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# LEGAL BASES IN THE EUROPEAN UNION

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An Analysis of pre- and post-Lisbon conflicts  
across the pillars

**Ph.D. Thesis in Law**  
by  
**Annegret Engel**

November 2013

Durham Law School

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## ABSTRACT

This thesis explores the structure of legal bases according to competences, instruments, and procedures; as well as legal basis litigation in the European Union before and after the introduction of the Treaty of Lisbon. Its main contribution lies in the analysis of general criteria for legal basis litigation as they have been developed under supranational EU law. It discovers several flaws inherited in the quest for the correct legal basis on the grounds of overlapping competences, divergent *inter*-institutional interests, and inconsistencies in the courts' judgements. In addition, the previous pillar structure of the EU has also led to cross-pillar litigation which is particularly the case in the area of external relations.

With the introduction of the Treaty of Lisbon, the previous pillar structure has been abolished and the former third pillar has been integrated into the realm of supranational EU law. While the intergovernmental sphere is thus minimised to the area of common foreign and security policy, legal basis conflicts will continue to occur between this area and the TFEU as well as within the TFEU itself. In addition, the Lisbon Treaty has even created new problems concerning the choice of the correct legal basis, most notably as regards the newly codified competence categories as well as the new hierarchy of legal instruments. This may require the development of new criteria for legal basis litigation in order to guarantee legal certainty in these areas for future cases.

## LIST OF ABBREVIATIONS

ACP	African, Caribbean, and Pacific Group
Art	Article
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
DHS	Department of Homeland Security
EAEC	European Atomic Energy Community
EEC	European Economic Community
EC	European Community
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
e.g.	<i>exempli gratia</i> (for example)
ERTA	European Agreement concerning the work of crews of vehicles engaged in international road transport
et al.	<i>et alii</i> (and others)
etc	<i>et cetera</i> (and other things)
EU	European Union
EUI	European University Institute
ECR	European Court Reports
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
i.e.	<i>id est</i> (that is)
ILO	International Labour Organisation
JHA	Justice and Home Affairs
NATO	North Atlantic Treaty Organisation
No	number
p.	page
para	paragraph
PJCC	Police and Judicial Cooperation in Criminal Matters
PNR	Passenger Name Record
SEA	Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPs	Trade-Related Aspects of Intellectual Property Rights



UK..... United Kingdom  
UN..... United Nations  
US..... United States  
v..... *versus*  
WEU..... Western European Union  
WTO..... World Trade Organisation

## **DECLARATION OF ORIGINAL AUTHORSHIP**

I confirm that this thesis is my own work and the use of all material from other sources has been properly and fully acknowledged.

Parts of the third Chapter of this thesis have been published in a collective EUI Working Paper: Engel, Annegret (2012), “Retained Distinctiveness in the Integrated Third Pillar: Safeguarding Member States’ Competences in the European Criminal Law Sphere”, in “Deconstructing EU Federalism through Competences”, EUI Working Paper LAW 2012/06, p. 39-49.

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# INTRODUCTION

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The motivation of this thesis has been the incomplete and often rather fragmented literature on the structure of legal bases and the resulting legal basis litigation in the European Union. While certain cases have been discussed extensively in academic literature (e.g. *Tobacco Advertising*, *ECOWAS*), there is little analysis of the generally underlying criteria and principles governing the choice of the legal basis by the European institutions. Such an analysis has, however, become necessary in order to better understand and possibly predict judicial outcomes, or to identify existing flaws in the current legislative framework. Despite the introduction of the Treaty of Lisbon, differences in the structure of legal bases and therefore the problem of legal basis litigation will continue to exist with minor changes. Therefore this thesis will provide a comprehensive discussion of legal bases and legal basis litigation under supranational EU law as well as the intergovernmental areas, *intra-pillar* as well as *inter-pillar* conflicts, before and after the Lisbon Treaty. At first, the introductory section will provide a general overview of the structure of legal bases, secondly the causes for legal basis litigation in the EU, which is thirdly followed by a brief examination of the development of the pillar structure, and fourthly an outline of this thesis.

## I. The structure of legal bases

The structure of legal bases is an important indicator for the potential for legal basis litigation: The existence of differences between legal bases often causes conflicts between the EU institutions or between the EU and its Member States. In the same legal order, differences can be found in the scope and nature of the competence,<sup>1</sup> in the legal instruments and the procedures.<sup>2</sup> In general, all actors aim for a maximum of influence and autonomy and therefore favour one legal basis over another which may then conflict with the choice of legal basis of their counterpart. The different institutional

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<sup>1</sup> “[A] competence is the *material field* within which an authority is entitled to exercise power.” Definition in Schütze, R. (2009). *The European Community's Federal Order of Competences - A Retrospective Analysis. 50 Years of the European Treaties: Looking Back and Thinking Forward*. M. Dougan and S. Currie. Oxford, Hart Publishing: 63-92, at page 65.

<sup>2</sup> This is called the “supply-side” factor, Jupille, J. (2006). “The Legal Basis Game and European Governance.” *Swedish Institute for European Policy Studies* 12: 1-70, at page 17.

actors thus endeavour to continuously increase their input during the legislative process and to extend their overall scope of competences:<sup>3</sup> Different legislative procedures can have an impact on the degree of involvement of the different legal actors available (for example the European institutions, competent authorities of the Member States, etc.). Finally different legal instruments having different legal effects can be used dependent on the legal base.

## II. The conundrum of legal basis litigation

The so-called ‘principle of conferred powers’ according to Article 5 TEU requires the Union to derive any action from the powers provided for in the Treaties:

the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.

In general, the reference to a specific legal basis is considered “as a minimum item of information” for a measure to contain.<sup>4</sup> Further, according to the Court, the choice of the correct legal basis is of “constitutional significance”: The reliance on an incorrect legal basis would render any measure or agreement which was adopted on such basis nugatory.<sup>5</sup>

Notwithstanding the fact that the conferral principle is of a constitutional nature, it has been undermined in the past three decades or so by the courts’ teleological interpretation and by the more and more extensive application of general legal bases, such as Articles 114 and 352 TFEU. The EU has extended its competences within the first pillar in such a way that the principle of enumerated powers has become less and less important. Thus, for the majority of cases, there will almost always be a Union

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<sup>3</sup> This is called the “demand-side” factor, *ibid*, at pages 17 and 18.

<sup>4</sup> Case C-370/07, *Commission of the European Communities v Council of the European Union*, [2009]: ECR I-08917, at para 52. This judgement was criticised on the grounds that the threshold was placed too high for the requirement to indicate a legal basis and that the Court failed to explain under which circumstances an exceptional non-statement of the legal basis in a measure would be allowed; Heliskoski, J. (2011). "Court of Justice: Case C-370/07, *Commission v. Council*, Judgment of the European Court of Justice (Second Chamber) of 1 October 2009, nyr." *Common Market Law Review* 48(3): 555-567, at pages 566 and 567.

<sup>5</sup> Opinion 2/00, *Cartagena Protocol on Biosafety*, [2001]: ECR I-09713, at para 5.

competence available.<sup>6</sup> In only a few exceptions, the courts have refused to accept that those provisions could serve as a legal basis for a proposed measure.

In general, therefore, the question today is less likely about whether there *is* a legal basis available, but rather the determination of *which* one applies. Legal basis litigation has therefore become a frequently discussed issue before the European courts. This phenomenon is not an invention of the European Union but is quite familiar to some of its Member States, for example Germany.<sup>7</sup> The quest for the correct legal basis is often complicated *inter alia* by the complexity of the treaties and can mainly be attributed to the fact that there are differences in the structure of legal bases.

### III. The pillar structure of the EU

For more than one and a half decades, EU law was shaped by the artificial concept of a three-pillar structure, introduced in 1993 by the Treaty of Maastricht.<sup>8</sup> The three pillars represented different sets of competences and were decisive in determining *who* was acting *when* and *how*.<sup>9</sup> The distinction between different competences thus had an impact on the choice of which measure had to be used, the institutions involved in the decision-making process and the degree of judicial control.<sup>10</sup> During the time of its existence, the pillar structure was amended twice, once by the Treaty of Amsterdam<sup>11</sup> and once by the Treaty of Nice<sup>12</sup>. Throughout its existence, the system was flawed with certain deficiencies concerning uncertainty and inconsistencies in legal basis litigation; competence overlaps between the pillars, i.e. between the Union and the Member

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<sup>6</sup> As has been observed, e.g., in Wuemeling, J. (2004). "Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents." Europarecht 39(2): 216-229, at page 219.

<sup>7</sup> See e.g. BVerfG, 1 BvR 636/02 vom 9.6.2004, concerning shop opening hours on Sundays and public holidays.

<sup>8</sup> For an extensive study on the Maastricht Treaty, see O'Keeffe, D. (1994). Legal issues of the Maastricht Treaty. London, Chancery Law Publishing Ltd.

<sup>9</sup> It goes without saying that such differences could not only occur between the three pillars but also within the pillars themselves, i.e. *inter-* as well as *intra-*pillar differences.

<sup>10</sup> This sometimes created confusion and many authors pleaded for a simplification of the treaties and the underlying pillar structure. As an example, see de Witte, B. (2002). "Simplification and Reorganization of the European Treaties." Common Market Law Review 39(6): 1255-1287.

<sup>11</sup> For an interesting discussion on the changes introduced by the Treaty of Amsterdam, see O'Keeffe, D. and Twomey, P. (Eds.), (1999). Legal Issues of the Amsterdam treaty. Oxford, Hart Publishing.

<sup>12</sup> Further discussion on the changes introduced by the Treaty of Nice can be found in Andenas, M. and Usher, J.A. (Eds.), (2003). The Treaty of Nice and beyond: Enlargement and constitutional reform. Oxford, Hart Publishing.

States; as well as a certain lack of clarity surrounding the distinction between the concepts of the European Community and the European Union.<sup>13</sup>

With the so-called ‘de-pillarisation’ of the Union, the pillar structure has finally met its fate by formally being abolished under the Treaty of Lisbon. Thus, at first glance, it seems as if these problems surrounding the former pillar structure have now been solved. However, having a closer look at it, such a conclusion would be rather overhasty. The merger of the pillars does not in itself solve this kind of issues. While the Reform Treaty has brought about an integration of the former third pillar into the realm of supranational EU law which constitutes the Treaty on the Functioning of the European Union (TFEU), some of the former intergovernmental characteristics of the area of freedom, security and justice have been preserved. In addition, the area of common foreign and security policy remains an entirely separate area.<sup>14</sup> Therefore, not only will there be *intra*-pillar legal basis litigation after Lisbon, but also *inter*-pillar conflicts will continue to be at issue before the courts. In addition, the Treaty of Lisbon has created new problems for legal basis litigation which may equally ‘replace’ those conflicts which apparently have been solved by the Treaty.

#### **IV. Thesis outline**

This thesis will discuss the structure of legal bases and legal basis litigation in three Chapters. While these Chapters are inspired by the three pillars, they are not restricted to such a distinction since a clear delimitation of the different policy areas has never been achieved and additionally has varied over time. Instead, the distinctions drawn in this thesis shall be as follows:

The first Chapter will discuss the structure of legal bases and legal basis litigation under supranational EU law, where the courts have been able to develop a sophisticated array

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<sup>13</sup> Compare von Bogdandy, A. (1999). “The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System.” *Common Market Law Review* 36(5): 887-910; De Witte, B. (1998). The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral? *The European Union after Amsterdam: a legal analysis*. T. Heukels, N. Blokker and M. Brus (Eds.). The Hague, Kluwer Law International; and Pechstein, M. and C. Koenig (2000). *Die Europäische Union*. Tübingen, J.C.B. Mohr (Paul Siebeck).

<sup>14</sup> Wessel has argued that “the Union’s pillars are still separate, but inseparable”, Wessel, R. A. (2009). The Constitutional Unity of the European Union: The increasing irrelevance of the pillar structure?. *European Constitutionalism beyond Lisbon*. J. Wouters, L. Verhey and P. Kiiver. Antwerp, Intersentia: 283-306, at page 305.



of general criteria which are the determinant factors in the quest for the correct legal basis. Since the courts' scrutiny as regards judicial review is rather limited within the intergovernmental policy areas, such criteria have been elaborated far better under the former first pillar, which may thus be considered as an important signpost for other areas as well. Therefore, the first Chapter also constitutes the foundation for Chapters two and three.

The second Chapter will be discussing the structure of legal bases and legal basis litigation in the area of external relations. Traditionally, provisions in this field can be found under the common foreign and security policy (former second pillar); however, they also appear under supranational EU law, which thus gives this area an *inter-pillar* dimension. The criteria established under Chapter one will be assessed in how far they can also apply here or whether the courts had to develop new principles for this cross-pillar area.

The third Chapter will be analysing the structure of legal bases and legal basis litigation in the area of freedom, security and justice under the intergovernmental (Maastricht and Amsterdam) and supranational (Amsterdam and Lisbon) frameworks. Again, the previously established criteria under the former first pillar will be examined as regards their applicability in this area.

Since this thesis mainly refers to legal basis litigation, thus the actual jurisdiction of the European courts, little attention is drawn on such conflicts which may be solved before they reach the courts. As regards the legislative frameworks, this thesis does not attempt to provide a thorough overview of the various treaties and their respective changes. Instead, it focuses on selected issues which have already generated or will generate conflicts between legal bases and therefore could contribute to the main discussion.

# CHAPTER I:

## Supranational EU Law: General Criteria and Paradoxes

---

### I. Introduction

Legal basis litigation has been best evolved under supranational EU law, thus the former first pillar which now can be found under the Treaty on the Functioning of the European Union (TFEU). This area is characterised by a diverse set of provisions which makes it rather interesting to examine legal basis litigation here: Not only does supranational EU law provide the full range of the different types of competences, legal instruments and legislative procedures; but it also allows for a thorough judicial review process to take place. The provisions of the former first pillar have thus been in the centre of the courts' legal basis litigation, thus having been challenged to determine the correct legal basis on numerous occasions.

In order to provide guidelines for the determination of the correct legal basis for a proposed measure the European courts have had to develop general criteria of legal basis litigation. In particular, this involves a thorough scrutiny by the Court of the contested measure, analysing it according to its aim and content ('centre of gravity'), and evaluating the different legal bases available. These criteria are an attempt to achieve more legal certainty and judicial consistency in European law. However, various treaty amendments have sometimes blurred the picture and led to rather ambiguous outcomes. Further, the courts have diverted from their own established rules on various occasions and have therewith created additional confusion in legal basis litigation. Nevertheless, it will be shown that these guidelines may also be applied under the Treaty of Lisbon; which, although it has attempted to remedy some of the legal basis conflicts, still provides sufficient potential for newly emerging problems in legal basis litigation.

The differences in the structure of legal bases and the resulting issue of legal basis litigation under the former first pillar shall be in the centre of the discussion in this

Chapter. First, it will scrutinise the causes of legal basis litigation, including an analysis of the nature of the competence, legal instruments and legislative procedures. This will also include a discussion about new legal basis conflicts which have emerged under the Treaty of Lisbon and which are anticipated to play a major role in future cases before the courts, as well as a potential development of new criteria of legal basis litigation. Second, it will go on to identify the general criteria which have been developed in order to provide guidelines as to which legal basis can be used for which type of measure, such as the ‘centre of gravity’ theory and the *lex specialis derogat legi generali* principle. Last, there will be some concluding remarks, summarising the findings of this Chapter.

## **V. Differences between legal bases**

Supranational EU law provides a vast variety of different provisions in various policy areas. Unfortunately, the delimitation between these provisions is not always clearly defined. Therefore, in some cases it may happen that a proposed measure could be adopted on two or more legal bases. Choosing one over another legal basis may have significant implications: First, there may be different competence types at stake which is the determinant factor of whether the Union is competent to act on its own, in parallel with the Member States, or only in a supportive function. Second, different legal instruments can also lead to legal basis litigation if a provision prescribes the adoption of a specific legal instrument. Third, legislative procedures may have an impact on which institution may perform which specific role in the legislative process for the adoption of a measure. It is thus necessary to look at these differences first as they constitute the basis of the courts’ analysis in legal basis litigation.

### **A. The nature of the competence**

Legal basis litigation may occur if there are two or more potential legal bases which differ in terms of the types of competences, i.e. those of the European Union and its Member States. The Union’s power to act could be exclusive, concurrent, shared, complementary, coordinating, parallel, or joint in relation to the competences of the

Member States.<sup>1</sup> These different types of competences have evolved over time, in particular since the introduction of the Single European Act; however, until the introduction of the Treaty of Lisbon, they were not codified<sup>2</sup> and thus were subject to a constant shift and re-interpretation in favour of the *acquis communautaire*. While the codification of the types of competences puts an end to this ‘supranationalisation’ of competences, most of the legal basis conflicts will nevertheless remain after Lisbon since an exact delimitation between competences has not been achieved by the Treaty. In addition, new problems of legal basis litigation have emerged after Lisbon which will also be discussed in this section.

## **1. Before Lisbon**

Before the introduction of the Treaty of Lisbon, there were neither clearly defined, nor codified, competence categories to be found in the treaties. The classification of the nature of competences has developed over time with the help of the jurisdiction of the European courts in legal basis litigation. As could be argued, this approach illustrates a high degree of flexibility and adaptability to changes over time. However, as regards transparency and legal certainty this approach has resulted in various problems before the courts.

### **a) Exclusive EU competences**

Initially, exclusive competences were limited<sup>3</sup> and the courts acknowledged such exclusivity only in few areas. Most prominently, this was the case with the area of common commercial policy. The Court found in its *Opinion 1/75* that an exclusive

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<sup>1</sup> For a detailed analysis on the different competences and their definition and scope, see Schütze, R. (2009). *The European Community's Federal Order of Competences - A Retrospective Analysis. 50 Years of the European Treaties: Looking Back and Thinking Forward*. M. Dougan and S. Currie. Oxford, Hart Publishing: 63-92.

<sup>2</sup> The Treaty did not provide a clear set of competences and their boundaries for all areas falling there under; instead the respective competences could only be found by looking at the specific treaty article of the policy area in question, specifying a different scope of the nature of competence in every policy area.

<sup>3</sup> Dashwood, A. (1998). "States in the European Union." *European Law Review* **23**(3): 201-216, at page 212.

competence had to rest with the Union under the area of common commercial policy (ex Article 113 EEC; now Article 207 TFEU).<sup>4</sup>

[A]ny unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality.

It cannot therefore be accepted that (...) Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere. The provisions of [Article 207 TFEU] (...) show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible.

To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.<sup>5</sup>

While legal basis litigation has still evolved concerning the broader area of common commercial policy, this shall be discussed under the external relations in Chapter II.

Exclusive competences were also found in the area of fisheries policy. In *Kramer and others*,<sup>6</sup> the Court was asked whether the Union had an exclusive competence to regulate fishing quotas according to *inter alia* ex Article 43 EEC (now Article 43 TFEU). The Court held that the Union has

the power to take any measures for the conservation of the biological resources of the sea, measures which include the fixing of catch quotas and their allocation between the different Member States.<sup>7</sup>

This was reiterated in *Commission v Ireland*,<sup>8</sup> and *Zonen and others*.<sup>9</sup>

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<sup>4</sup> Opinion 1/75, Draft Understanding on a Local Cost Standard drawn up under the auspices of the OECD, [1975]: ECR 1355.

<sup>5</sup> *Ibid*, at paras 14-16.

<sup>6</sup> Joined Cases 3, 4 and 6-76, *Cornelis Kramer and others*, [1976]: ECR 01279.

<sup>7</sup> *Ibid*, at paras 30/33.

<sup>8</sup> Case 61/77, *Commission of the European Communities v Ireland*, [1978]: ECR 00417.

The distinction between exclusive and shared competences has further been elaborated on in *Commission v UK*.<sup>10</sup> Here, the UK had adopted a series of unilateral measures in the area of sea fisheries,<sup>11</sup> which was subsequently challenged by the Commission on the grounds that this policy area falls within the exclusive competences of the Union with the result that the UK would have breached EU law.<sup>12</sup> This was also confirmed by the Court, which held that the Union had exclusive competences in this area

within which Member States may henceforth act only as *trustees of the common interest*, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures (...).<sup>13</sup>

Under the exclusive competence areas of the Union, the Member States were thus obliged to consult the Commission and to proceed only upon approval with any proposed measure. If such approval was rejected in its entirety or in parts by the Commission, the Member States were expected to amend or abandon the original proposal.<sup>14</sup>

The Union has further been able to acquire exclusive competences subsequently with the help of the ‘doctrine of implied powers’. This allowed the Union to extend its exclusive competences externally in areas in which no such exclusivity existed internally, to the detriment of Member States’ powers. Subsequently exclusive powers will be discussed in Chapter II as they largely concern the external sphere of EU law.

### **b) Non-exclusive EU competences**

The overly dominant role of the Union competences and its expanding *acquis communautaire* was particularly visible with all areas of non-exclusive competences, where it was provided in the old Article 5 EC (now Article 5 TEU) that

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<sup>9</sup> Joined cases 185/78 to 204/78, Criminal proceedings against J. van Dam en Zonen and others, [1979]: ECR 02345.

<sup>10</sup> Case 804/79, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, [1981]: ECR 01045.

<sup>11</sup> The Fishing Nets (North-East Atlantic) (Variation) Order 1979, SI No 744; The Immature Sea Fish Order 1979, SI No 741; The Immature Nephrops Order 1979, SI No 742; The Nephrops Tails (Restrictions on Landing) Order 1979, SI No 743; The Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979, SI No 235; The Herring (Irish Sea) Licensing Order 1977, SI No 1388; The Herring (Isle of Man) Licensing Order 1977, SI No 1389.

<sup>12</sup> Case 804/79, supra note 10, at para 1.

<sup>13</sup> Ibid, at para 30, emphasis added.

<sup>14</sup> Ibid, at para 31.

the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Shared competences between the Union and its Member States have been said to be diverse in nature rather than homogeneous.<sup>15</sup> As has been claimed by Schütze, other competence types may be considered to constitute sub-categories of shared competences rather than being classified as distinct on their own: These include in particular parallel and joint competences which may in theory be defined separately, however, practically, could turn out as mere shared powers.<sup>16</sup> A certainly distinct type of competence from the otherwise exclusive or shared powers can be found in the category of complementary competences. This concept comprises the introduction of minimum harmonisation measures, allowing each Member State to introduce more stringent measures in such an area,<sup>17</sup> as well as the introduction of incentive measures.<sup>18</sup>

The distinction of the category of complementary competences was at issue in the *Fornasar* case.<sup>19</sup> The contested measures<sup>20</sup> in this case had been adopted by the Union under the area of environmental law establishing a list of hazardous waste. While this list was considered exhaustive by *inter alia* the Commission, some national governments<sup>21</sup> objected to such an interpretation requiring certain freedom for Member States to supplement this list with additional hazardous waste.<sup>22</sup> In its judgement, the Court confirmed the complementary nature of Union competences in the area of environmental policy. While it acknowledged the need for a high level of protection in this field, the Court nevertheless took the diversity of Member States' situations into consideration,<sup>23</sup> and thus denied pre-emption of national powers in this sensitive area.<sup>24</sup>

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<sup>15</sup> Craig, P. (2004). "Competence: clarity, conferral, containment and consideration." European Law Review 29(3): 323-344, at page 333.

<sup>16</sup> Schütze, R. (2009), *supra* note 1, at pages 82-87.

<sup>17</sup> E.g. in the area of environmental policy (old Arts 175 and 176 EC, now Arts 192 and 193 TFEU) or social policy (old Art 137 EC, now Art 153 TFEU).

<sup>18</sup> E.g. in the area of public health (old Art 152 EC, now Art 168 TFEU).

<sup>19</sup> Case C-318/98, Criminal proceedings against Giancarlo Fornasar, Andrea Strizzolo, Giancarlo Toso, Lucio Mucchino, Enzo Peressutti and Sante Chiarcosso, [2000]: ECR I-04785.

<sup>20</sup> Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (Official Journal 1991, L 377, p. 20) and Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689 (Official Journal 1994, L 356, p. 14).

<sup>21</sup> Germany and Austria.

<sup>22</sup> Case C-318/98, *supra* note 19, at paras 35 and 36.

<sup>23</sup> *Ibid*, at para 46.

## 2. After Lisbon

With the introduction of the Treaty of Lisbon there are now three codified competence categories available including their respective scope: The Treaty confers exclusive competences in the policy areas listed under Article 3 TFEU,<sup>25</sup> shared competences under Article 4 TFEU, coordinating competences according to Article 5 TFEU, and competences to support/coordinate/supplement under Article 6 TFEU.<sup>26</sup> Exclusive competences are defined in Article 2(1) TFEU, allowing

only the Union [to] legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union of for the implementation of Union acts.

Under shared competences according to Article 2(2) TFEU

the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

The Union's competence to support/coordinate/supplement Member States' action shall not supersede the latter's competences in the specified areas and must not entail any harmonisation of national laws or regulations.<sup>27</sup>

The codification of competence categories may be considered an achievement, in particular in comparison to the pre-Lisbon era. This can be seen, for example, with the area of common commercial policy which now falls under the exclusive competence of the Union and it is therefore anticipated that this area will create less legal basis conflicts than before.<sup>28</sup> However, it could be argued that Article 3(1) TFEU expands

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<sup>24</sup> For a thorough analysis of complementary competences, see Schütze, R. (2006). "Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order." *European Law Review* 31(2): 167-184.

<sup>25</sup> Art 3(1) TFEU grants exclusive competence to the EU in the following five policy areas: customs union, the establishment of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, and common commercial policy.

<sup>26</sup> See also Piris, J.-C. (2010). *The Lisbon Treaty: A Legal and Political Analysis*. Cambridge, Cambridge University Press, at pages 74-78.

<sup>27</sup> Art 2(5) TFEU.

<sup>28</sup> This was mainly due to the allocation of two different types of competence to this area: exclusive competences of the Union and shared competence of the Union and its Member States (see above). For



exclusive EU competences compared to those previously recognised by the case law.<sup>29</sup> This is significant for future legal basis litigation as these newly defined exclusive competences will now be in competition with legal bases which confer upon the Union a non-exclusive competence.<sup>30</sup> In addition, as will be argued, controversies in delimiting competences remain and, in addition, new problems have emerged.

First, the obvious: some policy areas have been allocated two competence categories, while others have not been allocated any of the above mentioned. While it could be argued that the latter will automatically fall under shared competences due to their residual nature,<sup>31</sup> some policy areas receive an exceptional treatment. Those include economic and employment policies,<sup>32</sup> research, technological development and space,<sup>33</sup> development cooperation and humanitarian aid,<sup>34</sup> and social policy.<sup>35</sup> In addition, the latter is also classified as a shared competence under Article 4(2)(b) TFEU. Such a 'double-classification'<sup>36</sup> can also be observed for the areas of health,<sup>37</sup> and fisheries policy.<sup>38</sup> One may further wonder whether the distinctions made between the customs union,<sup>39</sup> the establishment of the competition rules necessary for the functioning of the internal market,<sup>40</sup> and the internal market;<sup>41</sup> or the economic policy,<sup>42</sup> the monetary policy,<sup>43</sup> and the common commercial policy;<sup>44</sup> will be sufficient in order to ensure a clear delimitation of the different competence typologies there under.

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a closer analysis of the reforms under the Lisbon Treaty in this area, see Puig, G. V. and B. Al-Haddab (2011). "The common commercial policy after Lisbon: an analysis of the reforms." European Law Review **36**(2): 289-301.

<sup>29</sup> Previously, the Court had recognised exclusive EU competences in the area of common commercial policy and the conservation of marine biological resources. See discussion above.

<sup>30</sup> See, e.g. Schütze, R. (2012). European Constitutional Law. Cambridge, Cambridge University Press, at pages 164-166.

<sup>31</sup> Art 4(1) TFEU.

<sup>32</sup> Arts 2(3), 5(1) and (2) TFEU.

<sup>33</sup> Art 4(3) TFEU.

<sup>34</sup> Art 4(4) TFEU.

<sup>35</sup> Art 5(3) TFEU.

<sup>36</sup> Also called "competence cocktails", Schütze, R. (2008). "Lisbon and the federal order of competences: a prospective analysis." European Law Review **33**(5): 709-722.

<sup>37</sup> Shared competence (Art 4(2)(k) TFEU) and competence to support/coordinate/supplement (Art 6(a) TFEU).

<sup>38</sup> Exclusive competence (Art 3(1)(d) TFEU) and shared competence (Art 4(2)(d) TFEU).

<sup>39</sup> Exclusive competence (Art 3(1)(a) TFEU).

<sup>40</sup> Exclusive competence (Art 3(1)(b) TFEU).

<sup>41</sup> Shared competence (Art 4(2)(a) TFEU).

<sup>42</sup> Special competence (Arts 2(3) and 5(1) TFEU).

<sup>43</sup> Exclusive competence for countries whose currency is the euro (Art 3(1)(c) TFEU).

<sup>44</sup> Exclusive competence (Art 3(1)(e) TFEU).

For example, the Treaty distinguishes between the area of *public* health and the area of *human* health. The former is regulated by shared competences,<sup>45</sup> while under the latter the Union enjoys a mere competence to support/coordinate/supplement Member States' actions.<sup>46</sup> As could be argued, this distinction might not always be as straightforward and could therefore generate new problems for legal basis litigation. Further, Article 168(5) TFEU explicitly concerns “measures designed to protect and improve *human* health [...] and measures which have as their direct objective the protection of *public* health”.<sup>47</sup> It is thus possible to adopt a measure on this provision without formally classifying its objectives into either area. However, this then poses serious problems for the actual delimitation of competences between the Union and the Member States, whether the Union could pre-empt Member States' competences, or whether the measure could entail approximation of Member States' laws.<sup>48</sup> Therefore, it will be vital to ensure a clear distinction between both areas in order to be able to classify measures in a consistent manner according to their objectives. In the present situation, it might however be more obvious to decide for the area of public health and thus for shared competences.

Second, the less obvious: Article 2(6) TFEU provides that the exact scope of the competence in relation to one policy area may only be determined after consulting the relevant provisions under that area in question. In other words, even if a policy area has been placed within one general competence type it may still reveal elements of other types when having a detailed look at the specific provisions.<sup>49</sup> This potentially extends the number of actual competence types and complicates the matter of clear competence allocations. In fact, this resembles the situation of the pre-Lisbon era and, as could be argued, renders such competence categories rather inefficient or even counteracts legal certainty. Admittedly, it would have been almost impossible for the European legislator

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<sup>45</sup> Arts 2(2) and 4(2)(k) TFEU.

<sup>46</sup> Arts 2(5) and 6(a) TFEU.

<sup>47</sup> Emphasis added.

<sup>48</sup> The latter could be regarded as immaterial in this case since such harmonisation is already explicitly excluded under Art 168(5) TFEU.

<sup>49</sup> Competences diverging from the general categorisation (mainly from the type of shared competences) can be found e.g. for the area of freedom, security and justice under Art 79(4) TFEU: “to provide incentives and support for the action of Member States”, for social policy under Art 153(1) TFEU: “the Union shall support and complement the activities of the Member States”, for consumer protection under Art 169(2)(b) TFEU: “measures which support, supplement and monitor the policy pursued by the Member States”. The category of shared competences has therefore been described as a mere “umbrella term” embracing a number of variations, Schütze, R. (2009), *supra* note 1, at page 91.

to define stiff boundaries; and while certain flexibility in this regard may be desirable,<sup>50</sup> this cannot result in an overlapping of competences to the extent that some policy areas explicitly fall within two types of competences.<sup>51</sup> As can be seen from the above, the newly codified system of competences could result in the application of multiple types of competences for one policy area.

## **B. Legal Instruments**

Different legal instruments entail different legal effects, such as direct effect or pre-emption. This may be an important factor for legal basis litigation if a proposed measure could be adopted on the basis of two or more legal provisions each of which prescribes a different legal instrument. While the Commission is interested in more harmonising effects, Member States favour a maximum degree of discretion for their implementation. Initially, the differences between legal instruments were rather rigid; however, various judgements and treaty amendments have diluted such a clear-cut delimitation. Nevertheless, it is important to analyse legal basis litigation as regards the legal instruments at stake, since their different legal effects still exist albeit in a much weakened form. In addition, as will be shown, the Treaty of Lisbon has introduced a new hierarchy of legal instruments which might lead into new legal basis litigation.

### **1. The set of legal instruments**

The set of legal instruments available under the first pillar has not been changed by the Treaty of Lisbon and has various implications: According to Article 288 TFEU, regulations, directives and decision are binding, while recommendations and opinions are non-binding instruments.<sup>52</sup> Regulations are also directly applicable and thus equipped with direct effect.<sup>53</sup> Such direct effect automatically increases the efficiency of an EU measure since it does not require further implementing measures within the

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<sup>50</sup> Weatherill, S. (2005). Competence Creep and Competence Control. *Yearbook of European Law*, 23, 2004. P. Eeckhout and T. Tridimas. Oxford, Oxford University Press, at page 18.

<sup>51</sup> R. Schütze has argued that “each competence must belong to only one category”, Schütze, R. (2009), supra note 1, at page 71.

<sup>52</sup> Bast identifies three other types of legal instruments emanating from these general instruments: state-addressed decisions, addressee-less decisions, as well as other non-binding legal instruments, such as the resolution, Bast, J. (2009). Legal Instruments and Judicial Protection. *Principles of European Constitutional Law*. A. v. Bogdandy and J. Bast. Oxford, Hart Publishing, at pages 364-366.

<sup>53</sup> See Case 41-74, Yvonne van Duyn v Home Office, [1974]: ECR 01337, at para 12.

Member States.<sup>54</sup> Nevertheless, in *Monte Arcosu*, the Court found that the contested regulation did not have such direct effect on the grounds that some of its provisions required the adoption of further implementing measures which was up to the discretion of the national state.<sup>55</sup>

It was also attempted to apply direct effect to other measures, such as directives which are only binding “as to the result to be achieved, upon each Member State to which it is addressed”<sup>56</sup>. However, the courts have been more reluctant to accept direct effect for directives,<sup>57</sup> clearly favouring national implementing measures,<sup>58</sup> and therefore only accepted an indirect effect of directives.<sup>59</sup> Most commonly, the Court has reasoned that

where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion set by the directive (...).<sup>60</sup>

In contrast to regulations, directives further lack horizontal direct effect,<sup>61</sup> as they can only have vertical effect.<sup>62</sup> Thus, in *Dori*, the Court found that

(...) a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.<sup>63</sup>

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<sup>54</sup> On a historical analysis of the development of direct effect within the EU, see de Witte, B. (2011). *Direct Effect, Primacy, and the Nature of the Legal Order. The Evolution of EU Law*. P. Craig and G. de Burca. Oxford, Oxford University Press: 323-362; Arnull, A. (2006). *The European Union and its Court of Justice*. Oxford, Oxford University Press, at pages 184-252.

<sup>55</sup> Case C-403/98, *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna, Organismo Comprensoriale no 24 della Sardegna and Ente Regionale per l’Assistenza Tecnica in Agricoltura (ERSAT)*, [2001]: ECR I-00103.

<sup>56</sup> Art 288 TFEU.

<sup>57</sup> See e.g. *Joined Cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic*, [1991]: ECR I-05357.

<sup>58</sup> Case 8/81, *Ursula Becker v Finanzamt Münster-Innenstadt*, [1982]: ECR 00053, at para 19.

<sup>59</sup> See e.g. Craig, P. (1997). "Directives: direct effect, indirect effect and the construction of national legislation." *European Law Review* 22(6): 519-538.

<sup>60</sup> Case C-287/98, *Grand Duchy of Luxembourg v Berthe Linster, Aloyse Linster and Yvonne Linster*, [2000]: ECR I-06917, at para 32.

<sup>61</sup> Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986]: ECR 00723, at para 48. See commentary on this development: Dashwood, A. (2007). "From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?" *Cambridge Yearbook of European Legal Studies* 9: 81-109.

<sup>62</sup> Schütze, R. (2006). "The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers." *Yearbook of European Law* 25(1): 91-151, at page 124.

This was clarified in the *Carp* case, where the Court explained that

(...) even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (...).<sup>64</sup>

The effects of legal instruments may therefore be considered as the determinant factor for the choice of the type of measure to be adopted: The availability of legal instruments can have an impact on legal basis litigation if a provision prescribes the adoption of a specific legal instrument. The most important conflict between legal instruments involves directives and regulations due to their direct and indirect effects. Regulations are considered to being a “direct source of rights and duties” by the Court,<sup>65</sup> since they are directly applicable in all Member States, while directives first have to be transformed by the Member States into national law before they can become applicable.<sup>66</sup> While ‘adverse repercussion’ has been acknowledged also for directives,<sup>67</sup> regulations can also have horizontal direct effect which was denied for the application of directives:

The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.<sup>68</sup>

On the grounds of these considerations, it could be argued that regulations represent the preferred legal instrument under supranational EU law.<sup>69</sup> Indeed, the statistics compiled by von Bogdandy show that 31 per cent of all legal instruments within the European Union consist of regulations, while directives amount to a total of 9 per cent only.<sup>70</sup>

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<sup>63</sup> Case C-91/92, Paola Faccini Dori v Recreb Srl, [1994]: ECR I-03325, at para 20.

<sup>64</sup> Case C-80/06, *Carp Snc di L. Moleri e V. Corsi v Ecorad Srl*, [2007]: ECR I-04473, at para 20.

<sup>65</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978]: ECR 00629, at para 15.

<sup>66</sup> Art 288 TFEU.

<sup>67</sup> See e.g. Case 103/88, *Fratelli Costanzo SpA v Comune di Milano*, [1989]: ECR 01839, at para 29.

<sup>68</sup> Case C-91/92, *supra* note 63, at para 24. See also Case T-390/94, *Aloys Schröder, Jan and Karl-Julius Thamann v Commission of the European Communities*, [1997]: ECR II-00501, at para 54.

<sup>69</sup> Schütze, R. (2006), *supra* note 62, at page 107. See also analysis of the nature of directives and regulations in Ward, A. (2007). *Judicial Review and the Rights of Private Parties in EU Law*. Oxford, Oxford University Press, at pages 25-85.

<sup>70</sup> Von Bogdandy, A., F. Arndt, et al. (2004). "Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis." *Yearbook of European Law* 23(1): 91-136, at pages 97-100.

The conflict between directives and regulations can be exemplified with the discussion in the *Massey-Ferguson* case.<sup>71</sup> The case concerned Regulation No 803/68/EEC<sup>72</sup> which was challenged by the Massey-Ferguson GmbH to be validly adopted on Article 352 TFEU as a legal basis, or, alternatively should have rather been adopted on the basis of *inter alia* Article 115 TFEU. The old version of Article 115 TFEU (ex Article 100 EEC) allowed for the adoption of a directive only, while Article 352 TFEU would also allow for a regulation to be adopted thereupon. The Council thus justified its decision to have chosen Article 352 TFEU as a legal basis on the mere grounds that the adoption of a directive would have been insufficient in order to achieve the aims pursued in the contested measure:

In the case of provisions relating to the value for customs purposes, the Council considers that, in adopting rules in that connection, it could have based itself on Article 100. But in this field the Council considers that the power to issue directives provided by Article 100 is insufficient.<sup>73</sup>

This was confirmed by the Court, which concluded in its judgement that “the procedure prescribed by Article 100 [EEC] for the approximation of legislation by means of directives does not provide a really adequate solution”.<sup>74</sup> Whether or not a specific provision is chosen as a legal basis for the adoption of a measure may thus also depend upon which legal instrument is available there under.

Another conflict between legal instruments, though maybe less important, has arisen between regulations and decisions, in particular those decisions which are addressed to Member States. In a preliminary ruling in *Grad v Finanzamt Traunstein*,<sup>75</sup> the Court was requested to review the effects of a Council decision.<sup>76</sup> The German government had argued that the effects of decisions and regulations in any case have to be considered as dissimilar. While the Court did not deny the different effects, it nevertheless held that “this difference does not exclude the possibility that the end result (...) may be the same as that of a directly applicable provision of a regulation.”<sup>77</sup>

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<sup>71</sup> Case 8-73, *Hauptzollamt Bremerhaven v Massey-Ferguson*, [1973]: ECR 00897.

<sup>72</sup> Regulation No 803/68/EEC of the Council of 27 June 1968 on the valuation of goods for customs purposes (Official Journal 1968, L 148, p. 6).

<sup>73</sup> Case 8-73, *supra* note 71, at page 902.

<sup>74</sup> *Ibid*, at para 3, last indent.

<sup>75</sup> Case 9-70, *Franz Grad v Finanzamt Traunstein*, [1970]: ECR 00825.

<sup>76</sup> Council Decision No 65/271/EEC of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway (Official Journal Special Edition 1965, p. 67).

<sup>77</sup> Case 9-70, *supra* note 75, at para 5.

Therefore, state-addressed decisions are considered as “a second form of indirect Community legislation.”<sup>78</sup>

More recently, however, the distinction between the various legal instruments has lost significance for legal basis litigation. This can be best illustrated with the pre-emptive effect of directives as compared to regulations. Initially, a pre-emptive effect was only found for regulations: In *Bollmann*, it was held that Member States “are precluded from taking steps, for the purposes of applying the regulation, which are intended to alter its scope or supplement its provisions.”<sup>79</sup> In contrast, directives cannot be considered of having had such pre-emptive effect from the beginning.<sup>80</sup> Subsequently, however, this distinction was flattened by the courts, indicating that the effects of both instruments are rather similar: On the one hand, regulations were held to pre-empt Member States’ actions merely to the extent as it concerns “national law to a different or contrary effect”.<sup>81</sup> On the other hand, it was held that directives could also be applied to “ensure the absolute identity” of provisions across the Member States.<sup>82</sup>

As a result of this alignment of the effects of legal instruments, various treaty reforms have contributed to a successive omission of the restrictive availability of legal instruments.<sup>83</sup> Most of the legal bases provided for in the Treaty nowadays leave the choice of legal instruments to the discretion of the competent institution; they are simply required to adopt the appropriate measures.<sup>84</sup> Any legal instrument may be employed for the various legal bases available and has therefore ceased to constitute a determinant factor in legal basis litigation. Thus, as can be argued, the choice of the legal instrument may have had an impact in early cases on the actual choice of legal basis if the latter prescribed a specific legal instrument. It is clear from the above, that the Union still has its preferences as regards legal instruments. This, however, has lost its significance in recent years for legal basis litigation.

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<sup>78</sup> Schütze, R. (2006), *supra* note 62, at page 131.

<sup>79</sup> Case 40-69, *Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollmann*, [1970]: ECR 00069, at para 4.

<sup>80</sup> See e.g. Schütze, R. (2012), *supra* note 30, at pages 371 and 372.

<sup>81</sup> Case 55-77, *Marguerite Maris, wife of Roger Reboulet v Rijksdienst voor Werknemerspensionen*, [1977]: ECR 02327, at para 18.

<sup>82</sup> Case 38-77, *Enka BV v Inspecteur der Invoerrechten en Accijnzen Arnhem*, [1977]: ECR 02203, at para 12.

<sup>83</sup> *Ibid*, at page 146. See also Bast, J. (2009), *supra* note 52.

<sup>84</sup> See e.g. Art 114 TFEU which merely provides that measures shall be adopted, regardless of the type of legal instrument.

## 2. A new hierarchy

As regards legal instruments, no significant changes have been made by the Lisbon Treaty. The set of legal instruments under Article 288 TFEU matches its predecessor under the old Article 249 EC and therefore is not expected to make a significant difference. However, the newly introduced hierarchy of legal instruments<sup>85</sup> according to Articles 289, 290 and 291 TFEU certainly has to be considered as a significant change which may even lead into new legal basis conflicts which was not the case before the introduction of the Reform Treaty. The three levels in the hierarchy of legal instruments under the Lisbon Treaty are as follows: First, any binding legal instrument<sup>86</sup> which has been adopted by the legislative procedure<sup>87</sup> constitutes a legislative act.<sup>88</sup> A legislative act must regulate “*essential* elements of an area”.<sup>89</sup> Second, “*non-essential* elements of the legislative act” may be supplemented or amended by “non-legislative acts of general application”, the so-called delegated acts.<sup>90</sup> Third, implementing acts may be adopted, laying down “uniform conditions for implementing legally binding Union acts”.<sup>91</sup> The latter two have been formerly known as comitology mechanisms pursuant to ex Article 202 EC,<sup>92</sup> which has now been divided up into two separate types of non-legislative acts. While this distinction might add some clarity as regards the actual nature of the measure (delegated or implementing),<sup>93</sup> it raises new problems for legal basis litigation which shall be discussed in the following.

Having a closer look at Articles 290 and 291 TFEU, a clear delimitation between the provisions may turn out to be rather complicated. In particular, this might be the case in situations of a material overlap, i.e. the supplementation or amendment of a legislative act having the (side-) effect of also facilitating its very implementation. In other words,

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<sup>85</sup> For a general analysis of this development, see Lenaerts, K. and M. Desomer (2005). "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures." European Law Journal 11(6): 744-765. Bast argues that the categories of delegated and implementing acts merely “constitute a horizontal, rather than a vertical divide at the same level of the pyramid of EU law”, Bast, J. (2012). “New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law.” Common Market Law Review 49(3): 885-928, at page 924.

<sup>86</sup> i.e. regulation, directive, or decision.

<sup>87</sup> i.e. ordinary or special legislative procedure.

<sup>88</sup> Art 289(3) TFEU.

<sup>89</sup> Art 290(1) second indent, second sentence TFEU, emphasis added.

<sup>90</sup> Art 290(1) first indent TFEU, emphasis added.

<sup>91</sup> Art 291(2) TFEU.

<sup>92</sup> On a brief overview of the old comitology system, see Piris, J.-C. (2010), supra note 26, at pages 98-102.

<sup>93</sup> De Witte, B. (2008). Legal Instruments and Law-Making in the Lisbon Treaty. The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty? S. Griller and J. Ziller. Wien, Springer-Verlag: 79-108, at page 95.



it appears rather reasonable to assume that a measure may have more than one purpose. Thus, the question arises whether such borderline cases may trigger the application of general criteria of legal basis litigation, e.g. the 'centre of gravity' theory. This might then even challenge the superior legislative act which already defines the delegation of power according to its objectives, content, scope and duration.<sup>94</sup> Otherwise, as could be argued, the distinction between delegated and implementing acts could thus be prejudiced, in favour or against either provision.

The choice between Articles 290 and 291 TFEU has further implications on the institutions involved. While a delegated act can be adopted by the Commission only and may be subject to scrutiny by the European Parliament or the Council,<sup>95</sup> implementing acts may also be adopted by the Council in exceptional circumstances<sup>96</sup> and are subject to control by Member States.<sup>97</sup> Thus, the compliance with the limitations set out in the provisions in question will be an essential pre-requisite for the maintenance of the institutional balance. Otherwise, *inter*-institutional disputes may become inevitable if, for example, the Commission gives preference to the adoption of implementing acts rather than delegating acts in order to avoid scrutiny by the European Parliament.<sup>98</sup> Moreover, the Commission could misuse its powers by delegating to itself implementing power (for example with the help of a regulation) and therewith shift the institutional balance.<sup>99</sup> Such a practice would, however, be incompatible with the Court's previous judgement in *Parliament v Council*, where it held that

To acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaty.<sup>100</sup>

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<sup>94</sup> Art 290(1) second indent, first sentence TFEU.

<sup>95</sup> Art 290(2) TFEU. The conditions for this have to be explicitly defined in the legislative act.

<sup>96</sup> Art 291(2) TFEU in conjunction with Arts 24 and 26 TEU.

