CASE LAW: 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 *

* Case note written by Peter Van Elsuwege, Assistant Professor, Ghent University (Jean Monnet Centre of Excellence). The author would like to thank Stanislas Adam for his comments on an earlier version of this text.

NAME: Peter Van Elsuwege

SUMMARY:
... Council (C-91/05), delivered on May 20, 2008, the European Court of Justice annulled Council Decision 2004/833/CFSP, Providing a European Union Contribution to the Economic Community of West African States (ECOWAS) in the Framework of the Moratorium on Small Arms and Light Weapons. ... INTRODUCTION On May 20, 2008, the European Court of Justice (ECJ) took important steps toward clarifying the hazy boundaries between the European Community's external competences in the field of development cooperation (Title XX of the EC Treaty) and the European Union's competences in the framework of the Common Foreign and Security Policy (CFSP) (Title V EU). ... THE COURT'S JUDGMENT In line with its settled case law and the Opinion of Advocate General Mengozzi, the Court defines Article 47 EU as a watertight barrier between the EC and the EU protecting the competences of the Community against any encroachment by acts which are claimed by the Council to fall within the scope of the second (or third) Pillar. ... With regard to the third Pillar, Article 29 EU further lays down that the objectives in the areas of freedom, security, and justice are to be pursued "without prejudice to the powers of the European Community". ... Given the Court's wide margin of appreciation in analyzing the "aims and content" of a given measure and, in particular, the broadly-worded goals of the CFSP and the respective EC external relations provisions, it is questionable whether a clear separation of the Pillars is feasible or even desirable. ... In other words, the ease with which the Court may determine that a contested decision also pursues development objectives, which are non-incidental to CFSP objectives, clearly limits the scope for parallel CFSP actions in practice.

HIGHLIGHT:

In its judgment in Commission v. Council (C-91/05), delivered on May 20, 2008, the European Court of Justice annulled Council Decision 2004/833/CFSP, Providing a European Union Contribution to the Economic Community of West African States (ECOWAS) in the Framework of the Moratorium on Small Arms and Light Weapons. Based on Article 47 EU, the Court concluded that the contested Decision, which pursues objectives not only falling within Common Foreign and Security Policy but also
Community development cooperation policy, should have been adopted under the EC Treaty and not the EU Treaty. This judgment confirms the hierarchic relationship between the first Pillar and the second Pillar of the European Union. It is argued that the Court's interpretation of Article 47 EU significantly limits the scope for CFSP actions in practice and poses significant challenges for the objective of inter-Pillar coherence in the EU's external relations.

TEXT:

I. INTRODUCTION

On May 20, 2008, the European Court of Justice (ECJ) took important steps toward clarifying the hazy boundaries between the European Community's external competences in the field of development cooperation (Title XX of the EC Treaty) and the European Union's competences in the framework of the Common Foreign and Security Policy (CFSP) (Title V EU). The Court's judgment comes after a number of other inter-institutional conflicts on the relationship between first and third Pillar competences. However, the first example in which the Commission contested the legality of a CFSP Decision on the ground that the decision ought to have been adopted under Community competence. Despite the fact that the ECJ in principle does not have jurisdiction to rule on the legality of a measure falling within the CFSP, Articles 46(f) and 47 EU imply that the Court is entitled to supervise the borders between the intergovernmental Pillars and the European Community. In accordance with its case law on acts adopted under the third Pillar, the ECJ confirmed the primacy of the EC Treaty even when a measure pursues different and non- incidental objectives falling respectively within the EC and EU Treaty provisions.

II. GENERAL BACKGROUND

In July 2002, the Council adopted a Joint Action designed to combat the proliferation of Small Arms and Light Weapons (SALW). In order to implement that Joint Action, the Council later adopted Decision 2004/833/CFSP. This decision provides a European Union financial contribution to the Economic Community of West African States (ECOWAS) which, among other things, would provide financial support and technical assistance to combat the accumulation and spread of SALW. Thereafter, the European Commission contested the legality of this Decision on the grounds that this policy should not have been adopted under the CFSP provisions of the EU Treaty and should have instead been adopted under the framework of the Community's development cooperation policy—specifically, under the Cotonou Agreement. The Commission's argument focuses on the interaction between the goals of decommissioning SA LW and the objectives of development cooperation.

The fact that the EC is not exclusively competent in the field of development aid raises the question of to what extent the complementary character of the EC's development competence affects the application of Article 47 EU. The United Kingdom government's argument in this case was that, as a result of the concurrent competences in the sphere of development cooperation, the mere fact that the Community is competent to adopt a measure does not preclude the Union from adopting an act which has a similar content but pursues one of the aims of Article 11(1) EU. This line of reasoning is based upon the division of competences between the Community and the Member States. With regard to the EC's non-exclusive competence in the field of development aid, the ECJ confirmed that "the Member States are entitled to enter into commitments themselves vis-a-vis non-Member States, either collectively or individually, or even jointly with the Community." The fact that the EC's competence in development cooperation is not exclusive led the UK government to conclude that an action which would seemingly infringe on Article 47 EU is not pre-empted as long as the EU action is pursuing a CFSP objective.

