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## **The evolving system of EU external relations as evidenced in the European Union Partnerships with Russia and Ukraine**

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**THE EVOLVING SYSTEM  
OF EUROPEAN UNION EXTERNAL RELATIONS  
AS EVIDENCED IN THE EU PARTNERSHIPS  
WITH RUSSIA AND UKRAINE**

Christophe Hillion  
Leiden, 2005

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**Conclusion**

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## ABBREVIATIONS

<i>AFDI</i>	<i>Annuaire Français de Droit International</i>
AG	Advocate General
<i>AJIL</i>	<i>American Journal of International Law</i>
Bull. EC	Bulletin of the European Communities
CCP	Common Commercial Policy
<i>CDE</i>	<i>Cahiers de Droit Européen</i>
CEEC	Central and Eastern European Country
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CIS	Commonwealth of Independent States
<i>CMLRev.</i>	<i>Common Market Law Review</i>
COREPER	Comité des Représentants Permanents
CS	Common Strategy
CSCE	Conference on Security and Cooperation in Europe
<i>CUP</i>	<i>Cambridge University Press</i>
<i>CYELS</i>	<i>Cambridge Yearbook of European Legal Studies</i>
DG	Directorate General
EA	Europe Agreement
EAEC	European Atomic Energy Community
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Report
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
<i>EFARev.</i>	<i>European Foreign Affairs Review</i>
EFTA	European Free Trade Association
EIPA	European Institute of Public Administration
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>ELJ</i>	<i>European Law Journal</i>
<i>ELRev.</i>	<i>European Law Review</i>
ENP	European Neighbourhood Policy
EP	European Parliament
EPC	European Political Cooperation
EU	European Union
EUI	European University Institute
FAO	Food and Agriculture Organisation
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
<i>GYIL</i>	<i>German Yearbook of International Law</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>JCMS</i>	<i>Journal of Common Market Studies</i>
JHA	Justice and Home Affairs
<i>LIEI</i>	<i>Legal Issues of European Integration</i>
<i>MJ</i>	<i>Maastricht Journal of European and Comparative Law</i>
MOU	Memorandum of Understanding

NIS	Newly independent States
<i>NQHR</i>	<i>Netherlands Quarterly of Human Rights</i>
OJ	Official Journal
OSCE	Organisation for the Security and Cooperation in Europe
<i>OUP</i>	<i>Oxford University Press</i>
PCA	Partnership and Cooperation Agreement
PHARE	Poland and Hungary Assistance for Reconstructing the Economy
PJCCM	Police and Judicial Cooperation in Criminal Matters
PUF	Presses Universitaires de France
<i>RAE-LEA</i>	<i>Revue des Affaires Européennes</i>
<i>RMCUE</i>	<i>Revue du Marché Commun et de l'Union Européenne</i>
<i>RMUE</i>	<i>Revue du Marché Unique Européen</i>
<i>RTDE</i>	<i>Revue Trimestrielle de Droit Européen</i>
SAA	Stabilisation and Association Agreements
SEA	Single European Act
TCA	Trade and Cooperation Agreement
TCE	Treaty establishing a Constitution for Europe
TEU	Treaty on European Union
TRIPs	Trade-Related Aspects of Intellectual Property rights
USSR	Union of Socialist Soviet Republics
WEU	Western European Union
<i>YEL</i>	<i>Yearbook of European Law</i>

## INTRODUCTION

Founded on the European Communities, and supplemented by other forms of cooperation and policies,<sup>1</sup> the European Union is endowed by its Member States with the task of asserting its identity on the international stage.<sup>2</sup> Given the differentiated constitutional order of the EU, attaining this objective depends on the cooperation between the Union acting on the basis of Title V and Title VI of the TEU, the Community acting on the basis of the EC Treaty and their Member States. The web of interactions underpinning this tripartite cooperation constitutes *the system of EU external relations*.

The present study aims at decrypting the evolution of this system, by focusing on the development of the EU Partnerships with Russia and Ukraine. These two case studies epitomise the development of the system which a mere analysis of the law would only partially capture.

The Partnerships involve the whole spectrum of EU external dimensions. Based on mixed agreements negotiated in the aftermath of the establishment of the Union, they encompass areas relating to the non-Community sub-orders of the EU. In other words, they *exemplify* the presence of the triangle EU/EC/Member States at the external level, and bring to light the rules governing this tripartite cooperation. Finally, the Partnerships typify the pivotal role of institutional practice in upholding and adjusting such rules.

EU relations with Russia and Ukraine are however more than mere *examples* of current trends in the system of EU external relations. They themselves *influence* the development of this system. Their geographical proximity and high political

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<sup>1</sup> Art. 1 TEU. In the remainder of this study, reference will be made to the most recent numbering of Treaty articles (introduced by the Treaty of Amsterdam, and consolidated by the Nice Treaty), in combination with earlier number references (based on the Treaty of Rome as regards the EC Treaty, and complemented by the Treaty of Maastricht as regards the TEU) where relevant for the argument.

<sup>2</sup> Art. 2 TEU.

significance have made Russia and Ukraine focal points for the development of the Union's external action. Indeed, the Partnerships have systematically been used as testing grounds for applying new devices of EU external relations, thus contributing to assessing innovative formulas resulting from the cooperation EU/EC/Member States. In that, institutional practices taking place in the context of the Partnerships with Russia and Ukraine have tended to *anticipate* developments later codified in the constitutional charter of the Union.

Through the case studies of the Partnerships, it will be seen that the fulfilment of the EU objective of asserting its identity on the international stage is a function of the cooperation between the EU, the EC and their Member States, which is determined by a combination of four interlinked elements.

First, the tripartite cooperation is governed by EU constitutional law. The latter establishes an institutional architecture divided in sub-orders, but also encompasses fundamental principles which underpin the system of EU external relations. The principles fall into two main categories. A first category comprises devices aimed at guaranteeing the division of competences in the EU constitutional order. A second category consists of principles aimed at promoting the coherent exercise of these competences. In view of the overlapping powers of the EC, the EU acting on the bases of Titles V and VI of the TEU, and the Member States in the field of external relations, there is a tension between the aims of the two sets of principles, which is not tackled by the Treaty itself. While providing that the European Court of Justice should guarantee the division of powers between the EC/EU/Member States, it leaves it to the other institutions, particularly the Council of the EU and the Commission of the European Communities to ensure the coherence of the EU external action.

Secondly and consequently, the system of EU external relations is fleshed-out by institutional practice. It will be seen that the tension enshrined in the Treaty between the division of competence and the quest for coherence becomes apparent through frictions between the Council and the Commission, incarnating the strain between the EU and the EC institutional logics. Circumscribing this "pillar politics" inherent in the EU constitutional order, new forms of interactions between these institutions have developed, outside of the treaty framework thanks to the political endorsement of the

European Council. In effect, these ad hoc arrangements have fostered the coherence of the external action of the EU.

Thirdly, the system has been articulated by the case law of the European Court of Justice, endowed by the Treaty with the task of ensuring the division of competence enshrined in the EU constitutional order. In the first place, the Court has extensively adjudicated upon the distribution of powers between the Community and the Member States, particularly by refining the doctrines of mixity and implied Community external competence. It has also policed the boundaries between the EU sub-orders. The case law has thereby contributed to entrench further the logic of competence in the system of EU external relations. At the same time, the Court has established an *obligation* of cooperation between the Member States and the Community, in the conduct of EU external action.

Finally, the configuration of cooperation EU/EC/Member States varies depending on the *third party* in question. It is also affected by the evolving *objectives* of the EU towards the partner concerned. The system therefore encompasses a degree of flexibility, if not unpredictability, in order to adapt itself to political realities.

In view of these elements, the present study of the system as evidenced in the Partnerships is articulated as follows. Part I explores the implications of the TEU on the methodology of EC external relations, and the emergence of the tripartite cooperation to establish and conduct the external action of the EU. Part II examines the constitutional principles that underpin the system of EU external relations with a view to decrypting their contribution to the development of interactions between the EC/EU and the Member States. Part III purports to establish how the institutional practice within the Partnerships has developed and adjusted these interactions, and eventually contributed to changes in the EU constitutional charter.

## **PART I**

### **THE PARTNERSHIP AND COOPERATION AGREEMENTS WITH RUSSIA AND UKRAINE: A NEW FORMULA OF MIXITY**

The Partnership and Cooperation Agreements with Russia and Ukraine represent an innovative formula of EC external relations. The content of the Agreements has been highly influenced by the emerging constitutional order encapsulated in the Treaty on European Union, and articulated in the jurisprudence of the European Court of Justice, particularly as regards the distribution of powers between the Member States and the Community. Moreover, the PCAs were negotiated and concluded as part of an emerging network of relations between the newly established EU and its European neighbours. In particular, they were sketched out after the first Europe Agreements had been concluded with the countries from central and eastern Europe. In substantive terms, it appears that the PCAs were, to a large extent, defined by default as neither an association nor a trade and cooperation agreement (chapter 1). They were concluded by the Community and the Member States, “acting in the framework of the European Union” (chapter 2). In that, this new formula of mixity highlights the emergence of the tripartite cooperation between the EU, the EC and the Member States.

## CHAPTER 1

### MIXED AGREEMENTS DEFINED BY DEFAULT

Partnership and Cooperation Agreements were crafted as specific contractual frameworks for the EU to develop partnerships with each of the Newly Independent States (NIS), following the disintegration of the Soviet Union.<sup>3</sup> They replaced the Trade and Cooperation Agreement (TCA) concluded by the Community and the Soviet Union in 1989, and laid the grounds for establishing elaborate and ambitious links between new actors.<sup>4</sup>

The nature of the PCAs was influenced by the EC/EU constitutional evolution, characterised by clarified principles governing Community competence, and the development of alternative formulas of cooperation between Member States in the form of “intergovernmental” cooperations in Common Foreign and Security Policy (CFSP, Title V) and Justice and Home Affairs (JHA, Title VI). Going beyond the sphere of Community competence refined by the new constitutional order, the Agreements constitute a new model of mixed agreements, embodying the restated doctrine of mixity defined by the European Court of Justice in its famous Opinion

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<sup>3</sup> PCA between the EC and their Member States, of the one part, and the Russian Federation, of the other part (OJ 1997 L327/1); PCA between the EC and their Member States, of the one part, and Ukraine, of the other part (OJ 1998 L49/1); PCA between the EC and their Member States, of the one part, and the Republic of Moldova, of the other part (OJ 1998 L181/1); PCA between the EC and their Member States, of the one part, and Armenia, of the other part (OJ 1999 L239/1); PCA between the EC and their Member States, of the one part, and Azerbaijan, of the other part (OJ 1999 L246/1); PCA between the EC and their Member States, of the one part, and Georgia, of the other part (OJ 1999 L205/1); PCA between the EC and their Member States, of the one part, and the Republic of Kazakhstan, of the other part (OJ 1999 L196/1); PCA between the EC and their Member States, of the one part, and the Kyrgyz Republic, of the other part (OJ 1999 L196/46); PCA between the EC and their Member States, of the one part, and Uzbekistan, of the other part (OJ 1999 L229/); see also the proposal for a PCA between the EC and its Member States, on the one hand, and Belarus, on the other hand (COM(95)44); the proposal for a PCA between the EC and its Member States, on the one hand, and Turkmenistan, on the other hand (COM (1997)693).

