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]

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 Cooperation 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 has 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

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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] For a general survey of the CFSP and PJCC, see E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford, Oxford University Press 2002).

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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 organisation with a unitary but complex character. This conclusion was not only based on the analysis of the Union Treaties and other basic instruments, but also on so-called legal practices, i.e. forms of legal action that are – explicitly or implicitly – employed in order to make the legal institution an operational entity.[3]

With regard to the European Union as a whole, one can thus perceive a clear evolution towards more institutional unity across the spectrum of the European Union, 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 European Union (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 European Union 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 EU that the Union is 'to assert its identity on the international scene, *in particular* through the implementation of a common foreign and security policy' (emphasis added), leaves open the possibility of the Union acting outside the CFSP framework in its external relations. The objectives of the other

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[3] D.M. Curtin and I.F. Dekker, 'The EU as a "Layered" International Organisation: 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 Organisations', in N.M. Blokker and H.G. Schermers, eds., *Proliferation of International Organisations* (The Hague, Kluwer Law International 2001) pp. 381-414; and R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (The Hague, 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.

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 has refused to be forced into the straitjacket of treaty provisions. Third States and international organisations increasingly approach the Union as such, which has 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 is the case, for example, with regard to Europol) adds immensely to this (institutional and substantive) complexity.

The ambition of this paper 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 – in order 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, in order to be able to make a link with 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 other issues) that sometimes drive the content. I would like to outline the different institutional factors that may be at the origins of the different ways the external relations of the European Union as such have evolved. Moreover, I will examine and put into context the evidence that the European Union 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 has not followed the neat separating lines foreseen in the Union Treaty between economics and politics. The international agenda – which includes issues such as environmental protection, social standards, 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 concerning 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 the CFSP. Apart form the fact that the 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 of the European Union 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* and that it is better to opt for 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]

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

[6] The CFSP objectives in Article 11 EU include the safeguarding of common values, fundamental interests and integrity of the 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 and C. Hillion, eds., *The General Law of EC External Relations* (London, Sweet & Maxwell 2000) pp. 115-138 at 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 and P.M. Twomey, eds., *Legal Issues of the Maastricht Treaty* (London, Wiley Chancery Law 1994) pp. 247-258 at p. 249.

[9] See more extensively B. Weidel, 'The Impact of the Pillar Construction on External Policy', in Griller and Weidel, op. cit. n. 5, at 23-64 at p. 50; and R.A. Wessel, 'The Inside Looking Out:

The difficult separation can also be seen in the relationship between EC and EU cooperation in the area of police and justice. Enhanced cooperation in this field may be based on both Article 29 EU and Article 135 EC. Also, 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]

An example 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 interests 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. More generally, however, the intensification of the Union's external relations has lead to a need to take decisions whose scope supersedes 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 organisations.

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 organisations, differs between the Community and the other two pillars. In the European Community, the Commission is the most important actor, both in terms of representation and in relation to the negotiation of international agreements (Art. 300 EC). In the area of the 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 for its responsibility under international law as well.[14]

Consistency and Delimitation in EU External Relations', *CMLRev.* (2000) pp. 1135-1171 at pp. 1152-1157.

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

[11] Cf. Weidel, loc. cit. n. 9, at p. 27.

[12] See C. 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. n. 7, at pp. 287-301.

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

[14] On this subject, see C. Tomuschat, 'The International Responsibility of the European Union', in Cannizzaro, op. cit. n. 4, at pp. 177-191.

2. Decision-making procedures differ substantially, both with regard to voting modalities (qualified majority voting being the default situation in Community matters) and the role of the institutions. While 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 the 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 of CFSP and PJCC measures of the Council with Community law, 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 to interpretation.[16] Secondly, it seems clear that the Court has jurisdiction whenever the Council makes use of 'hybrid' acts, covering both matters governed by the CFSP or PJCC as well as matters governed by the Community Treaties. Examples may be found in the area of economic sanctions, development policy, trade policy, anti-terrorism measures or measures related to visa and immigration policy.