<sup>97</sup> Art 291(3) TFEU. The conditions for this have to be defined in advance by the European Parliament and the Council.

<sup>98</sup> Craig, P. (2008). The Role of the European Parliament under the Lisbon Treaty. *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* S. Griller and J. Ziller. Wien, Springer-Verlag: 109-134, at pages 123 and 124. See also Craig, P. (2011). "Delegated acts, implementing acts and the new Comitology Regulation." *European Law Review* 36(5): 671-687.

<sup>99</sup> Craig, P. (2008), *ibid*, at pages 120-122. See also Bast, J. (2012), *supra* note 85, at page 920. On a contradictory view see Ponzano, P. (2008). 'Executive' and 'delegated' acts: The situation after the Lisbon Treaty. *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* S. Griller and J. Ziller. Wien, Springer Verlag: 135-141, at page 140.

<sup>100</sup> Case C-133/06, *European Parliament v Council of the European Union*, [2008]: ECR I-03189, at para 56.

In order to avoid such conflicts and possible material overlaps between Articles 290 and 291 TFEU both provisions have to be understood as distinct constitutional concepts: The former from a horizontal perspective concerning the legislation of EU law, the latter from a vertical perspective concerning the execution of such law.<sup>101</sup> This distinction may be considered sufficiently fundamental for the Court to strike a balance between the two provisions at stake;<sup>102</sup> however, as could be argued, this will neither prevent legal basis litigation on this matter, nor enhance transparency or contribute to a simplification of the set of legal instruments.<sup>103</sup> As a result, certain mechanisms of the old comitology system of the pre-Lisbon era could remain significant in order to ensure the proper application of and distinction between Articles 290 and 291 TFEU.<sup>104</sup>

Another issue concerning Article 291 TFEU has been identified by Schütze who claims that paragraph 2 of the provision could even provide the Union with a general executive competence, similar to those under Articles 114 and 352 TFEU.<sup>105</sup> As a result, all three provisions would be available if no other more specific provision can be found as a legal basis. Further, the Court would have to establish new principles for a clear delimitation between them since this would otherwise lead to greater legal uncertainty in legal basis litigation. If Article 291(2) TFEU was indeed to be interpreted as a legal basis providing the Union with an executive power, this would certainly strengthen the Union's influence and increase its competences in the intergovernmental sphere. As could be argued, this might not be an ideal solution since from a teleological perspective certain control seems to have been intended to rest with the Member States.<sup>106</sup>

Thus, as could be argued, the newly introduced hierarchy of legal instruments could cause conflicts for legal basis litigation even in areas where no such conflicts previously existed. This could be the case, for example, in the area of fiscal politics. Here, secondary legislation has so far been a common approach to legislate in this field and

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<sup>101</sup> Schütze, R. (2011). "'Delegated' Legislation in the (new) European Union: A Constitutional Analysis." *Modern Law Review* **74**(5): 661-693, at pages 690 and 691.

<sup>102</sup> Driessen, B. (2010). "Delegated legislation after the Treaty of Lisbon: an analysis of Article 290 TFEU." *European Law Review* **35**(6): 837-848, at page 843.

<sup>103</sup> Hofmann, H. (2009). "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality." *European Law Journal* **15**(4): 482-505, at page 499.

<sup>104</sup> Möllers, C. and J. VonAchenbach (2011). "Die Mitwirkung des Europäischen Parlaments an der abgeleiteten Rechtsetzung der Europäischen Kommission nach dem Lissabonner Vertrag." *Europarecht* **46**(1): 39-60, at page 44.

<sup>105</sup> Schütze, R. (2010). "From Rome to Lisbon: "Executive Federalism" in the (new) European Union." *Common Market Law Review* **47**(5): 1385-1427, at pages 1397-1400.

<sup>106</sup> For an analysis of Art 291 TFEU, see also Stelkens, U. (2011). "Art. 291 AEUV, das Unionsverwaltungsrecht und die Verwaltungsautonomie der Mitgliedstaaten." *FÖV Discussion Papers* **68**: 1-44.

will now have to distinguish between ‘delegated’ and ‘implementing’ acts according to Articles 290 and 291 TFEU. As could be argued, the courts might therefore have to apply general criteria of legal basis litigation in order to determine the correct legal basis for such measures. One possibility could be the application of the ‘democracy maximising’ rationale.<sup>107</sup> This would certainly favour the application of Article 290 TFEU which can be considered to be more democratic than Article 291 TFEU, since the latter does not allow for the European Parliament to be involved in the legislative process. However, this might lead to a pre-emption of implementing acts and it is therefore possible that the courts might even develop new principles of legal basis litigation in such situations. Thus, it remains to be seen how the first legal basis conflicts in this area will be solved.

### **C. Legislative Procedures**

Differences in the legislative procedure may also have an impact on legal basis litigation. Such differences in the legislative process include in particular voting requirements, i.e. qualified majority or unanimity; and the institutional balance, i.e. each institution’s degree of involvement in the legislative process.<sup>108</sup> Generally, the Commission supports legal bases which prescribe qualified majority voting, thus avoiding single Member States to be able to block a proposed measure. In contrast, the Council prefers unanimity voting as this leaves the Member States with a maximum amount of influence in the legislative process. The Parliament’s interest is to ensure the maintenance of the institutional balance, i.e. its own influence favouring legal bases which require co-decision rather than a mere consultation procedure, the latter being preferred by Council and Commission. The following will therefore discuss legal basis litigation concerning the different legislative procedures.

#### **1. Voting requirements**

Differences in the requirements for the voting procedure in the Council could be said to have been a rather decisive factor as to when a measure is to be adopted on a specific legal basis. With the enlargement of the European Union, qualified majority became

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<sup>107</sup> See further below.

<sup>108</sup> On a detailed analysis of the institutional balance and the different procedures see Dashwood, A. (1998), *supra* note 3.

necessary in order to maintain efficient decision-making. It could be argued that after the introduction of the Single European Act there has been a certain tendency of the Court to promote qualified majority voting rather than unanimity voting in the Council. This can be illustrated, in particular with similar measures which were based upon different legal bases due to the promotion of qualified majority voting.

Before the introduction of the SEA, Article 352 TFEU was a commonly applied legal basis for the adoption of various measures. This can be seen, for example, in *Massey-Ferguson*,<sup>109</sup> in which the Court found that a measure regulating the valuation of goods for customs purposes was validly based on Article 352 TFEU.<sup>110</sup> However, after the introduction of the SEA, Article 352 TFEU still required unanimity voting and was thus put at a disadvantage in comparison to those provisions which required qualified majority voting, for example Article 207 TFEU. The courts have thus taken a much stricter approach towards Article 352 TFEU in the aftermath of the SEA, favouring other legal bases which provided for qualified majority voting. Therefore, in the *Generalized Tariff* case,<sup>111</sup> which concerned a similar measure<sup>112</sup> as in *Massey-Ferguson*, the Court held that recourse to Article 352 TFEU was only justified if no other provision could suffice as a legal basis for the contested measure.<sup>113</sup> Since the Court did find that Article 207 TFEU constituted a sufficient legal basis, the additional legal basis of Article 352 TFEU was rejected.

Within the past four decades or so, various treaty amendments as well as the support before the European courts have gradually extended the application of qualified majority voting in the Council. However, this does not mean that unanimity has been abandoned entirely from the procedural landscape in the EU legislative process: While qualified majority voting certainly constitutes the rule after the introduction of the Treaty of Lisbon,<sup>114</sup> the unanimity requirement remains part of the Treaty's voting

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<sup>109</sup> Case 8-73, *supra* note 71.

<sup>110</sup> Regulation No 803/68/EEC, *supra* note 72.

<sup>111</sup> Case 45/86, *Commission of the European Communities v Council of the European Communities (Generalized Tariff)*, [1987]: ECR 01493. For an analysis of this case, see Steenberg, J. (1987). "Case 45/86, *Commission v. Council*, Judgment of 26 March 1987, not yet reported." *Common Market Law Review* 24(4): 731-737.

<sup>112</sup> Council Regulation (EEC) No 3599/85 of 17 December 1985 applying generalized tariff preferences for 1986 in respect of certain industrial products originating in developing countries (Official Journal 1985, L 352, p. 107).

<sup>113</sup> Case 45/86, *supra* note 111, at para 13.

<sup>114</sup> Art 294 TFEU.

procedures,<sup>115</sup> in particular in those areas which fall under the ‘special legislative procedure’. However, in the absence of voting requirements provided for in the legal basis, for example in Article 245 TFEU, qualified majority voting applies according to Article 238 TFEU.<sup>116</sup>

## 2. The institutional balance

The Union aims to interpret any provision which could serve as a legal basis as broadly as possible; this is counteracted by the Member States in pursuance of their federal interests. While EU and Member States signify the vertical division of powers, Member States are also represented in the Council and therefore in addition have an interest in the horizontal division of powers amongst the EU institutions. Thus, one underlying rationale of Member States’ attempts in the quest for the correct legal basis is the maintenance of the institutional balance,<sup>117</sup> ultimately strengthening the role of the Council which represents Member States’ interests.<sup>118</sup> As Bradley points out when identifying the correct legal basis for a measure, there are occasionally significant discrepancies between Commission and Council.<sup>119</sup>

Originally, the influence of the European Parliament in the legislative process of the EU was minimal: The Parliament merely had to be consulted which did not require the Council to also follow the former’s opinion. This was often referred to as the ‘democratic deficit’ of the Union.<sup>120</sup> Through various treaty reforms the role of the European Parliament has been strengthened: With the introduction of the Single European Act (SEA), the already existing consultation procedure was complemented with two further procedures, namely the cooperation and the consent procedure. The cooperation procedure allows the European Parliament to suggest amendments to a proposed measure, while the consent procedure gives the European Parliament an

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<sup>115</sup> Art 292 TFEU, which provides that the Council “shall act unanimously in those areas in which unanimity is required for the adoption of a Union act.”

<sup>116</sup> See e.g. Case C-426/93, *Federal Republic of Germany v Council of the European Union*, [1995]: ECR I-03723, at para 18.

<sup>117</sup> For a general discussion on the institutional balance, see Jacqu e, J.-P. (2004). "The Principle of Institutional Balance." *Common Market Law Review* 41(2): 383-391.

<sup>118</sup> It was held that “[a]ccording to the institutional balance of the Union, the Council is not a mere ‘executive body’ of the Commission.” Case C-40/10, *European Commission v Council of the European Union*, [2010]: ECR 00000.

<sup>119</sup> Bradley, K. S. C. (1988). "The European Court and the legal basis of community legislation." *European Law Review* 13(6): 379-402, at page 394.

<sup>120</sup> See e.g. Bono, R. G. (1992). "The international powers of the European Parliament, the democratic deficit, and the Treaty of Maastricht." *Yearbook of European Law* 12(1): 85-138.

absolute veto power.<sup>121</sup> These are now part of the ‘special legislative procedure’ which requires a partial involvement of the Parliament in the legislative process.

The co-decision procedure was introduced with the Maastricht Treaty and now constitutes the ‘ordinary legislative procedure’ according to Article 294 TFEU. This procedure requires a compromise between the Council and the Parliament on a proposed legislative measure. The introduction of new legislative procedures which would increase the influence of the Parliament was thus an attempt to remedy the existing ‘democratic deficit’ in the European Union. This was also reflected in the courts’ judgements which have constantly held that the proper involvement of the European Parliament “reflects (...) the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.”<sup>122</sup>

In a case concerning the capacity of the Parliament to bring an action for annulment,<sup>123</sup> the Court has acknowledged the significance of the preservation of the institutional balance:

The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.

Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.

The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance (...).<sup>124</sup>

Any proposed legislative measure has to be approved by the Council which has the biggest influence as regards the choice of legal basis.<sup>125</sup> Even though the Commission

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<sup>121</sup> For more information on the evolution of the various legislative procedures, in particular on the role of the European Parliament, see Craig, P. and G. de Burca (2003). *EU Law: Text, Cases, and Materials*. Oxford, Oxford University Press, at pages 139-150.

<sup>122</sup> First mentioned in Case 138/79, SA Roquette Frères v Council of the European Communities, [1980]: ECR 03333, at para 33; and Case 139/79, Maizena GmbH v Council of the European Communities, [1980]: ECR 03393, at para 34.

<sup>123</sup> Case C-70/88, European Parliament v Council of the European Communities, [1990]: ECR I-02041.

<sup>124</sup> *Ibid*, at paras 21-23.

<sup>125</sup> Dashwood, A. (1998), *supra* note 3, at page 207.

might have lost some influence in the past,<sup>126</sup> there is nevertheless certain continuity as regards its powers in the decision-making process. The only variable in the equation is the role of the Parliament which has equalised powers with the Council if the co-decision procedure applies; otherwise its role is less influential.<sup>127</sup>

## VI. General Criteria of Legal Basis Litigation

The above analysed differences between legal bases have been the motivation for the courts to develop general criteria which could provide some guidance as regards the determination of the correct legal basis for a measure. Thus, legal basis litigation of the past four decades or so has provided an entire range of general criteria, principles and theories which were aimed at increasing legal certainty in complex areas of overlapping or competing competences. Ideally, these criteria would lead to one possible solution only, ruling out all other options. Unfortunately, however, this is rather self-deceptive and as this section will demonstrate, the courts have more than once deviated from their own principles, creating exceptions or even new criteria which would undermine previous ones.

First, this section will look at which *objective*, rather than *subjective*, factors the courts have taken into account when determining the correct legal basis. Second, it will elaborate on the courts' 'zig-zag' course between a single and a dual legal basis. Third, it will analyse the democracy maximising rationale as it has been developed in the *Titanium Dioxide* case. Fourth, it will discuss the 'centre of gravity' theory and its exceptions. Fifth, it will also look at the *lex specialis derogat legi generali* principles, particularly focusing on the general competences under Articles 114/115 and 352 TFEU.

### A. Objective Factors

It was held by the ECJ in the *Generalized Tariff* case that the

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<sup>126</sup> See Jacqu , J.-P. (2004), *supra* note 117, at page 390.

<sup>127</sup> The latter has been described as an 'ill-defined' institutional balance, Koutrakos, P. (2008). *Legal Basis and Delimitation of Competence in EU External Relations. EU foreign relations law: constitutional fundamentals*. M. Cremona and B. de Witte. Oxford, Hart Publishing: 171-198, at page 184.

choice of the legal basis for a measure may not depend simply on an institution's conviction (...) but must be based on objective factors which are amenable to judicial review.<sup>128</sup>

In this case, two Council Regulations<sup>129</sup> were challenged by the Commission on the grounds that both measures should have been based on the single legal basis of Article 207 TFEU, while the Council also 'intended'<sup>130</sup> to apply Article 352 TFEU as a legal basis in addition to the afore mentioned. The additional recourse to the latter provision would entail unanimity voting in the Council which the Commission attempted to avoid by its choice of a single legal basis, requiring only qualified majority voting. The Council argued that "it was *convinced* that the contested regulations had not only commercial-policy aims, but also major development-policy aims" which would go beyond the scope of Article 207 TFEU and therefore required the additional legal basis of Article 352 TFEU.<sup>131</sup> Referring to *Opinion 1/78*,<sup>132</sup> the Court found that the area of common commercial policy was sufficiently broad to accommodate not only measures with a mere commercial aim but also such instruments which partially target development matters.<sup>133</sup> The Court thus did not follow the Council's reliance on subjective factors; instead, it relied on other factors, such as the actual aims of the contested regulations and the scope of the legal provisions in question. Reference to the institution's conviction as a possibility to determine the correct legal basis was however gradually omitted after the *Generalized Tariff* case and more recent cases exclusively referred to the principle of basing a measure on objective factors only.

In *UK v Council*, a case concerning the choice of the correct legal basis for Council Directive 85/649/EEC,<sup>134</sup> the Court added that a mere Council practice could not derogate from treaty rules due to its subjective nature and therefore could not have a binding effect on the EU institutions in determining the correct legal basis.<sup>135</sup> The contested measure was based on Article 43 TFEU, but, according to the UK, should

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<sup>128</sup> Case 45/86, *supra* note 111, at para 11.

<sup>129</sup> Council Regulation (EEC) No 3599/85, *supra* note 112 and Council Regulation (EEC) No 3600/85 of 17 December 1985 applying generalized tariff preferences for 1986 to textile products originating in developing countries (Official Journal 1985, L 352, p. 107).

<sup>130</sup> The contested measures did not state any express legal basis.

<sup>131</sup> Case 45/86, *supra* note 111, at para 10, *emphasis added*.

<sup>132</sup> *Opinion 1/78*, *Opinion* given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty (International Agreement on Natural Rubber), [1979]: ECR 02871.

<sup>133</sup> Case 45/86, *supra* note 111, at paras 19 and 20.

<sup>134</sup> Council Directive 85/649/EEC of 31 December 1985 prohibiting the use in livestock farming of certain substances having a hormonal action (Official Journal 1985, L 382, p. 228).

<sup>135</sup> Case 68/86, *United Kingdom of Great Britain and Northern Ireland v Council of the European Communities*, [1988]: ECR 00855, at para 24.



have additionally been based on Article 115 TFEU. While the measure was adopted with qualified majority voting, the additional recourse to Article 115 TFEU would have required unanimity voting in the Council, a practice previously applied by the Council.<sup>136</sup> This reasoning was, however, rejected by the Court on the grounds that this could not be considered to be an objective factor when determining the correct legal basis. Instead, it found that the contested measure fell within the area of common agricultural policy and was therefore validly adopted on the basis of Article 43 TFEU.

Further subjective factors were equally rejected by the courts: In *Commission v Council*,<sup>137</sup> it was held to be irrelevant whether an institution desired to increase its participation for the adoption of this measure, whether such an institution had already been involved in this area of law, or which circumstances led to the adoption of the measure in question, in this case Council Regulation 820/97.<sup>138</sup> The Commission had challenged the contested regulation, arguing that Article 114 TFEU was more appropriate as a legal basis on the grounds that first, a measure which, as in the present case, concerned the protection of human health had to entail the proper involvement of the Parliament in the legislative process.<sup>139</sup> Second, the Parliament pointed out that it had already been successfully involved in the legislative process of similar measures concerning public health and consumer protection matters.<sup>140</sup> Third, the Parliament stressed the illegal manner in which the contested regulation came into force.<sup>141</sup> This reasoning was criticised by the Council which recalled the principle of objective factors to be the decisive aspect when determining the correct legal basis for a measure.<sup>142</sup> This was also followed by the Court, which confirmed that the contested regulation was correctly adopted on the basis of Article 43 TFEU, since it was mainly aimed at the stabilisation of the market.<sup>143</sup>

In addition, it is also important to note that an amending measure did not necessarily have to be adopted on the same legal basis as the amended measure(s) but that the ECJ would still have to scrutinise it accordingly, applying the above criteria since an

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<sup>136</sup> *Ibid*, at para 4.

<sup>137</sup> Case C-269/97, *Commission of the European Communities v Council of the European Union*, [2000]: ECR I-02257, at para 44.

<sup>138</sup> Council Regulation (EC) No 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products (Official Journal 1997, L 117, p. 1).

<sup>139</sup> Case C-269/97, *supra* note 137, at paras 9 and 18.

<sup>140</sup> *Ibid*, at para 24.

<sup>141</sup> *Ibid*, at para 26.

<sup>142</sup> *Ibid*, at para 27.

<sup>143</sup> *Ibid*, at para 59.

amending measure may have different objectives than its predecessor. This may be due to changes in the legislative procedures which could render previously compatible legal bases incompatible after certain treaty amendments. This was illustrated in *Commission v Council*,<sup>144</sup> in which Council Directive 87/64<sup>145</sup> had been adopted on the joint legal basis of Articles 115 and 207 TFEU, which was challenged by the Commission, arguing that it should have rather been adopted on the basis of Article 43 TFEU since both its predecessors already had Articles 43 and 115 TFEU as their joint legal basis.<sup>146</sup> The Court, however, did not follow this reasoning. Instead, it recalled that objective factors have to determine the correct legal basis only.<sup>147</sup> Such objective factors would preclude the joint legal basis of Articles 43 and 115 TFEU due to an incompatibility of the required legislative procedures.<sup>148</sup> Nevertheless, the contested measure was declared void on the grounds that its purpose, which only partly concerned imports, would not justify recourse to Article 207 TFEU.<sup>149</sup>

## **B. Dual Legal Basis**

A dual legal basis may become necessary if no single legal basis can be found in the treaties which provides sufficient competence, or if two or more inseparable objectives are accredited to the proposed measure which thus requires a double legal basis. In general, such a dual legal basis could be problematic in terms of the possible differences between such legal provisions as they have been identified above. Most prominently, this concerns differences in the legislative procedures, but also the nature of the competence or the legal instruments prescribed could vary. Initially, recourse to a dual legal basis was common practice as a result of the ‘Luxembourg compromise’ from 1966. It provided that

Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions

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<sup>144</sup> Case C-131/87, *Commission of the European Communities v Council of the European Communities*, [1989]: ECR 03743.

<sup>145</sup> Council Directive 87/64 of 30 December 1986 amending Directive 72/461 on health problems affecting intra-Community trade in fresh meat and Directive 72/462 on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries (Official Journal 1987, L 34, p. 52).

<sup>146</sup> Case C-131/87, *supra* note 144, at paras 4 and 5.

<sup>147</sup> *Ibid*, at para 7 and cited case law.

<sup>148</sup> *Ibid*, at para 8.

<sup>149</sup> *Ibid*, at paras 27-29.

which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community.<sup>150</sup>

Thus, in order to accommodate both interests, those of the Union and of the Member States, it became common practice to have recourse to joint legal bases which would ensure the proper acknowledgement of all possible competences at stake.

For example, in *Commission v Council*,<sup>151</sup> the Court had to review the legality of Council Decision 87/369<sup>152</sup> which had been adopted on the triple legal basis of Articles 32, 207 and 352 TFEU. This was subsequently challenged by the Commission which claimed that recourse to the single legal basis of Article 207 TFEU was sufficient. However, the Court held that “where an institution’s power is based on two provisions (...), it is bound to adopt the relevant measures on the basis of the two relevant provisions.”<sup>153</sup> Therefore, it found that the dual legal basis of Articles 32 and 207 TFEU was justified for the contested measure, while the additional recourse to Article 352 TFEU was held to be unnecessary.<sup>154</sup>

However, according to the Council, the ‘Luxembourg compromise’ “was without prejudice to its future action”.<sup>155</sup> More recently therefore, the European courts have tended to deny the application of a dual legal basis for the adoption of an EU measure. This was generally justified by the courts with the incompatibility of different legislative procedures within a joint legal basis. This was made clear in *Titanium Dioxide*,<sup>156</sup> which concerned Council Directive 89/428/EEC<sup>157</sup> adopted on the basis of Article 192 TFEU. The Commission challenged the recourse to Article 192 TFEU as a legal basis, arguing that the contested directive should have rather been based on Article 114 TFEU. The former required unanimity within the Council and a mere consultation of the European Parliament, while the latter required the cooperation procedure. The

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<sup>150</sup> Final Communiqué of the extraordinary session of the Council ("Luxembourg Compromise"), Bulletin of the European Communities, March 1966, 3-66, pp 5 – 11, at page 9.

<sup>151</sup> Case 165/87, *Commission of the European Communities v Council of the European Communities*, [1988]: ECR 05545.

<sup>152</sup> Council Decision 87/369 of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System (Official Journal 1987, L 198, p. 1).

<sup>153</sup> Case 165/87, *supra* note 151, at para 11.

<sup>154</sup> *Ibid*, at paras 13, 17 and 18.

<sup>155</sup> Case 131/86, *United Kingdom of Great Britain and Northern Ireland v Council of the European Communities*, [1988]: ECR 00905, at para 9.

<sup>156</sup> Case C-300/89, *Commission of the European Communities v Council of the European Communities (Titanium Dioxide)*, [1991]: ECR I-02867.

<sup>157</sup> Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (Official Journal 1989, L 201, p. 56).

Court stated that the “use of both provisions as a joint legal basis would divest the cooperation procedure of its very substance” and therefore held that a dual legal basis under such circumstances was excluded since this would otherwise undermine the powers of the European Parliament.<sup>158</sup>

This would hold true even if the Council had previously relied on dual legal bases for the adoption of such measures. In *UK v Council*,<sup>159</sup> Council Directive 86/113/EEC<sup>160</sup> was adopted on a single legal basis of Article 43 TFEU, thus diverting from a previous Council practice to adopt similar measures on a dual legal basis of Article 43 in conjunction with Article 115 TFEU.<sup>161</sup> This was therefore challenged by the United Kingdom; however, the Court did not follow such reasoning. Instead, it scrutinised the case according to objective factors and made clear that

A previous Council practice of adopting legislative measures in a particular field on a dual legal basis cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on the Community institutions with regard to the determination of the correct legal basis.<sup>162</sup>

As a result, the contested directive was validly based on Article 43 TFEU only, since this was sufficient for measures regulating in the area of agricultural policy even if it entailed harmonisation of national laws.<sup>163</sup> This tendency towards a single legal basis has also been supported amongst scholars, for example Tridimas who observed that “[i]ncreasing the quantity of legal bases cannot improve their quality.”<sup>164</sup>

However, the ECJ also pointed out that under certain exceptional circumstances a dual legal basis could nevertheless still find approval before the Court, thus establishing a compromise between the single-legal-basis and the dual-legal-basis approach. In its *Opinion 2/00*,<sup>165</sup> the Court was requested to state its opinion about the validity of

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<sup>158</sup> Case C-300/89, supra note 156, at paras 18-21.

<sup>159</sup> Case 131/86, supra note 155.

<sup>160</sup> Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages (Official Journal 1986, L 95, p. 45).

<sup>161</sup> Case 131/86, supra note 155, at para 8.

<sup>162</sup> *Ibid*, at para 29.

<sup>163</sup> See also (more recently) Case C-178/03, *Commission of the European Communities v European Parliament and Council of the European Union*, [2006]: ECR I-00107, at para 55; Case C-155/07, *European Parliament v Council of the European Union*, [2008]: ECR I-08103, at para 34.

<sup>164</sup> Tridimas, T. (2009). "Terrorism and the ECJ: empowerment and democracy in the EC legal order." *European Law Review* 34(1): 103-126, at page 110.

<sup>165</sup> *Opinion 2/00*, *Cartagena Protocol on Biosafety*, [2001]: ECR I-09713.

Council Decision 93/626/EEC<sup>166</sup> which had been adopted on the basis of Article 192 TFEU. The Commission, however, claimed that only a dual legal basis of Articles 207 and 191 TFEU could be considered as the appropriate legal basis for the contested decision.<sup>167</sup> The Court declared that it would accept the adoption of a dual legal basis “if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other”.<sup>168</sup> While the Court in this case nevertheless found that recourse to the single legal basis of Article 192 TFEU was justified since it could identify a predominant objective within the area of environmental policy,<sup>169</sup> the Court’s reasoning concerning the exceptional acceptance of a dual legal basis was followed in subsequent case law.

This can be seen, for example, in *Commission v Council*.<sup>170</sup> Here, Council Directive 2001/44/EC<sup>171</sup> had to be reviewed concerning its dual legal basis of Articles 113 and 115 TFEU which was challenged by the Commission, arguing that the contested directive should have rather been based on the single legal basis of Article 114 TFEU.<sup>172</sup> Obviously, the Commission would have preferred a legal basis which merely requires qualified majority voting, rather than unanimity voting as was the case with the Council’s choice of legal bases. The Court briefly elaborated on the compatibility of Articles 113 and 115 TFEU and found that no formal problem would arise since both provisions required unanimity voting.<sup>173</sup> In addition, since the contested measure aimed at a certain degree of harmonisation in the area of fiscal policy, recourse to both provisions became necessary in order to constitute the correct legal basis.

As can be observed from this case law, the Court has taken into account the issue of procedural differences, trying to avoid approving measures which had been adopted on multiple legal bases, especially if this included different procedural requirements. It was pointed out on numerous occasions that the “argument with regard to the correct legal basis is not a purely formal one” and that the “choice of the legal basis could thus affect

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<sup>166</sup> Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (Official Journal 1993, L 309, p. 1).

<sup>167</sup> Opinion 2/00, supra note 165, at page I-9722.

<sup>168</sup> Ibid, at para 23.

<sup>169</sup> Ibid, at para 42.

<sup>170</sup> Case C-338/01, *Commission of the European Communities v Council of the European Union*, [2004]: ECR I-04829.

<sup>171</sup> Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties (Official Journal 2001, L 175, p. 17).

<sup>172</sup> Case C-338/01, supra note 170, at paras 14 and 15.

<sup>173</sup> Ibid, at para 58.

the determination of the content of the contested directive(s).”<sup>174</sup> It seems, however, that in those cases the Court has merely intended to justify its judicial scrutiny and the need to find a correct legal basis with the existence of such differences in the procedural requirements. For example in *Commission v Council*,<sup>175</sup> the Council had adopted Decision 87/369<sup>176</sup> on the basis of Articles 32, 207 and 352 TFEU. Notwithstanding the fact that the ECJ found recourse to Article 352 TFEU had been unjustified, it did not annul the contested decision. At the time of its adoption and before the introduction of the Single European Act (SEA), the old version of Article 32 TFEU (ex Article 28 EEC) had required unanimity, just like Article 352 TFEU, and therefore did not make any difference in the Court’s opinion. The only procedural difference was the consultation requirement under Article 352 TFEU, which had taken place; however, this was not required under Article 32 TFEU. In its judgement, the ECJ considered the incorrect reliance on Article 352 TFEU to supplement Articles 32 and 207 TFEU as “only a purely formal defect which cannot make the measure void.”<sup>177</sup>

This attitude of the Court hardly changed over the years and in *British American Tobacco* it came to a similar conclusion. This time, the contested measure had been adopted on Articles 114 and 207 TFEU, the latter of which was held not to be inappropriate as a legal basis since qualified majority was the required voting procedure under both provisions and the co-decision procedure required under Article 114 TFEU had not been jeopardised by the supplementing legal basis of Article 207 TFEU.<sup>178</sup> This approach, which only looks at the effects of the provisions in question, could be argued to have jeopardised the concept of the institutional balance since an inappropriate provision could validly be accepted to serve as a legal basis for a measure as long as the voting requirements of that provision are in conformity with the anticipated institutional consequences of the contested measure. In other words, this suggests that the non-compliance with institutional requirements are considered as a purely ‘formal defect’ only after the Court is assured of the conformity of the voting procedures.

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<sup>174</sup> Case 68/86, supra note 135, at para 6; Case 131/86, supra note 155, at para 11; Case C-131/87, supra note 144, at para 8.

<sup>175</sup> Case 165/87, supra note 151.

<sup>176</sup> Council Decision 87/369, supra note 152.

<sup>177</sup> Case 165/87, supra note 151, at para 19.

<sup>178</sup> Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, [2002]: ECR I-11453, at paras 100-111.

### C. Democracy Maximising Rationale

The incompatibility of certain legal bases on the grounds of different legislative procedures which thus requires a single legal basis generates the question under which criterion the correct legal basis has to be determined. One possibility would be to prioritise the most democratic procedure which ensures an adequate influence of the European Parliament and therefore the maintenance of the institutional balance.

The democracy maximising rationale was first established in *Titanium Dioxide*,<sup>179</sup> where the Court had to review the validity of Council Directive 89/428/EEC<sup>180</sup> which had been adopted on the basis of Article 192 TFEU.<sup>181</sup> The Court found that the contested directive had a twofold aim and content: It was inseparably linked with both the area of environment and the establishment and functioning of the internal market.<sup>182</sup> This being said, the ECJ went on to examine the procedural consequences of each provision with the conclusion that if both provisions would have had to serve as a dual legal basis the cooperation procedure would have been rendered nugatory: Since Article 114 TFEU required qualified majority voting as opposed to Article 192 TFEU which required unanimity, the latter procedure – as a general rule – would have to be applied. This would entail that all procedural requirements under this provision also had to be applied, such as the requirement to consult the Parliament rather than the cooperation procedure which Article 114 TFEU referred to:

As a result, use of both provisions as a joint legal basis would divest the cooperation procedure of its very substance.

(...)

The very purpose of the cooperation procedure, which is to increase the involvement of the European Parliament in the legislative process of the Community, would thus be jeopardized.<sup>183</sup>

The Court, thus, gave priority to the safeguarding of a high degree of parliamentary participation which, in the ECJ's opinion, "reflects a fundamental democratic principle".<sup>184</sup>

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<sup>179</sup> Case C-300/89, supra note 156.

<sup>180</sup> Council Directive 89/428/EEC, supra note 157.

<sup>181</sup> See case comment by Somsen, H. (1992). "Case Law. Court of Justice. Case C-300/89, Commission v. Council (Titanium dioxide), Judgment of 11 June 1991." *Common Market Law Review* 29(1): 140-151.

<sup>182</sup> Case C-300/89, supra note 156, at para 16.

<sup>183</sup> *Ibid*, at paras 18-20.

In two subsequent cases after *Titanium Dioxide*, the *Waste* cases,<sup>185</sup> the Court was again asked to determine the correct legal basis in similar settings. In these cases the ECJ simply did not consider the contested measures<sup>186</sup> to be of a twofold aim, but rather suggesting that their effects of harmonising the internal market was of an ancillary nature,<sup>187</sup> therefore upholding the validity of the measures which both had been based on Article 192 TFEU. Nettesheim described the judgements on *Waste* to be “one step forth and one step back at the same time”.<sup>188</sup> It could be argued that this inconsistent ruling as regards Article 114 *versus* Article 192 TFEU has led to even more confusion in the quest for reliable criteria in legal basis litigation.<sup>189</sup>

In *Kadi and Al Barakaat*, the Court held that

adding Article [352 TFEU] to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles [75 TFEU] and [215 TFEU], no role is provided for that institution.<sup>190</sup>

Contrary to *Titanium Dioxide*, however, the notion of the Court in *Kadi and Al Barakaat* suggested that the rationale of ‘democracy maximising’ cannot determine by itself the correct legal basis but can only be an additional factor once the substantive requirements of a provision are fulfilled. This underlying ‘democracy maximising’ rationale was repeated more recently in *Parliament v Council*<sup>191</sup> as well as touched upon, although in an alleviated version, in various cases in which the ECJ has taken into

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<sup>184</sup> *Ibid*, at para 20.

<sup>185</sup> Case C-155/91, *Commission of the European Communities v Council of the European Communities (Waste I)*, [1993]: ECR I-00939; Case C-187/93, *European Parliament v Council of the European Union (Waste II)*, [1994]: ECR I-02857.

<sup>186</sup> Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste (Official Journal 1991, L 78, p. 32); Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (Official Journal 1993, L 30, p. 1).

<sup>187</sup> Case C-155/91, *supra* note 185, at para 20; Case C-187/93, *supra* note 185, at para 25.

<sup>188</sup> “Aus diesem Blickwinkel bedeutet das Urteil zur Abfallrichtlinie sowohl einen Schritt nach vorn als auch einen solchen zurück: Indem der EuGH darauf verzichtet, seine Kompetenznormrechtsprechung vom Vehikel des Integrationsfortschritts zu machen, erkennt er zutreffend die gegenwärtigen Grenzen seiner Akzeptanz“, translated of Nettesheim, M. (1993). “Horizontale Kompetenzkonflikte in der EG.” *Europarecht* 28(3/4): 243-260, at page 258.

<sup>189</sup> See also Cullen, H. and A. Charlesworth (1999). “Diplomacy by other Means: The use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States.” *Common Market Law Review* 36(6): 1243-1270, at page 1248.

<sup>190</sup> *Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, [2008]: ECR I-06351, at para 235.

<sup>191</sup> Case C-155/07, *supra* note 163, [2008]: ECR I-08103.



account the possibility that the European Parliament may be deprived of its rights if a measure is adopted on a joint legal basis.<sup>192</sup>

The most recent judgement, however, suggests a different approach of the European Court of Justice. In a case concerning the International Fund for Ireland,<sup>193</sup> the Court seems to have adopted the rule of applying the most stringent procedure if more than one legal basis require different legislative procedures: The contested measure<sup>194</sup> was adopted on the single legal basis of Article 352 TFEU, which was subsequently challenged by the European Parliament, arguing that the third paragraph of Article 175 TFEU would have better served as a legal basis, in particular with regard to the objectives of the contested measure of “strengthening the economic and social cohesion of the Community.”<sup>195</sup> The Parliament’s choice of legal basis was interpreted by the Council as a mere tool “to reduce disparities between the levels of development of different regions”, while the contested measure was aimed at “contributing financially to an international organisation”, thus Article 352 TFEU sufficiently served as a legal basis.<sup>196</sup> In its judgement however, the Court held that the contested measure should have additionally been based on the third paragraph of Article 175 TFEU. Considering the different legislative procedures at stake, the Court held that the co-decision procedure as well as unanimity should apply, thus enforcing the most stringent requirements.<sup>197</sup> On the one hand, this judgement ensured a high level of parliamentary participation and thus ruled in favour of the institutional balance. On the other hand, it could be argued that the application of the unanimity rule instead of qualified majority voting may be considered as deviant since the overall trend appears to be away from unanimity and towards qualified majority voting. However, in the case of an existence of more stringent requirements their preservation by courts has to be welcomed and this rule may certainly entail some greater clarity concerning procedural differences.

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<sup>192</sup> E.g. Case C-94/03, *Commission of the European Communities v Council of the European Union*, [2006]: ECR I-00001, at para 52; Case C-178/03, *supra* note 163, at para 57.

<sup>193</sup> Case C-166/07, *European Parliament v Council of the European Union*, [2009]: ECR I-07135.

<sup>194</sup> Council Regulation (EC) No 1968/2006 of 21 December 2006 concerning Community financial contributions to the International Fund for Ireland (2007 to 2010) (Official Journal 2006, L 409, p. 86).

<sup>195</sup> Case C-166/07, *supra* note 193, at para 22.

<sup>196</sup> *Ibid*, at para 31.

<sup>197</sup> *Ibid*, at para 69.

## D. Centre of Gravity

In *Titanium Dioxide* it was explicitly specified for the first time that the above discussed objective factors “include in particular the aim and content of the measure.”<sup>198</sup> In this case, Commission and Parliament argued that the main purpose of the contested measure<sup>199</sup> was the “improvement of conditions of competition in the titanium dioxide industry”, thus “concerning the establishment and functioning of the internal market” under Article 114 TFEU.<sup>200</sup> The Council, however, found that the ‘centre of gravity’ was “the elimination of the pollution caused by waste from the titanium dioxide manufacturing process” and that the contested measure was therefore correctly based on Article 192 TFEU.<sup>201</sup> Looking more closely at the exact aim and content, the Court held that no single ‘centre of gravity’ could be found since the measure was inextricably linked “with both the protection of the environment and the elimination of disparities in conditions of competition.”<sup>202</sup>

The main purpose of a measure thus constitutes the ‘centre of gravity’; while a mere incidental effect was held not to be decisive for the choice of legal basis. This distinction was first drawn in *Parliament v Council* concerning Council Regulation (Euratom) No 3954/87<sup>203</sup> which had as its main purpose the protection of the population against the dangers arising from contaminated foodstuffs and feeding stuffs.<sup>204</sup> The fact that this Regulation also had an ancillary effect of harmonising the conditions for the free movement of goods within the EU could not justify an annulment of the contested Regulation which was validly adopted on the basis of Article 31 of the EAEC Treaty.<sup>205</sup> A similar approach can also be found in *Parliament v Council*.<sup>206</sup> This distinction between main purpose and incidental effects constituted the so-called ‘centre of gravity’

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<sup>198</sup> Case C-300/89, supra note 156, at para 10. See also Case C-295/90, *European Parliament v Council of the European Communities*, [1992]: ECR I-04193, at para 13; Case C-268/94, *Portuguese Republic v Council of the European Union*, [1996]: ECR I-06177, at para 22; Case C-22/96, *European Parliament v Council of the European Union*, [1998]: ECR I-03231, at para 23.

<sup>199</sup> Council Directive 89/428/EEC, supra note 157.

<sup>200</sup> Case C-300/89, supra note 156, at para 7.

<sup>201</sup> *Ibid*, at para 9.

<sup>202</sup> *Ibid*, at paras 11-13. See case comment by Somsen, H. (1992), supra note 181.

<sup>203</sup> Council Regulation (Euratom) No 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and feedingstuffs following a nuclear accident or any other case of radiological emergency (Official Journal 1987, L 371, p. 11).

<sup>204</sup> Case C-70/88, supra note 123, at para 12.

<sup>205</sup> *Ibid*, at paras 17 and 18.

<sup>206</sup> Case C-42/97, *European Parliament v Council of the European Union*, [1999]: ECR I-00869.

theory,<sup>207</sup> under which the legislator adopted a measure according to its main objective, not taking into account secondary effects.

Subsequent case law refined<sup>208</sup> and extended the ‘centre of gravity’ theory. In *Spain v Council*,<sup>209</sup> the Court was required to find the correct legal basis for Council Decision 97/825/EC<sup>210</sup> within the Union policy on environment. The Council had adopted the contested measure on the basis of Article 192(1) TFEU. However, Spain argued that the measure should have rather been based on Article 192(2) TFEU. The European Court of Justice expressly stated that a dual legal basis could not be accepted if the contested measure

reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental.<sup>211</sup>

It therefore had to go on and scrutinise the exact aim and content of the measure, eventually identifying its primary purpose as “the protection and improvement of the quality of the waters of the catchment area of the river Danube” while only incidentally referring to “the use of those waters and their management in its quantitative aspects.”<sup>212</sup> The measure was therefore validly adopted on the basis of Article 192(1) TFEU.

More recently, however, in *Ireland v European Parliament and Council*,<sup>213</sup> the Court seems to have deviated slightly from the common ‘aim-and-content approach’ for the ‘centre of gravity’ theory in so far as it did not take into account the actual objectives of the contested measure. The case concerned Directive 2006/24/EC<sup>214</sup> which was adopted on the basis of Article 114 TFEU. Ireland argued that this basis was incorrect since the

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<sup>207</sup> See also Breier, S. (1995). "Der Streit um die richtige Rechtsgrundlage in der Rechtsprechung des Europäischen Gerichtshofes." *Europarecht* 30(1/2): 46-53, at page 50.

<sup>208</sup> See e.g. Joined Cases C-402/05 P and C-415/05 P, *supra* note 190.

<sup>209</sup> Case C-36/98, *Kingdom of Spain v Council of the European Union*, [2001]: ECR I-00779.

<sup>210</sup> Council Decision 97/825/EC of 24 November 1997 concerning the conclusion of the Convention on cooperation for the protection and sustainable use of the river Danube (Official Journal 1997, L 342, p. 18).

<sup>211</sup> Case C-36/98, *supra* note 209, at para 59.

<sup>212</sup> *Ibid*, at para 74.

<sup>213</sup> Case C-301/06, *Ireland v European Parliament and Council of the European Union*, [2009]: ECR I-00593.

<sup>214</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (Official Journal 2006, L 105, p. 54).

measure's main objective was the facilitation of "the investigation, detection and prosecution of crime, including terrorism" and therefore should have rather been based on a former third-pillar provision, which have now been integrated into supranational EU law, namely Articles 30, 31(1)(c) and 34(2)(b) (Amsterdam) TEU.<sup>215</sup> The Parliament, however, defended the decision to adopt the contested measure on the basis of Article 114 TFEU on the grounds that its 'centre of gravity' should be seen in the elimination of "obstacles to the internal market for electronic communication services".<sup>216</sup> Diverting from its previous practice to scrutinise both aim and content of a contested measure, the Court merely relied on its content which was primarily concerned with the functioning of the internal market.<sup>217</sup> The Court thus upheld Article 114 TFEU as the correct legal basis. As has been argued by van Vooren,

the 'aim' component serves little purpose in the final outcome of deciding the correct legal base, and is nothing more than an initial sentiment on what the overall objective may be.<sup>218</sup>

By doing so, as could be argued, the Court has been able to strengthen the *acquis communautaire* and to defend the Union's scope of influence against that of Member States under the intergovernmental pillars.<sup>219</sup> Whether or not the shift from an 'aim-and-content' approach towards a 'content-only' test was actually intended by the Court remains unclear.<sup>220</sup> On any account, with the introduction of the Treaty of Lisbon and with the integration of the third pillar into the realm of supranational EU law, there would no longer be the need to choose either legal basis since a dual legal basis would now be possible in such a case.<sup>221</sup> However, under a different setting in *Parliament v Council*,<sup>222</sup> the Court seems to have reverted to the 'aim-and-content' approach: The judgement followed the classical 'centre of gravity' theory, thus scrutinising the contested regulation according to its objectives as well as its content.<sup>223</sup>

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<sup>215</sup> Case C-301/06, supra note 213, at para 28.

<sup>216</sup> Ibid, at para 35.

<sup>217</sup> Ibid, at paras 83-85.

<sup>218</sup> Van Vooren, B. (2012). *EU external relations law and the European neighbourhood policy: a paradigm for coherence*. Abingdon, Routledge, at page 136.

<sup>219</sup> Konstadinides, T. (2010). "Wavering between centres of gravity: comment on Ireland v Parliament and Council." *European Law Review* 35(1): 88-102, at page 98.

<sup>220</sup> Poli, S. (2010). "European Court of Justice: The Legal Basis of Internal Market Measures With a Security Dimension. Comment on Case C-301/06 of 10/02/2009, Ireland v. Parliament/Council, nyr." *European Constitutional Law Review* 6(1): 137-157, at pages 150 and 151.

<sup>221</sup> See Chapter III.

<sup>222</sup> Case C-130/10. A detailed discussion of this case can be found further below in Chapter III.

<sup>223</sup> At paras 67-72 of the judgement in case C-130/10.

## **E. Lex Specialis Derogat Legi Generali**

In order to facilitate legal basis litigation, the Court has made an attempt to categorise legal bases, in particular, distinguishing between ‘special’ and ‘general’ competences. Numerous provisions could fall under the description of a special legal basis; while only few constitute general competences, most prominently Articles 114/115 and 352 TFEU. According to the *lex specialis derogat legi generali* principle, a general provision may only serve as a legal basis in the absence of more specific provisions (“save where otherwise provided in the Treaties”, Article 114(1) TFEU)<sup>224</sup> provided that those specific provisions could serve as a sufficient legal basis for the proposed measure.<sup>225</sup> Thus, while under the ‘centre of gravity’ theory two different provisions with two different aims are at stake; the *lex specialis derogat legi generali* principle concerns two different provisions, both of which have the same aim, but one being more specific than the other.

The following sections will analyse the case law concerning the two main *lex generalis* provisions, Articles 114 and 352 TFEU. As can be argued, these provisions could almost always serve as a last resort for the Union to claim its competence for a measure if no other more specific provision can be found. It is therefore important to examine whether the Court has developed any general criteria in order to delimit the scope of their application. The focus will be on how the courts have applied the *lex specialis derogat legi generali* principle in order to find the correct legal basis for a measure in the specific cases. It will also look at the detailed characteristics of the two general provisions in question as well as their distinction between each other.

### **1. Approximation of Laws under Articles 114 and 115 TFEU**

The Lisbon Treaty has renumbered the old Article 95 EC to Article 114 TFEU. This ‘new’ provision resembles its predecessor almost entirely throughout.<sup>226</sup> Therefore, it is anticipated that similar legal basis problems will occur surrounding Article 114 TFEU,

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<sup>224</sup> For an analysis of this specific phrase as well as a thorough discussion of the limits of Article 114 TFEU, see Crosby, S. (1991). "The single market and the rule of law." *European Law Review* 16(6): 451-465.