<sup>4</sup> EU/Russia (1993), para. 8.

1/94.<sup>5</sup> Moreover, the PCAs were designed in the context of the reorganisation of the intra-European relationships. More precisely, the Community and its Member States envisaged the PCAs as an *alternative* to the Europe (association) Agreements concluded with the countries from central and eastern Europe (CEECs).

This chapter scrutinizes the PCAs from the point of view of the evolving law of EC external relations, as stimulated by the developing jurisprudence of the European Court of Justice. It will also situate these agreements in relation to the other main Community external agreements constituting the EU *Ostpolitik* at the dawn of the nineties, thereby attempting to clarify their position in the typology of EC agreements. It will be seen that, to a great extent, the PCAs, as new model of agreement, were defined by default: neither a TCA like the Community Agreement with the Soviet Union (1.1), nor an association agreement like the Europe Agreement with the CEECs (1.2).

### **1.1. More comprehensive than the Trade and Cooperation Agreement between the Community and the Soviet Union**

The PCAs resemble the classic trade and cooperation agreements (TCAs). They nonetheless find their place *above* the TCAs in the typology of EC external agreements. This holds particularly true if one takes the TCA concluded between the EC and the USSR in 1989, as a point of reference.<sup>6</sup> Compared to the 1989 TCA, the PCAs have more ambitious objectives (1.1.1), and contain broader reciprocal commitments (1.1.2). These features explain the subtle distinctions between the legal bases of the two types of agreements (1.1.3).

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<sup>5</sup> Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*.

<sup>6</sup> OJ 1990 L68/1. This holds true also in respect of the TCAs concluded with the former Soviet satellites, e.g. Trade and Cooperation Agreement between the Community and the People's Republic of Poland (OJ 1989 L339/2) and Trade and Commercial and Economic Cooperation with the Hungarian People's Republic (OJ 1988 L327/1). See further Maresceau (1992:94ff), and Horovitz (1990:259).

### 1.1.1. The PCAs: more ambitious political aims than the 1989 TCA

While the political significance of the 1989 TCA with the Soviet Union is undisputable,<sup>7</sup> its objectives however remained modest, particularly if compared to those of the PCAs.<sup>8</sup> The latter surpass the TCA's aim of normalising the relationship between the Community and the Soviet Union (1.1.1.1), and contain a more elaborate list of objectives (1.1.1.2).

#### 1.1.1.1. *Beyond normalisation: the EU ambition to support the transformation in the Partner countries*

The essential ambition of the TCA was to *normalise* the relations between Parties that had only recently established their first official contacts, after a protracted mutual ignorance.<sup>9</sup> The Agreement was also shaped in consideration of the partners' distinct political and economic features.<sup>10</sup>

Article 1 of the TCA stipulated that, “in the framework of their respective laws and regulations”, the Contracting Parties “shall use their best endeavours to facilitate and promote” first, the harmonious development and diversification of their trade; and second, the development of various types of commercial and economic cooperation. To that end, they confirmed their resolve to consider favourably, each for its own part, suggestions made by the other Party with a view to attaining these objectives. The TCA thus represented an “entry-level” agreement,<sup>11</sup> which was to be built upon

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<sup>7</sup> For Edvard Shevardnadzé (1991: 238), then Soviet Minister of Foreign Affairs, this agreement constituted a great leap towards relations of good neighbours between Eastern and Western Europe, the elimination of obstacles that separated them, and the creation of the European economic area. See also Yakemtchouk (1997: 445).

<sup>8</sup> Shemiatenkov (1998: 163); Maresceau (1992: 109-112, 2001: 20).

<sup>9</sup> The “Joint Declaration on the establishment of official relations between the Council for Mutual Economic Assistance and the European Economic Community” is recalled in the Preamble of the TCA. See OJ 1988 L157/34. See also Shemiatenkov (1998: 163), Maresceau (1991: 158ff), and Shishkov (2002: 71-72).

<sup>10</sup> De Laet (1995).

<sup>11</sup> The expression is borrowed from Steve Peers (1995: 845, 2000a: 165).

thereafter.<sup>12</sup> Indeed, negotiations for elaborating this initial agreement had already started when the Soviet Union disintegrated.<sup>13</sup>

The PCAs are built upon these initial foundations, but introduce more ambitious objectives in the relationship, which indeed involves new partners, following the break-up of the Soviet Union, on the one hand, and the creation of the European Union, on the other hand.<sup>14</sup> The Preambles of the Agreements with Russia and Ukraine, respectively, emphasise the Parties' wish to strengthen their "historical links and to establish a partnership and cooperation agreement which would *deepen and widen* the relations established between them in the past in particular by the Agreement between the European Economic Community and the European Atomic Energy Community and the [USSR]" (emphasis added).<sup>15</sup>

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<sup>12</sup> The Preamble of the TCA (OJ 1990 L68/1) stated in its first indent that the Parties recognised "that the Community and the USSR desire[d] to establish direct contractual relations with one another which [would] permit further development at a later stage".

<sup>13</sup> European Commission (1992a: 19).

<sup>14</sup> In its Communication on the relations between the Community and the Independent States of the former Soviet Union, the Commission identified two reasons making it indispensable to replace the TCA. First, the change of identity of the Community's partner required in itself the negotiation of a new agreement. Secondly, the TCA had to be upgraded to take account of the new independent States' commitment to economic and political reform (European Commission, 1992b). See also European Commission (1992c). In para. 8 of the "Common Political Declaration on the Partnership and Cooperation between the Russian Federation and the European Union" the Parties (i.e. President of the Russian Federation, Heads of States or Government of the Member States of the EU, and the President of the European Commission) pointed out that: "les parties estiment nécessaire de donner *une base qualitativement nouvelle* à leurs relations économiques fondées sur les principes de l'économie de marché" (emphasis added) (EU/Russia, 1993). See also in this sense the Report of the European Parliament Committee for Economic External Relations on the future agreements between the Community and the Newly Independent States of the former Soviet Union (European Parliament, 1993a), and the ensuing EP Resolution of 12 March 1993 (European Parliament, 1993b) as well as the opinion of the Economic and Social Committee on relations between the EU, Russia, Ukraine and Belarus (Economic and Social Committee, 1995); and de Laet (1995).

<sup>15</sup> Second indent of the Preamble of the PCA with Russia and third indent of the Preamble of the PCA with Ukraine; also the preambles of the Council and Commission decisions on the conclusion of the PCA with Russia (OJ 1997 L327/1) and Ukraine (OJ 1998 L49/1), respectively; and EU/Russia (1993).

### 1.1.1.2. *Furthering rapprochement between the EU and its Partners*

Article 1 of each PCA sets out a long list of ambitious objectives that ostensibly overtake the modest, albeit significant aims of the 1989 TCA, and which ought to be mentioned *in extenso*. In the case of the PCA with Russia, the Partnership aims:

- To provide an appropriate framework for the political dialogue between the Parties allowing the development of close relations between them in this field,
- To promote trade and investment and harmonious economic relations between the Parties based on the principles of market economy and so to foster sustainable development in the Parties,
- To strengthen political and economic freedoms,
- To support Russian efforts to consolidate its democracy and to develop its economy and to complete the transition to market economy,
- To provide a basis for economic, social, financial, and cultural cooperation founded on the principles of mutual advantage, mutual responsibility and mutual support,
- To promote activities of joint interest,
- To provide an appropriate framework for the gradual integration between Russia and a wider area of cooperation in Europe,
- To create the necessary conditions for the future establishment of a free trade area between the Community and Russia covering substantially all trade in goods between them, as well as conditions for bringing about freedom of establishment of companies, of cross-border trade in services and of capital movement.<sup>16</sup>

The above ambitions clearly surpass the entry-level objectives of the 1989 TCA. They upgrade the relationship in consideration of the global transformation undertaken by the partners of the Community and its Member States.

Summarising these objectives, the Commission underlined in 1994 that the PCA aims at raising the standard of the Community links with the NIS to that of “a close

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<sup>16</sup> Art. 1 of the PCA with Ukraine provides that “[t]he objectives of this partnership are:

- to provide an appropriate framework for the political dialogue between the Parties allowing the development of close political relations,
- to promote trade and investment and harmonious economic relations between the Parties and so to foster their sustainable development,
- to provide a basis for mutually advantageous economic, social, financial, civil scientific technological and cultural cooperation,
- to support Ukrainian efforts to consolidate its democracy and to develop its economy and to complete the transition into a market economy.

political and economic relationship” which would favour “a gradual rapprochement between the NIS and a wider area of cooperation in Europe and neighbouring regions”.<sup>17</sup> On the occasion of the conclusion of the PCA with Ukraine, following the ratification by all Member States, the Council pointed out that: “[t]he Agreement... *constitutes a new step towards the establishment of a close and mutually profitable partnership* between the EU and Ukraine. The Agreement will introduce *a new dimension to the parties' relations*. It is intended to govern political, economic and trade relations between the EU and Ukraine and establish the basis for social, financial, scientific, technological and cultural cooperation” (emphasis added).<sup>18</sup> This ambition was further articulated in the operative parts of the PCAs.

### **1.1.2. The PCAs: broader commitments than in the TCA**

As a preliminary point, it is noticeable that, while the TCA contained only 26 articles, the PCA with Ukraine comprises 109 Articles, and the PCA with Russia adds up to 112 Articles. Although the lower number of articles of the TCA is not, in itself, a measure of the quality or *intensity* of the relationship, it is nonetheless suggestive of its more restricted *scope*,<sup>19</sup> as illustrated by the following comparison with the PCAs’ provisions on trade (1.1.2.1), cooperation (1.1.2.2) and on the institutional framework they establish (1.1.2.3).

