitario”, German: “gemeinschaftlichen Besitzstands”, or Swedish: “gemenskapens regelverk”). However, from both the doctrine and the accession treaties of 1972, 1979, 1985 and 1994 one can derive that the notion covers the whole of existing Community rules and norms, including the case law of the ECJ and CFI. See Devroe and Wouters, *op. cit. supra* note 3, at p. 98; Curti Gialdino, *Il Trattato di Maastricht sull’Unione Europea* (Rome, 1995), at p. 1091: “It means, in substance, that the applicant States must accept ‘without reservation’ the whole of the following: the founding Treaties and their political objectives, all measures enacted after establishment of the Community, as well as the options chosen for the development of the European construct”. A recent and rather extensive analysis of the (unclear) notion of the *acquis communautaire* was made by Weatherill, “Safeguarding the *Acquis Communautaire*”, in Heukels et al., *op.cit. supra* note 1, pp. 153–178. Some authors hold that the notion of the *acquis communautaire* after Maastricht refers to the *acquis* of the Union, thus comprising the developments in CFSP and PJCC; see esp. Elliott, “Neutrality, the *acquis communautaire* and the European Union’s search for a common foreign and security policy under Title V of the Maastricht Treaty: The Accession of Austria, Finland and Sweden”, (1996) *Ga.J. Int’l & Comp.l.*, 601–639, at 619–620. While in discussions on the accession of new Member States it may be convenient to use the term in this sense, using this definition in interpreting the TEU would deprive the notion of all possible relevance.

50. Cf. Constantinesco, Kovar and Simon (Eds.), *Traité sur l’Union Européenne: Commentaire article par article* (Paris, Economica, 1995), at p. 73.

51. See also Willaert and Marqués-Ruiz, “Vers une politique étrangère et de sécurité commune: états des lieux”, (1995) *Revue du Marché Unique Européen*, 35–95, 40.

52. Cf. Devroe and Wouters, *op. cit. supra* note 3, at 613, who assert that the claim of CFSP to cover “all areas of foreign and security policy” (Art. 11(1)) only holds true insofar as these areas do not fall under the provisions in either the Community or PJCC.

that subject to the provisions amending the Community Treaties and to the final provisions (that is Titles II, III, IV and VIII of the TEU), nothing in the TEU shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.

As far as CFSP is concerned, three articles dealing with its relation with the Community formed part of the modification of the original EC Treaty (Arts. 268, 60 and 301 EC). An *a contrario* reasoning would entail that no further adaptations of Community law to CFSP are allowed. Nevertheless, despite the plain language of Article 47 TEU, it cannot be maintained that Community law is not at all affected by CFSP, or – more generally – by Union law apart from the explicit modifications in the three Treaties. *Implied* modifications of Community law do not seem to be subject to Article 47, since this would deprive a number of provisions in the remaining Titles of the TEU (Titles I, V, VI, VII and VIII) of their effect.<sup>53</sup> The requirement of consistency (Arts. 1 and 3 TEU, *infra*) is the best example in this respect. But one could also mention the single institutional framework (Arts. 3 and 5), the common objectives (Art. 2), or the respect for human rights (Art. 6).<sup>54</sup> The preservation of the *acquis communautaire* may be a key principle in the Treaty on European Union, but a functioning of the Community in complete isolation from the other areas of the Union is obviously not intended.<sup>55</sup>

The conclusions drawn in the previous paragraphs seem to apply to the relation between the Community and CFSP, and are furthermore confirmed by Article 29 TEU, which stipulates that the PJCC cooperation shall be carried out “without prejudice to the powers of the European Community”. However, no such solutions are provided for a delimitation between CFSP and PJCC. Concrete problems concerning the definition of the scope of either of these areas – and the question of supremacy in case of conflicting provisions – seem therefore to be solved by applying the rule that *lex specialis derogat lege generali*. Hence, the scope of CFSP is limited by the areas mentioned in Article 29 concerning the fields of police and judicial cooperation in criminal matters, regardless of the potential “foreign policy” nature of some of these areas. Concerning decisions dealing with issues which find their basis in different Union areas, Van Ooik has argued that the topic on which

53. See Pechstein, “Das Kohärenzgebot als entscheidende Integrationsdimension der Europäischen Union”, (1995) EuR, 247–258, 252; Devroe and Wouters, *op. cit. supra* note 3, at 99 point to the fact that despite the preservation of the *acquis communautaire*, the modified EC Treaty and the annexed Protocols do show examples of “deterioration”: the deletion of Art. 116 (common trade policy), decreasing the influence of the European Parliament in particular programmes (research and development), the Protocol on real estate in Denmark, the Barber Protocol and the Grogan Protocol.

54. Cf. Pechstein, *op. cit. supra* note, 252.

55. Cf. Van Ooik, *op. cit. supra* note 28, at 356 who claimed that a *general* relationship between the three Union areas cannot be assumed.

the emphasis is laid in a decision (“the point of gravity”) should determine the legal basis.<sup>56</sup> This implies that when the emphasis in a specific decision is laid on a Community issue, the decision should find its basis in the EC Treaty, irrespective of “accessory parts” falling under CFSP or PJCC.<sup>57</sup> But in the opposite situation the emphasis on a CFSP or PJCC issue allows for a CFSP/PJCC legal basis irrespective of the fact that minor aspects of the decision may have a relation with Community issues. A problem emerges when a decision has *two* main points. To guarantee the consistency of the Union’s external policy either a dual legal basis or two separate but connected decisions seem to be needed for policies covering both Community and CFSP matters (see further *infra*).

### 3.2. *The concept of consistency*

This situation not only points to a need for a *delimitation* of the competences and obligations of the actors involved; at the same time the concept of *consistency* (as the other side of the same coin) is to be taken into account where different Union policies endanger the consistency of the external activities of the Union as a whole.<sup>58</sup> Indeed, consistency is adopted as the guiding principle of the Treaty on European Union. Three articles explicitly refer to this notion. Article 1, first of all, provides that the Union’s task shall be “to organ-

56. Van Ooik, *op. cit. supra* note 28.

57. Cf. Case C-268/94, *Portugal v. Council*, [1996] ECR I-6177, in which the ECJ decided on the justified use of a Community legal basis as the key elements of the agreement at stake were Community issues irrespective of their relation with CJHA issues.

58. Compare Art. 3 TEU. The terms vertical and horizontal consistency were also used by Krenzler and Schneider, “Die Gemeinsame Außen- und Sicherheitspolitik der Europäischen Union – Zur Frage der Kohärenz”, (1994) *EuR*, 144–161 and Krenzler and Schneider, “The Question of Consistency” in Regelsberger, De Schoutheete, Wessels (Eds.), *Foreign Policy of the European Union: From EPC to CFSP and Beyond* (Boulder, 1997), pp. 133–152. The authors define “consistency” in terms of European policy as “coordinated, coherent behaviour based on agreement among the Union and its Member States, where comparable and compatible methods are used in pursuit of a single objective and result in an uncontradictory (foreign) policy”. The terms vertical and horizontal *coherence* are used by Tietje, “The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy”, (1997) *EFA Rev.*, 211–234. See also Monar, “The Foreign Affairs System of the Maastricht Treaty: A Combined Assessment of the CFSP and EC External Relations Elements”, in Monar, Ungerer, Wessels (Eds.), *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic* (Brussels, 1993); Müller-Graff, “Europäische Politische Zusammenarbeit und Gemeinsame Außen- und Sicherheitspolitik: Kohärenzgebot aus rechtlicher Sicht”, (1993) *Integration*, 147–157; Schmalz, *Kohärenz der EU-Außenbeziehungen? Der Dualismus von gemeinschaft und gemeinsamer Außen- und Sicherheitspolitik in der Praxis*, Konrad Adenauer Stiftung Arbeitspapier (Sankt Augustin, 1997); and Schmalz, “The Amsterdam Provisions on External Coherence: Bridging the Union’s Foreign Policy Dualism”, (1998) *EFA Rev.*, 421–442.

