

*Tous pour un, un pour tous!**Coherence in the External Relations of
the European Union**Christophe Hillion*¹**1. Introduction**

Asserting its identity on the international scene is one of the core objectives of the European Union.² It is also a difficult task in view of the number of actors and means involved in achieving this grand ambition.³ Under the present version of the Treaty on European Union, the EU external action is served by the external relations of the European Community (EC), the Common Foreign and Security Policy (CFSP) and the external dimension of the Police and Judicial Cooperation in Criminal Matters (PJCCM), not to forget the foreign relations of its Member States.⁴ Ensuring the coherence of this multifaceted external action is therefore a central and indeed recurring concern in the EU external relations narrative.⁵

¹ Many thanks to Anne Myrjord and Jacco Bomhoff for all their helpful comments, and to the participants of the 2006 Academy of European Law (European University Institute) for their useful remarks. All remaining mistakes are mine.

² Article 2 TEU. Unless indicated otherwise, all Articles referred to in this essay are Articles of the Treaty on European Union or Treaty establishing the European Community, as amended by the Treaty of Nice.

³ J Monar, 'The Foreign Affairs System of the Maastricht Treaty: A Combined Assessment of the CFSP and EC External Relations Elements' in J Monar, W Ungerer, and W Wessels (eds), *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic* (1993); CWA Timmermans 'The Uneasy Relationship between the Community and the Second Pillar of the Union: Back to the Plan Fouchet?' (1996) 1 LIEI 66; M Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (1999) 137.

⁴ In this sense, see the communication from the Commission, 'Europe in the World—Some practical proposals for greater coherence, effectiveness and visibility' (2006) COM 278.

⁵ Article 27 A TEU on enhanced cooperation in the field of Common Foreign and Security Policy establishes an explicit connection between the assertion of the EU identity and coherence: 'Enhanced cooperation in any of the areas referred to in . . . title [V] shall be aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as

Hence, the Inter-Governmental Conference called in June 2007 was mandated 'to draw up a 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*'.⁶ In the same vein, and following an earlier Commission communication on 'Europe in the World—Some practical proposals for greater coherence, effectiveness, and visibility' (emphasis added),⁷ the European Council invited:

the Presidency, the Council, the Secretary-General/High Representative and the Commission to examine . . . further measures, on the basis of the existing treaties, with a view to improving inter alia strategic planning and *coherence between the Union's various external policy instruments as well as cooperation between the EU institutions and between the latter and the Member States* (emphasis added).⁸

Various practical ways have indeed been mooted to enhance the coherence of the Union's external action.⁹ This essay examines the role of *EU law* in promoting and guaranteeing such coherence. A first part attempts to shed light on the notion of coherence in the context of EU primary law, notably by relating it to the TEU concept of 'consistency' (2). A second part argues that achieving coherence in the EU external action depends on the degree of deference, by EU institutions and Member States, to other organizing principles of the EU system of external relations, and notably to the rules governing the distribution of

a coherent force on the international scene.' Further on the connection between EU external action and coherence: N Neuwahl, 'Foreign and Security Policy and the Implementation of the Requirement of "Consistency" under the Treaty on European Union' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (1994) 227; H-G Krenzler and HC Schneider, 'The Question of Consistency' in E Regelsberger, P de Schoutheete de Tervarent, and W Wessels (eds), *Foreign Policy of the European Union. From EPD to CFSP and Beyond* (1997) 133; C Tietje, 'The Concept of Coherence in the TEU and the CFSP' (1997) 2 EFARev 211; U Schmalz, 'The Concept of Coherence in the Amsterdam Treaty—Bridging the Union's Dual External Policy Structure' (1998) 3 EFARev 421; S Duke, 'Consistency as an Issue in EU External Activities' (1999) *EIPA Working Paper 99/W/06* <http://www.eipa.nl/Publications/Summaries/1997_2000/WorkingPapers/99w06.pdf>; P Gauttier, 'Horizontal Coherence and the External Competences of the European Union' (2004) 10 ELJ 23.

⁶ Draft IGC Mandate, annexed to the Presidency Conclusions, 22–23 June 2007. The resulting Treaty signed in Lisbon by the Heads of State or Government also underlines in its Preamble the parties' desire 'to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and *to improving the coherence of its action*' (emphasis added); see OJ [2007] C306/3 (17 December 2007).

⁷ Communication from the Commission to the European Council of June 2006, 'Europe in the World—Some practical proposals for greater coherence, effectiveness, and visibility'; COM (2006) 278 final.

⁸ Presidency Conclusions, 15/16 June 2006, pt 32.

⁹ For examples of such practical measures, see the Commission Communication 'Europe in the World', COM (2006) 278 final; the Presidency Stocktaking Reports 'on the implementation of measures to increase the efficiency, coherence and visibility of EU external policies and future work' (16419/06, 8 December 2006) and on 'Measures to increase the effectiveness, coherence and visibility of EU external policies' (8909/07, 13 June 2007); as well as House of Lords EU Committee, Report 48th Report (2005–2006): 'Europe in the World' (HL 268).

powers within that system, as well as the multi-dimensional duties of cooperation compelling its actors (3).

2. Defining Coherence in the Context of EU Primary Law

Against the background of ambiguous treaty provisions, the notion of ‘coherence’ ought to be distinguished from that of ‘consistency’. It is suggested that the latter is an essential but insufficient condition for achieving the former (A). Moreover, as indicated by the European Council’s conclusions mentioned above, the coherence of the EU external action has to be sought not only between the different policy instruments of the EU, but also between Member States’ external actions, on the one hand, and those of the EC and EU on the other hand (B).

A. *The Ambiguity of the Notion of Coherence*

As pointed out by several authors,¹⁰ the various linguistic versions of the Treaty on European Union appear to refer to different concepts when evoking coherence. The French and German texts use the term *cohérence* and *Kohärenz*, respectively, whereas the English version generally refers to ‘consistency’,¹¹ rather than to the English notion of ‘coherence’.

Thus, in the ‘Common Provisions’ of the TEU, Article 1 foresees that the Union’s task shall be ‘to organise, in a manner demonstrating *consistency* and solidarity, relations between the Member States and between their peoples’ (emphasis added). In addition, Article 3 TEU states, in its first paragraph, that the Union shall be served by ‘a single institutional framework which shall ensure *consistency*’ of the Union’s activities in general. Its second paragraph further specifies that the Union shall ‘ensure the *consistency* of its external activities as a whole in the context of its external relations, security, economic and development policies’,¹² and requires that the Commission and the Council cooperate to this end.

In the specific Title on the CFSP, Article 13(3) TEU asks the Council to ‘ensure the unity, *consistency* and effectiveness of action by the Union’ (emphasis added). Furthermore, Article 27a TEU foresees that any enhanced cooperation

¹⁰ Eg P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (2001), at 39–44; Wessel, *The European Union’s Foreign and Security Policy—A Legal Institutional Perspective* (1999), at 297; Tietje, *supra* n 5.

¹¹ The concept of ‘consistency’ predates the TEU. It was first introduced by the Single European Act (SEA), whose Preamble refers to the ‘responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and *to act with consistency* and solidarity in order more effectively to defend its common interests and independence’ (emphasis added). Moreover, Article 30(5) SEA stipulated that ‘the external policies of the European Community and the policies adopted by the European Political Cooperation must be consistent’.

¹² This expression was inserted on the request of the then President of the Commission: J Cloos et al, *Le Traité de Maastricht—Genèse, analyse, commentaries* (1993), at 117.

in the field of the CFSP shall notably respect the ‘consistency of the [CFSP] and the decisions taken within the framework of that policy’, as well as ‘the consistency between all the Union’s policies and its external activities’. Indeed, Article 27c TEU requires that the Commission ‘give its opinion particularly on whether the enhanced cooperation proposed is consistent with Union policies’.¹³

Each time the English version of the Treaty refers to the notion of ‘consistency’, the French text uses the concept of ‘cohérence’.¹⁴ But does ‘consistency’ correspond to ‘cohérence’? While no specific substantive clarification may be expected from the Court of Justice given its lack of jurisdiction over the TEU provisions concerned,¹⁵ two judgments of 2005 relating to the external relations of the Community, are worth evoking here.¹⁶ In these two cases, involving enforcement proceedings against Germany and Luxembourg respectively, the Court of Justice underlines the need for the Member States to cooperate with the Community institutions to ensure ‘the coherence and consistency of the action and [...] international representation [of the Community]’ (emphasis added).¹⁷ At this stage suffice to note that the Court thus suggests that the two notions cannot be used interchangeably, and that they should instead be understood as distinct concepts though, arguably, equally important and complementary.

Such distinction echoes the general position of legal scholarship which, on the whole, submits that the notion of ‘coherence’ differs from that of ‘consistency’.¹⁸

¹³ Exceptions to the use, in the Treaty, of the word ‘consistency’ can be found in Article 299(2) EC, 4th indent, which relates to Community measures in relation to the outermost regions. It foresees that ‘[t]he Council shall adopt the measures [...] without undermining the integrity and the coherence of the Community legal order, including the internal market and common policies’ (emphasis added); also, the Maastricht ‘Declaration on the implementation of Community law’ and the Amsterdam ‘Declaration on the establishment of a Policy Planning and Early Warning Unit’ refer, in their English version to the concept of ‘coherence’. In particular the latter Declaration foresees in point 1 that: ‘A policy planning and early warning unit shall be established in the General Secretariat of the Council under the responsibility of its Secretary-General, High Representative for the CFSP. Appropriate cooperation shall be established with the Commission in order to ensure full coherence with the Union’s external economic and development policies.’