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

Nevertheless, EU law generally forces decision-makers to choose a legal basis in one of the pillars. In short, this choice then not only defines the role of the

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[15] The Court of first instance almost had a chance to settle this question in two cases 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 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 basis by the Council and claimed that measures concerning immigration and asylum policy fell 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* [1993] *ECR* I-3207, on Article F(1) EU (now Article 6 EU).

institutions (e.g. whether or not there is room for a Commission initiative or co-decision by the European Parliament), but also the road to be followed during the decision-making process (e.g. whether or not there is a role for the Political and Security Committee or other committees), the voting modalities, the type of available instrument, the possibilities for judicial 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-makers were aware of this problem and included a number of principles in the Union Treaty 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),[17] while the latter often hinders the former, but also seems to take 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 also to be developed. Thus, the CFSP and PJCC appear 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.[18] 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 also have to be recognised by the Community (which indeed happens in practice).[19] While the preservation of the *acquis communautaire* thus seems to form the starting point in cases of conflict with the second or third pillar, the functioning of the Community in splendid isolation form these pillars is obviously not in conformity with the unity of the Union's legal order as introduced by the Maastricht Treaty.[20]

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

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[17] On the fuzzy nature of the *acquis*, see further S. Weatherill, 'Safeguarding the Acquis Communautaire', in T. Heukels, N. Blokker and M. Brus, eds., *The European Union after Amsterdam* (The Hague, Kluwer Law International 1998) pp. 153-178. For a recent analysis of the problem of coherence, see P. Gauttier, 'Horizontal Coherence and the External Competences of the European Union', 1 *European Law Journal* (January 2004) pp. 23-41.

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

[19] See more extensively Wessel, loc. cit. n. 9.

[20] On this unity, see both publications by Curtin and Dekker cited in n. 3 *supra*.

such 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 have noted: 'Though not explicitly foreseen by the Community Treaty, "mixity" has thus become a characteristic feature of European foreign policy.'[21] 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 the 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.'[22] More recently, in *Centro-Com*, the Court added that where a measure would affect Community competence, Member States are precluded from action on their own, regardless of the possible foreign policy motives of such measures.[23] 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 (*horizontal* delimitation), but also on the basis of the relationship of the Union with its Member States (*vertical* delimitation).[24] This is one of the constitutional challenges the Union is facing today.

3. THE 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 justice and home affairs dimension; in other areas practical solutions have been found. Based on the practice within the European Community, the most obvious solution is the use of a dual legal basis, but this is only possible when the decision-making procedures

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

[22] Case 22/70 *Commission* v. *Council (ERTA)* [1971] *ECR* 263. See also Tizzano, loc. cit. n. 4, at 139.

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

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

prescribed by the legal bases coincide.[25] An early example is the Joint Action concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country (the reaction of the Union to the Cuba and Iran and Libya Sanctions Acts of the United States). This Joint Action was the first one with a dual legal basis, which was located in both the second and the third pillar (former Articles J.3 and K.3(2)(b) EU are mentioned as the legal basis).[26] In addition, it was explicitly connected to an EC Regulation in order to constitute an 'integrated system'. The adoption of the Joint Action was to a large extent superfluous, in view of the scope of the EC Regulation, but the Council obviously 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 was to be seen as supplementary to the EC Regulation, since both decisions stipulated that Member States should take the measures they deemed 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's 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.[27] The decisions, as well as all subsequent ones related to them, are based on both Article 15 EU (CFSP) and Article 34 EU (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.[28]

This example shows that a combination of legal bases chosen from the second and the third pillar may work because they involve similar decision-making procedures and instruments. At present, this forms the reason why the combination of a Community legal basis 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 that 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

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

[26] Council Decision 96/668/CFSP of 22 November 1996.

