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The Two (or Three) Treaty Solution: The New Treaty Structure of the EU

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I. Introduction[1]

The Treaty of Lisbon is essentially an amending treaty; it amended the Treaty on European Union and the EC Treaty, renaming the latter the Treaty on the Functioning of the EU (TFEU).[2] These amendments are major ones and include the replacement of the EC by the EU. Nevertheless, we do not see, as the Constitutional Treaty proposed, a complete replacement of the previous treaties with a new legal instrument. Instead, we have the impression of incremental change through amendment, as has happened many times before.[3]

This decision, to act through an amending treaty and to retain the separated treaty structure of the existing constitutional architecture, was obviously predominantly driven by the need to demonstrate first that the Treaty of Lisbon is something different from the Constitutional Treaty (and that the public voice evidenced in the negative referendums on the Constitution had been heard), and second that the new Treaty does not in fact make major constitutional changes to the status quo (and that therefore new referendums did not need to be held). As the IGC Mandate agreed by the European Council in June 2007—which formed the basis for the negotiations of the Treaty of Lisbon—stated, 'The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution," is abandoned.... The TEU and the Treaty on the Functioning of the Union will not have a constitutional character.'[4] On the other hand, the 'innovations resulting from the 2004 IGC' (and reflected in the

[1] Thanks to Bruno de Witte, Paivi Leino-Sandberg, Madalina Moraru and Anna Södersten for helpful conversations; this is not to imply that they share the views expressed in what follows.

[2] In this chapter, the abbreviation 'TEU' refers to the Treaty on European Union in the version in force after 1 December 2009, while 'TFEU' refers to the Treaty on the Functioning of the European Union. The abbreviation 'EC' after a Treaty article refers to a provision of the European Community Treaty in the version in force until 30 November 2009; similarly 'EU' refers to an article of the Treaty on European Union in the version in force until that date.

[3] See B de Witte, 'The Question of the Treaty Architecture: 1957–2007' in A Ott and E Vos (eds), *Fifty Years of European Integration—Foundations and Perspectives* (TMC Asser Press, 2009).

Constitutional Treaty) were indeed to be incorporated into the TEU and TFEU.[5] Is the Reform Treaty (as the IGC Mandate called the Treaty of Lisbon) therefore merely about presentation, public relations and a purely cosmetic adjustment, given that the text of the resulting two Treaties is very similar, in essence, to the Constitutional Treaty? What are its implications, as compared on the one hand with the Constitutional Treaty and on the other with the pre-Lisbon state of play?

Prior to the coming into force of the Lisbon Treaty the European Union was essentially based on two treaties[6] and three pillars;[7] the Constitutional Treaty would have simplified matters by replacing these with one treaty and one pillar; following the Treaty of Lisbon we have two treaties and (ostensibly) one pillar: we might call this the 'two treaty solution'. This chapter will first of all examine the two treaty solution as established by the Treaty of Lisbon, and will then focus on the legal relationship between the two Treaties, comparing this structure to the prior relationship between the EU and EC Treaties as well as to the Constitutional Treaty. In a final section we will address the somewhat anomalous and 'forgotten' position of the Euratom Treaty which is actually a third treaty in this two-treaty picture.

My conclusion is that the two treaty solution offered by the Treaty of Lisbon is in fact rather different both from the Constitutional Treaty and—to an even greater extent—from the status quo ante of the pre-Lisbon Treaties. It is more than a purely cosmetic exercise (it does not just disguise the Constitutional Treaty) but at the same time it produces results significantly different from the pre-existing treaty structure. As we shall see, some crucial questions as to the precise relationship between the two Treaties are left unanswered and the Euratom is in a decidedly ambiguous position.

II. The Two Treaty Solution

It might be thought that the division between the two Treaties (TEU and TFEU) is only formal and that the unifying effect of the single Constitutional Treaty has been fully preserved (remembering that even the Constitutional Treaty did not fully dismantle the pillar differentiation). However, the Lisbon Treaty does not merely split the Constitutional Treaty into two. It preserves the basic structure and differentiation between the pre-existing EU and EC Treaties, while making substantial amendments to both. What follows is a very brief summary of the way in which the provisions are distributed between the TEU and the TFEU.

[5] Ibid paras 1 and 4.

[6] In fact we had—according to J-C Piris's count—three basic Treaties (EC, TEU and Euratom) with a total of 36 Protocols (of the same legal value as the Treaties to which they are attached), nine amending or supplementary Treaties and six accession Treaties (18 treaties not counting Protocols) all with provisions in force: Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press, 2006) 57.

[7] Traditionally, the pre-Lisbon EU was regarded as being made up of three pillars: the first encompassing the EC and Euratom (and formerly the Coal and Steel Community); the second being the Common Foreign and Security Policy and the third being Police and Judicial Cooperation

A. The Treaty on European Union

Title I contains the General Provisions, including:

- Creation of the Union, Article 1
- Relations between the TEU and TFEU, Article 1
- Union values, Article 2
- Union objectives, Article 3
- Reserved powers, the equality of the Member States and the loyalty principle, Article 4
- The principles of conferral, subsidiarity and proportionality, Article 5
- Fundamental human rights and accession to the ECHR, Article 6
- Sanction for serious breach of Union values, Article 7
- Relations with neighbours, Article 8

Title II is on democratic principles, including the role of national parliaments, and European Union citizenship (the detailed provisions on citizens' rights are in the TFEU).

Title III provides the institutional framework, but does not include details of decision-making procedures or the jurisdiction of the Court of Justice, which are in the TFEU. It includes among the institutions the European Council and the European Central Bank. It also provides for the office of High Representative for Foreign Affairs and Security Policy.

Title IV is on enhanced cooperation.

Title V contains first, the general provisions on external action and second, the detailed competence-conferring provisions on the Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP).

Title VI contains final provisions including:

- Legal personality of the Union, Article 47
- Treaty revision, Article 48
- Membership of the Union, including accession (Article 49) and withdrawal (Article 50)
- Territorial scope, Article 52
- Language versions, Article 55

B. The Treaty on the Functioning of the European Union

Part I contains the common provisions, first giving a description of the TFEU and its relationship to Article 1 TEU.

Title I sets out the categories of Union competence.

Title II contains provisions of general application, including:

- Principles of consistency and conferral
- Horizontal provisions on equality, employment, social protection, discrimination, environment, consumer protection, animal welfare, services of general interest, transparency, data protection

Part II contains specific provisions on nationality-based discrimination and citizenship.

Part III is on Union policies and internal action, including:

- Internal market
- Agriculture and fisheries
- Workers, Establishment, Services and Capital
- Area of freedom, security and justice, incorporating amended versions of the former 'third pillar', with chapters on borders, asylum and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters and police cooperation
- Transport
- Competition, taxation, approximation of laws
- Intellectual property
- Economic and monetary policy
- Employment
- Social policy
- Education and training
- Culture, health, consumer protection, industry, cohesion, research, space, environment, energy, tourism
- Civil protection
- Administrative cooperation

Part IV is on the association of the overseas countries and territories.