¹⁴ The reference to the English notion of consistency can be found elsewhere in EU primary law, although not in the specific context of EU external relations: eg Art 45 TEU (enhanced cooperation), Arts 99 EC (Economic and Monetary Union), Art 165 EC (on Research and Technological Development); Art 225 EC (on the Court of Justice); in Arts 62 and 62b of the Protocol 6 on the Statute of the Court of Justice; in Art 31 of Protocol 18 on the Statute of the ESCB and ECB; at point 11 of Protocol 30 on Subsidiarity and Proportionality.

¹⁵ See in this regard: Case C-167/94 *Juan Carlos Grau Gomis and others* [1995] ECR I-1023, para 6; Case T-584/93 *Roujansky* [1994] ECR II-585 and appeal C-253/94 [1995] ECR I-7; Case T-201/99 *Royal Olympic Cruises Ltd and others v Council and Commission* [2000] ECR II-4005; Case T-228/02 *Organisation des Modjbedines du peuple d’Iran* [2006] ECR II-4665 (para 49); C-354/04, *P Gestoras Pro Amnistia and Others v Council* (judgment of 27 February 2007) (para 50); on the other hand the Court has jurisdiction over the provisions of eg Arts 99, 165 and 225 EC, which could offer it a possibility to interpret the notion of consistency.

¹⁶ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; C-433/03, *Commission v Germany* [2005] ECR I-6985.

¹⁷ Case C-266/03 *Commission v Luxembourg*, para 60; Case 433/03 *Commission v Germany*, para 66.

¹⁸ Further eg: P. Koutrakos, *supra* n 10, at 39–44; Tietje *supra* n 5, at 211.

It is mostly contended that consistency refers to the absence of contradiction,¹⁹ whereas coherence relates to ‘positive connections’²⁰ or ‘the construction of a united whole’.²¹ Consistency is said to encapsulate ideas of compatibility and of making good sense, whereas coherence relates more to synergy and added value.²² Hence, coherence in law would be a matter of degree, whereas consistency would be a static notion in the sense that concepts of law can be more or less coherent but cannot be more or less consistent. They are either consistent or not.²³

Eileen Denza, on the other hand, points out that in the English language ‘consistency’ can indicate degrees of interconnection.²⁴ In the same vein, Panos Koutrakos suggests that the consistency referred to in the TEU should be given broad interpretation, so as to imply more than simply absence of contradictions between different instruments and actions. He notably refers to the provisions of Article 301 EC on sanctions to support the proposition that the TEU requirement of ‘consistency’ set out in Article 3 TEU entails that interaction between the sub-orders of the Union should not be merely envisaged as a non-contradictory one, but should be conceived as a relationship based on *synergy*.²⁵ Support for this proposition can indeed be found in the judgments of the Court of First Instance in the *Yusuf* and *Kadi* cases, where the CFI held that:

There are therefore good grounds for accepting that, in the specific context contemplated by Articles 60 EC and 301 EC, recourse to the additional legal basis of Article 308 EC is justified for the sake of the requirement of consistency laid down in Article 3 of the Treaty on European Union, when those provisions do not give the Community institutions the power necessary, in the field of economic and financial sanctions, to act for the purpose of attaining the objective pursued by the Union and its Member States under the CFSP.²⁶

The concept of ‘consistency’ to which the Treaty refers in several instances should therefore be understood broadly, indeed perhaps closer to the French notion of ‘cohérence’.

At this stage, it is worth returning to the above mentioned Court’s judgments of 2005 concerning Luxembourg and Germany.²⁷ A comparison of the different linguistic versions of the rulings indicate that, while the term ‘consistency’

¹⁹ The WTO Appellate Body also uses the term ‘consistency’ in the sense of absence of legal clash; see P Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005), at 652.

²⁰ Tietje, *supra* n 5, at 212. ²¹ Koutrakos, *supra* n 10, at 39.

²² A Missirolì, ‘European Security Policy: The Challenge of Coherence’ (2001) 6 EFARev 177, at 182.

²³ Tietje, *supra* n 5, at 211, citing W Van der Velden, ‘Coherence in Law: A Deductive and a Semantic Explanation of Coherence’ in B Brouwer et al (eds), *Coherence and Conflict in Law* (1992) 257; R Torrent, *Derecho y práctica de las relaciones económicas exteriores en la Unión Europea* (1998).

²⁴ E Denza, *The Intergovernmental Pillars of the European Union* (2002), at 289–90.

²⁵ Koutrakos, *supra* n 10, at 39.

²⁶ Cases T-306/01 *Yusuf et al v Council and Commission* [2005] ECR II-3533, para 164; T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649, para 128.

²⁷ Case C-266/03 *Commission v Luxembourg*, para 60; Case 433/03 *Commission v Germany*, para 66.

used in the English version is generally translated as ‘cohérence’ (French) or ‘Kohärenz’ (German), the phrase ‘coherence’ found in the same sentence of the rulings has been interpreted in other languages as ‘unité’ (French), and ‘Einheitlichkeit’ (German).²⁸ Coherence in English would thus encapsulate the notion of ‘united whole’ suggested earlier, signifying that in the context of EU primary law, the term ‘consistency’ should indeed be understood more restrictively than coherence.²⁹

Considering this haziness, one may wonder what the TEU ultimately requires from the institutions and the Member States when calling for the ‘consistency’ (in English) or ‘cohérence’ (in French) of EU external activities. Do references to ‘consistency’ in EU primary law only call for absence of legal contradiction between different norms, or do they entail an active quest for positive connections?

Although there is no established rule of *linguistic* majority in EU law,³⁰ it could be observed that most official versions of the TEU refer to coherence conceived as a quest for synergy and complementarity rather than ‘consistency’ understood in its sense of absence of contraction. Hence, the requirement of ‘consistency’ foreseen in Article 3 TEU, or Article 27a TEU, would entail not only avoiding legal contradictions between the different EU external instruments, but also the quest for synergy and complementarity. If this holds true, the provisions of the TEU could entail positive obligations of conduct for the different actors involved in the EU system of external relations.³¹

Indeed, the use of the notion ‘coherence’ when talking about the requirement of Article 3 TEU has become more systematic³² also in the English version of official policy documents. This is notably the case of the documents relating to the establishment of the European Security and Defence Policy (ESDP), where the requirement of ‘inter-pillar coherence’ is taken account of ‘in conformity with

²⁸ Paragraph 60 of Case C-266/03 *Commission v Luxembourg* and para 66 of Case 433/03 *Commission v Germany* refer in the Spanish version to ‘la unidad y la coherencia’, in the Italian version to ‘l’unità e la coerenza’, in the Dutch version to ‘eenheid en de samenhang’, in the Swedish version to ‘enhetlighet och konsekvens’, in the Polish version to ‘jedność i spójność’, but in the Danish version to ‘konsekvens og sammenhæng’.

²⁹ The combination ‘cohérence’ and ‘unité’ used in the Court’s judgments of 2005 can also be found in various linguistic versions of Art 13(3) TEU which in its French version provides that the Council ‘veille à l’unité, à la cohérence et à l’efficacité de l’action de l’Union’. In its English version, Art 13(3) TEU however refers to ‘ensur[ing] the *unity, consistency* and effectiveness of action by the Union’ (emphasis added), and does not therefore translate ‘unité’ by ‘coherence’ as this is done in the judgments, but by ‘unity’, alongside ‘consistency’!

³⁰ On the contrary, each and every version is in principle authentic. This has been confirmed by the Court of Justice, eg in Case 283/81 *CILFIT* [1982] ECR 3415, para 18. See Opinion of Stix Hackl AG in Case C-265/03 *Simutenkov* [2005] ECR I-2579.

³¹ RA Wessel, ‘The Inside Looking Out: Consistency and Delimitation in EU External Relations’ (2000) 37 CMLRev 1135, Duke, *supra* n 5, at 4.

³² The text submitted by the Irish Presidency to the December 1996 Dublin European Council as a general outline for a draft revision of the Treaties included a section entitled ‘An effective and coherent foreign policy’ (*The European Union today and tomorrow: adapting the European Union for the benefit of its peoples and preparing it for its future*, CNF 2500/96, Part A, Section III).