<sup>225</sup> Cullen, H. and A. Charlesworth (1999), *supra* note 189, at page 1268.

<sup>226</sup> Disregarding minor changes, such as the renumbering of other TFEU provisions referred to or the renaming of the Community into Union.

as was the case with the old Article 95 EC.<sup>227</sup> With the integration of the third pillar into supranational EU law under the TFEU, this area will now also be subject to approximation under Article 114 TFEU.<sup>228</sup> In how far its scope can also be extended to the area of common foreign and security policy will be discussed in Chapter II.

Article 114 TFEU is a general treaty provisions under which measures could be adopted which pursue the aim of approximating the laws in a certain area to the actual improvement and the proper functioning of the internal market.<sup>229</sup> As a legal basis it provides the Union with a so-called ‘functional’ or ‘horizontal’ competence.<sup>230</sup> This means that there is no specific area of law to which it applies, however, as soon as a measure has an effect on the internal market it could be adopted on the basis of this provision. The “mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition” cannot, however, justify recourse to Article 114 TFEU as a legal basis,<sup>231</sup> unless they directly affect the exercise of the fundamental freedoms and thus the functioning of the internal market.<sup>232</sup> The prevention of potential future obstacles to trade could also fall under the application of Article 114 TFEU if “the emergence of such obstacles [is] likely and the measure in question [is] designed to prevent them.”<sup>233</sup>

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<sup>227</sup> See also Maletic, I. (2009). "The Boundaries of the Internal Market after the Lisbon Treaty: A Closer Look at Article 95 EC." *Croatian Yearbook of European Law & Policy* 5: 19-30, at page 27.

<sup>228</sup> See discussion in Chapter III.

<sup>229</sup> Case C-376/98, Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising), [2000]: ECR I-08419, at para 84. See also Opinion of Advocate General Kokott in Case C-66/04, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union, [2005]: ECR I-10553, at para 18. This does not, however, require the measure to encompass free movement within the Member States *in* Case C-380/03, Federal Republic of Germany v European Parliament and Council of the European Union, [2006]: ECR I-11573, at para 80.

<sup>230</sup> It has been held by the Court that the expression ‘measures for the approximation’ in Article 114 TFEU is “intended to confer on the [Union] legislature a discretion” in its competence to decide which means would be necessary in order to achieve the objectives identified in the Treaty in a given situation, Case C-66/04, *ibid*, at para 45; Case C-217/04, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union, [2006]: ECR I-03771, at para 43. For an analysis of the latter case, see Randazzo, V. (2007). “Case C-217/04, “United Kingdom v. European Parliament and Council of the European Union”, judgment of the Grand Chamber of 2 May 2006, *nyr*.” *Common Market Law Review* 44(1): 155-169.

<sup>231</sup> Case C-376/98, *supra* note 229, at para 84.

<sup>232</sup> Joined Cases C-154/04 and C-155/04, *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health (C-154/04) and The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales (C-155/04)*, [2005]: ECR I-06451, at para 28.

<sup>233</sup> Case C-350/92, Kingdom of Spain v Council of the European Union, [1995]: ECR I-01985, at para 35; Case C-376/98, *supra* note 229, at para 86; Case C-377/98, Kingdom of the Netherlands v European Parliament and Council of the European Union (Biotechnology), [2001]: ECR I-07079, at para 15. For an analysis of the latter case, see Moore, S. (2002). “Challenge to the biotechnology directive: Kingdom of

It can be observed that measures falling under Article 114 TFEU always pursue two objectives: the approximation of laws aimed at the establishment and functioning of the internal market on the one hand and the achievement of a more specific objective on the other hand, e.g. agriculture, public health, or environment.

In a series of judgements regarding measures harmonising in the field of agriculture, Article 43 TFEU was considered to be the correct legal basis, rather than Article 115 TFEU, on the grounds of constituting the *lex specialis* provision, which is also explicitly supported by Article 38(2) TFEU.<sup>234</sup> This can be seen, for example, in *UK v Council*,<sup>235</sup> which concerned Council Directive 85/649/EEC.<sup>236</sup> Here, the Council's choice of Article 43 TFEU as a legal basis was considered insufficient for the adoption of the contested measure, which, according to the applicant, required also recourse to Article 115 TFEU.<sup>237</sup> The Court, however, pointed out that a general provision, such as Article 115 TFEU, "cannot be relied on as a ground for restricting the field of application" of a more specific legal basis, such as Article 43 TFEU.<sup>238</sup> The fact that the contested directive also involved harmonisation of national laws in the area of agriculture did not necessitate an additional recourse to Article 115 TFEU.<sup>239</sup> The Court thus gave priority to the *lex specialis* of Article 43 TFEU.<sup>240</sup>

Another example of a more specific provision in relation to Article 115 TFEU is the public health provision under Article 154 TFEU as was held in *UK v Council*.<sup>241</sup> This case concerned Council Directive 93/104/EC<sup>242</sup> which was adopted on Article 154 TFEU under the qualified majority voting procedure. This was challenged by the applicant, favouring either Article 115 or Article 352 TFEU as the appropriate legal basis for the contested measure since these provisions require unanimity voting and

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the Netherlands v. European Parliament and EU Council, case C-377/98, ECJ." European Intellectual Property Review 24(3): 149-154.

<sup>234</sup> "Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products", Art 38(2) TFEU.

<sup>235</sup> Case 68/86, supra note 135.

<sup>236</sup> Council Directive 85/649/EEC, supra note 134.

<sup>237</sup> Case 68/86, supra note 135, at para 4.

<sup>238</sup> Ibid, at para 16.

<sup>239</sup> Ibid, at para 14.

<sup>240</sup> Similar judgements include Case 131/86, supra note 155, at paras 20 and 21; Case C-131/87, supra note 144, at para 11; Case C-11/88, Commission of the European Communities v Council of the European Communities, [1989]: ECR 03799.

<sup>241</sup> Case C-84/94, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, [1996]: ECR I-05755.

<sup>242</sup> Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (Official Journal 1993, L 307, p. 18).

therefore would ensure a greater influence of each Member State.<sup>243</sup> The Court found that Article 154 TFEU “relates only to measures concerning the protection of the health and safety of workers” which therefore rendered it a *lex specialis* in comparison to Articles 114 and 115 TFEU.<sup>244</sup> Since aim and content of the contested directive fell within the area of public health, i.e. the protection of health and safety of workers, Article 154 TFEU constituted the correct legal basis of the measure.<sup>245</sup>

However, Article 192 TFEU which concerns the specific area of environmental law was held not to have the character of a *lex specialis* provision in relation to Article 114 TFEU.<sup>246</sup> According to Article 11 TFEU, the protection of the environment is relevant to all Union policies,<sup>247</sup> which thus renders recourse to Article 192 TFEU superfluous: The Court interpreted Article 192 TFEU to be

intended to confer powers on the Community to undertake specific action on environmental matters, while leaving intact its powers under other provisions of the Treaty, even if the measures in question pursue at the same time one of the objectives of environmental protection.<sup>248</sup>

As could be argued, measures pursuing a twofold aim could be subject to highly politicised decisions: the Union legislator could, by formulating precisely the objectives of a measure in their favour, predetermine its anticipated legal basis which the Court would then be able to uphold.<sup>249</sup> Certainly, the courts claim to take into consideration the objective effects rather than the mere subjective motives of a measure, however, it remains questionable whether this separation would always be possible to achieve in

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<sup>243</sup> Case C-84/94, *supra* note 241, at para 10.

<sup>244</sup> *Ibid*, at para 12.

<sup>245</sup> *Ibid*, at para 45.

<sup>246</sup> See *Titanium Dioxide* in which the Commission had even argued that Article 114 TFEU should be considered to be more specific than Article 192 TFEU and not the other way around. This was, however, not in the centre of the discussion in the Court’s judgement, Case C-300/89, *supra* note 156, at para 8.

<sup>247</sup> In fact, the area of environmental law cannot be restricted to one or two provisions in the treaties. Instead, this area is inherent in a variety of different provisions and therefore has caused numerous problems for legal basis litigation in the past. For an analysis of legal basis conflicts in environmental law, see de Sadeleer, N. (2012). “Environmental Governance and the Legal Bases Conundrum.” *Yearbook of European Law* 31(1): 373-401.

<sup>248</sup> Case C-336/00, *Republik Österreich v Martin Huber*, [2002]: ECR I-07699, at para 33 and case law cited.

<sup>249</sup> Emiliou, N. (1994). “Opening Pandora’s Box: the legal basis of Community measures before the Court of Justice.” *European Law Review* 19(5): 488-507, at page 499.



practice. As a result, it has been argued that there is a certain likelihood of arbitrary legal basis litigation.<sup>250</sup>

In contrast to Article 352 TFEU, the scope of Article 114 TFEU is not of a mere residual nature; it can be applied independently in relation to as well as in combination with other provisions. As a response to this rather extensive use of Article 114 TFEU, a limitation has been inserted in certain provisions in the form of the so-called ‘saving clause’.<sup>251</sup> For example, the approximation of laws aimed at the protection and improvement of human health is excluded following the wording of Article 168(5) TFEU. The old version of this provision, Article 129(4) EEC, was subject of judicial review in *Tobacco Advertising*.<sup>252</sup> Here, the Court had to review the validity of Directive 98/43/EC<sup>253</sup> which was adopted on the basis of Articles 53(2), 62 and 114 TFEU. Germany challenged the measure in question, arguing that it would rather fall within the area of public health which would therefore exclude the application of the more general provision of Article 114 TFEU. The Court, however, held that this

does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. (...).

Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty.<sup>254</sup>

In other words, only if a measure is mainly aimed at the protection of public health, the ‘saving clause’ can apply and limit harmonisation in this area. However, the Court found that in this case the special provision could not derogate from the more general one, therefore, as could be argued, effectively reversing the *lex specialis derogat legi*

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<sup>250</sup> Breier, S. (1995), supra note 207, at page 52. See also Dougan, M. (2000). "Minimum Harmonization and the Internal Market." *Common Market Law Review* 37(4): 853-885, at page 881; "Die bisher angewendeten oder diskutierten Methoden der Wahl der Kompetenzgrundlage (insbesondere *lex specialis*-Regel und Schwerpunkttheorie) sind jedoch unzureichend und bieten weder objektive und gerichtlich nachprüfbar Kriterien der Kompetenzwahl noch beachten sie die Struktur der Unions- und Gemeinschaftskompetenzen hinreichend." Trübe, C. (2004). "Das System der EU-Kompetenzen vor und nach dem Entwurf eines Europäischen Verfassungsvertrags." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64: 391-427, at page 394.

<sup>251</sup> Schütze, R. (2009), supra note 1, at pages 87-90.

<sup>252</sup> Case C-376/98, supra note 229.

<sup>253</sup> Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Official Journal 1992, L 213, p. 9).

<sup>254</sup> Case C-376/98, supra note 229, at paras 78 and 79.

*generali* principle into *lex generalis derogat legibus specialibus*.<sup>255</sup> What can be deduced from this case are two things: First, there is a high threshold for the application of ‘saving clauses’.<sup>256</sup> Second, the *lex specialis derogat legi generali* principle can only apply in addition to other criteria of legal basis litigation, such as the ‘centre of gravity’ theory, and only if the latter fails to generate a concrete result for the choice of the correct legal basis and thus leaves the Court with two or more possible options. It could therefore be argued that this renders the *lex specialis derogat legi generali* principle a supplementary criterion of legal basis litigation.

One example of a *lex specialis* provision where the Court indeed recognised derogation from Article 114 TFEU is the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation under Article 113 TFEU.<sup>257</sup> This was found in *Commission v Council*.<sup>258</sup> In this case, Council Directive 2001/44/EC<sup>259</sup> was under review which had been adopted on the basis of Articles 113 and 115 TFEU, while the Commission was of the opinion that only Article 114 TFEU could constitute the appropriate legal basis for the contested measure.<sup>260</sup> By comparing Articles 113 and 114 TFEU, the Court held that not only does Article 113 TFEU constitute a more specific one than Article 114 TFEU, the latter also excludes “fiscal provisions” from its scope to harmonise national laws.<sup>261</sup> Recourse to Article 113 TFEU as a legal basis was thus justified and therefore the validity of the contested directive could be upheld.<sup>262</sup>

In general, it is clear from the foregoing that the Court interpreted the competence of the Union to approximate national laws rather extensively. Therefore, the Union has been provided with a very general legal basis which it can have recourse to if there is no other more specific provision available. The Union has been able to justify its

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<sup>255</sup> See Trüé, C. (2002). Das System der Rechtsetzungskompetenzen der Europäischen Gemeinschaft und der Europäischen Union. Baden-Baden, Nomos Verlagsgesellschaft, at page 485.

<sup>256</sup> On a more extensive analysis of Union competences in the internal market and *Tobacco Advertising*, see Wyatt, D. (2009). Community Competence to Regulate the Internal Market. 50 Years of the European Treaties: Looking Back and Thinking Forward. M. Dougan and S. Currie. Oxford, Hart Publishing: 93-136. See also de Witte, B. (2006). Non-market values in internal market legislation. Regulating the Internal Market. N. N. Shuibhne. Cheltenham, Edward Elgar Publishing: 61-86.

<sup>257</sup> “The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition”, Art 113 TFEU.

<sup>258</sup> Case C-338/01, supra note 170, at para 60.

<sup>259</sup> Council Directive 2001/44/EC, supra note 171.

<sup>260</sup> Case C-338/01, supra note 170, at paras 14 and 15.

<sup>261</sup> Art 114(2) TFEU, *ibid*, at para 61.

<sup>262</sup> *ibid*, at para 77.

application with the general need to harmonise national laws even if there is only a potential risk that obstacles to trade would occur. It has thus been made difficult to claim the non-existence of Union competences for harmonisation in a given area of law.

## 2. Article 352 TFEU – A subsidiary provision

In the early days until the introduction of the Single European Act (SEA), Article 352 TFEU had been invoked to serve as a legal basis for numerous measures. This can be ascribed to the fact that the Luxembourg compromise<sup>263</sup> exerted influence upon the Council's decisions when determining the correct legal basis. The compromise entailed the entitlement for every Member State to invoke a veto on the grounds of 'important national interest' in order to postpone the adoption of specific measures if the voting procedure required for its implementation was qualified majority.<sup>264</sup> The Council therefore tried to avoid such scenarios by using Article 352 TFEU more often and where possible as a legal basis since this provision required unanimity voting. It was not until the SEA came into force and qualified majority became the preferred voting procedure, that Article 352 TFEU would be invoked less often.<sup>265</sup>

Like Article 114 TFEU, Article 352 TFEU confers upon the Union a 'horizontal' competence to issue measures. However, in contrast to Article 114 TFEU, it has been considered to be a so-called 'residual' or 'subsidiary' provision<sup>266</sup> which is only applicable if Union action is required and the necessary powers cannot be derived from the objectives of the Union or the Treaty. In other words, if a different provision in the Treaty suffices to provide the legal basis for a proposed measure then recourse to Article 352 TFEU would not be necessary. This implies that according to its 'subsidiary' character, Article 352 TFEU should be less prominent than Article 114 TFEU. Thus, from the very wording of the provision it is rather difficult to draw a clear conclusion as to the exact scope of Article 352 TFEU which was thus left to the

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<sup>263</sup> Council Agreement of 29 January 1966 on majority votes within the Council /\* Luxembourg Compromise \*/.

<sup>264</sup> For an analysis of the Luxembourg compromise see Nicoll, W. (1984). "The Luxembourg Compromise." *Journal of Common Market Studies* 23(1): 35-43.

<sup>265</sup> For an early analysis of the old version of Article 352 TFEU see Schütze, R. (2003). "Organized Change towards an 'Ever Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence." *Yearbook of European Law* 22(1): 79-115; see also Trüe, C. (2002), supra note 255, at pages 158-171.

<sup>266</sup> See e.g. Baratta, R. (2002). Overlaps between European Community Competence and European Union Foreign Policy Activity. *The European Union as an Actor in International Relations*. E. Cannizzaro. The Hague, Kluwer Law International: 51-75, at page 61.

discretion of the EU institutions. Schütze argues that according to the principle of limited powers, “Article [352] had to be treated as an *exception* to the specifically transferred competences and its scope had to be interpreted restrictively.”<sup>267</sup> However, unfortunately, the provision does not give information about whether it was meant to only extend existing EU powers or whether it could even be used to create new competences. Neither does it clearly indicate whether Article 352 TFEU could be applied only autonomously or whether it was also possible to use it in conjunction with other provisions. Its scope could thus be “potentially unlimited”.<sup>268</sup> In contrast to this, it has also been argued that Article 352 TFEU could be characterised as defining the ‘outer limit’ of the powers expressly conferred upon the European Union.<sup>269</sup> In order to shed more light on these questions it is thus necessary to scrutinise the Court’s interpretation of the application of Article 352 TFEU as a legal basis.

The first case in which a legal basis problem as regards Article 352 TFEU emerged was in *Massey-Ferguson*.<sup>270</sup> Resulting from the rather divergent interpretations of Commission and Council as to whether the old version of Article 352 TFEU could be relied upon as the legal basis for Regulation No 803/68/EEC,<sup>271</sup> the case was brought before the ECJ. The Commission had argued that the common commercial policy provided for a sufficient legal basis in Article 207 TFEU without there being recourse necessary to Article 352 TFEU. However, the Court, taking a rather broad interpretation of the provision in question, concluded that the Council was allowed to employ Article 352 TFEU as being the appropriate legal basis since no other provision in the Treaty could be found which would have empowered the EU to issue the contested Regulation:

If it is true that the proper functioning of the customs union justifies a wide interpretation of [Articles 28, 31, 32, and 207] of the Treaty and of the powers which these provisions confer on the institutions to allow them thoroughly to control external trade by measures taken both independently and by agreement, there is no reason why the Council could not legitimately consider that recourse to the procedure of [Article 352] was justified *in the interest of legal certainty*.<sup>272</sup>

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<sup>267</sup> Schütze, R. (2003), *supra* note 265, at page 81.

<sup>268</sup> *Ibid*, at page 109.

<sup>269</sup> Dashwood, A. (2009). Article 308 EC as the Outer Limit of Expressly Conferred Community Competence. *The Outer Limits of European Union Law*. C. Barnard and O. Odudu. Oxford, Hart Publishing: 35-44.

<sup>270</sup> Case 8-73, *supra* note 71.

<sup>271</sup> Regulation No 803/68/EEC, *supra* note 72.

<sup>272</sup> Case 8-73, *supra* note 71, at para 4, emphasis added.

This judgement clearly stands in contrast to the position the Court took only a few years later in the *Generalized Tariff* case<sup>273</sup> which was decided shortly after the introduction of the SEA. Here, the ECJ rejected the necessity to refer to Article 352 TFEU as a legal basis.<sup>274</sup> Therewith, the Court followed its own reasoning underlying *Opinion 1/78*<sup>275</sup> of a broad interpretation of Article 207 TFEU which anticipated the insignificance of a common commercial policy if it was to be restricted “to the use of instruments intended to have an effect only on the traditional aspects of external trade”.<sup>276</sup> With this extensive interpretation, the EU could derive sufficient legislative power from Article 207 TFEU without the additional reference to Article 352 TFEU. This approach was supported by the ruling in *Germany v Council*<sup>277</sup> concerning the scope of the common agricultural policy in relation to Article 352 TFEU. The ECJ held that the application of Article 43 TFEU as a legal basis could not be restricted on the grounds that the proposed measure pursued agricultural objectives as well as objectives regulated under different Treaty provisions, thus confirming the more and more subsidiary nature of Article 352 TFEU in the aftermath of the SEA.

It was not until *Opinion 2/94*<sup>278</sup> that the Court provided some clear indication as to the function and scope of Article 352 TFEU. In this opinion, the Court had been requested to evaluate whether the existing Treaty provided for a sufficient legal basis for the Union to accede to the Convention of Human Rights and Fundamental Freedoms (ECHR). Since no specific powers authorising the Union to take action in the field of human rights could be found in the Treaty, the ECJ considered the application of Article 352 TFEU. The Court acknowledged that the function of Article 352 TFEU was of a gap-filling nature, i.e. to be applicable only in the absence of any express or implied EU powers.<sup>279</sup>

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<sup>273</sup> Case 45/86, supra note 111.

<sup>274</sup> In this context see also Case 242/87, *Commission of the European Communities v Council of the European Communities*, [1989]: ECR 01425, in which the Court approved a measure to be based on the joint legal basis of Articles 167 and 352 TFEU since it had been adopted before the entering into force of the SEA. In contrast, the Court rejected the additional legal basis of Article 352 TFEU for a similar measure which was adopted after the SEA in *Joined cases C-51/89, C-90/89 and C-94/89, United Kingdom of Great Britain and Northern Ireland, French Republic and the Federal Republic of Germany v Council of the European Communities (Comett II)*, [1991]: ECR I-02757.

<sup>275</sup> *Opinion 1/78*, supra note 132.

<sup>276</sup> *Ibid*, at para 44.

<sup>277</sup> Case C-280/93, *Federal Republic of Germany v Council of the European Union*, [1994]: ECR I-04973.

<sup>278</sup> *Opinion 2/94*, on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996]: ECR 1759.

<sup>279</sup> *Ibid*, at para 29.

That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, [Article 352] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.<sup>280</sup>

The Court thus observed that a treaty amendment or a modification in a specific area of law would go beyond the intended scope of Article 352 TFEU as this would entail “fundamental institutional implications for the [Union] and for Member States” which would be of a “constitutional significance.”<sup>281</sup> What could be deduced from this ruling is that while Article 352 TFEU may serve to widen the Union’s competences, it cannot be applied to create entirely new areas of competences. Nevertheless, the exact distinction between both remains rather unclear.

To sum up the pre-Lisbon era, it can be observed that Article 352 TFEU has been interpreted differently over time. Its indefinite wording allowed for a rather broad interpretation and therefore extensive use in the beginning, while the Court enforced the subsidiary nature of the competence after the introduction of the Single European Act. However, the decreasing application of Article 352 TFEU as a legal basis cannot be said to have been at the expense of EU competences as a whole. Instead, the scope of other provisions has been widened, such as Articles 43 and 207 TFEU which rendered recourse to Article 352 TFEU dispensable. It could thus be argued that by adopting measures on the basis of other articles in the Treaty, the EU has not yet exhausted its competences since it still has the possibility of having recourse to Article 352 TFEU as a last resort. The guidance provided in *Opinion 2/94* was certainly intended to limit the scope of Article 352 TFEU with the means available. However, it could be argued that what has been achieved was no more than another opinion which left its interpretation very much to the discretion of the Court and added rather little to the actual determination of the outer scope of Article 352 TFEU. It can thus be concluded that despite its less prominent character in comparison to Article 114 TFEU, Article 352 TFEU nevertheless has an almost unlimited scope and could serve as a legal basis of last resort, thus being at the Union’s disposal at any time.

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<sup>280</sup> *Ibid*, at para 30.

<sup>281</sup> *Ibid*, at para 35.

With the introduction of the Treaty of Lisbon, most of the issues discussed above continue to apply to Article 352 TFEU. The main difference the post-Lisbon provision has introduced is the restriction in paragraph 4 which clarifies the relationship between supranational EU law and the intergovernmental area of common foreign and security policy, stating explicitly that Article 352 TFEU cannot be adopted as a legal basis for objectives falling outside the scope of the TFEU. The integrated third pillar, however, is now capable of being affected by Article 352 TFEU.<sup>282</sup> The only constraint for applying Article 352 TFEU is provided in paragraph 3, providing that a measure “based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation.” In general, this applies to all areas in the TFEU which grant the Union a competence to support/coordinate/supplement Member States’ actions.<sup>283</sup> It is, however, anticipated that these changes concerning Article 352 TFEU will not significantly limit its scope of application, in particular as regards supranational EU law.<sup>284</sup>

## VII. Concluding Remarks

This Chapter has discussed the structure of legal bases and legal basis litigation under supranational EU law. As can be observed, differences in the structure of legal bases may lead to legal basis litigation. Such differences can occur if two or more competing treaty provisions require a different degree of involvement from the EU and/or the Member States, provide for different sets of legal instruments which have different legal effects, or prescribe different legislative procedures which determine the degree of involvement of the EU institutions and the voting requirements in the Council. The different interests at stake are expressed by the various choices of legal bases and in

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<sup>282</sup> See Chapter III.

<sup>283</sup> Art 2(5) TFEU. Other areas include non-discrimination (Art 19(2) TFEU), immigration policy (Art 79(4) TFEU), crime prevention (Art 84 TFEU), employment (Art 149 TFEU), social policy (Art 153(2)(a) TFEU), education (Art 165(4) TFEU), vocational training (Art 166(4) TFEU), culture (Art 167(5) TFEU), public health (Art 168(5) TFEU), industry (Art 173(3) TFEU), research and technological development and space (Art 189(2) TFEU), tourism (Art 195(2) TFEU), civil protection (Art 196(2) TFEU), administrative cooperation (Art 197(2) TFEU), and common commercial policy (Art 207(6) TFEU).

<sup>284</sup> Nevertheless, as has been observed by Konstadinides, there has already been a decrease in numbers of proposals under Art 352 TFEU after the introduction of the Reform Treaty which may or may not be caused by the changed wording in Art 352 TFEU and its newly inserted limitations; Konstadinides, T. (2012). “Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty’s Flexibility Clause.” *Yearbook of European Law* 31(1): 227-262, at pages 261 and 262.

situations in which there is no clear delimitation provided for within the treaties, such an issue can only be settled before the European courts. Legal basis litigation has therefore been an important tool to provide further clarification in situations of competing legal bases.

Under the first pillar the courts had the opportunity on various occasions to set a range of general criteria which helped to determine the correct legal basis for a measure. Those criteria may also set the standard for the other intergovernmental pillars under which the courts had less judicial power to scrutinise and therefore were not able to develop a similar set of criteria for legal basis litigation. The most significant criteria established under the first pillar are the ‘centre of gravity’ theory and the *lex specialis derogat legi generali* principle. However, the courts have not always been consistent in their judgements and have thus created legal uncertainty in some areas: the courts accepted that a widening of the scope of these criteria was allowed in exceptional circumstances. The case in point here is the zig-zag course of the European courts between the single-legal-basis and dual-legal-basis approach. At first, a dual legal basis was generally allowed which the Court then denied, giving preference to measures adopted on a single legal basis. Most recently, the courts have accepted to allow for a dual legal basis in exceptional circumstances if more than one objective is found which are inseparably linked with each other. This already shows some inconsistency in the Court’s case law and in certain circumstances it is therefore rather difficult to anticipate the possible outcome of a case if the legal basis of a measure is contested.

As can further be observed from the above, the courts have recognised the existence of procedural differences and their significance as regards legal basis litigation. This holds especially true for different voting requirements. While the courts have ensured the conformity of voting procedures if a dual legal basis was under scrutiny, different institutional requirements have been considered as mere ‘formal defects’. The only attempt of the ECJ to take serious account of the objective to protect the institutional balance was in *Titanium Dioxide* in which the ‘democracy maximising’ rationale has been developed. Had this principle been followed suit in subsequent cases the maintenance of the institutional balance would have had a greater impact in the determination of the correct legal basis. However, subsequent cases have either used a much alleviated version of the mentioned rationale, taking into account the importance of respecting the institutional balance but not considering it as a decisive factor in the choice of legal bases; or in other cases after *Titanium Dioxide* the Court has availed



itself of the ‘centre of gravity’ theory instead. In its most recent judgement in which different legislative procedures were at stake, the Court has developed the rule of applying the most stringent procedure, i.e. unanimity and co-decision rather than qualified majority voting and consultation. While it remains to be seen whether the latter judgement will be followed suit in subsequent case law, it can be argued that the courts have not been consistent when challenged with different legislative procedures.

Moreover, as has been argued, the *lex specialis derogat legi generali* principle has not been a valuable tool in order to delimit the scope of general competences, such as Articles 114 and 352 TFEU. Instead, these articles are considered as a last resort, thus widening the reach of EU competences as a whole. Any harmonising measure could be adopted upon Article 114 TFEU, the application of which could not even be affected by the explicit exclusion of such harmonisation in Article 168 TFEU. Moreover, the rather controversial interpretation of Article 352 TFEU before the courts could neither be said to delimit EU competences nor to enhance legal certainty. Any restrictive interpretation of Article 352 TFEU was in favour of other EU provisions, indicating a rather high threshold for its application as well as an extensive scope of EU competences. The application of the *lex specialis derogat legi generali* principle is also limited to the extent that only competing provisions with the same aim, but one being more specific than the other, could fall there under. The principle may therefore be considered as an auxiliary principle which, under certain circumstances, can help to make a choice between two or more possible legal bases for a contested measure. It is further considered as being weaker in comparison to other criteria of legal basis litigation, such as the ‘centre of gravity’ theory: If the correct legal basis can be found by determining the ‘centre of gravity’ of a contested measure, the additional application of the *lex specialis derogat legi generali* principle will not be necessary.

The ‘centre of gravity’ theory can be considered as the most commonly applied criteria in legal basis litigation, which may also render recourse to other principles unnecessary if a legal basis can be found therewith.<sup>285</sup> Nevertheless, it appears from the above that the ‘centre of gravity’ theory provides a rather flexible approach as regards the choice of the correct legal basis. The ‘centre of gravity’ theory provides that the legal basis of a measure is to be determined only by its main objective regardless of any ancillary effects. However, despite the courts’ attempt to develop some guidance in the form of the classical ‘aim-and-content approach’, it nevertheless raises questions of legal

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<sup>285</sup> See, in particular, Case C-376/98, *supra* note 229.

certainty since the Court seems to have diverted from that approach on occasion towards a ‘content-only’ test. In addition, since it is not possible to categorise the provisions in the Treaty so as to avoid a case-by-case approach in the quest for the correct legal basis, it could be argued that at least some decisions might be politically motivated rather than based on objective factors. The ‘centre of gravity’ theory was therefore criticised in academic literature, most prominently by Trüe who has described it as an “Etikettenschwindel”, a ‘false labelling’, since the mere looking at aim and content would be insufficient to determine the centre of gravity in borderline cases.<sup>286</sup> Moreover, as has been claimed by van Vooren,

Aim and content may be conceptually objective, but the methodologies involved in sorting out which supports to the final decision on legal basis are generally quite arbitrary.<sup>287</sup>

Legal basis litigation continues to exist after Lisbon as well as the validity of most of the general criteria previously established under the first pillar. In addition, it has been argued that new legal basis conflicts are likely to emerge which could thus challenge the European courts anew. The major challenges for the post-Lisbon era lie in the delimitation of competences between the European Union and the Member States and the resulting possibility of competence cocktails as well as the newly introduced hierarchy of legal instruments. As has been argued above, the latter could turn out particularly crucial in the exact delimitation of Articles 290 and 291 TFEU. It is anticipated that *inter*-institutional disputes may evolve over the correct application and distinction between the two provisions which might have serious implications on legal basis litigation. As has been shown above, the Treaty of Lisbon fails to define clear boundaries of competences and even allows for more than one competence type to apply to certain policy areas. In practice, this could lead to competence overlaps unless the Court is able to identify clear guidelines to distinguish in such cases. It will thus be vital to ensure the correct application of the previously established criteria of legal basis litigation in order to achieve a high degree of legal certainty in these new areas of conflict.

Overall, as has been shown, the courts have provided certain criteria for legal basis litigation under the first pillar which are, however, deficient to some extent and have led

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<sup>286</sup> “Die Schwerpunktlösung entpuppt sich somit in vielen ihrer Anwendungsfälle als Etikettenschwindel, weil objektive Schwerpunkte sich bei einem Konflikt von Ziel- und Sachbereichskompetenz nicht ermitteln lassen.” Trüe, C. (2002), *supra* note 255, at page 543.

<sup>287</sup> Van Vooren, B. (2012), *supra* note 218, at page 144.

to inconsistencies in judgements. In addition, as has been argued, institutional choices could have an arbitrary character which might prejudice legal basis litigation and lead to legal uncertainties. The new challenges of the post-Lisbon era require for a consistent application of previously established criteria or even the development of new guidelines in some areas in order to ensure a higher degree of legal certainty for the provisions under the Reform Treaty.

# CHAPTER II:

## EU External Relations: *intra-* and *inter-*pillar aspects

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### I. Introduction

Having looked at the structure of legal bases and general criteria of legal basis litigation under supranational EU law within the former first pillar, this Chapter will look at the specific legal bases in EU external relations and their structure as well as discuss legal basis litigation in this area. In particular, this will include an examination of whether external powers follow the same rules and principles as they have been discussed under Chapter I for the internal sphere or whether different rules have been developed specifically for the area of external relations. It is anticipated that the external sphere differs from the internal sphere in some aspects as regards competences, legal instruments and procedures. As will be shown, the courts therefore had to establish special criteria in order to provide guidelines for legal basis litigation in this area.

External relations has in the past been divided and distributed over three pillars, which informally continues to be the case after the introduction of the Treaty of Lisbon: Despite the integration of the former third pillar into the realm of supranational EU law,<sup>1</sup> the field of external relations is still governed by supranational and intergovernmental provisions at once. On the one hand, the Union is equipped with supranational powers to regulate in the external relations sphere. On the other hand, the area of common foreign and security policy has been established which grants Member States competences in external relations. This area is of an intergovernmental character which, as shall be seen further below, is governed by entirely different rules and principles than supranational law. As a result, legal basis litigation in this area may easily receive a cross-pillar dimension. In a highly politicised and at the same time

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<sup>1</sup> The discussion in this Chapter will refrain from getting into a detailed analysis of the third pillar which will be the main focus of Chapter III. The external sphere of the third pillar is understood to be subject to similar settings as the second pillar in the pre-Lisbon era, while it has become part of the TFEU and thus the supranational regime post-Lisbon.

sensitive area,<sup>2</sup> such as the external relations of the European Union, it is of the utmost importance to establish a certain degree of consistency, transparency, and, most significantly, legal certainty. Whether or not this has eventually been achieved by the Reform Treaty will also be analysed in this Chapter.

This Chapter will discuss external relations in the European Union before and after the introduction of the Treaty of Lisbon. First, it will examine the structure of legal bases in external relations under the former first pillar before and after Lisbon, according to the scope and nature of such competences, legal instruments and treaty-making procedures, including the resulting potential for *intra*-pillar legal basis litigation. Second, it will analyse the structure of legal bases within the common foreign and security policy under the former second pillar according to the nature and scope of the competence, legal instruments, and decision-making procedures available, including the resulting potential for *intra*-pillar legal basis litigation. Third, there will be a retrospective discussion of *inter*-pillar or cross-pillar conflicts in external relations. This will be specifically focusing on legal basis litigation concerning the old Article 47 (Amsterdam) TEU. After this, the new Article 40 TEU will be evaluated and its impact on legal basis litigation will be illustrated with the help of a hypothetical case scenario. There will also be an excursus examining the unity theory and whether or not such a unity has finally been accomplished with the entering into force of the Reform Treaty. This will include an evaluation of the newly created position of the High Representative of the Union for Foreign Affairs and Security Policy as well as the single legal personality. Finally, there will be some concluding remarks.

## **VIII. External Relations under the First Pillar**

One of the assumptions made in the beginning in order to justify the separate examination of the specific field of external relations was that there are certain

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<sup>2</sup> Cremona observed that third countries could have certain expectations as to the specific outcome in determining the legal basis for a measure which may thus prejudice legal basis litigation, Cremona, M. (2006). *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*. EU Working Paper LAW No. 2006/22. San Domenico, European University Institute, Department of Law, at pages 10 and 11. See also Koutrakos who equally states that “[b]y introducing the interests of third parties as an additional factor in the process of the choice of legal basis, the Court rendered a process already fraught with problems even more difficult to predict.”, Koutrakos, P. (2008). *Legal Basis and Delimitation of Competence in EU External Relations*. EU foreign relations law: constitutional fundamentals. M. Cremona and B. De Witte. Oxford, Hart Publishing: 171-198, at page 183.

differences in the external sphere concerning the structure of legal bases as well as the principles established for legal basis litigation. For example, this is the case with the ‘doctrine of implied powers’,<sup>3</sup> according to which the Union has acquired subsequent external competences flowing from powers granted in the internal sphere. In order to analyse the specificities of the area of external relations under supranational EU law, this section will first discuss the scope of the competence under supranational external relations law and the Union’s ways of extending this scope continuously. In the second part of this section, the nature of the competence will be analysed, in particular highlighting peculiarities of the external relations area in comparison with internal competences under supranational EU law. The third and fourth parts will briefly look at external legal instruments and treaty-making procedures respectively.

### **A. The scope of the competence**

Before the introduction of the Treaty of Lisbon, the European Union had several express powers in external relations. One of the first and most prominent areas under the realm of supranational powers is the area of common commercial policy which was introduced under the Rome Treaty. Subsequent areas of EU competences in external relations include humanitarian aid and development cooperation. However, while the principle of conferral not only applies to the internal sphere, the scope of external competences has been extended by the courts to areas which did not confer express powers to the Union in a specific area. Instead, the Union has also been granted implied competences according to the ‘doctrine of implied powers’<sup>4</sup> or ‘doctrine of parallelism’<sup>5</sup>. This has allowed supranational powers in external relations to expand to

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<sup>3</sup> Established by the ECJ in Case 22/70, *Commission of the European Communities v Council of the European Communities (ERTA)*, [1971]: ECR 00263. See e.g. Temple Lang, J. (1986). “The ERTA judgment and the Court’s case-law on competence and conflict.” *Yearbook of European Law* 6(1): 183-218.

<sup>4</sup> See e.g. Eeckhout, P. (2004). *External Relations of the European Union: Legal and Constitutional Foundations*. Oxford, Oxford University Press, at Chapter 3 ; Koutrakos, P. (2006). *EU International Relations Law*. Oxford, Hart Publishing, at Chapter 3; Holdgaard, R. (2008). *External relations law of the European community: legal reasoning and legal discourses*. Alphen aan den Rijn, Kluwer Law International BV, at Chapter 4; Cremona, M. (2011). *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy*. *The Evolution of EU Law*. P. Craig and G. de Burca. Oxford, Oxford University Press: 217-268.

<sup>5</sup> Schütze observes that such “[e]xternal powers run ‘parallel’ to internal powers”, Schütze, R. (2007). On ‘Middle Ground’. *The European Community and Public International Law*. *EUI Working Paper LAW No. 2007/13*. San Domenico, European University Institute, Department of Law. See also Schütze, R. (2010). *Federalism and Foreign Affairs: Mixity as a (Inter)national Phenomenon*. *Mixed Agreements Revisited: The EU and its Member States in the World*. C. Hillion and P. Koutrakos. Oxford, Hart Publishing: 57-86, at pages 74-77.

such an extent that the Union would almost always be able to take extended action where it had an internal competence.

The ‘doctrine of implied powers’ was first established in the *ERTA* case.<sup>6</sup> Here, the Court was requested to review the legality of the Council’s proceedings for the negotiation and conclusion of an International Agreement on European road transport.<sup>7</sup> The Commission argued that the necessary external competence would flow from an internal competence of the Union in the field of the common transport policy.<sup>8</sup> The Council, however, claimed that according to the principle of conferred powers such an interpretation would not be possible and that any external competence can only flow from express provisions in the Treaty.<sup>9</sup> The Court clarified in its judgement that even in the absence of express provisions for the *external* sphere the Union may draw competences from the *internal* sphere:

[T]he Community’s authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.

Such authority arises not only from an express conferment by the Treaty (...) but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.<sup>10</sup>

In its *Opinion 1/76*, the ECJ clarified that the Union’s authority extended to cases not only where it had already exercised its internal powers but that such authority may also be derived from the mere treaty provision without there being the need for the Union to have exercised its powers previously if “the participation of the Community in the international agreement is (...) necessary for the attainment of one of the objectives of the Community.”<sup>11</sup>

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<sup>6</sup> Case 22/70, *supra* note 3.

<sup>7</sup> Council's proceedings of 20 March 1970 regarding the negotiation and conclusion by the Member States of the Community, under the auspices of the United Nations Economic Commission for Europe, of the Agreement concerning the work of crews of vehicles engaged in European road transport (ERTA).

<sup>8</sup> Case 22/70, *supra* note 3, at para 6.

<sup>9</sup> *Ibid*, at para 9.

<sup>10</sup> *Ibid*, at paras 15 and 16.

<sup>11</sup> *Opinion 1/76*, Draft Agreement establishing a European laying-up fund for inland waterway vessels, [1977]: ECR 741, at para 4. See also Böhm, R. (1985). Kompetenzauslegung und Kompetenzlücken im Gemeinschaftsrecht: Ein Beitrag zur Klärung und Abgrenzung von effet utile, implied powers, resulting powers und Lückenklauseln. Frankfurt, Peter Lang.

This was confirmed more recently in *Opinion 2/91*.<sup>12</sup> The Court was again requested to review the conclusion of an international convention.<sup>13</sup> The Netherlands and Germany argued that since the Union is not a member of the International Labour Organisation (ILO) it subsequently cannot have any competence to conclude the convention in question, which would thus be reserved for Member States only. However, the Court reiterated the ‘doctrine of implied powers’, stating that

The (...) Community’s competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis.<sup>14</sup>

The notion of the ‘doctrine of implied powers’ was reiterated and refined by the Court in its *Opinion 2/94* in which it held that

The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.

Thus, in the field of international relations, at issue in this request for an Opinion, it is settled case-law that the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The Court has held, in particular, that, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect (...).<sup>15</sup>

It follows from the latter reasoning that the Union had *implied external* competences for matters in which it had *express internal* powers. On the one hand, this establishes certain symmetry between the internal and the external sphere. On the other hand, this also shows that external relations are governed by different principles than those which the Union has to follow internally: With the development of the ‘doctrine of implied

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<sup>12</sup> Opinion 2/91, Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, [1993]: ECR I-01061. See also Stadlmeier, S. (1997). “Die ‘Implied Powers’ der Europäischen Gemeinschaften.” *Austrian Journal of Public and International Law*. 52(3): 353-388.

<sup>13</sup> ILO Convention N° 170 concerning safety in the use of chemicals at work.

<sup>14</sup> Opinion 2/91, supra note 12, at para 9.

<sup>15</sup> Opinion 2/94, on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996]: ECR 1759, at paras 25 and 26.



powers' the Union has, in effect, found a way to circumvent the internal principle of conferral for the external sphere. It has thus been able to acquire powers not expressly conferred to it under the treaties.

## **B. The nature of the competence**

The previous Chapter has already looked at the nature of the competence of supranational EU law in the internal sphere. However, as will be shown, there are differences in external relations which will be discussed in the following. In particular, such differences can be found under the exclusive and shared competences of the Union. In addition, there is also subsequent exclusivity of supranational competences which does not exist at all in the internal sphere.

### **1. Exclusivity**

An exclusive EU competence was first found in *Opinion 1/75*: Taking into account the common interest of the Union, the Court established that the competence concerning Article 207 TFEU had to be of an exclusive nature.<sup>16</sup> While the main provision under the Treaty is (and always has been) an exclusive EU competence,<sup>17</sup> the actual area of common commercial policy could be considered much broader and therefore might overlap with other EU powers. This has led to legal basis litigation before the courts which were called upon to provide clarification in the delimitation of competences in this area.

In its *Opinion 1/94*,<sup>18</sup> the Court of Justice was requested by the Commission to deliver an opinion on the nature of the Union competence to conclude the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). These agreements were annexed to the Agreement establishing the World Trade Organisation (WTO Agreement). While the Council and the Member States claimed

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<sup>16</sup> Opinion 1/75, Draft Understanding on a Local Cost Standard drawn up under the auspices of the OECD, [1975]: ECR 1355.

<sup>17</sup> Now Art 207 TFEU.

<sup>18</sup> Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property (WTO), [1994]: ECR I-05267.

that the competence to conclude international agreements in these areas could only be shared between the Union and the Member States, they gave permission to the Commission to act on their behalf during the negotiations. This was interpreted by the Commission as an acknowledgement of its exclusive powers which it believed would flow from Article 207 TFEU alone, or in combination with Articles 114 and 352 TFEU.

The Court first examined the Union's competence to conclude the Multilateral Agreements on Trade in Goods. The exclusivity of the Union's competence according to Article 207 TFEU for Euratom products was undisputed by the Council and the Member States, however, this was not the case as regards ECSC products. In particular concerning the Agreement on Agriculture and the Agreement on the Application of Sanitary and Phytosanitary Measures, the Council argued that their effect was predominantly internal and thus could not be adopted on the basis of Article 207 TFEU.<sup>19</sup> This reasoning was rejected by the Court which considered all Multilateral Agreements on Trade in Goods to be covered by the framework of the common commercial policy and thus to fall under the ambit of exclusive EU powers.<sup>20</sup>

Concerning the GATS and TRIPs Agreements, however, the Court took a rather different view. The Court exempted cross-frontier supplies from GATS which were covered under Article 207 TFEU and therefore fell within the exclusive competence of the Union.<sup>21</sup> However, the Union had only shared competences for "the modes of supply of services referred to by GATS as 'consumption abroad', 'commercial presence' and the 'presence of natural persons'" which were not covered by the exclusive competence under the area of common commercial policy.<sup>22</sup> Article 207 TFEU also applied to measures to prohibit the release for the free circulation of counterfeit goods which were regulated under the TRIPs Agreement.<sup>23</sup> The Court, however, held that other aspects of the TRIPs Agreement were not covered by the Union's exclusive competence under the common foreign and security policy since their internal effects outweighed their external effects.<sup>24</sup>

The Court's attempt in *Opinion I/94* was thus very much focused on distinguishing between the different aspects of policy areas of the WTO Agreement, allocating some

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<sup>19</sup> *Ibid*, at para 28.

<sup>20</sup> *Ibid*, at para 34.

<sup>21</sup> *Ibid*, at para 53.

<sup>22</sup> *Ibid*, at para 47.

<sup>23</sup> *Ibid*, at para 55.

<sup>24</sup> *Ibid*, at para 57.

competences to the Union alone, while others would have to be shared with the Member States. On the one hand, from an internal perspective, this may seem very satisfying for Member States' interests which did not have to give up their entire sovereign powers in this area for the mere sake of consistency on the external stage. On the other hand, however, this very consistency appears highly fractured if it is taken into consideration that the WTO Agreement as well as the other multilateral agreements were established as a "single undertaking"<sup>25</sup> and as such should have been treated as a consistent whole rather than in separate pieces.<sup>26</sup> *Opinion 1/94* was therefore also described as a "missed opportunity" of the Court to bring clarity and consistency in the Union's external relations.<sup>27</sup>

In the aftermath of *Opinion 1/94*, the situation slightly changed with the introduction of the Treaty of Nice which incorporated the conclusion of agreements in the field of trade in services in the EU competence under the area of common commercial policy.<sup>28</sup> However, the situation remained unsatisfactory,<sup>29</sup> *inter alia* since the area was now divided into exclusive and shared competences. In particular, the field of trade in services remained ambiguous: According to Article 133(5) EC, such agreements were considered similar to the general common commercial policy, the only exception being that the last indent provided for some kind of residual competence for Member States:

the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

Thus, since Member States were left with this possibility to conclude their own agreements in this area, the competence for trade in services was of a shared rather than exclusive nature. Even more striking is that "agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services" could

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<sup>25</sup> Bourgeois, J. H. J. (1995). "The EC in the WTO and Advisory Opinion 1/94: An Echernach Procession." *Common Market Law Review* 32(3): 763-787, at page 785.