Part V is on external action (except CFSP), including trade, development cooperation, economic, financial and technical cooperation, humanitarian assistance, restrictive measures ('sanctions') and procedures for concluding international agreements.

Part VI contains

- the institutional provisions, including those on the jurisdiction of the Court of Justice
- the types of legal act
- decision-making procedures
- procedure for adoption of the budget
- detailed provisions on enhanced cooperation

Part VII contains the final provisions including the flexibility clause (Article 352).

Apart from the two Treaties, the constitutional architecture of the EU includes the 37 Protocols attached to the TEU and TFEU,[8] the Charter of Fundamental Rights,[9]

[8] All Protocols are attached to both the TEU and TFEU; some are attached also to the EAEC: on this see below section VII.

[9] By virtue of Article 6(1) TEU the Charter has the same legal value as the Treaties. For the revised Charter as proclaimed on 12 December 2007, see OJ 2007 C 303/1. There is no space in this chapter

and the Treaty establishing the European Atomic Energy Community.[10] The Protocols range in length and substance; some establish a set of detailed rules such as the Statutes of the Court of Justice and European Central Bank, Protocol 7 on the privileges and immunities of the Union, or Protocol 10 on permanent structured cooperation in defence; some set out special rules or derogations for particular Member States; and some are aimed at clarifying particular treaty provisions.

The division and allocation of matters between the two revised Treaties is not as logical as that between Parts I and III of the Constitutional Treaty. Thus, the basic provision on types of competence is in the TFEU (Article 2 TFEU), while the provision on the principles of conferral, subsidiarity and proportionality is in the TEU (Article 5 TEU). The provisions establishing the institutions are in the TEU but those on decision-making, types of legal act and the jurisdiction of the Court are in the TFEU. In fact, neither treaty would be able to stand alone. The TEU would have objectives and institutions but no powers or policies (apart from CFSP). The TFEU would have powers but nothing on the principles governing their exercise, the establishment of the institutions or indeed the creation of the Union.

III. Linking the Two Treaties

The two Treaties provide for a single Union on which competences are conferred (Article 1(1) TEU) and which will 'replace and succeed' the EC (Article 1(3) TEU). Some had already argued in favour of seeing the Union legal order as a single entity.[11] If we regard a legal order as a set of norms all ultimately deriving their authority and legitimacy from the same source, the new interrelationship between the Treaties makes it clear that we are now talking about one single Union legal order, founded on two treaties, not two separate legal orders. Although there are two treaties, they are, as we have seen, incapable of standing alone (this was not true of the former EU and EC Treaties) and together they provide the 'foundation' for the Union. The relationship between the two treaties is established in Article 1 TEU and Article 1 TFEU.

> The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.[12]

to discuss the relationship between the Charter, the Treaties and general principles of EU law; see further M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *CMLRev* 617, 661–72.

[10] On the EAEC see section VII.

[11] A von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System' (1999) 36 *CMLRev* 887; C Herrmann, 'Much Ado about Pluto? The Unity of the European Union Legal Order Revisited' in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008).

[12] Article 1(3) TEU.

> This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as 'the Treaties'.[13]

The two Treaties are of equal value, and EC priority is removed: the reference to the EU Treaty 'supplementing' the EC in the former Article 1(3) EU has disappeared and the Union is now founded on both treaties rather on the 'European Communities,' as previously. The reference to maintaining and building on the Community *acquis* in the former Article 2 EU has also disappeared—in fact all references to the *acquis communautaire* per se have disappeared.[14] If EC priority has disappeared, neither is the TEU with its more general and institutional (not to say constitutional) provisions given a more fundamental status than the TFEU, although we should note that the simplified revision procedure only applies to the TFEU so in some sense the TEU provisions are more entrenched. As Dougan has said, the two Treaties, together with their Protocols, 'should be read as a seamless ensemble of primary law for the Union'.[15]

The merger of the EC into the EU—into a single entity with a single legal personality—is reflected in the treaty structure. The two Treaties are bound more closely together than were the EU and EC Treaties.[16] In a clever piece of drafting, the TEU and TFEU refer to 'the Treaties' not only in Article 1 in each, but throughout. So for example under Article 17(1) TEU, the Commission shall 'ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them'; under Article 19(1) TEU, the Court of Justice 'shall ensure that in the interpretation and application of the Treaties the law is observed'; under Article 18 TFEU, 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' Under Article 167(4) TFEU, 'The Union shall take cultural aspects into account in its action under other provisions of the Treaties'. Under Article 193 TFEU more stringent protective measures for the protection of the environment adopted by Member States 'must be compatible with the Treaties'. On the other hand, such references to 'the Treaties' are not

[13] Article 1(2) TFEU.

[14] It is rather ironic that the term *acquis communautaire* disappears, while other uses of *acquis*, which have developed out of its original use in relation to the Community legal order, remain: see Article 20 (4) TEU which refers to the accession *acquis* in the context of enhanced cooperation, and Article 87(3) TFEU which refers to the Schengen *acquis*.

[15] M Dougan, above n 9 at 624.

[16] Although there were references to the EC Treaty in the EU Treaty, notably in the Common Provisions, there were rather few references to the EU Treaty in the EC Treaty (eg Article 11 EC on closer cooperation referring to Articles 3 and 4 EU; Article 61(a) and (e) EC on the Area of Freedom Security and Justice referring to the third pillar; Article 125 EC on employment referring to the objectives established in Article 2 EU as well as Article 2 EC; Article 268 EC on the budget referring to CFSP administrative expenditure; Article 300 EC referring to procedures for amendment set out in Article 48 EU; Article 301 EC on economic sanctions against third countries; Article 309 EC referring to the procedure established in Article 7 EU). In addition, the procedures for accession and amendment were established by the EU Treaty and applied to the Union as a whole and to all the founding Treaties.

entirely systematic, and tend to replace earlier references to 'this Treaty' in the equivalent provisions in the EC Treaty.

In addition to the use of the term 'the Treaties', the Treaties are linked in other ways. As will have been seen from the above summary of their content, some issues are dealt with by provisions in both treaties with consequent inter-treaty cross-referencing. Thus the principle of enhanced cooperation is established in Article 20 TEU, which refers to the detailed provisions in Articles 326–334 TFEU. The concept of EU citizenship is introduced in Article 9 TEU among the provisions on democratic principles, the detailed provisions being found in Articles 20–24 TFEU. Article 52 TEU provides that the territorial scope of 'the Treaties' is defined in Article 355 TFEU. The citizen's initiative is governed by Articles 11 TEU and 24 TFEU. The provision on the adoption of restrictive measures against third countries (Article 215 TFEU) refers to the prior adoption of a decision under the CFSP chapter of the TEU. One other example might be mentioned here, although the cross-treaty reference is not explicit. Article 8 TEU provides for a 'special relationship' with neighbouring countries, which may involve the conclusion of agreements with those countries containing 'reciprocal rights and obligations' as well as the possibility of joint activities. A number of reasons might be put forward for the placing of this provision right at the start of the TEU, instead of within Part V of the TFEU which deals generally with external relations, including provision for association and cooperation agreements. Its placing here, as well as the references to the 'special relationship' and the establishment of 'an area of prosperity and good neighbourliness' which is 'founded on the values of the Union' not only evoke the policy *acquis* of the European Neighbourhood Policy but suggest that this is about the status of the neighbouring countries vis-à-vis the Union rather than simply an external policy. Be that as it may, it is clear that agreements concluded on the basis of Article 8 TEU may cover all Union competences, including those found in the TFEU, and that the general treaty-making procedures laid down in Article 218 TFEU will apply.[17]