#### *1.1.2.1. The wide scope of the PCAs’ trade regime*

The trade regime established by the PCAs differs in scope from the one envisaged by the TCA. The latter provided for the MFN treatment with respect to all goods, except textiles, coal and steel products.<sup>20</sup> It also contained a prudent “best endeavours” clause for the progressive elimination of “specific” quantitative restrictions that Member

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<sup>17</sup> European Commission (1994c). Further: Raux (1998: 163).

<sup>18</sup> General Affairs Council (1998a).

<sup>19</sup> Assemblée Nationale (1996).

<sup>20</sup> Art. 3 TCA. Further: Shemiatenkov (1998: 40), Peers (1995: 831) and Maresceau (1992: 109-112).

States had maintained with respect to Soviet products.<sup>21</sup> While confirming the GATT inspired MFN treatment, the PCAs refer more systematically to the GATT principles. For instance, the Parties must guarantee the freedom of transit for goods (Article V(2-5) GATT), and they should also observe the GATT principle of non-discrimination in internal taxes, charges or regulations (Article III(2)).<sup>22</sup> Furthermore, the Agreements consolidate the abolition by the Community of “specific quantitative restrictions”.<sup>23</sup> These provisions must be read in the light of the Preamble of both Agreements, which underline the Parties’ aim to encouraging progressive integration of Russia and Ukraine into the open international trading system. In this perspective, the references of the PCAs to GATT norms suggest that the Agreements prepare their eventual accession to the World Trade Organisation.<sup>24</sup>

Moreover, the PCAs contain an “evolution clause” whereby the Parties undertake to discuss the establishment of a free trade zone at a later stage.<sup>25</sup> While it falls short of obliging the Parties to *establish* such an FTA, it nonetheless introduces it as a long-term *objective*. Such an objective was absent in the TCA.

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<sup>21</sup> According to Art. 8 TCA, the Community “undertakes to make efforts to ensure progress towards the progressive abolition of ‘specific quantitative restrictions’ namely those quantitative restrictions applied to imports originating in the USSR under Regulation No 3420/83...”. See OJ 1990 L138/1 for the application of this phasing-out of QRs. Further on specific QRs, see Maresceau (1989: 14), and on other trade defence mechanisms, e.g. antidumping, see Jacobs (1989: 291).

<sup>22</sup> In addition to the GATT key principles, the PCAs also make references to the various derogations to these principles, as allowed under GATT, e.g. Art. XXIV on free trade areas and customs union.

<sup>23</sup> Joint Declaration to Art. 12 of the PCA with Russia.

<sup>24</sup> Applying several GATT norms by anticipation, the PCAs thereby represent a “pre-accession strategy” to the WTO. Further: Lebullenger (1998: 199), Maresceau and Montaguti (1995: 1327) and Hillion (1998a: 409ff).

<sup>25</sup> Art. 3 PCA Russia and Art. 4 PCA Ukraine. Russia in particular was adamant that it should get a trade regime as similar as possible to that provided in the Europe Agreements. However, the Community and its Member States were not ready to commit themselves to establish an FTA immediately. The evolution clause thus represents a compromise between these two opposite positions. Ukraine then asked to be treated the same way as Russia. See Maresceau and Montaguti (1995: 1339); also, European Commission (1994b), “Short Guide to the Agreement on Partnership and Cooperation between the European Union and its Member States and the Russian Federation” (hereinafter “Short Guide to the PCA with Russia”).

Finally, as opposed to the TCA, the trade provisions of the PCAs include services and movement of capital, as well as provisions on the protection of intellectual property rights. They also stipulate the conditions affecting the establishment of companies,<sup>26</sup> and contain a section on the movement of workers. On many accounts therefore, the PCAs envisage a trade dimension which, in terms of *scope*, is wider than the TCA. Section 1.2. below will come back to some of these substantive points in further detail.

#### 1.1.2.2. *The broader scale of cooperation under the PCAs*

Like the PCA trade regime, the title on “economic cooperation” inserted in each PCA overtakes the TCA provisions on the matter, both in terms of scope and objectives. Title IV of the TCA provided that the Parties should “encourage” economic cooperation in areas of mutual interest, such as customs, standardisation, industry, statistics, energy, agriculture and transport.<sup>27</sup> Such cooperation was intended *inter alia* to strengthen and diversify existing economic links between the Parties. It also aimed at underpinning the “development of their economies and respective living standards”.

By contrast, the PCAs envisage a broader, multidimensional type of cooperation<sup>28</sup> that covers not only the economic field *stricto sensu*,<sup>29</sup> but which equally refers to environment, as well as to education and training, tourism, culture, money laundering and drugs.<sup>30</sup> The inclusion of some of these additional dimensions finds its justification in the fact that the said policy areas were expressly introduced by the TEU (Maastricht version) in the Community sphere of competence, albeit in a measured fashion.<sup>31</sup> The broadening of the scope of cooperation under the PCAs also

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<sup>26</sup> Titles IV and V in the PCA with Russia, Titles IV and V in the PCA with Ukraine.

<sup>27</sup> Art. 20 TCA.

<sup>28</sup> Raux (1998: 163).

<sup>29</sup> For instance, industrial cooperation, investment promotion, public procurement, standards and conformity assessment.

<sup>30</sup> Title VII of each of the two PCAs.

<sup>31</sup> Title VII EC introduced by the Maastricht Treaty. It should be noted that while the TEU established new Community powers, these powers were conceived as complementary to those of Member States,

corresponds to the ambition of the Parties to widen and upgrade their relationship. Indeed with Ukraine, the cooperation foreseen is geared towards the promotion of economic and social *transformation*,<sup>32</sup> while it is envisaged as a means to the Partner's "integration" in a wider area of cooperation in Europe, in the case of Russia.<sup>33</sup> Such references to "economic and social transformation" and "integration in a wider area of cooperation" hint at the Community's conversion into being a key player in the re-organisation of the continent in the aftermath of the collapse of the Eastern bloc.<sup>34</sup> Judging from the list of subject matters covered by the PCAs, this transformation requires more than development of trade in goods and basic economic cooperation. The Agreements encompass the full range of economic activities of the Community: namely competition, state aids, and approximation of laws which accompany the trade and economic dimensions of the Agreement.<sup>35</sup> At first sight, these provisions indicate the Community and Member States' ambition to influence the Partner's transformation by reference to their own regulatory model, and, as it shall be seen below, in accordance with the political objectives of the then newly established European Union.<sup>36</sup>

Furthermore, compared to the TCA, the multi-dimensional cooperation envisaged by the PCAs appears to use, to some extent, a more mandatory language. For instance, the provisions on cooperation in the field of education and training provide that the Parties "shall cooperate with the aim of raising the level of general education and professional qualifications, both in the public and private sectors".<sup>37</sup> Also in the field of transport, the Parties "shall develop and strengthen their cooperation", with the aim *inter alia* to restructure and modernise transports systems and networks.<sup>38</sup> It should

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in the sense that they could not lead to harmonisation, which precludes Member States' action in the field covered. This prudent allocation of new powers to the Community is characteristic of the Member States' changing disposition towards the European integration process. Further: Dehousse and Ghemar (1994: 151), Flaesch-Mougin (1993: 351) and Dashwood (2004b: 360).

<sup>32</sup> Art. 52 PCA Russia.

<sup>33</sup> Art. 56 PCA Ukraine.

<sup>34</sup> Pelkmans and Murphy (1991).

<sup>35</sup> Title VI of both agreements.

<sup>36</sup> See further in chapter 2.

<sup>37</sup> Art. 63(1) PCA Russia, equivalent provisions can be found in Art. 59 (1) PCA Ukraine.

<sup>38</sup> Art. 70 PCA Russia, Art. 64 PCA Ukraine.

nevertheless be noted that the PCAs fall short of establishing specific obligations in those fields.<sup>39</sup>

#### *1.1.2.3. The sophisticated institutional framework of the PCAs*

Last, but not least, each PCA establishes an institutional framework that is significantly more elaborate and systematic than the one based on the TCA. While the latter foresaw the establishment of a “mixed commission” meeting once a year to ensure the proper functioning of the agreement,<sup>40</sup> the PCAs set up a three-level institutional structure, involving the highest political authorities of each Party, parliamentarians and senior civil servants.<sup>41</sup> This institutional framework not only supervises the implementation and development of the PCAs, but it is also used to support and develop the political dialogue established by each of the two Agreements, and which had no equivalent in the context of the TCA.<sup>42</sup>

The foregoing cursory comparison between the TCA and the PCAs reveals that on many accounts the latter encompass more areas of cooperation and include increased commitments from the Parties, than the former. The objectives of the PCAs and notably that of supporting the transformation of the two partner countries, explain the breadth of their scope and the nature of the obligations foreseen in the new Agreements. The wider scope of the PCAs is indeed epitomised by their mixed nature, as their scope exceeds the limits of Community exclusive external powers, and covers notably fields where Member States and the Community share competence.<sup>43</sup> Unlike the TCA, which was concluded by the Community only, the PCAs had to be

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<sup>39</sup> Concrete actions have rather been dealt with on the EC technical assistance programme towards the NIS, the so-called TACIS programme (e.g. OJ 1991 L 201/2; OJ 1993 L187/1).

<sup>40</sup> Art. 22 TCA.

<sup>41</sup> Title IX PCA Russia, Title X PCA Ukraine.

<sup>42</sup> Title II in each PCA. The only TCA provisions of a “political” nature can be found in its Preamble, which indicates that the Agreement should help fulfilling the objectives of the Final Act of the Conference on Security and Cooperation in Europe. See also Maresceau and Montaguti (1995: 1327).

<sup>43</sup> In view of the case law of the Court of Justice, particularly Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, see further below.

ratified by both the Community and its Member States. The inflation of areas of cooperation as well as the apparent deepening of mutual commitments, notably as regards trade, have implied the progressive elaboration of the PCAs' legal bases.

### **1.1.3. The extended legal bases of the PCAs**

Initially, the PCAs and the TCA were based on the same legal foundations, viz. the combination of Articles 133 and 308 EC (ex Articles 113 and 235 EC).<sup>44</sup> However, the legal bases of the PCA were revisited by the Commission, in view of the European Court of Justice's evolving case law regarding the extent and nature of Community external powers (1.1.3.2). Moreover, the *procedural* legal bases of the PCAs differ from that of the TCA thereby involving the European Parliament to a greater extent (1.1.3.1).