ize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples". Article 3 continues by stating that the single institutional framework "shall ensure the consistency and the continuity of the activities carried out". And, finally, Article 13(3) calls upon the Council to "ensure the unity, consistency and effectiveness of action by the Union".<sup>59</sup> Despite the importance of the concept of consistency in the Treaty, the notion can only be found in the English version. Other language versions seem to refer to the principle of "coherence" rather than "consistency". Thus one may find terms like *Kohärenz*, *cohérence*, *coherencia*, *coerenza*, *coerência*, *samenhangend* or *samenhæng*.<sup>60</sup> In legal theoretical analysis the concepts of consistency and coherence are often distinguished. Consistency in law is the absence of contradictions; coherence, on the other hand, refers to positive connections. Moreover, coherence in law is a matter of degree, whereas consistency is a static concept. Concepts of law can be more or less coherent, but they cannot be more or less consistent – they are either consistent or not.<sup>61</sup> The use of the term "coherence" in most language versions of the Treaty should be kept in mind whenever decision-making is analysed in the light of external policies pursued by the Union. In a legal sense, one could argue that decisions not meeting the demands of consistency would run the risk of being invalidated, while the more flexible nature of coherence allows for a more balanced judgement, taking into account the obviously intended incremental approach towards a single foreign and security policy.

The problem of possible overlapping Community and CFSP/PJCC competences and the need for an integrated policy evokes another question: does Article 3 TEU imply that the consistency requirement not only entails international legal (treaty) obligations for the Member States, but also obligations that find their basis in Community law? It may indeed be argued that the consistency requirement is binding under Community law as well, the key being Article 10 EC.<sup>62</sup> In this line of reasoning it is first of all beyond any doubt that all Community external relations, including the actions of the Community which are explicitly linked to CFSP actions (for instance economic sanctions

59. Neuwahl, *op. cit. supra* note 45, at 234, referred to a possible distinction between the requirements of "organization consistency" (as in Art. 1) and "material consistency" (as in Arts. 3 and 13).

60. In the German, French, Italian, Spanish, Portuguese, Dutch and Danish versions respectively.

61. Taken from Tietje, *op. cit. supra* note, at 212–213. See also Van der Velden, "Coherence in law: A deductive and a semantic explication of coherence", in Brouwer et al., *op. cit. supra* note 7, at 279, and Wintgens, "Some critical comments on coherence in law", in Brouwer et al., *op. cit. supra* note 7, at 110.

62. The same conclusion is drawn by Krenzler and Schneider, *op. cit. supra* note 58 (1994), at 157–159. Cf. also Gilsdorf, "Les réserves de sécurité du Traité CEE, à la lumière du Traité sur l'Union Européenne", (1994) RMC, No. 374, 17–25.

on the basis of Article 301 EC) are subject to the general loyalty obligations of Article 10. In addition, one could argue that Article 10 prohibits actions outside the Community framework that could harm the Community's development, even when these actions are taken within the broader framework of the European Union. That this provides an opening for the Court of Justice to effectively protect the *acquis communautaire* and to prevent an "intergovernmentalization" of the overall external relations of the Union will be developed below.

Both the Council and the Commission are responsible for ensuring consistency in the external activities of the Union (Art. 3). A major shortcoming, however, is that no procedural rules are included in Article 3 to guarantee this supervision. This has led to some dubious delimitation problems with regard to the external relations of the Union, which will be focused on *infra*. A minor improvement, however, was introduced by the Amsterdam Treaty, with the introduction of the obligation that both institutions "shall cooperate to this end".

But, what about the Court? Despite its obvious role as a Union institution, the Court of Justice is left with a limited set of possibilities when the external relations are concerned. First of all, the Court is allowed to review the required compatibility with Community law of CFSP and PJCC measures of the Council, including the choice of legal basis (EC or CFSP/PJCC) and the consistency of foreign policy measures ("policing the boundaries"). This includes the Court's use of the non-judiciable CFSP/PJCC provisions as aids of interpretation.<sup>63</sup> After the 1998 *Airport Transit Visas* case, which confirmed the Courts competence on the basis of Article 47 TEU in relation to EC and PJCC overlaps,<sup>64</sup> cases have recently been put before the Court of First Instance in which it is claimed that the CFSP decisions dealing with visa policy (the travel restrictions within the European Union of certain nationals from the Federal Republic of Yugoslavia) should have been based on Title IV EC.<sup>65</sup> It is expected that the Court will confirm its competence in relation to EC and CFSP delimitation problems. Secondly, it seems clear that the Court has jurisdiction whenever the Council makes use of "hybrid" acts, covering both matters governed by CFSP/PJCC as well as matters governed by the Community Treaties.<sup>66</sup> Examples could be found in the area of economic sanctions, development policy or trade policy. And, finally, it is obvious that whenever issues fall under the Community's competence, Article 46 TEU cannot be interpreted so as to affect the existing powers of the Court in relation to

63. Cf. Case C-473/93, *Commission v. Luxembourg*, [on Art. F(1) TEU (now Art. 6)]. See also Peers, "National Security and European Law", (1997) YEL, 399.

64. Case C-170/96, *Commission v. Council*, [1998] ECR I-2763.

65. Cases T-349/00 and T-350/99, pending.

66. See also Neuwahl, *op. cit. supra* note 45, at 246.

external policy issues. This means that the Court's competences, for instance, extend to international agreements concluded by the Community (Art. 300 EC, including *mixed agreements*), to trade policy (Art. 133 EC), visas, asylum and immigration policy (Title IV EC), the human rights principles in Article 6(2) TEU as general principles of Community law,<sup>67</sup> or development policy (Title XX EC) – regardless of possible relations of measures in these areas with CFSP issues. On the other hand, the non-justiciability of the consistency requirement in Article 3 TEU results in a situation in which this requirement is reduced (as far as judicial control is concerned) to the extent that it is covered by Article 47 (preservation of the *acquis communautaire*). This means, first of all, that the CFSP decisions cannot be adjudicated as to their conformity with the *overall* consistency of the Union's external policy (that is in relation to other CFSP decisions or PJCC decisions);<sup>68</sup> and, secondly, that the Court is not allowed to view Community decisions in relation to the prerogatives or obligations of the Member States in the areas of the Union.

#### 4. Delimitation and consistency in practice

##### 4.1. *Overlapping competences*

With the external relations in the PJCC area still being scarcely out of the egg,<sup>69</sup> delimitation problems have occurred mainly in the relation between the Community and CFSP. Moreover, after the transfer of a number of issues from CJHA to the Community by the Amsterdam Treaty, the “material overlap” between the non-Community areas has decreased. Nevertheless, under the Maastricht system an example of possible legal basis confusion can be found in the fact that visas were sometimes denied to third country nationals for foreign policy reasons (and based on a CFSP Decision). However, when the focus is placed on the migration aspects of these decisions, it can be claimed that the CJHA Article K.3 (now Art. 62 EC) could also have served as the right basis.<sup>70</sup>

However, the key examples of overlapping competences are to be found between the Community and CFSP. An early example of complementary

67. Cf. in this line also the Opinion of A.G. Jacobs in Case C-84/95, *Bosphorus*, [1996] ECR I-3953.

68. See also Pechstein, *op. cit. supra* note at 258.

69. The development of the EU's external relations in the PJCC area is still on the Council's agenda and mainly concerns a number of issues decided upon by the European Council of Tampere (Oct. 1999), including a full use of the agreements based on Art. 38 TEU and a Unionwide fight against crime. In addition one may point to international agreements concluded by Europol.