Second, a single set of objectives is applicable to both treaties and all policies. Article 2 TEU establishes the Union's values and Article 3 TEU its overall objectives; the separate objectives, tasks and activities previously set out in Articles 2 EU and 2, 3 and 4 EC have disappeared. A single set of legal acts applies across both treaties and all policy areas (although some acts—legislative acts—are excluded from the CFSP). The consistency provision in the TFEU (Article 7 TFEU) refers to all policies and activities of the Union and to all its objectives (objectives which are defined in the TEU). The only substantive area of activity that is spread between the two Treaties—external action—has a set of 'general principles and objectives'[18] which are explicitly stated to apply both to the CFSP Chapter in the

[17] The description of the agreements which may be concluded under Article 8 TEU, in its reference to reciprocal rights and obligations and joint action, resembles closely Article 217 TFEU which provides for the conclusion of association agreements; as the Court of Justice held in case 12/86 *Demirel* [1987] ECR 3719, at para 9, this provision 'empower[s] the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty'.

TEU and to Part Five of the TFEU and both of these refer back to these general principles and objectives.[19]

Are there then *any* provisions explicitly specific to one or other Treaty? Such provisions are in fact very limited, both in number and extent. First, the formal provisions on language versions, duration of the Treaties and ratification are separate for each treaty. Article 55 TEU on the authenticity of language versions refers only to 'this Treaty'; however, Article 358 TFEU simply provides that Article 55 TEU shall also apply to the TFEU, thereby making an explicit link. The separate treatment of duration and ratification in Articles 53 and 54 TEU and Articles 356 and 357 TFEU is a technical consequence of having two treaties.

Among the substantive provisions, there are two instances, the first relating to treaty revision, the second to certain treaty-specific competences. Article 48(6) TEU provides that the simplified revision procedure applies only to (parts of) the TFEU, not the TEU. However, the provision itself is contained in the TEU and also specifies the ordinary revision procedure which applies to both treaties. Second, each policy competence is defined within one or other of the Treaties (in most cases the TFEU) and two of the competence categories specified in Article 2 TFEU are expressly linked to one or the other Treaty. Under Article 2(3) TFEU the coordination of the Member States' economic and employment policies is to take place 'within arrangements as determined by' the TFEU itself; this does not imply that the TEU provisions are inapplicable to these policy fields; it appears to be a reference to the specific procedures operating in these two policy sectors and set out in the relevant TFEU provisions (Articles 5(1) and (2), 120–126, and 145–150 TFEU). Then, Article 2(4) TFEU provides that the CFSP competence is to be defined in accordance with the provisions of the TEU; we will consider the position of the CFSP in relation to the overall treaty structure below. In addition, two fields of shared competence make specific reference to the TFEU: the shared competences granted under Article 4(2) TFEU both for social policy and for common safety concerns in public health matters apply to 'the aspects defined in this Treaty'. This, however, seems to be concerned more with the Union/Member State balance of powers in setting limits to the competence granted to the Union than with the relations between the Treaties.

It is clear that the two revised Treaties are intertwined in a way in which the EC and EU Treaties were not; nevertheless they are two separate legal instruments. The question that then arises is what significance, if any, attaches to a provision being placed in one treaty rather than the other? Are the Treaties so connected that a provision's position in one rather than the other is no more (or less) significant than its allocation to a particular Chapter or Title, even in the absence of a specific cross-reference or inclusion of a reference to 'these Treaties'? We can look at this from two perspectives. On the one hand, we can ask to what extent general or horizontal

[19] Article 23 TEU; Article 205 TFEU. The provision on relations with neighbouring countries is an anomaly here: it is placed in Article 8 TEU, which falls outside the scope of Article 21(3) requiring respect for these general principles. Still, the wording of Article 21(1) and (2) is sufficiently general to

provisions placed in one treaty also apply to the other. On the other hand, we can question the significance of placing the CFSP in the TEU rather than the TFEU. And in what way should our answers to these questions be affected by Article 40 TEU?

IV. Applying Common and General Provisions

As we have seen, the TEU contains a set of 'common provisions', including those on the creation of the EU, provisions on the Union's values and objectives, on the principles of conferral, subsidiarity and proportionality, the principle of sincere cooperation, fundamental human rights and sanctions for serious breaches of the Union's values by a Member State. These provisions are in the TEU but refer to the Union and are clearly intended to be common to the Union as a whole and to govern the TFEU and actions governed by TFEU competences; this is uncontroversial. Thus, for example, if a serious and persistent breach of the Union's values was found under Article 7(2) TEU, the Council may decide under Article 7(3) to 'suspend certain of the rights deriving from the application of the Treaties to the Member State in question', including rights under the TFEU. Similarly, the principles of subsidiarity and proportionality are said in Article 5(1) TEU to apply to the use of the Union's competences and this clearly includes competences conferred by the TFEU (we shall discuss below whether it also includes the CFSP competence conferred by the TEU itself).

The TFEU contains a group of 'provisions having general application' in Title II, namely principles of conferral (again) and consistency (Article 7 TFEU); equality between men and women (Article 8); objectives of high levels of employment, education and public health, and adequate social protection (Article 9); combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 10); environmental protection and sustainable development (Article 11); consumer protection (Article 12); animal welfare (Article 13); services of general economic interest (Article 14); transparency and access to documents (Article 15); data protection (Article 16); and the status of churches and religious organizations (Article 17). Do these have 'general application' across both treaties? Or does their position at the start of the TFEU rather than among the common provisions of the TEU imply that they apply only to the policies contained in the TFEU itself? Or is this positioning simply a reflection of the fact that they represent a gathering together of a number of horizontal provisions formerly found in the EC Treaty? In some cases, indeed, the provisions reflect and expand on values, objectives and principles already found in the TEU (for example, the principles of equality, non-discrimination, social justice, environmental protection and sustainable development) and there is no reason to suppose that they are not intended to apply equally to both treaties. Even where this is not the case, it can surely be argued that provisions of general application should apply across all Union activities and policy sectors, in the absence of an express limitation or derogation. Thus, since Article 13 TFEU links concern for animal welfare to certain specific

policies (agriculture, fisheries, transport, internal market, research and technological development and space) it can be argued that there is no *obligation* in respect of other policies, such as external trade. Article 16 TFEU on data protection is subject to a specific provision on data protection in the context of the CFSP (Article 39 TEU); this latter competence is stated to be both 'in accordance with Article 16' and 'in derogation from' paragraph 2 of that provision which contains the decision-making competence. Decisions with respect to establishing data protection rules within the CFSP are thus covered by Article 39 TEU rather than Article 16 TFEU, but the principle of data protection established by Article 16(1) TFEU applies across both treaties and all Union activities.[20]

What then of Article 15 TFEU on transparency and access to documents? To what extent does it encompass action taken under the TEU, and more specifically, action in the framework of the CFSP? Our starting point here must be the fact that we are dealing with one single legal order, albeit containing within it different spheres of activity with different decision-making rules. The Treaty of Lisbon has changed the rule/exception relationship that existed between the EU and EC Treaties: whereas previously, there was no application of EC rules to the EU unless specified,[21] under the Lisbon Treaty the same rules will apply throughout unless a specific exception is made. As we will see in the following section, an exception *is* made in relation to the CFSP, and the question that must be answered is how far that exception extends; would it, for example, cover Article 15 TFEU in the absence of a specific derogation?