<sup>26</sup> Schütze described this as "ontological deformations", arguing that mixed competences in common commercial policy were a logical consequence of the initial broad interpretation of the Union's exclusive powers in this area, Schütze, R. (2009). *From Dual to Cooperative Federalism: The Changing Structure of European Law*. Oxford, Oxford University Press, at pages 167-173.

<sup>27</sup> Pescatore, P. (1999). "Opinion 1/94 on "Conclusion" of the WTO Agreement: Is there an escape from a programmed disaster?" *Ibid.* 36(2): 387-405, at page 387.

<sup>28</sup> Old Art 133(5) EC, now Art 207(4) TFEU.

<sup>29</sup> For a critical analysis of the area of common commercial policy after the introduction of the Treaty of Nice, see in particular Cremona, M. (2001). "A policy of bits and pieces? The Common Commercial Policy after Nice." *Cambridge Yearbook of European Legal Studies* 4: 61-91; Herrmann, C. W. (2002). "Common Commercial Policy after Nice: Sisyphus would have done a better job." *Common Market Law Review* 39(1): 7-29.

only be concluded jointly between the Union and the Member States according to Article 133(6) EC. In fact, this codifies mixity in external relations.<sup>30</sup> Therefore, as could be argued, the area of common commercial policy provided only for partial exclusivity.<sup>31</sup> As a result, *intra* legal basis litigation, i.e. within this policy area, and in particular concerning the area of trade in services, was still possible to occur after the introduction of and the codification in the Treaty of Nice.

In *Opinion 1/2008*, the Court was requested to deliver another opinion on the conclusion of these international agreements.<sup>32</sup> The opinion concerned the proposed modifications and withdrawals of commitments under the GATS agreements. After negotiations with certain WTO members and a successfully completed certification procedure, the Commission proposed to adopt the contested agreements on the basis of Article 133(1) and (5) EC, in conjunction with Article 300(2) EC. The Commission explained

that it had negotiated the agreements at issue for and on behalf of the Community and its Member States on the premiss that it could not, from the outset, be ruled out that those agreements would require approval by Member States. In view of the compensatory adjustments actually negotiated, the Commission was, however, of the opinion that they did not go beyond the Community's internal powers and did not lead to harmonisation of the laws of the Member States in an area for which the Treaty rules out such harmonisation, so that the second subparagraph of Article 133(6) EC would not be applicable and conclusion of the agreements at issue would therefore be within the exclusive competence of the Community.<sup>33</sup>

The Commission argued that the contested agreements could only fall under the Union's exclusive competence of the area of common commercial policy. The Commission was convinced that only its exclusive competence would allow for the necessary consistency and flexibility, both of which are required to ensure the proper application of the agreements in question. In addition, the Commission insisted that

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<sup>30</sup> Mixity and mixed agreements are discussed further below under shared competences.

<sup>31</sup> See discussion on exclusivity in Cremona, M. (2001), *ibid*, at pages 83-86.

<sup>32</sup> *Opinion 1/2008*, Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union, [2009]: ECR I-11129; For an in-depth case review see Cremona, M. (2010). "Balancing Union and Member State interests: *Opinion 1/2008*, choice of legal base and the common commercial policy under the Treaty of Lisbon." *European Law Review* 35(5): 678-694.

<sup>33</sup> *Ibid*, at para 24.

Article 133(6) EC should be interpreted narrowly, thus allowing for an effective application of the Union's powers under the area of common commercial policy.<sup>34</sup>

In contrast, the Council as well as some Member States<sup>35</sup> insisted that recourse should be had to Article 133(6) EC which would only allow for a joint competence of the Union together with the Member States.<sup>36</sup> They claimed that the Union's exclusive competences should not be evoked on mere considerations of effectiveness. Instead, they found that mixed agreements have proven effective in the past and therefore the proper application of Article 133(6) EC cannot be restricted. The Council and the Member States argued that since the contested agreements fell within the scope of Article 133(6) EC, this provision had to be applied.<sup>37</sup>

In *Opinion 1/2008*, the Court reached a similar conclusion as in *Opinion 1/94*: The agreements in question could only be concluded under a shared competence between the Union and its Member States since the Commission failed in its claim to conclude the agreements solely under the exclusive competence of the Union within the area of common commercial policy.<sup>38</sup> Interestingly, the Court did not apply the 'centre of gravity' theory in its judgement. Instead, its analysis focused on ex Article 133 EC and the specific derogations thereunder. While the 'centre of gravity' theory has proven to be a useful criterion in legal basis litigation concerning the internal sphere, it has been observed by Cremona that it may be rather difficult to be employed as regards international agreements due to the multitude of objectives such agreements entail.<sup>39</sup>

The Treaty of Lisbon provides some increased clarity as regards the area of common commercial policy, codifying an exclusive Union competence in this field, internally as well as externally.<sup>40</sup> Article 207(1) TFEU explicitly states that the area of "common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." This shall, however, "not affect the delimitation of competences between the Union and the Member States" according to Article 207(6) TFEU. The wording of this phrase has been rather unfortunate: Even though unlikely, such a non-affectation rule could render the whole provision subsidiary similar to the phrase "[s]ave where otherwise provided in the Treaties" in Article 114 TFEU. As has

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<sup>34</sup> Ibid, at paras 44-51.

<sup>35</sup> Namely the Czech Republic, Denmark, Portugal and the UK.

<sup>36</sup> *Opinion 1/2008*, supra note 32, at paras 41-43.

<sup>37</sup> Ibid, at paras 55-67.

<sup>38</sup> Ibid, at paras 130-137.

<sup>39</sup> Cremona, M. (2010), supra note 32, at page 687.

<sup>40</sup> Art 3(1)(e) TFEU.

been observed by Schütze, the drafters of the treaties have probably intended to “find a systemic limit in the internal competences of the Union” with this provision.<sup>41</sup> As has been argued, the Treaty of Lisbon has nevertheless achieved a better coherence in this area between internal and external matters.<sup>42</sup> However, as has also been observed, this was only achieved with an increased supranationalisation of the law in this field.<sup>43</sup>

## 2. Subsequent Exclusivity

In external relations, the Union has been able to gain subsequent exclusive powers through implied competences. The ‘implied powers doctrine’ has been developed by the courts under three main lines of argumentation. These shall be discussed in the following.

The first line of argumentation has been developed by the Court in its famous *ERTA* ruling: In the case of the Union exercising its implied competences in a specific field, the Court has argued that this power would become exclusive since Member States are then pre-empted from exercising their powers.<sup>44</sup>

(...) it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.<sup>45</sup>

More recently, in *Opinion 1/03*, the ECJ had the chance to revise on the nature of EU competences in external relations. In contrast to the *ERTA* judgement, it found that the implied external powers “may be exclusive *or shared* with the Member States.”<sup>46</sup> The Court further explained that

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<sup>41</sup> Schütze, R. (2012). *European Constitutional Law*. Cambridge, Cambridge University Press, at page 194.

<sup>42</sup> Dimopoulos, A. (2008). "The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?" *Croatian Yearbook of European Law & Policy* 4: 101-129.

<sup>43</sup> Dimopoulos, A. (2010). "The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy." *European Foreign Affairs Review* 15(2): 153-170, at page 169.

<sup>44</sup> Case 22/70, *supra* note 3, at paras 17 and 18.

<sup>45</sup> *Ibid*, at para 22.

<sup>46</sup> *Opinion 1/03*, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2006]: ECR I-01145, at para 115.

(...) the Community enjoys only conferred powers and that, accordingly, any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules.

[It is thus necessary to take into account] the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.<sup>47</sup>

The Court thus required for a “substantive normative conflict” to be found between the agreement concluded by the Member States and for a proper functioning of EU legislation in order to establish a supranational competence.<sup>48</sup> While this may be considered as a slight curtailing of the original even broader *ERTA* ruling, it nevertheless can be observed that the Union’s competences in external relations, whether explicit or implied, are rather extensive and as such have been construed widely before the courts.

Under the second line of argumentation, the Court delivered *Opinion 1/76*<sup>49</sup> which was concerned with the rationalisation of the economic situation of the inland waterway transport industry. The respective geographical area included the Netherlands, Germany and Switzerland. With particular regard to the latter, the establishment of common rules in the area of common transport policy would have hardly been sufficient and therefore required an international agreement between the respective states.<sup>50</sup> Thus, an implied EU power was found to be justified if it is “necessary for the attainment of one of the objectives of the Community.”<sup>51</sup> More recently, a more restrictive interpretation of the Union’s exclusive competences can be found in the *Open Skies* cases. In its rulings, the Court of Justice pointed out that such exclusive competence may only flow from an internal objective if this was “inextricably linked” to the external relations field.<sup>52</sup>

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<sup>47</sup> *Ibid*, at paras 124 and 133.

<sup>48</sup> Schütze, R. (2009), *supra* note 26, at page 339.

<sup>49</sup> *Opinion 1/76*, *supra* note 11.

<sup>50</sup> *Ibid*, at para 2.

<sup>51</sup> *Ibid*, at para 4.

<sup>52</sup> Case C-467/98, *Commission v Denmark*, [2002]: ECR I-9519, at para 61; Case C-468/98, *Commission v Sweden*, [2002]: ECR I-9575, at para 58; Case C-469/98, *Commission v Finland*, [2002]: ECR I-9627, at

The third line of argumentation considered that if the Union had hitherto not exercised its powers at the internal level Member States could not be excluded from acting in the field in question.<sup>53</sup> In other words, this meant that the external competences would have to be shared between the Union and the Member States. This was clarified in the Court's *Opinion 1/94*<sup>54</sup> which particularly analysed the scope of implied exclusive competences in the external sphere.<sup>55</sup> Here, the Court was requested to determine the nature of the Union's implied competence to conclude multilateral agreements on trade in goods.<sup>56</sup> While the Commission argued that the Union's exclusive competence could be implied from its internal competences in the field or from the need to achieving a Union objective, the Council objected to this on the grounds that the Union's competence cannot be exclusive to conclude such agreements but can only be shared between the Union and the Member States.<sup>57</sup> The judgment in *Opinion 1/94* thus defined the outer boundaries of the 'doctrine of implied powers': the Union may only acquire such powers if it is "not possible to achieve that objective by the establishment of autonomous common rules".<sup>58</sup> The Court found that this was not the case here since the

attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community.<sup>59</sup>

Thus, the Union could not acquire implied exclusive powers to conclude agreements in the external sphere, such as the GATS and the TRIPs Agreements. The Court held that

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para 62; Case C-471/98, *Commission v Belgium*, [2002]: ECR I-9681, at para 72; Case C-472/98, *Commission v Luxembourg*, [2002]: ECR I-9741, at para 66; Case C-475/98, *Commission v Austria*, [2002]: ECR I-9797, at para 72; Case C-476/98, *Commission v Germany*, [2002]: ECR I-9855, at para 87. See also discussion in Petite, M. (2006). *Current Legal Issues in the External Relations of the European Union*. EUI Working Paper LAW No. 2006/38. San Domenico, *Current Legal Issues in the External Relations of the European Union*, at page 8.

<sup>53</sup> *Opinion 1/94*, supra note 18, at para 77.

<sup>54</sup> *Ibid.*

<sup>55</sup> On an analysis of the court's ruling on the implied aspects of the Union's powers, see Maunu, A. (1995). "The Implied External Competence of the European Community after the ECJ *Opinion 1/94*: Towards Coherence or Diversity?" Legal Issues of European Integration 2: 115-128.

<sup>56</sup> General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods (TRIPs). These agreements were annexed to the WTO Agreement establishing a common institutional framework for the conduct of trade relations among its members in matters related to the agreements and legal instruments annexed to it.

<sup>57</sup> *Opinion 1/94*, supra note 18, at para 72.

<sup>58</sup> *Ibid.*, at para 85.

<sup>59</sup> *Ibid.*, at para 86.



such competences could only be shared between the Union and the Member States.<sup>60</sup> Nevertheless, as could be argued, the Court has failed in its Opinion to provide clear guidelines as to the exact demarcation between the different competences of the European Union on the one hand and the Member States on the other,<sup>61</sup> as well as to significantly delimit the expansion of exclusive EU competences in the external sphere.<sup>62</sup> As with the *ERTA* judgement, *Opinion 1/94* was subsequently relativized in *Opinion 1/03* in which the Court found that both exclusive as well as shared competences may be possible in external relations.<sup>63</sup>

With the introduction of the Treaty of Lisbon, the Union has been granted exclusive competence to conclude international agreements, according to the newly introduced Article 3(2) TFEU.<sup>64</sup> While the different types of competences are now static for the internal sphere of EU law,<sup>65</sup> they could still be considered to be rather dynamic for the external sphere:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.<sup>66</sup>

This, in fact, is the codification of the three lines of argumentation of the ‘doctrine of implied powers’ which provides the Union with an exclusive competence for the external sphere.<sup>67</sup> A similar wording can be found in Article 216(1) TFEU. The introduction of these two provisions has been criticised by Koutrakos who claims that

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<sup>60</sup> Ibid, at paras 98 and 105.

<sup>61</sup> Hilf, M. (1995). "The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise? -." European Journal of International Law 6: 245-259, at page 250.

<sup>62</sup> For a more in-depth analysis on the emergence of exclusive competences, see Schütze, R. (2007). "Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order." European Law Review 32(1): 3-28.

<sup>63</sup> See first line of argumentation.

<sup>64</sup> The conclusion of international agreements are subject to the procedure laid down in Art 218 TFEU.

<sup>65</sup> Art 3(1) TFEU.

<sup>66</sup> Art 3(2) TFEU.

<sup>67</sup> Schütze, R. (2012), supra note 41, at pages 201-204. See also Craig, P. (2010). The Lisbon Treaty: Law, Politics, and Treaty Reform. Oxford, Oxford University Press, at pages 165-167.

the Lisbon Treaty fails to capture the subtlety and the dynamic nature of the Court's interpretation of competence, risks introducing generalisations in an area which least requires them, and raises serious questions as to the ramifications of its provisions.<sup>68</sup>

It has further been argued that this codification could have the effect of a disposal of implied competences, thus increasing the scope of exclusive Union competences which would lead to a tremendous diminishing of mixity in external relations.<sup>69</sup> Nevertheless, there remains some ambiguity concerning these two provisions: As has been argued by Eeckhout, Article 216(1) TFEU does not explicitly state the nature of the competence in question, i.e. exclusive or shared, which could potentially generate new legal basis conflicts since it would contradict the exclusive competence provided for in Article 3(2) TFEU.<sup>70</sup> On any account, subsequently exclusive competences and their codification in the Treaty of Lisbon are a special peculiarity of external relations which differs from the internal sphere where such possibility has never existed due to the strict interpretation of the principle of conferral.

### 3. Shared Competences

Similar to the internal sphere, shared powers of the Union in external relations means that Member States are also competent to take the necessary measures. An example of an area of shared competences in external relations is the field of humanitarian aid,<sup>71</sup> as was held in *Parliament v Council*:<sup>72</sup> The Court

pointed out that the Community does not have exclusive competence in the field of humanitarian aid, and that consequently the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it.<sup>73</sup>

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<sup>68</sup> Koutrakos, P. (2008). "Primary law and policy in EU external relations: moving away from the big picture." *European Law Review* 33(5): 666-686, at page 684.

<sup>69</sup> Cremona, M. (2006). A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty. *EUI Working Paper LAW No. 2006/30*. San Domenico, European University Institute, Department of Law, at pages 10 and 11. See also Schütze, R. (2008). "Lisbon and the federal order of competences: a prospective analysis." *European Law Review* 33(5): 709-722, at pages 713 and 714.

<sup>70</sup> Eeckhout, P. (2011). *EU External Relations Law*. Oxford, Oxford University Press, at pages 112 and 113.

<sup>71</sup> In the pre-Lisbon era, there was no express provision in the treaties as regards humanitarian aid but was recognised as a shared competence by the ECJ. The Treaty of Lisbon has expressly included this area in the TFEU.

<sup>72</sup> Joined Cases C-181/91 and C-248/91, *European Parliament v Council and Commission*, [1993]: ECR I-3685.

<sup>73</sup> *Ibid*, at para 16.

With the entering into force of the Treaty of Lisbon a new competence has been introduced in the TFEU concerning the field of humanitarian aid: Article 214(1) TFEU defines humanitarian aid as providing

*ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations.

The Treaty still leaves some doubt as to the exact nature of the competences in this field. While the third sentence of Article 214(1) TFEU suggests that European Union and Member States have shared powers to “complement and reinforce” each other’s action, Article 4(4) TFEU rather gives the impression of a parallel nature of competences,<sup>74</sup> since it explicitly excludes the possibility of a pre-emptive effect of EU actions on Member States’ powers.<sup>75</sup> The same wording was used to define the nature of competences in the field of development cooperation,<sup>76</sup> and in the areas of research, technological development and space, suggesting a similar parallelism of powers between the Union and the Member States since pre-emption is excluded.<sup>77</sup> If these provisions are indeed to be distinguished from shared competences, this would allow for potential legal basis conflicts to arise between them due to their distinct nature. However, as could also be argued, shared competences in the external sphere are being distinguished from shared competences internally.

This becomes apparent looking at one of the peculiarities of external relations: In areas of shared competences, international agreements are concluded jointly between the Union and the Member States, which constitutes so-called ‘mixed agreements’<sup>78</sup>. This mixity is of a ‘compulsory’ or ‘obligatory’ nature as shared competences in external relations legally require for a joint conclusion of international agreements.<sup>79</sup> In contrast, shared competences under the internal sphere allow for autonomous action of the

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<sup>74</sup> See also Schütze, R. (2008), *supra* note 69, at pages 716 and 717.

<sup>75</sup> Thus, paragraph 4 of Art 4 TFEU could be interpreted as an exception to the preceding paragraphs defining shared competences of the Union.

<sup>76</sup> Art 4(4) TFEU.

<sup>77</sup> Art 4(3) TFEU.

<sup>78</sup> For a thorough analysis on mixed agreements, see Heliskoski, J. (2001). Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States. Erik Castrén Institute Monographs on International Law and Human Rights, The Hague, Kluwer Law International.

<sup>79</sup> Rosas, A. (1998). Mixed Union – Mixed Agreements. International Law Aspects of the European Union. M. Koskeniemi. The Hague, Kluwer Law International: 125-148, at pages 131 and 132.

Union.<sup>80</sup> So-called ‘facultative mixity’ in external relations can only be found under the parallel or concurrent competences of the Union.<sup>81</sup> As could be argued, this practice may have weakened the Union’s capability to a more pro-active role in external relations.<sup>82</sup> As regards their legal effects in the European legal order, ‘mixed agreements’ are being treated just as other international agreements falling under the exclusive competence of the European Union.<sup>83</sup>

Examples of mixed agreements include the above discussed WTO Agreements and the Cartagena Protocol on Biosafety. Another noteworthy mixed agreement is the Cotonou Agreement: Signed in December 2005, the European Consensus on Development<sup>84</sup> constitutes a revealing document, providing a certain amount of guidance in this *inter-pillar* area. In pursuance of the Millennium Development Goals set out by the UN, the European Community and the Member States agreed on a slight supranationalisation of this area, thus making such international aid more effective. The Agreement points out the Union’s “comparative advantages” in the areas of trade and regional integration; environment and the sustainable management of natural resources; infrastructure, communications and transport; water and energy; rural development, territorial planning, agriculture and food security; governance, democracy, human rights and support for economic and institutional reforms; conflict prevention and fragile states; human development; and social cohesion and employment. An example of such a development cooperation agreement is the Cotonou Agreement,<sup>85</sup> which was just recently revised for the second time.<sup>86</sup> This Agreement was concluded with the aim

to promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.<sup>87</sup>

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<sup>80</sup> See discussion in Chapter I.

<sup>81</sup> Rosas, A. (1998), *supra* note 79, at pages 131 and 132.

<sup>82</sup> See e.g. Pescatore, P. (1999), *supra* note 27.

<sup>83</sup> Case 12/86, Meryem Demirel v Stadt Schwäbisch Gmünd, [1987]: ECR 03719, at para 9; Case C-13/00, Commission of the European Communities v Ireland, [2002]: ECR I-02943, at para 14.

<sup>84</sup> (2006). Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’. Parliament, Council and Commission, Official Journal of the European Union. **C 46/01**.

<sup>85</sup> (2000). Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part.

<sup>86</sup> First signed on 23 June 2000, first revision 25 June 2005, second revision 19 March 2010.

<sup>87</sup> Art 1 first indent of the Cotonou Agreement.

It further focuses on the reduction and eventual eradication of poverty “consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.”<sup>88</sup>

The significance of this Agreement may be somewhat diluted considering the non-exclusiveness of the Union’s powers in these areas. This means that there is a *de facto* parallelism of external competences in this area, allowing for the EU as well as the Member States to conclude individual bilateral agreements on development cooperation with third countries.<sup>89</sup> While the latter could be considered to be less significant and less effective, they could nevertheless undermine the effectiveness of an agreement of greater scope such as the Cotonou Agreement. On the other hand, it can also be argued that the intergovernmental approach could be more adequate to give consideration to the sensitive nature of development policy. In any case, however, it can be assumed that the parallel nature of external powers in this field, even though comprehensive for a European lawyer, may be rather confusing for third countries entering into negotiations with the European Union.

As can be observed, the exact nature of the competence in the field of development cooperation is rather unclear, which remains the case in the post-Lisbon era.<sup>90</sup> While Article 208(1) TFEU suggests shared competences, Article 4(4) TFEU could imply certain parallelism in development cooperation. In any case, since pre-emption is excluded, Member States may take action in the field irrespective of whether or not the Union exercises its powers. This means that in cases such as the Cotonou Agreement, the Member States will still be able to conclude their individual agreements with third countries, notwithstanding and alongside the agreement concluded by the Union.

As regards mixity after Lisbon, it can be observed that the codification and allocation of additional exclusive competences to the European Union as well as a better delimitation of competences in shared policy areas could decrease the significance of mixed agreements.<sup>91</sup> However, mixity will certainly not vanish from the external relations

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<sup>88</sup> Art 1 second indent of the Cotonou Agreement.

<sup>89</sup> “[Art 133 EC] shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations *in so far as such agreements comply with Community law* and other relevant international agreements.” Article 133(5) fourth indent EC, emphasis added; See also Holland, M. (2002), *supra* note 281, at page 21.

<sup>90</sup> See also Craig, P. (2010). *The Lisbon Treaty: Law, Politics, and Treaty Reform*. Oxford, Oxford University Press, at page 394.

<sup>91</sup> See de Baere, G. (2008). *Constitutional Principles of EU External Relations*. Oxford, Oxford University Press, at pages 69 and 70.

sphere of EU law.<sup>92</sup> Within all areas of shared competences mixed agreements are possible, unless the agreement in question fulfils the requirements set out in Article 3(2) TFEU and thus falls under the exclusive competence of the Union. This certainly indicates a tendency towards more harmonisation as regards international agreements by encroaching upon Member States' competences.

### C. Legal Instruments

Under supranational EU law, internal legal instruments are also available externally. They have the same legal status and effects as has already been discussed above. However, in addition, legal instruments in external relations also include international agreements. According to Article 216(1) TFEU

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

As has already been argued above, this could be considered as the codification of the 'doctrine of implied powers', a strategy which was pursued by the European courts before the introduction of the Treaty of Lisbon in order to grant the Union additional competences in the external sphere. In addition, Article 217 TFEU also enables the Union to conclude international "agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."

According to Article 216(2) TFEU international agreements "are binding upon the institutions of the Union and on its Member States." Whether or not such an agreement also becomes directly effective has to be decided by the courts on a case-by-case analysis, employing a 'two-stage test'.<sup>93</sup> In general, the courts first have to establish the capability of the agreement in question to entail such direct effect or the lack of any

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<sup>92</sup> Rosas finds that "[m]ixity is here to stay", Rosas, A. (2010). *The Future of Mixity. Mixed Agreements Revisited: The EU and its Member States in the World*. C. Hillion and P. Koutrakos. Oxford, Hart Publishing: 367-374, at page 367. See also Dashwood, A. (2010). *Mixity in the Era of the Treaty of Lisbon. Mixed Agreements Revisited: The EU and its Member States in the World*. C. Hillion and P. Koutrakos. Oxford, Hart Publishing: 351-366.

<sup>93</sup> For an illustration of this 'two-stage test' see Schütze, R. (2012), *supra* note 41, at pages 339-341.

contrary evidence.<sup>94</sup> In the *International Fruit* case,<sup>95</sup> the Court was requested in a preliminary ruling to evaluate on the compatibility of Regulations No 459/70,<sup>96</sup> 565/70<sup>97</sup> and 686/70<sup>98</sup> with Article XI of the GATT<sup>99</sup> Agreement. For the alleged incompatibility it had to be necessary for the latter to bind the Union as well as to confer rights on its citizens.<sup>100</sup> The Court established that this capability of direct effect of an international agreement and thus the requirement for the first part of the test has to include an analysis of “the spirit, the general scheme and the terms” of the agreement in question.<sup>101</sup> In this case, the Court found that Article XI of the GATT Agreement was not capable of entailing direct effects and therefore the contested regulations could not be incompatible with international law. As has been argued by Schütze, the evaluation on the first part of the test is purely ‘political’ in nature and may therefore lead to arbitrary results.<sup>102</sup>

Second, in order to be considered directly effective, the specific provisions must be “unconditional and sufficiently precise” which has to be analysed “in the light of both the object and purpose of the Agreement and of its context.”<sup>103</sup> This is equivalent to the test in the internal sphere whether or not an instrument can have direct effect.<sup>104</sup> So far, the courts have refused such direct effect only in a few cases as, for example, for the WTO agreements in *Germany v Council*.<sup>105</sup> The Court clarified in *Portugal v Council* its reasoning for rejecting such direct effect for WTO agreements:

To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or

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<sup>94</sup> See e.g. Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, [1982]: ECR 03641, at para 18.

<sup>95</sup> Joined cases 21 to 24-72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, [1972]: ECR 01219.

<sup>96</sup> Regulation No 459/70 of the Commission of 11 March 1970 laying down the protective measures applicable to the importation of eating apples (Official Journal 1970, L 57, p. 20).

<sup>97</sup> Regulation No 565/70 of the Commission of 25 March 1970 on the operation of the system of transport certificates for eating apples, amending Regulation No 459/70 (Official Journal 1970, L 69, p. 33).

<sup>98</sup> Regulation No 686/70 of the Commission of 15 April 1970 (Official Journal 1970, L 84, p. 21).

<sup>99</sup> General Agreement on Tariffs and Trade (GATT).

<sup>100</sup> Joined cases 21 to 24-72, *supra* note 95, at paras 7 and 8.

<sup>101</sup> Joined cases 21 to 24-72, *supra* note 95, at para 20.

<sup>102</sup> Schütze, R. (2012), *supra* note 41, at page 339.

<sup>103</sup> Case 104/81, *supra* note 94, at para 23.

<sup>104</sup> See discussion above.

<sup>105</sup> Case C-280/93, *Federal Republic of Germany v Council of the European Union*, [1994]: ECR I-04973.

executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.<sup>106</sup>

Another example in which direct effect was rejected concerned the UN Convention on the Law of the Sea as has been held in the *Intertanko* case: On the grounds that this convention does not so much confer rights on individuals as it does on coastal states and ships, it could not have any direct effect.<sup>107</sup>

Concerning the scope of direct effect, the Court has stated in *Walrave*, referring to regulations and agreements, that “to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.”<sup>108</sup> The Court further clarified in *Case C-438/00* that an international agreement can have direct effects on private parties:<sup>109</sup> Here, a non-discrimination rule included in the Association Agreement between the Union and Slovakia had to be scrutinised according to its scope.<sup>110</sup> It was held that the provision in question had

effects vis-à-vis third parties inasmuch as it does not apply solely to measures taken by the authorities but also extends to rules applying to employees that are collective in nature.<sup>111</sup>

Thus, international agreements have horizontal direct effect, which may be considered as taking the form of “external regulations”.<sup>112</sup> In comparison, a mere vertical direct effect would be tantamount to external directive and therefore preclude the direct enforceability of the agreement in a private setting.<sup>113</sup>

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<sup>106</sup> Case C-149/96, Portuguese Republic v Council of the European Union, [1999]: ECR I-08395, at para 46.

<sup>107</sup> Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, [2008]: ECR I-04057.

<sup>108</sup> Case 36-74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federacion Española Ciclismo*, [1974]: ECR 01405, at para 19.

<sup>109</sup> Case C-438/00, *Deutscher Handballbund eV v Maros Kolpak*, [2003]: ECR I-04135.

<sup>110</sup> Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, signed in Luxembourg on 4 October 1993.

<sup>111</sup> *Ibid*, at para 19.

<sup>112</sup> Schütze, R. (2012), *supra* note 41, at page 341.

<sup>113</sup> *Ibid*, at page 341.



## D. Treaty-making Procedures

Treaty-making procedures for the Union's external relations competences are laid down in Article 218 TFEU. The Council has been entrusted with the principal role to "authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them."<sup>114</sup> The European Commission is entitled to submit recommendations to the Council, unless "the agreement relates *exclusively or principally* to the common foreign and security policy" in which case the right to initiative rests with the High Representative.<sup>115</sup> As has been observed by Eeckhout

The division of labour as regards CFSP and non-CFSP matters between the High Representative and the Commission appears to reflect the methodology which the Court of Justice has developed for delimiting different legal bases in the Treaties: that of the main or principal purpose or component of the measure.<sup>116</sup>

This, in fact, signifies the potential for new *intra* legal basis conflicts in this area: As could be argued, the Commission and the High Representative are likely to battle for the right of initiative and in which sphere of competence the predominant purpose of a measure falls.

Voting in the Council is required to follow the qualified majority procedure according to Article 218(8) TFEU. Exceptionally, this provision requires unanimity if this is specified in the field covered by the agreement, for association agreements, agreements falling under Article 212 TFEU, as well as for the Union's accession agreement to the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>117</sup> As could be argued, this could generate *intra* legal basis litigation as regards the correct delimitation between cases falling under the qualified majority voting and those exceptionally requiring unanimity. Eeckhout again distinguishes between CFSP and non-CFSP matters, the former being restricted to unanimity voting only.<sup>118</sup> International agreements may be challenged according to the procedure set out in Article 218(11) TFEU. If requested by any Member State, the Parliament, the

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<sup>114</sup> Art 218(2) TFEU.

<sup>115</sup> Art 218(3) TFEU, emphasis added.

<sup>116</sup> Eeckhout, P. (2011), *supra* note 70, at page 196.

<sup>117</sup> Art 218(8) TFEU, second indent.

<sup>118</sup> Eeckhout, P. (2011), *supra* note 70, at page 202.

Council or the Commission, the European Court has to scrutinise the agreement's compatibility with the treaties.<sup>119</sup>

The European Parliament is generally entitled to be “immediately and fully informed at all stages of the procedure” according to Article 218(10) TFEU. In addition, the Parliament has to be consulted before the Council can proceed to adopt a decision concluding an agreement.<sup>120</sup> Consent of the Parliament is required in a few cases set out in Article 218(6)(a) TFEU.<sup>121</sup> In particular the fifth option of this provision shows some congruency with the internal sphere: The Parliament's consent is required if the proposed agreement falls within an area which internally would also require at least consent.<sup>122</sup> Nevertheless, symmetry between the external and internal sphere is not entirely fulfilled: As can be observed, this is still lagging behind the standards to be complied with in the internal sphere where the Parliament's role is extended to the co-decision procedure in certain circumstances. This has been described as the “structural ‘democratic deficit’ in the procedural regime for international agreements”.<sup>123</sup> *Intra* legal basis litigation could occur as regards the delimitation between consultation and consent procedures: While the European Parliament will have an interest in a maximum of influence, thus the requirement to give its consent, the Council will have an interest in a rather quick procedure, thus favouring mere consultation of the Parliament.

### **E. *Intra*-pillar Legal Basis Litigation**

As regards legal basis litigation under supranational external relations, conflicts usually arise between areas of the Union's exclusive powers and such areas where it has only a shared competence with the Member States. Obviously, the Union prefers the adoption of international agreements upon a legal basis excluding Member States' involvement, while the latter attempt to ensure their inclusion in the legislative process. As has already been identified above, a significant area of legal basis conflicts in external

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<sup>119</sup> See e.g. Opinion 1/09, Opinion delivered pursuant to Article 218(11) TFEU, [2011]: ECR 00000.

<sup>120</sup> Art 218(6)(b) TFEU.

<sup>121</sup> These are (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

<sup>122</sup> Art 218(6)(a)(v) TFEU.

<sup>123</sup> Schütze, R. (2012), *supra* note 41, at page 211.

relations is the field of common commercial policy. Not only has it generated *intra* legal basis litigation, i.e. within the same provision, as can be seen for example in *Opinion I/2008*,<sup>124</sup> but also *intra*-pillar legal basis litigation, i.e. with other provisions under the former first pillar.

In *Portugal v Council*,<sup>125</sup> Council Decision 94/578/EC<sup>126</sup> was challenged on the grounds of an incorrect legal basis. The contested decision was adopted on the basis of Articles 207 and 211 TFEU in conjunction with Article 167 TFEU, thus under the joint areas of common commercial policy, development cooperation and culture. Portugal, however, claimed that Article 352 TFEU should have been considered an additional legal basis necessary for the conclusion of the contested decision. While the Council was able to adopt the contested measure under a mere qualified majority voting, the additional recourse to Article 352 TFEU would have required unanimity voting. Portugal, being unfavourable of the decision in question, was thus denied its power to veto under the former procedure.<sup>127</sup>

Portugal argued *inter alia* that Article 352 TFEU was a necessary legal basis for the adoption of measures concerning human rights. Such human rights provisions were incorporated in the contested decision. Portugal observed that

the fact that respect for fundamental rights ranks among the general principles whose observance is mandatory in the Community legal order does not justify the conclusion that the Community is competent to adopt measures in that field, whether internal or external.<sup>128</sup>

While Article 211 TFEU was sufficient only for cooperation agreements with human rights as a general objective, Portugal argued that the contested decision was essentially concerned with the respect for human rights.<sup>129</sup> The Council, however, explained that the human rights objective was considered an “essential element of development policy”<sup>130</sup> and therefore Article 211 TFEU was a sufficient legal basis. The Court recalled general principles of legal basis litigation concerning the residual nature of

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<sup>124</sup> See discussion above.

<sup>125</sup> Case C-268/94, Portuguese Republic v Council of the European Union, [1996]: ECR I-06177.

<sup>126</sup> Council Decision 94/578/EC of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development (Official Journal 1994, L 223, p. 23).

<sup>127</sup> Case C-268/94, *supra* note 125, at para 13.

<sup>128</sup> *Ibid*, at para 16.

<sup>129</sup> *Ibid*, at para 17.

<sup>130</sup> *Ibid*, at para 18.

Article 352 TFEU and the ‘centre of gravity’ theory.<sup>131</sup> It held that the inclusion of a human rights objective did not go beyond the competences found in the legal bases on which the contested measure had been adopted and therefore an additional recourse to Article 352 TFEU was not justified.<sup>132</sup>

Another example of *intra*-pillar legal basis litigation can be found as regards different competences. Since the area of common commercial policy generally falls within the exclusive competences of the Union, it usually conflicts with other shared competences, such as the area of environmental policy. In its *Opinion 2/00*,<sup>133</sup> the Court was asked to elaborate on the Commission’s questions referring to the correct choice of legal basis as well as the nature of Member States’ competences and their involvement in the Cartagena Protocol on Biosafety. This agreement was negotiated as a result to the Convention on Biological Diversity, signed in 1992 and adopted on the basis of Article 192 TFEU. The Commission essentially claimed that the protocol in question should have rather been adopted on the basis of an exclusive Union competence provided by Article 207 TFEU in order to ensure a coherent and effective application of a common objective of the Union; more specific, however incidental, matters could be covered by the additional legal basis of Article 191 TFEU.<sup>134</sup> In general, the Commission relied on a broad interpretation of the concept of the common commercial policy and insisted that

The fact that provisions governing international trade in certain products pursue objectives which are not primarily commercial (...) cannot (...) have the effect of excluding the Community’s exclusive competence and justifying recourse to, for example, Article 175 EC where the measures in question are intended specifically to govern the Community’s external trade (...). In reality, measures regulating international trade often pursue a wide range of different objectives, but this does not mean that they must be adopted on the basis of the various Treaty provisions relating to those objectives.<sup>135</sup>

The Council as well as the Member States defended their choice of legal basis of Article 192 TFEU on the grounds that the protection of the environment constituted the main aim and purpose of the contested protocol. This was also confirmed by the Parliament,

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<sup>131</sup> *Ibid*, at paras 21 and 22, and case-law cited.

<sup>132</sup> *Ibid*, at paras 23-29.

<sup>133</sup> *Opinion 2/00*, Cartagena Protocol on Biosafety, [2001]: ECR I-09713.

<sup>134</sup> *Ibid*, at para 20.

<sup>135</sup> *Ibid*, at para 35.

which, however, did not entirely reject an additional recourse to Article 207 TFEU due to the protocol's international reach.<sup>136</sup>

In its judgement, the Court looked at general principles of legal basis litigation, such as the objective factors and the 'centre of gravity' theory.<sup>137</sup> More specifically, the Court considered that the interpretation of an international agreement should be in conformity with Article 31 of the Vienna Convention on the Law of Treaties which reads that

a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>138</sup>

The Court found that the Protocol pursued an environmental objective and therefore could be adopted on a legal basis within that area. Thus, the Court did not follow the Commission's reasoning of a broad interpretation of the concept of the common commercial policy. Instead, it confirmed the protocol's main aim to rest within the environmental policy area, while having only incidental international effects.<sup>139</sup> The competence to conclude the protocol in question was therefore shared between the Union and the Member States according to Article 192 TFEU.<sup>140</sup> Thus, while the Court affirmed the legal basis used, it once more did not provide any more information concerning the actual demarcation of powers between the Union and the Member States. It merely held that both share competences in their capacities to conclude the Protocol in question.

In another case,<sup>141</sup> concerning the Energy Star Agreement,<sup>142</sup> the Court was again requested to find the correct legal basis in either common commercial policy or environmental policy. The Agreement was adopted under the environmental policy on the legal basis of Article 192(1) TFEU in conjunction with Article 218 TFEU. This was subsequently challenged by the Commission which argued that the main objective of the contested agreement was to facilitate trade and therefore should have rather been

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<sup>136</sup> *Ibid*, at para 21.

<sup>137</sup> For a case-by-case analysis of the principles see Chapter I.

<sup>138</sup> Opinion 2/00, *supra* note 133, at para 24.

<sup>139</sup> *Ibid*, at para 37.

<sup>140</sup> *Ibid*, at para 47.

<sup>141</sup> Case C-281/01, *Commission of the European Communities v Council of the European Union*, [2002]: ECR I-12049.

<sup>142</sup> Council Decision 2001/469/EC of 14 May 2001 concerning the conclusion on behalf of the European Community of the Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficient labelling programs for office equipment (Official Journal 2001, L 172, p. 1).

adopted under the area of common commercial policy on the basis of Article 207 TFEU.<sup>143</sup> The Council denied any such effects on international trade evolving from the contested measure, arguing that the main aim of the Agreement is “to reduce energy consumption by stimulating the supply of, and demand for, energy-efficient equipment.”<sup>144</sup>

Again, the Court looked at the general criteria of legal basis litigation, finding that the contested agreement pursues both commercial as well as environmental objectives. However, when looking at the effects of the measure in question, the Court observed that

It is true that in the long term, depending on how manufacturers and consumers in fact behave, the programme should have a positive environmental effect as a result of the reduction in energy consumption which it should achieve. However, that is merely an indirect and distant effect, in contrast to the effect on trade in office equipment which is direct and immediate.<sup>145</sup>

Thus, according to the ‘centre of gravity’ theory, the Court held that the Agreement should fall under the common commercial policy and should have therefore been adopted on the basis of Article 207 TFEU.

In general, different competences in external relations have led to *intra*-pillar legal basis litigation, in particular under supranational EU law. It is evident from the above that there is no clear demarcation to be drawn between the different legal bases. In addition, international agreements usually pursue two or more objectives which have made it even more challenging for the courts to apply general criteria of legal basis litigation, such as the ‘centre of gravity’ theory which may lead to diverging results on a case-by-case analysis.

## **IX. External Relations under the Second Pillar**

The second pillar was established in accordance with the Maastricht Treaty in 1993, the framework of which was subsequently changed under the Treaties of Amsterdam and

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<sup>143</sup> Case C-281/01, *supra* note 141, at para 20.

<sup>144</sup> *Ibid*, at para 27.

<sup>145</sup> *Ibid*, at para 41.

Nice. However, those changes have left the area of common foreign and security policy almost unaffected; both in explicit terms as well as in the way these rules have been interpreted in the decision-making processes within the institutions. The few significant changes have rather codified existing practices or have contributed to their facilitation.<sup>146</sup> Hardly any newly introduced rules can be said to have restricted Member States in their sovereign rights over common foreign and security policy.<sup>147</sup> It is important to note here that the area of common foreign and security policy has been rather remote from scrutiny of the European Court of Justice which thus impeded legal basis litigation in the former second pillar. The lack of judicial control in this area is being maintained under the Treaty of Lisbon which provides that the Court

shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.<sup>148</sup>

However, as could be argued, there is a potential for legal basis conflicts even within the CFSP area due to the two exceptions provided for in Article 275 TFEU under which the Court of Justice may nevertheless scrutinise the compliance with Article 40 TEU as well as the legality of restrictive measures according to Article 263 TFEU.<sup>149</sup> This section will therefore analyse the second pillar as regards its distinctiveness from supranational EU law before and after Lisbon, in particular looking at the available safeguard mechanisms so as to maintain the autonomy of this area of law as well as the compliance with such rules in practice. It will start by looking at the competences available under the common foreign and security policy and how this differs from Union competences. Second, it will analyse the specific nature of the set of legal instruments available under the former second pillar in comparison to supranational instruments. Third, CFSP decision-making procedures will be scrutinised as to their distinctiveness from legislative procedures available under the TFEU. Last, there will be

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<sup>146</sup> See e.g. Koutrakos, P. (2009). *Common Foreign and Security Policy: Looking Back, Thinking Forward. 50 Years of the European Treaties: Looking Back and Thinking Forward*. M. Dougan and S. Currie. Oxford, Hart Publishing: 159-179, at page 161.

<sup>147</sup> See Denza, E. (2002). *The Intergovernmental Pillars of the European Union*. Oxford, Oxford University Press, at pages 126-128; Koutrakos, P. (2001). *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulations of sanctions, exports of dual-use goods and armaments*. Oxford, Hart Publishing, at Chapter 2; Bono, R. G. (2006). "Some Reflections on the CFSP Legal Order." *Common Market Law Review* 43(2): 337-394.

<sup>148</sup> Art 275 TFEU. See also Art 24(1) TEU.

<sup>149</sup> On a brief overview of the different constitutional concepts of economic sanctions, see Schütze, R. (2007), *supra* note 5, at pages 13-16. An extensive historical analysis of economic sanctions can be found in Koutrakos, P. (2001), *supra* note 147; more recently, see Gazzini, T. and E. Herlin-Karnell (2011). "Restrictive measures adopted by the EU from the standpoint of international and EU law." *European Law Review* 36(6): 798-817. See also discussion below in the *Kadi* cases.

an evaluation of the findings as regards their influence on the actual relationship between the two pillars. It is anticipated that the former second pillar remains distinct from the supranational EU law to a large extent, despite the introduction of the Reform Treaty.

## **A. CFSP competences**

### **1. The scope of the competence**

The scope of the competence under the area of common foreign and security policy has largely remained the same as before the introduction of the Treaty of Lisbon. Article 2(4) TFEU declares that there is a Union competence in the area of common foreign and security policy:

The Union shall have competence, *in accordance with the provisions of the Treaty on European Union*, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.<sup>150</sup>

Article 24 TEU provides that the Union's competence under the field of CFSP

shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

Article 42(2) TEU comprises a 'saving clause' concerning Member States' relations with international organisations:

The policy of the Union (...) shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

Subparagraph six of the same Article contains another 'saving clause' concerning the relationship between Member States:

Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most

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<sup>150</sup> Emphasis added.



demanding missions shall establish permanent structured cooperation within the Union framework.

The general objectives of the common foreign and security policy after Lisbon are

democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.<sup>151</sup>

It can be argued that the Union's competence under the second pillar has always been construed widely with certain flexibility for Member States' self-determination. The new treaty fails to clarify the scope of CFSP competences and its concrete delimitation from supranational external competences *per se*. Nevertheless, it is anticipated that this situation may be remedied by the introduction of the new Article 40 TEU which will be discussed further below.

## **2. The nature of the competence**

While the EU Treaties do not provide a clear statement as to the actual type of the Union's competence, Article 24 TEU entitles the Union to *some kind of* competence only which may be interpreted in several ways.

It could be argued that CFSP competences are shared between the Union and the Member States according to Article 4(1) TFEU which provides that any competence conferred by the Treaties "which does not relate to the areas referred to in Articles 3 and 6" TFEU shall be of a shared nature. The area of common foreign and security policy is only mentioned in Article 2(4) TFEU, however, neither in Article 3 TFEU relating to an exclusive Union competence nor in Article 6 TFEU as regards the Union's complementary powers. It could thus be argued that the Treaty of Lisbon has introduced shared competences under the former second pillar. This would suggest that CFSP measures would be directly applicable as well as superior as regards national laws. However, this would also mean that the Union could pre-empt Member States' powers according to Article 2(2) TFEU which arguably cannot have been intended to apply to the area of common foreign and security policy by the drafters of the Treaty of

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<sup>151</sup> New Art 21 in conjunction with the new Art 23 TEU.

Lisbon.<sup>152</sup> Whether or not such an interpretation is intended is only relevant in so far as the courts will follow a teleological interpretation when deciding such cases which is, of course, highly desirable. Otherwise, Member States' powers would be vulnerable to pre-emption whenever the Union decides to exercise its powers. This approach can therefore only be rejected and it is recommended that the ECJ should not interpret CFSP competences as being shared between the Union and its Member States.

It could further be argued that the CFSP competences are of a *sui generis* nature.<sup>153</sup> It is anticipated from further below that there is only a limited possibility of interaction of Union law under the common foreign and security policy with the laws of the Member States after Lisbon. Thus, the possibility of pre-emption of CFSP competences is rather unlikely and therefore the nature of CFSP competences will not be shared between the Union and the Member States. Since the Treaty of Lisbon has preserved a certain degree of independency and distinctness of the former second pillar, especially as regards the area of security policy, the nature of the competence under the CFSP Title can thus be described as more intergovernmental rather than supranational. While this could be considered as evidence for a parallel competence under the new Treaty on European Union, it might equally constitute an exception from the otherwise *sui generis* competences in the area of common foreign and security policy. Therefore, it is suggested here that the Lisbon Treaty has established a *sui generis* competence for the area of common foreign and security policy which is rather distinct from other EU policy areas under the TFEU.<sup>154</sup> The significance of this distinction lies with the specificity of CFSP provisions for which it is vital to be protected from encroachment from TFEU provisions, in which case the intergovernmental exercise of competences would be jeopardised.

Having a closer look at the specific provisions under the former second pillar after Lisbon, a distinction could be made between the area of foreign policy on the one hand and the area of security policy on the other: The former has allocated a dominant role to the Union and a supporting role to the Member States, which are obliged to comply

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<sup>152</sup> Cremona, M. (2008). Defining competence in EU external relations: lessons from the Treaty reform process. Law and Practice of EU External Relations: Salient Features of a Changing Landscape. A. Dashwood and M. Maresceau. Cambridge, Cambridge University Press: 34-69, at page 65.

