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RAMSES A. WESSEL

Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe

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"The Union's external policy is not easy to define.
It goes beyond the traditional diplomatic and military aspects
and stretches to areas such as justice and police matters
the environment, trade and customs affairs,
development and external representation of the euro zone.
Our aim must be to integrate these different areas
and make all the resources available work together well."
(European Commission, A Project for the European Union, 22 May 2002) [1]

RAMSES A. WESSEL
Associate Professor of International and European Law, Centre for European Studies,
University of Twente *(R.A.Wessel@utwente.nl)*

1. Introduction

As recently as a few years ago it could be shown that regarding the existence and nature of a legal system of the European Union there was no clear legal picture at all and certainly no consensus of opinion. To this very day one can observe the existence of largely isolated EC, CFSP (Common Foreign and Security Policy) and PJCC (Police and Judicial Co-operation in Criminal Matters) research communities, in which research is frequently 'content driven' rather than reflecting a more institutional approach.[2] Over the past years a separate school of thought laid emphasis on the unity of the Union's legal order, rather than on the differences between the Union's three pillars. One research group in this school, in which the present author participated, concentrated on two main questions: whether the European Union could be qualified as an international organisation in legal terms, and if so, whether its institutional legal system is developing in practice towards institutional unity, albeit in disguise. We analysed the Union as a legal institution and defended the thesis that the Union is an international organization with a unitary but complex character. This conclusion was not only based on the analysis of the EU-treaties and other basic instruments, but also on the so-called legal practices, i.e. forms of legal action which are – explicitly or implicitly – employed in order to make the legal institution an operational entity.[3]

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1 Communication from the Commission, *A Project for the European Union*, COM(2002) 247 final, 22 May 2002, p. 12. The remaining part of the paragraph is also relevant: "it is not a question of the 'communitarisation' of foreign policy, applying the traditional Community procedures, as this would not be compatible with the emergence of a European military dimension, but nor should we make external policy more 'intergovernmental' by extending the powers of the Member States or of the High Representative to the detriment of the Commission. Wholesale 'communitarisation' would not today make it possible to embrace the full political dimension of external policy, which is not a mere set of powers, instruments and areas of action; nor would it be able to cater fully for the military aspects.

2 See for a general survey of CFSP and PJCC: E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford, Oxford University Press 2002).

3 D.M. Curtin and I.F. Dekker, 'The EU as a 'Layered' International Organization: Institutional Unity in Disguise', in P. Craig and G. de Búrca, eds , *The Evolution of EU Law* (Oxford, Oxford University Press 1999) pp. 83-136. See further, D.M. Curtin and I.F. Dekker, 'The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-In-Diversity', in N. Walker et al., eds , *Convergence and Divergence in European Public Law* (Oxford, Hart 2002) pp. 59-78; R.A. Wessel, 'Revisiting the International Legal Status of the EU', *European Foreign Affairs Review* (2000) pp. 507-537; I.F. Dekker and R.A. Wessel, 'The European Union and the Concept of Flexibility. Proliferation of Legal Systems within International Organizations', in N.M. Blokker en H.G. Schermers, eds , *Proliferation of International Organizations* (Den

With regard to the EU as a whole one can thus perceive a clear evolution towards more institutional unity across the spectrum of the EU which has taken place incrementally over the course of the past ten years. This evolution tends to manifest itself first in so-called legal and institutional practices of the institutions themselves and only later when the manner of governance is more established also in the normative provisions of the EU (treaties and formal laws). Despite the fact that clear elements of such progress towards institutional unity are present, this evolution exists in unresolved tension with the fact that governance by the EU is still characterised by (considerable) fragmentation in practice. Or, as one observer holds:

"[What] remains is a fragmented and divided structure, which fails to establish in the area of external powers, as for the internal, an organic and comprehensive framework and a clear allocation of competences between the Union and its Member States".[4]

This has become apparent in the area of the external relations in particular. 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", 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 has proven to be far too simplistic to distinguish between a European Community in charge of external commercial policy, a CFSP dealing with foreign policy and an isolated PJCC policy for police and judicial matters. The overlapping of certain objectives has been unavoidable from the outset as practice refused to be forced into the straitjacket of treaty provisions. Third states and international organisations increasingly approach the Union as such, which resulted in a practice in which the different modes of governance no longer coincide with the three original pillars. The fact that autonomous legal entities *within* the Union may have set their own external relations regime (as for example is the case with regard to Europol) adds immensely to this (institutional and substantive) complexity.

The ambition of this chapter is to map the terrain of EU governance in the area of external relations by using the previously developed insights from what has been termed the legal institutional perspective. Moreover the term governance is deliberately used – instead of other terms more familiar to legal researchers – to be able to approach the question in a more flexible manner, taking account of the informal context as well as the legal and institutional practice and moreover be able to make a link with the more normative issues. While the Community method will be used as an implicit benchmark, the focus will be more or less exclusively on the second pillar. The modes of governance in this area seem to have evolved in an ad hoc manner, almost from Presidency to Presidency. At the same time there has been a certain vulnerability to external influences from other international organisations (e.g. NATO in the second pillar) to third states (e.g. the United States with regard to the fight against terrorism and broader) that are sometimes driving the content. I would like to draw out the different institutional factors that may be at the origins of the different ways the external relations of the EU as such have evolved. Moreover, I will examine and put in context the evidence that the EU is progressing towards (much) more institutional unity as a result of the work of the Convention on the Future of Europe (and the subsequent IGC) and consider the possible solutions of the new Constitution for Europe with regard to the fragmentation of the Union's external relations.