V. The Special Nature of the CFSP

The clearest example of the legacy of the EU and EC Treaties is the decision to retain the CFSP provisions in the TEU.[22] This may seem to be anomalous, and in a sense it is, as apart from the Neighbourhood Policy (Article 8 TEU) the CFSP is the only substantive policy competence established by the TEU. However, it is not only an anomalous historical legacy of the pre-existing treaty structure. It emphasizes—and is clearly intended to emphasize—the separation of the CFSP

[20] It is notable that whereas Article 16 TFEU refers in general to the right to the protection of personal data, and establishes a competence to legislate 'the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law', Article 39 TEU only refers to 'the processing of personal data by the Member States when carrying out activities which fall within the scope of [the CFSP]' thereby omitting processing of personal data by the EU institutions when acting within the scope of the CFSP. Since the derogation from Article 16(2) is not qualified this might perhaps be interpreted so as to exclude the latter from the EU's legislative competence; however, this seems both unlikely and contrary to the statement that Article 39 TEU is 'in accordance with' Article 16; according to Piris, the necessary implication is that the acts of the institutions, even within the field of the CFSP, will be covered by Article 16 TFEU and legislation adopted on that legal basis: J-C Piris, *The Lisbon Treaty* (Cambridge University Press, 2010) 265.

[21] Which did not prevent the Court from importing general principles in some cases: see Case C-105/03 *Pupino* [2005] ECR I-5285.

[22] This section will not discuss the impact of the Treaty of Lisbon on the CFSP more generally; for further discussion see chapter 13 below.

competence from other competences, something which was intended in the Constitutional Treaty but which its provisions did not make fully clear. The Constitutional Treaty had placed the CFSP in Part III among the other provisions on the Union's external action. The Lisbon Treaty divides these provisions on external action into three: a set of general provisions, including the EU's objectives, applicable to the whole of external policy (in the TEU); the common foreign, security and defence policy provisions (also in the TEU); and all other aspects of external action, including treaty-making procedures (in the TFEU). Although covered by common principles and objectives, including common strategy formation, the CFSP is thus separated off from other fields of external action.

This separation is not only a matter of placement in the Treaties. The CFSP is treated as a special type of competence in the TFEU (Article 2(4) TFEU), not being listed among the exclusive, shared, supporting, coordinating or supplementary competences but in a separate paragraph. Article 24(1) TEU emphasizes that the CFSP is subject to 'specific rules and procedures', and although exactly what this means is not explained some indications are given. First, the institutional balance in policy-framing, decision-making and implementation is different from other EU policy sectors; there is emphasis on the role of the European Council, the Council and the High Representative as opposed to the Commission and European Parliament.[23] Second, although the Treaty of Lisbon abolished the special types of CFSP instrument introduced by the Treaty of Maastricht (the common position and the joint action), replacing them with 'decisions', these decisions are by default to be adopted unanimously, and—most significantly—legislative acts may not be adopted.[24] Third, the so-called 'flexibility clause', Article 352 TFEU (ex Article 308 EC), may not be used in order to achieve CFSP objectives.[25] Fourth, there is the 'non-affect' clause in Article 40 TEU, which seems designed to separate the CFSP from other policy competences and which will be discussed more fully in the next section. Finally, the jurisdiction of the Court of Justice over 'provisions relating to' the CFSP is strictly limited; the Court may monitor compliance with Article 40 TEU and may also hear cases brought under Article 263 TFEU for

[23] The European Council is to establish overall strategy (Articles 22(1) and 26(1) TEU); the Council is to 'frame' the CFSP and take decisions to 'define' and 'implement' it (Article 26(2) TEU); the High Representative is to submit proposals to the Council (Articles 22(2) and 27(1) TEU), ensure the implementation of European Council and Council decisions (Article 27(1) TEU) and (together with the Member States) to put the CFSP into effect (Article 26(3) TEU); the Commission, by contrast, is represented in CFSP policy-making through the High Representative who is a Vice President of the Commission, and it also assists the High Representative through its officials in the External Action Service (Article 27(3) TEU); the European Parliament is to be regularly consulted by the High Representative (Article 26 TEU).

[24] Articles 24(1) and 31(1) TEU; see also Declaration 41. The joint action and common position have been replaced by decisions on operational action (Article 28 TEU) and decisions which 'define the approach of the Union to a particular matter of a geographical or thematic nature' (Article 29 TEU). Decisions are adopted by the European Council or Council; the exclusion of legislative acts excludes the European Parliament from formal participation in decision-making.

[25] Article 352(4) TFEU; see also Declaration 41, which affirms that Article 352 may be used to achieve the Union objectives set out in Article 3(5) TEU 'with respect to external action under Part V of the [TFEU],' in other words non-CFSP external action. It may nevertheless be argued that the flexibility clause is scarcely necessary.

review of the legality of CFSP decisions providing for restrictive measures against natural and legal persons.[26]

The move from one Constitutional Treaty to two treaties, and the corresponding separation of the CFSP and explicit reference to 'specific rules and procedures', underline the distinctive nature of the CFSP. They make it less likely that the Court would seek to minimize the difference, as it might have done in the ambiguous context of the Constitutional Treaty. The special status of the CFSP is not equivalent to a derogation from a fundamental principle, to be interpreted strictly (with the assumption of preference for the Community method).[27] The CFSP is given its own status and space, indicated in particular by Articles 24 and 40 TEU and Article 352(4) TFEU. In some sense the CFSP remains a separate 'pillar' of the EU. However, neither should we exaggerate the separation: the 'specific rules and procedures' do not put into question the single legal order; the chapter on the CFSP is included in the same Title as, and is subject to, the general principles governing the Union's external action; it is part of that external action and part of the same legal system, albeit with a different institutional balance and decision-making procedure; the European Union is a single legal person, a single international actor in both CFSP and non-CFSP fields. Thus, for example, Article 220 TFEU on cooperation with the UN and other international organizations applies to CFSP as well as non-CFSP matters, and under Article 221 TFEU Union delegations will represent the whole of EU policy, including CFSP. Article 222 TFEU, the 'solidarity clause', is a striking example of a provision which brings together both internal and external security, action which may fall within CFSP as well as non-CFSP powers, with an explicit cross reference to Article 31 TEU (CFSP decision-making). Without denying the specificity one may say that there is a presumption that, where no special rule for the CFSP is mentioned, the general rules will apply.