Article 3 TEU'.³³ In the same vein, the 2000 'Common Strategies Report' of the High Representative for CFSP underlined that 'proper articulation between the CFSP area and the other "pillars" and adequate cross-pillar coherence is essential, and indeed obligatory under Article 3 TEU'.³⁴

More recently, the 'Europe in the World' Communication of the Commission refers in its title to 'greater coherence',³⁵ while not mentioning the term 'consistency' at all. The European Council's response to that Communication appears to follow the same approach.³⁶ Indeed, since the European Council endorsed that Communication, each Presidency has produced 'stocktaking reports' on measures to increase the effectiveness, coherence, and visibility of EU external policies. Such reports provide an inventory of techniques and practical ways to improve cooperation and co-ordination among actors involved in the EU external action, rather than mechanisms to deal with legal conflicts between them and/or between their activities.³⁷

Perhaps more importantly, there is a *functional* argument to support the proposition that the requirement of 'consistency' encapsulated in the TEU provisions entails more than merely tackling legal contradictions between the different actions of the Union. Simply, the provision of Article 3 TEU would be deprived of any *raison d'être* if it were merely for that purpose. As will be seen in further detail below, EU law foresees other devices to handle such legal contradictions, under judicial supervision. In particular, Article 47 TEU guarantees that EC law is not encroached upon by measures adopted on the basis of the TEU, and notably Titles V and VI. Moreover, as mentioned earlier, Article 3 TEU establishes an obligation of *cooperation* between the Commission and the Council to ensure consistency between EU external activities as a whole.³⁸ Arguably, the function

³³ For example, the Presidency Progress Report to the 1999 Helsinki European Council on Common European Policy on Security and Defence stated that: '[t]he Council decides upon policy relevant to Union involvement in all phases and aspects of crisis management, including decisions to carry out Petersberg tasks in accordance with Art 23 of the EU Treaty. Taken within the single institutional framework, decisions will respect European Community competences and ensure inter-pillar coherence in conformity with Article 3 of the EU Treaty' (Emphasis added); report available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/13619-r1.en9.htm>. Also the 'Action Plan for Civilian Aspects of ESDP', adopted by the European Council on 17–18 June 2004, insists under the heading 'synergies' on the 'complementarity and coherence' between all the instruments it has at his disposal; document available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81344.pdf>. Indeed, 'coherence' is also used by the legal service of the Council, for example in Note of 28 November 2000 of the legal service for the attention of M Solana: Commission's views on crisis management procedures and of the use of Joint Actions (unpublished).

³⁴ High Representative for CFSP, 'Common Strategies Report—An evaluation report', Brussels, 21 December 2000, pt 25.

³⁵ COM (2006) 278 final. ³⁶ Presidency Conclusions—15/16 June 2006; esp pt 32.

³⁷ The 'Stocktaking Reports' are mentioned in *supra* n 9; see also the House of Lords EU Committee, 48th Report (2005–2006): 'Europe in the World' (HL 268).

³⁸ Article 3 TEU foresees that '[t]he 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'. In the same vein, the provisions

of such cooperation is less to solve legal conflict, a task left to the judiciary, than to ensure positive connections and synergy between the external actions of the EU.

The foregoing indicates that the TEU requirement of ‘consistency’ between the external activities of the Union, foreseen in particular in Article 3 TEU, entails more than avoiding contradiction between the EU and the EC external activities, as a restrictive reading of the notion would otherwise imply. A functional interpretation of the notion of ‘consistency’ in EU primary law and particularly in the law of EU external relations suggests that it involves, beyond the assurance that the different policies do not legally contradict each other, a quest for synergy and added value in the different components of EU policies. In this sense, guaranteeing consistency *stricto sensu* between the external activities of the Union *contributes* to achieving the coherence of its external action.³⁹

B. The Multifarious Dimensions of Coherence in EU External Relations

The coherence of the *EU* external action implies not only the consistency and coherence of the external activities of the Union as a whole, in the context of its external relations, security, economic and development policies, in conformity with Article 3 TEU (‘horizontal coherence’). Coherence of its external action is also dependent on the consistency and coherence of the action of the Community which, as the Court’s case law suggests,⁴⁰ derive from the cooperation between the Community institutions and the Member States (‘vertical coherence’).⁴¹ It equally depends on the consistency and coherence between the Member States’ actions and those of the Union *qua* CFSP and PJCCM,⁴² as well as between the internal and external dimensions of each Union policy, and of the Union’s activities within each of its sub-orders.⁴³

of Art 45 TEU foresee that ‘[t]he Council and the Commission shall ensure the consistency of activities undertaken on the basis of... title [VII on enhanced cooperation] and the consistency of such activities with the policies of the Union and the Community, *and shall cooperate to that end*’ (emphasis added).

³⁹ Gauttier (*supra* n 5, at 26) suggests that consistency and coherence are mutually reinforcing, referring to the Irish Presidency proposal on foreign policy in 1996, underlining the need for its political and economic aspects to be ‘consistent, coherent and mutually reinforcing’; see also Cremona, *supra* n 3, at 169.

⁴⁰ Paragraph 60 of Case C-266/03 *Commission v Luxembourg*; and para 66 of Case 433/03, *Commission v Germany*.

⁴¹ Further on the distinction between horizontal and vertical coherence, see S Nuttall, ‘Coherence and Consistency’ in C Hill and M Smith (eds), *International Relations and the EU* (2005) 91; from the same author: ‘Consistency and the CFSP: a Categorization and its Consequence’, at: <<http://www.lse.ac.uk/Depts/intrel/pdfs/EFPU%20Working%20Paper%203.pdf>>; Krenzler and Schneider, *supra* n 5; Tietje, *supra* n 5.

⁴² See COM (2006) 278, esp p 6; Presidency Conclusions—15/16 June 2006; pt 32; and Presidency Stocktaking Reports (*supra* n 9).

⁴³ COM (2006) 278, Stocktaking Reports, *supra* n 9.

It is against the background of these broad notions of coherence and consistency that the legal ways in which they can be attained have to be examined. As hinted at by the Court in its 2005 Germany and Luxembourg judgments,⁴⁴ coherence and consistency are achieved through the fulfilment of other principles of EU law, such as the principle of cooperation between the Community institutions and the Member States. The next section unpacks the constitutive rules and principles of coherence in EU external relations.

3. Coherence as a Function of other EU Legal Principles

EU law includes two categories of principles whose observance arguably contributes to achieving coherence. First, coherence is determined by the principles aimed at ensuring consistency. While the avoidance of legal contradiction between different EU external activities constitutes an essential tenet of coherence (negative coherence) (A), it does not, in itself, suffice to achieve full coherence of the EU external action. A second category of principle involving multi-dimensional duties of cooperation thus supplements the TEU rules on allocation of powers. Such principle of cooperation compels the actors of the EU system of external relations to exercise their respective external powers in a harmonious fashion (positive coherence), with a view to ensuring the overall coherence of the EU external action (B).

A. Negative Coherence: Absence of Contradictions in the External Activities of the Union

In the EU system of external relations, the European Community and the European Union co-exist with the Member States. The latter have retained their full ability to act on the international scene, as subjects of international law.⁴⁵ Ensuring consistency, understood as absence of contradiction, presupposes clear rules on distribution of powers among the various actors of the system, including mechanisms to resolve potential conflicts of norms. In EU external relations, allocation of competences between the EC, the EU (*qua* CFSP and PJCCM), and the Member States is based on two key organizing principles, enshrined in the TEU. First, the principle of attributed powers which governs, although in a differentiated fashion, the distribution of competence between the Member States and the Union (1). Secondly, the principle of the preservation of the *acquis communautaire* organizes the allocation of powers between the EU (*qua* CFSP and PJCCM) and the EC (2).

⁴⁴ Case C-266/03 *Commission v Luxembourg* (para 60); Case 433/03, *Commission v Germany* (para 66).

⁴⁵ Further: Denza, *supra* n 24, at 6ff.

1. *The Distribution of Powers between the Member States and the EU*

The Union being based on the Community supplemented by other policies and forms of cooperation,⁴⁶ the distribution of competence between the Member State and the Union is multifarious. Reflecting the latter's complexity, the distribution of powers must be envisaged first, between the Member States and the EC (a), and second, between the Member States and the Union, *qua* CFSP and PJCCM (b).

(a) **Competence allocation between the Member States and the EC**

On the basis of the 'principle of attributed powers' envisaged in Article 5(1) EC, the Community only acts within the limits of the powers conferred upon it by the EC Treaty. In other words, the Community can only intervene, either internally or externally,⁴⁷ where the Member States have allowed it to act, either explicitly or implicitly, on the basis of Treaty provisions.⁴⁸ Outside its conferred powers, the Community is not entitled to take action, as indeed recalled by the Court of Justice.⁴⁹ In principle, the Community powers are shared with the Member States, but may exceptionally be exclusive by nature, or become exclusive as a result of Community legislative action. Thus, the Member States are not allowed *a priori* to act in areas of Community competence such as the management of the biological resources of the sea.⁵⁰ They may also be prevented from taking action in areas where the Community *has* adopted common rules which could be affected by Member States' international action,⁵¹ *is* in the process of developing

⁴⁶ Article 1 TEU. ⁴⁷ Opinion 2/94 *ECHR* [1996] ECR I-1759.

⁴⁸ Express competence refers to the express attribution of competence by the EC Treaty itself. This is the case in the field of Commercial Policy (Art 133 EC); the conclusion by the Community of association agreements with third states or international organizations (Art 310 EC); environmental protection (Art 174 EC); development cooperation (Art 177 EC), etc. External competence can also be conferred to the Community implicitly, as established by the Court of Justice, notably in its judgment in Case 11/70 *Commission v Council (AETR)* [1971] ECR 263. Indeed, the EC Treaty offers, on the basis of Art 308, the subsidiary possibility for the Community to act on the international stage when such measure is necessary for the achievement of an objective of the Community. On the limits to the use of Art 308 EC in the context of external relations: see Opinion 2/94 *ECHR* [1996] ECR I-521; Opinion 1/94 *WTO* [1994] ECR I-5267; Cases T-306/01 *Yusuf et al v Council & Commission* [2005] ECR II-3533, para 164; T-315/01 *Kadi v Council & Commission* [2005] ECR II-3649, para 128. Further on the attribution of competence, see eg A Dashwood, 'The Attribution of External Relations Competence' in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (2000), 115; K Lenaerts and E de Smijter, 'The European Community's Treaty Making Competence' (1996) 16 *YEL* 1; more generally: P Eeckhout, *External Relations of the European Union—Legal and Constitutional Foundations* (2004); P Koutrakos, *EU International Relations Law* (2006); M Dony and JV Louis, *Commentaire J. Mégret: Le droit de la CE et de l'Union européenne—Relations extérieures*, vol 12 (2005).