2. The Difficult Separation between External Relations Issues: A Tale of Three Pillars

Practice did not follow the neat separating lines foreseen in the Union Treaty between economics and politics. The international agenda – listing issues such as environmental protection, social standards,

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Haag: Kluwer Law International 2001) pp. 381-414; and R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Den Haag, Kluwer Law International 1999).

4 Cf. A. Tizzano, 'The Foreign Relations Law of the EU', in E. Cannizzaro, *The European Union as an Actor in International Relations* (The Hague, Kluwer Law International 2002) pp. 135-147 at p. 137.

development cooperation, international security, conflict management, sanctions policy and human rights protection – simply does not take the sensitivities of all Member States into account. Political choices are often clearly visible when, for instance, economic policies in the field of development cooperation are made public (often with explicit objectives concerning democracy, the rule of law and human rights). At the same time economic issues can hardly be approached without political choices (e.g. trade conflicts about bananas, beef hormones and more recently steel), while occasionally the link between politics and economics is made explicit (through 'human rights' or 'essential element' clauses in agreements with third states). Hence, it has been rightly observed that "a considerable part of 'foreign policy' actually belongs to the EC's day to day business" and "the attempt to uphold clear dividing lines between economic and political issues is thus artificial and indefensible in practice".[5]

Indeed, overlapping competences can easily be found in the relationship between the Community and CFSP. Apart form the fact that CFSP is to cover "all areas of foreign and security policy" (Art. 11 EU), other objectives may also raise questions regarding the division of competences. With regard to *all* CFSP objectives one could argue that the policies in those areas are at the same time part of the day-to-day practice on the basis of the Community Treaty.[6] Keeping in mind the *ERTA*-doctrine (internal competences result in external ones), the complexity is being increased because of the fact that CFSP competences may not only conflict with explicit external Community competences, but also with implicit ones.[7] This means that it has become increasingly difficult to fix the division of competences between the pillars in a *Kompetenz Katalog*; one should rather opt for a constant mutual tuning.[8] A practical solution was found in references to instruments that were adopted under another pillar regime, but there are examples of CFSP decisions that already regulate what is expected of the Community in a certain case.[9]

The difficult separation can also discovered in the relationship between the EC and EU cooperation in the area of police and justice. Enhanced co-operation in this field may be based on both Articles 29 EU and 135 EC; and, in the area of data protection measures relating to the collection, storage, processing and exchange of information (Art. 30 EU) may already be covered by Community instruments concerning data protection on the basis of Article 95 EC.[10] In addition, the combating of fraud allows for a choice between Article 280 EC or a measure on the basis of PJCC, in which the prevention of fraud forms part of the general objectives.[11]

A personification of 'pillar overarching' decisions may be the Common Strategies, which according to Article 13 EU are meant to deal with areas in which the Member States have important interest in common.[12] So far, Common Strategies have been adopted by the European Council on the Russian Federation, Ukraine, and the Mediterranean.[13] Despite their basis in the second pillar, these Common Strategies address issues covering the entire Union. But more in general, the intensification of the Union's external relations has lead to a need to take decisions the scope of which supersedes

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5 S. Griller en B. Wiedel, 'External Economic Relations and Foreign Policy in the EU', in S. Griller en B. Weidel, eds., *External Economic Relations and Foreign Policy in the European Union* (Wien/New York, Springer 2002) pp. 5-22, p. 12.

6 The CFSP objectives in Art. 11 EU include the safeguarding of common values, fundamental interests and integrity of he Union; the strengthening of the security of the Union; the preservation of peace; the promotion of international cooperation and the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms.

7 Cf. A. Dashwood, 'The Attribution of External Relations Competence', in A. Dashwood en Chr. Hillion, eds., *The General Law of EC External Relations* (London, Sweet & Maxwell 2000) pp. 115-138, p. 116

8 Cf. one of the very first studies in this area: M. Cremona, 'The Common Foreign and Security Policy of the European Union and the External Relations Powers of the European Community', in D. O'Keeffe en P. Twomey, eds , *Legal Issues of the Maastricht Treaty* (London 1994) pp. 247-258, p. 249.

9 See more extensively B. Weidel, 'The Impact of the Pillar Construction on External Policy', in Griller en Weidel, op. cit., 23-64, p. 50; and R.A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations', *CML Rev.* (2000) pp. 1135-1171, pp. 1152-1157.

10 E.g. Directive 95/46/EC, *OJ* L 281, 23 November 1995, 31.

11 Cf. B. Weidel, 'The Impact of the Pillar Construction on External Policy', in Griller and Weidel, op.cit., pp. 23-64, p. 27.

12 See Chr. Hillion, 'Common Strategies and the Interface between EC External Relations and the CFSP: Lessons of the Partnership between the EU and Russia', in Dashwood and Hillion, op. cit., pp. 287-301.