Let us take the example of CFSP decisions. There is nothing to suggest that they are not 'decisions' in the sense of Article 288 TFEU and thus binding legal acts;[28] however, they cannot, according to the 'specific rule' mentioned above, be legislative acts. Therefore they cannot be adopted according to the ordinary legislative procedure,[29] nor may they create delegated powers in the sense of Article 290 TFEU; or confer implementing powers on the Commission under Article 291 TFEU; however, they may provide for implementation by the Council.[30] As non-legislative acts, CFSP decisions are not subject to the procedures established in Protocol 2 on the application of the principles of subsidiarity and proportionality,

[26] Article 275 TFEU.

[27] But see D Eisenhut, 'Delimitation of EU-Competences under the First and Second Pillar: A View between *ECOWAS* and the Treaty of Lisbon' (2009) 10 *German Law Journal* 585, 600ff, who argues that the 'primacy of supranational law' should prevail even under the Lisbon regime.

[28] De Witte takes the view that the Treaties are ambiguous here and that the drafters of the Lisbon Treaty probably did not intend the CFSP decision to be the same legal instrument as the Article 288 TFEU decision: B de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty—EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008) 79, 90.

[29] This is reserved for legislative acts: Article 289 TFEU.

[30] Articles 24(1) and 26(2) TEU.

which apply only to legislative acts. This does not mean, however, that these principles as such are irrelevant to the CFSP: there is no reason, for example, why the principle of proportionality established in Article 5(4) TEU should not be taken into account by the Court of Justice when engaging in judicial review under Article 275(2) TFEU of a CFSP decision imposing restrictive measures. As non-legislative acts, they are not subject to Article 15(2) TFEU which requires the Council to meet in public when considering and voting on a legislative act. However, this does not prevent the application of the right of access to documents relating to CFSP issues under Article 15(3) TFEU, as indeed was the case before the Lisbon Treaty, since Article 255 EC was applicable to the CFSP by virtue of former Article 28(1) EU.[31]

To take a principle of Union law which is not regulated explicitly by the Treaties, what of the direct effect of CFSP decisions? Decisions per se are capable of direct effect under Union law,[32] and without express provision[33] it seems difficult to exclude CFSP decisions as a category from the possibility of direct effect. Whether or not a specific CFSP decision possesses this characteristic will depend on its nature and content and in practice many of them will not entail the granting of individual rights. Others, however, may do so, particularly those imposing restrictive measures which must include 'necessary provisions on legal safeguards',[34] and may be challenged by individuals pursuant to Article 275(2) TFEU. The issue will have to be decided on a case-by-case basis, either by the Court of Justice or, where its jurisdiction is excluded, by a national court.[35]

Since the CFSP is not categorized as either an exclusive, shared, supporting, coordinating or supplementary competence, the Treaties leave undefined the important question of the relationship between Union and Member State powers in this field. By giving the CFSP a separate status, and deliberately not including it among the supporting, coordinating or supplementary competences in Article 6 TFEU, the Treaties make clear that this policy field is not intended merely to complement or support Member States' foreign policies; it is to develop an identity of its own. That said, to what extent do the principles and rules associated with the 'supranational' EC Treaty relating to the principle of sincere cooperation, primacy, or exclusivity in relation to international agreements, now apply to the CFSP? The

[31] That is not to say that specific exceptions are not possible. Under Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43, Article 4(1)(a), access to a document may be refused where its disclosure would undermine the public interest as regards, inter alia, public security, defence and military matters or international relations and there are special procedures for sensitive documents established by Article 9.

[32] Case 9/70 *Grad* [1970] ECR 825, para 5; see also as regards the direct effect of decisions, the Opinion of Advocate General Trstenjak in Case C-80/06 *Carp* [2007] ECR I-4473, para 55 et seq.

[33] cf former EU, Article 34(2)(b).

[34] Article 215(3) TFEU.

[35] This latter possibility, with its opportunity for divergent interpretations at national level, is one major disadvantage of the limits to the Court's jurisdiction over the CFSP. Even if one were to take the view—contrary to that expressed here—that CFSP decisions are by their nature incapable of direct [illegible] different conclusion.

principle of sincere cooperation is expressed in Article 4(3) TEU.[36] It refers to 'the Treaties', the Union, and Union objectives in general terms and there is nothing to indicate that it would not apply to all Union policy fields, including the CFSP. There is an additional loyalty clause specific to the CFSP in Article 24(3) TEU, but unlike Article 39 TEU on data protection, there is no indication that this is intended to derogate from Article 4(3). The emphasis in Article 24(3) TEU on the Member States' obligation to support the Union's CFSP and the emphasis elsewhere in the CFSP chapter on the need for the Member States to implement CFSP acts[37] can be seen to counterbalance the fact that the Commission does not have enforcement powers in relation to the CFSP, rather than replacing the general loyalty clause.[38]

The provision on primacy of Union law that was in the Constitutional Treaty has been removed;[39] it reappears as Declaration number 17 which purports to affirm the application of the principle to 'the Treaties' (that is, TEU and TFEU) although the 'well settled case law' to which it refers does not affirm the primacy of EU law but only of EC law. In any event, primacy in the strong sense of the *Simmenthal* case is intended to ensure the application in the national legal order of acts which are directly applicable.[40] Although this may possibly be the case for some CFSP decisions it will certainly not apply to all, and since the Court of Justice has no preliminary ruling jurisdiction over CFSP acts,[41] there will be little opportunity for the Court to declare a CFSP act to have primacy over national law, or (for example) to apply its *Francovich* case law[42] to failures to implement CFSP decisions. As Van Elsuwege points out, to apply a strong doctrine of primacy in

[36] Article 4(3) TEU provides: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

[37] Eg Articles 26(3), 28(2), 29, 32, 42(1) and (3) TEU.

[38] Under Article 24(3) TEU it is for the Council and the High Representative to ensure compliance with the loyalty principle as regards the CFSP; the Court of Justice has no jurisdiction under Article 258 TFEU in respect of provisions relating to the CFSP.

[39] This removal was stipulated by the IGC Mandate agreed by the European Council in June 2007: see above n 4, para 3.

[40] Case 106/77 *Simmenthal* [1978] ECR 629. See further M Cremona, 'The Union's External Action: Constitutional Perspectives' in G Amato, H Bribosia and B de Witte (eds), *Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (Editions Bruylant, 2007) 1173, 1194.

[41] Although the decision of the Court in *Segi* should be borne in mind: C-355/04 P *Segi v Council* [2007] ECR I-01657, paras 52–3, in which the Court held that 'all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties' must be subject to control by the Court of Justice. CFSP acts affecting individuals are indeed subject to control by the Court via judicial review under Articles 263 and 275(2) TFEU, but the preliminary ruling procedure is part of the 'complete system of legal remedies and procedures' offered to individuals by Union law: Case C-50/00 P *Union de Pequeños Agricultores v Spain (UPA)* [2002] ECR I-6677, para 40.