<sup>153</sup> See e.g. Cremona, M. (2003). "The Draft Constitutional Treaty: External Relations and External Action." Common Market Law Review 40(6): 1347-1366, at page 1354; Schütze, R. (2008), supra note 69, at page 711.

<sup>154</sup> See also Streinz, R., C. Ohler, et al. (2008), supra note 157.

with the Union's actions and to refrain from acting against the Union's interests.<sup>155</sup> Thus, rejecting the concept of shared competences for the area of common foreign and security policy, this could be an indication of the existence of parallel powers.<sup>156</sup> For example, Article 28(2) TEU provides that decisions adopted under this provision "shall commit the Member States in the positions they adopt and in the conduct of their activity." This would support the classification of CFSP provisions as parallel competences.<sup>157</sup> In contrast to this, the area of security policy confines the competences of the Union to a complementary or supporting nature: The Union may make recommendations to the Member States but it can neither prejudice their specific policies nor prevent them from adopting more stringent measures.<sup>158</sup> This certainly supports the argument that competences under the area of common foreign and security policy cannot be classified as shared between the Union and the Member States, however, should rather be considered as parallel or even *sui generis* in nature.

## B. Legal Instruments

### 1. Before Lisbon

A distinct set of legal instruments had been developed under the common foreign and security policy since the establishment of the pillar structure under Maastricht.<sup>159</sup> Before the entry into force of the Treaty of Lisbon, available measures have comprised principles and general guidelines, common strategies, joint actions, and common positions.<sup>160</sup> While the nature of general guidelines, common strategies and other CFSP instruments, such as declarations,<sup>161</sup> were only vaguely defined in the old Article 13 (Amsterdam) TEU, the EU Treaty provided some more guidance as to the nature of joint actions and common positions: According to the old Article 14(1) (Amsterdam)

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<sup>155</sup> E.g. Art 24(3) TEU.

<sup>156</sup> Parallel powers: It is suggested that the only way both, EU and Member States, may exercise *parallel* powers is on a 'first come, first served' basis.

<sup>157</sup> Streinz, Ohler, et al. argue that the Lisbon Treaty classifies parallel competences as a subordinated type of shared competences rather than as an independent category. They describe this as an "Etikettenschwindel", i.e. a false labelling, Streinz, R., C. Ohler, et al. (2008). Der Vertrag von Lissabon zur Reform der EU: Einführung mit Synopse. München, Verlag C.H.Beck oHG, at page 88. This reasoning will, however, not be followed here since it could also be possible that an independent parallel competence is implied in Art 4 TEU.

<sup>158</sup> E.g. Art 42(2), (6) and (7) TEU.

<sup>159</sup> Except joint actions which have existed since the Single European Act, 1986.

<sup>160</sup> Art 12 (Amsterdam) TEU.

<sup>161</sup> See Wessel, R. A. (1999). The European Union's Foreign and Security Policy: A Legal Institutional Perspective. The Hague, Kluwer Law International, at pages 185-189.

TEU joint actions were defined as to “address specific situations where operational action by the Union is deemed to be required.” Further, Article 14(3) (Amsterdam) TEU provided some indication as to the legal effects of such joint actions, requiring that they “shall commit the Member States in the positions they adopt and in the conduct of their activity.” It could be argued that this obligation entailed legal effects for Member States since it required them to take action or refrain from any contradictory action respectively, although the actual form of this action was left almost entirely for the discretion of the Member State in question. Compliance with joint actions was also required in Article 20 (Amsterdam) TEU which, unfortunately, was drafted in similarly vague terms. The question which arose was what would happen if a Member State acted contrary to the objectives set out in a joint action or if it did not take any action in a situation in which a joint action would require it to do so. Although direct effect for joint actions was not explicitly excluded under Article 14 TEU,<sup>162</sup> such vertical direct effect would be difficult to establish considering the lack of judicial review<sup>163</sup> in the area of common foreign and security policy.<sup>164</sup>

The uncertainty surrounding joint actions as regards their binding or non-binding nature respectively thus led to criticism<sup>165</sup> and to far-fetched speculation whether this CFSP legal instrument could even be interpreted to resemble to a certain extent Regulations and Directives as regards the obligation imposed upon Member States with the adoption of such instruments.<sup>166</sup> However, this cannot be seen as to have constituted sufficient evidence for a similar status of joint actions with legal instruments available under supranational EU law, especially when taking into account the lack of direct effect of former second pillar measures. Such a comparison is further unconvincing since the European courts have never mentioned such a possibility to read Article 14 (Amsterdam) TEU in a similar vein as any Union legal instrument.

Article 15 (Amsterdam) TEU regulated common positions which “shall define the approach of the Union to a particular matter (...)” Similar to the legal effects of joint actions, Article 15 (Amsterdam) TEU provided that “Member States shall ensure that their national policies conform to the common positions.” This ‘conformity’

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<sup>162</sup> As was the case, for example, with Title VI legal instruments under Article 34(b) and (c) (Amsterdam) TEU.

<sup>163</sup> See discussion below.

<sup>164</sup> Dashwood, A. (2008). *The Law and Practice of CFSP Joint Actions*. *EU foreign relations law: constitutional fundamentals*. M. Cremona and B. De Witte. Oxford, Hart Publishing: 53-77, at page 55.

<sup>165</sup> “The ill-defined nature of joint actions (...)”, Eeckhout, P. (2004), *supra* note 4, at page 402.

<sup>166</sup> See discussion in Wessel, R. A. (1999), *supra* note 161, at page 155.

requirement, though equally imprecisely worded, has been said to have been even more significant in practical terms in the case of common positions than it is for joint actions.<sup>167</sup> Further, there was also an external dimension to the scope of common positions: Member States were required to sustain the objectives of such common positions in international organisations and at international conferences.<sup>168</sup> Similar to joint actions, however, it would be difficult to establish direct effect for common positions on the grounds that the ECJ had no powers to scrutinise in the area of common foreign and security policy.

It can thus be argued that the set of legal instruments previously available under the second pillar was intergovernmental in nature due to its lack of direct effect. The legislative amendments under Amsterdam and Nice have led to a codification and a better definition of the available forms of cooperation between the Member States. The intergovernmental character, however, was preserved which can be largely attributed to the fact that no direct or indirect effect could be implied. The result of this interpretation is that the area of common foreign and security policy has remained as a rather remote area, particularly in comparison to the laws and principles available under the Union pillar.

## 2. After Lisbon

With the introduction of the Treaty of Lisbon, the set of legal instrument slightly changes: While general guidelines continue to exist as an independent instrument after Lisbon,<sup>169</sup> (joint) actions and (common) positions are now part of the accumulative instrument of decisions.<sup>170</sup> Arrangements for the implementation of such decisions constitute a third sub-category of instruments.<sup>171</sup> Common strategies have disappeared under the new set of legal instruments after Lisbon. These changes have been criticised by de Witte who claims that Lisbon does not simplify the system of legal instruments.<sup>172</sup>

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<sup>167</sup> Eeckhout, P. (2004), *supra* note 4, at page 404.

<sup>168</sup> Arts 19(1) and (2), 20, and 37 (Amsterdam) TEU.

<sup>169</sup> Art 25(a) TEU.

<sup>170</sup> Art 25(b)(i) and (ii) TEU. It is noticed that this instrument of a TEU decision is distinct from the decision which is available under the TFEU.

<sup>171</sup> Art 25(b)(iii) TEU which will be subject to qualified majority voting according to the new Art 31(2) third indent TEU.

<sup>172</sup> De Witte, B. (2008). *Legal Instruments and Law-Making in the Lisbon Treaty. The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* S. Griller and J. Ziller. Wien, Springer-Verlag: 79-108, at page 90.

First, this is due to the fact that the newly introduced CFSP instrument of a decision comes in three versions (actions, positions and arrangements), two of which were previously independent instruments (joint actions and common positions). This could lead to confusion in so far as it might not always be immediately clear as to which type of decision is meant. Second, there is further risk of confusion as regards the decision available under the TFEU and the decision available for CFSP competences. CFSP decisions and TFEU decisions might differ in scope and applicability which makes it even more regrettable that the drafters of the Treaty of Lisbon have not been able to convert this distinctiveness into the actual denomination of the instruments.<sup>173</sup>

It is thus not entirely clear whether the set of legal instruments available under the common foreign and security policy has remained distinct from the legal instruments available under the TFEU. On the one hand, it could be argued that apart from the mere labels of the instruments, the main difference in their nature is that TFEU instruments have a binding effect on Member States, while CFSP instruments remain without such direct effect. The adoption of legislative acts, which would be directly applicable, is explicitly excluded under the CFSP area.<sup>174</sup> Member States could therefore remain independent since they are free to choose whether and to which extent they are willing to comply with the adopted CFSP measures, which is not the case with TFEU instruments. This would be evidence of the intergovernmental character of the former second pillar after Lisbon and would require the protection of the provisions under the common foreign and security policy from encroachment from TFEU provisions.

On the other hand, it could also be argued that these decisions available under the area of common foreign and security policy should be considered as a mere sub-category or special form of the general instrument of a TFEU decision. The drafters of the Lisbon Treaty might have chosen the same name in order to facilitate the alignment of these instruments which are likely to have the same legal characteristics in practice, i.e. directly effective if the provisions are clear, unconditional and precise.<sup>175</sup> The set of legal instruments available under the first pillar has in the past already shown a tendency for assimilation to the extent that the differences between legal instruments have been blurred,<sup>176</sup> a development which may now have been extended to CFSP instruments alike. Under this scenario, the intergovernmental character will be lost and

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<sup>173</sup> See *Ibid.*

<sup>174</sup> Arts 24(1) second indent, third sentence and 31(1) first indent TEU.

<sup>175</sup> See discussion above on the effects of legal instruments under the first pillar.

<sup>176</sup> See Chapter I.

CFSP instruments would receive binding character. It remains questionable whether such an enormous step towards supranationalisation in the area of common foreign and security policy can be enforced in practice instantly. On any account, it will trigger legal basis conflicts where the courts will have the chance to give direction, one way or the other.

As regards international agreements, the Union is empowered to conclude such agreements “with one or more States or international organisations” according to Article 37 TEU under the area of common foreign and security policy. This CFSP instrument has to be considered as the same as international agreements under Title V of Part Five TFEU. According to Article 216(2) TFEU such agreements “are binding upon the institutions of the Union and on its Member States.” Further, as has been shown above, international agreements can also entail direct effect under certain circumstances, applying a ‘two-stage test’ on a case-by-case analysis.

### **C. Decision-making Procedures**

Decision-making procedures under the common foreign and security policy largely characterise the intergovernmental nature of the former second pillar. The distinctiveness of decision-making procedures has contributed to the maintenance of the CFSP as a remote area under the sovereignty of Member States and their competent authorities.

#### **1. The institutional balance**

A major difference which distinguishes the area of common foreign and security policy from supranational EU law is the distribution of competences between the institutions. Previously, the main institutional actor in the decision-making processes under the second pillar used to be the Council which had the duty to ensure the compliance with the general CFSP objectives as was set out in Article 11 (Amsterdam) TEU. The Council also ensured “the unity, consistency and effectiveness of action by the Union”,<sup>177</sup> and, in particular, could take the necessary decisions, recommended common

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<sup>177</sup> Art 13(3) (Amsterdam) TEU, now Art 26(2) TEU.

strategies, and adopted joint actions and common positions.<sup>178</sup> Any Member State had the right of initiative to bring in a proposal for such measures.<sup>179</sup> After the introduction of the Treaty of Lisbon, Member States remain the main actors which shall together with the High Representative<sup>180</sup> of the Union put into effect the CFSP which shall be defined and implemented by the European Council and the Council.<sup>181</sup> The right of initiative in the area of common foreign and security policy as well as the common security and defence policy is now mainly vested in the High Representative.<sup>182</sup>

The Council also remains the main actor for the conclusion of international agreements, according to Article 218(2) TFEU which provides that the “Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.” The European Parliament’s influence continues to be of a specific nature under the CFSP area,<sup>183</sup> being exempted from Article 218(6) TFEU which otherwise requires the Parliament’s consent under specific circumstances, thus maintaining the mere consulting procedure for CFSP provisions. The Commission’s influence remains limited to make recommendations and proposals for international agreements.<sup>184</sup>

Thus, the influence of other European institutions, apart from the Council, has always been rather limited under the second pillar. For example, the Commission has a limited capacity to submit proposals, which, after the introduction of the Treaty of Lisbon, may even have to be jointly with the High Representative.<sup>185</sup> Further, the involvement of the European Parliament in CFSP matters does not go beyond the mere consultation requirement.<sup>186</sup> Most prominently, however, is the lack of judicial scrutiny for CFSP

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<sup>178</sup> Arts 14(1), and 15 (Amsterdam) TEU.

<sup>179</sup> Art 22(1) (Amsterdam) TEU, now Art 30(1) TEU.

<sup>180</sup> Since the High Representative is officially an institution of the EU and part of the Commission it could be argued that this in itself constitutes a shift towards supranationality within the second pillar. However, it is also observed that the High Representative is further part of the Council which accounts for the intergovernmental nature of its role. The supranational effect will thus be of a rather minor significance.

<sup>181</sup> Art 24(1) second indent TEU.

<sup>182</sup> Art 18(2) TEU. See also Art 218(3) TFEU.

<sup>183</sup> See Art 24(1) second indent TEU.

<sup>184</sup> Art 218(3) and (9) TFEU. These tasks may, however, also be conducted by the High Representative.

<sup>185</sup> Art 22(2) TEU. It could be argued that the choice of institution to submit proposals already constitutes the first stage of legal basis litigation as this could indicate whether the proposed measure will be adopted on a CFSP legal basis or on a TFEU provision which would then have further implication as regards direct effect, legislative procedure, judicial review, etc.

<sup>186</sup> See e.g. Arts 27(3), 36, and 41(3) TEU. This is further supported by the explicit exclusion of the adoption of legislative acts (Arts 24(1) second indent and 31(1) first indent TEU) which require the co-decision procedure. For more in-depth discussions on the European Parliament’s limited role in CFSP matters and the resulting ‘democratic deficit’ in this area, see Wessel, R. A. (1999), *supra* note 161, at



matters. The European Court of Justice remains to have no jurisdiction under the second pillar after Lisbon except where it is required to review the compliance with the new Article 40 TEU.<sup>187</sup>

## 2. Voting requirements

Another important indicator for the intergovernmental nature of the former second pillar is the availability of voting procedures in favour of individual Member States. It is explicitly provided in the new Article 24(1) second indent TEU that specific rules and procedures will continue to apply to CFSP provisions. While qualified majority voting has been promoted under supranational EU law for a long time, unanimity in the Council remains the rule under the common foreign and security policy.<sup>188</sup> This unanimity requirement highlights the integrity of Member States and thus contributes to the intergovernmental character of CFSP measures. The Treaty further provides for Member States to opt-out from certain measures as well as emergency brakes if at least one third of the Member States<sup>189</sup> abstain from a proposed measure.

Nevertheless, qualified majority voting has also been promoted under the common foreign and security policy and may apply in exceptional circumstances listed in Article 31(2) TEU.<sup>190</sup> It is observed that the Treaty of Lisbon has introduced a distinction between two different types of qualified majority voting: ‘ordinary’ and ‘special’ qualified majority voting.<sup>191</sup> While under the ‘ordinary’ voting procedure a majority of “at least 55% of the members of the Council (...), comprising at least 65% of the population”<sup>192</sup> would be sufficient, the ‘special’ qualified majority requires “at least 72% of the members of the Council”<sup>193</sup>. The ‘ordinary’ qualified majority applies if the Council acts upon a proposal from the Commission or the High Representative of the

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pages 213-223; de Baere, G. (2008), supra note 91, at Chapter 5; Bieber, R. (2002). *Democratic Control of International Relations of the European Union. The European Union as an Actor in International Relations*. E. Cannizzaro. The Hague, Kluwer Law International.

<sup>187</sup> Art 24(1) second indent TEU and Art 275 second indent TFEU. On a thorough analysis of the Court’s powers under the second pillar, see Ketvel, M.-G. G. (2006). "The Jurisdiction of the European Court of Justice in respect of the Common Foreign and Security Policy." *International & Comparative Law Quarterly* 55: 77-120.

<sup>188</sup> Art 31(1) TEU.

<sup>189</sup> They need to comprise at least one third of the population of the Union, Art 31(1) second indent TEU.

<sup>190</sup> Subject to the exceptions stated in Art 31(2) and (3) TEU.

<sup>191</sup> See Schütze, R. (2012), supra note 30, at pages 206 and 207.

<sup>192</sup> Art 238(3)(a) TFEU.

<sup>193</sup> Art 238(3)(b) TFEU.

Union for Foreign Affairs and Security Policy. Otherwise, the ‘special’ qualified majority applies. Accordingly, the exceptions listed in Article 31(2) TEU have to be distinguished: The first exception requires the ‘special’ qualified majority, while exceptions number two and four entail the ‘ordinary’ voting procedure. The third exception listed under Article 31(2) TEU could require either procedure.

It could be argued that the distinction between those different types of qualified majority voting for the exceptions listed under Article 31 TEU in the area of common foreign and security policy may have further implications for legal basis litigation in future cases.<sup>194</sup> In particular, the first and second options under Article 31(2) TEU could trigger such legal basis conflicts. Here, the European Council and the High Representative of the Union for Foreign Affairs and Security Policy are likely to quarrel over their right of initiative which would have an impact on each Member State’s weight in the subsequent voting procedure. While Member States would have an interest in a decision to be adopted under the first indent of Article 31(2) TEU and thus the requirement of at least 72% of the members approving the proposed decision in the Council, the Union could prefer a lower threshold for measures to be adopted in this area and thus would rather the decision to be adopted under the second indent. It is difficult to anticipate the outcome of such a legal basis conflict and any further developments on these matters will hopefully induce increased clarity.

#### **D. *Intra-pillar* Legal Basis Litigation**

*Intra-pillar* legal basis litigation within the area of common foreign and security policy does not exist. There are several reasons for that: First, as has been demonstrated in the analysis above concerning the structure of legal bases in this area, there are hardly any differences between the provisions as regards the scope and the nature of the competences, legal instruments, or decision-making procedures. It could be argued that the provisions found in the area of foreign policy differ from provisions under the area of security policy as regards the nature of the competence. Nevertheless, this has not led to any *intra-pillar* legal basis litigation in this area because, second, the European Court of Justice does not have any competence for legal review over the area of common foreign and security policy according to Article 275 TFEU. It may only do so in exceptional situations in which CFSP provisions conflict or interfere with supranational

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<sup>194</sup> After the transitional period, starting from 1 November 2014, Art 238(3) TFEU.

law, which then receives an *inter-pillar* dimension. This will be discussed in the following.

## **X. *Inter-pillar conflicts in External Relations***

Since the area of external relations has never been restricted to one pillar only, the delimitation of competences has been rather difficult. As a result, cross-pillar conflicts have emerged which has led to cross-pillar litigation in the area of external relations. As has been observed above, the problem concerning the protection of CFSP provisions from encroachment lies with the insufficient definition of the nature of competences in this area. Such competences are not entirely safe from pre-emption since there is a slight possibility that the European courts do not follow a teleological approach taking into account the intention by the drafters of the Treaty. Instead, the courts could interpret Article 4(1) TFEU in such a way that CFSP competences have to be shared between the Union and the Member States. In such a case the scope of the provisions under the common foreign and security policy could easily be jeopardised.

It is therefore necessary to examine the courts' litigation in these cases. First, in most cases the courts are required to decide for one legal basis since a cross-pillar legal basis may not be possible. This section will thus analyse the means of delimiting supranational and intergovernmental competences before and after the Treaty of Lisbon, as well as scrutinise the relationship between CFSP and non-CFSP provisions. Second, this section will look at *inter-pillar* mixity which has occurred in some cases. In a third part, an excursus will be provided discussing the EU's unity theory and whether or not such a unity has finally been achieved with the introduction of the Treaty of Lisbon.

### **A. Legal Basis Litigation**

Legal basis litigation in the area of external relations has been a rather great challenge for the European courts due to the cross-pillar dimension of this area. This section will discuss some prominent policy areas which have been particularly threatened by cross-pillar conflicts in the past as well as analyse the new treaty framework and anticipate possible developments in external relations. It will first discuss legal basis litigation

under the old Article 47 (Amsterdam) TEU followed by an analysis of the current Article 40 TEU and its anticipated impact on future legal basis litigation in external relations.

### 1. Before Lisbon: Article 47 (Amsterdam) TEU

The European Union had safeguarded its own competences by introducing the old Article 47 (Amsterdam) TEU which “aims [...] to maintain and build on the *acquis communautaire*”.<sup>195</sup> Wessel argued that “the development of CFSP (...) should not only respect the *acquis communautaire*, but that it should even be at its service.”<sup>196</sup> According to the old Article 47 (Amsterdam) TEU, Member States could take action as long as this did not encroach upon the powers which were conferred on the Union.<sup>197</sup> This meant that as soon as a proposed measure could be adopted under the former first pillar, it could no longer be adopted under the intergovernmental pillars.<sup>198</sup> Any such measure would be in breach of Article 47 (Amsterdam) TEU and therefore be declared void before the courts. Before the introduction of the Treaty of Lisbon, there was only one case on the infringement of Article 47 (Amsterdam) TEU under the second pillar, namely the *ECOWAS*<sup>199</sup> case on the compatibility of a CFSP measure with supranational EU law. Before analysing this case, however, this section will first discuss two other cases which have arguably also been influenced by Article 47 (Amsterdam) TEU to the extent that if a Union competence had been applicable this would have taken priority.

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<sup>195</sup> Case C-91/05, *Commission of the European Communities v Council of the European Union (ECOWAS or Small Arms and Light Weapons)*, [2008]: ECR I-03651, at para 59; Case C-301/06, *Ireland v European Parliament and Council of the European Union*, [2009]: ECR I-00593, at para 76.

<sup>196</sup> Wessel, R. A. (2000). "The Inside Looking Out: Consistency and Delimitation in EU External Relations." *Common Market Law Review* 37(5): 1135-1171, at page 1147.

<sup>197</sup> Case C-170/96, *Commission of the European Communities v Council of the European Union (Airport Transit Visa)*, [1998]: ECR I-02763, at para 16.

<sup>198</sup> This has been described as the ‘substitution effect’ which means that a Union instrument may not be substituted by an instrument under the TEU, Dashwood, A. (2008). *Article 47 TEU and the relationship between first and second pillar competences. Law and Practice of EU External Relations: Salient Features of a Changing Landscape*. A. Dashwood and M. Maresceau. Cambridge, Cambridge University Press: 70-103, at page 82. Others have, however, argued that this in fact constitutes pre-emption of Member States’ powers in external relations. See e.g. Herlin-Karnell, E. (2008). "'Light Weapons' and the Dynamics of Art 47 EU - The EC's Armoury of Ever Expanding Competences." *The Modern Law Review* 71(6): 998-1008, at pages 1006 and 1007.

<sup>199</sup> Case C-91/05, *supra* note 195.

*a) PNR and Kadi cases*

The scope of CFSP competences was challenged in the Agreements on ‘PNR’ data. In the course of a series of measures adopted in the aftermath of the 9/11 terrorist attacks, the United States entered into negotiations with the European Union with an aim to ensuring that US customs authorities were provided with electronic access to all Passenger Name Records (‘PNR’ data) on flights to, from, or across US territory. Following these negotiations, the EU subsequently adopted two decisions: Decision 2004/535 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection, and Decision 2004/496 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR (Passenger Name Record) data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection.

In the joined cases concerning ‘Passenger Name Records’ (PNR),<sup>200</sup> the European Parliament brought forward an action at law as regards the improper conclusion of the EU-US Agreement on PNR on the basis of Article 114 TFEU. While the Council as well as the Commission had been confident that there existed some supranational competence to conclude the agreement which could justify Article 114 TFEU as being the appropriate legal basis;<sup>201</sup> the European Parliament had argued against that, claiming there was no EU competence to be relied upon.<sup>202</sup> In its judgement, the ECJ distinguished between the mere collection of PNR data, the processing of which is “necessary to provide a service”, as opposed to “data processing regarded as necessary for safeguarding public security and for law-enforcement purposes.”<sup>203</sup> While only the former would fall within the competence of the Union, the Court considered the latter to be at issue here and thus held that the contested decisions had been wrongly adopted on the first pillar legal basis of Article 114 TFEU. In a rather swift appraisal, the Court thus gave preference to the European Parliament’s reasoning and concluded that the Union did not have any such competence as to conclude the PNR Agreement in question.<sup>204</sup> The Court failed to provide any guidelines as to which principles had been taken into consideration or how similar cases in the future should be dealt with. It is thus not

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<sup>200</sup> Joined Cases C-317/04 and C-318/04, *European Parliament v Council of the European Union (C-317/04) and Commission of the European Communities (C-318/04) (PNR)*, [2006]: ECR I-04721.

<sup>201</sup> *Ibid.*, at paras 53, 64 and 65.

<sup>202</sup> *Ibid.*, at paras 51 and 63.

<sup>203</sup> *Ibid.*, at para 57.

<sup>204</sup> *Ibid.*, at paras 67-70.

entirely clear as to whether the ECJ applied the ‘centre of gravity’ theory to a wider scale, i.e. the cross-pillar dimension.<sup>205</sup>

The Court further remained silent as to which alternate provision could have been used as an appropriate legal basis for the measures in question. As can be perceived from an earlier decision before the CFI<sup>206</sup> “the fight against international terrorism and its funding is unarguably one of the Union’s objectives under the CFSP, as they are defined in Article 11 EU (...).”<sup>207</sup> Since this also constituted the primary objective of the measures on PNR data, it can be assumed that a CFSP provision would have been more appropriate as a legal basis in the case at hand. This mainly objective-driven approach was criticised by Cremona who argued that the effects of a measure should also be taken into account. According to her, the effects of the contested decisions in the PNR cases could be better attributed to Article 114 TFEU, i.e. the proper functioning of the internal market.<sup>208</sup> This view can be contrasted with Mitsilegas’ opinion who clearly argued in favour of the Court’s reasoning, notwithstanding a certain degree of inconsistency in comparison to other (unchallenged) internal and international agreements.<sup>209</sup>

Hillion and Wessel argued that the PNR judgements represented a first attempt of the Court to acknowledge the possibility that Community law can also encroach upon the provisions laid down in the Treaty on European Union.<sup>210</sup> Although this might be a desirable interpretation, this view has to be criticised, since the Court has made no statement in its judgement which would allow for such a conclusion. Had the Court intended to protect the ‘*acquis intergouvernemental*’, it would have certainly articulated this intention, also in regard of the significance of such a ruling. However, the brevity of its judgement as well as subsequent case law suggest that importance should be attached

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<sup>205</sup> This was suggested by Wasmeier and Thwaites (2004): “The legal boundary between the powers of the Community in the first and the third pillar regime must be determined according to the general principles of Community law.” Wasmeier, M. and N. Thwaites (2004). “The “battle of the pillars”: does the European Community have the power to approximate national criminal laws?” European Law Review 29(5): 613-635, at page 634.

<sup>206</sup> Due to no contradictory evidence from the ECJ’s judgement, the CFI’s statement has to be considered as good law.

<sup>207</sup> Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, [2005]: ECR II-03533, at para 167.

<sup>208</sup> Cremona, M. (2006), supra note 2, at page 12.

<sup>209</sup> See Mitsilegas, V. (2009). EC Criminal Law. Oxford, Hart Publishing, at pages 302-304.

<sup>210</sup> Hillion, C. and R. A. Wessel (2009). “Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?” Common Market Law Review 46(2): 551-586, at pages 575 and 576. See also van Oik, R. (2008). “Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences.” European Constitutional Law Review 4: 399-419, at page 407.

to the *PNR* case only insofar as the conclusion of the agreement was excluded from the scope of Article 114 TFEU but not that it could possibly amount to an exception from the Court's preference of the '*acquis communautaire*'. This is also in conformity with the argument put forward by Herrmann who states that the judgement should not be overestimated as regards the delimitation of competences between the EC and the EU.<sup>211</sup>

The Court's reasoning in the *PNR* cases can be contrasted with a similar case, in which it was held that Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks was correctly adopted upon Article 114 TFEU.<sup>212</sup> Here, the ECJ found that the contested measure as its main objective laid down rules covering "the activities of service providers in the internal market", as opposed to "rules governing the activities of public authorities for law-enforcement purposes" which was at issue in the *PNR* judgements.<sup>213</sup> It can thus be observed, that the Court again focused on the objectives rather than the effects of the contested measure. However, depending on the very objective of a measure, the Union could have the necessary competences for the measure to be adopted on the basis of a supranational provision.

In the *Yusuf*<sup>214</sup> and *Kadi*<sup>215</sup> cases the CFI, and on appeal in *Kadi and Al Barakaat*<sup>216</sup> the ECJ, had to analyse to what extent Article 352 TFEU could be applied not only to complement EU competences but also to accomplish an objective falling under the area of common foreign and security policy. The cases originally concerned the annulment of Council Regulation (EC) No 467/2001<sup>217</sup> which had been adopted on the basis of

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<sup>211</sup> Herrmann, C. (2008). Much Ado About Pluto? The 'Unity of the European Union Legal Order' Revisited. *EU foreign relations law: constitutional fundamentals*. M. Cremona and B. de Witte. Oxford, Hart Publishing: 20-52, at page 29.

<sup>212</sup> Case C-301/06, supra note 195, [2009]: ECR I-00593.

<sup>213</sup> Ibid, at para 91.

<sup>214</sup> Case T-306/01, supra note 207.

<sup>215</sup> Case T-315/01, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, [2005]: ECR II-03649.

<sup>216</sup> Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, [2008]: ECR I-06351. For a thorough analysis of the case, see Tzanou, M. (2009). "Case-note on Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities." *German Law Journal* 10(2): 123-154.

<sup>217</sup> Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (Official Journal 2001, L 67, p. 1).

Articles 75 and 215 TFEU, and subsequently Council Regulation (EC) No 881/2002<sup>218</sup> which had been adopted not only on Articles 75 and 215 TFEU but was further supplemented by the legal basis of Article 352 TFEU.<sup>219</sup> While the originally contested regulation was aimed at the interruption or reduction of economic relations with a third country involved in international terrorism and therefore was validly adopted on the dual legal basis of Articles 75 and 215 TFEU,<sup>220</sup> the subsequently contested regulation had directed such action against individuals and organisations established within the EU. The Council had therefore considered it necessary to include Article 352 TFEU as an additional legal basis in order to establish a supranational EU competence.<sup>221</sup> The CFI first considered whether Article 352 TFEU could have been used as the sole legal basis for Council Regulation (EC) No 881/2002 and found that this would have gone beyond the scope of the provision in question.

[N]either the institutions nor the Member States [are authorised] to rely on the ‘flexibility clause’ of [Article 352 TFEU] in order to mitigate the fact that the Community lacks the competence necessary for achievement of one of the Union’s objectives. To decide otherwise would amount, in the end, to making that provision applicable to all measures falling within the CFSP and within police and judicial cooperation in criminal matters (PJC), so that the Community could always take action to attain the objectives of those policies. Such an outcome would deprive many provisions of the Treaty on European Union of their due ambit and would be inconsistent with the introduction of instruments specific to the CFSP (common strategies, joint actions, common positions) and to the PJC (common positions, decisions, framework decisions).<sup>222</sup>

However, recourse to Article 352 TFEU in order to supplement Articles 75 and 215 TFEU was held to be justified since this could in fact be considered as Union action implemented under the first pillar after the adoption of a second-pillar common position or joint action of the Council.<sup>223</sup> On appeal, the ECJ took a rather different approach and held that the requirement in Article 352 TFEU to pursue an objective of the Union

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<sup>218</sup> Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (Official Journal 2002, L 139, p. 9).

<sup>219</sup> See also Case T-253/02, *Chafiq Ayadi v Council of the European Union*, [2006]: ECR II-02139.

<sup>220</sup> See also Case T-362/04, *Leonid Minin v Commission of the European Communities*, [2007]: ECR II-002003. And similarly, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council of the European Union*, [2006]: ECR II-04665.

<sup>221</sup> For a similar case see Case T-47/03, *Jose Maria Sison v Council of the European Union*, [2007]: ECR II-00073.

<sup>222</sup> Case T-306/01, *supra* note 207, at para 156; Case T-3135/01, *supra* note 215, at para 120.

<sup>223</sup> Case T-306/01, *supra* note 207, at para 161; Case T-315/01, *supra* note 215, at para 125.



“cannot on any view be regarded as including the objectives of the CFSP.”<sup>224</sup> However, the Court identified an implied instrumental objective underlying Articles 75 and 215 TFEU, thus nevertheless justifying recourse to Article 352 TFEU.<sup>225</sup> Neither the CFI nor the ECJ judgement provided a clear definition of the scope of supranational EU competences, the establishment of which “requires a leap of faith”<sup>226</sup> considering the facts in the current case. On any account, the courts have widened supranational EU powers into the sphere of the second pillar despite its earlier denial of such a possibility;<sup>227</sup> this could therefore be considered to constitute an encroachment upon Member States’ powers. In addition, it could be argued that the courts failed to provide for a clear delimitation of powers between the pillars in external relations.<sup>228</sup>

### **b) The ECOWAS judgement**

The contested measures in the *ECOWAS*<sup>229</sup> case were Council Decision 2004/833/CFSP<sup>230</sup> and Council Joint Action 2002/589/CFSP.<sup>231</sup> Both of the contested measures had been adopted on the basis of a CFSP provision, i.e. the contested joint action had Article 28 TEU as its legal base and the contested decision was based on the contested joint action in conjunction with Article 31 TEU. The Commission had relied upon a ‘fixed’ boundary between the powers of the Union on the one hand and those of the Member States on the other. It had argued that by adopting the contested measures, the Council had infringed Article 47 (Amsterdam) TEU since the EU would have had a supranational competence to take such action on the basis of Article 208(1) TFEU which provides that the Union shall have a complementary power with the Member States in the field of development cooperation. The Commission had argued that such a

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<sup>224</sup> Joined Cases C-402/05 P and C-415/05 P, supra note 216, at para 201.

<sup>225</sup> Ibid, at paras 226 and 227.

<sup>226</sup> Tridimas, T. (2009). "Terrorism and the ECJ: empowerment and democracy in the EC legal order." *European Law Review* 34(1): 103-126, at page 109.

<sup>227</sup> Therefore, Tridimas (2009) argued that in this judgement the Court “confuses means with objectives and is self-contradictory.” Ibid, at page 107.

<sup>228</sup> E.g. Hillion and Wessel (2008) observed that “the past 15 years have blurred the distinction between Community law and the law of the other Union pillars”, Hillion, C. and R. Wessel (2008). *Restraining External Competences of EU Member States under CFSP. EU foreign relations law: constitutional fundamentals*. M. Cremona and B. de Witte. Oxford, Hart Publishing: 79-121, at page 105.

<sup>229</sup> Case C-91/05, supra note 195.

<sup>230</sup> Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons (Official Journal 2004, L 359, p. 0065).

<sup>231</sup> Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP (Official Journal 2002, L 191, p. 0001).

shared competence between the Union and the Member States entailed that the Union could not act independently even if such powers had not been exercised.<sup>232</sup> This had been argued against by the Council which had denied the existence of a ‘fixed’ boundary between the powers of the Union and those of the Member States.<sup>233</sup> In particular, the United Kingdom had argued that encroachment upon a supranational competence in an area of shared powers is only possible if the contested measure had a pre-emptive effect.<sup>234</sup> The Council had observed that interpreting the powers of the Union under the area of development policy broadly, would undermine the sole competences conferred upon the Union concerning the preservation of peace and the strengthening of international security which constitute, according to the Council, the main objective of the contested measures.<sup>235</sup> The Council had further claimed that the scope of the *acquis communautaire* would be potentially unlimited if the Union had the power to adopt measures of which only the ancillary effects would be covered with the supranational competence.<sup>236</sup>

Before judging on their aim and content, the Court had to analyse the application of Article 47 (Amsterdam) TEU concerning the two contested measures. For this, the ECJ considered it irrelevant whether there was a potential encroachment of a shared or exclusive supranational competence, but only the existence of such powers as decisive.<sup>237</sup> The Court further recalled its ‘centre of gravity’ theory applied in previous cases and that a dual legal basis may be admitted under exceptional circumstances. However, taking into account the cross-pillar nature of the measure, the Court held that

[U]nder Article 47 [Amsterdam] EU, such a solution is impossible with regard to a measure which pursues a number of objectives or which has several components falling, respectively, within development cooperation policy, as conferred by the EC Treaty, and within the CFSP, and where neither one of those components is incidental to the other.

Since Article 47 [Amsterdam] EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order

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<sup>232</sup> Case C-91/05, *supra* note 195, at para 36.

<sup>233</sup> *Ibid*, at para 43.

<sup>234</sup> *Ibid*, at para 44.

<sup>235</sup> *Ibid*, at para 46.

<sup>236</sup> *Ibid*, at para 48.

<sup>237</sup> *Ibid*, at paras 61 and 62.

to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community.<sup>238</sup>

By examining the aim and content of the contested measures, the Court found, contrary to the opinion of Advocate General Mengozzi who had concluded that their main purpose lay within the area of security, that there was a twofold component “neither of which can be considered to be incidental to the other, one falling within supranational development cooperation policy and the other within the CFSP.”<sup>239</sup> The ECJ therefore concluded that the contested measures were in breach of Article 47 (Amsterdam) TEU since they encroached upon the competences conferred on the Union under Article 208(1) TFEU.

This case clearly shows a tendency for measures with cross-pillar objectives to be adopted on the basis of a supranational provision rather than under the former second pillar. The provisions of the latter might therefore, as could be argued, be undermined. “The original sin of overall EU external action”, as has been argued by Eeckhout, “is that the CFSP *supplements* the first pillar with a less intrusive policy, and yet is intended to cover *all areas* of foreign and security policy”,<sup>240</sup> according to Article 24 TEU.<sup>241</sup> Wessel, however, criticised this provision for being ‘misleading’, insofar as the area of common foreign and security policy was not intended to encroach upon the competences of the other pillars. He further expressed his preference of a *lex specialis* rule protecting the ‘*acquis communautaire*’ in the case of conflicts.<sup>242</sup> This in turn was criticised by Baratta who argued that such a rule would jeopardise the relationship between the pillars.<sup>243</sup>

As can be seen from the analysed judgement, the former first pillar had preference over the second pillar in the Court’s judgement. It seems, however, unclear from the wording of the judgement whether the Court intended to deny the application of the ‘centre of gravity’ theory in its entirety for cross-pillar measures or whether it merely rejected the

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<sup>238</sup> Ibid, at paras 76 and 77.

<sup>239</sup> Ibid, at para 108.

<sup>240</sup> Eeckhout, P. (2004), *supra* note 4, at page 145.

<sup>241</sup> Gauttier distinguished between first- and second-pillar overlaps which are provided for in the Treaty and those which are not, Gauttier, P. (2004). “Horizontal Coherence and the External Competences of the European Union.” *European Law Journal* 10(1): 23-41.

<sup>242</sup> Wessel, R. A. (1999), *supra* note 161, at page 320. See also Cremona, M. (2008), *supra* note 152, at page 46.

<sup>243</sup> Baratta, R. (2002). Overlaps between European Community Competence and European Union Foreign Policy Activity. *The European Union as an Actor in International Relations*. E. Cannizzaro. The Hague, Kluwer Law International: 51-75, at page 68.

exceptional adoption of a dual legal basis which is possible under the first pillar if the 'centre of gravity' test unfolds a twofold objective of the contested measure. If the former is the case, a *lex specialis* treatment of supranational powers could be assumed according to which measures would have to be adopted under the first pillar even if their objectives only touched upon Union competences. However, if the judgement has to be understood in line with the latter assumption, the application of the 'centre of gravity' theory would imply a similar approach as was developed under the first pillar with the only exception that there would be no possibility to accept a dual legal basis even if the measure pursues a twofold objective since a cross-pillar legal basis is excluded under Article 47 (Amsterdam) TEU. In such a case, supranational law would then prevail over the application of intergovernmental provisions.

It is clear from the above that there was a primacy of supranational law over Member States' law. It is also clear that the old Article 47 (Amsterdam) TEU provided the European courts with a valuable tool to review the compatibility of EU law as well as to preserve the *acquis communautaire*. However, as could be argued, the preferential treatment of supranational EU law might have affected Member States in their capacity to validly exercise their powers laid down under the Treaty on European Union. For example, Dashwood doubted that the authors of the Treaty on European Union could have intended

to allow the scope and effectiveness of the CFSP, as explicitly there defined, to be restricted by Article 47, above all when considerations of the security of the Union, or of international peace and security, are in play.<sup>244</sup>

Similarly, Wessel argued that

apart from guarding, the Court should prevent the misuse of the *acquis communautaire* in cases where an unconditional compliance with the preservation of the *acquis communautaire* would lead to a complete negation of the key provisions in the Union Treaty.

However, he also acknowledged the lack of alternatives in this regard.<sup>245</sup>

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<sup>244</sup> Dashwood, A. (2008), supra note 198, at page 75. For another critical analysis of the case and Art 47 (Amsterdam) TEU see van Vooren, B. (2009). "EU-EC External Competences after the Small Arms Judgment." *European Foreign Affairs Review* 14: 7-24.

<sup>245</sup> Wessel, R. A. (2000), supra note 196, at page 1168.

## 2. After Lisbon: Article 40 TEU

The second pillar has previously been described as only supplementing the first pillar due to its subordinate nature of policies.<sup>246</sup> This artificial prioritisation between the pillars led to certain difficulties as regards legal basis litigation which resulted in the expansion of supranational EU law, i.e. the encroachment of former first pillar provisions on the powers and competences available under the area of common foreign and security policy. These problems will be addressed by the Treaty of Lisbon. The new Treaty has brought the second pillar on an equal footing with the first pillar,<sup>247</sup> thus abolishing the previously unequal treatment of the pillars. While this might remedy the existing uncertainties as regards the actual status of second pillar provisions, it does not render legal basis litigation dispensable. On the contrary, legal basis litigation will be even more crucial considering the fact that under Lisbon both pillars have been moved closer together, thus making it more difficult to distinguish between them and to decide which set of provisions shall apply.

Concerning the institutional and procedural differences between the two pillars, the Treaty of Lisbon significantly changes the relationship between the first and the second pillar by amending the former Article 47 (Amsterdam) TEU in so far as the '*acquis communautaire*' no longer receives the sole protection from the Treaty.<sup>248</sup> The new "infrastructure" after Lisbon provides for a protection in both directions under the new Article 40 TEU, replacing the previous "one-way street". The new provision reads as follows:

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

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

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<sup>246</sup> See Eeckhout, P. (2004), *supra* note 4, at page 145.

<sup>247</sup> According to the new Art 1 third indent TEU which provides that both Treaties shall have the same legal value. This is further supported by the new Art 4(2) TEU which provides that the "Union shall respect the equality of Member States before the Treaties" as well as their national identities and their right of self-determination.

<sup>248</sup> On a thorough analysis of the former Article 47 (Amsterdam) TEU see Dashwood, A. (2008), *supra* note 198.

As can be seen, this new article also provides for a reverse way of protection, i.e. the protection of the *'acquis intergouvernemental'* in the second paragraph.<sup>249</sup> The above mentioned 'one-way street' thus is now open for both ways since the entering into force of the Treaty of Lisbon. The new provision introduces what has been described as a "Chinese wall"<sup>250</sup> between EU law and the area of common foreign and security policy. This has brought former second pillar provisions on an equal footing with those under the TFEU which could be interpreted in two different ways.

First, it has been suggested that this would imply that all general criteria of legal basis litigation established under the former first pillar would also apply for CFSP provisions after Lisbon.<sup>251</sup> While the application of Article 352 TFEU for CFSP matters is explicitly excluded,<sup>252</sup> such general criteria could favour the application of other TFEU provisions rather than those under the common foreign and security policy. For example, the application of the *lex specialis derogat legi generali* principle could implicate that the area of common foreign and security policy would be considered as *lex generalis* in comparison to other more specific areas in the TFEU,<sup>253</sup> e.g. common commercial policy, development policy, etc. This would imply a rather residual nature of CFSP provisions,<sup>254</sup> which, arguably would run counter to the hierarchical equalisation introduced by the Lisbon Treaty between the supranational powers under the TFEU and intergovernmental CFSP competences.<sup>255</sup>

As regards the 'centre of gravity' theory, van Elsuwege convincingly argues that this theory may fail to apply due to a lack of specific CFSP objectives set out in the Lisbon Treaty.<sup>256</sup> It could be argued that this could again be interpreted as to prioritise TFEU provisions. This could lead to a similar if not worse situation than under the previous

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<sup>249</sup> See Hillion, C. and R. A. Wessel (2009), *supra* note 210, at page 583.

<sup>250</sup> Cremona, M. (2008), *supra* note 152, at page 45. Another term would be 'two-way street'. While 'Chinese wall' signifies the blocking of interaction between the two policy-areas, namely CFSP and TFEU, the term 'two-way street' refers to the protection now provided in both direction and may also imply the possibility of some interaction.

<sup>251</sup> See e.g. *Ibid*; van Vooren, B. (2009). "The Small Arms Judgment in an Age of Constitutional Turmoil." *European Foreign Affairs Review* **14**: 231-248, at page 247.

<sup>252</sup> Art 352(4) TFEU.

<sup>253</sup> Herlin-Karnell, E. (2008), *supra* note 198, at page 1007.

<sup>254</sup> Van Elsuwege, P. (2010). "EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency." *Common Market Law Review* **47**(4): 987-1019, at page 1005.

<sup>255</sup> Van Elsuwege, P. (2009). "On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the ECOWAS Judgment of the European Court of Justice." *Columbia Journal of European Law* **15**(3): 531-548, at pages 545 and 546.

<sup>256</sup> *Ibid*, at page 545.

framework.<sup>257</sup> It would be possible for EU competences to encroach upon CFSP powers which would endanger the latter's special character and ultimately render such provisions nugatory. It could also be argued that the application of any of the general criteria of legal basis litigation could not exclude the infringement of the new Article 40 TEU which prohibits an encroachment on either side. Therefore, it is recommended that this approach shall not be followed by the courts.

A second approach suggests that instead of applying general criteria of legal basis litigation in "cross-pillar"<sup>258</sup> cases, such measures could be split into two measures one of which should be adopted on a CFSP legal basis, while the other could be adopted upon a TFEU legal basis;<sup>259</sup> both measures could be linked with each other with the use of cross-references.<sup>260</sup> Obviously, if the Court finds that the objectives of a measure are inseparably linked a choice has to be made for either legal base.<sup>261</sup> However, it lies within the discretionary power of the Court to minimise such cases since it could be argued that a splitting of a measure may almost always be possible if it is being conducted in the appropriate manner. While there would be a certain risk that this could increase bureaucracy which may further decrease transparency, this approach might be better suited to ensure the proper application of CFSP provisions and thus protect the significance of their special character as well as the integrity of Member States' powers. It is therefore recommended that this second approach shall be followed by the European courts.

Therefore, the *ECOWAS* case might have to be reconsidered after Lisbon, as has been argued by Cremona<sup>262</sup> as well as Dashwood.<sup>263</sup> This does not mean, however, that a

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<sup>257</sup> A similar argument has been brought forward by Klamert, M. (2010). "Conflicts of legal basis: no legality and no basis but a bright future under the Lisbon Treaty?" *European Law Review* 35(4): 497-515.