#### *1.1.3.1. Different procedural legal bases implying an enhanced role for the European Parliament*

The legal bases of the PCAs include, in addition to Articles 133 and 308 EC, a reference to Article 300 (2) and (3) sub-paragraph 2 (ex Article 228 (2) and (3) sub-paragraph 2) of the EC Treaty, introduced by the TEU. This reference relates to the procedure used by the Community institutions to negotiate and conclude external agreements. In particular, sub-paragraph 2 of Article 300(3) EC provides that the Council concludes the agreement after the *assent* of the European Parliament has been obtained.<sup>45</sup>

The requirement of the Parliament's assent derogates from the usual consultation procedure set out in Article 300(3) EC,<sup>46</sup> which was used in the case of the TCA.<sup>47</sup> Such a derogatory procedure always applies to the conclusion of *association*

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<sup>44</sup> This legal basis was traditionally used by the Community for establishing so-called "second" and "third generation agreements", up to the entry into force of the TEU. Peers (2000a: 163), Raux (1990: 7).

<sup>45</sup> Assent of the EP to conclusion of the PCA-Russia (European Parliament, 1995b); Assent of the EP to conclusion of the PCA-Ukraine (European Parliament, 1995a). Further, see Delcourt (1998: 85).

agreements. In certain situations however, it is also brought into play in relation to non-association agreements. Assent is required first, where the agreement in question establishes “a specific institutional framework by organising cooperation procedures”, secondly, when the agreement has “important budgetary implications for the Community”, and thirdly, in case the agreement entails “amendment of an act adopted under the [co-decision] procedure”.<sup>48</sup>

It has been argued that the PCAs do not easily correspond to any of the three categories,<sup>49</sup> and that it is essentially their *political* significance which justified the need for an EP assent.<sup>50</sup> The institutional frameworks set up by the PCAs may also explain the requirement to obtain the EP’s assent, even if such frameworks are not endowed with any decision-making power.<sup>51</sup> Indeed, Article 300 EC does not expressly limit the requirement to obtain the Parliament’s assent to agreements establishing institutional frameworks endowed with power to adopt binding decisions.<sup>52</sup>

Be it as it may, the fact that the Parliament’s assent had to be obtained before the PCAs could be concluded, gives these Agreements a particular significance in the typology of EC external agreements. It assimilates them, from a *procedural* point of view, to association agreements which, as pointed out above, always require the EP assent. The PCAs are thus ranked at a higher level than the 1989 TCA.<sup>53</sup> The stronger involvement of the Parliament in the conclusion of the PCA also reflects an internal

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<sup>46</sup> The Parliament’s right to be consulted should not be underestimated. As recalled by the Court of Justice in Case 138/79 *Roquette Frères v Council* and Case 139/79 *Maïzena v Council*, consultation of the EP is an essential procedural requirement. An act adopted in violation of this requirement can be held unlawful on the basis of Art. 230 EC. On the role of the European Parliament in external relations, see e.g. Weiler (1980: 151).

<sup>47</sup> European Parliament (1990).

<sup>48</sup> Art. 300(3), sub-para. 2 (ex Art. 228(3), second sub-para) EC.

<sup>49</sup> Delcourt (1998: 85).

<sup>50</sup> Report of H. Carrère-d’Encausse MEP on the proposal for a Council and Commission decision on the conclusion of a Partnership and Cooperation Agreement with the Russian Federation (European Parliament, 1995c).

<sup>51</sup> This is also suggested by Lenaerts and van Nuffel (1999: 700), as well as by de Walsche (1999: 69). On the institutional framework of the PCA, see section 2.3 below.

<sup>52</sup> Further on old Art. 228 EC: Schmitter (1995: 726), Flaesch-Mougin (1993: 351).

evolution whereby it has occupied an increasingly significant role in the EC law-making process,<sup>54</sup> particularly after the entry into force of the Maastricht Treaty.<sup>55</sup>

1.1.3.2. *Amplified legal bases ratione materiae following Opinion 1/94*

The substantive differences between the TCA and the PCAs highlighted above explain the distinction between the legal bases of the two types of Agreements, especially in view of the Court of Justice's evolving case law regarding external competence of the Community. In its famous Opinion 1/94, the Court clarified the concept of common commercial policy (CCP), and shed further light on the doctrine of Community implied powers and on the use of Article 308 (ex 235) EC in external relations. This Opinion had profound repercussions on the law of EC external relations in general, and on the choice of legal bases of the PCAs, in particular. The following will recall the main conclusions of the Court in Opinion 1/94 and examine their implications for the conclusion of the PCAs.<sup>56</sup>

On the basis of Article 300(6) EC, the Commission requested an Opinion from the Court of Justice on whether the Community was competent to conclude, on its own, all parts of the Agreement establishing the World Trade Organisation,<sup>57</sup> a position that

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<sup>53</sup> It should be pointed out that the TCA was adopted before the TEU was signed. Pre-TEU Art. 228 EEC only provided for assent of the EP in two situations, namely before the conclusion of an association agreement (Art. 238 EEC), and before accession of new states (Art. 237 EEC). One could however doubt whether the EP would have been asked to give its assent before the conclusion of the TCA, had the latter been negotiated and concluded under Art. 228 EC, Maastricht version. While politically significant, the content of the TCA would not have warranted the use of the assent procedure, particular given its remaining exceptional character.

<sup>54</sup> Further Louis and Walbroeck (1988). On the limits to this evolution, see e.g. Gaudissart (1999a: 28ff).

<sup>55</sup> Indeed, it corresponds to the Parliament's long-standing request to be more involved in Community external relations. Quintin (1975: 211), Jacobs *et al* (1992).

<sup>56</sup> Opinion 1/94.

<sup>57</sup> The WTO Agreement establishes a common institutional framework for the conduct of trade relations among its members in matters related to the agreements and legal instruments annexed to it (Art. II(1) WTO). Among those agreements, one may recall the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services ("GATS") and the Agreement on Trade Related

was much disputed by the Council and a majority of Member States. In Opinion 1/94, the Court held that the Agreement had to be concluded by the Community and Member States *acting jointly*.<sup>58</sup>

First, the Luxembourg judges considered that the WTO Agreement could not be concluded by the Community solely on the basis of Article 133 EC for its provisions on trade in services (GATS) and trade-related aspects of intellectual property (TRIPS) partly fell outside the ambit of the CCP.<sup>59</sup> Only the Multilateral Agreements on Trade in Goods (still referred to as GATT), including ECSC and agricultural products, could be concluded on the basis of ex-Article 113 EC, for they were considered to be covered by the CCP.<sup>60</sup>

Secondly, the Court opined that the WTO Agreement could not be concluded by the Community alone on the basis of implied external powers as a result of an “*ERTA effect*”.<sup>61</sup> The latter was indeed restated in Opinion 1/94 as involving the *effective* exercise of the Community internal competence with regard to the matter concerned through the adoption of common rules, as a prerequisite for the Community to acquire exclusive external power on this matter.<sup>62</sup> *In casu*, the Court found that fields enclosed

Aspects of Intellectual Property Rights (“TRIPs”) (World Trade Organization (1994).

<sup>58</sup> For commentaries, see e.g. Burnside (2000: 152), Tridimas (2000: 48), Tridimas and Eeckhout (1994: 143), Bourgeois (1994: 11; 1995: 763), Duteil de la Rochère (1995: 461), Raux (1997: 34ff), Simon (1994: 1).

<sup>59</sup> As regards services, the Court found that with the exception of cross-frontier supply services, the modes of supply of services referred to by GATS as “consumption abroad”, “commercial presence” and the “presence of natural persons” (Art. I(2) GATS) are not covered by the CCP (para. 47). With respect to TRIPs, the Court held that apart from those of its provisions that concern the prohibition of the release into free circulation of counterfeit goods, TRIPs does not fall within the scope of the CCP (para. 71).

<sup>60</sup> Arnall (1996: 3). Further on the complex definition of the CCP, Maresceau (1993: 3).

<sup>61</sup> Case 22/70 *Commission v Council (ERTA)*. Further on the *ERTA* case, Dashwood and Heliskoski (2000: 3), Temple Lang (1986: 183), Scannell (2001: 343).

<sup>62</sup> At para. 77, the Court held that the Community’s exclusive competence does not automatically flow from its power to lay down rules at internal level. Referring to the *ERTA* judgment, the Court added that the Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. To be sure, the Court also said in

in the WTO Agreement that partly fell outside the CCP, namely GATS and TRIPs, were not fully covered by common rules. The Community could not therefore claim to have exclusive competence by relying on the “*ERTA* effect” to conclude these agreements.<sup>63</sup> In addition, the Court found that the Community could not successfully invoke the argument of *necessity*, acknowledged in Opinion 1/76 to justify exclusivity.<sup>64</sup> So far as GATS is concerned, the Court held that the attainment of freedom of establishment and freedom to provide services was not “inextricably linked” to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community.<sup>65</sup> With respect to TRIPs, it was found that unification and harmonisation of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective.<sup>66</sup>

Thirdly, the Court found that the subsidiary legal basis of Article 308 EC (ex-Article 235) could not be relied upon to allow the Community to conclude the WTO Agreement on its own. It recalled that this provision enables the Community to cope with any insufficiency in the powers conferred on it, expressly or by implication, for the achievement of its objectives, but then held that it could not, in itself, vest exclusive competence in the Community at international level.<sup>67</sup>

In view of all these elements, the Court concluded that the Community was not competent to sign the WTO Agreement on its own. While it could conclude the Multilateral Agreement on Trade in Goods on the basis of ex-Article 113 EC, it had to act together with the Member States in relation to GATS and TRIPs. The Court’s Opinion, consolidated thereafter,<sup>68</sup> had considerable constitutional implications,<sup>69</sup> especially with respect to the conduct of Community external relations.

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para. 88 in relation to Art. 95 (ex 100a) EC that an internal power to harmonise which has not been exercised in a specific field cannot confer exclusive competence in that field on the Community.

<sup>63</sup> Para. 97 as regards services, para. 103 with respect to areas covered by TRIPs.

<sup>64</sup> Opinion 1/76 *Draft Agreement Establishing a Laying-up Fund for Inland Waterways Vessels*.

<sup>65</sup> Para. 86.

<sup>66</sup> Para. 100.

<sup>67</sup> Para. 89.

<sup>68</sup> E.g. Opinion 2/92 *Third Revised Decision of the OECD on National Treatment*.