[42] See Joined Cases C-6/90 and C-9/90 *Francovich & Bonifaci v Italy* [1991] ECR I-5357; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany* and *R v Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029.

national legal orders without the possibility of making a preliminary ruling would put the national courts in a potentially precarious position.[43]

It is clear that the CFSP is not an exclusive competence, since these are listed in Article 3(1) TFEU. It also appears not to be a shared competence to which pre-emption applies.[44] However, ambiguity remains: it is not clear from the text whether the provision on exclusive competence to conclude international agreements (Article 3(2) TFEU) applies to the CFSP. On the one hand, as we have already seen, the CFSP appears to be categorized as neither exclusive nor shared competence; on the other hand, this provision is drafted in general terms without reference to specific types of competence and its application to the CFSP is not excluded.[45] Declarations 13 and 14 affirm that the CFSP will not affect the responsibilities of the Member States for the formulation and conduct of their foreign policy, a statement which is designed to reinforce the presumption that pre-emption will not apply to the CFSP as well as to signal that the Union, through the CFSP, is not intended to replace the Member States as international actors.[46]

The CFSP, although enmeshed in the general provisions of the Treaties,[47] thus has a sufficient distinctiveness in terms of the powers of the institutions, the nature of the legal acts adopted and—in particular—the jurisdiction of the Court, to render significant the choice of acting under CFSP or other Union powers, and the position of the CFSP in the TEU, as opposed to the TFEU, is one aspect of this distinction between the alternative bases for action. In making such choices, the institutions will be bound by Article 40 TEU, a provision which appears to be designed to emphasize the separation between the CFSP and other powers.

VI. Separating the Two Treaties? Article 40 TEU

We should make clear at the outset that Article 40 TEU is not concerned directly with the relationship between the Treaties; however, since it deals expressly with the relationship between the CFSP and other EU powers, contained in the TEU and TFEU respectively, it should help us to understand the implications of separating the CFSP from other Union powers by placing it in a different treaty.

[43] P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency' (2010) 47 *CMLRev* 987, 991.

[44] Article 2(2) TFEU describes shared competence; the CFSP competence is mentioned separately in Article 2(4) TFEU.

[45] In practical terms, the conditions set by Article 3(2) TFEU for exclusive competence are unlikely to apply to the CFSP: legislative acts are not permitted within the CFSP; a CFSP agreement is unlikely to be necessary in order for the Union to exercise an internal competence (the CFSP is entirely external); its conclusion is unlikely to affect 'common rules', as the nature of CFSP instruments, at least thus far, is not to establish common rules.

[46] The formulation of the Member States' foreign policy is of course 'affected' by the CFSP in the sense that they are bound by decisions taken and by the loyalty clauses (Articles 4(3) and 24(3) TEU); presumably what is meant here is that the Member States retain full competence to act, in conformity with these obligations.

[47] See Van Elsuwege, above n 43 at 994–8 for the argument that the CFSP can no longer be regarded as a purely intergovernmental legal system but is evolving into a 'fully integrated part of EU law'.

Its presence and wording reflects well both the change in the relationship between the Treaties as a result of the Treaty of Lisbon and the specificity of the CFSP (its 'special rules and procedures'):

> The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.
>
> Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.[48]

Article 40 differs from its predecessor, Article 47 EU, in a number of ways.[49] First, it deals with a separation not between treaties but between policies and institutional powers. Second, its concern is to maintain the different 'procedures and the extent of the powers of the institutions' in the different policy fields and thus to respect the 'special rules and procedures' for the CFSP. Third, whereas former Article 47 EU referred to the Treaties establishing the European Communities, Article 40 TEU refers only to TFEU competences, and the provision thus no longer covers (or protects) the Euratom Treaty.[50] Fourth, the second paragraph is wholly new and results in a reciprocal protection for the CFSP. This is a logical consequence of the equal value of the two Treaties, asserted in Article 1 of both the TEU and TFEU. It also confirms the conception of the CFSP as a separate policy sphere rather than an exceptional derogation. Thus although the new provision does not weaken the close links between the two Treaties (the distinction it draws being based on policy competences not treaties), it nonetheless serves to emphasize the separation between the TEU-based CFSP and other TFEU-based policies.

The former Article 47 EU helped to keep the EU and EC Treaties separate. Advocate General Mengozzi argued that Article 47 provided a watertight divide between the two, in order to protect the primacy of the Community legal order.[51] The Court of Justice had also emphasized this separation, referring to the Union and Community as 'integrated but separate legal orders',[52] and interpreted its task under Article 47 EU as 'to ensure that acts which, according to the Council, fall within the scope of Title V of the Treaty on European Union [that is, CFSP acts]

[48] Article 40 TEU. Articles 3 to 6 TFEU, referred to in para 1, specify the Union's exclusive and shared competences, economic policy coordination and supporting, coordinating or supplementary action—that is, all categories of non-CFSP competence.

[49] Article 47 EU stated more briefly: 'nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.'

[50] On the Euratom Treaty, see further below.

[51] 'Article 47 EU aims to keep watertight, so to speak, the primacy of Community action under the EC Treaty over actions undertaken on the basis of Title V and/or Title VI of the EU Treaty, so that if an action *could* be undertaken on the basis of the EC Treaty, it *must* be undertaken by virtue of that Treaty.' Opinion of AG Mengozzi in Case C-91/05 *Commission v Council* (on small arms and light weapons), para 116.

[52] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, para 202, citing the CFI (now the General Court) in case T-315/01 *Kadi* [2005] ECR II-3649, para 120.

and which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the EC Treaty on the Community'.[53] Article 47 EU was thus interpreted not simply as a rule which gave priority to the EC Treaty in case of conflict, but as a delimitation or allocation rule designed to ensure that CFSP powers were not used where EC powers could be. Further it was an allocation rule which gave preference to Community powers, so that, according to the Court, in a case where EC and CFSP objectives are equally important, Article 47 did not permit a joint CFSP–EC legal basis and the EC legal base alone must be used.[54]

The new Article 40 TEU, with its reciprocal 'non-affect' clauses, alongside the 'equal value' provisions in both TEU and TFEU, removes the Community priority that was at the heart of Article 47 EU while at the same time emphasizing the separation between CFSP and non-CFSP competence. It may still be read as an allocation provision: with its references to procedures and institutional powers, it looks like a simple reaffirmation of the principle that the appropriate legal base should be chosen for Union acts, in line with the principle of institutional balance, respecting the powers and prerogatives of the institutions and the limits to Union action set out in the Treaty, and not using one legal base to circumvent restrictions laid down in another.[55] But when one comes to ask on what basis a decision might be made in a particular case as between CFSP and other competences—what allocation rule might be applied—it becomes more difficult. The familiar tests of objectives and content[56] are not so helpful. First, as we have seen, we have a single set of objectives for all external action; second, the CFSP is defined to include all of foreign policy (Article 24(1) TEU). In the past, this potential breadth of the CFSP was tempered by two things: first, a specific set of CFSP objectives including such things as international peace and security, and second, Article 47 EU with its Community-priority rule. The first has been subsumed into the Union's general external objectives none of which are expressly linked to the CFSP,[57] and the second has been amended so as to remove the priority accorded to (former) Community competence.