<sup>258</sup> I.e. between the TFEU and the area of common foreign and security policy.

<sup>259</sup> This practice has previously already been applied for third pillar measures with a supranational part: e.g. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (Official Journal 2002, L 328, p. 17) and Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (Official Journal 2002, L 328, p. 1). See also Hatzopoulos, V. (2008). "With or without you ... judging politically in the field of Area of Freedom, Security and Justice." *European Law Review* 33(1): 44-65, at page 52.

<sup>260</sup> Hillion, C. and R. A. Wessel (2009), supra note 210; Heliskoski, J. (2008). "Small arms and light weapons within the Union's pillar structure: an analysis of Article 47 of the EU Treaty." *European Law Review* 33(6): 898-912.

<sup>261</sup> It seems rather unlikely that a measure could be adopted on the joint legal basis of a CFSP and a TFEU, an option which has nevertheless been considered in Eeckhout, P. (2011), supra note 70, at pages 180-186.

<sup>262</sup> Cremona, M. (2008). "Coherence through Law: What difference will the Treaty of Lisbon make?" *Hamburg Review of Social Sciences* 3(1): 11-36, at page 32.

<sup>263</sup> Dashwood, A. (2008), supra note 164, at page 77.

similar measure under the new treaty framework would be annulled. In the contrary: It could be argued that such a measure would have been held invalid not just on the grounds that it would encroach upon supranational EU powers, but also that if the EU was to take action this would infringe the second paragraph of the new Article 40 TEU. This means that this measure could not be properly adopted any more in its entirety on the basis of either pillar. Instead, there would be an increased need to take separate action, one measure to be adopted in the field of CFSP and another one under supranational EU law.<sup>264</sup> This shall be illustrated in the following case scenario.

In a ‘resurrected’ scenario of the *ECOWAS* case,<sup>265</sup> a decision defining actions to be undertaken by the Union concerning its contribution to combating the destabilising accumulation and spread of small arms and light weapons could be adopted on the basis of Article 28 TEU. The Council would act by unanimity (Articles 25(b)(i) and 31(1) TEU). Member States shall be bound by the decision in the positions they adopt and in the conduct of their activity (Article 28(2) TEU). There is no need to consult the European Parliament and the Court of Justice has no jurisdiction.

The competing legal basis under the TFEU upon which the measure could also be adopted is Article 208. Here, the ‘ordinary legislative procedure’ would apply.<sup>266</sup> Under this procedure codecision and qualified majority voting are prevailing.<sup>267</sup> According to Article 288 TFEU such a decision is binding in its entirety and the European Court of Justice has full jurisdiction.

If general criteria of legal basis litigation as established under the first pillar apply in order to determine the correct legal basis for this decision choosing between Article 28 TEU and Article 208 TFEU, it could be argued that the provision under the TFEU always prevails: In a ‘centre of gravity’ test the Court of Justice could attribute more weight to Article 208 TFEU, arguing that this provision plays a greater role for the decision to be adopted upon. Only if this principle is properly applied, i.e. unprejudiced from the side of the European institutions, the centre of gravity would not necessarily fall within TFEU competences. Further, considering the ‘democracy maximising’

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<sup>264</sup> Heliskoski, J. (2008), *supra* note 260, at page 911.

<sup>265</sup> Case C-91/05, *supra* note 195.

<sup>266</sup> Art 209 TFEU.

<sup>267</sup> Art 294 TFEU.



rationale,<sup>268</sup> this principle would normally support the application of a TFEU provision since this would ensure a greater involvement of the European Parliament.

The application of the *lex specialis derogat legi generali* principle could generate two different results. On the one hand, this principle would counteract CFSP provisions. In the case of an international development agreement, there could be a legal basis conflict between development policy and CFSP provisions. While the Commission is more likely to support the application of the former, the Council would plead in favour of the latter. The European Court of Justice could interpret the area of common foreign and security policy as *lex generalis* also with regard to Article 24(1) TEU which provides that the CFSP “shall cover *all areas* of foreign policy and *all questions* relating to the Union’s security”.<sup>269</sup> Any development policy provision, such as Article 208 TFEU, could then be considered to be a *lex specialis* which would derogate from the application of the more general CFSP provisions. Thus, the ECJ could reject CFSP provisions to serve as legal bases on the ground of the *lex specialis derogat legi generali* principle if it considers other TFEU provisions to be more specific.<sup>270</sup>

On the other hand, though less probable, the *lex specialis derogat legi generali* principle could also support the application of CFSP provisions. These could be considered to be more specific than the general provisions to harmonise in the field. While there would be a possibility to harmonise in the area of common foreign and security policy,<sup>271</sup> having recourse to Article 114 TFEU, this provision could be rejected on the grounds of the *lex specialis derogat legi generali* principle if other provisions available in the Treaty on European Union are considered to be more specific. Recourse to the residual competence of Article 352 TFEU is explicitly excluded under paragraph 4 which provides that it cannot be applied for CFSP measures.

On any account, it is vital to ensure the proper functioning of the provisions under the common foreign and security policy. The former second pillar remains distinct from the TFEU to a large extent, thus protecting the integrity of Member States in this area. If general criteria of legal basis litigation apply the specific CFSP character is likely to be jeopardised. TFEU provisions could encroach upon those under the area of common

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<sup>268</sup> As has been established in Case C-300/89, *Commission of the European Communities v Council of the European Communities (Titanium Dioxide)*, [1991]: ECR I-02867, at para 20.

<sup>269</sup> Emphasis added.

<sup>270</sup> See also Cremona, M. (2008), *supra* note 262, at page 32.

<sup>271</sup> E.g. if a relation to the internal market can be established.

foreign and security policy with the effect of ultimately rendering the latter nugatory.<sup>272</sup> Therefore, the European Court of Justice has to ensure the adequate application of the provisions under the new Treaty on European Union after Lisbon, in particular the new Article 40 TEU. In the concrete example here, if no single legal basis can be agreed upon without encroaching upon another policy area and thus infringing the new Article 40 TEU, the measure in question has to be split into two parts. Thus, one part of the measure concerning the common foreign and security policy objectives could be adopted on the basis of Article 28 TEU. The other part relating to the development policy objectives could then be adopted on the basis of Article 208 TFEU. Both measures can be linked with each other by inserting cross-references where necessary. Thereby, an encroachment of either policy area is being avoided and the proper application of the new Article 40 TEU is being guaranteed. It appears that in such a case the function of the new Article 40 TEU can be described as a ‘two-way street’ rather than a ‘Chinese wall’, allowing for a limited interaction between the two areas by cross-referencing but nevertheless providing sufficient protection against encroachment.

It could thus be argued that the Lisbon Treaty has brought about a clearer delimitation of competences between the pillars. With the newly introduced Article 40 TEU, the Court has been provided with a better guideline which will further improve legal certainty. It could be argued that the previous *ECOWAS* judgement has put the integrity of former second-pillar measures at risk, which is no longer the case after Lisbon. The division of any such measure into two measures, one adopted under the CFSP and the other falling under TFEU competences, will certainly constitute a different challenge, considering for example the additional effort, bureaucracy and the possible confusion with an increase of the number of measures in the European political landscape. However, as regards legal basis litigation, the new provision will most likely have the effect of partly clarifying the actual relationship between the former first and second pillars.

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<sup>272</sup> Although in the opinion of the author rather unlikely, this also applies *vice versa*, i.e. there is a chance that CFSP provisions could also pre-empt TFEU competences under certain circumstances as was claimed in Eisenhut, D. (2009). "Delimitation of EU-Competences under the First and Second Pillar: A View Between ECOWAS and the Treaty of Lisbon." German Law Journal 10(5): 585-604, at page 599.

## B. *Inter-pillar Mixity*

In contrast to the common form of ‘classical’ mixed agreements,<sup>273</sup> there is also ‘inter-pillar mixity’<sup>274</sup>. It has been argued by Neframi that mixity poses a real threat to “the assertion of the identity of the Union on the international scene” and thus justifies the need for unity within the EU.<sup>275</sup> While there are a number of international agreements concluded under the Treaty on European Union on the basis of both intergovernmental pillars,<sup>276</sup> it can be observed that the conclusion of international agreements involving both, supranational and intergovernmental EU law, is rather rare. International agreements based on the former second and third pillars include the Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information,<sup>277</sup> agreements of the European Union with Australia and the United States of America on the procession and transfer of the so-called ‘PNR’<sup>278</sup> and Financial Messaging Data,<sup>279</sup> as well as the Agreement

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<sup>273</sup> See above.

<sup>274</sup> On an interesting contribution about the different forms of ‘inter-pillar mixity’ and their implications, see Wessel, R. A. (2010). Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements. Mixed Agreements Revisited: The EU and its Member States in the World. C. Hillion and P. Koutrakos. Oxford, Hart Publishing: 30-54.

<sup>275</sup> Neframi, E. (2010). "The Duty of Loyalty: Rethinking its scope through its application in the field of EU External Relations." Common Market Law Review **47**(2): 323-359, at page 354.

<sup>276</sup> For an in-depth analysis of intergovernmental agreements in external relations, see Rosas, A. (2011). "The status of EU law of international agreements concluded by EU Member States." Fordham International Law Journal **34**(5): 1304-1345.

<sup>277</sup> Council Decision 2005/296/CFSP, JHA of 24 January 2005 concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information (Official Journal 2005, L 094, p. 0038).

<sup>278</sup> See Council Decision 2006/729/CFSP/JHA of 16 October 2006 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security (Official Journal 2006, L 298, p. 0027); Council Decision 2007/551/CFSP/JHA of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement) (Official Journal 2007, L 204, p. 0016); Council Decision 2008/651/CFSP/JHA of 30 June 2008 on the signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service (Official Journal 2008, L 213, p. 0047).

<sup>279</sup> See Council Decision 2010/16/CFSP/JHA of 30 November 2009 on the signing, on behalf of the European Union, of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (Official Journal 2010, L 8, p. 0009).

between the European Union and Japan on mutual legal assistance in criminal matters.<sup>280</sup>

A significant area in which both the Union as well as the Member States pursue common objectives is the field of development cooperation.<sup>281</sup> This congruency was found between Article 208 TFEU<sup>282</sup> and Article 24 TEU. Both require the development and consolidation of democracy and the rule of law, as well as respect for human rights and fundamental freedoms. It was pointed out that the difference between the two provisions could be seen in the actual level of importance to the different set of objectives: While the above mentioned objectives are listed as paramount to common foreign and security policy, it could be considered as merely secondary to the Union's external relations objectives.<sup>283</sup> This however, should be neglected here as being a mere formality since in a legal basis dispute such a classification is rather irrelevant. While it also has to be acknowledged that EU powers in the field of development cooperation are not exclusive,<sup>284</sup> this does not derogate from the fact that Articles 208 TFEU and 24 TEU may be seen as conflicting legal bases. As a result, the only notable international agreement with a supranational-intergovernmental dimension is the Agreement between the European Union, its Member States and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis.<sup>285</sup>

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<sup>280</sup> See Council Decision 2010/88/CFSP/JHA of 30 November 2009 on the signing, on behalf of the European Union, of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters (Official Journal 2010, L 39, p. 0019).

<sup>281</sup> Holland has even gone one step further and has argued that this area "constitutes a core component of Europe's external relations and CFSP", Holland, M. (2002). *When is Foreign Policy not Foreign Policy? Cotonou, CFSP and External Relations with the Developing World. The European Union in International Affairs*. National Europe Centre, Australian National University, National Europe Centre Paper. **28**, at page 6.

<sup>282</sup> The same holds true for the area of economic, financial and technical cooperation with third countries, Article 212 TFEU.

<sup>283</sup> See Petite, M. (2006). "Current Legal Issues in the External Relations of the European Union." EUI Working Paper 38, at page 2.

<sup>284</sup> In *Parliament v Council*, the court held that the competence in the field of development cooperation has to be shared between the Union and the Member States. The latter "are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community", Case C-316/91, *European Parliament v Council*, [1994]: ECR I-625, at para 26.

<sup>285</sup> See Council Decision 2004/849/EC of 25 October 2004 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen acquis (Official Journal 2004, L 368, p. 0026); Council Decision 2004/860/EC of 25 October 2004 on the signing, on behalf of the European Community, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation,

The question thus arises why ‘cross-pillar mixity’, in particular the combination of supranational and intergovernmental competences, has been used on such few occasions at the international scene. A rather ‘functional view’ taken by Hillion suggests that ‘classical’ mixed agreements, even though concluded by the European Union and the Member States, may nevertheless be “inspired by the objectives” of the CFSP, and may also “include areas of cooperation that correspond to the external dimension of the cooperation in justice and home affairs”.<sup>286</sup> Thus, by fulfilling the objectives of the Union, the Member States should be considered as its legitimate representatives externally, resulting in a *de facto* ‘cross-pillar’ dimension.<sup>287</sup> In its early *Ruling 1/78*, the Court pointed out that the actual delimitation of competences in external relations and in particular mixed agreements is a matter of purely internal interest:<sup>288</sup>

It is not necessary to set out and determine, as regards other parties to the Convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers *within* the

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concerning the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis (Official Journal 2004, L 370, p. 0078); Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis (Official Journal 2008, L 53, p. 0001); Council Decision 2008/149/JHA of 28 January 2008 on the conclusion on behalf of the European Union of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis (Official Journal 2008, L 53, p. 0050); Council Decision 2008/261/EC of 28 February 2008 on the signature, on behalf of the European Community, and on the provisional application of certain provisions of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis (Official Journal 2008, L 83, p. 0003); Council Decision 2008/262/EC of 28 February 2008 on the signature, on behalf of the European Union, and on the provisional application of certain provisions of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis (Official Journal 2008, L 83, p. 0005).

<sup>286</sup> Hillion, C. (2005). *The Evolving System of European Union External Relations as evidenced in the EU Partnerships with Russia and Ukraine*. Leiden. **Ph.D. Dissertation**, at page 58.

<sup>287</sup> For a general analysis of the Union’s representation in the external sphere, see Gatti, M. and P. Manzini (2012). “External Representation of the European Union in the Conclusion of International Agreements.” *Common Market Law Review* 49(5): 1703-1734.

<sup>288</sup> See also Koutrakos, P. (2006), *supra* note 4, at page 153.

Community, it being understood that the exact nature of that division is *a domestic question* in which third parties have no need to intervene.<sup>289</sup>

Mixed agreements in the classical sense can therefore be seen as an alternative to the actual ‘cross-pillar mixity’: Instead of using intergovernmental competences by explicitly referring to a legal basis under the second or third pillar, the ECJ derogates from a rather awkward ‘cross-pillar’ dual legal basis by allowing the Union to draw its missing competence from the cooperation with the Member States in order to conclude international agreements.

### C. Excursus: The Unity Theory – A self-fulfilling prophecy?

From the early days of the existence of the three-pillar system, von Bogdandy argued in favour of a unity theory, which meant that the law under the intergovernmental pillars was considered to be comparable to the law under the first pillar, both methods, the ‘intergovernmental method’ and the ‘Community method’, thus forming part of one single legal order.<sup>290</sup> According to von Bogdandy, the advantages of this concept were evident in the enhancement of political accountability and legal responsibility, “in the practical simplification and consolidation of the law concerning the European institutions”, as well as in the “decrease of political controversy”.<sup>291</sup> In an earlier contribution with Nettesheim, he already pleaded for the unity theory to apply for the Maastricht framework,<sup>292</sup> which was then reinforced in von Bogdandy’s later contribution after Amsterdam. Both argued in favour of a single European organisation on the grounds that the same institutions are responsible in the decision-making processes in all three pillars, even though with different capacities.

In a similar vein, de Witte supported this unity theory, the only difference being that he rather referred to the European Community as a sub-organisation having its own legal existence.<sup>293</sup> Further, he denied the concept of a “Greek temple” with the three

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<sup>289</sup> Ruling 1/78, Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports, [1978]: ECR 02151, at para 35, emphasis added.

<sup>290</sup> Von Bogdandy, A. (1999). "The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System." *Common Market Law Review* 36(5): 887-910.

<sup>291</sup> Ibid, at pages 888 and 889.

<sup>292</sup> Von Bogdandy, A. and M. Nettesheim (1996). "Ex Pluribus Unum: Fusion of the European Communities into the European Union." *European Law Journal* 2(3): 267-289.

<sup>293</sup> De Witte, B. (1998). The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral? *The European Union after Amsterdam: a legal analysis*. T. Heukels, N. Blokker and M. Brus. The Hague, Kluwer Law International, at page 59.

prominent pillars. Instead, de Witte suggested the concept of a “French gothic cathedral” which, according to him, was to illustrate better the integrated approach which united the three pillars into a single European system.<sup>294</sup>

An opposing view was taken by Koenig and Pechstein who argued that the law of the intergovernmental pillars would be comparable to international law, thus proposing a dualistic view of European law with two separate legal orders. This was justified with a teleological interpretation of the legislative framework of the European Union arguing that the drafters of the Treaty on European Union could have easily included the second and the third pillar into the framework of the European Community. However, since they decided otherwise, this had to be taken into consideration and therefore the ‘intergovernmental method’ had to be distinguished from Community law. The main difference pointed out by Koenig and Pechstein was a general lack of direct/indirect effect of provisions under the intergovernmental pillars.<sup>295</sup> Instead, the Treaty merely required cooperation between the Member States.<sup>296</sup>

It shall be argued here that the latter approach by Koenig and Pechstein appears rather convincing from a chronological point of view as well as at its time of writing. The pillar structure was established as such, differentiating between a Community and an intergovernmental approach, both of which were intended to be rather divergent in nature. However, this initial shape of the intergovernmental pillars has changed over time due to the treaty amendments of Amsterdam and Nice as well as the interpretation before the European courts. Thus, it is submitted that the assumptions made as regards the definition of the intergovernmental method has certain consequences for legal basis litigation in the European Union. Defending the separation approach for the early stages of the pillar structure under Maastricht and beyond, the competences available under the different legal orders could not be considered as competing with each other, thus preventing cross-pillar legal basis litigation.

Whilst denying the unity theory under previous treaty frameworks, the introduced Treaty of Lisbon has altered the shape of the EU in such a way which may finally

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<sup>294</sup> Ibid, at pages 64-66. On a similar opinion, see Weiler, J. H. H. (1993). Neither Unity nor Three Pillars - The Trinity Structure of the Treaty on European Union. The Maastricht Treaty on European Union - Legal Complexity and Political Dynamic. J. Monar, W. Ungerer and W. Wessels. Brussels, European Interuniversity Press.

<sup>295</sup> The Court, however, found such indirect effect in relation to the third pillar in Breier, S. (1995), supra note 207.

<sup>296</sup> Pechstein, M. and C. Koenig (2000). Die Europäische Union. Tübingen, J.C.B. Mohr (Paul Siebeck), at pages 1-8.

support this concept as having fulfilled its own ‘prophecy’:<sup>297</sup> It could be claimed that the intergovernmental pillars have lost their actual intergovernmental character by having been integrated into and thus become part of the European Union; this could now be considered as a single legal order. This would then allow for the competences available under the whole EU framework to enter into competition with each other and thus make legal basis litigation possible.

However, as has been discussed above, there is no unlimited interaction between all EU competences due to the new Article 40 TEU. This provision divides the law of the European Union into two parts: supranational EU law comprising the former first and third pillars, and intergovernmental EU law comprising the area of common foreign and security policy. A better protection mechanism ensures that the two areas of law do not infringe each other: No EU measure may ever override any kind of CFSP measure, and *vice versa*. It will further be impossible to adopt a measure on a dual legal basis involving one supranational EU provision and one intergovernmental CFSP provision since the former second pillar is still composed of special features different to and incompatible with those under the TFEU, including an entirely distinct set of legal instruments as well as decision-making procedures. This clearly supports the view that the CFSP area still represents a *sui generis* part within the European legal order.

## **1. Legal Personality**

An essential indicator for the existence of a single legal order is the availability of a single legal personality. There has always been the question whether the European Union has any legal personality, expressly or implied.<sup>298</sup> Under the old treaty framework, only the European Community was equipped with legal personality according to the old Article 281 EC. In addition, the old Article 24 (Amsterdam) TEU also provided for an intergovernmental power to conclude international agreements. This implied a legal personality, separate from the one conferred upon the European Community under the former first pillar.

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<sup>297</sup> It is acknowledged that von Bogdandy’s theory was meant to describe the *status quo* at that time rather than being a prophecy. However, if denied for the early years of the existence of the pillar structure, the unity theory could be considered as having been ahead of its time, mirroring a reality which better matches the law as it stands post-Lisbon.

<sup>298</sup> See e.g. discussion in Wessel, R. A. (2000). “Revisiting the International Legal Status of the EU.” *European Foreign Affairs Review* 5(4): 507-537.



According to the new Article 47 TEU, the Union now has legal personality. As such, it has the capacity to “conclude agreements with one or more States or international organisations”.<sup>299</sup> It has been argued that this “would remove some of the difficulties of so-called “inter-pillar mixity”.”<sup>300</sup> Further, it will be possible for the Union to be held accountable for its actions on the international scene; the EU has also received other privileges and immunities comparable to those of other international organisations.<sup>301</sup> Moreover, with the introduction of the Treaty of Lisbon, the former second pillar has lost its separate legal personality.<sup>302</sup> As a result, any international agreements concluded under the enclave of the former second pillar are deemed as being concluded under the European Union. Thus, the only European actor on the international scene is the European Union, and occasionally individual Member States. This increases consistency and legal certainty for contractual partners in third countries. However, the Union’s competences under the CFSP differ somewhat from other external competences under the TFEU. As has been discussed above, the competences available under the common foreign and security policy are of a *sui generis* nature, lacking direct effect and supremacy, and thus remain intergovernmental even after the introduction of the Reform Treaty.

## 2. Bridging the gap – The High Representative

The High Representative of the Union for Foreign Affairs and Security Policy is the new institutional position created by the Treaty of Lisbon in external relations. The introduction of a High Representative was aimed at a “better coherence between foreign policy decisions (...) and deployment of instruments in the field of external relations”, thus “replacing the current Troika.”<sup>303</sup> This personal union “combining the functions of HR for CFSP with those functions currently carried out by the Relex Commissioner” was a compromise between a mere synergy and a full merger option.<sup>304</sup> Thus, the High

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<sup>299</sup> Art 37 TEU.

<sup>300</sup> Cremona, M. (2006), *supra* note 69, at pages 2 and 3.

<sup>301</sup> See Booß, D. (2010). EU-Verträge: Kommentar nach dem Vertrag von Lissabon. C. O. Lenz and K.-D. Borchardt. Köln, Bundesanzeiger Verlag, at pages 266-268.

<sup>302</sup> Lisbon does not provide for an equivalent to the old Art 24 (Amsterdam) TEU which equipped the second pillar with a Treaty-making capacity and thus supported the legal independence of the area of common foreign and security policy.

<sup>303</sup> (2002). The European Convention Working Group VII - "External Action", Final Report. CONV 459/02. Brussels, at pages 4 and 5.

<sup>304</sup> *Ibid*, at pages 19-21.

Representative of the Union for Foreign Affairs and Security Policy constitutes an institutional bridge between the former first and the second pillar of the Union.<sup>305</sup>

Appointed by the European Council and with the consent of the President of the Commission,<sup>306</sup> the High Representative is responsible to “conduct the Union’s common foreign and security policy”,<sup>307</sup> as well as to “ensure the consistency of the Union’s external action” being one of the Vice-Presidents of the Commission. The latter function would entail responsibilities within the Commission for “external relations and for coordinating other aspects of the Union’s external action.”<sup>308</sup> Further, as the chair of the Foreign Affairs Council,<sup>309</sup> the High Representative “shall contribute through his proposals towards the preparation of the common foreign and security policy” and at the same time “shall ensure implementation of the decisions adopted by the European Council and the Council.”<sup>310</sup> In CFSP matters, the High Representative represents the Union, by conducting “political dialogue with third parties on the Union’s behalf” as well as by expressing “the Union’s position in international organisations and at international conferences”,<sup>311</sup> thus organising the coordination of Member States’ action in such forums.<sup>312</sup> If a rapid decision is needed, the High Representative may “convene an extraordinary Council meeting within 48 hours or, in an emergency, within a shorter period.”<sup>313</sup>

The High Representative is assisted by a European External Action Service.<sup>314</sup> The High Representative is further accountable to the Commission when exercising his or her powers therein and bound by Commission procedures as long as such action is consistent with his other duties concerning the common foreign and security policy and the Foreign Affairs Council.<sup>315</sup> The High Representative’s position can be terminated by a qualified majority vote in the European Council with the approval of the President of

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<sup>305</sup> See e.g. Wouters, J., D. Coppens, et al. (2008). *The European Union's External Relations after the Lisbon Treaty. The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* S. Griller and J. Ziller. Wien, Springer-Verlag: 143-203, at page 150.

<sup>306</sup> The Council is acting by qualified majority voting, new Art 18(1) TEU. Further, the High Representative, like the President as well as other members of the Commission, needs to be approved by a vote of consent by the European Parliament, new Art 17(7) TEU.

<sup>307</sup> New Art 18(2) TEU.

<sup>308</sup> New Art 18(4) TEU.

<sup>309</sup> New Art 18(3) TEU.

<sup>310</sup> New Art 27(1) TEU.

<sup>311</sup> New Art 27(2) TEU.

<sup>312</sup> New Art 34(1) first indent TEU.

<sup>313</sup> New Art 30(2) TEU.

<sup>314</sup> New Art 27(3) TEU.

<sup>315</sup> New Art 18(4) fourth sentence TEU.

the Commission.<sup>316</sup> Like any other member of the Commission, the High Representative may be asked to resign by the President of the Commission.<sup>317</sup> Such a resignation from his or her responsibilities within the Commission may also be requested by the European Parliament by voting on a motion of censure according to Article 234 TFEU.<sup>318</sup>

Criticism was already brought forward in the early process creating the position. Opponents of a 'personal union'<sup>319</sup> expressed some concern as regards the threat this position would cause to the 'principle of collegiality'. They also denounced the exorbitant scope of activities the High Representative would be responsible for.<sup>320</sup> Further, the "double-hatted"<sup>321</sup> position of the High Representative, uniting the former CFSP High Representative and the former EC Commissioner, would be capable of "suffering somewhat from multiple personality disorder", as has been argued by de Baere.<sup>322</sup> The only indication as to how such internal disparities can be resolved is provided in Article 18(4) TEU requiring the High Representative's loyalty to the Commission procedures as long as consistency with his other duties is ensured. It has been argued that this suggests a slight favouritism of these other responsibilities, mainly the obligations concerning the common foreign and security policy.<sup>323</sup> However, this still leaves sufficient scope for interpretation. Being accountable to both, the Council and the Commission, the High Representative could rather be seen in a position of mediation between the two institutions in case of discrepancies.<sup>324</sup> It is then, however, questionable whether it is possible to ensure strength of a leadership role which would be required for the position of the High Representative. The schizophrenic nature of this position is rather unlikely to be of an advantage in reality.

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<sup>316</sup> New Art 18(1) second sentence TEU.

<sup>317</sup> New Art 17(6) TEU.

<sup>318</sup> New Art 17(8) TEU.

<sup>319</sup> "An arrangement in which two or more states share a single head of state. A personal union does not create a single international person; rather, each state retains its separate legal personality. For example, in 1603 James VI of Scotland became monarch of England (styled as James I) but continued to be monarch of Scotland (styled as James VI).", Martin, E. A. and J. Law, Eds. (2006). A Dictionary of Law. Oxford, Oxford University Press, at page 393.

<sup>320</sup> The European Convention WG VII, supra note 303, at page 22. See also Eeckhout, P. (2011), supra note 70, at pages 491-494.

<sup>321</sup> Or even 'triple-hatted', as has been claimed in Piris, J.-C. (2010). The Lisbon Treaty: A Legal and Political Analysis. Cambridge, Cambridge University Press, at page 243.

<sup>322</sup> De Baere, G. (2008), supra note 91, at page 218.

<sup>323</sup> Schütze, R. (forthcoming). "Reforming Europe's External Relations."

<sup>324</sup> For a contribution analysing the relationship between the High Representative and the other institutions, see Kaddous, C. (2008). Role and position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty. The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty? S. Griller and J. Ziller. Wien, Springer-Verlag: 205-221.

A further problem is the exact delimitation of competences between the High Representative of the Union for Foreign Affairs and Security Policy and the newly created position of the President of the European Council. As has been argued by Bitterlich, progress will depend on the avoidance of friction between these two positions since they are both responsible for the external representation of the Union as well as to which extent Member States are willing to transfer certain competences to them.<sup>325</sup> Despite the possibility of internal inconsistency concerning the High Representative, the Lisbon Treaty ensures with the introduction of this institution an increased harmonisation in the field of EU external relations which could enhance and facilitate the Union's representation internationally.<sup>326</sup> Internally, however, the exact division of competences might become even less transparent.

## **XI. Concluding Remarks**

This Chapter has looked at the structure of legal bases and legal basis litigation in EU external relations. It has examined whether the same principles apply as under the internal sphere of supranational EU law. As has been shown, the area of external relations constitutes a special field of EU law with some distinct rules and principles. In addition, the field of external relations is spread over both constitutional regimes: the supranational as well as the intergovernmental policies. Their specific characteristics were analysed in the first two parts of this Chapter. The last part has discussed cross-pillar conflicts in external relations as a result of the distribution of this area.

Under supranational EU law, the area of external relations differs from the internal sphere in several aspects: Most notably, this concerns the 'doctrine of implied powers' which was established by the courts to enable the Union to acquire additional competences not explicitly conferred upon it by the treaties. Therefore, in most areas of supranational external relations the European Union will be competent to take action,

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<sup>325</sup> "Tatsächliche Fortschritte werden entscheidend davon abhängen, inwieweit Friktion angesichts der institutionell angelegten Kompetenzüberschneidungen zwischen dem neu geschaffenen Präsidenten des ER und dem Hohen Vertreter für die GASP, die beide für die Außenvertretung der EU zuständig sind, vermieden werden können und zugleich die MS in ihren nationalen Außenpolitiken tatsächlich bereit sind, an das neue Führungsgespann zunehmend klar umrissene Sachkompetenzen und politische Führungsaufgaben „abzutreten“.", Bitterlich, J. (2010). EU-Verträge: Kommentar nach dem Vertrag von Lissabon. C. O. Lenz and K.-D. Borchardt. Köln, Bundesanzeiger Verlag, at page 180.

<sup>326</sup> See e.g. Missiroli, A. (2010). "The New EU 'Foreign Policy' System after Lisbon: A Work in Progress." European Foreign Affairs Review 15(4): 427-452, at page 431.

the only question being upon which legal basis in the TFEU this can be done. This has led to an increased pre-emption of Member States' competences in these areas. However, the constant shift and re-interpretation of the different competences at stake have contributed rather little to legal certainty in EU external relations. Ultimately, this development has favoured exclusive competences and has increased their influence. Nevertheless, the back and forth pivoting is evidence of the indecisiveness in the courts' judgements when confronted with specific legal basis problems, for example those surrounding Article 207 TFEU. Further, there may be different competence types in one and the same policy area which can lead to an overlapping of competencies and thus create *intra* legal basis litigation. With the introduction of the Treaty of Lisbon even more competences have been expressly 'supranationalised'. Other institutions, such as the European Parliament have less influence in the external legislative process than internally, as can be seen for example with international agreements. In addition, there is the possibility of mixed agreements, i.e. the joint action of Union and Member States, which differs from the internal arrangements for shared competences.

In contrast, the area of common foreign and security policy has had a special status under EU law since its incorporation in the treaties: The most important indication for this has been the lack of judicial control in this area, which has mainly prevented *intra*-pillar legal basis litigation to take place. However, as has been identified above, there is still a potential for legal basis conflicts even after the introduction of the Reform Treaty. As can be observed, most of the peculiarities of the former second pillar remain under Lisbon. The new Treaty largely preserves the intergovernmental character of CFSP provisions. Most prominently, the decision making procedures previously in place under the second pillar have – with a few minor changes – been incorporated in the Lisbon Treaty, which to a large extent differ from those legislative procedures available under the TFEU. The CFSP area is thus composed of special features different to those under the TFEU. While the old Article 47 (Amsterdam) TEU has allowed for a constant encroachment upon Member States' powers, the new Article 40 TEU better ensures the delimitation of competences in this area. It nevertheless brings CFSP matters on an equal footing with the provisions laid down under the TFEU which could lead to an emergence of new problems, such as whether this would imply the application of general criteria of legal basis litigation.

Overall, it can be argued that with the introduction of the Lisbon Treaty legal basis litigation will continue to exist due to instrumental and procedural differences between

the different policy areas of CFSP and TFEU as well as different types of competence between the various legal bases. However, contrary to the previous treaty structure in place, the Lisbon Treaty has the potential to bring about more clarity, i.e. with the new Article 40 TEU. It is suggested that the application of the new Article 40 TEU could serve as a dividing line between the different competence areas. As has been argued, the preferred interpretation of this provision shall allow for a splitting of measures which could otherwise be adopted on multiple legal bases falling into two or more different policy areas. The different parts could then be linked with each other through the use of cross-references. This would increase legal certainty and help to avoid competence overlaps between the different policy areas. It is therefore recommended that the European courts send an early signal of delimited competences under the Treaty of Lisbon which would ensure increased legal certainty for future conflicts in legal basis litigation.

# CHAPTER III:

## The area of freedom, security and justice

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### I. Introduction

Having looked at the structure of legal bases and legal basis litigation under the area of common foreign and security policy in the previous Chapter, this Chapter will be discussing another formerly intergovernmental policy area: The area of freedom, security and justice.<sup>1</sup> In particular, this will include an examination of the rules and principles employed in the former third pillar as compared to supranational EU law on the one hand and the area of external relations on the other. It is anticipated that the area of freedom, security and justice has undergone a distinctive development, thus impacting on the structure of legal bases as regards competences, legal instruments and procedures. In addition, the courts have established special criteria for legal basis litigation in order to regulate this area.

The area of freedom, security and justice is regulated under Title V of Part Three TFEU. Before the introduction of the Treaty of Lisbon, this area had undergone major modifications since its first appearance under the third pillar. The third pillar, comprising the area of justice and home affairs (JHA), was introduced by the Maastricht Treaty which entered into force in 1993. Over time, the third pillar was amended by the Treaty of Amsterdam in 1999 and by the Treaty of Nice in 2003. These changes brought about an integration of third pillar provisions and an alignment with the rules and principles under former Community law, most significantly the so-called ‘communitarisation’ of the policy area of asylum, migration and judicial cooperation in civil matters, which reduced the third pillar to the area of police and judicial cooperation

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<sup>1</sup> Parts of this Chapter have been published in a collective EUI Working Paper: Engel, Annegret (2012), “Retained Distinctiveness in the Integrated Third Pillar: Safeguarding Member States’ Competences in the European Criminal Law Sphere”, in “Deconstructing EU Federalism through Competences”, EUI Working Paper LAW 2012/06, p. 39-49.

in criminal matters (PJCC).<sup>2</sup> In general, the modified decision-making framework as well as its accompanying judicial interpretation contributed to a subtle diminishing of the intergovernmental powers and competences under the third pillar and the extension of supranational law. The attempt to remedy the initial shortcomings of the third pillar, such as opacity and inefficiency, created further confusion and legal uncertainty as regards its actual scope of application.

In general, it has been observed that with the introduction of the Treaty of Lisbon the Union has gained further competences, without any retrocession of Union competences to the Member States.<sup>3</sup> In particular, this can be seen concerning the incorporation of the third pillar into the general framework of the former first pillar. At the same time, and in order to make the Union more democratic, qualified majority voting has been extended throughout the treaties as well as an enhanced influence of the European Parliament.<sup>4</sup> It will be argued that, regardless of the fact that the area of freedom, security and justice has been formally incorporated into the TFEU under the new Title V of Part Three, this area has not been fully integrated and thus remains distinct from the other parts of the TFEU. This is particularly significant since the preservation of differences between the previous policy areas may result in further legal basis litigation problems as well as a certain risk of competence overlaps. Further, with no protection mechanisms in place, Union law could continue to expand its influence by encroaching upon the intergovernmental characteristics which have been preserved in Title V of Part Three TFEU, thus violating the integrity of Member States and ultimately undermining such provisions. This Chapter thus seeks to identify possible legal basis conflicts in the sphere of freedom, security and justice as a result of a retained distinctiveness in the integrated third pillar after the introduction of the Lisbon Treaty.

To this end, this Chapter will conduct a chronological analysis of the three major steps from the third pillar until the integrated Title V of Part Three TFEU. The first section will discuss the former third pillar, its characteristics as well as its relationship with the

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<sup>2</sup> For some thorough analysis of the third pillar and its development see Peers, S. (2006). EU Justice and Home Affairs Law. Oxford, Oxford University Press; Kuijper, P. J. (2004). "The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects." Common Market Law Review 41(2): 609-626. See also Denza, E. (2002). The Intergovernmental Pillars of the European Union. Oxford, Oxford University Press.

<sup>3</sup> Folz, H.-P. (2009). Die Kompetenzverteilung zwischen der Europäischen Union und ihren Mitgliedstaaten. Der Lissabonner Reformvertrag: Änderungsimpulse in einzelnen Rechts- und Politikbereichen. U. Fastenrath and C. Nowak. Berlin, Duncker & Humblot GmbH.

<sup>4</sup> For a practical commentary of criminal laws after Lisbon, see Schulze, R., M. Zuleeg, et al. (2010). Europarecht: Handbuch für die deutsche Rechtspraxis. Baden-Baden, Nomos Verlagsgesellschaft, § 42 Strafrecht, at pages 2294-2376.



former first pillar. The discussion shall focus on the area of justice and home affairs (Maastricht) as well as the area of police and judicial cooperation in criminal matters (Amsterdam), both of which have experienced a diminishing nature of their intergovernmental powers due to the continued extension of the *acquis communautaire*. The second part will examine the previously separated area of visas, asylum, immigration and judicial cooperation in civil matters which was integrated in the former first pillar after the introduction of the Treaty of Amsterdam. It will identify intergovernmental features which have been preserved under Title IV of Part Three EC and which require special treatment. It will also look at the relationship between Title IV of Part Three EC and other provisions under the EC Treaty, in particular as regards legal basis litigation. The third section will analyse the current treaty framework under Lisbon and the integrated area of freedom, security and justice as regards the degree to which the provisions hereunder have remained distinct from the majority of TFEU provisions. It will further discuss the application of general criteria of legal basis litigation under Title V of Part Three TFEU and the possible delimitation of the provisions thereunder. Finally, some concluding remarks will summarise the findings of this Chapter.

## **II. Justice and Home Affairs (Maastricht) and Police and Judicial Cooperation in Criminal Matters (Amsterdam)**

Before the introduction of the Treaty of Lisbon, the third pillar consisted of the area of justice and home affairs (Maastricht)<sup>5</sup> and later remained the area of police and judicial cooperation in criminal matters (Amsterdam).<sup>6</sup> Both areas have ‘suffered’ from an increasing encroachment from EU law which diminished the scope of third pillar provisions, despite the restriction of judicial review to preliminary reference procedures upon request.<sup>7</sup> While *intra*-pillar legal basis litigation was therefore rather limited under the former third pillar, the provisions thereunder were integrated with two ‘waves’ into the realm of the *acquis communautaire* which will be discussed in the sections further below. This section will focus on the distinctive intergovernmental character of third pillar provisions and their relationship with the laws under the former first pillar. It will

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<sup>5</sup> For the general framework under Maastricht, see Peers, S. (2011). *EU Justice and Home Affairs Law*. Oxford, Oxford University Press, at pages 10-17.

<sup>6</sup> For the general framework under Amsterdam, see *ibid*, at pages 17-41.

<sup>7</sup> Art 35 (Amsterdam) TEU.

analyse the structure of legal bases as regards the nature and scope of the competence under the former third pillar, legal instruments and decision-making procedures. It will then go on to discuss the delimitation between the former third pillar with supranational EU law in cross-pillar conflicts and legal basis litigation as regards ex Article 47 (Amsterdam) TEU.

## **A. The Structure of Legal Bases under the Third Pillar before Lisbon**

Before the introduction of the Treaty of Lisbon, the third pillar was intergovernmental in character, similar to the provisions available under the former second pillar. As will be shown, the distinctive structure of legal bases is evidence of the area's intergovernmental nature, despite a few supranational features which appeared under the former third pillar over time. Therefore, it is necessary to discuss the structure of the legal bases under this policy area, highlighting differences to both supranational law under the former first pillar and intergovernmental law under the former second pillar: This section will be analysing the former third pillar according to first, its nature and scope of the competence, second, legal instruments, and third, decision-making procedures.

### **1. The nature and scope of the competence**

The nature of the competence of third pillar matters before Lisbon can be described as intergovernmental in most instances, or even *sui generis*, similar to the nature of the competence under the area of common foreign and security policy in the second pillar:<sup>8</sup> Member States coordinated their powers through closer cooperation and common action.<sup>9</sup> Harmonisation in this field was restricted to the establishment of “minimum rules”.<sup>10</sup> Nevertheless, such action was required to be “without prejudice to the powers of the European Community”.<sup>11</sup> While this could be an indicator for parallel competences in the field, a general supranational power had been denied by the courts<sup>12</sup> and therefore this statement signifies merely the lack of interaction between

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<sup>8</sup> See Chapter II.

<sup>9</sup> Art 29 (Amsterdam) TEU, third and fourth indent.

<sup>10</sup> Arts 29 fifth indent and 31(1)(e) (Amsterdam) TEU.

<sup>11</sup> Art 29 (Amsterdam) TEU, first indent.

<sup>12</sup> See discussion below.

supranational and intergovernmental powers in this area. This shows a high self-determination and autonomy of Member States under the former third pillar which may therefore be described as intergovernmental or even *sui generis*.

The objectives of Title VI (Amsterdam) TEU were listed in Article 29 (Amsterdam) TEU, which included

a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

Common action in the field of police cooperation was defined in Article 30 (Amsterdam) TEU and common action on judicial cooperation in criminal matters in Article 31 (Amsterdam) TEU. The intergovernmental character of the third pillar secured a reasonable independence of this area of law from other more regulated areas, especially the EC Treaty, since Title VI (Amsterdam) TEU was excluded from supremacy, direct effect<sup>13</sup> and pre-emption. Further, Article 33 (Amsterdam) TEU comprised a so-called ‘saving clause’, providing that the provisions under Title VI (Amsterdam) TEU

shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

## 2. Legal Instruments

Third pillar legal instruments were defined in Article K.6 (Maastricht) TEU, and later in Article 34 (Amsterdam) TEU, which included common positions,<sup>14</sup> framework decisions,<sup>15</sup> decisions,<sup>16</sup> and conventions.<sup>17</sup> In comparison to first pillar legal instruments, those available in the area of police and judicial cooperation in criminal matters did not entail direct effect which was the main characteristic of their intergovernmental nature. However, framework decisions and decisions had a binding effect upon Member States which was confined in the case of framework decisions:

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<sup>13</sup> However, an indirect effect was implied by the courts in *Pupino*, which will be discussed further below.

<sup>14</sup> Art 34(2)(a) (Amsterdam) TEU.

<sup>15</sup> Art 34(2)(b) (Amsterdam) TEU.

<sup>16</sup> Art 34(2)(c) (Amsterdam) TEU.

<sup>17</sup> Art 34(2)(d) (Amsterdam) TEU.

They were only binding “as to the result to be achieved”, leaving the choice of form and methods to the national authorities to decide.<sup>18</sup> As such, it was observed that framework decisions<sup>19</sup> resembled the first pillar legal instrument of a Directive,<sup>20</sup> except that the latter entailed direct effect.<sup>21</sup>

This was also stressed by the courts in the famous *Pupino* judgement.<sup>22</sup> In this case, an Italian nursery teacher had committed a number of offences against her pupils causing physical injuries and traumas. The teacher was subsequently accused of abuse of disciplinary measures under Article 571 and the causing of serious injuries under Articles 582, 585 and 576 of the Italian Criminal Code.<sup>23</sup> Due to the young age of the witnesses in this case, the Public Prosecutor’s Office proposed to apply the special procedure for taking evidence early according to Article 392(1a) and also requested special arrangements to be made according to 398(5a) of the Italian Code of Criminal Procedure.<sup>24</sup> The question referred to the ECJ concerned the compliant interpretation of these Articles with Community law, and more specifically their conformity with Articles 2, 3, and 8 of the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings.<sup>25</sup> Looking at the nature of Article 34(2)(b) (Amsterdam) TEU, the Court found that:

It should be noted at the outset that the wording of Article 34(2)(b) EU is very closely inspired by that of the third paragraph of Article 249 EC. (...).

The binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national law in conformity.<sup>26</sup>

The Court explained the underlying rationale, arguing that in the teleological context

(...) it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that

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<sup>18</sup> On a more thorough analysis as to the legal effects of third pillar instruments see Hinarejos, A. (2008). "On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?" *European Law Journal* 14(5): 620-634.

<sup>19</sup> On a detailed analysis of the actual classification of framework decisions, see Schönberger, C. (2007). "Der Rahmenbeschluss Unionssekundärrecht zwischen Völkerrecht und Gemeinschaftsrecht." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67(4): 1107-1139.

<sup>20</sup> Art 249 EC.

<sup>21</sup> Mitsilegas, V. (2009). *EC Criminal Law*. Oxford, Hart Publishing, at page 16.

<sup>22</sup> Case C-105/03, Criminal proceedings against Maria Pupino, [2005]: ECR I-05285.

<sup>23</sup> *Ibid*, at para 12.

<sup>24</sup> *Ibid*, at para 15.

<sup>25</sup> *Ibid*, at para 18.

<sup>26</sup> *Ibid*, at paras 33 and 34.

treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives.<sup>27</sup>

However, it could be argued that if the drafters of the Treaties had indeed intended such a high degree of similarities between the legal instruments of the first and the third pillars they would have not had to make the effort of defining two entirely different pillars with two different sets of legal instruments. Instead, they could have referred to one and the same set of legal instruments, pointing out the relevant exceptions under each pillar. Since the drafters, however, had not opted for the latter alternative, it has to be assumed that they intended to highlight a certain degree of peculiarity of third pillar legal instruments and their legal effects.<sup>28</sup> Yet the ECJ did not take into consideration that this intergovernmental character of the third pillar required some kind of protection. On the contrary, Community law was interpreted extensively and it was implied that framework decisions should be indirectly effective by arguing that the Court's jurisdiction which was defined in Article 35 (Amsterdam) TEU "would be deprived of most of its useful effect" if such framework decisions could not also be invoked by individuals "in order to obtain a conforming interpretation of national law before the courts of the Member States."<sup>29</sup> This interpretation clearly identified Community features in the otherwise intergovernmental third pillar which was counteractive its original purpose.

This ruling in *Pupino*, which gave indirect effect to framework decisions, was criticized on the grounds that it weakened the intergovernmental nature of the third pillar, "both as regards the legal effect of EC measures and more generally, as regards the existence of the basic rules underpinning that legal order."<sup>30</sup> Further, it was pointed out that the cooperation envisaged under the third pillar (horizontal relationship between the Member States and their police and judicial authorities) and the one envisaged under Community law (vertical relationship between the EC and the Member States) were

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<sup>27</sup> Ibid, at para 36.

<sup>28</sup> Similarly, Fletcher argued that since there cannot be found any textual support for the Court's interpretation it appeared "that the Court (...) once again had to invoke rather inventive means to justify a ruling of constitutional significance", Fletcher, M. (2005). "Extending "indirect effect" to the third pillar: the significance of *Pupino*?" *European Law Review* 30(6): 862-877, at page 872.