<sup>69</sup> See Appella (1996: 440) and Baquero Cruz (1997: 257).

First, it clarified the concept of CCP which, as a matter of principle, involved exclusive Community competence. By limiting the extent of the CCP, the Court limited the scope of *a priori* or “pre-emptive exclusivity”.<sup>70</sup>

Secondly, it shed further light on the doctrine of implied powers. In particular, the Court clarified the conditions whereby the Community may acquire exclusive external competence following the *ERTA* doctrine. By emphasising the requirement of full harmonisation before the Community can become externally exclusively competent in the field concerned, the Court insisted on the Member States’ political choice to keep their competence externally for as long as internal Community competence is not exercised. Thirdly, it refined and partly restricted the recourse to the subsidiary powers provided by Article 308 EC, suggesting that it cannot serve to grant *new* powers to the Community.<sup>71</sup>

The Court therefore emphasised the principle that the Community and the Member States share competence at the external level, including in the field of external trade.<sup>72</sup> As a corollary, it confirmed the prime importance of mixity in the system of EC external relations.<sup>73</sup> As suggested by Alan Dashwood, Opinion 1/94 did not result from alleged doctrinal or idiosyncratic policy considerations. The Treaty of Maastricht had altered the balance between the Community’s powers and those of the Member States, and the Court was “loyally giving effect to the Treaties as they must [henceforth] be interpreted”.<sup>74</sup> Also, the Luxembourg judges did not want to bring about judicially what the Commission had failed to achieve politically a few years before in the run-up to the Maastricht Treaty.<sup>75</sup> The jurisprudence of Opinion 1/94

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<sup>70</sup> Dashwood and Heliskoski (2000: 3).

<sup>71</sup> This was later confirmed and further articulated in Opinion 2/94 *Accession to the European Convention of Human Rights*.

<sup>72</sup> Louis (1994: 8).

<sup>73</sup> See, in this regard, AG Tesouro’s Opinion in Case C-53/96 *Hermès International v FHT Marketing Choice BV*, and comments by Heliskoski (2001: 47), Dashwood (1998d: 95), and Garzón Clariana (1998: 17).

<sup>74</sup> Dashwood (1996b: 113).

<sup>75</sup> Cremona (1999a: 157) recalls that the Commission wanted to re-draw the Community’s external powers, including an extended “external economic policy” that would have included not only matters

thus finds its roots in the new constitutional order set out by the Treaty on European Union.

This new configuration of Community and Member States' role in EC external relations had a direct influence on the conclusion of the PCAs.<sup>76</sup> In particular, the Court's clarification of the scope of the CCP entailed a reappraisal of the nature of several provisions included in the Agreements. The provisions of a CCP nature became more limited than initially conceived by the Commission. Conversely, several obligations foreseen in the PCAs involved instead either implied external powers or subsidiary powers of the Community, as understood in Opinion 1/94. In other words they did not necessarily entail exclusive powers of the Community, e.g. in the field of establishment or services.

Following Opinion 1/94, the Commission revisited the legal bases of the PCAs, and proposed to conclude them by reference to Community implied external powers in several areas, in addition to the initial combination of ex-Articles 113, 235 and 228 (2) and (3) (now Articles 133, 308 and 300 (2) and (3)).<sup>77</sup> The Council followed the Commission's adjusted proposal and concluded the PCAs on additional legal bases. First, the Preambles of the decisions to conclude the PCAs with Russia and Ukraine, respectively, refer to the EC Treaty and "in particular" to Articles 44(2), 47(2), 55 (ex Articles 54(2), 57(2) and 66) EC on establishment and services and Articles 71 and 80(2) (ex Articles 75 and 84 (2)) EC on transport,<sup>78</sup> as well as to Articles 57(2) (ex

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within the existing CCP, but also services, establishment, capital, intellectual property, competition, and for which the Community would have had exclusive competence. See also Maresceau (1993: 5).

<sup>76</sup> Flaesch-Mougin (1998: 57).

<sup>77</sup> Proposal for a Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Union and Ukraine (European Commission, 1995d) (it also covers the decision on the conclusion of the PCAs with Belarus, Kazakhstan, Kirghistan, Moldova respectively). Therein, the Commission underlined that the new legal basis represented "une *amplification considérable* de celle prévue dans l'accord de 1989". At first, the Commission did not propose any amended legal basis for the PCA with Russia. It was revised on the occasion of the proposals for the signature of a Protocol to the PCA following accession of Austria, Finland and Sweden to the Union (European Commission, 1996b) and eventually in the decision on the conclusion of the PCA (OJ 1997 L327/1). Further: Flaesch-Mougin (1998: 66) and Peers (2000a: 164-165).

<sup>78</sup> The Preambles of the Council and Commission's decisions to conclude the Agreements add further explanation to the adjustment of the PCAs legal basis. They state that certain provisions impose on the

Article 73c (2)) on movement of capitals and payments.<sup>79</sup> Furthermore, a reference to Articles 93 and 94 (ex Articles 99 & 100) EC was added to the PCAs legal bases in view of the fiscal provisions of the Agreements.<sup>80</sup> All these provisions relate to implied external powers of the Community.

Secondly, the Preambles state that, with regard to certain provisions of the PCAs which are to be implemented by the Community, “the Treaty establishing the European Community makes no provision for specific powers, it is therefore necessary to resort to [ex] Article 235 [new Article 308] EC”. In view of Opinion 1/94, Article 308 is of limited use however.<sup>81</sup> Arguably, it is included in the PCAs legal bases essentially to support the provisions falling outside trade matters altogether, particularly the provisions on economic cooperation.<sup>82</sup>

The updated legal basis of the PCAs shed further light on the nature of the Community and Member States’ competence in the context of the Agreements.<sup>83</sup> Opinion 1/94 limited the scope of the CCP and clarified the doctrine of implied powers. It appears that one of its effects was that of consolidating Member States’ involvement in external relations in general, and in the context of the PCAs in Community obligations in the field on the provision of services which go beyond the cross-border framework. They also mention that various PCAs obligations, falling outside the scope of Community trade policy, affect or are likely to affect the arrangements laid down by Community acts adopted in the areas of the right of establishment, transport and the treatment of enterprises, which incidentally looks like a broad formulation of the *ERTA* doctrine.

<sup>79</sup> The Preambles point out that the PCAs impose on the European Community certain obligations regarding capital movements and payments between Community and Russia, and Ukraine respectively.

<sup>80</sup> In this regard, the Preambles indicate that insofar as the PCAs affect Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, and Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, which are based on ex Art. 100 (Art. 94) EC, that Article should thus be used as a legal basis of the PCAs.

<sup>81</sup> It was confirmed thereafter e.g. in Opinion 2/94 *Accession to the European Convention on Human Rights*. See further above section 2.2.

<sup>82</sup> Further: Flaesch-Mougin (1998: 69). See further below.

<sup>83</sup> The PCA was the first bilateral agreement to be concluded on this new complex legal basis, the only previous external instrument which had used this type of “post-Opinion 1/94” legal basis was the European Energy Charter Treaty (European Commission, 1994a).

particular. Not only did the Member States become more influential at the levels of negotiation, and conclusion considering the requirement for national ratification, but they also got a key role in the implementation and further development of the Agreements.<sup>84</sup>

For the sake of exhaustiveness, it should be added that, in contrast to the TCA, the decisions on the conclusion of the PCAs refer also to Article 95 of the Treaty establishing the European Coal and Steel Community (ECSC),<sup>85</sup> which suggests that the Agreements involve non-trade aspects of the ECSC.<sup>86</sup> Similarly, the reference in the PCAs to Article 101 of the Treaty establishing the European Atomic Energy Community (“Euratom”) implies that the Agreement involves non-trade aspects of the Euratom Treaty.<sup>87</sup> Both ECSC and EAEC legal bases carry with them a supplementary layer of procedural arrangements for the conclusion of the PCA, on the Community side.<sup>88</sup>

The foregoing comparison of the PCAs objectives, provisions and legal bases with those of the 1989 TCA, shows that the former Agreements establish a broader, deeper

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<sup>84</sup> Art. 2(1) of each decision to conclude the PCA provides that “[t]he position to be adopted by the Community in the Cooperation Council and the Cooperation Committee shall be determined by the Council, on a proposal from the Commission, or, where appropriate, by the Commission, in each case in accordance with the relevant provisions of the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community.”

<sup>85</sup> The ECSC being concluded for a duration of 50 years, it ceased formally to exist on 23 July 2002. Art. 95 provided in its paragraph 1 that: “[i]n all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the High Authority is necessary to attain, within the common market in coal and steel and in accordance with Art. 5, one of the objectives of the Community set out in Arts 2, 3 and 4, the decision may be taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted.” Art. 95 ECSC was equivalent to Art. 308 in the EC Treaty.

<sup>86</sup> Indeed, trade in ECSC products could be supported by ex Art. 113 EEC, as suggested by the Court in Opinion 1/94. It was held that the Community has exclusive competence under ex-Art. 113 EC to conclude agreements of a general nature covering all goods, even if they extend to coal and steel products. See paras 25-27, Opinion 1/94.

<sup>87</sup> In Opinion 1/94, para. 24, the Court considered that “(s)ince the Euratom Treaty contains no provisions relating to external trade, there is nothing to prevent agreements concluded pursuant to Article 113 of the EC Treaty from extending to international trade in Euratom products”.

<sup>88</sup> On these complications, see the speaking notes of Kuijper (2002: 15).

and more complex relationship than the latter. Going beyond normalisation, the PCAs aim at fostering the *rapprochement* between new partners based on the widening of trade relations, the development of cooperation and the establishment of a political dialogue. The more elaborate character of the relationship established by the PCAs entails an enhanced participation of the Member States, particularly post-Opinion 1/94 context. As such, the PCAs embody an updated formula of mixed agreements.

The PCAs have also been crafted in consideration of the policy being established by the Community and its Member States towards the CEECs. The next section will situate the PCAs in relation to this policy and will explore the rationale behind the differentiation between the EU relationships with Russia and Ukraine, on the one hand, and the links established between the EU and the CEECs, on the other hand.