The Commission and the European Parliament, on the other hand, claimed that the Union does not enjoy the same complementary competence as the Member States do because, under their interpretation of Article 47 EU, the Union must respect all of the Community's competences regardless of their exclusive or non-exclusive nature. Under this view, a CFSP act which could have been properly adopted on the basis of the EC Treaty, shall be deemed to infringe upon Article 47 EU and should therefore be excluded.
The crux of the matter is clearly the interpretation of Article 47 EU. According to the Court's settled case law, this provision aims to ensure that acts which according to the Council fall within the scope of the CFSP "do not encroach upon the powers conferred by the EC Treaty on the Community." n10 In order to determine whether or not an encroachment of Community powers is at stake, the Court examines the "aim and content" of the contested Decision in the light of the contested Joint Action. In Commission v. Council (Environmental Penalties), the Court annulled Council Framework Decision 2003/80/JHA on the ground that the main purpose of this act was to protect the environment and that the measure should, therefore, have been properly adopted under the authority of Article 175 EC. n11 Similarly, in case C-440/05 (regarding ship-source pollution), the Court found that the Framework Decision in question, which was "essentially aimed" at improving maritime safety, was also an environmental protection measure that could have been adopted under Article 175 EC. n12

In light of this case law, the question at stake in the ECOWAS case was whether the campaign against SALW essentially aims at the protection of international peace and security, as claimed by the Council, or whether it forms an integral part of Community policy on development cooperation, as argued by the Commission. Significantly, the Commission acknowledged that certain aspects of the action may properly be covered by the CFSP whereas others fall within the scope of development aid. The essential criterion is the nature of the actions in question. Whereas political actions such as the deployment of military or police missions to disarm local militia fall into the realm of CFSP authority, technical and financial assistance belongs to the first Pillar. This overlap between first and second Pillar competences raises specific questions as to the structure of the Union and the relationship between the Pillars. Whereas the Commission and the European Parliament defended the view that Article 47 EU establishes a "fixed boundary" between the competences of the Community and those of the Union, the Council and the intervening governments of the Member States claimed that this provision aims to protect "the balance of powers" established by the Treaties. According to the latter view, a broad interpretation of the EC competences, one that embraces EC competences as having completely exclusive jurisdiction in their subject areas, has the potential to undermine the effet utile of the CFSP.

III. OPINION OF ADVOCATE GENERAL MENGOZZI

In response to the UK government's claims that Article 47 EU has no pre-emptive effect in the field of development cooperation, Advocate General Mengozzi focused his interpretation of Article 47 EU on the division of powers between the Community and the Member States (compare supra). In this respect, the Advocate General pointed at the specific formulation of Article 47 EU, which makes no gradation in the protection conferred on the powers of the EC Treaty. Article 47 EU, therefore, appears to rest on the presumption that all the competences conferred to the Community, irrespective of their nature (exclusive, shared, or concurrent), "deserve to be protected against any encroachment on the part of the Union." n13 Accordingly, a distinction can be made between collective actions of the Member States and actions of the Union by virtue of Title V of the EU Treaty. Whereas the former are complementary to the EC's competences in the field of development cooperation, the latter have to respect the primacy of Community actions under the EC Treaty. The interpretation of Article 47 EU as a hierarchic delimitation rule between the EC and EU legal orders is based upon the wording of this provision n14 and derived from several other articles of the EU Treaty. n15

An ostensible infringement of Article 47 EU can only be discounted if an EU action exclusively or essentially pursues a CFSP objective under Title V of the EU Treaty. Measures connected with security may, however, fall within the scope of EC development aid provided that they can be linked with the social and economic development objectives of Article 177 EC. This does not mean that any measure fostering economic and social development of a developing country automatically falls within the ambit of Title XX EC. This would be inconsistent with the principle of conferral established by Article 5 EC. In order to find out whether a measure falls within the scope of the CFSP or the Community development policy--and thus to secure a balance between Article 47 EU and Article 5 EC--a judicial review of the content and purpose of that measure is necessary to determine its main aim. If a measure pursues two aims which are inextricably linked without one being incidental to the other, Article 47 EU implies that priority should be given to the Community legal base. The use of multiple legal bases, combining EC and EU Treaty provisions to promulgate the same action, appears impossible in view of the different procedural requirements for the adoption of first and second Pillar acts.
In assessing the purpose and content of the contested Decision, the Advocate General concluded that the main aim was a security interest. According to the Advocate General, the mere statement in the preamble to Decision 2004/833/CFSP that the excessive and uncontrolled accumulation and spread of SALW reduces the prospects for sustainable development is insufficient for the Decision to be brought under the EC's development competence. In the opinion of the Advocate General, the inclusion of financial and technical instruments does not automatically trigger the involvement of the Community. In order to come within the scope of Article 177 EC, the Decision "must aim precisely at development." Moreover, there is nothing in the EU Treaty that forbids the use of a financial instrument or technical assistance in the framework of the second Pillar. In light of his determination that the contested Decision essentially aims at strengthening regional and international security, the Advocate General urged that it could not have been adopted by the Community under Title XX of the EC Treaty and, therefore, that it does not infringe upon Article 47 EU. Even though the ECJ largely followed the reasoning of the Advocate General with regard to the interpretation of Article 47 EU, it nevertheless came to a different conclusion.

IV. THE COURT'S JUDGMENT

In line with its settled case law and the Opinion of Advocate General Mengozzi, the Court defines Article 47 EU as a watertight barrier between the EC and the EU protecting the competences of the Community against any encroachment by acts which are claimed by the Council to fall within the scope of the second (or third) Pillar. Hence, a measure having legal effects adopted under Title V (or VI) EU infringes Article 47 EU whenever it could have been adopted on the basis of the EC Treaty. The question of whether the EC Treaty provisions are affected relates to the very existence of a Community competence and does not depend on its exclusive or shared nature.