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

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

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.[29] In this case, the decision-making procedures coincided because Article 28 EU simply refers to Article 207 EC.[30]

The solution is mostly found in a combination of two governance regimes, as in the case of the extra-territorial application of the above-mentioned legislation. The classic example, of course, is the case of 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 being the need for a Commission proposal under Article 301 EC, the possibility for qualified majority voting under the 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 approached; apart from the possibility of using either a single CFSP legal basis (arms embargoes)[31] 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 the violation of international obligations by a third State (e.g. withdrawal of benefits, suspension of development assistance and/or flight bans) or in cases of the suspension of treaty obligations (e.g. suspending a cooperation agreement because of a fundamental change in circumstance or invoking the human rights clauses in bilateral cooperation or trade agreements).[32] Whereas the suspension of treaty obligations may only be based on the Community Treaty (Art. 300(2), second subparagraph), in the other situations one may come across single CFSP or EC decisions, or combinations thereof, 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, was established on

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

[30] 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 Military Committee or the Political and Security Committee. In that respect, the choice of this legal basis is somewhat surprising.

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

[32] See more extensively E. Paasivirta and A. Rosas, 'Sanctions, Countermeasures and Related Actions in the External Relations of the EU', in Cannizzaro, op. cit. n. 4, at pp. 207-218.

the basis of Article 14 EU.[33] In 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's field of competence.[34] 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 continues to be based on the second pillar.[35]

Over the years, this led to situations in which Community competences seemed to be eroded by CFSP measures, while at other times they were actually widened due to the 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 monitoring of the elections in Russia and South Africa and the KEDO initiative on nuclear energy in Korea.[36] One could argue that the latter decision in particular clearly concerned a Community matter, but it was nevertheless pulled into the 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 external policy would be contained.[37] Other examples include the above-mentioned decisions on the export of dual-use commodities (the CFSP dimension of which could be questionable),[38] the Joint Action on the Middle East peace process (which contained a number of Community issues) and the Common Positions on Rwanda and Ukraine (which were already explicitly criticised by the Commission in 1994 because of the inclusion of Community matters in the operational part of the decisions).[39] In addition, the implementation of the Mostar operation showed that budgetary procedures were also able to create an impression of the 'PESCalisation' of Community principles.[40] The implementation of this operation was in the hands of a special EU Administrator

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[33] For an overview, see P. Koutrakos, 'Inter-Pillar Approaches 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.

[34] Regulation (EC) No 1334/2000 of 22 June 2000, *OJ* 2000 L 159, 30 June 2000.

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

[36] G. Burghardt and G. Tebbe, 'Die Gemeinsame Außen- und Sicherheitspolitik der Europäischen Union – Rechtliche Struktur und politischer Prozeß', *EuR* (1995) pp. 1-20 at p. 15. H.G. Krenzler and H.C. Schneider, 'Die Gemeinsame Aussen- und Sicherheitspolitiek der Europäischen Union – Zur Frage der Kohärenz', 29 *Europarecht* (1994) pp. 144-161, also point 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.

[37] Keukeleire, op. cit. n. 36, at p. 333.

[38] See C.W.A. Timmermans, 'The Uneasy Relationship between the Communities and the Second Union Pillar: Back to the "Plan Fouchet"?', 26 *Legal Issues of European Integration* (1997) pp 61-70 at p. 69.

[39] See Common Positions 94/697/CFSP and 94/779/CFSP, also referred to by Gauttier, loc. cit. n. 17, at p. 28.

[40] PESC is the French abbreviation for the CFSP.

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 brought the whole system into conflict with the prerogatives of the Commission in this field.[41] Finally, Common Strategies partly seem to direct Community action as well, irrespective of their CFSP basis. 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).[42]

Although maybe less frequently, Community competences in the area of external relations have also widened. With the development of the CFSP, the Community has also explored new terrains. A case in point is the Community's contribution to UNMIK, the UN interim administration in Kosovo. On the basis of Regulation (EC) No 1080/2000, the Commission was, *inter alia*, in charge of the 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 basis of last resort when no explicit legal basis is available).[43] More generally, the Community is often pulled into foreign policy actions that 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 in which the Community is competent to engage. However, many of these actions simply require the use of Community funds for actions that have their origin in a CFSP decision.

All in all, this leaves us with a complex picture of the 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. These dilemmas have also occurred in an institutional sense within both the Commission and the Council. Thus, the attempt to create more coherence by reshuffling the portfolios of the Commissioners does not yet seem to have resulted in 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 High Representative for the CSFP). 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, for example, Community measures on the promotion (or

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[41] Keukeleire, op. cit. n. 36, at p. 319.