<sup>29</sup> At para 38 of the judgement.

<sup>30</sup> Peers, S. (2007). "Salvation outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgments." *Common Market Law Review* 44(4): 883-929, at page 916. See also Gross, T. and T. Fetzner (2005). "Die *Pupino*-Entscheidung des EuGH - Abkehr vom intergouvernementalen Charakter der EU? - Erwiderung auf Herrmann, EUZW 2005, 436." *Europäische Zeitschrift für Wirtschaftsrecht* 16(18): 550-552.

distinct; however, the Court interpreted the former in the same way as the latter.<sup>31</sup> It could thus be argued that the *Pupino* judgement constituted a landmark ruling in favour of the *acquis communautaire* to the very detriment of the *acquis intergouvernemental* in the third pillar.<sup>32</sup> Retrospectively, however, this ruling may be seen as a rather logical step towards an integrated third pillar.<sup>33</sup>

This trend was also followed in the more recent *Segi* judgement which extended the notion in *Pupino* to common positions. The *Segi* case concerned a Basque organisation which was included in a terrorist list annexed to Common Positions 2001/931, 2002/340 and 2002/462, identifying it as an integral part of the terrorist group E.T.A. While the ECJ acknowledged that “a common position is not supposed to produce of itself legal effects in relation to third parties”,<sup>34</sup> such legal effects would occur in conjunction with Article 37 (Amsterdam) TEU which provided that Member States were under an obligation to defend common positions if they were to take part in international organisations or at international conferences. This shows a certain tendency of the European courts towards standardisation of EU law rather than to safeguard a high degree of intergovernmental integrity and self-determination of Member States. While it has to be acknowledged that the rulings of *Pupino* and *Segi* increased the effectiveness of third pillar legal instruments, the actual purpose of a distinction of provisions on police and judicial cooperation in criminal matters in a separate pillar was rather ignored by the courts.

### 3. Decision-making Procedures

The intergovernmental nature of the provisions on police and judicial cooperation in criminal matters could also be observed as regards the decision-making procedures in this field. First, the Commission’s monopoly of initiative for first pillar legal instruments<sup>35</sup> did not include legal instruments under the third pillar where the Commission did not enjoy such exclusivity: The Commission had the right to submit proposals under the third pillar, just as any other Member State. However, the fact that each individual Member State was able to propose a measure showed the

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<sup>31</sup> Fletcher, M. (2005), *supra* note 28, at page 871.

<sup>32</sup> See also *Mitsilegas, V.* (2009), *supra* note 21, at page 28.

<sup>33</sup> See e.g. Spaventa, E. (2007). "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*." *European Constitutional Law Review* 3(1): 5-24.

<sup>34</sup> Case C-355/04, *Segi, Aritz Zubimendi Izaga and Aritza Galarraga v Council of the European Union*, [2007]: ECR I-01657, at para 52.

<sup>35</sup> Art 251 EC.

intergovernmental self-determination under the third pillar, although it could be argued that this was partly diminished due to the Commission's interference.

Second, decision-making under the third pillar was also largely influenced by its general intergovernmental character. In particular, the unanimity requirement in the Council, which was the dominant institution in the third pillar, signified the prominence of each Member State's opinion and the enforcement of measures only if all members participated: According to Article 34(2) (Amsterdam) TEU, this concerned the adoption of common positions,<sup>36</sup> framework decisions,<sup>37</sup> decisions,<sup>38</sup> and conventions.<sup>39</sup> As a derogation from this rule, qualified majority voting was allowed for measures implementing decisions according to Article 34(2)(c) (Amsterdam) TEU, and measures implementing conventions could be adopted by a majority of two thirds according to Article 34(2)(d) (Amsterdam) TEU. There was thus a potential for legal basis litigation between 'ordinary' decisions and conventions and their implementing measures.

Further, the European Parliament's role was rather limited under Title VI (Amsterdam) TEU. Article 39(1) (Amsterdam) TEU merely required the Parliament to be consulted if the Council aimed to adopt a framework decision, decision or convention. Enhanced cooperation was introduced by the Treaty of Nice.<sup>40</sup>

With the introduction of the *passerelle* clause in Article 42 (Amsterdam) TEU, which provided that a matter may be referred to the competences of the Community if the Council unanimously so decides, the third pillar allowed for some flexibility, however, only in the direction favouring the Community method. Baker and Harding described the *passerelle* clause as a "source of instability" within the third pillar as it complicated and rendered "unstable the substantive content of its regime, in turn obfuscating its constitutional objectives and coherence."<sup>41</sup> Further, they compared the third pillar with a "temporary antechamber – a loose zone of convenience, where politically sensitive areas of policy are opportunistically collected together for intergovernmental handling until mature enough for Community treatment."<sup>42</sup> Indeed, it seemed as if the *passerelle* clause did not add to the value of the intergovernmental character of the third pillar.

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<sup>36</sup> Art 34(2)(a) (Amsterdam) TEU.

<sup>37</sup> Art 34(2)(b) (Amsterdam) TEU.

<sup>38</sup> Art 34(2)(c) (Amsterdam) TEU.

<sup>39</sup> Art 34(2)(d) (Amsterdam) TEU.

<sup>40</sup> Arts 40, 40a and 40b (Amsterdam) TEU.

<sup>41</sup> Baker, E. and C. Harding (2009). "From past imperfect to future perfect? A longitudinal study of the third pillar." *European Law Review* 34(1): 25-54, at page 38.

<sup>42</sup> *Ibid.*

Instead, it was further evidence of its diminishing powers and of the resulting expansion of the powers under the EC Treaty.

Third, the jurisdiction of the European Court of Justice was limited as to the constraints provided in Article 35 (Amsterdam) TEU.<sup>43</sup> In general, the ECJ could

give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions (...) and on the validity and interpretation of the measures implementing them.<sup>44</sup>

However, this was contingent upon a prior declaration from each Member State to accept such jurisdiction.<sup>45</sup> It also appeared that common positions escaped from judicial scrutiny of the Court since they were not explicitly mentioned in Article 35 (Amsterdam) TEU. Further, the ECJ did not have jurisdiction, neither as regards “the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State”, nor as regards their responsibilities, such as “the maintenance of law and order and the safeguarding of internal security.”<sup>46</sup> The Court could “review the legality of framework decisions and decisions in actions brought by a Member State or the Commission”<sup>47</sup> and it also had jurisdiction “to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2)”<sup>48</sup> (Amsterdam) TEU.

In practice, however, the Court’s competences were interpreted widely, so as to prevent an entire area of European law to escape from judicial review.<sup>49</sup> In *Spain v Eurojust* the Court acknowledged that it was not possible to derive additional judicial competences from Article 230 EC.<sup>50</sup> However, the Court stressed the importance of effective judicial protection (*effet utile*):

(...) in a community based on the rule of law which (...) requires that all decisions of a body with legal personality subject to Community law be amenable to judicial review, it

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<sup>43</sup> Art 46(b) (Amsterdam) TEU.

<sup>44</sup> Art 35(1) (Amsterdam) TEU.

<sup>45</sup> Art 35(2) (Amsterdam) TEU.

<sup>46</sup> Art 35(5) (Amsterdam) TEU.

<sup>47</sup> Art 35(6) (Amsterdam) TEU.

<sup>48</sup> Art 35(7) (Amsterdam) TEU.

<sup>49</sup> See for a thorough analysis of the ECJ’s role in the third pillar Peers, S. (2007), supra note 30.

<sup>50</sup> Case C-160/03, Kingdom of Spain v Eurojust, [2005]: ECR I-02077, at para 38.



must be observed that *the acts contested in this case are not exempt from judicial review*.<sup>51</sup>

The Court's reasoning could be criticised on the grounds that it did not differentiate between Community principles on the one hand as opposed to principles available under the intergovernmental third pillar on the other. In essence, it applied Community law in an area which was clearly distinct from the *acquis communautaire*. A similar line of argument was found in *Segi* in which the ECJ based its judicial competence upon Article 6 (Amsterdam) TEU, claiming that

(...) the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.

While the Court acknowledged in *Pupino* that it had less judicial powers under the third pillar than under the first pillar,<sup>52</sup> it nevertheless accepted the application of Article 234 EC on Title VI (Amsterdam) TEU to give preliminary rulings, subject to the limits provided in Article 35 (Amsterdam) TEU.<sup>53</sup>

It could thus be observed that the peculiar decision-making procedures established under the third pillar, especially the limited jurisdiction of the European courts, were interpreted widely so as to allow for a subtle supranationalisation. The intergovernmental character of the area of police and judicial cooperation in criminal matters was not protected before the courts. The ECJ's aim to further extend its powers and to rule in the interest of the supranationality was not reconcilable with the special interests of Member States for self-determination and autonomy in certain areas of law. Therefore, it could be argued that the by-passing of such intergovernmental principles led to an undermining of the provisions under Title VI (Amsterdam) TEU.

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<sup>51</sup> *Ibid.*, at para 41, emphasis added.

<sup>52</sup> Case C-105/03, *supra* note 22, at para 35.

<sup>53</sup> *Ibid.*, at paras 19 and 28.

## B. Legal Basis Litigation in cross-pillar conflicts: Article 47 (Amsterdam) TEU

Before the entering into force of the Lisbon Treaty, the old Article 47 (Amsterdam) TEU not only defined the relationship between the first and the second pillar,<sup>54</sup> but also regulated the relationship between the first and the third pillar in the same way. In contrast to the area of CFSP, the Union has challenged the integrity of the third pillar more often and, as a result, has encroached upon this field to a greater extent.<sup>55</sup> Primarily, approximation of criminal laws under the third pillar was limited to a progressive adoption of “measures establishing *minimum rules* relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.”<sup>56</sup> In addition, the Council could adopt measures for the progressive establishment of an area of freedom, security and justice, provided for in Article 61(a) EC. Nevertheless, a general EU competence to harmonise in the area of criminal law was consistently denied by the courts,<sup>57</sup> however, subject to certain exceptions. In the early *Casati* case, the ECJ pointed out that “criminal legislation and the rules of criminal procedure are matters for which the Member States are *still* responsible.”<sup>58</sup> This appears to suggest certain flexibility for subsequent cases, leaving an option for a possible transferral of such responsibilities into the sphere of Community competences. The Court further made it clear in *Casati* that

Community law also sets certain limits in [criminal law] as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons.<sup>59</sup>

This was affirmed in *Cowan*, in which the Court held that national “legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.”<sup>60</sup> The Court, reaffirming the general rule of Member States’ responsibility, held

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<sup>54</sup> See discussion in Chapter II.

<sup>55</sup> See also Peers, S. (2011), *supra* note 5, at pages 108-117.

<sup>56</sup> Art 31(1)(e) TEU, emphasis added.

<sup>57</sup> E.g. by means of general harmonisation provisions, such as Articles 94, 95, and 308 EC.

<sup>58</sup> Case 203/80, Criminal proceedings against Guerrino Casati, [1981]: ECR 02595, at para 27, emphasis added.

<sup>59</sup> *Ibid.*, at para 27, second sentence.

<sup>60</sup> Case 186/87, Ian William Cowan v Trésor public, [1989]: ECR 00195, at para 19.

that criminal law may indeed “be *affected* by Community law”,<sup>61</sup> however, remained silent as to the actual scope of such an EC interference. Title VI (Amsterdam) TEU also appears to have had a lower legal value than provisions under the EC Treaty. One indication for this was the opening of the first Article under this Title which read: “Without prejudice to the powers of the European Community”.<sup>62</sup> The most prominent indication, however, was Article 47 (Amsterdam) TEU which provided that “nothing in this Treaty shall affect the Treaties establishing the European Communities”. Especially the latter Article proved to be crucial for the intergovernmental competences under the third pillar since the European courts interpreted certain of the competences of police and judicial cooperation in criminal matters to rest with the Community. While the Union received express powers to legislate in the field of criminal law with the introduction of the Treaty of Amsterdam,<sup>63</sup> the ECJ further implied the application of EU competences in cases of harmonisation of criminal laws (*Airport Transit Visa* case)<sup>64</sup>, the introduction of environmental penalties (*Environmental Crime* case)<sup>65</sup> and penalties under the framework of the common transport policy (*Ship Source Pollution* case)<sup>66</sup>. These cases shall now be discussed in turn.

### 1. Airport Transit Visa

The *Airport Transit Visa* case<sup>67</sup> was the first case in which the Court had to review the compatibility of a measure adopted under Title VI of the (Maastricht) TEU (justice and home affairs) with the provisions under the EEC Treaty. The contested measure in this

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<sup>61</sup> Case C-226/97, Criminal proceedings against Johannes Martinus Lemmens, [1998]: ECR I-03711, at para 19, emphasis added. See also more recently Case C-61/11 PPU, Criminal proceedings against Hassen El Dridi, alias Karim Soufi, [2011]: ECR I-00000, at para 53.

<sup>62</sup> Art 29 (Amsterdam) TEU.

<sup>63</sup> See e.g. Title IV of Part Three EC on Visas, Asylum, Immigration and other policies related to free movement of persons. According to Art 61(a) EC measures could be adopted “to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union” and according to Art 61(e) EC “measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union.”

<sup>64</sup> Case C-170/96, Commission of the European Communities v Council of the European Union (*Airport Transit Visa*), [1998]: ECR I-02763.

<sup>65</sup> Case C-176/03, Commission of the European Communities v Council of the European Union (*Environmental Crime*), [2005]: ECR I-07879.

<sup>66</sup> Case C-440/05, Commission of the European Communities v Council of the European Union (*Ship-Source Pollution*), [2007]: ECR I-09097.

<sup>67</sup> Case C-170/96, supra note 64.

case was a Joint Action<sup>68</sup> adopted by the Council on the basis of Article K.3 (Maastricht) TEU which had as its main objective the regulation of entry for third-country nationals into the European Union by establishing a system of airport transit visa.<sup>69</sup> The Commission had argued that the contested measure encroached upon the powers of the European Community in so far as Article 100c (1) EEC provided the Community with the necessary competence to harmonise this area of law, therefore rendering such action taken by the Council void.<sup>70</sup> Ex Article 100c (1) EEC stated that a visa system was to be established for third-country nationals who were “crossing the external borders of the Member States.” The Commission interpreted this requirement as constituting a physical or geographical entry into the Member State’s territory thus being fulfilled by third-country nationals who have landed on an airport within the EU.<sup>71</sup> The Council, however, justified its chosen legal basis on the grounds that such crossing of external borders had to be interpreted in a legal sense which would not be fulfilled by the mere landing on an airport and transit through its international zones: In order to legally enter the European Union, a third-country national had to cross the border control point since only after this legal entry one could benefit from the advantages of the internal market, which the implementation of the airport transit visa system aimed to protect.<sup>72</sup>

The Court,<sup>73</sup> following the Council’s reasoning, held that ex Article 100c EEC had to be interpreted to serve as a legal basis for a measure concerning the legal entry into one of the Member States and thus the free movement within the EU.<sup>74</sup> However, the Court distinguished the concept of airport transit visa, stating that it did not involve the legal element of crossing the EU’s external borders and therefore did not fall within the scope of ex Article 100c EEC:

The airport transit visa is concerned with the situation of a passenger arriving on a flight from a third country and remaining in the airport of the Member State in which the

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<sup>68</sup> Joint Action 96/197/JAI of 4 March 1996 on airport transit arrangements (Official Journal 1996, L 63, p. 8).

<sup>69</sup> *Ibid*, at first and second recital of the preamble.

<sup>70</sup> Case C-170/96, *supra* note 64, at para 9.

<sup>71</sup> *Ibid*, at para 19.

<sup>72</sup> *Ibid*, at para 20.

<sup>73</sup> The UK’s argument that the Court had, according to Art L (Maastricht) TEU, no jurisdiction under Art 173 EEC was dismissed on the grounds that judicial review was not intended to scrutinise the legality of a third-pillar measure as such but rather its compatibility with EC law and therewith to guarantee the protection of the ‘*acquis communautaire*’. Mr Advocate General Fennelly had observed in his opinion that this was to be considered as the very purpose of Art M (Maastricht) TEU which, in the event of no possibility to judicial review, would be undermined (at paras 8 and 15 of his opinion).

<sup>74</sup> Case C-170/96, *supra* note 64, at paras 22-26.

aircraft landed in order to take off in the same or another aircraft bound for another third country. The requirement of such a visa [...] therefore presupposes that the holder will remain in the international area of that airport and will not be authorised to move within the territory of that Member State.<sup>75</sup>

Thus the Joint Action did not encroach upon the competences of the European Community and was validly adopted on the basis of Article K.3 (Maastricht) TEU. As can be observed from the general tenor of the judgement, the Court merely relied on the literal phrasing of Article 100c (1) EEC in its interpretation and held that there was thus no Community power. If, however, this provision had provided enough competence for the Community to regulate airport transit visas, the Joint Action would have been held to infringe Article M (Maastricht) TEU on the grounds that it encroached upon the powers of the Community and thus would have been void.<sup>76</sup>

## 2. Environmental Crime

The second case, which was on environmental penalties,<sup>77</sup> also concerned a measure adopted on the basis of Title VI (Amsterdam) TEU and its therewith alleged encroachment upon Community powers through the infringement of Article 47 (Amsterdam) TEU. The Council had based its Framework Decision 2003/80/JHA<sup>78</sup> on Articles 29, 31(e) and 34(2)(b) (Amsterdam) TEU while the Commission maintained that such a measure should have been adopted on the legal basis of Article 175(1) EC. The Commission, while admitting that there was no Community competence as regards criminal law, had argued that the purpose and content of the contested measure was to be considered to fall within the scope of environmental policy and thus in the sphere of the application of the EC Treaty.<sup>79</sup> Supported by the European Parliament, it had mainly based its reasoning on the increased effectiveness which could be achieved if the

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<sup>75</sup> Ibid, at para 30.

<sup>76</sup> Dashwood, A. (2008). Article 47 TEU and the relationship between first and second pillar competences. *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*. A. Dashwood and M. Maresceau. Cambridge, Cambridge University Press: 70-103, at page 79.

<sup>77</sup> Case C-176/03, supra note 65; on a thorough analysis of the case see Ryland, D. (2009). "Protection of the Environment Through Criminal Law: A Question of Competence Unabated?" *European Energy and Environmental Law Review* **18**: 91-111.

<sup>78</sup> Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (Official Journal 2003, L 29, p. 55).

<sup>79</sup> Case C-176/03, supra note 65, at para 18.

Community was competent to take the necessary action,<sup>80</sup> thus implying the existence of a Community competence to harmonise in the field of criminal law.<sup>81</sup> The Commission had further observed that the provisions of the contested measure falling under criminal law as opposed to those which have environmental objectives were inseparably linked with each other and therefore the Commission pleaded to have the entire framework decision annulled.<sup>82</sup>

The Council, in support of the Member States, primarily relied on the criminal law objective of the decision, justified its adoption under those provisions which provided for the sole competence to reside with the Council. It further stated that the environmental law component of the framework decision was merely to supplement Community law in that area.<sup>83</sup> Only the Netherlands had argued that Community action should be accepted if the two components were inseparably linked with each other and such action proved to be necessary for the effective implementation of such a measure. If, however, it was shown that the two different components in the contested measure could be separated, the sole competence for a criminal law measure should remain with the Member States.<sup>84</sup>

Without precedent, the ECJ was thus required to deliver a judgement on the relationship between EU criminal law and EC environmental law and to ascertain whether the Council, by adopting the contested measure under Title VI (Amsterdam) TEU, had encroached upon Community powers. The Court began by recalling the importance of the protection of the environment under Community law.<sup>85</sup> Moreover, it observed that, according to its title and the first three recitals, the contested measure clearly aimed for the protection of the environment.<sup>86</sup> It then looked at the criminal law component of the contested measure and found that as such no Community competence could be established, however:

[This] does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking

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<sup>80</sup> This was criticised as a "naive belief" by Faure, M. (2004). "European Environmental Criminal Law: Do we really need it?" *European Environmental Law Review* 13: 18-29, at page 21.

<sup>81</sup> Case C-176/03, *supra* note 65, at para 25.

<sup>82</sup> *Ibid*, at para 23.

<sup>83</sup> *Ibid*, at paras 26-35.

<sup>84</sup> *Ibid*, at paras 36 and 37.

<sup>85</sup> *Ibid*, at paras 41-43.

<sup>86</sup> *Ibid*, at para 46.

measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.<sup>87</sup>

It thus followed the Commission's reasoning on effectiveness<sup>88</sup> and considered the environmental objective to constitute the main purpose of the contested decision which therefore could have been adopted on the legal basis of Article 175 EC. It further held that

[t]hat finding is not called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. It is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law.<sup>89</sup>

Thus, the Court concluded that the Council by adopting the contested framework decision had infringed Article 47 (Amsterdam) TEU since it encroached upon the competences conferred on the European Community under Article 175 EC and, as a result, the measure had to be annulled in its entirety. It was argued that this judgement left unclear the question as to its extent: There was no indication whether the judgement had to be understood in a general criminal law sphere thus conferring upon the Community a general competence in this area, or whether it had implications only and insofar as environmental objectives were at stake.<sup>90</sup>

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<sup>87</sup> Ibid, at para 48.

<sup>88</sup> On the notion of effectiveness in the context of this case see Herlin-Karnell, E. (2007). "Commission v. Council: Some Reflections on Criminal Law in the First Pillar." *European Public Law* **13**(1): 69-84.

<sup>89</sup> Case C-176/03, supra note 65, at para 52.

<sup>90</sup> Mitsilegas, V. (2009), supra note 21, at pages 73 and 74. In favour of the first alternative see Dawes, A. and O. Lynskey (2008). "The ever-longer arm of EU law: The extension of Community competence into the field of criminal law." *Common Market Law Review* **45**(1): 131-158, at page 143. In favour of the latter alternative see Neagu, N. (2009). "Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law." *European Law Journal* **15**(4): 536-551, at pages 543 and 544.

### 3. Ship Source Pollution

The most recent case concerning the interrelation between the third and the first pillar is the *Ship Source Pollution* case.<sup>91</sup> At issue in this case was Council Framework Decision 2005/667/JHA<sup>92</sup> which had been adopted on the basis of Articles 31(1)(e) and 34(2)(b) (Amsterdam) TEU. The Commission had brought an action against this measure on the grounds of an invalid choice of legal basis, the application of which infringed Article 47 (Amsterdam) TEU, thus encroaching upon the powers conferred on the Community. The Commission had argued that the main purpose of the contested measure was aimed at the improvement of maritime safety and the protection of the environment and could have therefore been validly adopted on the basis of Article 80(2) EC, as was Directive 2005/35/EC<sup>93</sup> which was intended to be supplemented by the contested framework decision.<sup>94</sup> As regards the criminal law component, the Commission relied on the preceding judgement in the *Environmental Crime* case,<sup>95</sup> claiming that the Community had an ‘ancillary criminal law competence’<sup>96</sup> which it could exercise if such action proved to be more effectively taken under Community law.

This reasoning had been supported by the European Parliament which had also observed that the contested framework decisions in the two cases coincided as regards their aim and content and differed only in the defined type and level of the declared criminal penalties.<sup>97</sup> However, the Council had pointed out that both cases differed essentially since the area of transport policy did not constitute an objective as fundamental as the environmental objective at issue in the *Environmental Crime* case. As regards Directive 2005/35/EC, the Council had submitted that since the Commission had opted not to include certain provisions, it was left to the Member States to take action in order to supplement that Directive.<sup>98</sup> It had also argued that if the Community

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<sup>91</sup> Case C-440/05, supra note 66; on a thorough analysis of the case see e.g. Hedemann-Robinson, M. (2008). "The EU and Environmental Crime: The Impact of the ECJ's Judgment on Framework Decision 2005/667 on Ship-Source Pollution." *Journal of Environmental Law* **20**(2): 279-292.

<sup>92</sup> Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (Official Journal 2005, L 255, p. 164).

<sup>93</sup> Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (Official Journal 2005, L 255, p. 11).

<sup>94</sup> Case C-440/05, supra note 66, at paras 29-31.

<sup>95</sup> Case C-176/03, supra note 65.

<sup>96</sup> Case C-440/05, supra note 66, at para 36.

<sup>97</sup> *Ibid*, at para 40.

<sup>98</sup> *Ibid*, at paras 42-44.



was granted to take action in the field of criminal law, this would undermine the provisions under Title VI (Amsterdam) TEU.<sup>99</sup>

The Court, however, did not accept the reasoning of the Council. Instead, it followed its previous judgement in the *Environmental Crime* case. It began by stressing the significance of the area of transport policy, likewise those provisions on environmental protection.<sup>100</sup> The ECJ further observed a balance between the objective of transport policy and the criminal-law component in the contested measure,<sup>101</sup> similar to the balance in its previous case between the latter and the protection of the environment. It recalled from its previous judgement that notwithstanding the fact that there was no general Community competence in the field of criminal law, such action could not be excluded if the circumstances required an effective implementation of such a measure which could only be achieved at Community level.<sup>102</sup>

For the first time, the Court thus acknowledged the possibility that certain provisions on the type and level of criminal penalties could not be considered to fall within the Community competence. Those provisions were inextricably linked with the other provisions of the contested measure which the Court found to be in breach of Article 47 (Amsterdam) TEU since they could have been validly adopted on the basis of Article 80(2) EC.<sup>103</sup> The Court concluded that the Council, by adopting the contested measure, had encroached upon the competences of the Community and therefore the framework decision had to be annulled in its entirety.<sup>104</sup> By also linking this judgement with an environmental objective which had to be dealt with under the first pillar, the Court still left uncertain whether or not the Community would have the competence to regulate in the field of criminal law if such a link did not exist.<sup>105</sup>

#### 4. Evaluation

These cases illustrate the increasing encroachment of the '*acquis communautaire*' onto the area of police and judicial cooperation in criminal matters in the pre-Lisbon period. The Community succeeded in extending its powers which left Member States with a

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<sup>99</sup> *Ibid*, at para 49.

<sup>100</sup> *Ibid*, at para 55.

<sup>101</sup> *Ibid*, at paras 61-65.

<sup>102</sup> *Ibid*, at para 66.

<sup>103</sup> *Ibid*, at paras 70-73.

<sup>104</sup> *Ibid*, at para 74.

<sup>105</sup> *Mitsilegas, V.* (2009), *supra* note 21, at page 84.

weakened tool to adopt measures under the third pillar.<sup>106</sup> It holds indeed true that the Community was equipped with more effective means, i.e. measures having direct effect, which were guaranteed in the EC Treaty, which was not the case with the Treaty on European Union.<sup>107</sup> However, by defending the '*acquis communautaire*' and by arguing that any action taken by the Member States would have the effect of encroaching upon EC powers, the Community was, as could be claimed, in fact substantially encroaching upon the powers conferred upon the Union under the third pillar.<sup>108</sup> Further, although the Court's reasoning might sound justified when it held that action taken under the Community was more effective, this effectiveness could not be declared to be a legal basis principle concerning cross-pillar measures.<sup>109</sup> Neither did it provide any clear answer on the actual delimitation of the pillars. Instead, the Community was able to extend its powers with the help of such vague terms like 'effectiveness' attributed to EU policies,<sup>110</sup> such as transport and environment protection, to the detriment of legal certainty in these areas.<sup>111</sup>

### **III. Visas, asylum, immigration and judicial cooperation in civil matters (Amsterdam)**

With the introduction of the Treaty of Amsterdam in 1999, the area of Justice and Home Affairs was split into two parts: The area of Judicial Cooperation in Criminal Matters which constituted the sole remainder of the third pillar,<sup>112</sup> and the area of visas, asylum, immigration and judicial cooperation in civil matters which was integrated into the first

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<sup>106</sup> This was described as a "theoretical disharmony", arguing that the rulings on Art 47 (Amsterdam) TEU in criminal matters may be contradictory to the objectives set out in Art 1 (Amsterdam) TEU, see Herlin-Karnell, E. (2009). "Subsidiarity in the Area of EU Justice and Home Affairs Law - A Lost Cause?" *European Law Journal* 15(3): 351-361, at pages 356 and 357.

<sup>107</sup> Hillion, C. (2008). *Tous pour un, un pour tous! Coherence in the External Relations of the European Union. Developments in EU external relations law*. M. Cremona. Oxford, Oxford University Press: 10-36, at page 23. Criminal law has been described as 'a means to an end': the effectiveness of EC law justifies a first-pillar competence in this area, Mitsilegas, V. (2009), *supra* note 21, at page 110.

<sup>108</sup> Douglas-Scott, S. (2004). "The rule of law in the European Union - putting the security into the area of freedom, security and justice." *European Law Review* 29(2): 219-242, at page 240.

<sup>109</sup> In the light of the introduction of the Treaty of Lisbon this development can be understood to follow the principle of 'sensitive interpretation' which takes into account a treaty change "not necessarily yet in force", see Bergström, M. (2007). "Spillover or Activist Leapfrogging? Criminal Competence and the Sensitiveness of the European Court of Justice." *European Policy Analysis* 2: 1-9, at page 7.

<sup>110</sup> This has been criticised as "'competence creep' in the name of 'effectiveness'" by Herlin-Karnell, E. (2007), *supra* note 88, at page 78.

<sup>111</sup> For further arguments against the effectiveness-claim see Dawes, A. and O. Lynskey (2008), *supra* note 90, at pages 145-157.

<sup>112</sup> See discussion above.

pillar under the new Title IV of Part Three EC.<sup>113</sup> This latter integration into the realm of supranational law from the previous intergovernmental sphere of the former third pillar will have to be analysed as to how the structure of legal bases has changed and whether or not certain intergovernmental features were preserved under this enclave. If this can be answered in the affirmative, then there was a potential for legal basis litigation with the otherwise supranational law under the EC Treaty. It will be interesting to analyse such legal basis cases as regards the courts' acknowledgement of the area's partly distinctive character and the choice of principles applied. The existence of such legal basis litigation would additionally be a significant signpost for the integration of the remainder of the former third pillar after the introduction of the Treaty of Lisbon.

### **A. The Structure of Legal Bases under Title IV of Part Three EC**

With the integration of the area of visas, asylum, immigration and judicial cooperation in civil matters under the new Title IV of Part Three EC, it appeared as if this field had undergone a complete 'communitarisation' with the same rules and principles applicable to it as for other EC provisions. However, a closer look at the provisions under this title reveals that some of its previously intergovernmental character was partly preserved. Most importantly, this concerns ex Article 68 EC which provided for several exceptions as regards the otherwise full scrutiny by the European Court of Justice.<sup>114</sup> The aim of this section will therefore be to analyse and discuss the preserved special status of Title IV of Part Three EC within the first pillar. In particular, this will include the voting requirements as well as the institutional balance, since the nature of the competence as well as the set of legal instruments seem to have been adjusted to the *acquis communautaire*. Therefore, the main focus of this section will be on the distinctive legislative procedures available under Title IV of Part Three EC.

In general, according to ex Article 67 EC, a transitional period of five years applied to all provisions under Title IV of Part Three EC. During this time unanimity voting, the consultation procedure, and a shared right of initiative between the Commission and the

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<sup>113</sup> Subject to a transitional period of five years according to ex Art 67 EC.

<sup>114</sup> These include a preliminary reference procedure only available for final national courts (paragraph one) and a lack of judicial review concerning ex Art 62(1) EC (paragraph two). See also Peers, S. (1998). "Who's Judging the Watchmen? The Judicial System of the 'Area of Freedom Security and Justice'." *Yearbook of European Law* **18**(1): 337-413.

Member States was accepted. After the transitional period, however, most of the provisions under Title IV of Part Three had to adjust to the legislative procedures set out in ex Article 251 EC (now Article 294 TFEU) that required qualified majority voting, the co-decision procedure, and a monopoly of initiatives by the Commission.<sup>115</sup> Yet, this did not cover the entire area under Title IV of Part Three EC. Most prominently, matters on legal migration<sup>116</sup> and family law<sup>117</sup> were exempted from this rule, thus preserving the intergovernmental features of unanimity voting and consultation procedure until the introduction of the Treaty of Lisbon.<sup>118</sup>

Another peculiarity was ex Article 64(1) EC which provided that “with regard to the maintenance of law and order and the safeguarding of internal security” Member States’ responsibilities shall not be affected by the provisions of Title IV of Part Three EC. Further, paragraph two of this article provided for emergency measures to be implemented for a maximum of six months in order to a “sudden inflow of nationals of third countries”. In addition, according to ex Article 69 EC, the United Kingdom, Ireland,<sup>119</sup> and Denmark<sup>120</sup> were granted a special status as regards Title IV of Part Three EC, i.e. a general opt-out from measures adopted under these provisions. In general, opt-outs can be described as intergovernmental features as they allow certain flexibility and self-determination for Member States as opposed to the otherwise harmonised supranational areas. Thus, Member States would always favour legal bases allowing them to maintain their own rules by opting-out from EU law. This therefore constitutes a potential for legal basis litigation.

Concerning these opt-outs on matters on visas and immigration, two judgements were delivered on 18 December 2007.<sup>121</sup> In these cases, the UK challenged Council Regulation (EC) No 2007/2004<sup>122</sup> and Council Regulation (EC) No 2252/2004<sup>123</sup>

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<sup>115</sup> For more details, see Peers, S. (2005). "Transforming decision making on EC immigration and asylum law." *European Law Review* 30(2): 285-296.

<sup>116</sup> Ex Art 63(4) third indent EC.

<sup>117</sup> Ex Art 67(5) second indent EC.

<sup>118</sup> For an in-depth analysis of each competence under Title IV of Part Three EC, see Peers, S. (2011), *supra* note 5.

<sup>119</sup> See Protocol (No 4) on the position of the United Kingdom and Ireland (1997) as annexed to the EC Treaty.

<sup>120</sup> See Protocol (No 5) on the position of Denmark (1997) as annexed to the EC Treaty.

<sup>121</sup> Case C-77/05, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, [2007]: ECR I-11459 and Case C-137/05, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, [2007]: ECR I-11593.

<sup>122</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Official Journal 2004, L 349, p. 1).

respectively. Both measures were subject to the Schengen Protocol<sup>124</sup> and had been based on Article 77(2)(a) TFEU; Regulation No 2007/2004 had additionally been based on Article 74 TFEU. The Council took the opinion that the UK would thus be excluded from adoption of these measures. However, the UK *inter alia* argued that the contested measures were only “Schengen-related” and therefore could not exclude the UK’s participation *per se*.<sup>125</sup>

In its two judgements, the Court found that the Council’s decision to classify the contested regulations as “developing the provisions of the Schengen acquis” was comparable to the choice of legal basis since this classification “had a direct effect on the determination of the provisions governing the procedure for the adoption of that regulation”.<sup>126</sup> The Court thus recalled the general criteria of legal basis litigation of the consideration of objective factors, in particular the aim and content of a measure.<sup>127</sup> According to these factors, the Court held that

checks on persons at the external borders of the Member States and consequently the effective implementation of the common rules on standards and procedures for those checks must be regarded as constituting elements of the Schengen acquis.<sup>128</sup>

The contested regulations were thus correctly classified under the Schengen Protocol which could exclude the UK from participation in the adoption of the measures in question.

As can be observed, the integrated area of visas, asylum, immigration and judicial cooperation in civil matters was largely ‘communitarised’ and aligned with other provisions under the EC Treaty, especially after the transitional period of five years after the introduction of the Treaty of Amsterdam. Nevertheless, a few exceptions preserved a partly intergovernmental character of decision-making procedures until the enforcement of the Treaty of Lisbon. As could be argued, the peculiarity of these

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<sup>123</sup> Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (Official Journal 2004, L 385, p. 1).

<sup>124</sup> Protocol on the Schengen acquis integrated into the framework of the European Union (Official Journal 2004, C 310, p. 348).

<sup>125</sup> For a more detailed analysis of the facts of both cases, see Rijpma, J. J. (2008). "Case C-77/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported, and Case C-137/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported." *Common Market Law Review* 45(3): 835-852.

<sup>126</sup> Case C-77/05, *supra* note 121, at para 75; Case C-137/05, *supra* note 121, at para 54.

<sup>127</sup> Case C-77/05, *supra* note 121, at para 77; Case C-137/05, *supra* note 121, at para 56 and case-law cited.

<sup>128</sup> Case C-77/05, *supra* note 121, at para 84. See also Case C-137/05, *supra* note 121, at para 60.

provisions was a vital feature of the characteristics of Title IV of Part Three and consequently, it has to be analysed whether the European Court of Justice was able to protect this area from encroachment. Therefore, the following discussion will be on legal basis litigation in this area and, in particular, on the delimitation of competences between Title IV of Part Three and the remaining provisions under the EC Treaty.

### **B. Legal Basis Litigation between the EC and the area of visas, asylum, immigration and judicial cooperation in civil matters**

Only few cases have dealt with legal basis litigation between the EC legal bases and the area of visas, asylum, immigration and judicial cooperation in civil matters. A possible explanation for this lack of legal basis litigation could lie in the marginal overlap between the two areas. One of these rare cases is the *Metock* case.<sup>129</sup> Here, a reference was made for a preliminary ruling from the Irish High Court to review Directive 2004/38/EC<sup>130</sup> which had been adopted on the basis of the provisions of free movement within the Union, Articles 18, 21, 46, 50 and 59 TFEU. Essentially, the Court was asked whether this directive was in conflict with national regulations imposing upon a non-EU national spouse of a Union citizen the requirement to having been “lawfully resident in another Member State prior to coming to the host Member State in order to (...) benefit from the provisions of [the] Directive”.<sup>131</sup> The Irish Minister of Justice had argued that it would fall within the competence of each Member State, according to Title IV of Part Three EC, to regulate the admission of non-EU nationals within the respective EU territory; only the movement of EU citizens within EU territory could also fall within the competence of the Union to decide.<sup>132</sup> This was challenged by the applicants who relied upon the contested directive.

In its judgement, the Court held that the applicants could indeed rely on the provisions provided for in the directive in question and that Member States could not impose contradictory legislation even if the latter would concern the initial entry of a non-EU

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<sup>129</sup> Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, [2008]: ECR I-06241.

<sup>130</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Official Journal 2004, L 158, p. 77).

<sup>131</sup> Case C-127/08, *supra* note 129, at para 47.

<sup>132</sup> *Ibid*, at para 44.

national into the territory of the Union.<sup>133</sup> Rejecting such entry of a non-EU national spouse could act as a deterrent from the exercise of the free movement rights within the EU.<sup>134</sup> Consequently, the Court found that the Union had the necessary competence

to regulate, as it did by Directive 2004/38, the entry and residence of nationals of non-member countries who are family members of a Union citizen in the Member State in which that citizen has exercised his right of freedom of movement, including where the family members were not already lawfully resident in another Member State.<sup>135</sup>

Further, as regards the competence of Member States under Title IV of Part Three EC to regulate immigration, the Court found this to be conflicting with the general objective of a removal of obstacles to the free movement within the internal market.<sup>136</sup> The Court observed that

to allow the Member States exclusive competence to grant or refuse entry into and residence in their territory to nationals of non-member countries who are family members of Union citizens and have not already resided lawfully in another Member State would have the effect that the freedom of movement of Union citizens in a Member State whose nationality they do not possess would vary from one Member State to another (...) with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them.<sup>137</sup>

Therefore, the Court found that the contested directive had rightfully been adopted and precluded any conflicting national immigration laws. As has been argued by Currie, this judgement and the Court's interpretation of the directive had a broadening effect on EU competences in the field of free movement.<sup>138</sup> Similarly, Costello has criticised the Court's ruling as conventional, economically motivated, and as having left several questions unanswered, in particular those relating to atypical family members.<sup>139</sup>

Another interesting case, *Parliament v Council*,<sup>140</sup> involved secondary legal bases in the area of asylum policies. Here, the Court was requested to review the legality of Council

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<sup>133</sup> Ibid, at para 60.

<sup>134</sup> Ibid, at para 64.

<sup>135</sup> Ibid, at para 65.

<sup>136</sup> Ibid, at para 68.

<sup>137</sup> Ibid, at para 67.

<sup>138</sup> Currie, S. (2009). "Accelerated justice or a step too far? Residence rights on non-EU family members and the court's ruling in *Metock*." *European Law Review* 34(2): 310-326.

<sup>139</sup> Costello, C. (2009). "Metock: Free Movement and "Normal Family Life" in the Union." *Common Market Law Review* 46(2): 587-622, at page 621.

<sup>140</sup> Case C-133/06, *European Parliament v Council of the European Union*, [2008]: ECR I-03189.

Directive 2005/85/EC,<sup>141</sup> which was adopted on the basis of ex Article 63(1)(d) EC. This provision was subject to ex Article 67(5) first indent EC, which required qualified majority voting as well as the co-decision procedure according to Article 294 TFEU. However, the Council did not follow this procedure. Instead, it established secondary legal bases within the contested directive,<sup>142</sup> thus derogating from this procedure and applying unanimity voting as well as a mere consultation of the Parliament. The Council justified this approach with the help of ex Article 202 EC, which allowed in its third indent for such implementing powers to be attributed to the Council. The Parliament objected to this approach, arguing that all requirements of ex Article 67(5) EC had been fulfilled and that the Council therefore could not apply ex Article 202 EC. The Council, however, highlighted the politically sensitive nature of the issue which would thus justify such an approach, including a “less cumbersome” legislative procedure.<sup>143</sup>

In its judgement, the Court recalled the principle of institutional balance which is clearly defined in the treaties and therefore cannot be undermined by the institutions themselves:

To acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaty.<sup>144</sup>

The Court further observed that the two legislative procedures provided for in ex Article 67 EC and the secondary legal bases in the contested directive respectively differed and were thus incompatible with each other.<sup>145</sup> On any account, ex Article 202 EC required the conformity with other provisions of the Treaty. The Court held that this was not the case here, since the Council’s practice clearly violated the requirements set out in ex Article 67 EC.<sup>146</sup> In addition, the application of ex Article 202 EC and thus a less stringent legislative procedure could not be justified merely by the political sensitivity

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<sup>141</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Official Journal 2005, L 326, p. 13).

<sup>142</sup> Arts 29(1) and (2) and 36(3) of Directive 2005/85/EC.

<sup>143</sup> Case C-133/06, *supra* note 140, at para 36.

<sup>144</sup> *Ibid*, at para 56.

<sup>145</sup> *Ibid*, at paras 53 and 58.

<sup>146</sup> *Ibid*, at para 61.



of the issues in question.<sup>147</sup> Consequently, the provisions of the contested directive had to be annulled.

This case is evidence of the ‘supranationalisation’ of the integrated Title IV of Part Three EC and of the loss of intergovernmental features within this area. The Court clearly ruled in favour of a maximising of democracy in the form of qualified majority as well as a compliance with the institutional balance, i.e. the increased involvement of the Parliament in the legislative process. Admittedly, the Council was rather attempting to bend the law in its favour in this case. However, as could be argued, the Court has more often been willing to accept such conduct by the Commission rather than the Council. Nevertheless, as has been argued, the involvement of the Parliament could be considered “useful counterbalance” to the decrease of Member States’ rights in the legislative process.<sup>148</sup>

## **IV. Freedom, Security and Justice (Lisbon)**

### **A. The Structure of Legal Bases under Title V of Part Three TFEU: The ‘fully’ integrated Third Pillar after Lisbon**

With the introduction of the Lisbon Treaty and after a transitional period of five years,<sup>149</sup> the former third pillar provisions of the European Union will be fully integrated into the Treaty on the Functioning of the European Union (TFEU), i.e. the former first pillar. This entails certain implications on the actual relationship between the different sets of provisions which are now being dealt with under a single framework. Most significantly, this includes almost full scrutiny by the courts,<sup>150</sup> which was not possible under the previous framework.<sup>151</sup> The area of freedom, security and justice has therefore been described as part of a “linear process”,<sup>152</sup> which appeared to

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<sup>147</sup> Ibid, at para 59.

<sup>148</sup> See Craig, P. (2009). "Case C-133/06, European Parliament v. Council (Delegation of legislative power), judgment of the Grand Chamber of 6 May 2008." *Common Market Law Review* **46**(4): 1265-1275, at page 1274.

<sup>149</sup> Art 10(3), Protocol on Transitional Provisions, Treaty of Lisbon.

<sup>150</sup> According to Art 276 TFEU, this is subject to two exceptions: Excluded from scrutiny by the European courts are operations carried out by the police or other law-enforcement services of Member States as well as the maintenance of law and order and the safeguarding of internal security within Member States.

<sup>151</sup> Ex Arts 35 and 46 (Amsterdam) TEU.

<sup>152</sup> Klip, A. (2009). *European Criminal Law: An Integrative Approach*. Antwerp, Intersentia, at pages 425-427.

have as its ultimate goal a complete ‘Europeanisation’ of any intergovernmental features left in this area. At first glance, it seems as if the Treaty of Lisbon has now achieved this goal by abolishing the pillar structure and integrating the third pillar into the area of supranational EU law, and as a result thereof, having solved all problems surrounding the uncertainty of its intergovernmental nature. However, this would be a rather oversimplified picture of the reality. Instead, it is argued here that Title V of Part Three TFEU has to a certain extent retained a rather special role within the Lisbon Treaty.

The purpose of this section is thus not to provide an analysis of all the changes which mark the transition from the former pillar system<sup>153</sup> before Lisbon into the integrated system of a merged first and third pillar after Lisbon. Instead, specific issues shall be discussed which are evidence of the special status of former third pillar provisions and their preservation of intergovernmental characteristics in the Reform Treaty. To this end, this section will first look at the nature of the competence in Title V of Part Three as compared to other parts of the TFEU Treaty. Second, there will be an analysis of the legal instruments available. Third, the differences in the legislative procedures will be discussed.

### **1. The nature and scope of the competence**

While under the previous treaty framework third pillar competences have mainly been reserved for the Member States, the integrated third pillar after Lisbon has lost its intergovernmental character. The Lisbon Treaty attributes shared competences between the Union and the Member States not only to former first pillar matters but also extends them to the new Title V of Part Three TFEU.<sup>154</sup> This means that while the third pillar has previously been protected from supremacy, direct effect<sup>155</sup> and pre-emption, this has changed under the Lisbon Treaty. Shared competences between the Union and the Member States imply that Union law under Title V of Part Three TFEU is capable to

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<sup>153</sup> For an extensive study of the former third pillar system, see Peers, S. (2006), supra note 2; Peers, S. (2011). *EU Justice and Home Affairs Law (Non-Civil). The Evolution of EU Law*. P. Craig and G. de Burca. Oxford, Oxford University Press.

<sup>154</sup> Art 4(2)(j) TFEU. According to Art 2(2) TFEU Member States may thus exercise their competence unless the Union has already taken action or decided to cease exercising such power. See also Protocol (No 25) on the exercise of shared competence and Declaration 18 in relation to the delimitation of such competences, both being annexed to the Treaty of Lisbon.

<sup>155</sup> However, an indirect effect of third pillar measures was confirmed in Case C-105/03, supra note 22.

interfere with national laws in this area and may even repress Member States' competences under certain circumstances.<sup>156</sup>

With the thus accumulated competences under the TFEU the Union is now able to exercise a broader range of powers specifically conferred on it. As a result, Article 352 TFEU (ex Article 308 EC) can be applied to serve as a residual provision if the provisions under the area of freedom, security and justice do not provide the necessary powers.<sup>157</sup> Such a practice has previously been held to go beyond the scope of Article 308 EC since this provision was considered to be applicable to EC powers only which did not include third pillar competences.<sup>158</sup> However, with the integration of the third pillar such a restriction as to the scope of Article 352 TFEU concerning the application to former third pillar matters has ceased to exist. It could thus be argued that this development represents a threat which could ultimately jeopardise provisions under Title V of Part Three TFEU.