Nevertheless it seems likely that the Court will continue to apply a form of aim and content test based on a pre-Lisbon understanding of the scope of the CFSP. Apart from defence and external aspects of security, the CFSP will presumably include those aspects of foreign policy which are not covered by other express external legal bases such as the common commercial policy and development, or by specific TFEU policy objectives such as environment, migration or energy. However, this distinction between sectoral external relations and so-called 'high'

[53] Case C-91/05 *Commission v Council* (SALW/ECOWAS) [2008] ECR I-3651, para 33.

[54] Ibid paras 75–7.

[55] cf Case C-376/98 *Germany v Council & European Parliament* (tobacco advertising) [2000] ECR I-08419, para 79.

[56] Eg Case C-94/03 *Commission v Council* (Rotterdam Convention) [2006] ECR I-1; *Opinion 1/2008*, 30 November 2009.

[57] Article 21(2) TEU; although note that Article 352(4) TFEU assumes that 'objectives pertaining to the common foreign and security policy' can be identified, in prohibiting the use of the flexibility clause for this purpose.

foreign policy is not easy to maintain in practice;[58] it is easy to envisage debate over the respective scope of the CFSP and (for example) Article 212 TFEU as a basis for action aimed at democracy and rule of law promotion, and Article 40 TEU makes it clear that the CFSP has its own sphere of operation and should not be seen merely as a residual competence.[59] This is emphasized by Article 352(4) TFEU which excludes the use of the flexibility clause 'as a basis for attaining objectives pertaining to the common foreign and security policy', referring to the need to 'respect the limits set out in Article 40, second paragraph, of the Treaty on European Union'. This provision is not an attempt to curtail the creeping extension of CFSP powers by forbidding the use of the flexibility clause, since CFSP powers are drawn so widely there could scarcely be any need for Article 352 (although, as Declaration 41 on Article 352 reminds us, there is no power under the CFSP to adopt legislative acts). The reference to the second paragraph of Article 40 makes it clear that it is, rather, intended to 'protect' the CFSP, to prevent the use of Article 352 in a TFEU context so as to circumvent CFSP decision-making prerogatives.

Would the new relationship between the Treaties permit the use of joint CFSP and non-CFSP legal bases? Article 218 TFEU assumes that agreements will be concluded which contain both CFSP and non-CFSP elements, although it only provides explicitly for agreements relating 'exclusively or principally' to the CFSP, which are subject to specific procedural rules. Following previous legal base case law, agreements relating exclusively or principally to a non-CFSP policy would use the relevant non-CFSP legal base. A 'merely incidental' aim or component does not require a separate legal basis.[60] Less easy to predict is whether, where neither policy is predominant nor merely incidental, the Court will take the view that Article 40 TEU precludes, as did its predecessor, the use of joint CFSP and non-CFSP legal bases for an autonomous measure or international agreement—for example, a possible future agreement with a third country on data transfer and retention which may concern data held for the purposes of internal security, criminal investigation and counter-terrorism. Although the revised Treaties remove the priority rule which was the basis for the Court's refusal to accept a joint legal base under the pre-Lisbon regime,[61] it could be argued both that Article 40 reinforces the separation between CFSP and non-CFSP powers, and that the

[58] J-V Louis, 'The European Union: From External Relations to Foreign Policy?' EU Diplomacy Papers, 2/2007.

[59] The difficulty of drawing these boundaries is illustrated by case C-130/10 *European Parliament v Council* (currently pending before the Court) in which it is asked to determine the respective scope of financial restrictions adopted for counter-terrorism purposes under Article 75 TFEU and restrictive measures adopted under CFSP powers and Article 215 TFEU: Regulation 1286/2009 was adopted on the basis of Article 215 TFEU; the European Parliament argues that it should have been adopted on the basis of Article 75 TFEU.

[60] Case C-91/05 *Commission v Council* (SALW/ECOWAS) [2008] ECR I-3651, para 73. For a critique of the application of the predominant/incidental purpose analysis where competence boundaries are at issue, see M Cremona, 'Balancing Union and Member State Interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy under the Treaty of Lisbon' (2010) 35 *European Law Rev* 678. Unfortunately, Article 218 TFEU, by using terms such as 'exclusively or principally', invites the Court to maintain this approach.

[61] Case C-91/05 *Commission v Council* (SALW/ECOWAS) [2008] ECR I-3651, paras 75–7.

decision-making procedures are incompatible.[62] In favour of at least the possibility of a joint legal base is the fact that we are no longer dealing with separate legal orders, or legal acts of a wholly different nature, but rather different procedures and institutional roles. And the Court has held that use of the ordinary legislative procedure may be compatible with a provision under which the Council acts as sole legislator,[63] suggesting that it should not be assumed that there is an incompatibility in combining (in the example suggested above) Article 39 TEU and Article 16 TFEU as joint legal bases.[64]

VII. The Ambiguous Position of Euratom

In discussing the post-Lisbon Treaty structure we cannot ignore the position of the European Atomic Energy Community Treaty (EAEC) and in this section we will briefly consider its structural relationship to the Union, without, however, being able here to take a broader perspective on the future of the Euratom within (or without) the Union. Before the Treaty of Lisbon, the Euratom was one of the 'European Communities' which had once included also the European Coal and Steel Community. The former Treaty on European Union stated that the Union was 'founded on the European Communities' (Article 1 EU), the Euratom *acquis* was protected by Article 47 EU alongside the EC *acquis*, and Article 305(2) EC provided that the EC Treaty should not derogate from the EAEC.[65] The position now seems rather different. Most striking, the Union is founded upon the TEU and TFEU (Article 1 TEU); there is no mention of the Euratom or the EAEC either here or elsewhere in the text of either of these founding Treaties, nothing to indicate that the Euratom is part of the Union at all. Indeed, although a Protocol exists on the amendment of the EAEC it is attached to the Treaty of Lisbon and so does not appear among the Protocols attached to the TEU and TFEU in the consolidated versions of the Treaties in the EU's Official Journal.[66] Within the Treaties, all provisions linking the EAEC to the Union and its founding treaties have been placed in the EAEC itself. This has the advantage that changes to the

[62] On incompatibility of decision-making procedures, see Case C-300/89 *Commission v Council (Titanium dioxide)* [1991] ECR I-2867, paras 17–21; Case C-94/03 *Commission v Council* [2006] ECR I-1, para 52; Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, para 57.

[63] Case C-155/07 *European Parliament v Council* [2008] ECR I-08103, paras 77–9; for a suggestion that the Council's rights of participation are also relevant, see the Opinion of AG Kokott in the same case at para 89.

[64] Clearly this issue needs a more detailed discussion than is possible here; in its legal base case law, eg, the Court has taken the view that different voting rules in the Council may be incompatible (see Case C-155/07 *European Parliament v Council*, above n 63 at para 76). Here the object is only to suggest that the issue is not predetermined. For further discussion reaching a similar conclusion, see Van Elsuwege, above n 43 at 1006–7.

[65] This is not to suggest that the relationship between the EC and EAEC Treaties was entirely clear, even before the Treaty of Lisbon; on this see TF Cusack, 'A Tale of Two Treaties: An Assessment of the Euratom Treaty in Relation to the EC Treaty' (2003) 40 *CMLRev* 117.

