

Coherence through Law: What difference will the Treaty of Lisbon make?

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I. Introduction

In the process of treaty reform that started with the Laeken Declaration in December 2001 and ended with the Treaty of Lisbon, signed in October 2007 (although the process of constitutional development of the Union did not start with Laeken and will certainly not halt with Lisbon), the coherence of the Union's foreign policy has been one of the recurrent themes. The Laeken Declaration asks, "how should a more coherent common foreign policy and defence policy be developed?"¹ and raises the issue of foreign policy coherence expressly twice, first in the context of the organisation of Union competence and its relation to that of the Member States and second in the context of institutional and decision-making efficiency. In June 2006, when the future of the Constitutional Treaty was in doubt, the Commission published a Communication to the European Council ti-

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¹ Laeken Declaration on the Future of the European Union, European Council, 14 and 15 December 2001, Annex I to Presidency Conclusions.

tled “Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility”.² Again these two aspects of coherence are brought out. The Commission argues that coherent and effective external policies require political agreement among Member States on the goals to be achieved, appropriate policy instruments and an effective legal and institutional framework. Political will is not enough:

“even when there is sufficient political will, the EU’s impact falls short when there are unresolved tensions or a lack of coherence between different policies. There is a need for strong and permanent efforts to enhance the complementary interaction of various policy actions and to reconcile different objectives (for example in trade, agriculture, development, environment or migration). For the EU, there is the additional challenge in ensuring coherence between EU and national actions.”

In its Communication the Commission, while arguing that the Constitutional Treaty would make a number of changes that would enhance coherence, puts forward some practical proposals designed to improve coherence under the existing Treaty framework. These range from strengthening the role of the External Relations Group of Commissioners in identifying strategic priorities, to joint (Council, High Representative and Commission) policy papers, better coordination in Council to promote consensus in multilateral organizations and other international fora, and increased use of “double-hatting” between Heads of Delegation and EU Special Representatives. No doubt many of these initiatives will help in improving coherent policy-making and delivery but the IGC Mandate agreed in June 2007 still saw foreign policy coherence as a key objective of revived treaty reform: the IGC was asked to draw up a Reform Treaty amending the existing Treaties “with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union as well as the coherence of its external action”.³ What then does the outcome of this process, the Treaty of Lisbon, offer by way of an improved legal and institutional framework for coherence in EU foreign policy?

² EC Commission, Communication to the European Council, “Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility”, 8 June 2006, COM(2006)278.

³ IGC Mandate, adopted by the European Council June 2007, para 1.

II. The concept of coherence

Coherence and law

Before making some assessment of the Lisbon Treaty in this respect, we need to look briefly at coherence as a concept. First, although the dangers of incoherence in terms of policy outcomes and unfulfilled potential are evident, the nature and different dimensions of coherence as a principle are still difficult to pin down. Coherence in fact has an ambiguous character: it appears to have a primarily institutional / political character, Gauttier for example arguing that at least in the context of EU foreign policy it does not designate a specific legal concept.⁴ However according to Tietje it is “one of the main constitutional values of the EU”.⁵ Certainly it is more than a somewhat vaguely defined objective of good institutional and policy practice, and finds its expression in a number of legal provisions and principles.⁶ It provides a context and rationale for the operation of fundamental legal principles governing the relations between Member States and the EU institutions and between the institutions themselves, including the principle of primacy, the duty of cooperation and the principle by which the Community acquis is protected from being affected by the exercise of CFSP powers.

What does coherence mean as a principle, or value, of EU constitutional law? An initial problem arises when considering coherence in the context of EU foreign policy. The different language versions of the Treaties do not use the same term; more specifically, where the French, Italian, German and other language version use “cohérence”, “coerenza”, “Kohärenz” – that is, “coherence”, the English versions use “consistency”. So, for example, Article 3 of the TEU enjoins “consistency of [the Union’s] external activities as a whole” in English; “la coerenza globale della sua azione esterna” in Italian, and “la cohérence de l’ensemble de son action extérieure” in French. This difference can be traced back at least as far as the Single European Act of 1987 in its provisions on European Po-

⁴ Gauttier, P., “Horizontal Coherence and the External Competences of the European Union” (2004) 10 *European Law Journal* 23, at 24.

⁵ Tietje, C., ‘The Concept of Coherence in the TEU and the CFSP’ (1997) 2 *European Foreign Affairs Rev.*, 211.

litical Cooperation⁷ and unfortunately has not been remedied in the Treaty of Lisbon. In reading of consistency in the English language version, therefore, we should be at least aware of the concept of coherence which informs the other language versions.⁸ Coherence is a broader and more flexible concept than consistency. As a number of writers have pointed out while coherence is a matter of degree, consistency is a static concept (legal provisions are either consistent or they are not).⁹ A theoretical approach would define coherence in terms of the justificatory structures of the law and its conceptual framework;¹⁰ Gauttier refers to coherence as a “principle of action and organisation”.¹¹ All point to its dynamic nature, involving balance and an incremental approach. Indeed, coherence may be said to include (but not be limited to) consistency.

The multi-layered nature of coherence

Coherence then appears to be a multi-layered concept. I propose here a three level analysis of coherence, each supported by its own legal rules or principles. A first level requirement of coherence would be consistency, encompassing rules for conflict avoidance between potentially conflicting norms and for resolving conflicts when they arise: *rules of hierarchy*. Thus we have the rule of primacy of Community law, ensuring that Community law will, if necessary, prevail over conflicting norms of national law;¹² similarly, the primary law of the EU including the founding Treaties but also including general principles

⁶ Hillion, C., “*Tous pour un, un pour tous!* Coherence in the external relations of the European Union” in Cremona, M., ed., *Developments in EU External Relations Law*, Oxford University Press, forthcoming.