70. Cf. Curtin and Van Ooik, *op. cit. supra* note 6, at 27.

decision-making in that area may be found in the decisions concerning the control of exports of dual-use goods.<sup>71</sup> This set of decisions consist of a CFSP decision of the Council on the basis of Article J.3, and a Regulation founded on Article 113 EC (now Arts. 14 TEU and 133 EC respectively).<sup>72</sup> According to its Article 1, the CFSP decision, together with the EC Regulation constitutes “an integrated system involving, in accordance with their own powers, the Council, the Commission and the Member States”. The J.3 decision contains the lists of goods, export of which is subject to control along the lines set out in the EC Regulation. The reaction of the Commission that “this duplication of instruments was undoubtedly not necessary from a legal point of view”,<sup>73</sup> is understandable when taking into account that any modification of the list is now subject to the CFSP rule of unanimous voting, while the Community is deprived of the power to amend the list since the Commission itself lost its competences in that area. On the other hand, disregarding the CFSP provisions in relation to a decision which is “aimed at protecting Member States’ essential security interests and meeting their international commitments, on the control of exports from the Community of goods which can be used for both civil and military purposes” would be in conflict with the obligations set out in Title V TEU.

The same holds true for another example of a Joint Action which, together with an EC Council Regulation, constitutes an “integrated system”. This Joint Action – concerning the measures protecting against the effects of the extra-territorial application of legislation adopted by a third country (the reaction of the Union to the Cuban, Iran and Libya Sanctions Acts of the United States) – is the first one with a dual legal basis. Apart from being explicitly connected to the EC Regulation, the Joint Action finds its basis in both CFSP and CJHA; Articles J.3 and K.3(2)(b) are mentioned as the legal basis.<sup>74</sup> The

71. See in general on exports of dual-use goods under EU law: Koutrakos, “Exports of Dual-use Goods Under the Law of the European Union”, (1998) *EL Rev.*, 235–251.

72. Council Decision 94/942/CFSP and Council Regulation (EC) No. 3381/94, of 19 Dec. 1994, O.J. 1994, L 367. See also Emiliou, “Strategic export controls, national security and the Common Commercial Policy”, (1996) *EFA Rev.*, 55–78. The legality of using Art. 113 EC (now 133) as a legal basis for this Regulation is disputed. While some value a specific Community legal basis; e.g. Eeckhout, *The European Internal Market and International Trade: A Legal Analysis* (Oxford, 1994), at p. 258. Others consider a CFSP basis as sufficient; e.g. Van Ooik, “Externe bevoegdigheden van de Europese Unie – Colloquium verslag en synthese” in *Externe bevoegdeheden van de Europese Unie*, (Den Haag: TMC Asser Instituut, 1994), pp. 113–130, 119. The solution presented by Kuijper, to use Art. 310 EC (ex 228a) seems problematic, keeping in mind the reference to the “necessary urgent measures” in that Article. See Kuijper, “Trade sanctions, security and human rights and commercial policy” in Maresceau (Ed.), *The European Community’s Commercial Policy after 1992: The Legal Dimension* (Dordrecht, 1993), pp. 387–422, 414.

73. Report on the Operation of the Treaty on European Union, European Commission, 10 May 1995, at para 137.

74. Decision 96/668/CFSP, 22 Nov. 1996.

adoption of this Joint Action was to a large extent superfluous, in view of the scope of the EC Regulation. However, obviously, the Council intended to create a watertight system to protect the citizens of the Union in all possible issue areas. It was made clear, however, that the Joint Action is to be seen as supplementary to the EC Regulation, since both decisions stipulate that Member States shall take the measures it deems necessary to protect the interests of any person referred to in the EC Regulation "insofar as these interests are not protected under that Regulation".

It remains clear, however, that some CFSP decisions have seriously thwarted Community policy in a particular area, and that some CFSP actions could just as well have been taken in the framework of Community law. Examples include the observance of the elections in Russia and South Africa and the KEDO-initiative on nuclear energy in Korea.<sup>75</sup> One could argue that the latter decision in particular clearly concerned a Community matter; nevertheless it was pushed into CFSP for political reasons. By using the formula of a Joint Action, the Member States themselves would be more in control and the Commission's influence on the external policy would be contained.<sup>76</sup> Other examples include the decisions on the export of dual-use commodities (the CFSP dimension of which could be questionable),<sup>77</sup> and the Joint Action on the Middle-East peace process (which contained a number of Community issues). In addition, the implementation of the Mostar operation showed that budgetary procedures as well were able to create an image of a "PESCalization" of Community principles.<sup>78</sup> The implementation of this operation was in the hands of a special "Administrator" who was responsible only to the Presidency and to a permanent advisory group of the Council. The Presidency was responsible for the financial management of the operation, which made the whole system conflict with the prerogatives of the Commission in this field.<sup>79</sup>

To limit the danger of a "contamination" of the Community procedures by CFSP procedures, and to preserve the *acquis communautaire*, a *modus vivendi* was found according to which the CFSP Common Positions may contain the overall position of the Union *vis-à-vis* a third country by referring

75. Burghardt and Tebbe, "Die Gemeinsame Außen- und Sicherheitspolitik der Europäischen Union – Rechtliche Struktur und politischer Prozeß", (1995) EuR, 1–20, 15. Krenzler and Schneider, op. cit. *supra* note 58 (1994) also pointed to the danger of Community procedures being affected by CFSP practice. Cf. also Keukeleire, op. cit. *supra* note 44, at 332–337.

76. Keukeleire, op. cit. *supra* note 44, at 333.

77. See Timmermans, "The uneasy relationship between the Communities and the Second Union Pillar: Back to the 'Plan Fouchet'?", (1996/1) LIEI, 61–70, at 69.

78. PESC is the French abbreviation for CFSP.

79. Keukeleire, op. cit. *supra* note 44, at 319.

to Community actions.<sup>80</sup> The need to adopt this *mode d'emploi* became obvious after the establishment of some Common Positions which dealt, albeit in general terms, with Community matters as well. The Common Position regarding Rwanda,<sup>81</sup> for instance, is closely related to the activities of the Community in the framework of the Lomé Convention and refers to matters which clearly fall within the Community's competence (the continuation of humanitarian aid for refugees and the conditioned, progressive resumption of development cooperation). The same holds for the Common Position regarding Ukraine,<sup>82</sup> which refers to economic cooperation, the development of democratic institutions and legislation (partly financed through the Community's TACIS programme), and nuclear safety and the reform of the energy sector (clearly falling within the realm of Euratom competences).<sup>83</sup>

As Timmermans has rightly observed, the problem is not so much that these CFSP decisions *refer* to Community initiatives (this is, after all, demanded by the *mode d'emploi*), but that they do so in the *operative* part of the decision.<sup>84</sup> By mentioning ongoing and intended Community action in the operative part of a CFSP decision, the Council obviously encroaches on Community competences and procedures. As for instance shown in the Common Position on Angola, the *mode d'emploi* has not completely solved matters in this respect. The Angola decision even instructs the Community to act as far as its competences are concerned, by stating: "The Council and the Commission, acting within the framework of their respective competencies, shall take the measures necessary for the implementation of this Common Position".<sup>85</sup>

80. Cf. in this respect also Macleod, Hendry, Hyett, *The External Relations of the European Communities: A Manual of Law and Practice* (Oxford, 1996), at 416: "... a Title V instrument may not itself take legislative or executive action which could only lawfully be taken under the Community Treaties; nor can it legally bind the Communities or their institutions acting in accordance with the powers conferred on them by the Community Treaties".

81. Council Decision 94/697/CFSP.

82. Common Position 94/779/CFSP.

83. See also Timmermans, *op. cit. supra* note 77, at 62; Ryba, "La politique étrangère et de sécurité commune (PESC): Mode d'emploi et bilan d'une année d'application (fin 1993/1994)", (1995) RMC, No. 384, 14–35, at 21 and 25; and Willaert and Marqués-Ruiz, *op. cit. supra* note 52, at 42. Other examples include the Joint Action regarding support for the transition towards a democratic and multi-racial South Africa (Council Decision 93/678/CFSP, Art. 3) and the Joint Action on the Stability Pact (Council Decision 94/367/CFSP, Art. 3).