Based upon the clear linkage between stability and development, the Court observes that the campaign against the proliferation of SALW can be implemented both by the Union, under Title V EU, and by the Community, under its development policy. Significantly, after a detailed study of the "aim and content" of the contested decision, the Court concludes that the social and economic development objectives are not incidental to the objectives of preserving peace and strengthening international security. In the Community legal order, a measure pursuing several objectives which are not incidental to each other can, exceptionally, be founded on multiple legal bases. Such a solution is, however, impossible in a case concerning the distribution of competences between the first and second Pillars. In contrast to the Advocate General, the Court's judgment does not elaborate upon the reasons for this a priori exclusion. It could be that the different procedural requirements laid down in the framework of Title V EU and in that of Title XX EC are at the base of this conclusion. Also in the context of the EC Treaty, recourse to a dual legal basis is precluded in case of procedural incompatibilities between the various Treaty provisions involved.

Given the exclusion of cross-Pillar mixity, a solution for the legal basis question was identified in Article 47 EU. The Court held that this provision's rationale, that is, the protection of the acquis communautaire against any intergovernmental influences, implies that a measure which equally falls under the EU and EC Treaty objectives cannot be legally adopted on the basis of the EU Treaty.

V. COMMENTS

A. A Hierarchic Relationship Between the First Pillar and the Second Pillar

The long-awaited judgment in the ECOWAS case sheds light on the structure of the EU and the interrelationship between the EC development policy and the Common Foreign and Security Policy of the EU. An overlap between both policies is already obvious from the wording of the relevant Treaty provisions. Article 177 EC lays down that Community policy in the field of development cooperation "shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms," whereas Article 11(1) EU provides that "[t]he Union shall define and implement a common foreign and security policy.
covering all areas of foreign and security policy, the objectives of which shall be . . . to develop and consolidate
democracy and the rule of law, and respect for human rights and fundamental freedoms.*

The decision to adopt an action on the basis of Article 177 EC or Article 11(1) EU is not without consequences. A
Joint Action pursuing a CFSP objective is, in principle, adopted solely by the Council acting unanimously, whereas
decisions based upon Article 177 EC are to be adopted in accordance to the so-called co-decision procedure requiring
the involvement of the European Parliament and qualified majority voting in the Council. Moreover, the range of legal
effects and the options for levels of judicial scrutiny are fundamentally different. The choice of the [*537] appropriate
legal basis for the campaign against the proliferation of SALW has, in other words, far-reaching institutional
consequences and is of a constitutional nature. n22 A broad interpretation of the CFSP raises concerns about a potential
contamination of Community policies and vice versa.

A close reading of the common provisions contained in Title I of the EU Treaty reveals that Community policies
enjoy a certain priority over the other components of the Union. n23 Pursuant to Article 1(3) EU, the Union is "founded
on the European Communities" and "supplemented by" second and third Pillar cooperation. Moreover, Article 2 EU
establishes an obligation on the Union to "maintain in full the acquis communautaire and build on it." With regard to
the third Pillar, Article 29 EU further lays down that the objectives in the areas of freedom, security, and justice are to
be pursued "without prejudice to the powers of the European Community". Whereas no similar specific qualification is
included with regard to the CFSP, Article 47 EU generally applies as the crucial provision in determining inter-Pillar
relations. In its ECOWAS judgment, the ECJ explicitly acknowledged the interpretation of Article 47 EU as a
delimitation rule protecting the acquis communautaire against any encroachment by the EU Treaty. Whenever an act
can be adopted on the basis of the EC Treaty, it is impossible to adopt an act with a similar content on the basis of the
EU Treaty, irrespective of the nature of the Community competences.

The Court's judgment has two important implications. The first concerns the horizontal relationship between
Community powers under the EC Treaty and Union powers under the Treaty on European Union. That relationship
differs from the vertical division of competences between the Community and the Member States. The complementary
nature of EC competences in the field of development cooperation implies that the Member States are not precluded
from exercising their competence in this field collectively in the Council or outside it. n24 The situation is different
with regard to acts of the Union. As a result of Article 47 EU, non-exclusive EC competences do preclude second Pillar
decisions coming within their scope. This means that the Union possesses and exercises its own competences which are
not merely equivalent to the collective exercise of the competences retained by the Member States. It also implies that
the broad formulation of Article 11(1) EU has to be qualified. In light of Article 47 EU, the scope of the second Pillar is
limited to those areas of foreign and security policy not falling within the scope of the EC Treaty provisions.

The second implication of the ECOWAS judgment is closely linked to the conclusions of the Court of First Instance
(CFI) and the ECJ in the anti-terrorist cases. Despite the fact that they reached different conclusions, the CFI and the
ECJ [*538] both highlighted in the Kadi and Al Barakaat cases "the coexistence of the Union and the Community as
integrated but separate legal orders." n25 In contrast to the Commission's argument that the promotion of international
security forms part of the general framework of the EC Treaty, these judgments explicitly acknowledged that the latter
falls exclusively within the objectives of the Treaty on European Union. n26 The only explicit legal bridge between the
two legal orders is in the area of economic sanctions as provided in Articles 60 and 301 EC. n27 Articles 60 and 301
EC are special provisions that expressly allow action by the Community to achieve a CFSP objective; but even in this
case, two separate legal instruments are required, based on second and first Pillar provisions, respectively. The
interpretation of Article 47 EU in the ECOWAS case confirms the distinction between the EU and EC legal orders.
Depending upon its main objective, a legal act falls either within the scope of the CFSP or under the Community's
external powers.