⁷ Under Article 30(5) SEA “the external policies of the European Community and the policies adopted by the European Political Cooperation must be consistent. The Presidency and the Commission, each within its own sphere of competence, shall have special responsibility for ensuring that such consistency is sought and maintained.”

⁸ Hillion, C., *op. cit.* note 6.

⁹ See for example Tietje, C., ‘The Concept of Coherence in the TEU and the CFSP’ (1997)2 *European Foreign Affairs Rev.*, 211, at 212; Koutrakos, P., *Trade, Foreign Policy and Defence in EU Constitutional Law*, Hart Publishing 2001, 39; Wessel, R.A., “The Inside Looking Out: Consistency And Delimitation In EU External Relations” (2000) 37 *Common Market Law Review* 1135, at 1150.

¹⁰ For example Tietje, C., *op. cit.* note 5, 214-7.

¹¹ Gauttier, P., *op. cit.* note 4, 40-1.

¹² Case 106/77 *Simmenthal* [1978] ECR 629 in which the Court held that national courts are under a Community law obligation not to apply national law which conflicts with directly applicable Community law.

of law (including fundamental human rights) will take precedence over secondary law enacted by the institutions.¹³

A second level of coherence is the effective allocation of tasks between actors (and instruments), avoiding both duplication and gaps: *rules of delimitation*. So, for example, not only must the EC act within the limits of the powers conferred upon it by the Treaties (Article 5 EC), each institution must also act within the limits of its powers (Article 7(1) EC), and the allocation of functions to the different institutions within the decision-making process is an expression of the 'institutional balance' established by the Treaty. The often difficult issue of identifying the correct legal basis for an act is important precisely because of these principles of conferral and institutional balance. As the Court of Justice put it, these principles are an expression of the rule of law: 'The European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.¹⁴ The doctrine of pre-emption, under which the Member States are precluded from acting externally to the extent that the Community has enacted common rules in the field and insofar as those rules would be affected by national action, is also an example of a delimitation rule designed to ensure coherence: recent case law has emphasised a rationale for exclusivity based on the need 'to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law.'¹⁵

¹³ So for example, as far as the Community is concerned, in Joined cases T-364/95 and T-365/95 *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas* [1998] ECR page I-1023, aspects of a Council Regulation establishing an import regime for bananas were annulled on the grounds that they were in breach of the fundamental principle of non-discrimination. Although the Court does not have direct jurisdiction over the CFSP, it does have jurisdiction to ensure compliance with Article 47 TEU, which provides that the exercise of CFSP powers must not 'affect' the Community acquis; see Case 91/05 *Commission v Council*, judgment of 20 May 2008, discussed further below, in which a Council CFSP Decision was annulled for infringement of Article 47 TEU.

¹⁴ Case 294/83 *Parti Ecologiste ('Les Verts') v. European Parliament* [1986] ECR 1339, at para 23, holding that acts of the European Parliament that have legal effect must be subject to judicial review.

A third level of coherence implies synergy between norms, actors and instruments: *principles of cooperation and complementarity*. We see these expressed in Article 3 TEU, which requires consistency / coherence across all aspects of Union external action and in the duty of cooperation, based on Article 10 EC, which applies both to the Member States and to the institutions. As we shall see, although the duty of cooperation imposes clear obligations on the Member States coherence in the sense of synergy is promoted primarily through efforts towards complementarity, the formulation of strategy documents and other institutional mechanisms. We will also see evidence of a tension between the different levels of coherence, and in particular between coherence as expressed through rules of delimitation and coherence as expressed through the principle of complementarity.

III. Vertical and horizontal coherence

Bearing in mind these different “levels” or elements of coherence, a distinction has also been made between vertical and horizontal coherence.¹⁶ Each of these dimensions to coherence finds expression in legal principles referable to the levels of coherence already outlined.

Vertical coherence

Vertical coherence refers to the relationship between Member State and Union action, in particular in contexts where the Member States and the EU (or EC) may act simultaneously in relation to the same policy or subject matter. This is the case with respect to the common foreign and security policy (CFSP), governed by the Treaty of European Union (TEU), where the exercise of Union competence does not pre-empt or prevent Member State action, as well as shared competence under the EC Treaty, which may be pre-

¹⁵ *Opinion 1/2003* of 7 February 2006, para. 128; in this case the Court held that the Community had exclusive competence to conclude the revised Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁶ See Tietje, *op.cit.* note 5; Nuttall S., “Coherence and Consistency” in Hill, C. and Smith, M., eds., *International Relations and the EU*, OUP 2005, chap 5.

emptive or non-pre-emptive.¹⁷ We can trace the three levels of coherence here in rules relating to conflict-avoidance, in particular the principle of the primacy of Community law with respect to Member State domestic law; in rules relating to delimitation, in particular the principle of conferral; and in the principles of cooperation. The exercise of shared competence is governed by the principles of subsidiarity and proportionality (Article 5 EC) which may be said to embody elements of coherence, in the sense that the decision as to whether the EC should act should be based on logical principle and should be consistent with other such decisions in the same policy field. If the EC acts in a field of non-pre-emptive shared competence, such as development cooperation, the need for coherence clearly emerges and is recognised in the Treaty; Community policy on development cooperation, for example, is to be *complementary* to Member States' policies (Article 177(1) EC), and the Community and Member States are to *coordinate* their policies on development cooperation (Article 180(1) EC). More generally, the loyalty obligation found in both EC and EU Treaties requires the Member States, when exercising their own competence, to actively support the Union's external policy and to refrain from action "which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations" (Article 11(2) TEU) or which "could jeopardise the attainment of the objectives of [the EC] Treaty" (Article 10 EC). Advocate General Tizzano has recognised this "duty of cooperation" as a necessary foundation for the unity of Union external action, while emphasising its importance as a legal principle which may be applied by courts:

"The Community legal system is characterised by the simultaneous application of provisions of various origins, international, Community and national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system. That is, one might say, the inherent nature of the system which, while guaranteeing the maintenance of the realities of States and of individual interests of all kinds, also seeks to achieve a unified modus operandi. Its steadfast adherence to that aim, which the Court itself has described as an obligation of solidarity, is cer-

¹⁷ EC competence may also be exclusive *a priori*, meaning that it is exclusive independently of whether the EC has itself yet acted; the most important field of *a priori* exclusivity is the common commercial policy: see further Schütze, R., "Supremacy Without Pre-Emption? The Very Slowly Emergent Doctrine of Community Pre-Emption", (2006) 43 *Common Market Law Rev.* 1023. As the Member States are precluded from acting, vertical coherence is not a formal issue.

tainly lent considerable weight by the judicial review mechanism which is defined in the Treaty and relies on the simultaneous support of the Community court and the national courts.”¹⁸

These are obligations which not only concern the Member States’ implementation of EU policy but which also constrain the ways in which they may exercise their own competence, ensuring that they do not thereby obstruct EU objectives. So, for example, Germany and Luxembourg were found to be in breach of their obligations under Article 10 EC by concluding bilateral agreements with third countries on the transport of goods and passengers by inland waterway.¹⁹ The bilateral agreements were concluded after a decision by the Council to authorise the Commission to negotiate a multilateral agreement with a number of third countries. Although EC competence in the field was not exclusive, the Court held that the Member States were in breach of Article 10 EC (“that duty of genuine cooperation”²⁰) by continuing bilateral negotiations after the mandate had been agreed in the Council, without cooperating with or consulting the Commission:

“The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation.”²¹

Here we see the Court of Justice expressly framing the Member States’ duty of cooperation in terms of coherence and consistency of EU external action.

¹⁸ AG Tizzano in Case C-53/96 *Hermes International v. FHT Marketing* [1998] ECR I-3603, para 21.

¹⁹ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-04805; Case C-433/03 *Commission v Germany* [2005] ECR I-6985.

²⁰ C-266/03 *Commission v Luxembourg* [2005] ECR I-04805, para 58.

²¹ *Ibid*, para 60. See further on the duty of cooperation in the EC context, Hillion, C., *op.cit.* note 6; Cremona, M., “Defending the Community Interest: the Duties of Cooperation and Compliance”, and on the extent of the Member States’ loyalty obligation within the framework of the CFSP, Hillion C. & Wessel, R.A., “Restraining External Competences of EU Member States under CFSP”, both in M. Cremona and B. de Witte, *EU Foreign Relations Law – Constitutional Fundamentals*, Hart Publishing, forthcoming.

Horizontal coherence

Horizontal coherence is the term used to refer to inter-policy and inter-pillar coherence.²² Again, the concept implies rules concerning consistency and conflict-avoidance, delimitation of powers and cooperation and complementarity. International agreements concluded by the Community are by virtue of Article 300(7) EC, binding upon the institutions as well as the Member States. Thus, they will take priority over secondary law enacted by the institutions.²³ The hierarchy between international agreements (and indeed international legal obligations in general) and primary Community law, is not so clear.²⁴ Significantly however, the Council and Commission are required to ensure that international agreements negotiated under the common commercial policy are “compatible with internal Community policies and rules” (Article 133(3) EC).

Between EC policy fields the emphasis is on policy coordination, complementarity and even integration, rather than hierarchy. Thus, certain policy priorities such as environmental protection (Article 6 EC), the promotion of equality between men and women (Article 3(2) EC) are to be integrated into all policies and activities (including external policy) and the EC is to “take account of” development cooperation objectives in the implementation of policies likely to affect development countries (Article 178 EC). Allocation and delimitation, as well as institutional balance, are reflected in the principles developed by the Court of Justice governing choice of legal base. In considering the proper legal base (environmental protection, common commercial policy, or both) for the conclusion of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, the Court of Justice held:

²² Nuttall designates inter-pillar coherence as “institutional” coherence or consistency, thereby emphasising the different institutional structures of the pillars rather than their different legal nature; see Nuttall S. “Coherence and Consistency” in Hill, C. and Smith, M., eds., *International Relations and the EU*, OUP 2005, chap 5. See also Schmalz, U., ‘The Amsterdam Provisions on External Coherence: Bridging the Union’s Foreign Policy Dualism?’ (1998)3 *European Foreign Affairs Rev.*, 421.

²³ See for example Case C-344/04 *R v Department of Transport ex parte IATA*, [2006] ECR I-403, at para 35. We will not here enter into a detailed discussion of coherence as it applies between international legal norms and the exercise of internal competence by the EU.

*[T]he choice of the legal basis for a Community measure, including one adopted with a view to conclusion of an international agreement, must be based on objective factors which are amenable to judicial review and include in particular the aim and content of the measure ...*²⁵

It is in fact in the inter-pillar context that the Treaties are most explicit about the need for coherence and as we have seen this goes back to the formalisation of European Political Cooperation in the Single European Act.²⁶ The Union's task, in Article 1 TEU, is "to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples".²⁷ More specifically, Article 3 TEU requires consistency / coherence between the Union's activities, including its external policies:

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

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers."

The references to the *acquis communautaire* and to external economic and development policies make it clear that coherence is required across all pillars. In addition to the single institutional framework and the role of the institutions in ensuring this coherence, a set of broadly drawn objectives for the Union is established in Article 2 TEU. Most important, however, are the provisions determining priority and competence delimitation between the pillars. The Union is "founded on" the European Communities, "supplemented by" the second and third pillar policies (Article 1 TEU); one of its objectives is to "maintain

²⁴ See for example Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, in which the Court of First Instance held that UN Security Council Resolutions are not only binding on the EC but also take precedence over Community primary law.