[66] At OJ 2010 C 83; the Protocol is at OJ 2007 C 306/199; the amended consolidated EAEC is

EAEC, and indeed to its relationship to the Union, can be made without the need to amend the TEU and TFEU,[67] but its effect is to render the EAEC almost invisible. Almost, but not completely, since certain of the Protocols to the TEU and TFEU are also annexed to the EAEC,[68] and Protocol 36 on transitional provisions defines 'the Treaties' for the purposes of that Protocol as including the EAEC.

Somewhat paradoxically, given the silence of the TEU and TFEU with respect to the place of the Euratom within the Union, the amendments to the EAEC introduced by Protocol 12 to the Lisbon Treaty in fact tie the EAEC firmly into the Union structures by repealing the existing institutional and decision-making provisions and replacing them with the relevant TEU and TFEU provisions. This is done by a simple reference in Article 106a(1) EAEC to the relevant Articles of the TEU and TFEU. The provisions thus incorporated into the EAEC include the TEU and TFEU provisions on the institutions (excluding the European Central Bank), the Articles on treaty revision (ordinary revision procedure only), accession and withdrawal, the jurisdiction of the Court of Justice, types of legal act and decision-making procedures, including Article 15 TFEU on transparency, and financial and budgetary provisions. On the other hand, the general provisions of the TEU on the Union's values and objectives and on the principles of sincere cooperation, conferred powers, proportionality and subsidiarity are not directly incorporated into the EAEC; nor is Article 6 TEU on fundamental rights. Might these 'common provisions' apply also by inference to the Euratom, on the grounds that they apply generally to the Union in all its activities and that the Euratom is a part of the Union? An indication is given by the somewhat surprising inclusion, among those Articles which *are* directly applicable to the EAEC, of Article 7 TEU, providing for sanctions against a Member State in a serious breach of the Union's values. The inclusion of this provision is presumably intended to ensure that the suspension envisaged by Article 7 in some circumstances of 'certain of the rights deriving from the application of the Treaties' could include rights under the EAEC.[69] But if the sanction extends to suspension of EAEC rights, then consistency requires that at least the values thus protected should also be applicable to the EAEC.

A further indication of the relationship between the TEU, TFEU and the EAEC is given in Article 106a(3) EAEC according to which 'The provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty.' This replaces both Article 305

[67] In Declaration 54, attached to the Final Act adopting the Treaty of Lisbon, Germany, Ireland, Hungary, Austria and Sweden note that the core provisions of the EAEC have not been substantially amended since its coming into force and need to be updated; they support the idea of convening an IGC as soon as possible to undertake this reform.

[68] Protocol 1 (on national parliaments); Protocol 3 (on the Statute of the Court of Justice) which also refers to the EAEC in its Article 1; Protocol 6 (on the location of the Union's institutions); Protocol 7 (on privileges and immunities of the EU); and Protocol 36 (on transitional provisions).

[69] Article 106a(2) EAEC provides that references, inter alia, to 'the Treaties' shall be taken as a reference to the EAEC Treaty.

(2) EC and Article 47 EU.[70] Its being placed in the EAEC instead of the EC and EU Treaties emphasizes that the relationship between the EAEC and the Union's two founding Treaties is governed by the EAEC itself. The incorporation of the institutional, lawmaking and budgetary provisions and the non-derogation clause together suggest that the EAEC should be characterized as a special sectoral regime operating within the Union framework.[71] Apart from the fact that these conclusions are drawn by inference rather than made explicit in the Treaties, the oddity persists that the Euratom remains as a separate organization with its own legal personality (Article 184 EAEC) alongside the EU itself, undermining the simplification achieved by the Lisbon Treaty. There is no doubt that these anomalies and the somewhat ambiguous position of the EAEC in relation to the Union's legal regime is the result of uncertainty as to its future, and the legal solutions adopted in structuring the Treaties are designed to make changes to that position relatively easier to implement than if revision to the EU Treaties were required.

VIII. Conclusions

Already, a year after the entry into force of the Lisbon Treaty, we are getting used to working with the new TEU and TFEU. The choice of two treaties as the fundamental structural basis for a single Union system was mandated by history and politics, not by drafters working from a blank sheet of paper, and the drafters of the Lisbon Treaty have done a clever and effective job of 'knitting together' the two Treaties, notwithstanding some seemingly arbitrary choices. Neither treaty will stand alone; they are integrally connected in a way that the former EC and EU Treaties were not. The division of provisions between the two Treaties is influenced by the former treaty structure; it does not reflect a division between institutional and substantive provisions, nor between fundamental principles and detailed implementation (although there are elements of both of these). Most fundamentally, the relationship between the two Treaties is governed by the equal value principle, a fundamental departure from the previous position.

The two Treaties seek to create one Union, with one legal personality and one legal order, but at the same time to differentiate the CFSP from other (external) policy fields. This differentiation is clearer than it was in the Constitutional Treaty, but it is based on differences in procedure and institutional powers, rather than separation between legal orders, as was the case under the pre-Lisbon EC and EU Treaties. It has been argued here that in the absence of express provision the general

[70] Article 305(2) EC has been repealed, and as we have seen, Article 40 TEU makes no mention of the EAEC and indeed is not formulated in terms of treaty relationships.

[71] Care must be taken here; the relationship is perhaps not accurately described in terms of *lex generalis/lex specialis*. As Cusack points out, above n 65 at 127, it may be argued that the EC and EAEC Treaties are (were) equal and autonomous, and this reasoning would equally apply to the EU/EAEC relationship. Comparisons may be drawn with the earlier discussion on the relationship between the CFSP and other non-CFSP policies, although it should be noted that whereas Article 40 TEU is a non-affect clause, Article 106a(3) EAEC is a non-derogation clause.

treaty rules will apply to the CFSP. On the other hand, certain of those express provisions and the nature of the CFSP as a policy field mean that the CFSP will continue to retain distinctive characteristics. In addition, some ambiguities remain, in particular over the basis on which it should be decided whether to use CFSP or other competences to achieve a particular external objective. The relationship between the CFSP and other policy fields is governed by the non-affect clause, which does not prioritize one over the other. Given the single set of objectives for all external action, and the breadth of the potential scope of the CFSP, the classic approach to legal base questions will be difficult to apply, and the differences in institutional balance and choice of instruments may create problems for the practical application of the non-affect clause while maintaining policy coherence. In most cases the choice will be politically uncontroversial, or reached by negotiation. However, in one or two hard cases, the Court will be asked to create a 'choice of legal base' rule, but this time with no treaty-sanctioned priority clause.

Against this picture of consolidation, integration and simplification—at least as regards the treaty structure—the position of the European Atomic Energy Community appears to be anomalous. It is practically invisible if one looks at the TEU and TFEU; it retains its separate identity and sphere of action; however, membership of Euratom is possible only through membership of the Union, and its institutional structures are more closely integrated into the Union framework than before. The precise extent to which it forms part of the Union legal order, subject to the Union's common rules as established in Title I of the TEU, is remarkably ambiguous. The Euratom may well be in a transitional phase; if so, it is fortunate that its relationship with the Union is determined within the EAEC Treaty itself since a further major reform of the Union's treaty structures is unlikely to be attempted in the near future.