13 Resp. Decision 1999/414/CFSP, *OJ* L 157, 24 June 1999; Decision 1999/877/CFSP, *OJ* L 331, 23 December 1999; and Decision 2000/458/CFSP, *OJ* L 183, 22 July 2000.

mere economic or political foreign policy. The internal diversification of competences has thus resulted in a complex picture whenever the Union engages in relations with third states or other international organizations.

The fragmentation of the mechanisms that govern the exercise of external powers is visible in relation to a number of areas:

1 First of all the external representation of the Union, including its participation in international organizations, differs between the Community and the other two pillars. In the EC the Commission is the most important actor, both in terms of representation as in relation to the negotiation of international agreements (Art. 300 EC). In CFSP and PJCC the Presidency and the High Representative take a lead in representing the Union. Agreements are negotiated by the Presidency (Arts. 24 and 38 EU). The complex external representation of the Union may have consequences of its responsibility under international law as well.[14]

2 Decision-making procedures differ substantially, both with regard to voting modalities (with qualified majority voting being the default situation in Community matters) and the role of the institutions. Where the initiating role in the Community is obviously in the hands of the Commission, the other two regimes are still primarily dependent on initiatives by Member States (in practice often the Presidency) and the special preparatory organs of the Council (such as the Political and Security Committee). In addition, it is well known that the substantial enlargement of the competences the European Parliament enjoys under the Community Treaty have not been followed by a similar boost of powers in the other two pillars.

3 Limited parliamentary control may to some extent be compensated by judicial control. With respect to CFSP, however, the powers of the Court of Justice are excluded by Article 46 EU.[15] Within the third pillar, the Court's jurisdiction now includes the new preliminary procedure in Article 35 EU. This leads us to conclude that the Court of Justice is left with a limited set of possibilities in the non-Community pillars of the Union. First of all, the Court is allowed to review the required compatibility with Community law of CFSP or PJCC measures of the Council, including the choice of legal basis and the consistency of foreign policy measures ('policing the boundaries'). This includes the Court's use of the non-judiciable CFSP provisions as aids of interpretation.[16] Secondly, it seems clear that the Court has jurisdiction whenever the Council makes use of 'hybrid' acts, covering both matters governed by CFSP or PJCC as well as matters governed by the Community Treaties.[17] Examples could be found in the area of economic sanctions, development policy, trade policy, anti-terrorism measures or measures related to visa and immigration policy.

4 Available legal instruments differ in all three pillars. This means that in cases of cross pillar issues, addressees may be confronted with a bundle of decisions that are not always consistent and, at least, differ in their consequences with regard to their legal effects and the possibilities for legal protection.

Nevertheless, generally EU law forces the decision-makers to make a choice between a legal basis in one of the pillars. In short, this choice then not only defines the role of the Institutions (Commission initiative or not, co-decision by the European Parliament or not), but also the road to be followed during the decision-making process (e.g. a role of the Political and Security Committee or other committees), the voting modalities, de type of available instrument, the possibilities for judicial

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14 See on this subject: Chr. Tomuschat, 'The International Responsibility of the European Union', in Cannizzaro (2002), op.cit., pp. 177-191.

15 The Court of first instance almost had a chance to settle this question in two cases before it regarding the validity of Council Decision 1999/612/CFSP concerning additional restrictive measures against the Federal Republic of Yugoslavia. This Decision includes a list of persons being subject to an obligation of non-admission in the territories of the Member States. The applicants in the two cases – Miskovic and Karic – challenged the choice of legal base by the Council and claimed that measures concerning immigration and asylum policy fall within the exclusive competence under Title IV EC and not under Title V EU (CFSP). 'Unfortunately' Case T-349/99, *Miroslav Miskovic* v. *Council of the European Union* and Case T-350/99 *Bogoljub Karic and four others* v. *Council of the European Union* (*OJ* 2000, C 79/35-36) were removed from the register on 6 March 2001.

16 *Cf.* Case C-473/93, *Commission* v. *Luxembourg*, on Article F, paragraph 1 EU (now Article 6).

17 See also Neuwahl (1994), op.cit., at p. 246.

protection and the effect of the measure in the national legal orders. The connected parts of the external policy of the Union may thus result in a varied governance-palette.

The treaty legislator was aware of this problem and included in the EU Treaty a number of principles on the basis of which cross pillar problems are to be solved. Here, consistency and the preservation of the acquis communautaire take a lead (Art. 3 EU),[18] while the last one often hinders the first one, but also seems to have preference over it. After all, Article 1 EC refers to the Community as the foundation of the European Union, supplemented by the policies and forms of cooperation in the other two areas. Moreover, the acquis communautaire is not only to be preserved, but even to be further developed. Thus, CFSP and PJCC seem to be at the service of the development of the Community as conflicts are to be solved to the benefit of the latter – as implied by Article 47 EU (nothing in the Union Treaty shall affect the Community Treaties). It was clear from the outset that implicit modifications of the Community Treaty are allowed, in the sense that Community law is not completely immune to influences from the other two pillars.[19] The principle of consistency (Art. 3 EU) may serve as a good example in this respect, but one may also point to the single institutional structure (Arts. 3 and 6 EU), the common objectives (Art. 2 EU) or the principles of liberty, democracy, respect for human rights and fundamental freedoms in Article 6 EU. For these provisions to have any effect at all, they will have to be recognized by the Community as well (which indeed happens in practice).[20] While the preservation of the acquis communautaire thus seems to form he starting point in cases of a conflict with the second or third pillar, a functioning of the Community in splendid isolation form these pillars is obviously not in conformation with the unity of the Union's legal order as introduced by the Maastricht Treaty.[21]