²⁵ Case C-94/03 *Commission v Council*, [2006] ECR I-1, para 34.

²⁶ See note 7.

in full” and to “build on” the *acquis communautaire* (Article 2 TEU); third pillar powers are to be exercised “without prejudice to the powers of the European Community” (Article 29 TEU); and nothing in the TEU is to “affect” the Community Treaties (Article 47 TEU). These provisions, and in particular Article 47 TEU, have been interpreted to mean that second and third pillar powers should not “encroach upon” Community powers.²⁸ As the Court of First Instance put it in *Kadi*, despite the single institutional framework and shared overall objectives, the CFSP and the EC are two “integrated but separate legal orders”.²⁹ How Article 47 TEU should be applied in practice, especially where there are overlapping objectives, is still somewhat problematic. It could be seen as primarily a conflict-resolution rule, or rule of primacy, such that (for example) if conflict were to emerge between a CFSP act and a Community measure, the Community norm would prevail. However, both as regards the third pillar / first pillar relationship,³⁰ and now recently also as regards the CFSP / first pillar relationship,³¹ the Court of Justice has applied the provision as a delimitation rule, a rule governing the allocation of legal base. AG Mengozzi expressed the view accepted by the Court:

“The function of Article 47 EU is to protect the competences which the provisions of the EC Treaty confer on the Community against any encroachment by acts which are claimed by the Council to fall within the scope of Titles V and VI of the EU Treaty. ... Article 47 EU aims to keep watertight, so to speak, the primacy of Community action under the EC Treaty over actions undertaken on the basis of Title V and/or Title VI of the EU Treaty, so that if an action could be undertaken on the basis of the EC Treaty, it must be undertaken by virtue of that Treaty.”³²

²⁷ As elsewhere in this Treaty, consistency in the English text appears as coherence in other language versions: see discussion above.

²⁸ See further Hillion, C., *op.cit.* note 6.

²⁹ Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, para 120. One of the issues in this case concerned the absence in the current EC Treaty of an explicit legal basis for economic sanctions against individuals (as opposed to States or persons connected with the governments of States). The Court refused to imply into the EC Treaty objectives which are specific to the TEU and the CFSP, i.e. the maintenance of international peace and security.

³⁰ For example Case C-176/03 *Commission v Council* [2005] ECR I-7879 in which the Court annulled a third pillar framework decision on the ground that the measure requiring Member States to introduce criminal penalties for certain environmental offences could have been adopted as a directive under Community powers.

³¹ Case 91/05 *Commission v Council*, judgment of 20 May 2008.

³² Case C-91/05 *Commission v Council*, judgement of 20 May 2008, opinion of AG Mengozzi 19 September 2007, paras 92 and 116.

Primacy applies, it is argued by the Advocate General here, not only in case of a conflict of norms, but also to the allocation of competence. This particular case illustrates well the tension that can exist between the different aspects of coherence, on the one hand clarity of rules which allocate tasks, delimit competences and establish priority between rules in order to avoid inconsistency, and on the other coherence through synergy and complementarity. The Commission challenged the Council's use of a CFSP measure to give financial assistance to the Economic Community of West African States (ECOWAS) in the field of Small Arms and Light Weapons (SALW).³³ The control of SALW has been the subject of action both within the CFSP³⁴ and development policy.³⁵ In an "EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition" adopted in December 2005 the European Council links SALW to both the European Security Strategy and to development policy, highlighting the need for a comprehensive response and referring to the possibility of inserting clauses on SALW in future EC agreements, but without any concrete statement as to how to achieve coordination between the pillars. The Commission, which has included conflict prevention and support for the ECOWAS moratorium on SALW in its Regional Indicative Programme for West Africa, argued that the Council's action infringed Article 47 TEU as it affects Community powers in the field of development aid. The Council saw the decision as an implementation (one among several) of its 2002 Joint Action on SALW.³⁶ Clearly the Council is concerned that the Commission might use the potential breadth of development policy to ring-fence (via Article 47 TEU) an increasingly large slice of security policy; the Commission is concerned that the Council will increasingly encroach on development policy objectives by claiming a security dimension. Within the field of development cooperation,

³³ Decision 2004/833/CFSP OJ 2004 L 359/65.

³⁴ Council Joint Action 2002/589/CFSP on SALW, OJ 2002 L 191/1; see also Council Common Position 2005/304/CFSP on conflict prevention, management and resolution in Africa, OJ 2005 L 97/57, Art 7.

³⁵ Support has been given to SALW projects in a number of ACP States under the EDF; see also the Cotonou Convention, Article 11(3).

³⁶ See note 34.

the Member States may choose to act themselves either unilaterally or collectively;³⁷ should Article 47 TEU prevent them from choosing to act through a CFSP instrument? According to both the Advocate General and the Court of Justice it does prevent them doing so if it is possible to adopt the measure under Community powers. However the Advocate General and the Court then disagreed as to whether the Decision fell properly within Community powers. The Advocate General concluded that there was no breach of Article 47 since security was the primary aim of the SALW decision and therefore it could not have been adopted under Community powers. Significantly, in his analysis the Community priority rule established by Article 47 TEU is balanced by the principle of conferral established by Article 5 EC: the Community can only act within the limits of the powers granted by the Treaty and its development cooperation powers cannot be used to pursue objectives which are essentially security-oriented. The Court of Justice, while not disagreeing with this as a matter of principle, came to a different conclusion, finding that the substantial objectives of the Decision could be characterised as concerned both with CFSP (preservation of peace and strengthening of international security) and with development. Where two possible legal bases are both legally relevant (neither is merely incidental) within the Community system, it is possible to adopt the measure on a joint legal basis.³⁸ However in the Court's view, a joint legal base solution is not possible across the pillars as this would conflict with (its reading of) Article 47 TEU, and in such a case, Community powers only should be used:

'... under Article 47 EU, such a solution [joint legal bases] 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 on the Community, and within the CFSP, and where neither one of those components is incidental to the other.