## **1.2. Less ambitious than the Europe Agreements concluded with the central and eastern European countries**

Following the collapse of the Soviet Union, the Community and its Member States decided to approach the former satellites of central and eastern Europe and the former Soviet republics in a differentiated fashion.<sup>89</sup> This differentiation, encapsulated in the semantic distinction between the “CEECs” label and the “NIS” label, was epitomised by the choice of contractual relations.<sup>90</sup> While PCAs were concluded with the NIS, the EU established bilateral “Europe Agreements” (EAs) with the CEECs. Although the EAs and PCAs share some common features (1.2.1), the distinction between *Association* and *Partnership* is nonetheless more than semantic, with the former being

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<sup>89</sup> The Baltic States, which emerged from the disintegration of the Soviet Union, were initially granted an intermediate status by the EC. They first concluded free trade agreements with the Community, based on ex Art. 113 EC, but were progressively assimilated to the “CEECs”, and entered the Europe Agreement network. The free trade agreements can be found at OJ 1994 L 373/1 (Estonia); OJ 1994 L374/1 (Latvia) and OJ 1994 L375/1 (Lithuania). Further on the Baltic States, see van Elsuwege (2002b: 171). For Jacques Delors (1994: 269), “La grande Europe s’arrête aux frontières de la CEI, mais prendre les pays baltes de notre côté, c’est indiscutable historiquement”.

<sup>90</sup> It was underscored by the establishment of two distinct Community assistance programmes: the PHARE programme towards the CEECs (OJ 1989 L375/11), and the TACIS programme towards the NIS (OJ 1991 L201/2; OJ 1993 L187/1), each programme being based on specific regulations and involving specific objectives.

more ambitious than the latter. A comparison between the objectives, content, and legal foundations of the respective agreements shed light on the different types of relationship they establish (1.2.2).<sup>91</sup> It will become apparent that the differentiation underpins the complex policy of the EU towards the countries emerging from the dissolution of the Eastern bloc, a policy which will be referred to, in the following section, as the EU “*Ostpolitik*”.<sup>92</sup> It is based on a core of fundamental principles, but involves different degrees of cooperation and rapprochement.

### 1.2.1. PCAs and EAs as components of the EU *Ostpolitik*

On various accounts the PCAs and the EAs are inspired by a core of principles which the EU seeks to promote, notably by reference to various international documents (1.2.1.1). Moreover, both types of agreements involve similar procedural arrangements for their conclusion (1.2.1.2).

#### 1.2.1.1. *A common inspiration: promoting an emerging set of “values” towards countries in transformation*

The preambles of both the EAs and the PCAs refer to the “common values” that the Parties share.<sup>93</sup> They also highlight the latter’s common ambition to strengthen the political and economic freedoms, defined as the basis of both the association and the partnership,<sup>94</sup> and stress in particular the firm commitment of the Parties to the full implementation of principles and provisions contained in various documents of the Conference on Security and Cooperation in Europe (CSCE).<sup>95</sup> Both types of

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<sup>91</sup> The Court has emphasised on various occasions, the importance of the context and objectives of external agreements in interpreting their provisions: Case C-312/91 *Metalsa Srl*.

<sup>92</sup> Lippert (1995: 63), Smith (1996), Weidenfeld (1996), de la Serre (1994: 11), Kramer (1993). On the concept of *Ostpolitik*, see Garton Ash (1993), esp. chapter 2.

<sup>93</sup> For instance the first indent of the Preambles of EA Poland (OJ 1993 L348/2) and EA Bulgaria (OJ 1994 L358/3), respectively; first indent of Preamble of PCA Russia and second indent of Preamble of PCA Ukraine.

<sup>94</sup> Third indent of the Preamble of EA Poland; Fourth indent of Preamble of EA Bulgaria; third indent of the Preamble of PCA Russia, fourth indent of Preamble of PCA Ukraine.

agreements thus rely on the same political *foundations*, and aim at promoting the same principles and “values”.

This aspect is made more tangible through additional elements common to the two types of agreements. First, both the EAs and the PCAs establish political dialogues. The first indent of Article 2 of the Europe Agreement with Poland provided that:

A regular political dialogue shall be established between the Parties. It shall accompany and consolidate the rapprochement between the Community and Poland, support the political and economic changes underway in that country and contribute to the establishment of new links of solidarity.<sup>96</sup>

Similarly Article 6, first indent, of the PCA with Russia states:

A regular political dialogue shall be established between the Parties which they intend to develop and intensify. It shall accompany and consolidate the rapprochement between the European Union and Russia, support the political and economic changes underway in Russia and contribute to the establishment of new forms of cooperation.<sup>97</sup>

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<sup>95</sup> The CSCE was later transformed into the Organisation for Security and Cooperation in Europe (OSCE).

<sup>96</sup> Art. 2 EA Poland then reads as follows:

The political dialogue and cooperation:

- will facilitate Poland's full integration into the community of democratic nations and progressive rapprochement with the Community. The economic rapprochement provided for in this Agreement will lead to greater political convergence,
- will bring about better mutual understanding and an increasing convergence of positions on international issues, and in particular on those issues likely to have substantial effects on one or the other Party,
- will enable each Party to consider the position and interests of the other in their respective decision-making processes,
- will enhance security and stability in the whole of Europe.

<sup>97</sup> Art. 6 PCA Russia then reads as follows:

The political dialogue:

- shall strengthen the links between Russia and the European Union. The economic convergence achieved through this Agreement will lead to more intense political relations,
- shall bring about an increasing convergence of positions on international issues of mutual concern thus increasing security and stability,
- shall foresee that the Parties endeavour to cooperate on matters pertaining to the observance of the principles of democracy and human rights, and hold consultations, if necessary, on matters related to their due implementation.

While drafted in slightly different terms, particularly with respect to their ultimate aims (“new links of solidarity” v. “new forms of cooperation”), the political dialogues nonetheless stem from the same ambition to accompany and consolidate the partners’ rapprochement with the Union, and support the political and economic changes in these countries.<sup>98</sup> Furthermore, both dialogues are destined to take place within institutional frameworks established by the respective agreements, at presidential, ministerial and parliamentary levels.<sup>99</sup>

Secondly, each agreement includes a *political conditionality* which further articulates the common foundations of the PCAs and EAs, as well as their common aim to promote a set of values. Both agreements contain a “human rights clause” according to which respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a New Europe<sup>100</sup> inspires the domestic and external policies of the Parties, and constitutes an essential element of the agreement.<sup>101</sup> The establishment and the development of the relationship between the contracting parties are subject to the respect of these principles. The basis for including this specific clause in the two types of agreements is the same, namely the Declaration of the Council of 11 May 1992. This Declaration establishes a regional policy of the EU towards all its CSCE partners and requires specifically the inclusion of such a clause in agreements concluded with these countries.<sup>102</sup>

More generally, conditionality is a common *methodological* feature of the two types of agreements. Both EAs and PCAs establish a correlation between their full

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See also Art. 6 PCA Ukraine.

<sup>98</sup> See in this regard the conclusions of the 1990 Rome and Dublin European Councils, respectively (European Council, 1990b; 1990a). Further: Mayhew (1998: 19ff), Calleo (1994).

<sup>99</sup> The presidential level of dialogue involves the President of the Commission, President of the Council of the European Union and the President of the other Party. While the PCA with Ukraine does not explicitly provide for meetings at such a Summit level, meetings have nonetheless taken place.

<sup>100</sup> CSCE (1975); CSCE (1990).

<sup>101</sup> Art. 6 EA Bulgaria; Art. 2 PCA Russia. Art. 2 PCA Ukraine also refers to the principles of market economy. An analysis of the human rights clause is included in section 2.2 of this study.

<sup>102</sup> Council (1992). The fact that the Declaration was made in 1992 explains the absence of the clause in earlier Europe Agreements with Poland and Hungary, which had been signed in 1991. Further: Maresceau (1996: 125).

implementation and the continuation and accomplishment of the reforms undertaken by the partner/associated countries. For instance, the Preamble of the PCA with Ukraine emphasises the “necessary connection” between full implementation of the Partnership on the one hand, and the “continuation of the actual accomplishment of [the partner]’s political, economic and legal reforms on the other hand”.<sup>103</sup> Similarly, the EA with Poland underlines that “a link should be made” between full implementation of the association on the one hand, “and the actual rapprochement between the Parties’ systems, notably in the light of the conclusions of the CSCE Bonn Conference”.<sup>104</sup> This common approach is further articulated through the inclusion, in both types of agreements, of a clause on approximation of legislation, whereby for instance,

[t]he Parties recognize that an important condition for Bulgaria's economic integration into the Community is the approximation of Bulgaria's existing and future legislation to that of the Community. Bulgaria shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.<sup>105</sup>

Follows a non-exhaustive list of areas on which such approximation should focus. The PCAs with Russia and Ukraine contain the same provisions, although they link approximation of legislation to the aim of “strengthening of economic links” with the Community, rather than to the objective of economic integration into the Community,<sup>106</sup> foreseen on the basis of the EAs.

The two categories of agreement thus rely on the same political foundations, and involve a similar twofold methodology of dialogue and conditionality, to foster the strengthening of relations. These common features can be regarded as constituting the embryonic *Ostpolitik* of the Union towards its neighbours, in the early nineties.

1.2.1.2. *Agreements subject to the approval of the European and national parliaments*

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<sup>103</sup> Preamble of the PCA Ukraine, 9<sup>th</sup> indent.

<sup>104</sup> Preamble of the EA with Poland, 7<sup>th</sup> indent, *in fine*.

<sup>105</sup> Art. 69 EA Bulgaria.

<sup>106</sup> Art. 55 PCA Russia; Art. 51 PCA Ukraine.

The EU *Ostpolitik* was elaborated along the same procedural lines with the political involvement and necessary support of the Parties' parliaments. First, the PCAs and the EAs were concluded according to the same procedural arrangements at the EU level. The legal bases of the EAs and PCAs refer to the provisions of Article 300(3) second sub-paragraph, which provide that the European Parliament's assent should be obtained before the Council finally concludes the agreement.<sup>107</sup> As suggested above, subordinating the conclusion of the PCAs to the European Parliament's assent assimilates them to association agreements in procedural terms. Secondly, given their mixed character, both types of Agreements had to be concluded and ratified by Member States as well by the Community institutions, which explains their protracted entry into force.

### **1.2.2. A differentiated *Ostpolitik*: distinguishing Partnership and Association**

While the two agreements share common political foundations, procedural and methodological features, they remain, in essence, radically different. The distinctions between the two contractual frameworks are at least threefold: they concern the *degree of rapprochement* with the EU foreseen by each agreement (1.2.2.1), the level of mutual commitments that should materialise this rapprochement (1.2.2.2) and consequently the legal bases of the two types of agreements (1.2.2.3). Arguably, the justification for differentiating the two categories of country stems from political, rather than legal considerations (1.2.2.4).