This is not to conceal the fact that even within the first pillar we are familiar with fragmented modes of governance. Regarding its external relations in particular, the Community has not assumed an exclusive competence. Even in a key area as the Common Commercial Policy, Member States still have a role to play in agreements on trade in services and trade-related aspects of intellectual property. The same holds true for many other areas, including the environment or development cooperation. So, even within the Community we come across a mix of exclusive, mixed or even explicitly denied (for instance regarding defence issues) competences of the Community. As some observers noted: "Though not explicitly foreseen by the EC Treaty, 'mixity' has thus become a characteristic feature of European foreign policy".[22] At the same time, however, the exclusivity of Community competences does form a criterion to judge Member States' actions in the other two pillars as well. As Court held in *ERTA*, in the case of exclusive Community powers, all concurrent powers of the Member States are barred both "in the Community sphere and in the international sphere", and Member States "do longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those [Community] rules".[23] And, more recently, in *Centro-Com* the Court added that where a measure would affect Community competence, the Member States are precluded from action on their own, regardless of the possible foreign policy motives of such measures.[24] Thus, we have entered the complexity of the European Union's external relations, in which the fragmentation may not only be explained on the basis of the pillar structure (the *horizontal*

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18 See further on the fuzzy nature of the acquis: S. Weatherill, 'Safeguarding the Acquis Communautaire', in Heukels, Blokker, Brus, eds., *The European Union after Amsterdam* (The Hague, Kluwer Law International 1998) pp. 153-178. See for a recent analysis of the problem of coherence: P. Gauttier, 'Horizontal Coherence and the External Competences of the European Union', 1 *European Law Journal* (January 2004) pp. 23-41.

19 See also M. Pechstein, 'Das Kohärenzgebot als entscheidende Integrationsdimension der Europäischen Union', *EuR* (1995) pp. 247-258 at p. 252.

20 More extensively: R.A. Wessel, 'The Inside Looking Out', op. cit.

21 See on this unity Curtin and Dekker, op. cit.

22 I. Pernice and D. Thym, 'A New Institutional Balance for European Foreign Policy?', *European Foreign Affairs Review* (2002) pp. 369-400 at p. 372.

23 Case 22/70 *Commission* v. *Council (ERTA)* [1971] *ECR* 263. See also Tizzano, op. cit., at 139.

24 Case C-124/95 *Centro-Com Srl (ex parte), United Kingdom (The Queen)* v. *United Kingdom (HM Treasury Bank of England)* [1997] *ECR* I-81, paras. 26 and 41.

delimitation problems), but also on the relationship of the Union with its Member States (*vertical* delimitation).[25] This is one of the constitutional challenges the Union is facing these days.

3. CFSP and the Other Pillars: An Integrated Approach in External Policies?

In some areas the Treaties provide solutions for the fact that external policies may have a political as well as an economic or a justice and home affairs dimension, in others practical solutions were found. Based on the practice within the European Community, the most obvious solution would be the use of a dual legal basis. But, obviously this is only possible when the decision-making procedures prescribed by the legal bases coincide.[26] An early example is formed by the 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). This Joint Action was the first one with a dual legal basis., the Joint Action finds its basis in both the second and the third pillar (former Articles J.3 and K.3, paragraph 2(b) are mentioned as the legal basis).[27] In addition it was explicitly connected to an EC Regulation to constitute an 'integrated system'. The 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". A more recent case concerns the Council Common Positions on combating terrorism and on the application of specific measures to combat terrorism. These decisions clearly combine foreign policy issues with increased cooperation between the operational services responsible for combating terrorism: Europol, Eurojust, the intelligence services, police forces and judicial authorities.[28] The decisions, as well as all subsequent ones related to them, are based on both Article 15 (CFSP) and Article 34 (PJCC). It is interesting to note that where specific measures are needed to implement these decisions, the Council once again pulls the matter back into one single pillar. Thus, specific measures for police and judicial cooperation to combat terrorism were based on Articles 30, 31 and 34(2)(c) EU only.[29]

This example shows that a combination of legal bases chosen from the second and the third pillar may work because of similar decision-making procedures and instruments. At this time this forms the reason why a combination of a Community legal base with legal bases in the other EU pillars is more difficult. Even if one succeeds in combining the decision-making procedures, there is the problem of finding a legal instrument which may be used across all pillars. An exceptional case concerns the establishment of the new committees in the framework of the European Security and Defence Policy. The decisions to establish the Political and Security Committee, the Military Committee and the Military Staff were all based on Article 28(1) EU and Article 207(2) EC.[30] In this case decision-making procedures coincided because Article 28 EU simply refers to Article 207 EC.[31]

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25 See more extensively on the last dimension R.A. Wessel, 'The Multi-Level Constitution of European Foreign Relations', in D. Curtin, S. Griller, S. Prechal and B. de Witte, , eds , *The Emerging Constitution of the European Union* (Oxford University Press 2004, forthcoming).