However, despite the explicit statement in Article 4(2)(j) TFEU that the competence to regulate in the area of freedom, security and justice shall be shared between the Union and the Member States, some provisions under Title V of Part Three TFEU indicate that there may be a derogation from this general rule. For example, this is the case in Article 82(2) TFEU which provides for 'minimum rules' to be established, explicitly entitling Member States to adopting or maintaining more stringent measures. Similarly, Article 83 TFEU also refers to 'minimum rules' and although there is no explicit statement as to whether Member States are allowed to adopt stricter rules, such a meaning could well be implied. Under the old legislative framework this was a clear indicator for the existence of complementary competences. However, under the Lisbon Treaty 'complementary' competences are being confined to a 'supporting' nature<sup>159</sup> and any minimum harmonisation rules thus have to be considered to characterise shared competences.<sup>160</sup> This classification of competences under the new treaty framework has been criticised on the grounds that it leads to an increased number of so-called

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<sup>156</sup> Craig, P. (2010). *The Lisbon Treaty: Law, Politics, and Treaty Reform*. Oxford, Oxford University Press, at page 338.

<sup>157</sup> As regards the common immigration policy (Art 79(4) TFEU) as well as crime prevention (Art 84 TFEU), the application of Art 352 TFEU is restricted to the extent that harmonisation of Member States' laws is prohibited according to paragraph three.

<sup>158</sup> See, by analogy, concerning the second pillar, Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, [2008]: ECR I-06351, at paras 200 and 201.

<sup>159</sup> Art 6 TFEU.

<sup>160</sup> Art 2(6) TFEU.

“competence cocktails”, i.e. different types of competences within one policy area,<sup>161</sup> which may have rather dramatic consequences for legal basis litigation.<sup>162</sup>

## **2. Legal Instruments**

This differentiation between first pillar and third pillar instruments has been abolished with the introduction of the Treaty of Lisbon. The entire set of third pillar instruments has disappeared and has been replaced with the instruments already available under the first pillar before Lisbon. Any instrument adopted under the new Title V of Part Three TFEU now has to be in accordance with Article 288 TFEU which is similar to the former Article 249 EC. As regards the nature of the instruments available, the Lisbon Treaty distinguishes between legislative acts (Article 289 TFEU), delegated acts (Article 290 TFEU), and implementing acts (Article 291 TFEU).<sup>163</sup>

## **3. Legislative Procedures**

With the introduction of the Treaty of Lisbon the so-called ‘ordinary legislative procedure’ has been introduced according to which legislative regulations, directives, and decisions shall be implemented (Article 289(1) TFEU). The co-decision procedure now constitutes the rule, while consultation shall be sufficient only in specific circumstances (so-called ‘special legislative procedure’, Article 289(2) TFEU). Under the ‘ordinary legislative procedure’ the Commission retains its monopoly for proposals (Article 294(2) TFEU) which is further supported by Article 293(1) TFEU providing that such proposals can only be amended by unanimous Council decisions save those exceptions listed in the provision. Qualified majority voting is being applied regularly (Article 294 TFEU).

With the integration of the third pillar into the TFEU under Title V, it could generally be assumed that the ‘ordinary legislative procedure’ applies equally to the provisions under this Title. However, it can be observed that certain exceptions are incorporated into the provisions under Title V of Part Three which allow for derogation from the ‘ordinary legislative procedure’. According to Article 76 TFEU any measure concerning

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<sup>161</sup> See Schütze, R. (2008). "Lisbon and the federal order of competences: a prospective analysis." *European Law Review* 33(5): 709-722.

<sup>162</sup> See Chapter I.

<sup>163</sup> This applies to regulations, directives, and decisions.

judicial cooperation in criminal matters as laid down in Chapter 4, concerning police cooperation as specified in Chapter 5 as well as the administrative cooperation after Article 74 TFEU may not only be adopted on a proposal from the Commission (Article 76(a) TFEU) but also on the initiative of a quarter of the Member States (Article 76(b) TFEU). Thus, the Member States have managed to retain a certain degree of their right of initiative as regards these former third pillar measures without leaving it entirely up to the Commission to make proposals. It can further be observed that the 'ordinary legislative procedure' is far away from constituting the regular procedure for provisions under Title V of Part Three TFEU. Instead, the 'special legislative procedure', as way of derogating from the 'ordinary legislative procedure', can be applied accordingly.<sup>164</sup> Under this 'special legislative procedure' the Council shall act unanimously, while it is usually sufficient to merely consult the Parliament. It has been claimed by Hofmann that with the introduction of the 'ordinary legislative procedure' far less legal basis problems will occur.<sup>165</sup> This reasoning may only partly be supported here. While it could be true that the introduction of the 'ordinary legislative procedure' can bring about a greater unity for the legislative procedure amongst former first pillar provisions, this does not apply to the integrated third pillar provisions. Instead, Title V of Part Three TFEU could still be considered as distinctive in comparison to the other provisions under the TFEU. Therefore, legal basis problems are still likely to occur.

Despite the European Parliament's increased influence in the legislative procedure after Lisbon as regards the integrated third pillar, national parliaments retain certain responsibilities. In particular, national parliaments are responsible to ensure that proposed measures under Chapters 4 and 5 of Title V of Part Three TFEU comply with the principle of subsidiarity (Article 69 TFEU). Another peculiarity of the provisions under Title V of Part Three is the limited jurisdiction of the Court of Justice. Although the former Article 35 (Amsterdam) TEU has been abolished, the new Article 276 TFEU still provides for an exceptional treatment of Chapters 4 and 5 of Title V of Part Three as regards operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States which can escape from scrutiny by the Court of Justice.<sup>166</sup> It has been pointed out by

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<sup>164</sup> Arts 77(3), 81(3), 83(2), 86(1), 87(3), and 89 TFEU.

<sup>165</sup> Hofmann, H. (2009). "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality." *European Law Journal* 15(4): 482-505, at page 488.

<sup>166</sup> On a detailed analysis concerning the Court's jurisdiction under the former system, the transitional period and under the Lisbon Treaty after the transitional period, see Peers, S. (2008). "Finally 'Fit for

Ladenburger, these provisions can be seen as a balance between the need to abolish the “institutional weaknesses of the [former] Third Pillar” and the desire to maintain “some particularities of an area traditionally perceived as close to the concept of sovereignty of the national state.”<sup>167</sup>

A further specificity of the provisions under Title V of Part Three TFEU is the availability of emergency brakes<sup>168</sup> and opt-outs which do not exist in most of the other TFEU provisions. Articles under Title V of Part Three which allow for an emergency brake include Articles 82(3) and 83(3) TFEU enabling the Member States to suspend the ‘ordinary legislative procedure’ on the grounds that the proposed measure affects the criminal justice system fundamentally.<sup>169</sup> Opt-outs are possible under Articles 86(1) and 87(3) TFEU which permit a certain amount of Member States being in favour of a proposed measure to go ahead with its adoption, while others do not. This facilitates differential integration<sup>170</sup> in the area of freedom, security and justice. Thus, it can be argued that it is in the interest of Member States to adopt measures on the basis of those Title-V provisions which leave it up to them to choose whether to participate or not. In particular, those Member States which would otherwise be outvoted in the Council, like for example Great Britain,<sup>171</sup> can benefit from such provisions which provide for opt-outs and could oppose the application of other provisions under the TFEU.<sup>172</sup> These exceptions are further evidence of the special character of Title V of Part Three within the TFEU. The allegedly integrated third pillar has thus maintained a certain degree of distinction in legislative procedures in order to protect the integrity of the Member States in the area of freedom, security and justice.

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Purpose'? The Treaty of Lisbon and the End of the Third Pillar Legal Order." *Yearbook of European Law* **27**(1): 47-64, at pages 48-62.

<sup>167</sup> Ladenburger, C. (2008). "Police and Criminal Law in the Treaty of Lisbon: A New Dimension for the Community Method." *European Constitutional Law Review* **4**: 20-40, at page 31.

<sup>168</sup> See also Peers, S. (2011), *supra* note 5, at pages 65-70.

<sup>169</sup> On a detailed discussion on emergency brakes under the integrated third pillar provisions after Lisbon, see Peers, S. (2008). "EU criminal law and the Treaty of Lisbon." *European Law Review* **33**(4): 507-529, at pages 522-529.

<sup>170</sup> On a general discussion on differential integration, see Thym, D. (2006). "The political character of supranational differentiation." *European Law Review* **31**(6): 781-799.

<sup>171</sup> See e.g. Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

<sup>172</sup> It goes without saying that such rules on differential integration shall not be over-used but rather applied responsibly by the Member States, as it has been pointed out by Herlin-Karnell that “too much flexibility will lead to too much complexity”, Herlin-Karnell, E. (2008). "The Lisbon Treaty and the Area of Criminal Law and Justice." *European Policy Analysis* **3**: 1-10, at page 7.

## **B. Legal Basis Litigation between the TFEU and the area of freedom, security and justice**

### **1. Preliminary Observations**

#### ***a) Thesis One: Application of General Criteria of Legal Basis Litigation***

With the entering into force of the Treaty of Lisbon, the pillar structure has been abolished and the competences under the former third pillar have been brought within the ambit of supranational EU law. The same criteria which have been established under the former first pillar in legal basis litigation could now apply to the provisions in the area of freedom, security and justice. This would even allow for the adoption of a dual legal basis for a measure which pursues a twofold objective since the new Article 40 TEU is not explicitly applicable to the area of the integrated third pillar. Thus, it could be argued that by abolishing the pillar structure, the Treaty of Lisbon has also abolished the former difficulties which have occurred in the course of the extension of former Community powers and with it: the legal uncertainty as regards legal basis litigation in cross-pillar matters. However, it could equally be argued that due to the specific status of Title V of Part Three TFEU, and its differences to other provisions under the TFEU as has been discussed above,<sup>173</sup> this area also needs special protection mechanisms in order to ensure its integrity and proper application of the provisions therein. As has been pointed out by Peers, this is not to return to an entirely intergovernmental character of the area of freedom, security and justice as was the case before Lisbon.<sup>174</sup> Instead, this is meant as a modest attempt to divert from the rather absolute picture showing the flawlessly integrated third pillar, which certainly is not the case.

This shall be illustrated with a hypothetical example in legal basis litigation: Assuming that a third of the Member States proposes the adoption of a regulation establishing a European Public Prosecutor's Office from Eurojust in order to combat crimes affecting the financial interests of the Union according to Article 86 TFEU. The Parliament, however, refuses to give its consent to the Council to adopt the measure under Article 86 TFEU, arguing that such a measure should rather be adopted on Article 325 TFEU<sup>175</sup> in accordance with the 'ordinary legislative procedure' after consulting the Court of

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<sup>173</sup> See also Ladenburger, C. (2008), *supra* note 167, at pages 31-37; Peers, S. (2008), *supra* note 169.

<sup>174</sup> Peers, S. (2011). "Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon." *Common Market Law Review* 48(3): 661-693, at pages 692 and 693.

<sup>175</sup> Providing for measures to be adopted "in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies."

Auditors (Article 325(4) TFEU). In this hypothetical legal basis conflict the general criteria as discussed under the first pillar will have to be applied as a result of the integration of the third pillar provisions under Lisbon. Most likely, the Court will apply the ‘centre of gravity’ theory. By emphasising the importance of Article 325 TFEU as a legal basis for the proposed measure the centre of gravity can easily be found in favour of the more general TFEU provision to the detriment of the competence under Title V of Part Three, thus deterring Member States from their possibility of enhanced cooperation. Under these circumstances, it could be argued that the application of general criteria of legal basis litigation on the provisions of the integrated third pillar could potentially have the effect of undermining certain provisions under Title V of Part Three due to their specific character.

The only protection may flow from the *lex specialis derogat legi generali* principle which, however, could be considered as inferior to the more successfully applied ‘centre of gravity’ theory.<sup>176</sup> In addition, it could be argued that a provision can only be considered as *lex specialis* if it is compared to a more general legal basis, such as Article 114 TFEU or Article 352 TFEU. As a result, the *lex specialis derogat legi generali* principle cannot protect a provision under Title V of Part Three from other provisions under the TFEU than those just mentioned. Considering the eagerness of the European Commission to introduce new harmonising measures in the field of freedom, security and justice, it can be anticipated that the principle will soon be tested before the courts. Another possible derogation from the application of Article 114 TFEU may flow from the fact that provisions under the area of freedom, security and justice now already provide an option for harmonisation themselves.<sup>177</sup> This may thus reduce the application of Article 114 TFEU to the area of freedom, security and justice,<sup>178</sup> and therefore also the need to recall the *lex specialis derogat legi generali* principle. This, however, stands in contrast to the intergovernmental feature of mutual recognition between Member States in criminal matters which has been preserved in the integrated third pillar.<sup>179</sup> The Lisbon Treaty is thus trying to strike a balance between cooperation mechanisms and harmonisation of the area of freedom, security and justice and to incorporate both in the TFEU.

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<sup>176</sup> See discussion above.

<sup>177</sup> Arts 67(3), 81(1), 82(1) and 83(2) TFEU.

<sup>178</sup> Herlin-Karnell, E. (2008). "The Treaty of Lisbon and the Criminal Law: Anything New Under the Sun?" *European Journal of Law Reform* 10: 321-337, at page 336.

<sup>179</sup> Arts 67(3), 67(4), 70, 81(1), 81(2)(a), 82(1) and 82(2) TFEU.



As has already been pointed out by White, this may prove to be rather problematic.<sup>180</sup> Cooperation between Member States acknowledges their national identities to a greater extent, leaves them with a high discretion of choice, and does not prejudice their action. It can thus be argued that the area of freedom, security and justice “reflects a piece of the national legal culture and is therefore a symbol of state sovereignty.”<sup>181</sup> Harmonisation mechanisms on the other hand, are being imposed from the Union on the Member States by a superior act which is directly effective, thus national differences will become blurred. However, it may also be argued that mutual recognition could be seen as a concealed harmonisation in the long term: While one Member State takes a judicial decision, others will have to follow and adjust their laws, eventually leading to a harmonised approach in that field. The question which thus arises is whether it is an inevitable development that mutual recognition mechanisms will ultimately be substituted by harmonisation. On any account, it can be observed that mutual recognition in a specific area leads to a certain level of harmonisation therein: Although the actual terms are defined by the initiating Member State taking a leading decision, other Member States are obliged to recognize this decision and to comply with it. Peers even argued that a basic requirement for mutual recognition should be the existence of a minimum level of harmonisation or at least the comparability of substantive laws in criminal matters. According to him, the tension between the two approaches can only be solved by a European Public Prosecutor “who will work according to fully harmonized rules on procedure and substantive law.”<sup>182</sup>

To sum up, if general criteria of legal basis litigation as they have been established under the former first pillar are now equally applicable to Title V of Part Three TFEU there is a certain risk that the application of the latter could be undermined. Harmonisation in the field of freedom, security and justice would then be possible. As has been demonstrated above, the ‘centre of gravity’ theory could be used in order to ensure the expansion of the ‘Community method’<sup>183</sup> since other TFEU provisions would, in a majority of cases, prevail over those in Title V of Part Three TFEU. Further,

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<sup>180</sup> White, S. (2006). "Harmonisation of criminal law under the first pillar." *European Law Review* **31**(1): 81-92, at page 91.

<sup>181</sup> Vervaele, J. A. E. (2008). "The European Community and Harmonization of the Criminal Law Enforcement of Community Policy." *Tiedemann Festschrift*, at 7. Conclusion.

<sup>182</sup> Peers, S. (2004). "Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?" *Common Market Law Review* **41**(1): 5-36, at page 34.

<sup>183</sup> It is noticed that the Community no longer exists after Lisbon and thus there is no Community method. What is meant here is the scope of the current first pillar provisions which used to be characterised by the Community method until the introduction of the Reform Treaty.

general provisions such as the residual competence under Article 352 TFEU could serve as a legal basis for a measure concerning criminal matters for which no such power is provided for in Title V of Part Three TFEU. A theoretically possible but rather unlikely application of the *lex specialis derogat legi generali* principle would shield provisions under Title V of Part Three in such cases from encroachment. However, this principle can be considered as weaker than other criteria such as the above mentioned ‘centre of gravity’ theory. Therefore, it is argued here that the application of general criteria of legal basis litigation for the delimitation of competences between Title V of Part Three TFEU and other TFEU provisions should be rejected.

**b) Thesis Two: Non-affection rule**

If the application of such general criteria does not bring about the required solution in legal basis disputes between Title-V and non-Title-V provisions of the TFEU, and if the area of freedom, security and justice therefore suffers from encroachment, the need will arise for special protection mechanisms for the integrated third pillar. This could be justified with the distinct character which has been identified for the provisions in Title V of Part Three TFEU,<sup>184</sup> which, in turn, would uphold the continued validity of the Court’s statements in *Casati*<sup>185</sup> and subsequent cases<sup>186</sup> that certain responsibility for matters concerning freedom, security and justice should remain with the Member States. It could thus be possible that the Court establishes a new principle specifically aimed at Title-V provisions. This could be done in the shape of a non-affection rule similar to the one provided for in the new Article 40 TEU for provisions in the area of common foreign and security policy. The result of such a non-affection rule would be a clear delimitation between Title V of Part Three TFEU and other areas under the TFEU as well as a possible splitting of measures in borderline cases. Admittedly, the new Article 40 TEU cannot be applied directly as it only concerns the relationship between CFSP and TFEU provisions. However, the Court may nevertheless establish a similar rule along these lines as regards the area of freedom, security and justice if it turns out that this would better guarantee the effectiveness and preservation of the distinctive character of the provisions under Title V of Part Three TFEU.

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<sup>184</sup> See discussion above.

<sup>185</sup> Case 203/80, *supra* note 58.

<sup>186</sup> Case 186/87, *supra* note 60; Case C-226/97, *supra* note 61; Case C-61/11 PPU, *supra* note 61.

## 2. Case C-130/10

After these theoretical considerations, the Court's interpretation of the new provisions shall be analysed in the following, discussing *Case C-130/10*.

### *a) The facts of the case*

The first case concerning a legal basis dispute between a Title-V and a non-Title-V provision of the TFEU has already been brought before the Court of Justice.<sup>187</sup> Here, the Parliament sought to have Council Regulation (EU) No 1286/2009<sup>188</sup> annulled on the grounds that it has been based on an incorrect legal basis. The amended measure, Council Regulation (EC) No 881/2002,<sup>189</sup> was originally based on the triple legal basis of Articles 60, 301 and 308 EC. The new Council Regulation has now been based on Article 215(2) TFEU (ex Article 301 EC) only. Article 215 TFEU reads as follows:

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

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<sup>187</sup> Case C-130/10, *European Parliament v Council of the European Union* (Official Journal 2010, C 134, p. 26).

<sup>188</sup> Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (Official Journal 2009, L 346, p. 342).

<sup>189</sup> Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (Official Journal 2002, L 139, p. 139).

The Parliament has intervened arguing that the correct legal basis should have rather been Article 75 TFEU (ex Article 60 EC) which falls under Title V of Part Three TFEU. This provision reads as follows:

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Previously, these two provisions had the same procedural requirements involving the Council, acting by a qualified majority on the Commission's proposal. This allowed for a joint legal basis. However, the new provisions under the TFEU have procedural differences which may not permit a combined legal basis and which may have led the Parliament to bring this action before the Court: While Article 75 TFEU involves the Parliament to the extent that it can define the framework for measures falling under this provision jointly with the Council, Article 215 TFEU only provides for an obligation to inform the Parliament of the decisions taken by the Council. Another peculiarity is that Article 215 TFEU requires a joint proposal by the Commission and the High Representative. Article 75 TFEU on the other hand does not envisage the latter's involvement in the legislative process.<sup>190</sup>

There are also significant differences between the two provisions with regard to their substance: Article 75 TFEU may be applied as a legal basis for "measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains" in order to fight terrorism and other organised crime as set out in Article 67 TFEU.<sup>191</sup> In contrast, Article 215 TFEU concerns the adoption of restrictive measures "for the interruption or reduction, in part or completely, of economic and

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<sup>190</sup> Peers nevertheless argues that a joint legal basis of Articles 75 and 215(2) TFEU was possible, see Peers, S. (2001). *EU Justice and Home Affairs Law*. Oxford, Oxford University Press, at pages 59 and 60.

<sup>191</sup> First indent of Art 75 TFEU.

financial relations”.<sup>192</sup> Action under both provisions may be directed against natural or legal persons, groups or non-State entities. However, the overarching aim of Article 215 TFEU seems to target “relations with one or more third countries”,<sup>193</sup> which is not the case with Article 75 TFEU. It is explicitly stated in the proposed measure that the “purpose of Regulation (EC) No 881/2002” and thus also of Council Regulation (EU) No 1286/2009 itself “is to prevent terrorist crimes, including terrorist financing, in order to maintain international peace and security.”<sup>194</sup> Further, the Council Regulation provides in the replaced Article 2 for the freezing of funds and not making available of such funds concerning all persons, groups or entities listed in the annex.<sup>195</sup>

Finally, the proposed measure also has to be understood in the light of the CFSP objective flowing from the Council Common Position 2002/402/CFSP.<sup>196</sup> Both Regulations have been based upon this Common Position which allows for the Union to take the necessary action.<sup>197</sup> Since this Common Position was based upon Article 15 (Amsterdam) TEU, thus falling within the CFSP area, this ‘cross-pillar’ link would also have to be reflected in any subsequently adopted measure.

#### ***b) Opinion of the Advocate General***

In his opinion delivered on 31 January 2012, the Advocate General first highlights the new Treaty’s contribution of supplementing “the legal arsenal enabling the European Union to adopt restrictive measures against natural or legal persons, groups or non-State entities” on the basis of Articles 75 and 215(2) TFEU respectively, which thus makes Article 352 TFEU superfluous.<sup>198</sup> The delimitation of the two former competences was thus in the main focus of Advocate General’s opinion.

In order to determine the correct legal basis, the Advocate General applied general criteria of legal basis litigation as they have been developed under the former first pillar. The Advocate General first recalled the principle of objective factors, such as the aim

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<sup>192</sup> Art 215(1) TFEU.

<sup>193</sup> Art 215(1) TFEU.

<sup>194</sup> At recital 11 of the preamble of Council Regulation (EU) No 1286/2009.

<sup>195</sup> Art 1(2) of the Council Regulation (EU) No 1286/2009.

<sup>196</sup> Council Common Position (2002/402/CFSP) of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (Official Journal 2002, L 139, p. 134).

<sup>197</sup> Recital 9 of the preamble, Art 2(2) and Art 3 of the Council Common Position 2002/402/CFSP.

<sup>198</sup> At para 52 of the opinion.

and content of a measure.<sup>199</sup> He observes that the contested regulation “establishes a listing procedure the purpose of which is to guarantee that the fundamental rights of the defence (...) are respected” and therewith has as its main aim “the fight against international terrorism and respect for fundamental rights”.<sup>200</sup> The Advocate General further perceives that “the objective of preserving peace and strengthening international security, must be regarded as falling within the sphere of the CFSP”<sup>201</sup> which would require Article 215(2) TFEU as a legal basis rather than Article 75 TFEU.<sup>202</sup>

Analysing the exact relationship between the two legal bases in question, the Advocate General rejects the application of a *lex specialis derogat legi generali* principle. Instead, he considers the relationship to be of a complementary nature, however, at the same time points out that the contested measure cannot be adopted on a dual legal basis comprising both, Articles 75 and 215(2) TFEU, on the grounds that the legislative procedures required would contradict each other.<sup>203</sup> On the basis that Article 215(2) TFEU was required in order to provide the necessary ‘cross-pillar’ link with the area of common foreign and security policy, the Advocate General concludes that

the contested regulation was correctly adopted on the basis of Article 215(2) TFEU on account of its ‘CFSP’ dimension. That dimension lies, first, in the fact that, by supplementing the legislative framework for the restrictive measures adopted in respect of persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, that regulation has as its principal objective combating international terrorism in order to maintain international peace and security. Second, the contested regulation forms part of the system set up by the European Union to take forward international action decided upon within the Security Council and, more specifically, to implement measures to freeze funds and economic resources directed against persons and entities designated by the Sanctions Committee.<sup>204</sup>

The Advocate General thus applied the ‘centre of gravity’ theory which he argues to rest with Article 215(2) TFEU due to its CFSP link.

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<sup>199</sup> At para 56 of the opinion.

<sup>200</sup> At para 60 of the opinion.

<sup>201</sup> At para 64 of the opinion.

<sup>202</sup> At para 67 of the opinion.

<sup>203</sup> At para 69 of the opinion.

<sup>204</sup> At para 72 of the opinion.

### ***c) The judgement***

In its judgement, the Court first recalled general criteria of legal basis litigation, such as the focus on objective factors, the ‘centre of gravity’ theory, and the exceptional use of a dual legal basis.<sup>205</sup> It observed that the procedural differences between Articles 75 and 215(2) TFEU are of such a nature that a dual legal basis has to be rejected:

the differences in the procedures applicable under Articles 75 TFEU and 215(2) TFEU mean that it is not possible for the two provisions to be cumulated, one with the other, in order to serve as a twofold legal basis for a measure such as the contested regulation.<sup>206</sup>

The Court then went on to analyse the exact scope of both provisions in question as well as their relationship with each other. Article 75 TFEU was interpreted rather narrowly in that it

simply refers to the definition, for the purpose of preventing terrorism and related activities and combating the same, of a framework for administrative measures with regard to capital movements and payments, when this is necessary to achieve the objectives set out in Article 67 TFEU.<sup>207</sup>

According to the Court, the scope of Article 75 TFEU could thus relate to internal actions only,<sup>208</sup> while it attributed an extended scope of reaching the external sphere only to Article 215 TFEU due to the latter’s link with the area of common foreign and security policy.<sup>209</sup> It held that “the combating of terrorism and its financing may well be among the objectives of the area of freedom, security and justice”, and thus of Article 75 TFEU; however, “combating *international* terrorism and its financing in order to preserve *international* peace and security” would fall under the Union’s external action and thus within the realm of Article 215 TFEU.<sup>210</sup> Therefore, the latter

may constitute the legal basis of restrictive measures, including those designed to combat terrorism, taken against natural or legal persons, groups or non-State entities by

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<sup>205</sup> At paras 42-46 of the judgement.

<sup>206</sup> At para 49 of the judgement.

<sup>207</sup> At para 54 of the judgement.

<sup>208</sup> At para 54 of the judgement.

<sup>209</sup> At para 59 of the judgement.

<sup>210</sup> At para 61 of the judgement, emphasis added.

the Union when the decision to adopt those measures is part of the Union's action in the sphere of the CFSP.<sup>211</sup>

Scrutinising the contested regulation in greater detail, the Court observed that it was in line with the objectives of its preceding Regulation No 881/2002, i.e. the preservation of international peace and security and the combating of international terrorism.<sup>212</sup> This was further specified in the contested regulation as to also include the respect for fundamental human rights.<sup>213</sup> Since this required for an external Union competence, the Court considered Article 215(2) TFEU as a sufficient legal basis:<sup>214</sup>

Article 215(2) TFEU constitutes the appropriate legal basis for measures, such as those at issue in the present case, directed to addressees implicated in acts of terrorism who, having regard to their activities globally and to the international dimension of the threat they pose, affect fundamentally the Union's external activity.<sup>215</sup>

The Court then went on to examine the Parliament's prerogatives of the choice of legal basis for the contested measure. The Court reiterated that such prerogatives cannot be the determinant factor for the choice of legal basis *per se*.<sup>216</sup> While it confirmed the Parliament's participation in the legislative process to constitute a "fundamental democratic principle",<sup>217</sup> the Court held that

the difference between Article 75 TFEU and Article 215 TFEU (...) is the result of the choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union's action under the CFSP.<sup>218</sup>

The Court was thus convinced of the correctness of Article 215(2) TFEU as a legal basis for the contested measure and consequently upheld the validity of Council Regulation (EU) No 1286/2009.

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<sup>211</sup> At para 65 of the judgement.

<sup>212</sup> At paras 67 and 68 of the judgement.

<sup>213</sup> At para 70 of the judgement.

<sup>214</sup> At para 75 of the judgement.

<sup>215</sup> At para 78 of the judgement.

<sup>216</sup> At para 79 of the judgement.

<sup>217</sup> At para 81 of the judgement.

<sup>218</sup> At para 82 of the judgement.



#### **d) Evaluation**

The Court's judgement came without big surprise, as it mainly followed the Advocate General's reasoning. The Court applied general criteria of legal basis litigation as they have been developed under the former first pillar, in particular the 'centre of gravity' theory, thus prioritising Article 215(2) TFEU. While the Court's detailed analysis, and its attempt to define the scope of the two provisions in question, have to be appreciated; it still leaves a few questions unanswered.

The main point of criticism concerns the distinction between 'internal' and 'external' terrorism. Both Advocate General and Court have made this distinction and classified Article 75 TFEU as an 'internal' legal basis, while Article 215(2) TFEU was considered an 'external' competence. Although the Advocate General provides a detailed list of examples for measures to be adopted under either provision,<sup>219</sup> this distinction would nevertheless deprive Article 75 TFEU of much of its application in an international context since the objective to prevent and combat terrorism will arguably almost always have a CFSP dimension. Thus rejecting the external application of Article 75 TFEU would thus seem to undermine the provision's very substance. As the Advocate General rightly observed in his opinion, "[t]errorism does not recognise borders."<sup>220</sup> Further, as has been argued by Kau, Article 75 TFEU "conveys the impression of a highly political provision, in that it declares a strong commitment against *international* terrorism."<sup>221</sup> Thus, the distinction between internal and external terrorism may at best achieve different results as regards the correct choice of legal basis, and at worst be an impossible line to draw. In its judgement, the Court has attempted to minimise the importance of such a distinction by arguing that

the (...) argument that it is impossible to distinguish the combating of 'internal' terrorism, on the one hand, from the combating of 'external' terrorism, on the other, does not appear capable of calling in question the choice of Article 215(2) TFEU as a legal basis of the contested regulation.<sup>222</sup>

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<sup>219</sup> See paras 81 and 82 of the opinion. The Advocate General essentially argues that Art 75 TFEU could apply to all measures which do not trespass the CFSP sphere which therefore ensures the full integrity of this provision. However, this is not entirely convincing.

<sup>220</sup> At para 76 of the opinion.

<sup>221</sup> Kau, M. (2008). Justice and Home Affairs in the European Constitutional Process - Keeping the Faith and Substance of the Constitution. The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty? S. Griller and J. Ziller. Wien, Springer-Verlag: 223-234, at page 230, emphasis added.

<sup>222</sup> At para 74 of the judgement.

Nevertheless, the Court mainly relies on the ‘cross-pillar’ link incorporated in Article 215(2) TFEU referring to the CFSP area, which is not the case with Article 75 TFEU. However, it still remains questionable whether this can be considered as the ‘centre of gravity’ rather than the objective to fight terrorism. In addition, Peers argues that Article 215 TFEU does not even apply to measures concerning terrorism.<sup>223</sup> It is therefore questionable whether the application of the ‘centre of gravity’ theory should not rather lead to the conclusion that Article 75 TFEU constitutes the correct legal basis here. It could thus be argued that the delimitation of competences between Articles 75 and 215(2) TFEU does not depend on their scope but rather their subject matter. As has already been observed further above, the two provisions in question differ as regards their very subject matter. In particular, Article 75 TFEU explicitly refers to the freezing of funds which can be said to be one of the main tools mentioned in the contested regulation in order to achieve the set objectives.

Applying Article 75 TFEU, instead of Article 215(2) TFEU, as a legal basis for the proposed measure would further pay tribute to the specific nature of the area of freedom, security and justice. While it does not appear possible to apply the *lex specialis derogat legi generali* principle in the current case, the statement of the Court that “it would not seem possible to regard Article 75 TFEU as a more specific legal basis than Article 215(2) TFEU” has to be criticised.<sup>224</sup> As could be argued, the latter refers to any kind of restrictive measure, not necessarily linked to terrorism. Article 75 TFEU, however, restricts its application to administrative measures specifically linked to terrorism. Nevertheless, it is questionable whether a provision such as Article 215 TFEU could be considered as a more general provision in comparison to Article 75 TFEU since the *lex specialis derogat legi generali* principle may help to derogate only from general legal bases such as Articles 114 and 352 TFEU. Thus, the only possibility would be to declare the entire area of freedom, security and justice to be specific enough in order to trigger the application of the *lex specialis derogat legi generali* principle as a general rule to protect provisions under Title V of Part Three or to introduce a non-affectation clause similar to the one provided for in Article 40 TEU. Otherwise, if the judgement in the current case becomes the rule for conflicts in legal basis litigation in this area, this could eventually undermine the provisions under and the special character attributed to the area of freedom, security and justice.

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<sup>223</sup> Peers, S. (2001), *supra* note 190, at page 59.

<sup>224</sup> At para 66 of the judgement.

## V. Concluding Remarks

The area of freedom, security of justice as it was established under the former third pillar constituted an area remote from supranational EU laws and principles and as such it should have been interpreted intergovernmental throughout. As has been shown, the structure of the legal bases under the former third pillar can be compared to the former second pillar where the intergovernmental character was predominant. Nevertheless, the former third pillar was interpreted differently before the courts: Third pillar legal instruments were interpreted to entail indirect effect as well as a duty of loyal cooperation which significantly weakened the underlying intergovernmental concept since such principles have to be classified as rather supranational. Other examples were the *passerelle* clause as well as the extensive interpretation of the powers of the European Court of Justice to judicial review which contributed further to the diminishing intergovernmental character of the provisions under the former third pillar.

Thus, over time, the third pillar has lost more and more of its intergovernmental character due to the expanding nature of the *acquis communautaire*. As a result, supranational principles were applied in this area of law and Member States lost their sole responsibilities for the provisions available under the third pillar. However, despite this encroachment from Union competences, the third pillar still had to be considered as a distinct area of law with its special rules and procedures. With the introduction of the Treaty of Lisbon, the ‘supranationalisation’ of the area of freedom, security and justice has received an immense push towards the ambit of supranational EU law. However, as can be argued, the new treaty does not constitute the first and final stride to harmonise this field of law, but rather has to be considered as another cornerstone in the already on-going process of diminishing intergovernmental competences in the third pillar which may or may not continue after Lisbon.

As has been observed, the Treaty of Lisbon has not achieved to fully integrate the former third pillar into the realm of supranational EU law. The picture of a homogeneous legal system under the TFEU cannot be supported here. Instead, the area of freedom, security and justice has preserved some of its former intergovernmental features which are evidence of its partially special character. These include the application of a ‘special legislative procedure’, the involvement of national parliaments, Member States’ rights of initiative, emergency brakes, and opt-outs; under the TFEU these elements are mostly found within Title V of Part Three. Therefore, by preserving a

certain degree of distinctiveness for the area of freedom, security and justice and thus providing it with a special status, the Lisbon Treaty still grants Member States a preferential treatment in this area.

This Chapter has further argued that the application of general criteria of legal basis litigation may not be sufficient in order to ensure the effectiveness and proper application of provisions under Title V TFEU of Part Three. While the ‘centre of gravity’ theory may be politically prejudiced or even random in border-line cases, the *lex specialis derogat legi generali* principle can only be applied under certain circumstances. Title-V provisions are therefore endangered to suffer from encroachment from other non-Title-V provisions under the TFEU unless specific protection mechanisms are being established which can safeguard Member States’ competences in the area of freedom, security and justice. It has been suggested in this Chapter that a possible protection mechanism may be established in the shape of a non-affectation rule, similar to the one provided in the new Article 40 TEU, which could be specifically targeted at Title V of Part Three TFEU. This would lead to a better delimitation of competences between the area of freedom, security and justice and the other areas provided for in the TFEU. Further, this practice could result in a splitting of measures in cases where no single legal basis can be agreed upon. Overall, the Court’s judgement in Case C-130/10 has not brought about the necessary clarity for matters concerning the field of freedom, security and justice. It is hoped that future cases will divert from the rather narrow interpretation of Title-V provisions which could otherwise undermine their application.

# CONCLUSIONS

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This thesis has contributed to the academic discussion surrounding the structure of legal bases and legal basis litigation in the European Union. It has provided a comprehensive analysis of previously established general criteria of legal basis litigation under the former first pillar and has extended this discussion to intergovernmental and *inter-pillar* matters. In addition, the new provisions under the Treaty of Lisbon have been scrutinised according to their impact on legal basis litigation, i.e. what the differences will be as regards previous areas of conflict, whether there will be new problems emerging, and which criteria can be used by the courts in order to provide guidance for legal basis cases in the future. The overall purpose of this research has been to better understand and possibly predict judicial outcomes of legal basis litigation as well as to identify existing flaws in previous and current legislative frameworks.

## I. Summary of Chapters

The first Chapter has provided an intense discussion on the structure of legal bases and legal basis litigation under supranational EU law, i.e. the former first pillar. It has identified the differences between legal bases which lead to legal basis litigation before the European courts. First, the nature of the competence can be of various forms, i.e. exclusive, concurrent, shared, complementary, coordinating, parallel, or joint between the EU and the Member States. Second, different legal instruments entail different legal effects, i.e. directly effective, indirectly effective, or without direct effect. Third, legislative procedures can have an influence on the institutional balance and the voting requirements – qualified majority or unanimity – in the Council. These differences between the legal bases lead to divergent outcomes in the choice of legal basis by the EU as compared to the Member States or between the various EU institutions. Thus, legal basis litigation has occurred and the European courts had to solve situations of ambiguous or insufficient delimitation provided for within the treaties.

The first Chapter has also analysed the general criteria which have been developed by the courts to provide guidance in legal basis conflicts, most prominently the ‘centre of

gravity' theory and the *lex specialis derogat legi generali* principle. While these criteria of legal basis litigation were aimed at increasing legal certainty in such cases, the courts have failed to apply these principles in a consistent manner: Over time, the courts have created exceptions as well as conflicting criteria which would undermine previous ones. In particular, this was illustrated with the courts' zig-zag course between the single-legal-basis and the dual-legal-basis approach, but also the 'centre of gravity' theory has not consistently followed the 'aim-and-content approach' and occasionally diverted to a 'content-only' test. Such inconsistencies in the judgements can be attributed to numerous competing competences available in the treaties and to the fact that choices of legal basis may therefore often have an arbitrary character.

While the Treaty of Lisbon may have remedied some areas of legal basis conflicts, it has at the same time created new problems which the courts will have to address sooner or later. In particular, this includes the codification of the types of competences which may cause 'competence cocktails' in some areas, as well as the newly introduced hierarchy of legal instruments. The latter may lead to *inter*-institutional disputes concerning the distinction and correct application between Articles 290 and 291 TFEU. Thus, legal basis litigation will continue to exist under the supranational provisions of the TFEU, requiring a consistent application of previously established criteria and maybe even the establishment of new principles and criteria in order to ensure legal certainty in new legal basis conflicts.

The second Chapter has discussed external relations under the supranational EU law of the former first pillar, and intergovernmental law under the area of common foreign and security policy, as well as the cross-pillar dimension of external relations. These aspects have been analysed with regard to the general criteria established under the internal sphere of the former first pillar. As has been observed, external relations under supranational EU law has continuously been expanded with the help of the 'doctrine of implied powers', thus extending the exclusive powers of the EU to the detriment of Member States' competences. In addition, the overlapping of different competences even within the same policy area has created *intra* legal basis litigation. Another peculiarity of supranational external relations law is the existence of mixed agreements. In contrast, external relations law under the intergovernmental sphere has always remained distinct from supranational law. Most prominently, the area of common foreign and security policy preserved its remoteness from judicial scrutiny and its specific decision-making procedures.

The second Chapter has also examined the delimitation between supranational and intergovernmental competences previously provided for in the old Article 47 (Amsterdam) TEU. This provision has allowed for a constant encroachment upon Member States' powers. After Lisbon, the intergovernmental policy areas have been strengthened with the changes introduced by the new Article 40 TEU. Nevertheless, the new provision does not bring an end to cross-pillar legal basis litigation in external relations. Instead, it raises new questions as regards the possibility of applying general criteria of legal basis litigation, such as the 'centre of gravity' theory, in *inter-pillar* matters. As has been suggested, however, the best solution would be a splitting of such measures which have supranational as well as intergovernmental objectives, linking them with the introduction of cross-references. This would avoid an encroachment of competences and enhance legal certainty in an already politically sensitive and complex area of law.

The third Chapter has examined the area of freedom, security and justice under the various forms of legislative frameworks. The former third pillar has initially been intergovernmental in character which is evident from a similar structure of legal bases as under the former second pillar. However, a different, i.e. more supranationally influenced, judicial interpretation has led to a diminishing of intergovernmental competences in this area: Prominent examples are the attribution of indirect effect for former third pillar instruments, the introduction of loyal cooperation, the *passerelle* clause, as well as the diversion from the courts' otherwise lack of judicial control in intergovernmental matters. This subtle supranationalisation under the former third pillar significantly weakened its intergovernmental character already prior to the introduction of the Reform Treaty.

Over the years, the former intergovernmental third pillar has thus suffered from an increased diminishing of its powers until the final integration into the realm of supranational EU law under the Treaty of Lisbon. Nevertheless, this does not render legal basis litigation in this area obsolete. Rather, the previous *inter-pillar* litigation has now become *intra-pillar* conflicts. Indeed, most of the previous legal basis conflicts remain on the grounds that Title V of Part Three has preserved a special status within the TFEU, such as the application of the 'special legislative procedure', the involvement of national parliaments, Member States' rights of initiative, emergency brakes, and opt-outs. The formal integration, of course, now facilitates the application of general criteria of legal basis litigation, such as the 'centre of gravity' theory or the *lex specialis*

*derogat legi generali* principle. However, as has been argued, it would also be plausible to introduce a protection mechanism for Title-V provisions in the form of a non-affectation rule, similar to Article 40 TEU. This would ensure a better delimitation of competences for the area of freedom, security and justice as well as their proper functioning within supranational EU law. Unfortunately, such a solution was not found in Case 130/10 which has therefore not brought about the expected and also necessary clarification in this area.

## II. General Findings

Overall, this research has shown that there is a significant amount of differences in the structure of the legal bases which can lead to legal basis litigation before the European courts. Such differences may concern the nature and scope of the competences, the legal instruments, and the legislative or decision-making procedures. In general supranational law is characterised by a rather great influence by the European Union with a tendency to more exclusive competences rather than shared or supporting powers, with direct effect of the legal instruments available rather than indirect or even no effect, and with qualified majority voting in the Council rather than unanimity. In contrast, the intergovernmental areas are characterised by a greater influence by the Member States which are interested in ensuring their autonomy and self-determination on the European stage. Nevertheless, Member States also retain certain influence under the supranational policy areas, but even more so the European Union which has always been able to expand its powers into the intergovernmental sphere. Therefore, as has been shown, more and more legal basis litigation has occurred also under the former intergovernmental pillars.

However, as has been observed, differences in the structure of legal bases not only occur between the pillars, but also within the same pillar, and sometimes even within one and the same policy area or provision. This thesis has therefore distinguished three types of legal basis litigation as a result of the differences in the structure of legal bases: *Inter-pillar* legal basis litigation, *intra-pillar* legal basis litigation, and *intra* legal basis litigation. While *inter-pillar* legal basis litigation has mainly occurred between the supranational and the intergovernmental areas of EU law, i.e. between the former first and the former second or third pillars, *intra-pillar* legal basis litigation has been more



extensive under supranational EU law due to the limited possibility of judicial review under the intergovernmental areas. One of the main protagonists is undoubtedly the UK with its rather protectionist behaviour, but also other countries, such as Germany, Ireland, and Denmark, play their parts as main interveners before the European courts.

In general, legal basis litigation in the EU has challenged the European courts on various occasions due to the rather great amount of competing competences within the treaties. The main problem in this development has been the extension of the *acquis communautaire* which has encroached on intergovernmental competences in numerous cases. However, *inter-institutional* battles have also contributed to the great amount of legal basis cases. The maintenance of the institutional balance has thus been one of the key principles of the treaty reform processes and their interpretation by the courts. Nevertheless, the Parliament's role is still lacking in influence, particularly in areas such as external relations where it is often restricted to a mere consultation rather than co-decision procedure. The optimum judicial standard remains to be the 'centre of gravity' theory, despite its occasionally arbitrary character due to the lack of better alternatives.

With the introduction of Treaty of Lisbon legal basis litigation remains an issue before the courts and may even be extended in some areas. The introduction of a hierarchy of legal instruments and the codification of the different types of competences are examples of future areas of conflict under supranational law. However, as has been argued, the Reform Treaty has achieved to bring all areas of EU law within the same legal framework, thus fulfilling the often proclaimed unity theory. On the one hand, this might bring about some facilitation for the understanding of the EU system. On the other hand, the courts will be left with new challenges to solve legal basis conflicts which may even require the development of new principles or criteria of legal basis litigation. In particular, this concerns the integrated third pillar which has preserved some intergovernmental characteristics which should receive the necessary protection from the European courts or otherwise its provisions could eventually be rendered nugatory.

The most significant change made by the Treaty of Lisbon concerning *inter-pillar* legal basis litigation has been the newly introduced Article 40 TEU. While the old provision was characterised as a 'one-way street', the new Article now works in both ways. This means that there may be less encroachment of supranational upon intergovernmental competences. However, the delimitation of competences between TFEU and TEU

provisions remains difficult. The only significant difference to the pre-Lisbon era is that there will not be an automatic preference for the '*acquis communautaire*'. Whether or not this will facilitate *inter-pillar* legal basis litigation remains to be seen, however, such conflicts involving both supranational and intergovernmental policy areas will certainly continue to exist before the European courts.

### **III. Recommendations**

The final question which is yet to be answered is what could be done to confine the problem of legal basis litigation in the European Union. First, a rather radical solution could be to 'supranationalise' all areas of EU law with the Union acquiring exclusive competences. Certainly, this option would encounter enormous opposition from the Member States even though, as could be argued, their interests are still represented by the Council and a subtle 'supranationalisation' as is currently taking place will eventually lead to this result nonetheless. However, such an abrupt change seems far away from feasible and therefore does not contribute a solution to the legal basis problem.

A second option could be to introduce an entirely simplified system with clear-cut policy areas. While this might be difficult to achieve, it could be argued that a first step has already been done with the newly codified types of competences under the TFEU. Nevertheless, this would have to be improved in several aspects concerning competence overlaps. This would also have to include the abolishment of general provisions of harmonisation, such as Articles 114 and 352 TFEU. Admittedly, this would induce the Commission's opposition and might therefore also be rather difficult to enforce. On any account, as regards the different types of competences, there are other minor changes which have been discussed above which can easily be done without greater effort in order to increase legal certainty and avoid unnecessary legal basis litigation in the future.

A third solution could rely on the *status quo* which, as could be argued, includes a subtle 'surpanationalisation'. This could be remedied by the courts' interpretation which may either take account of existing criteria of legal basis litigation, applying them in a more consistent manner, or develop new principles which would better guarantee legal certainty in overlapping areas of competence. The courts' impact will be crucial in

particular as regards the changes made by the Treaty of Lisbon and therefore can be decisive for future legal basis litigation. Therefore it might be possible to minimise the problem of legal basis litigation rather than an entire abolishment. The legal system of the European Union is doomed to entail ambiguities between legal bases which cannot be modified easily. Thus, the only option is to ensure the proper application of the general criteria of legal basis litigation and the avoidance of the creation of unnecessary conflict areas and competence overlaps for the sake of legal certainty.

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