#### *1.2.2.1. Different aims as regards the rapprochement with the European Union*

PCAs and EAs differ as regards their ultimate objectives of rapprochement with the EU, notwithstanding suggestions that both agreements should be as similar as possible,<sup>108</sup> and despite Russian and Ukrainian attempts to obtain an agreement as

<sup>107</sup> European Parliament (1992a).

<sup>108</sup> See for instance Willy de Clercq's proposal for a resolution on the development of future contractual trade and economic relations between the Community and the Republics of the CIS (European Parliament, 1992b).

close as possible to that signed with the CEECs.<sup>109</sup> The PCAs conspicuously contrast with the EAs insofar as they do not evoke Union membership at all.<sup>110</sup> Instead, the PCAs refer to “a gradual rapprochement between the NIS and *a wider area of cooperation in Europe and neighbouring regions*” (emphasis added).<sup>111</sup>

This essential distinction between the “wider area of cooperation” on the one hand, and the perspective of membership, on the other, is echoed by Article 1 of the respective agreements. For instance, Article 1 of the EA with Poland provided *inter alia* that the association establishes “an appropriate framework for Poland’s *gradual integration into the Community*” (emphasis added).<sup>112</sup> By contrast, the first Article of the PCA with Russia, which appears to be the most ambitious PCA in terms of its objectives, refers more modestly to a “gradual integration between Russia and a wider area of cooperation in Europe.” With respect to Ukraine, the PCA merely refers to the development of “close political relations”, the promotion of trade and investment and “harmonious economic relations between the Parties... to foster their sustainable development”. The objectives of the Partnership also include the support to Ukraine’s efforts to consolidate its democracy, develop its economy and complete the transition into a market economy, but the concept of “integration” into the Community is absent.

The foregoing comparison suggests that there is a clear difference as regards the ultimate goals of the relationships envisaged by the PCAs and EAs, respectively.<sup>113</sup> Such difference, later accentuated by the eventual acknowledgment, by the EU, that

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<sup>109</sup> “Commission proposes free trade area with Russia”; *East West* No 545, 5.

<sup>110</sup> The reference to membership on the EA was however ambiguous. The last indent of the Preamble of the EA with Poland read as follows: “[r]ecognizing the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective”. Indeed, the initial proposal of the Commission concerning the establishment of EAs with CEECs, emphasised that the question of membership should be dealt with separately (European Commission, 1990). Further: Maresceau (1997a: 9), Müller-Graff (1997: 34). See also the Court’s understanding of the EAs reference to membership in Case C-63/99 *Głoszczuk*, Case C-235/99 *Kondova*; Case C-257/99 *Barkoci and Malik*; Case C-268/99 *Jany and Others*; and case note: Hillion (2003: 489ff).

<sup>111</sup> One could see in this formulation the premises of the “Wider Europe” policy of the EU towards the neighbours of the enlarged Union. See further section 6.1 of this study.

<sup>112</sup> See in this regard, Opinion of Jacobs AG in Case C-162/00 *Pokrzeptowicz-Meyer*.

associated countries in central and eastern Europe were eligible for membership,<sup>114</sup> is underscored by the differentiation in the level of commitments undertaken by the Parties to the EAs and PCAs, respectively.

*1.2.2.2. Differentiated commitments undertaken by the Partners and Associated countries*

Both the PCAs and the EAs cover trade in goods and services, and contain provisions on establishment and movement of workers. However, they differ significantly when it comes to the Parties' rights and obligations listed under these headings. It would be beyond the scope of the present discussion to examine in detail each and every substantive distinction between the two types of agreements. Rather, the following will highlight some of the key differences in a limited number of sectors, related to the external projection of the internal market with a view to supporting the proposition that the relationships established by the EAs and PCAs, respectively, do not entail the same degree of rapprochement with the Union.

First, the EAs provide in their Title III on "Free movement of goods" for the progressive establishment of a free trade area covering "all industrial goods".<sup>115</sup> The EAs thus establish a preferential trade regime, which contrasts with that of the PCAs. While the latter do not exclude the potential establishment of FTAs between the Community, and Russia and Ukraine, respectively, it is merely envisaged as a long term-objective. According to Article 3 of the PCA with Russia:

The Parties undertake to consider development of the relevant titles of this Agreement, in particular Title III ["Trade in goods"] and Article 53 ["competition"], as circumstances allow, with a view to the establishment of a free trade area between them... Such development shall only be put into effect by

<sup>113</sup> It was indeed emphasised during the negotiations of the PCAs, by the representative of the Council before the European Parliament, see the response to Written Question E-2997/93 to the Council on the relations between the Community, Eastern Europe and the Commonwealth of Independent States (Council, 1993).

<sup>114</sup> European Council (1993a), see further chapter 6.

<sup>115</sup> See for instance Art. 7 EA Poland; Art. 8 EA Bulgaria; a specific regime concerns textiles, ECSC and agricultural products. Maresceau (1996: 125, 1997b: 67), Maresceau and Montaguti (1995: 1327), Cremona (1993: 345), Norberg (1997: 75), Mayhew (1998: 60ff).

virtue of an agreement between the Parties in accordance with their respective procedures.<sup>116</sup>

The feasibility of the FTA is closely linked to the evolution of the economic situation of the two countries,<sup>117</sup> and implicitly to their accession to the WTO.<sup>118</sup> Under the current circumstances, Title III of the PCAs simply re-affirms the application of the basic MFN treatment,<sup>119</sup> by reference to Article I of GATT.<sup>120</sup> It may be added that the PCA regime is all the less preferential that, at the time of the signature of the PCAs, Russia and Ukraine were not regarded as market economies, but as “economies in transition”,<sup>121</sup> a concept which does not correspond to any particular Community commercial policy regime.<sup>122</sup> Rather, as non-market economies, they remained

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<sup>116</sup> Similar provisions are included in Art. 4 PCA Ukraine.

<sup>117</sup> The PCAs’ reference to the establishment of FTAs with Russia and Ukraine results from the insistence of the Community’s partners to have a regime as closely as possible to that of the EAs. The European Parliament had unsuccessfully insisted on the establishment of free trade area between the Community and the NIS notably in its Resolution of 17 Sept. 1992 (European Parliament, 1992c). It criticised the restrictive trade regime envisaged by the Community towards the NIS on several occasions, see Report of the EP Committee on external economic relations (European Parliament, 1993a), also Opinion of the Economic and Social Committee on the relations between the European Union and Russia, Ukraine and Belarus (Economic and Social Committee, 1995).

<sup>118</sup> Short Guide to the PCA with Russia (European Commission, 1994b). Also, the unpublished draft Commission position regarding a possible FTA with Ukraine (European Commission, 2000a).

<sup>119</sup> As already envisaged in Art. 3 of the TCA. Further: Vahl (2003).

<sup>120</sup> The draft agreement did not contain the reference to GATT, which appeared in the course of the negotiations (European Commission, 1994b). The inclusion of GATT entails that the relevant GATT practice is directly taken into account in the interpretation of the PCA provisions concerned, as indeed confirmed by Art. 94 PCA Russia and Art. 89 PCA Ukraine. They state that “[w]hen examining an issue arising within the framework of the [PCA] in relation to a provision referring to an Article of GATT, the Cooperation Council shall take into account, to the greatest extent possible, the interpretation that is generally given to the Article of the GATT in question by the Contracting Parties to the GATT”. The Parties thus have to take account of the “GATT *acquis*”. Maresceau and Montaguti (1995: 1327).

<sup>121</sup> The Community finally recognised Russia as a market economy in November 2002, although under certain conditions. A market economy treatment was granted earlier to Russian companies on an individual basis since 2000. The same case by case treatment has applied to Ukrainian companies since 2000.

<sup>122</sup> De Laet (1995).

covered by specific Community rules on trade defence mechanisms, and particularly anti-dumping regulations,<sup>123</sup> much to their displeasure.

Secondly, the two agreements appear to set out distinct regimes as far as the movement of workers is concerned. For example, the EA with Bulgaria contains a title on “movement of workers” which stipulates that “subject to the conditions and modalities applicable in each Member State”, a Bulgarian national legally employed in the territory of a Member State must not be discriminated on the basis of his/her nationality as regards working conditions, remuneration or dismissal, as compared to the nationals of that Member State.<sup>124</sup> The EA thereby establishes a principle of non-discrimination for EA nationals legally employed in a EU Member State.<sup>125</sup> The Court of Justice has recognised that this principle could be invoked before a national Court,<sup>126</sup> including against private employers.<sup>127</sup> In addition, the said title on movement of workers ensures access to the labour market of the host Member State for the spouse and children of the legally employed worker, during the period of his/her employment, provided the spouse and children legally reside with him/her on the territory of the host Member State. Finally, the EAs contain several requirements with a view to coordinating the social security systems for EA workers. The latter requirements had to be further implemented by the Association Council established by the Agreement.<sup>128</sup>

Compared to the EAs, the provisions regarding “labour conditions” included in the PCAs appear much more limited in terms commitments. The PCAs do not cover the situation of the spouse or children of the legally employed worker, and they do not include provisions on the coordination of social security, save a requirement for the

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<sup>123</sup> Further: Jacobs (1989: 291).

<sup>124</sup> Art. 38 EA.

<sup>125</sup> This principle is reciprocal.

<sup>126</sup> Case C-162/00 *Pokrzeptowicz-Meyer*.

<sup>127</sup> Case 438/00 *Deutscher Handballbund*. These provisions have also been granted horizontal direct effect by several Member States courts, e.g. the decision of the French Conseil d’Etat, 30 Dec. 2002, *Fédération Française de Basket-Ball c/. Malaja*, summarised and annotated by Auneau (2004) 40 *RTDE* 423.

<sup>128</sup> Further on this point: Cremona (1997: 198).

Parties to conclude further agreements on the matter.<sup>129</sup> With respect to the situation of workers themselves, the Agreement with Russia and the Agreement with Ukraine differ. The latter provides in its Article 24 that:

“[s]ubject to the laws, conditions and procedures applicable in each Member States, the Community and its Member States *shall endeavour to ensure* that the treatment accorded to Ukrainian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal as compared to its own nationals (emphasis added).