When the act in question has a double dimension, one falling under EC competences and the other under the CFSP,
and both dimensions are equally important, it becomes difficult to isolate the proper legal basis for the measure. In this
case the primacy of the Community legal order--as derived from Article 47 EU--is crucial. Hence, the ECOWAS
judgment implies that only acts exclusively or mainly pursuing the objectives of Article 11(1) EU can be legally adopted under the second Pillar. As soon as an act simultaneously pursues a Community objective which is not incidental to the CFSP purpose, Article 47 EU precludes the application of the Union legal basis. The main difficulty is in attempting to draw the demarcation between the EC and EU legal orders. Despite the Court's standard formulation that the choice of a legal basis "must rest on objective factors which are amenable to judicial review," an objective examination of the aim and content of a measure is not always an evident and straightforward exercise. This is clearly illustrated in the ECOWAS case where both the Advocate General and the ECJ followed the same reasoning as regards the interpretation of Article 47 EU but, nevertheless, reached different conclusions as far as the appropriate legal basis was concerned. Hence, there seems to be a need for clear delimitation rules in order to decide whether or not a measure falls within the scope of the EC and/or EU Treaty provisions.

[*539] B. The Choice of Legal Basis and "the constitutional architecture of the pillars" n29

The choice of legal basis is of constitutional importance for the legal order of the European Community. An appropriate internal legal basis provides the necessary competence for Community institutions, in line with Article 5 EC, and determines the procedures to be followed. Defining a legal basis when a measure pursues one well-defined objective is a fairly easy exercise. The choice of the proper legal basis becomes more complicated when a measure pursues multiple objectives. When such a multifaceted measure arises, the Court applies a so-called "centre of gravity test." Based upon an examination of the aim and content of the measure in question, the "leading objective" dictates which single legal basis will be controlling, which is to say the dominant objective "absorbs" the possible other substantive legal bases which are pursuing objectives of a subsidiary or ancillary nature. This "absorption doctrine" is well-founded in the ECJ's case law regarding the conclusion of Community agreements and applies mutatis mutandis also with regard to the determination of the appropriate legal basis in the Community's internal legal order. This is exactly the approach adopted by Advocate General Mengozzi in the ECOWAS case. Given the ancillary nature of the social and economic development objectives in relation to the main aim of strengthening regional and international security, the Advocate General concluded that Article 23 EU was the legal basis for the contested action. The Court, on the other hand, pointed to the inextricable link between the development and security aims of the measure in order to conclude that both objectives are pursued simultaneously. Remarkably, this conclusion was not only based solely upon an examination of the traditional aim and content of the contested decision, but also considered policy documents such as the "European Consensus on Development," a Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the European Commission.

The Court's conclusion in ECOWAS is also remarkable in comparison to another case concerning the EC's development cooperation policy. In this case--an action for annulment of a Commission decision approving a project relating to border security in the Philippines--the Court did not accept the argument that the project also contributed to the objective of institutional capacity building and, as such, to economic development cooperation. Both the Court and the Advocate General based their conclusion on an analysis of the contested decision to conclude that the Commission exceeded its implementing powers under Regulation (EC) 443/92 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America. The main difference between both judgments is, in other words, the understanding of the objectives of the respective decisions. It seems obvious that the Court has a wide margin of discretion to apply the centre of gravity test unless the main objective of a measure is expressed unambiguously in the text of a legal act. In order to avoid inter-institutional competence battles in the future, a more explicit drafting of a measure's objectives is therefore recommendable.

The finding in the ECOWAS case that no predominant purpose could be identified for the contested decision raised a specific problem. In the EC legal order, recourse to a dual legal basis is available in such a situation only on the condition that the procedures laid down for the respective legal bases are not incompatible and do not undermine the rights of the European Parliament. A relevant illustration of this practice can be found in a recent dispute on the legal basis for a Council Decision granting a Community guarantee to the European Investment Bank (EIB) against losses under loans and loan guarantees for projects outside the Community. This Decision was adopted on the
single legal basis of Article 181a EC, dealing with "economic, financial and technical cooperation with third countries." The European Parliament, however, argued that this measure needed Article 179 EC (development cooperation policy) as an additional legal basis because a majority of the third countries covered by the decision were considered developing countries. This dispute about the delimitation between areas falling under the Community's general economic, financial and technical cooperation with third countries, on the one hand, and its development policy on the other, resembles the issues at stake in the ECOWAS case. In both situations, the Court was called to clarify the relationship between overlapping competences. Moreover, after an analysis of the aim and content of the contested decisions the ECJ concluded that the measures at stake contained multiple components which are linked in such a way that it is not possible to identify a single leading objective. In the EIB case, recourse to a dual legal basis provided a rather simple solution to the definition of the appropriate legal basis. The Council acts by qualified majority both under the procedure referred to in Article 179 EC and under that laid down in Article 181a EC. The different legislative function of the European Parliament--co-decision under Article 179 EC and consultation under Article 181a EC--was not a problem either. The addition of Article 179 EC did not encroach upon the Parliament's rights but rather enhanced the democratic legitimacy of the adopted measures. As a result, the adoption of the contested decision on a dual legal basis turned out to be completely in line with the earlier case law of the ECJ.

[*541] In case of procedural incompatibilities, additional elements need to be taken into account in order to decide the appropriate legal basis. In the context of the EC Treaty, preference is given to the legal basis which best protects the rights of the European Parliament. n36 For cross-Pillar situations, Article 47 EU provides the key point of reference. Its basic function is to protect the **acquis communautaire** against intergovernmental influences, which implies that priority should be given to the Community legal basis. Hence, the adoption of measures under a CFSP legal basis is restricted to situations where Community objective(s) and/or component(s) are absent or at least incidental to the CFSP objective.