Since Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have

³⁷ Case C-316/91 *European Parliament v Council* [1994] ECR I-0625. In the case of SALW the Member States have indeed taken individual action: see Fourth Annual Report on the implementation of the EU Joint Action on SALW, OJ 2005 C 109/1.

³⁸ See for example Case C-94/03 *Commission v Council*, [2006] ECR I-1, note 25.

*recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community.*³⁹

Article 47 TEU is, on this view, such a strong delimitation rule that it precludes the simultaneous use of first and second pillar legal bases for the adoption of a measure which has both CFSP and Community objectives. This is an a priori prohibition: the Court does not discuss whether the two decision-making procedures are incompatible, as may be the case where a joint legal base is proposed within the Community legal order.⁴⁰ The Court's interpretation of Article 47 thus underlines the separation of the two legal orders (CFSP and Community) referred by the CFI in *Kadi*.⁴¹

On the basis of this case law we can identify a tension between (on the one hand) the creation of a European Union which is “founded on the European Communities,” which is intended to operate under a single institutional framework and to “assert its identity on the international scene” through consistent and coherent external action, and (on the other hand) a system of very different institutional bases for action and legal instruments (the CFSP, PJC, the EC Treaty). Increasingly the relationship between these legal bases and legal instruments, and the proper use of one rather than another, will come to the fore. The type of legal “bridge” created for economic sanctions is an isolated example – and even this procedure requires two separate legal instruments, one CFSP and one EC, not a single jointly-based instrument. More prevalent is the use of a non-binding policy framework to provide coherence to policies which straddle the pillars, such as that used for the European Neighbourhood Policy,⁴² and the increasing use of “Strategies” adopted at European Council level.⁴³ However, as the SALW case illustrates, the concrete implementation of such Strategies through legal instruments immediately raises the legal base question. The position is made more difficult by the fact that the Court of Justice has no jurisdiction under the CFSP and only a limited jurisdiction under the PJC, although as we

³⁹ Case C-91/05 *Commission v Council*, judgement of 20 May 2008, paras 76-77.

⁴⁰ It may not be possible to use a joint legal base where the two procedures are incompatible: see Case C-300/89 *Commission v Council* (the ‘Titanium dioxide case’) [1991] ECR I-2867, paras 18-20.

⁴¹ See note 29.

⁴² See further Cremona, M., “The European Neighbourhood Policy: More than a Partnership?” in Cremona, M., ed., *Developments in EU External Relations Law*, Oxford University Press, forthcoming.

have seen Article 47 TEU does allow the Court to assess the legality of CFSP measures for compliance with that provision. The Advocate General in the SALW case proposed a balance between two principles, both of which are, as argued here, inherent in the concept of coherence. The Court emphasised the delimitation rule (Article 47 TEU) and the priority of Community legislative and decision-making procedures. A different balance might give more emphasis to complementarity and primacy of the *acquis* in case of conflicts of norms. The judgment of the Court in this case is thus important in the evolutionary direction of inter-pillar coherence and the balance between its different elements.

Institutional coherence

Finally we should note the institutional dimension of coherence, relevant primarily in the context of horizontal coherence but with some relevance also to vertical coherence. As we have seen, the institutions – and in particular the Council and Commission – are enjoined to promote (horizontal) coherence between all Union external policies (Articles 3 and 13(3) TEU⁴⁴). The Council is also to ensure that the loyalty principle underpinning vertical coherence is applied in the operation of the CFSP (Article 11(2) TEU), an important role given the absence of jurisdiction of the Court of Justice to enforce this provision. The Commission, apart from its general enforcement powers within the EC legal order under Article 226 EC, is given a role in promoting (vertical) coherence through coordination of Member States' and Community development policies (it may “take any useful initiative”, Article 180(2) EC), and the Council and Commission are to ensure the compatibility of trade agreements with internal Community policies and rules (Article 133(3) EC). More generally, the Court of Justice has taken the view that the “duty of cooperation” expressed in relation to the Member States in Article 10 EC applies also to the institutions in their relations *inter se* and with the Member States. For example the Court has held that the Council was entitled to adopt a Regulation renewing and amending the Generalised System of Preferences for developing countries without first obtaining the

⁴³ For example, the European Security Strategy adopted in December 2003.

⁴⁴ Article 3 TEU is cited above; under Article 13(2) TEU, “The Council shall ensure the unity, consistency and effectiveness of action by the Union.”

opinion of the European Parliament;⁴⁵ since the Parliament failed to deliver an opinion in due time, and there was an urgent need to adopt the renewal regulation in order to avoid an interruption of the preferences system, ‘the essential procedural requirement of Parliamentary consultation was not complied with because of the Parliament's failure to discharge its obligation to cooperate sincerely with the Council’.⁴⁶

The institutions are also specifically concerned with allocation and delimitation of competence; many legal base disputes are actually inter-institutional disputes precisely because of the different institutional rules applicable to different legal bases (most obvious between the pillars but significant also within the EC Treaty itself). The Court, in annulling legal acts on the grounds of an incorrect legal base or failure to follow proper procedures will refer to the need to preserve the “institutional balance” established by the Treaty.⁴⁷ To take one example, although the Commission has implementation powers with respect to competition law, the Court annulled a Commission decision concluding a cooperation agreement with the United States on the grounds that Article 300 EC, which sets out the procedure for concluding international agreements “confers specific powers on the Community institutions” and, “with a view to establishing a balance between those institutions,” provides for negotiation by the Commission and conclusion by the Council.⁴⁸ Here, coherence at the institutional level ensures that it is the Council that concludes legally binding international agreements whether the Community’s treaty-making powers in the field are express or implied.