84. Timmermans, *op. cit. supra* note 77, at 63.

85. Common Position 95/413/CFSP. A reference to a task of the Commission may also be found in Art. 6 of the Common Position on Burma/Myanmar (96/635/CFSP), which stipulates that the Presidency and the Commission will report to the Council. Equally striking is "... the Commission shall implement the joint action within the limits of the amount charged to the European Communities" (Decision 93/729/CFSP). The Joint Action on the Great Lakes Region (96/669/CFSP) provides: "The Community and its Member States will contribute to implementing those [UN] Resolutions in ways which they deem appropriate, and which they will coordinate in the manner set out in this Joint Action". A clear instruction to the European

Bearing in mind that Common Positions create expectations on the part of the third country concerned, CFSP decisions may affect the content of Community decisions. As concluded in the previous Chapter, the Treaty on European Union clearly did not intend to subordinate the Community to CFSP decision-making. Apart from some explicit exceptions (Arts. 301 and 60 EC, *infra*) CFSP decision-making may not impose legal obligations on the Community.

The conclusion should therefore be that in the examples mentioned, the Council seems to have gone beyond its competences. While two different decisions with mutual references is one workable solution (as shown in the decisions on the export of dual-use commodities<sup>86</sup>), nothing definitively excludes the use of a decision which has a basis in both the EC and the CFSP/PJCC provisions, albeit that a combination of Community and CFSP/PJCC procedures may cause certain practical difficulties.<sup>87</sup> It is obvious that a combined legal basis is possible only when the relevant decision-making procedures do not contain incompatible requirements.<sup>88</sup> Within the Community the combination of different legal bases has occasionally been accepted. Despite some obvious obstacles (the incompatibility of the instruments, the jurisdiction of the Court regarding certain aspects of the decision only, the differing voting procedures and the involvement of the institutions) a way should be found for a Union-wide application of the notion of the dual legal basis.<sup>89</sup> However, it is believed that on the basis of the theory on the "point of gravity" referred to above, many problems may be solved.

An example of shared competence can be found in the provisions on development cooperation. While Article 177 EC states that Community policy in this area shall be complementary to the policies pursued by the Member States, Article 180 EC explicitly provides for coordination of Community and

Community was laid down in Art. 1 of Council Decision 94/366/CFSP of 13 June 1994: "The European Community shall prohibit satisfaction of the claims referred to in paragraph 9 of the United Nations Security Council Resolution No. 757 (1992)".

86. Decision 94/942/CFSP and subsequent amendments. There are also other instances of references to CFSP actions in EC decisions; see e.g. the Council Decision of 19 Dec. 1994 concerning the conclusion of a Cooperation Agreement between the European Community and the Republic of South Africa (94/822/EC, O.J. 1994, L 341), which refers to Decision 93/678/CFSP concerning support for the transition towards a democratic and multi-racial South Africa and the creation of an appropriate cooperation framework to consolidate the economic and social foundations of this transition.

87. Timmermans, *op. cit. supra* note 77, at 69, rejects this option, which in his opinion would lead to a procedural *imbroglio*. He points at a possible illegality of combining, for instance, the cooperation procedure of Art. 130W EC (now Art. 179) with the unanimity requirement of Art. J.2 TEU (now Art. 15).

88. Cf. also the judgment of the ECJ in the *Titanium Dioxide* case; Case C-300/89, *Commission v. Council*, [1991] ECR I-2895; see also Van Ooik, *op. cit. supra* note 28, at 374–375.

89. More extensively: Van Ooik, *op. cit. supra* note 28, at 373–377, who also points to the fact that the necessity of a dual EC/CFSP legal basis will be rare.

Member State policies, consultation on aid programmes, and the possibility of joint action. In fact, the Commission holds the view that development cooperation must serve the objectives of CFSP by addressing the causes of poverty and inequality, by helping to improve social cohesion and fighting marginalization. However, while development cooperation shares the objectives of CFSP, it should not be subordinated to foreign policy measures: "Although in the long term they are complementary, the objectives of the CFSP and those of development cooperation follow radically different time scales. Any subordination of cooperation policy to foreign policy measures could jeopardize development objectives, which are medium and long-term and hence require continuity of action. It is in compliance with the general principle of consistency of the European Union's external activities that the link between these two components must be ensured".<sup>90</sup>

Two issues in particular illuminate the problems of delimitation and consistency in practice: the adoption of sanctions *vis-à-vis* third States and the safeguard clauses concerning security in the EC Treaty. These two issues will be addressed in more detail.

#### 4.2. *The adoption of sanctions*

Regardless of the political dimensions of decisions dealing with a policy *vis-à-vis* a third State, the actual actions are often economic in nature, and must therefore fall within the Community's Common Commercial Policy.<sup>91</sup> This is the case in particular when economic sanctions (often on the basis of Security Council resolutions) are involved. Since the definition of the objective of a particular sanction policy falls within the scope of CFSP, the chosen instrument finds its legal basis in the CFSP provisions. Given the different nature of the cooperation in the Community and CFSP, this was bound to be a source of various legal institutional problems concerning the competences of the institutions involved (most importantly the Commission initiative). However, in this case the Treaty does provide a clear division of powers, laid down in Article 301 EC. Article 301 was intended to clear up a long-standing problem, namely how the Community and the Member States were to give effect to economic sanctions, which pursue political ends by economic means.<sup>92</sup> It builds on the practice established in the period of the European Political Cooperation, where political decisions to take sanctions

90. Commission Green Paper on Relations between the EU and the ACP countries on the Eve of the 21st Century – Challenges and Options for a New Partnership, COM(96)570, 20 Nov. 1996, Ch. IV, B.3.

91. Cf. Peers, *op. cit. supra* note 63, at 372.

92. Emiliou, *op. cit. supra* note 72, at 60.

would go hand in hand with Community regulations on the basis of Article 113 EC (now Art. 133). The use of Article 113, however, was not without difficulties because it was not always clear whether the action involved could properly be described as being in furtherance of the Common Commercial Policy, or whether the action proposed fell within the scope of Article 113.<sup>93</sup>

Article 301 TEU now stipulates that where it is provided, in a Common Position or in a Joint Action, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures.<sup>94</sup> According to Article 60 EC the same holds for measures on the movement of capital and on payments. In both cases the Council shall act by a qualified majority on a proposal from the Commission. It is generally understood that Article 301 covers services, including transport services.<sup>95</sup> Following Opinion 1/94 in which the Court of Justice held that an agreement which included ECSC products could fall within the Common Commercial Policy, one could come to the conclusion that a measure adopted under Article 301 may include ECSC products. In practice, however, separate decisions are taken by the Representatives of the Governments meeting within the Council to include these products in trade sanctions. The question whether sanctions may lead to the termination or suspension of economic agreements between the Community and third States has not been answered in practice in the post-Maastricht period,<sup>96</sup> but in general there are no reasons why a termination or suspension of specific agreements could not be part of sanctions adopted on the basis of Article 301.<sup>97</sup>

93. See more extensively on this issue: Macleod et al., op. cit. *supra* note 80, at 352–353.

94. Although it is not expressly provided, it seems reasonable that the same Article can be used to suspend, relax, or lift sanctions. See also Macleod et al., op. cit. *supra* note 80, at 356. In fact, practice has confirmed this. The assertion that sanctions fall within the Community's Common Commercial Policy was confirmed by the ECJ in its *Commission v. Greece* interim measures judgment, at least as far as sanctions involving trade in goods (Case C-120/94 R). Cf. Peers, op. cit. *supra* note 63, at 372. An important task in the preparation of Community initiatives on the basis of CFSP decisions is laid down for the Group of CFSP Counsellors. See Doc. 6384/95, *Lignes directrices de procédure pour l'examen par le groupe des Conseillers PESC des positions communes ou actions communes comme préalable à des actes communautaires fondés sur l'article 228A ou sur les articles 228A et 73G et des actes communautaires correspondants*, approved by the Council on 10 April 1995.

95. Macleod et al., op. cit. *supra* note 80, at 356.

96. However, examples can be found in the period of EPC. The case of the former Yugoslavia is illustrative in that this country was a party to agreements with the Community and was a beneficiary under preferential trading rules (see Decision 91/586/ECSC, EC, O.J. 1991, L 315/47). In the case of Haiti (a party to the Fourth ACP-EEC Convention) existing international obligations were affected by Community sanctions imposed by the Community in 1993 (Council Regulation 1608/93/EEC, O.J. 1993, L 155/2 and an ECSC Decision of 30 May 1994, O.J. 1994, L 139/8). See Macleod et al., op. cit. *supra* note 80, at 361 and 365.