It is noteworthy that the ECJ in the ECOWAS case annulled the entire CFSP Decision even though it also contributed to CFSP objectives. Would a partial annulment--and a subsequent adoption of a parallel EC measure based on Article 179 EC--not have been a more appropriate alternative taking into account the balance of competences in cross-Pillar situations? n37 The EU's financial contribution to ECOWAS pursues simultaneously the *inextricably linked* objectives of development cooperation and international peace and security. Accordingly, a partial annulment and division of the contested Decision into its first-- and second-Pillar elements, each requiring a specific legal basis, was out of question. If, however, a contested decision can be split in two clearly identifiable actions, the constitutional architecture of the Pillars seems to require that such a distinction must take place. n38 This point of view appears to be confirmed by Advocate General Bot in a case on the delimitation between first and third Pillar competences. n39 In this case, Ireland argues that the so-called Data Retention Directive n40 has been wrongfully adopted under Article 95 EC since its predominant objective is to facilitate the investigation, detention and prosecution of serious crimes, including terrorism. In applying the traditional "centre of gravity test," the Advocate General introduced a clear distinction between measures coming under the Community Pillar and those which must be adopted by virtue of Title VI TEU. Whereas measures harmonizing the conditions for the retention of data by providers of communication services belong to the Community Pillar, the harmonization of conditions under which national law-enforcement authorities may access, use and exchange retained data belongs to the third Pillar. n41 This horizontal division between EC and EU areas of competence [*542] confirms the ECOWAS interpretation of Article 47 EU as a "fixed boundary" between the Pillars. It implies that measures predominantly falling under EC or EU competences need to be separated if possible. Advocate General Bot explicitly recognizes the drawbacks of this approach:

I agree that it would be more satisfactory if the overall issue of data retention by the providers of electronic communication services and the detailed rules on their cooperation with the competent national law-enforcement authorities were the subject of a single measure which would ensure coherence between those two aspects. *Although it is regrettable, the constitutional architecture consisting of three pillars nevertheless requires that the areas of action be split.* The priority in this context is to guarantee legal certainty by clarifying as far as possible the respective boundaries between the spheres of action covered by the different pillars. n42
Given the Court's wide margin of appreciation in analyzing the "aims and content" of a given measure and, in particular, the broadly-worded goals of the CFSP and the respective EC external relations provisions, it is questionable whether a clear separation of the Pillars is feasible or even desirable. Any attempt to establish a fixed boundary between areas of activity such as development cooperation and CFSP is almost by definition an artificial endeavor. n43 Moreover, the concomitant inter-institutional conflicts risk undermining the Union's ability to respond flexibly and coherently to international crises. n44

C. Article 47 EU and the Challenge of Inter-Pillar Coherence

The dual nature of the EU's external action, based upon a separation between an essentially intergovernmental CFSP and the supranational external competences of the EC, is a long-term bone of contention in the European integration process. n45 Subsequent Treaty amendments have been designed with the aim of enhancing the coherence between the Union's various external policy instruments. n46 Coherence in this context is not straightforward. The separation of powers can be categorized into two principal relationships: a horizontal division (between the EC and EU), and a vertical division (between the EC/EU and the Member States). n47 Moreover, such a division cannot be disconnected from the principle of "consistency." Whereas the term "consistency" points at the absence of contradictions between the various external policies, "coherence" refers to the positive obligation of ensuring synergy between the different elements of the EU's external action. n48 The principles of consistency and coherence underpin the challenge of aligning the CFSP with the EC in order to assert the EU's identity on the international stage while simultaneously keeping both Pillars separated for internal procedural and constitutional reasons. In order to cope with the inherent complexities of the Pillar structure, Article 3 EU provides for a single institutional framework and imposes an obligation on the Council and the Commission to cooperate. Whereas this Article emphasizes that the aim of achieving consistency should be coupled with the need to respect and build upon the acquis communautaire, it does not clearly resolve the issue of hierarchy between the Pillars. n49 At this point, Article 47 EU comes into play, which, as the ECJ clearly spelled out in the ECOWAS case, guarantees the primacy of Community law over EU Treaty norms (compare supra). The question is, of course, whether and how this function of Article 47 EU contributes to the aim of consistency and coherence in the EU's external relations.

The role of Article 47 EU is to protect the acquis communautaire and to prevent any intergovernmental contamination of the EC's supranational decision-making. However legitimate this task may be from a purely legal point of view, political reality implies that any attempt to separate the different aspects of foreign policy appears to be somewhat artificial. In order to overcome the dichotomy between the political and legal realities, a certain interaction between the CFSP and EC rules is needed. Support for such a pragmatic modus vivendi between the Pillars can implicitly be found in the ECOWAS judgment. Even though the Court annulled Council Decision 2004/833/CFSP on the ground that it infringes Article 47 EU, it does not clearly resolve the issue of hierarchy between the Pillars. n49 At this point, Article 47 EU comes into play, which, as the ECJ clearly spelled out in the ECOWAS case, guarantees the primacy of Community law over EU Treaty norms (compare supra). The question is, of course, whether and how this function of Article 47 EU contributes to the aim of consistency and coherence in the EU's external relations.