[42] See Common Strategy 99/877/CFSP of 11 December 1999, *OJ* 1999 L 331, 23 December 1999. On this issue, see more extensively R. Baratta, 'Overlaps Between EC Competence and EU Foreign Policy Activity', in Cannizzaro, op. cit. n. 4, at pp. 51-75.

[43] See Baratta, loc. cit. n. 42, at p. 56.

suspension) of economic and social reconstruction are sometimes combined with CFSP measures on arms trade or travel restrictions for officials.[44] In addition, the recent anti-terrorism measures show that an integrated approach is possible. Because of the fragmentation of the Union's external relations, however, an integrated approach still does not come naturally.

4. PJCC AND THE OTHER PILLARS: THE DEVELOPMENT OF EXTERNAL RELATIONS IN THE JHA DOMAIN

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 has adopted almost ten texts per month on JHA issues.[45] Since 2001, external relations in the JHA domain can be found in so-called 'multi-presidency programmes'.[46] As Article 38 EU provides for matters in Title IV EU (PJCC) to be covered by agreements concluded on the basis of Article 24 EU, there is now an explicit competence for the Union to engage in legal relations with third States and other international organisations in this field. So far, two agreements have been signed on this basis: the EU-US Agreement on Extradition and the EU-US Agreement on Mutual Legal Assistance.[47] Although the European Union as such has become a party to the agreements, it is interesting to note that the United States 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 United States.[48] Apart from these agreements concluded by the Union as such, Article 42(2) of the Europol Convention allows the agency to establish and

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[44] See, for instance, the Common Positions on Liberia (2001/357/CFSP and 2002/457/CFSP) or the decisions relating to Zimbabwe (Common Position 2002/145/CFSP and Council Regulation (EC) No 310/2002). See more extensively Gauttier, loc. cit. n. 17, at p. 32.

[45] On this issue and on the external relations of the third pillar in general, see J. Monar, 'The EU as an International Actor in the Justice and Home Affairs Domain: Potential and Constraints', unpublished paper presented at the Inaugural Conference of the European Society of International Law, Florence, 13-15 May 2004.

[46] For a recent update, see Council of the European Union, Presidency: JHA External Relations Multi-Presidency Programme, Council Document 5097/04 of 7 January 2004.

[47] *OJ* 2003 L 181, 17 July 2003.

[48] 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 accords 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.

maintain relations with third States and international organisations.[49] The first agreement on this basis was signed between Europol and the United States 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.[50] These agreements, together with the two agreements concluded between the European Union and the United States on extradition and mutual legal assistance, revealed a serious shortcoming in the treaty-making procedure of Articles 24 and 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, as 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 cooperation in civil matters) have a clear relationship with those in Title VI EU. The external competences of the European Community 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.[51] 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*. Agreements have been concluded or are under negotiation both with Switzerland and with Norway and Iceland regarding the free movement of persons, covering both Community and third pillar issues. Monar points to the fact that this has the effect that, in one and the same article of an international agreement, 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.[52]

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[49] See also Council Act of 8 November 1998 providing for an explicit treaty-making power of Europol, *OJ* 1999 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. n. 48, at pp. 205-209.

[50] Respectively, Council Documents Nos. 14586/01 and. 15231/02. See Monar, op. cit. n. 45, at p. 10.

[51] All agreements were based on both Article 300 EC and Article 63(3)(b) EC. See, for 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* 2004 L 17/23, 14 January 2004.

[52] Monar, op. cit. n. 45, at p. 11. See also E. Barbe, 'L'influence de l'Union européenne dans les enceintes internationals', in De Kerchove and Weyembergh, op. cit. n. 48, at p. 213.

In the previous section, I already pointed to the fact that, in particular after the terrorist attacks of 11 September 2001, the relationship between the second and the third pillar has grown closer as well. At present, third pillar anti-terrorism issues are part and parcel of 'political dialogue' meetings, which are generally though to take place on the basis of the CFSP and agreements with third States, combine policies on the basis of both (or even all three) pillars.[53]

5. DOES THE NEW DRAFT CONSTITUTION OFFER SOLUTIONS FOR THIS FRAGMENTATION?

The draft Treaty establishing a Constitution for Europe (hereinafter, 'the Constitution') – which was finalised by the Convention on the Future of Europe in July 2003 – will be signed in the autumn 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 paper.