97. See also Macleod et al., op. cit. *supra* note 80, at 356.

This combination of CFSP and Community instruments reveals the different purpose of the two legal bases. CFSP provides the basis for the *political* decision to interrupt the economic relations with a third country; the *implementation* of this decision takes place on the basis of Community provisions.<sup>98</sup> Despite the fact that the Commission cannot be forced to produce a proposal this system nevertheless expects the Commission to do so. After all, the failure of the Commission to come up with a proposal would not only deprive the CFSP decision of its effect, but it would also prevent the Council from fulfilling its obligation on the basis of Article 301 EC.<sup>99</sup>

A number of elements may be discerned in the procedure. First, it is clear from the text of Article 301 that the situation described therein only occurs after the adoption of a CFSP decision.<sup>100</sup> The Community involvement is limited to economic relations; all other elements of the CFSP decision remain subject to the CFSP decision-making procedures. The possibility of action by a qualified majority and the requirement of a Commission proposal concern the subsequent EC decision only. The issue overlap has thus not resulted in an overlap in competences. Secondly, despite the wording of Article 301 that a CFSP decision must provide for an action by the Community, no *explicit* reference to a necessary Community decision seems to be needed. Apart from some clear exceptions,<sup>101</sup> the relevant CFSP decisions simply stipulate that the economic relations with a particular third country shall be reduced.<sup>102</sup> It is up to the Council to conclude that a subsequent decision – or several decisions in the case of separate EC, ECSC<sup>103</sup> and Euratom decisions – is needed on the

98. This system should not be confused with “implementation” in the sense in which it is used in the Community context (with the Commission being vested with implementing powers under certain conditions (“comitology”). It is not a question of delegation of powers; from a legal point of view the autonomy of the EC process is fully maintained. See for a recent example Common Position 1999/273/CFSP of 23 April 1999 which was used to decide on the imposition of an oil embargo against the Federal Republic of Yugoslavia, and the subsequently adopted EC Regulation No. 900/1999 of 29 April 1999 which set out the economic measures to implement the CFSP decision.

99. Along the same lines: Neuwahl, *op. cit. supra* note 45, at 239.

100. Cf. also Macleod et al., *op. cit. supra* note 80, at 355: to be able to use Art. 301 EC “there is a need for a prior decision in accordance with the pillar of the Treaty dealing with common foreign and security policy”.

101. Council Decision 94/366/CFSP of 13 June 1994 stipulates in its Art. 1: “The European Community shall prohibit satisfaction of the claims referred to in paragraph 9 of the United Nations Security Council Resolution No. 757 (1992)”. On 11 July 1994 the EC Council obeyed this “order” and adopted Regulation (EC) No. 1733/94 (O.J. 1994, L 182) on the basis of Art. 228A EC (now Art. 310). Likewise, the Common Position on the oil embargo against the Federal Republic of Yugoslavia (1999/273/CFSP) mentions in its preamble that action by the Community is needed in order to implement the measures.

102. See e.g. Decisions 93/614/CFSP (Libya); 94/315/CFSP (Haiti); 94/672/CFSP (Bosnia-Herzegovina); or 94/673/CFSP (Yugoslavia).

103. From a legal point of view it is not clear why a provision comparable to Art. 301 EC has not been inserted in the ECSC Treaty. The necessary ECSC Decisions following a CFSP

basis of Article 301 EC. This decision may take the form of a Regulation, a Directive or a Recommendation. Regulations are most commonly used, since in most cases the Community decision follows a binding UN Security Council decision.<sup>104</sup> However, in case of a non-binding Security Council Resolution, a Recommendation seems more appropriate, as we have seen with the sanctions against Haiti in 1994.<sup>105</sup>

Contrary to Article 60 EC, which only provides a competence for the Council to take the necessary urgent measures (“the Council *may* take . . .”), Article 301 stipulates that the Council *shall* take such measures. Here, we see a striking example of an explicit subordination of the Community to CFSP decision-making. The reason not to extend this automatic mechanism to measures on the movement of capital and on payments in Article 60 is no doubt to be found in the inherent danger of CFSP decisions thwarting the even more sensitive monetary policy of the Union. After all, the preceding Article 59 mentions strict conditions for the Council to interrupt the movement of capital or payments for financial-economic reasons.<sup>106</sup> In practice this already led to situations where the choice for a particular type of sanction was blocked during the CFSP stage, which left the Community with limited options. Fourteen out of the fifteen Member States wished to impose serious financial sanctions on Haiti in May 1994. These sanctions were, however, blocked by the United Kingdom when adopting the necessary Common Position. The Community, despite its possibility to act on a qualified majority in these cases, was thus bound to stick to more traditional economic sanctions and certain weakened financial measures.<sup>107</sup>

A third, somewhat ironic, observation hints at the possible superfluous character of the CFSP decisions on economic sanctions to date. In almost all cases, these decisions simply echo the Resolutions of the United Nations Security

Decision are now taken as a “Decision of the Representatives of the Governments of the Member States, Meeting within the Council”.

104. To date, only one exception to this rule can be discovered. Council Regulation (EC) No. 900/1999 of 29 April 1999 prohibiting the sale and supply of petroleum and certain petroleum products to the Federal Republic of Yugoslavia (FRY) is not a follow-up to a Security Council Resolution. Instead it only refers to Common Position 1999/273/CFSP of 23 April 1999. The legality of economic sanctions that are not based on a Security Council Resolution will no doubt be subject to profound academic debate.

105. Recommendation 94/313/EC of the Council of 30 May 1994, O.J. 1994, L 137.

106. Art. 59 provides that in “exceptional circumstances”, in case of “serious difficulties” the Council, “on a proposal from the Commission and after consulting the ECB”, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are “strictly necessary”. See also Devroe and Wouters, *op. cit. supra* note 3, at 627.

107. See Obradovic, “Repartition of powers in the European Community”, 34 CML Rev. (1997), 59–88, 70.

Council by which the economic sanctions were established.<sup>108</sup> *Prima facie* it would make much more sense if EC decisions would directly follow these Resolutions. The text of Article 301 EC, however, contains the requirement of a prior CFSP decision in this respect.<sup>109</sup> Therefore, this provision seems to be the *specialis*, in relation to the more general Article 133 EC on Common Commercial Policy.<sup>110</sup> Hence, independent Community decision-making on the basis of Article 301 EC seems to be excluded, which certainly contributes to consistency in the overall external policy of the Union.<sup>111</sup> The flip-side is that the (political) decision to impose economic sanctions is now subject to the unanimity rule, despite the voting rules in Article 301 EC (and in the absence of a Common Strategy of the European Council). In this area it will indeed be difficult to hold on to the view that the *acquis communautaire* is not at all affected by the decision-making in CFSP. The limited function of the CFSP decisions as unanimously adopted statements in this procedure explain why they are usually taken as a Common Position and not as a Joint Action. Nevertheless, it still seems possible for the Community to fall back on its original competences regarding Common Commercial Policy laid down in Article 133 EC whenever the Council does not come to a unanimous CFSP Decision on the implementation of UN initiated economic sanctions.<sup>112</sup>

A reason for the introduction of the system laid down in Article 301 EC can nevertheless be found in the existing (exclusive) competences of the EC in the field of commercial policy. The obligation to implement a UN Security Council decision on the imposition of economic sanctions lies with

108. With the clear exception of Commission Regulation (EC) No. 900/1999 establishing the oil embargo against the Federal Republic of Yugoslavia referred to above. But one could also point to Common Position 98/374/CFSP of 8 June 1998 concerning the prohibition of new investment in Serbia and to Common Position 98/426/CFSP of 26 June 1998 on a ban on flights by Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community (*sic!*). See on the effects of UN sanctions in other legal systems, e.g. Coomans, Grünfeld, Hartogh, Jansen, "Doorwerking en effecten van sanctiemaatregelen van de Verenigde Naties", (1995) SEW, 501–513; and on the relation between UN and EC sanctions: Van den Oosterkamp and Wijmenga, "Sancties in relatie tot VN-resoluties en EU-besluitvorming", (1996) VN-Forum, 6–10.