26 See R.H. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Deventer, Kluwer 1999) Chapter 9.

27 Decision 96/668/CFSP, 22 November 1996.

28 Council Common Positions 2001/930/CFSP and 2001/931/CFSP of 27 December 2001, *OJ* L 344, 28 December 2001. See for a recent update Council Common Position 2003/651/CFSP of 12 September 2003, *OJ EU* L 229, 13 September 2003.

29 See Council Decision 2003/48/JHA of 19 December 2002, *OJ* L 16, 22 January 2003.

30 See Council Decisions 2001/78/CFSP, 2001/79/CFSP and 2001/80/CFSP of 22 January 2001, *OJ* L 27, 30 January 2001. The same holds true for the subsequent decisions related to the setting up of these committees.

31 Article 28 EU provides that a listed number of EC provisions shall apply to CFSP as well. Article 207(2) EC regulates the role of the General Secretariat of the Council. While the relevance for the establishment of the Military Staff (as a part of the General Secretariat) is obvious, the Article does not seem to relate to the

The solution is mostly found in a combination of two governance regimes, as with the case of the extra-territorial application of legislation mentioned above. The classic example of course is the case of the economic sanctions, where CFSP and EC measures are presented as complementary. Despite the obvious differences in the separate decision-making procedures needed – the most striking ones being the need for a Commission proposal under Article 301 EC, the possibility for qualified majority voting under that same provision and the requirement of unanimity under Article 23(1) EU – this combination of legal bases is still the way in which the legal institutional dilemma is being approached; apart from the possibility to use either a single CFSP legal basis (arms embargoes)[32] or a single EC legal basis (many sanctions regimes based on UN Resolutions). The same complexity occurs with regard to unilateral measures adopted by the Union in cases of a violation of international obligations by a third state (e.g. withdrawal of benefits, suspension of development assistance, flight bans) or in cases of a suspension of treaty obligations (e.g. suspending a co-operation agreement because of a fundamental change in circumstance, or invoking the human rights clauses in bilateral co-operation or trade agreements).[33] Whereas the last situation may only be based on the Community Treaty (Art. 300, para. 2, 2nd subparagraph), in the other situations one may come across single CFSP and EC decisions or combinations on the basis of Article 301 EC and Articles 14 or 15 EU. Until recently a similar example could be found in the regime concerning the export of dual-use goods: the economic decision on the export ban was taken on the basis of Article 133 EC, whereas the actual list of goods falling under the regime, as well as their destinations, would established on the basis of Article 14 EU.[34] In the year 2000 this situation largely came to an end with the introduction of a new Regulation, bringing the CFSP parts of the regime within the Community field of competence.[35] Nevertheless, the tension between common commercial policy (EC) and national security measures (CFSP) continues to exist as the control of technical assistance related to certain military end-uses remains to be based on the second pillar.[36]

Over the years this led to situations in which Community competences seemed to be eroded by CFSP measures, while at other times they were even widened due to foreign policy activity of the Union as a whole. Examples of CFSP decisions that have seriously thwarted Community policy in a particular area include the observance of the elections in Russia and South Africa and the KEDO-initiative on nuclear energy in Korea.[37] One could argue that the latter decision in particular clearly concerned a Community matter; nevertheless it was pulled 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.[38] Other examples include the decisions on the export of dual-use commodities already referred to above (the CFSP dimension of which could be questionable),[39] the Joint Action on the Middle-East peace process (which contained a number of Community issues), and the Common Positions on for instance Rwanda and Ukraine (already explicitly criticised by the Commission in 1994 because of the inclusion of Community maters in the operational part of the decisions).[40] In addition, the implementation of the Mostar operation

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Military Committee or the Political and Security Committee. In that respect the choice for this legal basis may be somewhat surprising.

32 The rationale for not using Art. 301 EC in this situation is to be found in Art. 296(1)(b), which permits Member States to take the necessary measures for the protection of its essential security interests connected with the trade in arms.

33 See more extensively E. Paasivirta and A. Rosas, 'Sanctions, Countermeasures and Related Actions in the External Relations of the EU', in Cannizzaro (2002), op. cit., pp. 207-218.

34 See for an overview: P. Koutrakos, 'Inter-Pillar Aapproaches to the European Security and Defence Policy: The Economic Aspects of Security', in V. Kronenberger, ed., *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, TMC Asser Press 2001) pp. 435-480.

35 Regulation 1334/2000 of 22 June 2000, *OJ* L 159, 30 June 2000.

36 See Council Joint Action 2000/401/CFSP of 22 June 2000, *OJ* L 159, 30 June 2000.

37 Burghardt and Tebbe, 'Die Gemeinsame Außen- und Sicherheitspolitik der Europäischen Union – Rechtliche Struktur und politischer Prozeß', *EuR* (1995) pp. 1-20 at p. 15. Krenzler and Schneider, op.cit. (1994) also pointed to the danger of Community procedures being affected by CFSP practice. Cf. also S. Keukeleire, *Het buitenlands beleid van de Europese Unie* (Deventer, Kluwer 1998) at pp. 332-337.