The role of Article 47 EU is to protect the acquis communautaire and to prevent any intergovernmental contamination of the EC's supranational decision-making. However legitimate this task may be from a purely legal point of view, political reality implies that any attempt to separate the different aspects of foreign policy appears to be somewhat artificial. In order to overcome the dichotomy between the political and legal realities, a certain interaction between the CFSP and EC rules is needed. Support for such a pragmatic modus vivendi between the Pillars can implicitly be found in the ECOWAS judgment. Even though the Court annulled Council Decision 2004/833/CFSP on the ground that it infringes Article 47 EU, it did not actually decide on the legality of Joint Action 2002/589 CFSP. Whereas it might be argued that if the Court had to rule on the latter issue it would have reached the same conclusion due to the close connection of the aims and content of both instruments, n50 the continued de facto existence of Joint Action 2002/589 creates a bridge between a CFSP and EC norm. n51

The coupling of instruments from different Pillars is all but new. For instance, such coupling has provided a pragmatic solution for the export regime of dual-use goods in the 1990s. n52 This approach appears to be fully consistent with the idea of a constitutional structure of separated but nevertheless integrated Pillars. n53 The concern in such inter-Pillar situations is that the European Commission risks being reduced to a purely administrative organ implementing CFSP policy. This concern, which already existed at the time of the first common positions on Rwanda and Ukraine in 1994, n54 is clearly at the heart of the Commission's judicial action against Decision 2004/833/CFSP providing for an EU contribution to ECOWAS. Whereas a mere reference to parallel Community initiatives, pursuing a different objective, is not necessarily problematic, the Council potentially encroaches on Community competences and procedures once it instructs the Commission to act. n55 Such a subordination of Community action appeared in Article 3 of the contested Decision, which provided that "[t]he Commission shall be entrusted with the financial implementation of this Decision. To that end, it shall conclude a financial agreement with ECOWAS on the conditions for use of the European Union contribution, which shall take the form of a grant."
Ironically, this provision was designed to take into account the Community's competence to organize financial and economic assistance to development countries; instead, the provision triggered the inter-institutional conflict between the Commission and the Council.

Despite the obvious interrelationship between the Pillars and the overlap between first and second Pillar competences, a genuine inter-Pillar approach combining multiple legal bases is impossible "as the law of the European Union stands at present." n56 The only possible option seems to be the parallel application of CFSP and EC competences depending upon the specific objectives of the measures at stake. n57 The pitfalls of this approach, however, have become evident in the ECO WAS case. The ECJ's broad interpretation of EC objectives and/or components implies that CFSP actions can easily touch upon the Community's external competences and consequently infringe upon Article 47 EU. n58 In other words, the ease with which the Court may determine that a contested decision also pursues development objectives, which are non-incidental to CFSP objectives, clearly limits the scope for parallel CFSP actions in practice.

D. The ECO WAS Judgment in Light of the Lisbon Treaty

The constitutional structure of the EU, based upon a mechanism of three integrated but separate Pillars, inherently leads to complicated competence questions and inter-institutional conflicts. The deficiencies of this situation in terms of the efficiency and effectiveness of the EU's external relations are well known. It is, therefore, no coincidence that the constitutional revision process, which started with the Laeken Declaration of December 2001 and reached its provisional end with the [∗545] signature of the Treaty of Lisbon six years later, essentially aims to have a better division and definition of competences as well as increased coherence and consistency in the field of external relations. n59 The question arises to what extent the findings of the ECJ in the ECO WAS case are relevant in light of the revised Treaty provisions.

One of the most significant amendments of the Treaty of Lisbon is certainly the ascription of a single legal personality to the EU. n60 However, this formal abolition of the Pillar structure cannot hide the fact that the CFSP would remain separated from the other external policies of the Union. Also under the new Treaty structure, the CFSP would be subject to different decision-making procedures and essentially excluded from the jurisdiction of the ECJ. n61 Significantly, the provisions on the CFSP included in the revised Treaty on European Union (TEU) do not include any specific competences comparable to present Article 11(1) TEU. n62 Hence, the division between areas falling within the scope of the CFSP and the other specific areas of EU external action as defined in Title V of the Treaty on the Functioning of the Union (TFEU) would become a very difficult task.

The current delimitation rules as clarified by the ECJ in the ECO WAS case have to be qualified in view of the new Article 40 TEU, which would replace present Article 47 EU. Whereas the current provisions provide for a clear subordination of the CFSP to the external competences of the EC, the revised Article 40 TEU proceeds from a more equal relationship. Under the proposed article, the implementation of the CFSP "shall not affect" the procedures and institutional powers necessary for the exercise of other Union competences; furthermore, the proposed article provides that the exercise of the latter is not to affect CFSP procedures and institutional powers. Thus, the drafting of Article 40 TEU has far-reaching implications for the delimitation of competences between different types of external action. The presumption in favor of using non-CFSP powers whenever possible, as derived from Article 47 EU in the ECO WAS case, would no longer be valid. The CFSP would be elevated to an equal level of protection. How would the question of finding an appropriate legal basis for measures pursing different objectives be solved under the new Treaty rules?