109. Cf. Constantinesco et al., op. cit. *supra* note 50, at 761.

110. Also Stein, "Das Zusammenspiel von Mitgliedstaaten, Rat und Kommission bei der gemeinsamen Außen- und Sicherheitspolitik der Europäischen Union", (1995) EuR, 69–81, 67; and Macleod et al., op. cit. *supra* note 80, at 354.

111. Art. 133 EC may however continue to serve as a legal basis for economic measures which do not have foreign policy objectives, but which are e.g. directed at the protection of the internal market. See Stein, "Die gemeinsame Außen- und Sicherheitspolitik der Union unter Berücksichtigung der Sanktionsproblematik", Schriftenreihe des Forschungsinstituts für Europarecht der Karl-Franzens Universität, (Graz, 1993) and Stein, op. cit. *supra* note 110, at 80.

112. Cf. also Lenaerts and De Smijter, "The United Nations and the European Union: Living apart together, in Wellens (Ed.), *International Law: Theory and Practice*, (The Hague: Kluwer Law International, 1998), pp. 439–458, at 449.

the Member States. The EC as such is not bound by these decisions. The Member States are, but their competence in the field of external economic relations has been transferred completely to the Community. According to Lenaerts and De Smijter, the Member States thus run the risk of being held responsible for the absence of any action on the side of the Community. To avoid such international responsibility, the Member States introduced a Community law obligation for the Community institutions to implement UN economic sanctions.<sup>113</sup>

Finally, in the absence of Community competences in the area of arms trade (Art. 296 EC, see *infra*), an imposition of an embargo on arms, munitions or military equipment is not covered by Article 301. In these cases Member States are directly under the obligations set out in the CFSP decision.<sup>114</sup>

#### 4.3. Safeguard clauses in the EC Treaty

An emphasis on the preservation of the *acquis communautaire* can, notwithstanding its importance, lead to unexpected contradictions. The safeguard clauses found in Articles 296–298 EC in particular lead to important questions of competence. The traditional tension between the realization of the internal market and the strong wish of the Member States to be able to escape from the strict provisions on that issue in case of national security interests, has been given a new dimension with the introduction of CFSP. Article 30 EC permits Member States to derogate from the free movement of goods and the (exclusive) Common Commercial Policy of the Community for reasons of, *inter alia*, public security.<sup>115</sup> Furthermore, regarding national security interests, the EC Treaty contains special provisions in its Articles 296 and 297. Since these two Articles are to be seen as *lege speciali*, Article 30 has

113. Lenaerts and De Smijter, *ibid.*, at 448.

114. See e.g. the Common Position 94/165/CFSP concerning the imposition of an embargo on arms, munitions and military equipment on Sudan; Common Position 96/184/CFSP concerning arms exports to the former Yugoslavia; Common Position 96/746/CFSP concerning the imposition of an embargo on arms, munitions and military equipment on Afghanistan; Common Position 98/409/CFSP concerning Sierra Leone and Common Position 1999/206/CFSP on the imposition of an embargo on the export of arms, munitions and military equipment on Ethiopia and Eritrea.

115. Art. 30 EC reads: “The provisions of Article 28 and 29 [on quantitative imports and exports; RAW] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property . . .” Restrictions to intra-Community movement of dual-use goods fall under this provision as well, as established by the ECJ in Case C-367/89, *Aimé Richardt*. As we have seen exports of these goods to third States are now covered by Regulation 3381/94.

a complementary function only.<sup>116</sup> Despite strong pressure from the Commission and the European Parliament, the safeguard provisions on security interests were not modified by the Maastricht and Amsterdam Treaties.<sup>117</sup> In some interpretations these provisions indeed, to a large extent, contradict the obligations on a common security policy. Hence, it seems important to take a closer look at these potentially harmful clauses.

#### 4.3.1. *Essential security interests*

Article 296 EC first of all stipulates that the provisions of the EC Treaty shall not preclude the application of the rule that no Member States shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. While it is obvious from the formulation of Article 296(1) that no obligation to supply sensitive information can follow from the EC Treaty, this nevertheless seems to be in conflict with the CFSP obligation to “inform and consult one another within the Council on any matter of foreign and security policy of general interest” (Art. 16 TEU). Keeping in mind the general supremacy of Community law over the CFSP regulations, the parallel existence of Article 296(1)(a) EC and Article 16 TEU is, at the very least, surprising. Could it really be that the important and essential information obligation in Article 16 TEU is completely neutralized by Article 296 EC? The answer may first of all be found in Article 296 itself. The clause may only be invoked when the *essential interests* of the Member State’s security are at stake. This certainly limits the discretion of the Member States and it provides a criterion for the Court of Justice to scrutinize their actions in this respect. A second way out can be found in Article 298 EC, which provides for the possibility of the Commission or any Member State bringing the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 296 and 297. Regardless of these *a posteriori* possibilities to correct a Member State’s behaviour, a mutual attuning of the Community and CFSP provisions would certainly have favoured consistency in this respect.

An even more serious problem is caused by the second part of Article 296(1)(b), which reads: “Any Member State may take such measures as it

116. Case C-367/89, *Aimé Richardt*; Gilsdorf, *op. cit. supra* note 62, at 22. See also the Opinion of A.G. Jacobs of 6 April 1995 in Case C-120/94R, *Commission v. Greece*, in which he fleshed out the differences between Art. 30 (ex 36) and Art. 297 (ex 224): Art. 30 permits derogations from the free movement of goods only; Art. 297 permits derogations from the rules of the common market in general; furthermore situations covered by Art. 30 are exceptional, but those covered by Art. 297 are wholly exceptional.

117. See Art. Y31 in the Commission’s proposals (Supplement 2/91, Bull. EC, at 103) and the 1993 proposals of the European Parliament, in particular Resolution A3-0109/94, 24 March 1994, O.J. 1994, C 114, p. 56 and Resolutions B4-0050, 0066, 0071, 0091, 0111 and 0115/95, 19 Jan. 1995, O.J. 1995, C 43, p. 89.

considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material . . . ”. By invoking this clause Member States have, from the entry into force of the EEC Treaty, been given a tool to keep their production of and trade in military goods outside the internal market rules and the Common Commercial Policy. The relation with CFSP is again obvious. Production of and trade in arms, munitions and war material is clearly an area of security policy and is thus covered by the provisions in Title V TEU. It is especially striking that the policy of disarmament and arms control, and the control of the transfer of military technology to third countries and of arms exports, were explicitly identified by the European Council as areas which fall under the security dimension of CFSP. Moreover, Article 17(1) explicitly indicates that the progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments. Contrary to what could have been expected, no mutual references can be found in these CFSP and EC provisions to clear up their relationship.

Regardless of the obvious contradiction emerging from the co-existence of the mentioned EC and CFSP provisions, some arguments can be found to limit the scope of Article 296 EC in this respect. A first limitation can be found in Article 296(2), which limits the freedom of Member States regarding the production of or trade in arms, munitions and war material to a list of products drawn up by the Council. This list originates from 1958 and has not been modified since.<sup>118</sup> The fact that according to the same paragraph the list may only be modified by a unanimous vote in the Council leads one to conclude that the list is exhaustive. It may safely be assumed that many new strategic goods are not included. A second limitation was given by the Court of Justice in the *Johnston* case, when it considered that Article 223 (and 224) (now Arts. 296 and 297) should be interpreted restrictively, in the same way as Article 36 (now Art. 30) EC.<sup>119</sup> In the words of Emiliou: “Articles 223 and 224 . . . do not reserve matters to the exclusive jurisdiction of the Member States, but merely allow national legislation to derogate from the principle of free movement of goods to the extent that this is and remains justified in order to achieve the objectives set out in those provisions”.<sup>120</sup> Any use of Article

118. See Gilsdorf, *op. cit. supra* note 62, at 20; Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities* (Kluwer, 1998), at p. 682. The list is adopted by the Council (Doc. 255d/58 rev.), but was never officially published. A copy may be found in *Towards a Stronger Europe* (Independent European Programme Group (within NATO), Brussels, 1987). See also Colijn and Rusman, *Het Nederlandse wapenexportbeleid 1963–1988* (The Hague, 1989).