38 Keukeleire, op.cit., at p. 333.

39 See Timmermans, op.cit. at p. 69.

40 See Common Positions 94/697/CFSP and 94/779/CFSP; also referred to by Gauttier, op.cit, p. 28.

showed that budgetary procedures as well were able to create an image of a 'PESCalisation' of Community principles.[41] 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.[42] Finally, Common Strategies, irrespective of their CFSP basis, partly seem to direct Community action as well. Thus, the 1999 Common Strategy on Ukraine made decisions on the use of Community instruments (para. 38) and even spoke on behalf of the Community in the area of the environment, energy and nuclear safety (para. 56).[43]

Although maybe less frequently, a widening of Community competences in the area of external relations has occurred as well. With the development of CFSP, the Community also explored new terrains. A case at hand is the Community's contribution to UNMIK, the UN interim administration in Kosovo. On the basis of Regulation 1080/2000 the Commission was, *inter alia*, in charge of a division of costs between the European Union and other members of the international community. There was no legal basis for Community action in this area, which left the Council with Article 308 EC (the legal base of last resort when no explicit legal base is available).[44] More in general, the Community is often pulled into foreign policy actions, which used to be outside its range of activities. Many human rights protection and democracy enhancement operations in third countries do not have an explicit relation to actions the Community is competent to engage in. Many of these actions, however, simply require the use of Community funds for actions that had their origin in a CFSP decision.

All in all, this leaves us with a complex picture of legal institutional dilemmas resulting from the wish to hold on to the different modes of governance chosen for the distinct policy areas of the Union and the need for coherent external action. The dilemmas have also occurred in an institutional sense within both the Commission and the Council. Thus the attempt to create more coherence through a reshuffling of the portfolio's of the Commissioners does not yet seem to have resulted in an improved coordination between the pillars (in fact, this coordination seems to depend mainly on good working relations between the Commissioner for External Relations and the CFSP High Representative). The same holds true for the working methods of the Council, where the Political and Security Committee and Coreper both still have different input sources and decision-making tracks. Nevertheless, in some areas – e.g. economic sanctions and suspension of cooperation – the Union seems to have succeeded in assuring more coherence. Thus Community measures on for instance the promotion (or suspension) of economic and social reconstruction are sometimes combined with CFSP measures on for instance arms trade or travel restrictions for officials.[45] In addition, the anti-terrorism measures show that an integrated approach is possible. But, because of the fragmentation of the Union's external relations an integrated approach still does not come naturally.

4. PJCC and the Other Pillars: The Development of External Relations in the JHA Domain

The external relations in the area of Police and Judicial Cooperation in Criminal Matters are booming. An obvious reason is the fast development of the Justice and Home Affairs domain in general. Over the past few years the Council adopted almost ten texts per month on JHA issues.[46] Since 2001 the

41 PESC is the French abbreviation for CFSP.

42 Keukeleire, op.cit. at p. 319.

43 See Common Strategy 99/877/CFSP of 11 December 1999, *OJ* L 331, 23 December 1999. See more extensively on this issue R. Baratta, 'Overlaps Between EC Competence and EU Foreign Policy Activity", in Cannizzaro (2002), op.cit., pp. 51-75.

44 See Baratta, op.cit., at p. 56.

45 See for instance the Common Positions on Liberia (2001/357/CFSP and 2002/457/CFSP) or the decisions related to Zimbabwe (Common Position 2002/145/CFSP and Council Regulation No 310/2002). See more extensively Gauttier, op.cit., p. 32.

46 See on this issue and in general on the external relations of the third pillar J. Monar, 'The EU as an International Actor in the Justice and Home Affairs Domain: Potential and Constraints', unpublished paper

JHA external relations can be found in so-called 'multi-presidency programmes'.[47] As Article 38 EU provides for matters in Title IV (PJCC) to be covered by agreements concluded on the basis of Article 24, there is now an explicit competence for the Union to engage in legal relations with third states and other international organizations in this field. So far two agreements have been signed on this basis: the EU-US Agreement on Extradition and the Agreement on Mutual Legal Assistance.[48] Although the EU as such has become a party to the agreements, it is interesting to note that the US doubted the legal capacity of the Union to conclude agreements and demanded that the individual Member States drew up separate declarations on the applicability of the bilateral assistance and extradition agreements between them and the US.[49] Apart from these agreements concluded by the Union as such, Article 42(2) of the Europol Convention allows for this agency to establish and maintain relations with third states and international organisations.[50] The first agreement on this basis was signed between Europol and the US on the exchange of both strategic and technical information in the fight against a broad range of serious forms of international crime and the exchange of liaison officers. A more comprehensive agreement was signed on 20 December 2002.[51] These agreements, together with the two agreements concluded between the European Union and the US on extradition and mutual legal assistance revealed a serious shortcoming in the treaty-making procedure of Article 24/38 EU as this procedure does not include consultation of the European Parliament, irrespective of the potentially major implications for citizens' rights and freedoms.