Recourse to a dual legal basis would also be excluded under the Lisbon provisions due to procedural incompatibilities and the specificity of the CFSP. n63 Moreover, the traditional analysis of the "aim and content" of a measure to determine its appropriate legal basis appears impossible in the absence of any specific CFSP objectives. A potential solution could be to treat the CFSP as a lex generalis, which should be used only when action under a more specific provision (lex specialis) is not possible. n64 The problem is, however, that this option would reintroduce a hierarchic relationship difficult to reconcile with the clear language of [∗546] the new Article 40 TEU. In addition, the
rather broad definition of the Union's external competences in specific policy areas (commercial policy, development policy, economic, financial, and technical cooperation with third countries, and humanitarian aid) would potentially reduce the CFSP to a fairly restricted residual category of external relations competence. Hence, there seems to be no viable alternative for the traditional "centre of gravity test" in the absence of specific CFSP objectives, the list of objectives covering the entire external range of action of the EU, laid down in Article 21(2) TEU, would become the point of reference. In fact, this list combines the CFSP aims of present Article 11(1) EU and the external policies of the EC (development cooperation, commercial policy, environmental policy, etc.) in an attempt to ensure more coherence in the EU's external relations. To determine the legal basis, however, a distinction between the "high politics" of the CFSP and the other external policy areas would continue to be necessary. Depending upon the "leading objective," CFSP rules and procedures may or may not need to be followed. Additionally, the question of whether or not legislative action is required would remain since Article 24(1) TEU explicitly excludes the adoption of legislative acts in the framework of the CFSP. In any event, it seems obvious that the solution offered by the ECJ in the ECOWAS case to the problem of overlapping objectives--that is, giving priority to a non-CFSP legal basis whenever an act equally falls within a competence of the Community--will have be reconsidered under the Lisbon Treaty, if and when the treaty is implemented. Perhaps some inspiration can be found in the case law of the ECJ regarding the choice between incompatible legal bases in the Community legal order (compare supra). Even though the result might be the same, the preference for a non-CFSP legal basis would not be based on the a priori hierarchy laid down in Article 47 EU.

VI. CONCLUSION

The ECOWAS case clearly illustrates the complexities surrounding the division of competences belonging to the Community legislature and those assigned to the legislature of the Union. The constitutional architecture of the Pillars implies that whenever a measure can properly be adopted on the basis of the EC Treaty, recourse to a legal basis falling within the CFSP is excluded. The main difficulty is in determining the "centre of gravity" of a measure in the case of overlapping competences. In the absence of any suitable alternatives, the ECJ applies its standard analysis of the aims and content of a contested decision on an EU-wide basis. Accordingly, the ECJ operates as a true constitutional court of the EU regardless of the absence of any established jurisdiction in the field of CFSP. The main drawback of this approach is the existence of a large grey zone of measures containing elements of both EC and EU policy objectives. Taking into account the broad interpretation of the EC's development cooperation competence, particularly in light of policy documents such as the European Consensus on Development, the limits of EC activities in this field are ill-defined.

The problematic delimitation of EC competence on development cooperation and its almost natural overlap with other policy areas is not limited to the relationship between the first and the second Pillar. Also within the EC legal order, similar questions came to the ECJ in a case on the distinction between the scope of Article 179 EC (development cooperation) and 181a EC (economic, financial, and technical cooperation with third countries) The main difference is that in the EC context recourse to a dual legal basis usually offers a practical solution for situations where no leading objective can be identified. Such a solution is not possible in cross-Pillar situations because--apart from the evident procedural complexities--Article 47 EU implies that priority is to be given to the Community legal order.

In its ECOWAS judgment, the ECJ expressly confirmed the hierarchy between the Pillars and the crucial role of Article 47 EU in the EU's constitutional order. When a certain external action can be adopted under Community competences, it excludes the adoption of a CFSP legal basis. This effect is striking in comparison to the delimitation of competences between the EC and the Member States in the field of development cooperation. The parallel nature of the latter implies that even after the adoption of EC development actions, the Member States can decide to act autonomously or even collectively outside the framework of the EC as long as they comply with Community law. As a result of the Court's interpretation of Article 47 EU in the ECOWAS case, however, it is not possible for them to act on the basis of the CFSP. However absurd this may seem at first glance, it underscores the fact that the CFSP entails more than just a collective exercise of Member State competences. The ECOWAS case strengthens the perception of the EU as a legal order of integrated but nonetheless separate Pillars.
It is obvious that the legal distinction between different aspects of external action is difficult to square with the political necessity of a comprehensive and integrated foreign policy, covering elements of the EC, the EU, and the Member States' competences. Ensuring coherence and consistency among the various actors and instruments is, therefore, the key challenge for EU external relations in general. Article 47 EU aims to work toward this objective, articulated clearly in Article 3 EU, by creating watertight barriers between the Pillars. The Court's jurisdiction to check the horizontal division of competences is fundamental for guaranteeing legal certainty regarding the boundaries between the Pillars. The problem is, however, that no clear boundaries exist, which puts the Court up to a nearly impossible task. The [*548] conclusion may, therefore, well be—as Ramses Wessel already pointed out—that "the Union's pillars are still separate, but inseparable." n72 The abolition of the Pillar structure in the Treaty of Lisbon will not automatically solve all boundary problems between the CFSP and the other types of external action. Given the different drafting of the new Article 40 TEU in comparison to Article 47 EU, formally abolishing the current hierarchy between the Pillars, the solution offered in the ECOWAS case will need some revision. The outcome, however, might be the same: that is, the legal impossibility of pursuing a truly integrated foreign policy without encountering serious inter-institutional conflicts.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

- Civil Procedure
- Jurisdiction
- Subject Matter Jurisdiction
- General Overview
- International Trade Law
- Trade Agreements
- General Overview
- Labor & Employment Law
- Collective Bargaining & Labor Relations
- Strikes & Work Stoppages

**FOOTNOTES:**

n1 Case C-91/05, Comm'n v. Council, 3 C.M.L.R. 5 (2008).


n6 In addition, the European Commission relied on Article 241 EC (concerning the plea of illegality) in order to
also invoke the inapplicability of the underlying Joint Action, in particular Title II thereof.