119. Case 222/84, *Johnston*, [1986] ECR 1651.

120. Emiliou, *op. cit. supra* note 72, at 59.

296 beyond its scope would be subject to scrutiny by the Court on the basis of Article 298 (improper use of powers). It seems not unreasonable to suggest that the invoking of Article 296 (or Art. 30) EC in order to ignore an adopted Common Position or Joint Action could certainly be regarded as an improper use of powers in this respect.

#### 4.3.2. *Internal disturbance or international tension*

This brings us to another important alternative, which can be found in Article 297 EC. On the basis of this Article Member States seem to have the opportunity to completely sideline the Union's sanctions system of Article 301 EC, since they "shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbance affecting the maintenance of law and order, in the event of war or serious international tension constituting a threat to war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security". Article 297 thus enhances an important safeguard clause, but also an obligation for Member States to consult. A parallel existence of Article 297 (ex Art. 224) and a common security policy would indeed seem to be contradictory. It seems logical that the meetings of the Member States on the basis of Article 297 are now subject to the provisions on CFSP.<sup>121</sup>

Article 297 somehow managed to survive the modifications to the EC Treaty. Hence, under the conditions set out therein, Member States today have the legal possibility to deviate from Community measures in adopting unilateral measures. Nevertheless, the abovementioned limitations regarding Article 296 hold for this provision as well. Thus, Article 297 should be interpreted restrictively and any alleged misuse may be challenged before the Court on the basis of Article 298.<sup>122</sup> The situations mentioned in Article 297 (serious internal disturbance affecting the maintenance of law and order, war or serious international tension constituting a threat of war, or international obligations for the purpose of maintaining peace and international security) are thus subject to scrutiny by the Court. And, in the Opinion of the Advoc-

121. Cf. Macleod et al., op. cit. *supra* note 80, at 355 fn. 9: "Although Art. 224 [now 297; RAW] has been used in the past for collective action by the Member States . . . the use of the Article for collective action by the Member States is now less likely in view of the development of CFSP".

122. This procedure has only been used once. In 1994 Greece adopted unilateral measures imposing a trade embargo on (the Former Yugoslav Republic of) Macedonia, referring to a "serious international tension constituting a threat of war". The Commission brought this case before the Court, but it was struck off the Court register after the termination of the embargo; Case C-120/94R, *Commission v. Greece*.

ate General in the *Commission v. Greece* case, these situations are “wholly exceptional”.<sup>123</sup>

A possible function of Article 297 is to be found in the (improbable) event that the Community is unable or unwilling to implement UN economic sanctions at the European level. As established *supra*, this does not deprive the Member States from the obligation to implement the decision taken by the UN Security Council. The opportunity for a Member State offered by Article 297 to take measures “in order to carry out obligations it has accepted for the purpose of maintaining peace and international security” allows it to derogate from the ordinary rules of the EC Treaty. However, it seems that the use of Article 297 EC can only be justified when the possibility of Article 301 EC has failed.<sup>124</sup>

#### 4.3.3. *Unilateral financial measures*

A last safeguard clause can be found in Article 60(2) EC, which allows for Member States to take unilateral measures against a third country with regard to capital movements and payments. This provision refers to Article 297 EC (“Without prejudice to Article 297...”), but contrary to that article it explicitly contains a number of limitations and criteria of a stricter nature: (i) unilateral actions are only allowed for “as long as the Council has not taken measures pursuant to paragraph 1”; (ii) they are only possible “for serious political reasons and on grounds of urgency”; and (iii) the Commission and the other Member States shall be informed of the measures by the date of their entry into force at the latest. Moreover, the Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish the unilateral measures. Regardless of the clear competence of the Member States to take unilateral measures in this respect, this power is of a subsidiary nature only. It may only be invoked when the Council has not acted; it is obviously intended to provide for an opportunity for a Member State to take immediate action to prevent the removal of financial assets from its jurisdiction.<sup>125</sup> Any Council decision adopted on the basis Article 60(1) brings an end to the unilateral measures of the Member States.<sup>126</sup> Article 60(2) is obviously intended to

123. A.G.’s Opinion of 6 April 1995 in Case C-120/94. Compare also Case 222/84, *Johnston*.

124. Lenaerts and De Smijter, *op. cit. supra* note 112, at 450. In addition Lenaerts and De Smijter pointed to Art. 307, providing that the EC Treaty shall not affect “[t]he rights and obligations arising from agreements concluded before the coming into force of [the EC] Treaty between one or more Member States on the one hand, and one or more third countries on the other”. As confirmed in the *Centro-Com* Case (C-124/95, para 59), the Resolutions based on the UN Charter also fall within the field of application of Art. 297 EC (ex 234).

125. See also Macleod et al., *op. cit. supra* note 80, at 355.

126. Cf. Constantinesco et al., *op. cit. supra* note 50, at 196.

limit the margin of liberty provided by Article 297 in the sensitive area of monetary integration.

In spite of the fact that no references to CFSP provisions were included in the safeguard clauses to clear up their relationship *vis-à-vis* the obligations of the Member States in CFSP, it should be kept in mind that the possibilities for unilateral action are included with only one goal in mind: to offer possibilities for Member States to escape from the strict *internal market* rules in situations of national security problems. In no way do they intend to undermine the CFSP provisions in the TEU. Nevertheless, they entail an inherent danger of reducing the most important CFSP provisions to hollow phrases.

## 5. Concluding observations

This article started off with the assumption that the European Union should be viewed as a legal unity. A first consequence of that unity is that the norms in the single legal system of the EU are interrelated. This in turn implies that the different parts of the Union cannot be viewed as autonomous regimes, but that the interpretation of the norms should take into account their setting within the legal system of the Union, which reveals the necessity to establish a hierarchy of norms within the legal system of the European Union. On some points, the Treaty provides some *prima facie* rules for the solution of conflicts of norms (for instance the preservation of the “*acquis communautaire*”), but it is asserted that existing literature generally relies too much on these provisions, while neglecting the overall context brought into being by the establishment of an EU as a legal person engaging in relations with third States on a Union-wide range of issues.

This puts the “pillar structure” in a different perspective. The existence of “bits and pieces” may very well be acknowledged, but in early studies in particular, far too often the compelling consequences of the EU legal system that was established by the Maastricht Treaty are neglected in the analysis. The emphasis was laid on the differences between the various forms of cooperation, rather than on the unitary elements (such as the single institutional structure) which in practice indeed proved able to tie the different parts together. A new stream of literature seems to take account of the fact that both the internal and the external dimension of the unitary nature of the Union call for an interpretation of any EC, CFSP and PJCC provision in the context of the overall system as presented in the TEU.<sup>127</sup> Admittedly, this system at

127. See e.g.: Dekker and Wessel, *op. cit. supra* note 5; Curtin and Dekker, *op. cit. supra* note 1; Trüie, *op. cit. supra* note 1; and De Witte, *op. cit. supra* note 1. In contrast to their earlier focus on the “intergovernmental” aspects of the non-Community areas of the Union

certain points hints at a hierarchy between its norms, but examples were also pointed out in which an unconditional preference for the Community rules would simply neglect key provisions in the other areas. As Trüie has stated: “The fundamental equal ranking follows from the coherence requirement: the coherence requirement does not require . . . a change in the law under one pillar to conform to that of another, but a contemporaneous coordination of the pillars” (our translation).<sup>128</sup> The practice of Union decision-making on its external relations – with institutions being increasingly active in all Union areas – seems to have confirmed this constitutional element.<sup>129</sup>