⁴⁹ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 (internally), and Opinion 2/94 *ECHR* [1996] ECR I-1759 (externally).

⁵⁰ Joined Cases 3, 4, and 6/76, *Kramer* [1976] ECR 1279; Case 804/79 *Commission v United Kingdom* [1981] ECR 1045.

⁵¹ Case 22/70 *Commission v Council (AETR)* [1971] ECR 263. On the details of the implied power doctrine; see eg A Dashwood and J Heliskoski, 'The Classic Authorities Revisited' in

them,⁵² or where international action is the only way for it to adopt such common rules.⁵³ The Court also pointed out that exclusivity is determined not only by the scope of Community rules, but also by their nature.⁵⁴ Exclusivity thus implies that Member States are deprived of their ability to act in specific areas, unless authorized by the Community. Potential conflict is thus avoided and consistency in the external action of the Union secured.⁵⁵ Outside its exclusive powers, the Community shares competence with the Member States. It is in these policy areas that overlaps may occur, and where conflict of norms may ensue.

Binding Community instruments of external action, be they autonomous or contractual,⁵⁶ become part of the EC legal order. Such EC instruments are thus covered by the principle of primacy,⁵⁷ so that inconsistent Member States' norms have to be reviewed to ensure consistency with EC law. Member States may otherwise be brought to the Court of Justice by the Commission on the basis of Article 226 EC in case they fail to comply with obligations derived from those instruments of external action.⁵⁸ Indeed, Community instruments entail obligations which may be invoked before a national court against the Member States, if they were acting, or failing to act, in violation of those obligations.⁵⁹

This EC-specific system of monitoring and remedies guarantees compliance with EC law,⁶⁰ including the rules governing the distribution of powers between the Member States and the Community.⁶¹ Yet, as illustrated notably by the

A Dashwood and C Hillion (eds), *supra* n 48, at 3; D O'Keeffe, 'Exclusive, Concurrent and Shared Competences' in Dashwood and Hillion, *supra* n 48, at 179.

⁵² Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

⁵³ Opinion 1/76 *Laying-up Fund* [1977] ECR 741; Case C-467/98 *Commission v Denmark (Open Skies)* [2002] ECR-9519. R Holdgaard 'The European Community's Implied External Competence after the *Open Skies* Cases' (2003) 8 EFARev 365.

⁵⁴ Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

⁵⁵ See in this regard the Court's reasoning in its Opinion 1/75 *Local cost standard* [1975] ECR 1355 and in Case 11/70 *Commission v Council (AETR)* [1971] ECR 263.

⁵⁶ Article 300(7) EC provides that they bind the institution as well as the Member States; Case 181/73 *Haegeman* [1974] ECR 449; Case 104/81 *Kupferberg* [1982] ECR 3641.

⁵⁷ Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 10/61 *Commission v Italy* [1962] ECR 1.

⁵⁸ Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943; Case C-239/03 *Commission v France* [2004] ECR I-9325; Case C-465/01 *Commission v Austria* (judgment of 16 September 2004); as foreseen by Art 307(2), pre-accession Member States' international commitments have to be aligned with Community law, as confirmed by the Court in eg Case C-170/98 *Commission v Belgium* [1999] ECR I-5493; Case C-62/98 *Commission v Portugal* [2000] ECR I-5171; Case C-84/98 *Commission v Portugal* [2000] ECR I-5215; further: M Cremona, 'The Impact of Enlargement: External Policy and External Relations' in M Cremona (ed), *The Enlargement of the European Union* (2003) 161; C Hillion 'New Membership Bids into the EU and their Impact on Trade with Australia and Asia' in C Saunders and G Triggs (eds), *Trade and Cooperation with the European Union in the Next Millennium* (2002) 63.

⁵⁹ Case C-268/99 *Jany* [2001] ECR I-8615; Case C-162/00 *Pokrzepowicz-Meyer* [2002] ECR I-1049, Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301.

⁶⁰ Further: K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU law' (2006) 31 ELRev 287.

⁶¹ Further: G de Baere, *The Legal Organisation of EU External Relations: An Examination of Certain Key Concepts and Principles*, PhD dissertation, Cambridge, 2006.

WTO Opinion,⁶² the division of powers envisaged by the Treaty, and the guarantees to their effectiveness, does not suffice to ensure coherence, particularly in areas of shared competence involving joined action of the Community and the Member States.⁶³

(b) Competence allocation between the Member States and the EU

Like the EC, the Union may act only where it is empowered to do so. The principle of conferred powers thus also governs the interaction between the Member States and the EU *qua* CFSP and PJCCM.⁶⁴ However, it does not play as significant a role as in the EC context, given the largely intergovernmental character of these other sub-orders, and its corollary, the remaining strong Member States' autonomy.⁶⁵ A distinction may therefore be made between the way in which competence is distributed and guaranteed between the Member States and the EC on the one hand, and between the Member States and the EU on the other.

It would be beyond the scope of this contribution to expose all the differences between the EU pillars.⁶⁶ For the sake of the current discussion, suffice to recall that Title V TEU relating to the CFSP and Title VI on PJCCM establish a set of general objectives that the Member States take into account, and which can be pursued by the adoption, in principle by unanimity, of specific CFSP and PJCCM instruments.⁶⁷ The decision-making within these sub-orders generally involves the Council and the European Council, the supranational institutions, particularly the Court of Justice, playing a minor role.⁶⁸

The differentiated operation of the principle of attributed powers in the context of the EU is typified by the terminology of Articles 24 TEU and 300 EC. These provisions establish the procedure whereby the Union (Article 24 TEU) and the Community (Article 300 EC), respectively, may conclude agreements with third

⁶² Opinion 1/94 *WTO* [1994] ECR I-5267.

⁶³ Opinion 1/94 *WTO*, paras 107ff.

⁶⁴ G de Búrca and B de Witte, 'The Delimitation of Powers between the EU and Its Member States' in A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (2002) 201, at 202.

⁶⁵ Further on this point: A Dashwood, 'States in the European Union' (1998) 23 *ELRev* 201; cp M Brkan, 'Exploring the EU competence in CFSP: Logic or Contradiction?' (2006) 2 *Croatian Yearbook of European Law and Policy* 173.

⁶⁶ Further: eg Denza, *supra* n 24; B de Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?' in T Heukels, N Blokker, and M Brus (eds), *The European Union after Amsterdam—A Legal Analysis* (1998) 51; D Curtin and I Dekker, 'The EU as a "Layered" International Organization: Institutional Unity in Disguise' in Craig and de Búrca, *supra* n 3, at 83.

⁶⁷ On CFSP: see eg Wessel, *supra* n 10, and R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 *CMLRev* 337; on PJCCM, see eg S Peers, *EU Justice and Home Affairs Law* (2007).

⁶⁸ Though the Court's role in the context of the third pillar should not be underestimated as suggested by its judgments in Case C-105/03 *Pupino* [2005] ECR I-5285, Cases C-355/04 *P Segi and Others v Council* and C-354/04, *P Gestoras Pro Amnistía and Others v Council* (judgment of 27 February 2007). Further: see C Hillion and RA Wessel, 'Restraining External Competences of EU Member States under the CFSP' in M Cremona and B de Witte (eds), *EU Foreign Relations Law—Constitutional Fundamentals* (2008).

countries or international organizations. While the former provision appears to be modelled on the latter, the two articles nevertheless differ significantly, not least with respect to the element that triggers the procedure they foresee. Article 300 EC stipulates that ‘where this treaty provides’, the Commission ‘shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations’. Article 24 TEU, by contrast, provides that the EU treaty-making procedure is activated when the conclusion of an EU agreement is deemed ‘necessary... in implementation of [the CFSP and/or PJCCM] title’. Only then ‘may’ the Council ‘authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect.’⁶⁹

Article 300 EC is thus used on the initiative of the Commission in areas where the Community has been given competence, implicitly or explicitly, whereas Article 24 TEU provides for a procedure which may be used if the Council finds it necessary to conclude an agreement. In other words, while the decision to set off the procedure of Article 300 EC is first and foremost governed by the principle of attributed powers, the procedure of Article 24 TEU seems essentially determined by a subsidiarity assessment, the scope and nature of EU powers not being as relevant an element as in the EC context, at least not in relation to Member States’ powers.⁷⁰

Furthermore, without dwelling upon the question of whether EU rules are covered by the EC principle of primacy,⁷¹ the EC system of monitoring encapsulated in the enforcement procedure of Article 226 EC has no equivalent, either in the context of the CFSP, or that of the PJCCM. Arguably, only national courts, if national laws so allow, could guarantee that Member States comply with their CFSP obligations. In the PJCCM title, the Court of Justice plays a limited role, in cooperation with some national courts,⁷² to ensure harmony between the interpretation of national rules and third pillar rules, by interpreting the PJCCM provisions on the basis of Article 35 TEU,⁷³ though nothing prevents the national courts from ignoring the Court’s interpretation given the absence of any EU enforcement procedure.⁷⁴

⁶⁹ Article 38 TEU foresees that Agreements referred to in Art 24 TEU may cover matters falling under Title VI TEU.