It is clear that the fact that different procedures are used in the third pillar compared to the Community adds to the fragmentation of the Union's external relations as Article 300 EC does call for consultation of the Parliament. But cross-pillar problems are not limited to parliamentary control. The competences of the Community on the basis of Title IV EC (asylum, immigration, border controls and judicial co-operation in civil matters) have a clear relationship with those in Title VI EU. The external competences of the EC under Title IV have been confirmed by the conclusion of the readmission agreements concerning illegal immigration as well as for the readmission clauses in the Political Dialogue and Cooperation agreements with Central American countries signed on 15 December 2003.[52] These Community competences on the basis of Title IV EC occasionally overlap with EU competences in the third pillar. Obvious examples may be found in relation to the Schengen acquis. Both with Switzerland and with Norway and Iceland agreements have been concluded or are under negotiation regarding the free movement of persons, covering both Community and third pillar issues. Monar pointed to the fact that this has the effect that in one and the same article of an international agreements one aspect falls under Title IV EC and another under Title VI EU, which results in enormous coordination efforts between the Commission, the Presidency and the Member States.[53]

In the previous section I already pointed to the fact that, in particular after the terrorist attacks of September 11, 2001, the relationship between the second and the third pillar has grown closer as well. By now third pillar anti-terrorism issues are part and parcel of 'political dialogue' meetings which

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presented at the Inaugural Conference of the European Society of International Law, Florence 13-15 May 2004.

47 See for a recent update Council of the European Union, Presidency: JHA External Relations Multi-Presidency Programme, Council Document 5097/04 of 7 January 2004.

48 *OJ* L 181, 17 July 2003.

49 Article 3(2) of the Agreement on Extradition and Article 3(2) and (3) of the Agreement on Mutual Legal Assistance. See S. Marquard, 'La capacité de l'Union européenne de conclure des accord internationaux dans le domaine de la coopération policière et judiciaire en matière pénal', in G. De Kerchove and A. Weyembergh (Eds.), *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne*, Brussels : Editions de l'Université de Bruxelles, 2003, p. 189.

50 See also the Council Act of 8 November 1998 providing for an explicit treaty-making power of Europol; OJ C 26/19, 30 January 1999. See also H.G. Nilsson, 'Organs and Bodies of the Third Pillar as Instruments of External Relations of the European Union', in De Kerchove and Weyembergh, op.cit., pp. 205-209.

51 Council Document No. 14586/01 and No. 15231/02 respectively. See Monar, op.cit., p. 10.

52 All agreements were based on both Article 300 and Article 63, paragraph 3(b). See for an example Council Decision 204/80/EC on the conclusion of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, OJ L *17*/23, 14 January 2004.

53 Monar, op.cit, p. 11; See also E. Barbe, 'L'influence de l'Union européenne dans les enceintes internationals', in De Kerchove and Weyembergh, op.cit., p. 213.

are generally though to take place on the basis of CFSP and agreements with third states combine policies on the basis of both (or even all three) pillars.[54]

5. Does the New Draft Constitution offer Solutions for this Fragmentation?

The Treaty establishing a Constitution for Europe ('the Constitution') – which was finalized by the Convention on the Future of Europe in July 2003 – will be signed in the Fall of 2004, albeit in a somewhat modified version. The question is whether the new provisions will solve the fragmentation of the external relations discussed in this contribution.

The most important structural change is that the Constitution makes an end to the pillar structure: we are left with one international organization, the Union, with competences in the former Community areas as well as in the areas of CFSP and PJCC. Also in the area of the external relations no division is made between the economic and the political (foreign affairs) issues. Title V of Part III of the Constitution is labeled 'The Union's External Action' and covers all the Union's external policies. In addition, the external objectives of the Union are no longer scattered over different treaties. Instead Article I-3(4) provides:

"In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter."

Other provisions add to the idea of an integration of the different external policies as well. Thus, Article III-194 codifies the existing practice that the former 'Common Strategies'(the term is no longer used) may cover all aspects of the Unions' external action; they are no longer restricted to CFSP. Secondly, consistency is being sought in the introduction of the Minister for Foreign Affairs, who will not only chair the Foreign Affairs Council, but who will also be Vice-President of the Commission. Thirdly, the legal personalities of the Community and the European Union are merged into one legal personality of the new Union. This will certainly simplify matters in relation to the conclusion of treaties and questions of accountability and responsibility. Article III-227 applies to all agreements concluded by the Union and no distinction is made, either in procedure or in legal nature, between the different external policies. And finally, the Constitution makes an end to the different types of instruments that can be used for CFSP. Common Strategies, Joint Actions and Common Positions make way for the 'European decision', an instrument which may also be used in other (former Community) issue areas.