The most important structural change is that the Constitution puts an end to the pillar structure. We are left with one international organisation – the Union – with competences in the former Community areas as well as in the areas of the CFSP and PJCC. In the area of external relations, moreover, no division is made between economic and political (foreign affairs) issues. Title V of Part III of the Constitution is labelled '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 also add to the idea of the integration of the different external policies. 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 the 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 will also be Vice-President

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[53] See, for example, the Political Dialogue and Cooperation Agreements, available at: <http://europa.eu.int/comm/external_relations>.

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. Finally, the Constitution puts an end to the different types of instruments that can be used for the CFSP. Common Strategies, Joint Actions and Common Positions make way for the 'European decision', an instrument that 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), the CFSP continues to have a distinct nature under the new Treaty.[54] A first element concerns the kind of competences in the CFSP area. Article I-11 lists the competences of the Union in the different areas as exclusive, shared or supporting and supplementary. However, none of these competences relates to the 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 has already indicated, it is a little difficult to see what kind of competence it could be, if not one of the other categories.[55] But the simple fact that a special status has been introduced again is striking.

Similar confusion results from the available instruments. Indeed, the 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 of this instrument allows for differentiation, as non-legislative acts are not subject to the legislative procedure laid down in the Treaty. The procedure for adopting European decisions in the area of the CFSP indeed still differs from other areas of external relations and comes close to the

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

[55] Ibid., at p. 1353.

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. 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 find Common Strategies ('European decisions on the strategic interests and objectives of the Union', Arts. I-39 and III-194), Common Positions ('European decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature', Art. III-199) and Joint Actions ('Where the international situation requires operational action by the Union, the Council of Ministers shall adopt the necessary European decisions', Art. III-198(1)). The chances are high that in practice the current fragmentation of instruments will continue to exist.

This idea is strengthened by the fact that the CFSP still occupies a separate position in the new Constitution. Title V of Part I contains a separate Chapter II entitled 'Specific Provisions', in which the institutional provisions and procedures in the area of the CFSP and the Common Defence and Security Policy are laid down. In addition, Article III-209 underlines this separation by providing that the implementation of the 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 the 'PESCalisation' of other policies (see section 3 *supra*), but also the 'communitarisation' of the CFSP, this clearly echoes the current text of Article 47 EU. Finally, fragmentation returns in the external representation of the Union. Whereas the 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 could argue that consistency is ensured with the 'double-hatting' construction (the Minister for Foreign Affairs is at the same time a member of the Commission). On the other hand, given the fact that the preparation of CFSP policies will continue to be distinct from other policies, there remains a potential for conflicting policies. Moreover, practice will have to reveal if the Foreign Minister will be able to avoid schizophrenia while serving the Commission and the Council at the same time.

6. CONCLUSION

The current regulation of the European Union'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 area 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 has resulted in a fragmented external policy. To the traditional problems of vertical consistency and delimitation (often resulting in 'mixity'), the pillar structure has added the problem of horizontal consistency and delimitation. Practice shows 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 agreed upon in Maastricht.

The diversity and fragmentation is obstinate because of what economics refers to as 'path dependencies'. Because of the different institutional history of the pillars, which during their development created separate regimes in these areas, it has become difficult to ignore the origins of the cooperation in the three issue areas. With regard to the CFSP, in particular, the new draft Constitution maintains 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 become the default choice where decision making with regard to external relations is concerned, the point of gravity within the CFSP may come to rest more on the most sensitive issues (security and defence) and less on foreign relations. This may result in a 'residual character' of the CFSP, because of the inclusion of more and more foreign policy issues in the general external policy of the European Union.[56] At the same time, 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 present themselves. The new Constitution continues to offer possibilities in this respect.

[56] See also B. Martenczuk, 'Cooperation with Developing and Other Third Countries: Elements of a Community Foreign Policy', in Griller and Weidel, op. cit. n. 5, at pp. 385-418.