⁷⁰ Indeed, should the Court have jurisdiction to control the legality of CFSP acts, it appears unlikely that an EU act could be successfully challenged on the ground that the Union acted *ultra vires*, following a *Tobacco Advertising* approach (Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419), especially in view of the open-ended character of the scope of the CFSP (Art 11 TEU) and PJCCM objectives (Art 29 TEU). Such proceedings would be successful if it were shown that the Community should have acted instead of the Union, in view of Art 47 TEU, as examined below.

⁷¹ See Lenaerts and Corthout, *supra* n 60. See also the Declaration included in footnote 1 of the IGC Mandate, attached to the Presidency Conclusions, 21–22 June 2007.

⁷² This cooperation only concerns national courts of Member States that have made the declaration foreseen in Art 35 (2) TEU whereby they accept the jurisdiction of the Court of Justice to give preliminary rulings in the context of Title VI TEU.

⁷³ Case C-105/03, *Pupino* [2005] ECR I-5285.

⁷⁴ Cp Case C-224/01 *Köbler* [2003] ECR I-10239; Case C-173/03 *Traghetti del Mediterraneo SpA* [2006] ECR I-5177.

The foregoing suggests that while the principle of attributed powers also governs the interaction between the Member States and the Union, the TEU does not include specific mechanisms to guarantee its effectiveness, as it does in the context of the EC Treaty. Consistency between Member States' and Union (*qua* CFSP and the PJCCM) actions is thus more complex to secure legally under the TEU than under EC law.⁷⁵ At the same time, since most CFSP and PJCCM instruments are in principle adopted by unanimous decision, conflict seems less likely to occur, for a Member State that disagrees with a planned EU decision would simply prevent its adoption. Indeed, inconsistencies are more likely to occur between EU and EC actions.

2. *The Distribution of Powers in the EC–EU Relationship*

Consistency in the EU external action does not only depend on the rules on distribution of powers between the Member States, on the one hand, and the EU and the EC, on the other. Absence of contradiction between actions of the EU and the EC, respectively, also has to be guaranteed. The Treaty foresees that the distribution of competence between the Community and the Union is governed by the principle that the *acquis communautaire* should be preserved (a). From the point of view of consistency, it entails that in principle, the EU cannot act through the CFSP or PJCCM in areas where the action ought to be taken by the Community because it has been endowed with the relevant competence. This primacy of EC action over CFSP/PJCCM actions is guaranteed by the Court of Justice on the basis of Article 47 TEU (b).

(a) *The preservation of the *acquis communautaire**

The principle that the *acquis communautaire* should be preserved in full and built upon is enounced in Article 2 TEU as one of the Union's objectives.⁷⁶ Indeed, Article 3 TEU emphasizes that the institutions 'should ensure the consistency and *the continuity of the Union's activities* in order to attain its objectives *while respecting and building upon the *acquis communautaire**' (emphasis added).

The TEU thereby appears to establish a hierarchical superiority of the *acquis communautaire* over the rules of the other EU sub-orders.⁷⁷ The emphasis

⁷⁵ Further: Hillion and Wessel, *supra* n 68.

⁷⁶ On the interpretation of the *acquis communautaire*, see for instance S Weatherill, 'Safeguarding the Acquis Communautaire' in Heukels, Blokker and Brus, *supra* n 66, at 153; or CC Gialdino, 'Some Reflections of the Acquis Communautaire' (1995) 32 CML Rev 1089.

⁷⁷ The provisions of Art 2 TEU also provide that the Union 'should maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by the TEU *may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community*' (emphasis added). These provisions were interpreted as further indication of the primacy of the Community *acquis* over the other forms of cooperation, deemed to be transitional, and of the possibility of increasing Community powers; see eg P Demaret, 'Le Traité de Maastricht ou les voies diverses de l'Union' in Monar, Ungerer, and Wessels, *supra* n 3, at 42–43; P Demaret, 'The Treaty Framework' in O'Keefe and Twomey, *supra* n 4, at 6–7; P Willaert and C Marqués-Ruiz Willaert, 'Vers une politique étrangère et de sécurité commune' (1995) 3 RMUE 35, at 37.

put on the ‘continuity of the activities’, mentioned in Article 3 TEU, further expresses the prime importance of the *acquis*,⁷⁸ and the *supplementary* character of Titles V and VI, as indeed suggested in the provisions of Article 1 TEU. The latter defines the Union as ‘founded on the European Communities, *supplemented* by the policies and forms of cooperation established by this Treaty’.

The requirement that the *acquis* should be preserved aims at ensuring that Community norms and method are not ‘contaminated’ or substituted by other instruments adopted under a TEU procedure,⁷⁹ following a less ‘integrationist’ methodology.⁸⁰ It aims at ensuring that the powers attributed to the Community are not ‘taken back’ through the back door, by Member States acting in the context of other TEU procedures. The principle thereby supplements and consolidates the principle of attributed powers that governs the relationship between the Member States and the Community. In effect, it is designed to preserve the position and the autonomy of the Community in the EU system, particularly in relation to the other EU sub-orders, and indirectly in relation to the Member States.⁸¹

Placed in the Common Provisions of the Treaty, the principle that the *acquis* should be preserved guides the conduct of both institutions and Member States while acting in the framework of the TEU in general, and informs the functioning of the EU system of external relations in particular.⁸² This guiding principle is echoed and reinforced by the provisions of Article 47 included in the Final Provisions of the TEU, and which stipulate that ‘nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them’.⁸³

(b) The rule of conflict enshrined in Article 47 TEU

Article 47 TEU gives teeth to the rule of preservation of the *acquis communautaire*. For Article 46 TEU provides in its subparagraph (c) that this Article falls within the jurisdiction of the Court of Justice. The Court can thereby police the boundaries between the EC and the EU competence, and ensure that the requirement of primacy of Community law over other TEU norms is observed.⁸⁴

⁷⁸ V Constantinesco, R Kovar and D Simon, *Traité sur l’Union européenne—Commentaire article par article* (Economica, 1995) 73.

⁷⁹ Cloos et al, *supra* n 12; Timmermans, *supra* n 3; Wessel, *supra* n 31, at 1147; Eeckhout, *supra* n 48, at 146; Gosalbo Bono, *supra* n 67, at 351.

⁸⁰ J Weiler, ‘Neither Unity nor Three Pillars—The Trinity Structure of the Treaty on European Union’ in Monar, Ungerer and Wessels, *supra* n 3, at 54.

⁸¹ On the autonomy of the Community legal order, see K Lenaerts and P van Nuffel, *Constitutional Law of the European Union* (1999), at 666.

⁸² In this regard, see ‘Report of the Reflection Group IGC 1996’, 2 June 1995; Edwards, ‘Common Foreign and Security Policy’ (1994) 14 YEL 541; Koutrakos, *supra* n 10, at 44.

⁸³ In the same vein, the provisions of Art 29 TEU foresee that the Union acts in the context of Title VI TEU ‘without prejudice to the powers of the European Community’.

⁸⁴ Denza, *supra* n 24, at 319. It has been suggested that these provisions were designed specifically to ensure that the jurisdiction of the Court over the Community Treaties would not be limited by the initial ‘non-justiciability’ of the CFSP and JHA. P Dewost, ‘Les problèmes posés par la structure des Traités: quatre points particuliers’ in Monar, Ungerer and Wessels, *supra* n 3, at 64.

The Court's control has been exercised on several occasions. For instance, in the *Environmental Penalties* case,⁸⁵ the Court annulled a Council Framework Decision adopted under Title VI TEU. The impugned decision laid down environmental offences in respect of which the Member States were required to establish criminal penalties. The Court found that 'on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC'. Since the Framework Decision encroached upon powers conferred to the Community, it infringed Article 47 EC and was therefore annulled.

Article 47 TEU thus allows the Court to shield the *acquis communautaire* from PJCCM encroachment and if need be to annul an act based on an erroneous legal basis included in Title VI TEU.⁸⁶ This mechanism ensures consistency between Community and EU actions, by preventing the EU from acting in areas where the Community is empowered to take action.

The Court may also be asked to review CFSP measures to ascertain that they do not encroach upon Community powers, as confirmed by the *ECOWAS* judgment.⁸⁷ In this case, the Commission challenged the legality of two Council acts adopted in the context of title V TEU, notably a Decision implementing a Joint Action on the Union's contribution to combating the destabilizing accumulation and spread of small arms and light weapons, with a view to the European Union contribution to the West African organization ECOWAS. The Court emphasized that

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 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.

In the event, the Court found that taking account of its aim and its content, the contested CFSP measure contained two components, one falling within the Community development cooperation policy and the other within the CFSP, neither of which could be considered to be incidental to the other. The Court concluded that the Council had infringed Article 47 TEU by adopting the contested Decision on the basis of Title V TEU and annulled the impugned Decision.