These two aspects of the institutional dimension to coherence are, not surprisingly, linked. As Stetter has argued, “the functional context of EU foreign politics has given rise to a complex, institutionally fragmented, yet functionally unified policy framework.”⁴⁹ On the one hand, what Stetter refers to as institutional fragmentation persists, as a consequence of the pillar structure, with a different institutional balance operating in each pil-

⁴⁵ The consultation of the Parliament is an essential procedural requirement under Article 37 EC (at that time Article 43 EC) which was one of the legal bases of the Regulation.

⁴⁶ Case C-65/93 *European Parliament v Council* [1995] ECR I-643, para 28.

⁴⁷ See further Jacqu , J-P., “The Principle of Institutional Balance” (2004) 41 *Common Market Law Rev.* 383.

⁴⁸ C-327/91 *France v Commission* [1994] ECR I-3641, para 28. For a counter-example, in which it was held that the Commission had the power to conclude a non-binding arrangement with the US on regulatory cooperation, see case C-233/02 *France v Commission* [2004] ECR I-2759.

lar. On the other hand, the inevitable cross-pillar aspect of foreign policy, which is encouraged by the provisions on coherence such as Article 3 TEU, results in a more complex differentiation between institutions which is not solely “pillar-based” but which, for example, gives more weight to the executive (Commission, Council and European Council) as opposed to the non-executive institutions (European Parliament).⁵⁰ The increasing use of “soft” non-legislative policy frameworks to bind together cross-pillar policies, referred to earlier, is an example of this tendency.

IV. The Treaty of Lisbon and coherence

What impact will the Treaty of Lisbon have on the legal and institutional framework designed to further the coherence of EU foreign policy? Instead of the replacement of the existing Treaties by the Constitutional Treaty, we will see a substantial amendment of the Treaty on European Union and the EC Treaty, the latter being renamed the Treaty on the Functioning of the European Union (TFEU). The amendments to both the EC Treaty and TEU result in a much more integrated framework; the Treaties are referred to as “the Treaties” throughout and they are of equal legal value. The CFSP provisions remain in the TEU but alongside provisions establishing the institutional framework for the Union as a whole and a set of general provisions which govern all external policy. There will be one legal personality for the Union and one legal order,⁵¹ albeit with differing decision-making provisions. The presumption is that all Treaty provisions apply to the CFSP unless there is a specific exclusion.

Vertical coherence

With respect to vertical coherence, three points are notable. First, the Lisbon Treaty while reflecting very many of the changes introduced by the Constitutional Treaty, will remove the explicit provision on the primacy of Union law. This was decided in the Man-

⁴⁹ Stetter, S. “Cross-pillar politics: functional unity and institutional fragmentation of EU foreign policies” (2004) 11 *Journal of European Public Policy* 720, at 733.

⁵⁰ Stetter, op.cit. note 40, at 734.

⁵¹ The concept of an *acquis communautaire* to be maintained and protected has been removed from the TEU by the Treaty of Lisbon.

date for the IGC, agreed in June 2007 as part of the “de-constitutionalising” of the Treaty reform process. A Declaration (No.17) asserts that “in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.” This case law of course has not referred to the primacy of second pillar law (CFSP) and this Declaration thus leaves open the extent to which CFSP measures take priority over national law. The loyalty clause (now Article 4 (3) TEU⁵²) will apply to the CFSP as well as all other Union law and, to the extent that the Court has jurisdiction, may be used to resolve conflicts in favour of Union law. As far as consistency and the avoidance of conflict goes the Treaty of Lisbon will not alter the current position significantly.

Second, there is a clear emphasis on defining the Union’s competence with a concurrent prominence given to the principle of conferral, i.e. that the Union may act only within the limits of the powers granted to it by the Member States in the Treaties.⁵³ This principle appears in Articles 1, 4(1) and 5 TEU, as amended by the Treaty of Lisbon, as well as in Article 7 TFEU, where it is linked to the principle of consistency (in the English text). It is repeated in Declaration 18, and Declaration 24 confirms that “the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties”. This belt-and-braces approach is accompanied by an attempt to codify at least some of the Court of Justice’s case law on external competence, such as the power to conclude international agreements in Article 216 TFEU and the conditions under which such competence may become exclusive in Article 3 TFEU.⁵⁴ Some further express external powers are added, for example, concerning humanitarian aid (Article 214 TFEU), re-

⁵² Subsequent Treaty references in this section will refer to the Treaties as amended and renumbered by the Treaty of Lisbon unless otherwise specified.

⁵³ Under the Treaty of Lisbon, “the Treaties” will refer to the Treaty on European Union (as amended) and the Treaty on the Functioning of the European Union (the amended and renamed EC Treaty). The Union is founded upon these Treaties and they will have the same legal value (Article 1 TEU and Article 1 TFEU).

⁵⁴ For an analysis and critique of these provisions, see Cremona, M., “Defining competence in EU external relations: lessons from the Treaty reform process” forthcoming in Dashwood, A. and Maresceau M., eds., *Recent Trends in the External Relations of the Union*, Cambridge University Press 2008; Cremona, M., ‘The Union’s External Action: Constitutional Perspectives’, in

strictive measures against individuals (Article 215 TFEU), accession to the European Convention of Human Rights (Article 6 TEU), the neighbourhood policy (Article 8 TEU) and a more extended definition of the scope of the common security and defence policy (Article 42(1) TEU). Overall, then, and following the original mandate of the Laeken Declaration, an attempt has been made to define more precisely the extent of the Union's external powers and to emphasise the limits of those powers, in a way which is consonant with the legal principles underlying coherence (delimitation rules).