n7 Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of the One Part, and the European Community and its Member States, of the Other Part, June 23, 2000, 2000 O.J. (L 317) 3. This mixed agreement sets up the fight against the accumulation of SALW as a relevant criterion for the cooperation that it establishes. Id. art. 11(3). The ACP side of the Cotonou Agreement includes all of the member states of ECOWAS, which are all developing countries.


n9 Id. P 26 (emphasis added).


n13 Opinion of Advocate General Mengozzi, Case C-91/05, Comm'n v. Council, 2007 WL 2710698, P 98.

n14 See id. P 112.

n15 Article 1 EU states that the policies and forms of cooperation established by that Treaty supplement the European Communities; Article 2 EU includes the objective "to maintain in full the acquis communautaire and build on it . . . ." which is repeated in the first paragraph of Article 3 EU. With regard to the third Pillar, Article 29 EU further clarifies that its objectives are to be pursued "without prejudice to the powers of the European Community."


n17 Id. P 209.

n19 See, e.g., Case C-211/01, Comm’n v. Council, 2003 E.C.R. 1-8913, P 40; Case C-94/03, Comm’n v. Council, 2006 E.C.R.


n27 Whereas the CFI acknowledged that in exceptional circumstances those provisions could be complemented by Article 308 EC to guarantee the consistency of external action, the ECJ qualified such an approach as "an error of law." Neither the wording nor the structure of the EC Treaty allows for an extension of the bridge between the two pillars to other provisions of the EC Treaty. Compare Case T-315/01, Kadi v. Council & Comm’n, 2005 E.C.R. 11-3649, P 128; with Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v.


n32 Joint Statement on European Union Development Policy: the European Consensus, 2006 O.J. (C 46) I. The Court's openness to such non-binding policy documents is striking in view of the traditional formula that the choice of a legal basis is not dependent upon "an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review." See, e.g., Case 45/86, Comm'n v. Council, 1987 E.C.R. 1493, P 11.


n35 Case C-155/07, Comm'n v. Council, 1 C.M.L.R. 23 (2009).

n36 Case C-94/03, Comm'n v. Council, 2006 E.C.R. 1-1, P 52; Case C-178/03, Comm'n v. European Parliament & Council, 2006 E.C.R. 1-107, P 57. For comments on those cases, see Stanislas Adam, Le cumul des bases juridiques et les relations exterieures de la Communaute europeenne: l'eau et le feu? Note sous CJCE, 94/03 et
n37 In this respect, the practice of concluding cross-Pillar agreements on the basis of two separate decisions, one based on an EC Treaty provision and the other on the Treaty of the EU, provides an interesting point of reference. Whereas there are no examples of first Pillar-second Pillar mixed agreements, the agreement between the EU, the EC, and Switzerland concerning the latter's association with the implementation, application and development of the Schengen acquis has been adopted on the basis of two legal acts, combining first and third Pillar provisions. Council Decision 2004/849/EC, 2004 O.J. (L 368) 26; Council Decision 2004/860/EC, 2004 O.J. (L 368) 78.

n38 See Van Ooik, supra note 21, at 413.


n42 Id. P 108 (emphasis added).

n43 In this respect, it is noteworthy that the 2003 European Security Strategy expressly lays down that "security is the first condition for development" European Security Strategy: a Secure Europe in a Better World (Dec. 12, 2003), http://ue.eu.int/uedocs/cmsUpload/78367.pdf (last visited Feb. 24, 2009). The European Consensus on Development also notes that "[w]ithout peace and security development and poverty eradication are not possible, and without development and poverty eradication no sustainable peace will occur." Joint Statement, supra note 32, at 7.

n44 A. Dashwood, Article 47 EU and the Relationship Between First and Second Pillar Competences, in A. DASHWOOD & M. MARESCAUE, LAW AND PRACTICE OF EU EXTERNAL RELATIONS. SALIENT FEATURES OF A CHANGING LANDSCAPE 97 (Cambridge 2008).

n45 Piet Eeckhout refers to this dualism as the "sin of overall EU external action." See P. EECRHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION 145 (Oxford Univ. Press 2004).


n48 Id.

n49 EECKHOUT, *supra* note 45, at 153.

n50 Van Ooik, *supra* note 21, at 405.


n52 The ECJ later clarified that this matter falls within the scope of the EC Common Commercial Policy, which resulted in an abolition of the inter-pillar approach. See P. KOUTRAKOS, *TRADE, FOREIGN POLICY AND DEFENCE IN EU CONSTITUTIONAL LAW: THE LEGAL REGULATION OF SANCTIONS, EXPORTS OF DUAL-USE GOODS AND ARMAMENTS* 113-30 (Oxford Hart 2001).


n57 DASHWOOD, supra note 44, at 97.

n58 J. Heliskoski, Small Arms and Light Weapons within the Union's Pillar Structure: An Analysis of Article 47 of the EU Treaty, 6 EUR. L. REV. 908 (2008).

n59 Cremona, supra note 23, at 35.

n60 EU Treaty, art. 47.

n61 EU Treaty, art. 24(1).

n62 Article 24(1) EU bluntly states that "[t]he Union's competence in matters of common foreign and security policy 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."

n63 Van Ooik, supra note 21, at 417.

n64 Cremona, supra note 23, at 46.

n65 Arguably, the objectives laid down in points (a) to (c) come within the scope of the CFSP. See also Dashwood, supra note 44, at 103.


n68 Given the limited role of the European Parliament in the CFSP and the fact that the ECJ considers the rights of participation enjoyed by the Parliament as a decisive criterion to decide on the appropriate legal basis in the EC legal order, a preference for the non-CFSP legal basis seems evident.