⁸⁵ C-176/03 *Commission v Council (Environmental Penalties)* [2005] ECR I-7879. See also Case C-170/96 *Commission v Council (Airport Transit Visa)* [1998] ECR I-2763.

⁸⁶ See also Case C-440/05 *Commission v Council (ship-source pollution)* (judgment of 23 October 2007) where the Court found that Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, encroached on the competence which Article 80(2) EC attributes to the Community, thereby infringing Article 47 TEU.

⁸⁷ Case C-91/05, *Commission v Council (ECOWAS)* (judgment of 20 May 2008).

As mentioned above, the distribution of powers between the EC and the Member States is determined not only by the *scope* of Community competence but also by its *nature*.⁸⁸ In particular, the Court has recognized that in areas where the Community shares powers with the Member States, *viz* development cooperation, Member States 'are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community'.⁸⁹ Similarly the Court pointed out that since the Community does not have exclusive competence in the field of humanitarian aid, 'Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it'.⁹⁰ The Court thus admits that in those areas, Member States' and Community's acts may co-exist.

In the light of this case law, it has been wondered whether the distribution of powers between the Community and the Union could be influenced by the same logic. In particular, since development cooperation is an area where Member States are entitled to act including within the Council, alongside the Community, it has been contended that the Council should also be entitled to act on the basis of Title V TEU in that area, instead of the Member States acting collectively.⁹¹ The Council appeared to make that point in *ECOWAS* when arguing that the complementary nature of the competence conferred on the Community in the field of development cooperation ought to be taken into account in order to determine whether action by the Union affects Community competence. The Court however brushed that argument aside, emphasizing that 'the question whether the provisions of... a measure adopted by the Union fall within the competence of the Community relates to the attribution and, thus, the very existence of that competence, and not its exclusive or shared nature.

Indeed, allowing the Council to act through the CFSP machinery where the Community is also entitled to act under the EC Treaty would not sit easily with the principle underpinning the provisions of Article 47 TEU, namely that the *acquis* should be preserved and developed as an objective of the Union foreseen in Article 2 and 3 TEU. The Court explicitly acknowledged that connection in *ECOWAS* for the first time. It could further be suggested that such an EU act could jeopardize the achievement of Community objectives, in violation of Article 10 EC, and could put at risk the coherence of the EU external activities, required by Article 3 TEU. The next section intends to examine the principle underpinning these two sets of provisions.

⁸⁸ Opinion 1/03 *Lugano Convention* [2006] ECRI-1145.

⁸⁹ Case C-316/91 *European Parliament v Council of the European Union (EDF)* [1994] ECR I-625, para 26.

⁹⁰ Joined Cases C-181/91 and 248/91 *European Parliament v Council of the European Communities and Commission of the European Communities (Bangladesh)* [1993] ECR I-3685.

⁹¹ A Dashwood, 'The Interface between EC External Relations and the CFSP', in A Dashwood and M Maresceau (eds), *Recent Trends in the External Relations of the Union* (2008); cp Opinion Mengozzi AG in Case C-91/05 *Commission v Council* (19 September 2007).

B. Achieving Positive Coherence: The Principle of Cooperation

Policing the allocation of competence in the EU system of external relations, and tackling legal conflict therein, does not suffice to bring about harmony and synergy between the different instruments and policies of EU external action. Beyond the rules on the modalities and enforcement of power allocation, EU law envisages rules compelling each actor in the system to exercise its powers in cooperation with others.

The principle of cooperation is multifarious.⁹² It governs the interactions between the Member States and the EU institutions, for the purpose of ensuring the coherence and consistency of the action and representation of the Community and the Union (1). It also applies to the interplay between the Commission and the Council in order to ensure the coherence and consistency of the Union's external activities (2).

1. Cooperation between Member States and EU Institutions

The principle of cooperation governs the interactions between the Member States and the Community, based on Article 10 EC (a). The principle also applies in the interplay between the Member States and the EU, *qua* CFSP and/or PJCCM (b).

(a) The principle of cooperation based on Article 10 EC

On the basis of the principle of cooperation, expressed in Article 10 EC, Member States are expected to take all appropriate measures, whether general or particular, to ensure the fulfilment of obligations arising out of the EC Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks, and they shall abstain from any measure which would jeopardize the attainment of the objectives of the EC Treaty.

Falling within the jurisdiction of the Court of Justice, these provisions have been further articulated and elaborated in the case law.⁹³ In particular, the Court has emphasized the wide scope of application of Article 10 EC, pointing out that Member States are bound by the positive and negative obligations derived therefrom 'in all areas corresponding to the objectives of the EC treaty'.⁹⁴ The Court

⁹² See generally: D Halberstam, 'Of Power and Responsibility: The Political Morality of Federal Systems' (2004) 90 *Virginia Law Review* 731; S Bitter, 'Loyalty in the European Union—A Review' (2002) *German Law Journal*; K Mortelmans, 'The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions', (1998) 5 *Maastricht Journal of European and Comparative Law* 67; J Temple Lang, 'The Core of the Constitutional Law of the Community—Article 5 EC' in L Gormley (ed), *Current and Future Perspectives on EC Competition Law* (1997) 41; M Blanquet, *L'article 5 du traité C.E.E.—Recherches sur les obligations de fidélité des Etats membres de la Communauté* (1994).

⁹³ See eg Case C-339/00 *Ireland v Commission* [2003] ECR I-11757, paras 71 and 72 and case law cited.

⁹⁴ Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

also held that the ‘duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries’.⁹⁵ Hence, Member States must comply with their obligations under the principle of cooperation based on Article 10 EC even when acting in the context of their reserved powers, *viz* foreign policy.⁹⁶ Not only do they have to act consistently with, and respect, Community law,⁹⁷ they also have ‘to abstain from *any* measure which could jeopardise the attainment of the objectives of the [EC] Treaty’ (emphasis added).⁹⁸

In relation to the conclusion and implementation of international agreements in particular, recent case law suggests that various procedural obligations of cooperation and consultation between the Member States and the institutions can be derived from Article 10 EC. For instance, Member States have an obligation to consult the institutions when they negotiate bilateral agreements in a sphere where the Community has not yet concluded an agreement—and does not have exclusive powers—but where ‘there is a start of a concerted Community action at international level’.⁹⁹ Procedural obligations flowing from Article 10 EC in relation to Member States’ international commitments also encompass, within the specific framework of a mixed agreement, a duty to inform and consult the competent Community institutions.¹⁰⁰

It becomes apparent that the principle of cooperation does not organize the allocation of powers within the EU legal order. Rather, it influences the *exercise* of each actor’s competence. By requiring the Member States and the institutions to cooperate, and specifically to inform and consult one another, it not only aims at preventing potential conflict, it also seeks to stimulate mutually reinforcing actions. In the words of the Court, which controls compliance with this principle, the ‘duty of close cooperation between the [Member States] and the

⁹⁵ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para 58.

⁹⁶ See in this regard, Case 235/87 *Annunziata Matteucci* [1988] ECR I-5589. On the application of Art 10 EC beyond the scope of Community competence, see eg Blanquet, *supra* n 92, at 306; CWA Timmermans, ‘Organising Joint Participation of EC and Member States’ in Dashwood and Hillion, *supra* n 48, at 239.

⁹⁷ On this point, see Cremona, *supra* n 3; see also Opinion of AG Jacobs in Case C-124/95 *Centro-Com Srl* [1997] ECR I-81, paras 40–44.

⁹⁸ Emphasis added. Cases C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, and C-433/03 *Commission v Germany* [2005] ECR I-6985.

⁹⁹ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, Case C-433/03 *Commission v Germany* [2005] ECR I-6985.

¹⁰⁰ Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635. See also Opinion 2/91 *ILO* [1993] ECR I-1061; Opinion 1/94 *WTO* [1994] ECR I-5267; Case C-25/94, *FAO* [1996] ECR I-1469; Case C-53/96 *Hermès* [1998] ECR I-3603; Case C-300/98 *Christian Dior* [2000] ECR I-11307. Further: J Heliskoski, ‘The “Duty of Cooperation” between the European Community and its Member States within the World Trade Organisation’, (1996) VII Finnish Yearbook of International Law 59; J Heliskoski, ‘Joint Competence of the European Community and its Member States and the Dispute Settlement Practice of the World Trade Organisation’ (1999) 2 *CYELS* 61; J Heliskoski, ‘Internal Struggle for International Presence: The Exercise of Voting Rights within the FAO’ in Dashwood and Hillion, *supra* n 48, at 79.