Certain safeguard clauses in the EC Treaty entail the inherent danger that some of the most important CFSP provisions could be reduced to empty phrases. The question was asked whether the Court of Justice should not be granted a new task, bearing in mind the unitary character of the Union. It could be argued that apart from guarding, the Court should prevent the misuse of the *acquis communautaire* in cases where an unconditional compliance with the preservation of the *acquis communautaire* would lead to a complete negation of the key provisions in the Union Treaty. However, current legal possibilities are limited in this respect. The Treaty does not seem to provide an opening for access to the Court in cases where it is claimed that a Decision should have been based on a CFSP provision instead of an EC provision. Neither does it seem possible for the Court to annul PJCC acts that allegedly should have been taken on the basis of a CFSP provision, or *vice versa*.<sup>130</sup>

Nevertheless, the practice of CFSP shows some examples of dubious decisions when the requirement of consistency with Community law is taken into account.<sup>131</sup> This reflects the difficulty in maintaining a watertight separation between the Community and CFSP, in particular when policies *vis-à-vis* third countries are at stake. As we have seen it has proved to be difficult to live

(1995), Koenig and Pechstein now also seem to have accepted the existence of a Union legal system (“*Unionsrechtsordnung*”); see Koenig and Pechstein, “Die EU-Vertragsänderung”, (1998) *EuR*, 130–150.

128. “Die grundsätzliche Gleichrangigkeit folgt aus dem Kohärenzgebot: Das Kohärenzgebot verlangt . . . nicht eine Anpassung des Rechts der einen Säule an das Recht einer anderen, sondern eine gegenseitige Abstimmung der Säulen”: Trüie, *op. cit. supra* note 1, at 61.

129. See on the hierarchy of norms in relation to constitutional questions also Gaudin, “Amsterdam: l’échec de la hiérarchie des normes?”, (1999) *RTDE*, 1–20. Gaudin in particular pointed to the question as to what extent the Union constitution is bound to the “supra-constitutional” principles referred to in Art. 6 TEU.

130. Cf. Curtin and Van Ooik, *op. cit. supra* note 6.

131. De Búrca, “The institutional development of the EU: A constitutional analysis”, in Craig and De Búrca (Eds.), *op. cit. supra* note 1, 55–82, at 67–68. De Búrca in this respect pointed to the danger of “constitutional blurring” and the “negative consequences for the constitutional structure and the institutional balance established under the Community pillar”.

up to the requirements of consistency and delimitation at the same time.<sup>132</sup> Moreover, the Treaty itself seems to contain some potentially problematic regulations, in particular with regard to the adoption of sanctions and the safeguarding of national interests by the EC Treaty in the area of security.

The analysis furthermore supports the view that CFSP is not only to a large extent dependent on Community involvement, but that many Joint Actions in fact covered issues that would previously have been dealt with through Community actions. This seems to hold true for at least half of the adopted Joint Actions, including for instance the humanitarian assistance to Bosnia and Herzegovina and the support for the peace process in the Middle East. In addition, the decision on Ukraine showed that also Common Positions can serve as a political facade, veiling issues that concern predominantly Community prerogatives.<sup>133</sup> Despite some legal difficulties caused by the “uneasy relationship” between the Union’s areas, Timmermans correctly argued that “reference to Community matters at least served to put some flesh on the bones of what otherwise would have remained a rather empty text”.<sup>134</sup>

The initial fear of an intergovernmental “contamination” of the Community that would exist within the European Union has partly proven to be right. On the other hand, practice has shown that the “contamination” is not one-way traffic. Cases or structures can be revealed in which the influence of “Community elements” on CFSP decision-making might have been larger than foreseen by the Member States at the time of the 1990–91 IGC. This is due to the fact that certain procedures and institutional balances were developed “along the way”. Thus, the influence of Community practices became clear through the increased role of COREPER, the creation of the CFSP Counsellors, the adaptation of the Political Committee and the CFSP working groups to existing Community structures, the (although limited) influence of the Council’s legal service and the Court of Auditors and the use of Community funds as the standard for the financing of CFSP actions. In addition one could point to the presence of the Commission in the Troika and at all levels of CFSP decision-making and to the use of Community instruments to implement CFSP decisions. In some cases the role of Community procedures and means of implementation was larger than that of the individual Member States.<sup>135</sup>

132. Problems were already foreseen during the Maastricht negotiations. The Conference annexed a “Declaration on practical arrangements in the field of the common foreign and security policy” to the Treaty, which identified three areas in which ad hoc organizational arrangements were to enhance consistency: cooperation between COPO and COREPER, a merger of the EPC secretariat and the General-Secretariat of the Council, and cooperation between the Council and the Commission.

133. See Keukeleire, *op. cit. supra* note 44, at 223.

134. Timmermans, *op. cit. supra* note 77, at 62.

135. See more extensively: Keukeleire, *op. cit. supra* note 44, at 337–339.

Regardless of what the topic of the present article might suggest, the application of the notions of delimitation and consistency in practice reveals that, despite the material overlaps, overlapping competences are rare. Delimitation proves to be possible not only where the competences of the Member States are concerned, but also where competences within the various Union areas are at stake.<sup>136</sup> Even in the event of a close link between CFSP and Community issues (such as in the case of economic sanctions), the Treaty clearly divides the competences. The choice for the correct legal basis seems to depend on the issue in question (the content of the decision) rather than on the *prima facie* general rules of supremacy of the Community provisions.

It is well known that the chosen structure of the European Union was a compromise between “intergovernmentalists” and “supranationalists”, but it is questionable whether the consequences of the introduction of a new legal person were taken into account during the negotiations. CFSP and PJCC may be presented as “supplementary” by the Treaty, but in order really to keep these areas apart from the Community regime, there should have been more awareness of their inclusion in a EU legal system. The acceptance of the Union as a legal person and the associated “unity thesis”, may very well call for a replacement of the familiar notion of the “Greek temple”. Indeed different metaphors have been proposed, ranging from religiously inspired notions such as the “trinity structure” or the “gothic cathedral” to the more profane “Russian doll”.<sup>137</sup> However, it seems that all metaphors have their own flaws and their application usually brings about a number of new questions.<sup>138</sup> Nevertheless, the present article indicates that the pillar structure is less explanatory, and that it may be more appropriate to use the concept of the “*Gestuften internationalen Organisation*” or “layered international organization” introduced by Trüie and elaborated by Curtin and Dekker in particular.<sup>139</sup> This notion allows for the European Union to be seen as a legal entity which shelters a number of other legal entities (the European Communities), which in turn may shelter other legal persons, such as the Investment Bank or the European Central Bank. It also corresponds better to the existence of a legal system (the European Union legal system) which shelters the legal systems of its different issue areas (the European Communities, CFSP and PJCC) as well as the sub-

136. Cf. Van Ooik, *op. cit. supra* note 28, at 356.

137. See Weiler, “Neither unity nor three pillars – The trinity structure of the Treaty on European Union”, in Monar, Ungerer, Wessels (Eds.), *op. cit. supra* note 58); De Witte, *op. cit. supra* note 1 and Curtin and Dekker, *op. cit. supra* note 1 respectively.

138. Regarding the “Russian doll”, it remains difficult to imagine different dolls being put together side by side in one larger doll.

139. Trüie, *op. cit. supra* note 1; Curtin and Dekker, *op. cit. supra* note 1.

systems (or regimes) forming part of those systems.<sup>140</sup> Irrespective of new attempts to replace the “Greek temple” by other architectural metaphors, the acknowledgement of the existence of this Union legal system seems essential in order not only to fully comprehend the complex and unprecedented form of international institutional cooperation introduced by the Treaty on European Union, but also to understand the way in which the Union engages in relations with third States and other international organizations.

140. Cf. in that respect Dashwood, “The Council of the European Union in the era of the Amsterdam Treaty”, in Heukels et al., op. cit. *supra* note 1, at 126, who also referred to the Union’s “sub-orders” rather than to “pillars”.