Third, we find an emphasis on the retention of foreign policy powers by the Member States. Not only do we see general statements that powers not conferred on the Union remain with the Member States and that conferred powers may be returned to the Member States (Article 4 TEU and Declaration 18); there are *two* Declarations affirming that the exercise of CFSP competence “will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy” (Declarations 13 and 14). Indeed, the Treaties go further in that the CFSP is to be “put into effect” by the High Representative for Foreign Affairs and Security Policy *and by Member States* (Article 24(1) TEU, as amended). This not only stresses the Member States' implementing role as regards the CFSP, but suggests that they will remain actively involved in its development, an important aspect of vertical coherence. Elsewhere too, the retention of Member State powers is emphasized; for example in Declaration 36 the IGC “confirms” the continuing right of Member States to conclude international agreements in the fields of judicial cooperation in civil and criminal matters, and police cooperation “insofar as such agreements comply with Union law”.⁵⁵

In sum, then we may conclude that the Treaty of Lisbon responds to the challenge of vertical coherence, not by giving more power to the Union but by emphasizing the boundaries to Union power, the concurrent powers of the Member States and their role in furthering Union policy. Although the Union's system of foreign policy will be somewhat simplified (we will no longer have the Union and the EC as separate external actors), it will still very definitely comprise both Union and Member States.

Amato, G., Bribosia, H., and de Witte, B., eds., *Genèse et Destinée de la Constitution Européenne* (Bruxelles, Bruylant, 2007) 1173.

⁵⁵ Union law of course includes not only the “AETR doctrine” on the conditions under which of external competence may become exclusive but will also include Article 3(2) TFEU which partially codifies this case law.

Horizontal coherence

Horizontal coherence in general, and in relation to foreign policy in particular, may be said to be almost a theme of the Treaty of Lisbon. The TFEU proclaims the principle clearly in Article 7:

“The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers”.

This provision, at the start of the TFEU, heads a series of provisions which are designed to incorporate a set of horizontal objectives into all Union policy (external policy included) and operating alongside the more general Union objectives in Article 3 TEU.⁵⁶ These include eliminating inequality between men and women, employment, social protection, a high level of education and health protection, combating discrimination, environmental protection, consumer protection and services of general economic interest. Thus external policy is not only to be governed by its own specific objectives but also to have regard to the overall policy priorities of the Union. In the foreign policy field a very specific attempt has been made to enhance coherence by establishing a set of common principles and objectives for all Union foreign policy, including the CFSP, and by providing (in Article 21(3) TEU) that these objectives must also be pursued in the external aspects of the Union’s other policies (such as agricultural policy, transport, environmental or migration policy). The Union is to

“define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;*
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;*

⁵⁶ Article 3(5) TEU establishes the general objectives for Union foreign policy: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

- (c) *preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;*
- (d) *foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;*
- (e) *encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;*
- (f) *help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;*
- (g) *assist populations, countries and regions confronting natural or man-made disasters; and*
- (h) *promote an international system based on stronger multilateral cooperation and good global governance.”*

It is worth listing these overall objectives in order to demonstrate their potential in terms of horizontal coherence. Trade policy, for example, is not only take into the principle of liberalisation (Article 206 TFEU) but also sustainable development and support for democracy and human rights. Article 21(3) TEU concludes by repeating again the principle of consistency (cohérence):

“The Union shall ensure consistency between the different areas of its external action and between these and its other policies....”

These provisions, and especially the common objectives for external action, are designed to underpin the “de-pillarisation” effected by the Treaty of Lisbon. However, this de-pillarisation is only partial. The CFSP is still to be subject to “specific rules and procedures” with its own institutional balance, including the prohibition on the adoption of legislative acts (i.e. acts adopted under the co-decision procedure) and the exclusion, with exceptions, of the jurisdiction of the Court of Justice (Article 24(1) TEU). Most significantly, there is an attempt to prevent “cross-contamination” between the CFSP and other policy fields in Article 40 TEU, which provides not only that the implementation of the CFSP “shall not affect” the procedures and institutional powers for the exercise of other Union competences (reflecting the current version in Article 47 TEU), but also that the

exercise of those other competences is not to affect CFSP procedures and institutional powers. This double-sided clause, taken together with the provision establishing “equal legal value” for both Treaties, will remove the current priority accorded to the Community *acquis*; the CFSP will have an equal priority.

Thus despite the series of common objectives and the institutional mechanisms mentioned below, the current separation of the CFSP from other policies is maintained and even strengthened. Coherence does not necessarily imply removal of differences between policies and institutional structures; rather it is about recognising the differences and ensuring that they can live together harmoniously. A strict separation is not necessarily inimical to coherence, at least in its narrower sense of consistency, as long as the boundary is clear; hence the need for delimitation rules. However in this case the boundary is not clear in the sense of providing a clear rule determining choice of legal base for disputed cases such as the SALW case referred to above. Legal base, as we have seen, is determined by reference to a proposed measure’s aims and content. As far as aims are concerned, the new provisions establish a single set of objectives for external action and policy-specific aims have largely disappeared. There are no specific limits set to the content of CFSP action: it may cover “all areas of foreign policy and all questions relating to the Union’s security” (Article 24(1) TEU). Given this, the Court may take the view that the CFSP is the more general competence, to be resorted to only where no other external competence may apply. However some of the other external competences are also broadly drafted, e.g. economic, technical and financial cooperation with third countries, or the conclusion of association agreements. Further, to treat the CFSP as a kind of residual competence does not do justice to the evident desire of the Member States to maintain a distinctive sphere of activity for the CFSP with its own institutional balance (and its own approach to vertical coherence) and to grant it equal priority. The solution proposed by the Court in the SALW case to the problem of overlapping objectives – that of giving priority to Community processes – will have to be reconsidered under the Treaty of Lisbon as the legal basis for Community priority disappears.