Community institutions [aims] to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation'.¹⁰¹

(b) The principle of cooperation between the Member States and the EU

The principle of cooperation not only organizes the relations between the Member States and the Community, it also influences the interactions between the Member States and the EU both *qua* CFSP and PJCCM, albeit on the basis of different provisions. With respect to the Member States' duty to cooperate with the EU in the sphere of PJCCM, the Court has played an essential role by establishing that the principle of loyal cooperation, expressed particularly in Article 10 EC, could be applied also in the context of the third pillar. In its *Pupino* ruling in particular, the Court held that:

[i]t would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not *also* binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions (emphasis added).¹⁰²

Here, the Court transplants one specific application of the principle of cooperation developed in the EC context to that of the third pillar, namely the duty for national courts to interpret national law in the light of a framework decision, developed in the *Von Colson* line of case law.¹⁰³ Arguably, other established obligations deriving from Article 10 EC could also be imported into the context of the interactions between the Member States and the PJCCM. For instance, in line with the Court's ruling in *Commission v Luxembourg*,¹⁰⁴ the Member States could be expected to inform and consult with the institutions as soon as a concerted EU action emerges at international level, in order to facilitate the achievement of the Union tasks and to ensure the coherence and consistency of the action and its international representation. More generally, one could foresee that, applied in the context of external relations, the duty of cooperation entails that Member States ought not only to exercise their powers in a way that is consistent with PJCCM norms, but also to refrain from acting in a way that would make the Union's fulfilment of its tasks more difficult, in line with the Court's pronouncement in Opinion 1/03.¹⁰⁵

¹⁰¹ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, Case C-433/03, *Commission v Germany* [2005] ECR I-6985.

¹⁰² Case C-105/03 *Pupino* [2005] ECR I-5285, para 42.

¹⁰³ Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, also: Case C-106/89 *Marleasing* [1990] ECR I-4135; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835. Further: Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*' (2007) 3 *EuConst* 5.

¹⁰⁴ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, Case C-433/03 *Commission v Germany* [2005] ECR I-6985.

¹⁰⁵ Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

Arguably, the same holds true in the CFSP context, in view of the inclusion in Title V of a specific principle of cooperation. Article 11(2) TEU provides that:

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

According to the CFSP principle of cooperation, Member States are bound by a *positive* obligation actively to develop the Union's CFSP, which since the Amsterdam Treaty encompasses the Member States' duty to 'work together to enhance and develop their mutual political solidarity'. In addition, Article 11(2) TEU contains a *negative* obligation compelling the Member States not to undertake 'any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations'. It is notable that these positive and negative obligations echo those stemming from the principle of cooperation expressed in Article 10 EC, in the light of which Article 11(2) could thus be interpreted. Support for this transposition can be found in the *Pupino* case.¹⁰⁶ Indeed, the inclusion of 'shall' makes Member States' loyalty and cooperation clearly mandatory, while suffering little exception, as suggested by the expressions 'actively' and 'unreservedly'. On the other hand, Article 11(2) TEU does not fall within the jurisdiction of the Court of Justice. Control that the CFSP obligation of cooperation is complied with is ensured only by the Council, hence by the Member States themselves.

The foregoing suggests that on the basis of the principle of cooperation, Member States and EU institutions are expected to cooperate with a view notably to facilitating the achievement of the Community and Union's tasks. The multifaceted principle of cooperation entails procedural obligations compelling the actors of the system of EU external relations to inform and consult one another.¹⁰⁷ The purpose of such cooperation is to enhance the overall coherence between Member States' external actions and those of the Union, be that through the Community, the CFSP, or the PJCCM.

2. Cooperation between the Council and the Commission

Alongside, and supplementing the mutual duty of cooperation between the Member States and the EU institutions, the TEU foresees in its Article 3 a duty of the Commission and the Council to cooperate with a view to ensuring the positive coherence between EC and EU external activities (a). Falling outside

¹⁰⁶ Further: Hillion and Wessel, *supra* n 68.

¹⁰⁷ It should be recalled that this duty of cooperation also binds the institutions in relation to the Member States: Case 230/81 *Luxembourg v European Parliament* [1983] ECR 255, see also Case C-246/07 *Commission v Sweden (PFOS)* (pending, OJ [2007] C183/19). Further: S Hyett, 'The Duty of Cooperation: A Flexible Concept' in Dashwood and Hillion, *supra* n 48, at 248.

the Court's jurisdiction, the requirement of Article 3 TEU is supported by the EU single institutional framework, a 'singleness' which will be enhanced by the Treaty signed in Lisbon by the EU Heads of State or Government in 2007, a Treaty inspired by the innovations envisaged by the defunct 2004 Constitutional Treaty (b).

(a) The principle of cooperation enshrined in Article 3 TEU

As mentioned earlier, Article 3 TEU foresees in its paragraph 2 that the 'Union' shall ensure the consistency of its external activities. Placed at the beginning of the TEU, the requirement guides the activities of the EU as a whole. In more practical terms, the Council and the Commission are made responsible for ensuring that coherence¹⁰⁸ and, since the Treaty of Amsterdam, they are under an obligation to cooperate to this end. This addition seemingly strengthens the operational feature of Article 3 TEU, which thus mirrors and supplements the principle of cooperation between the Member States and Community institutions foreseen in Article 10 EC.¹⁰⁹

Yet, in contrast to Article 10 EC, Article 3 TEU does not fall within the jurisdiction of the Court of Justice whose role in relation to the interface between the EU and the EC is instead restricted to the control of consistency (*viz* absence of contradiction between the different EC and EU external actions),¹¹⁰ on the basis of Article 47 TEU.¹¹¹ Indeed, it is uncertain whether judicial control of coherence (harmony and synergy of EU external actions) would be expedient. After all, coherence essentially implies a political assessment that may be better left to the political decision-making entities. However, this contention does not mean that any judicial control over Article 3 TEU would be inappropriate, or impossible to exercise. Article 3 TEU could generate *procedural* obligations comparable to those derived from Article 10 EC, for example obligation of information and consultation, compelling the Commission and the Council. Observance of those procedural requirements could be guaranteed by the Court, as is done in the

¹⁰⁸ Article 3(2) TEU.

¹⁰⁹ The complementarity between Art 10 EC and Art 3 TEU has been pointed out by R Frid, *The Relations between the EC and International Organisations. Legal Theory and Practice* (1995), at 149. J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2001), at 64, has equally highlighted the link between the duty of cooperation and Art 3 TEU; see also Eeckhout, *supra* n 48, at 154 (footnote 60).

¹¹⁰ In accordance with Art 46 TEU, the Court does not have jurisdiction on the Common Provisions. The only exceptions concern first, 'Article 6(2) with regard to actions of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty'; and second 'the purely procedural stipulations in Article 7, with the Court acting at the request of the Member State concerned'. The limits to the Court's jurisdiction, particularly to interpret the TEU Common Provisions, was recalled by the Court of Justice itself in eg Case C-167/94 *Grau Gomis* [1995] ECR I-1023, para 6. Further: Neuwahl, *supra* n 5, at 235ff.

¹¹¹ The intervention of the Court under the heading of consistency could also occur in situations of conflict between EC rules and national rules implementing an EU measure based on title V or VI TEU. The issue here would be of supremacy of EC law, and the Court of Justice could ask the national court to set aside the contentious national measure.

context of Article 10 EC.¹¹² Moreover, however politically charged coherence may be, one could still envisage a control similar to the one developed by the Court in relation to subsidiarity, also a highly political notion.¹¹³

(b) The importance of the single institutional framework

In addition to the obligation of cooperation between the Commission and the Council, the Treaty foresees that coherence may be ensured by the Union's single institutional framework. According to Article 3(1) TEU:

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*.

This Union institutional framework is thus conceived as an additional *factor* of consistency and coherence of the Union's activities. While it is single in terms of the institutions it involves, the institutional framework is however plural in terms of the interactions among institutions which take place within it. Article 5 TEU foresees that:

the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers *under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by other provisions of this Treaty* (emphasis added).

In other words, the interplay between the institutions takes different forms, for the powers and role of each institution vary depending on the EU sub-order in which it acts, and on the subject-matter of the action within each of these sub-orders.¹¹⁴

The differentiated institutions' powers have generated inter-institutional squabbling within and across the different EU sub-orders.¹¹⁵ This state of affairs has partly contributed to increased fragmentation of EU external relations in the course of the 1990s, particularly following the Treaty of Amsterdam.¹¹⁶ Frictions and

¹¹² Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469.

¹¹³ Case C-491/01 *British American Tobacco* [2002] ECR I-11453; Case C-110/03 *Belgium v Commission* [2005] ECR I-2801; and Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653.

¹¹⁴ As pointed out by Joseph Weiler, differentiation in the roles and powers of the institutions can be as significant *within* a sub-order, notably the EC Treaty, as in the context of the TEU, without questioning the existence of a Community institutional framework; Weiler, *supra* n 80, at 58ff; see also A Von Bogdandy and M Nettesheim, 'Ex pluribus unum: Fusion of the European Communities into the European Union' (1996) 2 ELJ 267; and evidence of J-C Piris before the Working Group III (Legal personality; WG III-WD3) of the European Convention 26 June 2002, 9–10.

¹¹⁵ See in this regard: House of Lords EU Committee, 34th Report (2005–2006): 'The EU and Africa: Towards a Strategic Partnership', para 439; Timmermans, *supra* n 3.