While these modifications can certainly be regarded as an acknowledgment of the unity of the Union's legal order as it has developed over the years, a number of other provisions indicate that the drafters of the Constitution were not willing to go all the way where the integration of the pillars is concerned. While Community and third pillar issues indeed seem to have been placed on an equal footing (e.g international representation by the Commission and expansion of qualified majority voting) CFSP continues to have a distinct nature under the new treaty.[55] A first element concerns the kind of competence in the CFSP area. Article I-11 lists the competences of the Union in the different areas: exclusive, shared or supporting and supplementary. However, none of these competences relates to CFSP, as Article I-11 includes a separate paragraph referring to a "competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy." As Cremona already indicated, it is a little difficult to see what kind of competence it

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[54] See for an example the Political Dialogue and Cooperation agreements; <europa.eu.int/comm./external_relations>.

[55] See in general on an evaluation of the external relations under the new Constitution M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action', *CML Rev.* (2003) pp. 1347-1366; and D. Thym, 'Reforming Europe's Foreign and Security Policy', *European Law Journal*, 2004, pp. 5-22.

could be, if not one of the other categories.[56] But the simple fact that again a special status is introduced is striking.

Similar confusion results from the available instruments. Indeed, CFSP is going to be developed on the basis of one type of instrument, the 'European decision', which is defined in Article I-32(1) as "a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them." Apart from the inherent complexity of this description, the implications are that the choice for this instruments allows for differentiation as non-legislative acts are not subject to the legislative procedure laid down in the treaty. The procedure to adopt European decisions in the area of CFSP indeed still differs from other areas of external relations and comes close to the current situation: a limited role for the Commission and the European Parliament and an important (even enhanced) role for the European Council and the Council of Ministers. The Court's jurisdiction continues to be excluded. And despite the overall simplification of the instruments, the treaty even seems to hold on to the former CFSP instruments, albeit disguised as European decisions. Thus, we can easily discover the Common Strategy ('European decisions on the strategic interests and objectives of the Union', arts. I-39 and III-194), the Common Position ('European decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature', Art. III-199) and the Joint Action ('Where the international situation requires operation action by the Union, the Council of Ministers shall adopt the necessary European decisions', Art. III-198(1)). Chances are high that in practice the current fragmentation of instruments continues to exist.

This idea is strengthened by the fact that CFSP still occupies a separate position in the new Constitution. Title V of Part I contains a separate Chapter (II) entitled 'Special Provisions' in which the institutional provisions and procedures in the area of CFSP and Common Defence and Security Policy are laid down. In addition Article III-209 underlines the separation by providing that the implementation of CFSP shall not affect the other competences of the Union, and vice versa. Apart from the fact that with this provision the new treaty purports to prevent not only a 'PESCalisation' of the other policies (see *supra*), but also a 'communitarisation' of CFSP, this clearly echoes the text of current Article 47 EU. Finally, the fragmentation returns in the external representation of the Union. Where a general task of the Commission is to "ensure the Union's external representation" (Art. I-25), this role is excluded in CFSP policies, where the new Minister for Foreign Affairs will take the lead. One may argue that with the 'double-hatting' construction (the Minister for Foreign Affairs is at the same time a member of the Commission) consistency is ensured. On the other hand, given the fact that preparation of CFSP policy will continue to be distinct from other policies, there remains a potential for conflicting policies. And, practice will have to reveal if the Foreign Minister will be able to prevent schizophrenia in serving the Commission and the Council at the same time.

6. Conclusion

The current regulation of the EU's external relations reflects a compromise between the unity of the Union's legal order and the wish to use separate decision-making procedures and instruments in the areas of foreign and security policy, and police and judicial cooperation. From an institutional perspective, the combination of the modes of governance prescribed in the different pillars in pillar-overarching cases resulted in a fragmented external policy. To the traditional problems of vertical consistency and delimitation (often resulting in 'mixity'), the pillar structure added the problem of horizontal consistency and delimitation. Practice showed that – although competences are generally strictly divided, both vertically and horizontally – issues cannot always be handled within the safe boundaries of one pillar. Ironically, the legal institutional dilemmas caused by this situation seem to have resulted in a strengthening of the unity of the Union's legal order as practice was forced to shoot holes in the dividing walls between the pillars as agreed upon in Maastricht.

The diversity and fragmentation is obstinate because of – what economics refers to as – 'path dependencies' and so-called 'lock-in effects'. Because of the different institutional history of the pillars, which during the their further development created separate regimes in these areas, it has become

[56] Ibid., p. 1353.

difficult to ignore the origin of the cooperation in the three issue areas. With regard to CFSP in particular the new draft Constitution continues a certain fragmentation as procedures and instruments continue to be different. At the same time the unity of the Union's legal order will become more explicit after the dilution of the pillar structure, which may have a converging effect on the variations that still exist.

Finally, when the general EU procedures and instruments will become the default choice when decision-making on external relations is concerned, the point of gravity within CFSP may come more on the most sensitive issues (security and defence) and less on foreign relations. This may result in a 'residual character' of CFSP, because of an inclusion of more and more foreign policy issues in the general external policy of the EU.[57] At the same time, the cases of economic sanctions, dual use problems and the extra-territorial application of US legislation show that the non-Community pillars have served as an escape when sensitive issues are at hand. The new Constitution continues to offer possibilities in this respect.

[57] See also B. Martenczuk, 'Cooperation with Developing and Other Third Countries: Elements of a Community Foreign Policy', in Griller and Weidel (2002), op.cit., pp. 385-418.