Institutional coherence

It is significant that the revised version of Article 40 TEU is concerned to protect “the application of the procedures and the extent of the powers of the institutions laid down by the Treaties”. We no longer have separate pillars, or legal orders, but differentiated institutional dynamics are maintained. In spite of this, the Treaty of Lisbon contains three innovations clearly designed to enhance institutional coherence in external policy-making and delivery. First is to give to the European Council the mandate to develop overall foreign policy strategy, through its Conclusions, through non-binding strategy documents and also through binding Decisions which may cover CFSP and other external policy areas (Article 22(1) TEU, replacing the “common strategies” adopted under Article 13(2) of the current TEU). This to a large extent constitutionalises (if we should use that term of the Lisbon Treaty) existing practice. Second, the Treaties create the new role of High Representative for Foreign Affairs and Security Policy (HR), who will act in a double role as President of the Foreign Affairs Council and as a Vice-President of the Commission. He or she is given the task of “conducting” the CFSP and CSDP, both making proposals and implementing them. Within the Commission he or she will not only have overall responsibility for the Commission’s external relations functions but will also coordinate and “ensure the consistency of” the Union’s external action” (Article 18(4) TEU). Where conflicts of interest arise, the HR’s role within the Council prevails: he or she will be subject to Commission procedures only to the extent compatible with his conduct of the CFSP and his Council role. Third, the Treaty of Lisbon introduces the External Action Service to assist the HR (in both his functions); the EAS will be composed of officials of the Council Secretariat and the Commission as well as staff seconded from national diplomatic services. It is thus intended to bridge the gap between the two increasingly competitive policy services within the Commission and the Council Secretariat but also, through the involvement of the national diplomatic services, to encourage vertical cohesion.⁵⁷

⁵⁷ The details of the functioning of the EAS are to be the subject of a Council Decision (Article 27(3) TEU); see further Editorial comment, “Mind the Gap”, (2008) 45 *Common Market Law Rev.* 317, at 321.

These innovations no doubt have the potential to enhance coherence if they work as intended. However the institutional picture is of course more complex and we can identify a tendency in the Treaties to give a coordinating role not just to one but to several actors. In addition to the HR (who will chair the Foreign Affairs Council), we find that the *President of the European Council* “shall, at his or her level and in that capacity” ensure the external representation of the Union on CFSP matters, without prejudice to the powers of the HR (Article 15(6) TEU). The *Commission* is to ensure the Union’s external representation, outside the CFSP (Article 17(1) TEU). The *Council* (primarily the Foreign Affairs Council) is also, together with the HR, responsible for ensuring compliance with the principles of loyalty and solidarity within the CFSP. The *General Affairs Council* (presided over by a Member State representative) has charge over ensuring consistency in the work of the different Council configurations, including the Foreign Affairs Council (Article 16(6) TEU). Apart from the HR, individual Commissioners will have responsibility for specific aspects of external policy, including trade, development and humanitarian aid.⁵⁸ Not only will there be a number of different actors to coordinate, a number of different actors will have responsibility for that coordination.

V. Conclusion

Despite the simplification offered by the Lisbon Treaty in establishing a single European Union with a single legal personality and a single set of principles and objectives for the EU’s external action, the structural complexity inherent in the Union system will largely survive. In particular, emphasis on the principle of conferral and the limits to the Union’s powers, as well as the continuing foreign policy activity of the Member States will highlight the importance of vertical coherence and the role of the European Council in its support. Horizontal and institutional coherence have been a major theme of the Treaty reforms. The continued special treatment of the CFSP will not necessarily pose greater problems for coherence than the differences of approach between other policy fields.

⁵⁸ Although it has rightly been suggested that the framing of the HR’s tasks within the Commission in Article 18(4) TEU leaves open the possibility that he/she might take over all these responsibilities; the decision as to allocation would ultimately lie with the Commission President: Editorial comment, “Mind the Gap”, (2008) 45 *Common Market Law Rev.* 317, at 318-9.

However boundary disputes will not disappear and the institutional mechanisms designed to ensure coherence may prove over-complex: much will depend on evolving institutional practice and a willingness to avoid turf wars.

As we have seen, the legal principles underlying the different aspects of coherence are sometimes in tension. The Treaty of Lisbon preserves all these principles: rules of hierarchy and conflict-avoidance, rules of delimitation and allocation, principles of cooperation and complementarity. It could be argued from the analysis undertaken here that the innovations it introduces, both structural and institutional, give prominence to rules of delimitation and to the principle of complementarity in both vertical and horizontal dimensions of coherence. Despite the prominence given to the new institutional mechanisms, it could be that the most important element of the Treaty of Lisbon from the perspective of foreign policy coherence is the clear external mandate given to the Union as a whole in both substantive and instrumental terms. The substantive mandate as expressed in Article 3(5) TEU⁵⁹ is to be achieved by developing relations and building partnerships with third countries and international organisations which share the Union's principles and values, and promoting multilateral solutions to common problems (Article 21(1) TEU). There is a basis here for meeting the challenge of the Laeken Declaration, in finding a role for the Union as "a power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest. A power seeking ... to anchor [globalisation] in solidarity and sustainable development." ⁶⁰ Ambitious – some would say grandiose – words, but worth remembering as the ultimate objective of a coherent foreign policy.

⁵⁹ See note 56.

⁶⁰ Laeken Declaration on the Future of the European Union, European Council, 14 and 15 December 2001, Annex I to Presidency Conclusions.

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