¹¹⁶ Further: C Hillion, 'Institutional Aspects of the Partnership between the EU and the Newly Independent States of the Former Soviet Union—Case Studies of Russia and Ukraine' (2000) 37 CMLRev 1211; from the same author, *The European Union and its East-European Neighbours—A Laboratory for the Organisation of EU External Relations* (2008).

tensions have occasionally been resolved before the Court,¹¹⁷ while inter-institutional arrangements have been adopted to clarify the powers of each institution.¹¹⁸

But beyond this legal and/or judicial clarification of competences, there appears to be momentum for enhancing coherence, by finding new ways to enhance synergy, including at the judicial level.¹¹⁹ The innovations proposed by the ill-fated Treaty establishing a Constitution for Europe (TCE) were remarkable in this regard, particularly the proposal to establish the post of a Union Minister for Foreign Affairs (UMFA), destined to embody both the functions of the Commissioner for external relations and that of the High Representative for CFSP.¹²⁰

The Treaty signed in Lisbon in 2007 maintains the function and profile of the UMFA, albeit with the different title of ‘High Representative of the Union for Foreign Affairs and Security Policy’.¹²¹ Hence, based on the original text of Article I-28 TCE, the new HR is set to conduct the CFSP and Common Security and Defence Policy of the Union, contributing through the submission of proposals to the development of those policies, which s/he carries out as mandated by the Council.¹²² Also, s/he is set to preside over the Foreign Affairs Council,¹²³ and be also one of the Vice-Presidents (VP) of the Commission, within which s/he is responsible for external relations, and for co-ordinating other aspects of the Union’s external action.¹²⁴ In other words, the ‘double-hatting’ formula foreseen by the TCE is also part of the new constitutional complexion, a formula that

¹¹⁷ Eg Case C-170/96 *Commission v Council (Airport Transit Visa)* [1998] ECR I-2763; C-176/03 *Commission v Council (Environmental Penalties)* [2005] ECR I-7879; Case C-440/05 *Commission v Council (ship-source pollution)* (judgment of 23 October 2007); Case C-91/05 *Commission v Council (ECOWAS)* (judgment of 20 May 2008); Joined Cases C-317/04 and C-318/04 *Parliament v Council* (30 May 2006); Case C-94/03 *Commission v Council (Rotterdam Convention)* [2006] ECR I-1; Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107.

¹¹⁸ Heliskoski, *supra* n 100.

¹¹⁹ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; Case C-433/03 *Commission v Germany* [2005] ECR I-6985; Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

¹²⁰ Article I-28(4) TCE foresaw that: ‘The Union Minister for Foreign Affairs shall be one of the Vice-Presidents of the Commission. He or she shall ensure the consistency of the Union’s external action. He or she shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the Union Minister for Foreign Affairs shall be bound by Commission procedures to the extent that this is consistent with paras 2 and 3.’

¹²¹ Article 18 (3) and (4) of the consolidated version of the Treaty on European Union OJ [2008] C115 (hereinafter ‘TEU (Lisbon)’). See also point 3 of the IGC Mandate, annexed to the Presidency Conclusions, 21–22 June 2007.

¹²² Article 18(2) TEU (Lisbon). See also Art 27 TUE (Lisbon).

¹²³ Article 18(3) TEU (Lisbon). This formula, also foreseen in Article III-296(1) TCE, was seen by the WG on external action as advantageous from the point of view of continuity and consistency (Final report of Working Group VII on external action; CONV 459/02, 16 December 2002; pt 26).

¹²⁴ Article 18(4) TEU (Lisbon), which also stipulates that ‘[i]n exercising these responsibilities within the Commission, and only for these responsibilities’, s/he is to be ‘bound by Commission procedures to the extent that this is consistent’ with his or her other functions within the Council.

may also be regarded as a consolidation of the increasing collaboration between the Commission and the current HR.¹²⁵

With one foot in the Commission and the other in the Council, the new HR/VP is expected to incarnate the consistency and coherence of the Union's external action, as indeed stipulated by Article 18(4) of the new Treaty. Whether the competence bickering between the Council and the Commission will produce a schizophrenic double-hatted HR/VP remains to be seen.¹²⁶ The hope of course is that with only one head, the HR/VP may effectively keep a sense of direction for the EU external action.

In this task, the HR/VP is to be assisted by a European External Action Service (EEAS) that should work in cooperation with the diplomatic services of the Member States, thereby fostering the coherence between the Member States and the Union's actions. In addition to staff seconded from the national diplomatic services of the Member States, the EEAS would also consist of officials from relevant departments of the General Secretariat of the Council and of the Commission,¹²⁷ thus potentially enhancing coherence between the various external policies of the Union.¹²⁸

Under the new dispensation, the HR/VP should take part in the work of the European Council.¹²⁹ S/he would thus be a powerful figure, insofar as s/he would have a say in all the key institutions shaping the external action of the Union.¹³⁰ It should be pointed out that the Treaty of Lisbon keeps intact the office of

¹²⁵ In the form of eg HR and Commissioner 'Joint-Papers' or 'double-hatting' in the field, *viz* EU Special Representative being at the same time Head of the Commission Delegation, as tested in Macedonia (see House of Lords EU Committee, Report 48th Report (2005–2006): 'Europe in the World' (HL 268)); for further examples of cooperation: see COM (2006) 278; the Presidency Stocktaking Reports (above n 9). The development of the European Neighbourhood Policy also typifies this collaboration between the HR and the Commissioner for external relations; further M Cremona and C Hillion, '*L'Union fait la force?* Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy' (2006) EUI Law Working Papers 39.

¹²⁶ On this point, see J Wouters and D Coppens, 'A Global Actor in the Making? Reforming the EU's External Relations Machinery with or without the Constitution' (2005) Institute for International Law Working Paper 79; B Crowe, 'The Significance of the New European Foreign Minister' (2004) 2 *Fornet—CFSP Forum* 1, available at: <<http://www.fornet.info/documents/CFSP%20Forum%20vol%20no%20no%204.pdf>>; M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 *CMLRev* 1347.

¹²⁷ See in this regard, the joint progress report by the Secretary-General/High Representative and the Commission to the European Council on the European External Action Service, 9956/05, 9 June 2005. For a concise analysis of this EEAS, see F Cameron, 'Towards an EU Diplomatic Service' (2004) *European Policy Centre* (2004); C Hill, 'A Foreign Minister without a Foreign Ministry—Or With Too Many?' (2003) 1 *Fornet—CFSP Forum* 1, available at <<http://www.fornet.info/documents/CFSP%20Forum%20vol%201%20no%201.pdf>>.

¹²⁸ Article 27 TEU (Lisbon), which also foresees that the organization and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the HR/VP after consulting the European Parliament and after obtaining the consent of the Commission.

¹²⁹ Article 15(2) TEU (Lisbon).

¹³⁰ A Arnall, 'The Member States of the European Union and Giscard's Blueprint for its Future' (2004) 27 *Fordham International Law Journal* 503, at 524ff.

President of the European Council who, 'at his level and in that capacity, [shall] ensure the external representation of the Union on issues concerning its [CFSP], without prejudice to the powers of the [HR/VP]'.¹³¹ Given this potential overlap of functions between these two big wigs of the Union external action, it will be crucial that the division of tasks be clear, and that cooperation between the two be real, also with the President of the European Commission.¹³² Loyalty and institutional logics are likely to remain pivotal to the functioning of the system.¹³³

4. Conclusion

This essay has attempted to unpack that notion of coherence in the context of EU external relations, by distinguishing it from the concept of consistency, and by examining the legal principles, contained in the TEU, which may contribute to its achievement.

It was suggested that 'consistency', understood as absence of legal contradiction, is an essential element of coherence. Such consistency is ensured notably through the observance of EU rules on distribution of powers, and thanks to mechanisms to handle conflicts between acts adopted by each actor of the EU system of external relations. In the Member States–EC interface, the principles of attributed powers and primacy of EC law play a key role in ensuring consistency, and so does the preservation of the *acquis communautaire* in the EU–EC interface. Importantly, observance of these principles is guaranteed by the European Court of Justice, in cooperation with national courts. By contrast, consistency between the actions of the Member States and those taken under the other sub-orders of the EU is guaranteed by the Council and thus by the Member States themselves, given the limited supranational nature of the CFSP and PJCCM. The only nuance to this point is that the Court has jurisdiction to ensure the effectiveness of PJCCM law throughout the Union,¹³⁴ while national courts may play a role in ensuring that Member States comply with their EU obligations, if their domestic law so permits, thereby contributing to the consistency between EU external actions and Member States' foreign policy.¹³⁵

It was also contended that coherence in EU external relations does not only depend on the absence of legal contradiction between the different instruments of EU external action. Coherence also stems from the *degree of cooperation* between the different actors in the system, and particularly cooperation between

¹³¹ Article 15(6) TUE (Lisbon).

¹³² Further: Editorial Comments, 'Mind the Gap!' (2008) 45 CMLRev 317; 'New EU Foreign Minister to Complicate Institutional Power Balance' *EUobserver*, 13 August 2004.

¹³³ J-P Jacqué, 'The Principle of Institutional Balance' (2004) 41 CMLRev 383.

¹³⁴ As suggested by Cases C-355/04 *P Segi and Others v Council* and C-354/04 *P Gestoras Pro Amnistia and Others v Council*, judgments of 27 February 2007, not yet published.

¹³⁵ Further, Hillion and Wessel, *supra* n 68.

the Member States, on the one hand, and the Union's institutions, on the other; as well as cooperation between the institutions themselves when acting in the different EU procedural frameworks. In its respective field of power, each actor is bound by a multifarious principle of cooperation. In essence, this principle entails procedural obligations, whose purpose is to ensure that each actor's competence is exercised with the ultimate purpose of contributing to the general Union's objective of asserting its identity on the international scene. Rather than aiming at policing the boundaries between the different areas of competences, the duty of cooperation aims at moderating the implications of such division. It has a more positive undertone, suggesting that the Union's external action is not a zero sum game.