The PCA with Ukraine thus establishes an *obligation of conduct* rather than an obligation of result. Although it follows the same wording and contains the same caveat, Article 23 of the PCA with Russia nonetheless encloses a significant difference. It provides that the Community and its Member States “*shall ensure*” (instead of “shall endeavour to ensure” as in the PCA with Ukraine) that the treatment accorded to Russian nationals legally employed in a EU Member State is not discriminatory.<sup>130</sup> The Agreement thus establishes an *obligation of result*, similar to the one contained in the EAs,<sup>131</sup> which, as pointed out above, was interpreted by the European Court of Justice as having full direct effect.<sup>132</sup> It could thus be suggested that the non-discrimination principle foreseen in the PCA with Russia could also be invoked by a legally employed Russian national on the ground that he or she is discriminated on the basis of his/her nationality, both against the authorities of a Member State and private employer.

In this respect, it should however be noted that both PCAs include a caveat (“Subject to the laws, conditions and procedures applicable in each Member State”) which is drafted differently from the proviso contained in the EAs (“Subject to the conditions and modalities applicable in each Member State”).<sup>133</sup> In its *Pokrzeptowicz-Meyer* ruling, the Court considered that the latter proviso “may not be interpreted in such a

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<sup>129</sup> Art. 24 PCA Russia, Art. 25 PCA Ukraine.

<sup>130</sup> At the beginning of negotiations, only a “best endeavours” clause was foreseen by the Community side (European Commission, 1994b: 9).

<sup>131</sup> As indeed suggested by Stix-Hackl AG in her Opinion in Case C-265/03 *Igor Sumitenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, 11 January 2005.

<sup>132</sup> Case C-162/00 *Pokrzeptowicz-Meyer*, para. 30. See also Case 438/00 *Deutscher Handballbund*.

<sup>133</sup> Further Cremona (1997a).

way as to allow the Member States to subject the principle of non-discrimination... to conditions or discretionary limitations. Such an interpretation, said the Court, would render that provision meaningless and deprive it of any practical effect.<sup>134</sup> This approach, which was by no means evident,<sup>135</sup> could be applied also to the PCAs' caveat, insofar as it seems to have the same function as the one enclosed in the EAs. In the PCA with Russia, it does not appear to make the application of the principle dependent on Member States' intervention.<sup>136</sup> On the other hand, the Court's interpretation of the purpose and nature of the PCA would play an important role in examining the potential direct effect of the provision. It thus remains to be seen whether the Court would consider that the "conclusion that the principle of non-discrimination laid down [in the PCA with Russia] is capable of directly governing the situation of individuals, [is] invalidated [or not] by an examination of the purpose and nature of that agreement, of which that provision forms part".<sup>137</sup>

Thirdly, with regard to the provisions on establishment, the EAs foresee the national treatment both on the establishment and operation of companies and nationals from the other Party.<sup>138</sup> Indeed, for companies, the EA right of establishment means setting up and managing subsidiaries, branches and agencies, and the right to take up and

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<sup>134</sup> Case C-162/00 *Pokrzepowicz-Meyer*, para. 24. See also Opinion of Jacobs AG, paras 32-44. On the Member States residual powers as regards immigration rules, see also the judgment of the Court of Justice in case C-327/02 *Panayotova et al. v Minister voor Vreemdelingenzaken en Integratie*, judgment of 16 Nov. 2004, and the Opinion of Maduro AG of 19 Feb. 2004; Case C-63/99 *Głoszczuk*, Case C-235/99 *Kondova*; Case C-257/99 *Barkoci and Malik*; Case C-268/99 *Jany and Others*.

<sup>135</sup> Guild (1999: 129-130).

<sup>136</sup> See Opinion of Advocate-General Stix-Hackl, Case C-265/03 *Igor Sumitenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, 11 January 2005. It could be recalled that a Spanish Court allowed a Russian football player, Valery Karpin, to invoke the principle of non-discrimination of the PCA with Russia against his club (Juzgado de lo social No 15 de Madrid, *Valeri Karpin / Liga nacional de Fútbol Profesional*, Sentencia 478/2000). In Italy, measures were taken by the football federation to ensure non-discrimination in relation to Ukrainian players, particularly in relation to Shevchenko. Incidentally, this decision suggests that the difference in the wording of the labour provisions of the two agreements is not taken account of.

<sup>137</sup> Case C-162/00 *Pokrzepowicz-Meyer*, para. 25. Also: Case C-312/91 *Metalsa*; Case C-63/99 *Głoszczuk*, Case C-235/99 *Kondova*; Case C-257/99 *Barkoci and Malik*. Further on this point, Petrov (1999: 235).

<sup>138</sup> E.g. Art. 45 EA Bulgaria. Further: Guild (1996)

pursue economic activities as self-employed persons.<sup>139</sup> These provisions have been interpreted widely by the Court of Justice, in various cases dealing particularly with self-employed persons.<sup>140</sup> It notably gave a wide scope to the EA right of establishment by acknowledging that rights of entry and residence are conferred, as “corollaries”, to self-employed persons. It also interpreted the EA notion of “economic activities as self-employed persons” in terms that are similar to the EC notion of “activities of self-employed persons” (Article 43 EC).<sup>141</sup>

In contrast to the right of establishment foreseen in the EAs, the PCAs make several distinctions between establishment of companies on the one hand, and operation of subsidiaries and branches, on the other hand. Indeed the different PCAs vary in the regime they establish. More precisely, with respect to the *establishment* of Russian and Ukrainian companies in the EU Member States, the PCAs only provide for the application of the MFN treatment.<sup>142</sup> The *operation* of Community *subsidiaries* of *Russian* companies is however governed by the national treatment or MFN treatment “whichever is better”, while the operation of *subsidiaries* of *Ukrainian* companies is governed by the national treatment.<sup>143</sup> Furthermore, the operation of *branches* of Russian and Ukrainian companies is subject to the MFN principle.<sup>144</sup> In comparison to the EAs, the PCAs thus establish a complex legal regime for Russian and Ukrainian business operations in the Community.<sup>145</sup>

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<sup>139</sup> Art. 45(5) EA Bulgaria.

<sup>140</sup> Case C-63/99 *Głoszczuk*, Case C-235/99 *Kondova*; Case C-257/99 *Barkoci and Malik*; Hillion (2003).

<sup>141</sup> Case C-268/99 *Jany and Others*.

<sup>142</sup> Art. 28(1) PCA Russia; Art. 30(1)(a) PCA Ukraine. The establishment of Community companies in Russia is also governed by the MFN treatment (Art. 28(1)); whereas they shall benefit from the national or MFN treatment, whichever is better, for establishing themselves in Ukraine (Art. 30(2)(a)).

<sup>143</sup> Art. 28(2) PCA Russia; Art. 30(1)(b) PCA Ukraine. The operation of Russian or Ukrainian subsidiaries of Community companies enjoys the national or MFN treatment, whichever is better (Art. 28(3) PCA Russia; Art. 30(2)(b)).

<sup>144</sup> Art. 28(4) PCA Russia; Art. 30(1)(c) PCA Ukraine. The operation of Russian branches of Community companies is governed by the MFN treatment (Art. 28(4)); whereas the operation of their Ukrainian branches is covered by the national or MFN treatment, whichever is the better (Art. 30(2)(b)).

<sup>145</sup> It could be added that the Community made a number of reservations concerning the operation of subsidiaries of Russian and Ukrainian companies (Annex 3 of the PCA Russia and Annex IV of the PCA Ukraine, respectively). Russia did the same with respect to the operation of subsidiaries of

Indeed, the distinction between establishment and operation provided for in the PCAs is at odds with the notion of “establishment” in the EA and EC contexts.<sup>146</sup> The difference is accentuated by the fact that PCAs exclude self-employed persons from the ambit of establishment.<sup>147</sup> Natural persons do not have the right of establishment of their own and the right of entry and residence is limited to “key personnel”.<sup>148</sup> Clearly, the Community and the Member States wanted strictly to control the movement of persons coming from Russia and Ukraine, which in turn limits the rapprochement between the Parties.

Fourthly, as far as trade in services is concerned, the EAs do not provide for a specific regime given that the negotiations of GATS were still underway when the Agreements were being negotiated with CEECs.<sup>149</sup> They therefore contain a “best endeavours” clause.<sup>150</sup> The PCA with Ukraine follows the same approach. The Parties only undertake to take the necessary steps to allow progressively the cross-border supply of services by Community or Ukrainian companies. In other words, it is only an obligation of conduct.<sup>151</sup> By contrast, the PCA with Russia provides for the application of the MFN treatment with regards to an exhaustive list of services Community companies (Annex 4 PCA Russia). In addition, the PCA with Russia contains various exceptions to the application of the MFN principle on establishment and national treatment in the sectors of Russian banking and insurance services (Art. 29 and Annexes 6 and 7, PCA Russia). Ukrainian reservations also apply to these sectors (Annex V, PCA Ukraine. One may add that various sectors are not covered by the PCAs establishment provisions, namely air, inland waterways and maritime transports (Art. 35(1) PCA Russia and Art. 31(1) PCA Ukraine), although an exception to the exception concerns shipping agencies involved in international maritime transport (Art. 35(2&3) PCA Russia).

<sup>146</sup> Art. 43 EC. As regards the EA context, see Case C-268/99 *Jany and Others*.

<sup>147</sup> European Commission (1994b: 12).

<sup>148</sup> Art. 32 PCA Russia. See also Joint Declaration in relation to Arts 26, 32 and 37; Art. 35 PCA Ukraine.

<sup>149</sup> Further Cremona (1993: 345, 1997b: 204-207), Guild (1999: 127).

<sup>150</sup> For instance, Art. 56(1) EA Bulgaria reads: “[t]he Parties undertake in accordance with the provisions of this chapter to take the necessary steps to allow progressively the supply of services by Community or Bulgarian companies or nationals who are established in a Party other than that of the person for whom the services are intended taking into account the development of the services sectors in the Parties.”

<sup>151</sup> Art. 37(1) PCA Ukraine.

annexed to the Agreement.<sup>152</sup> However, specific rules apply to sectors not mentioned therein, such as transport, space launches and mobile satellite communications.<sup>153</sup>

Last but not least, the two types of agreements differ as regards the institutional frameworks they set out. While both the EAs and the PCAs establish a similar multi-level system, the former agreements specifically provide for the possibility for the highest organ, namely the Association Council, to take binding decisions.<sup>154</sup> For instance, the Association Council can develop the provisions of the EA on movement of workers, without involving the conclusion of a new agreement between the Parties.<sup>155</sup> By contrast, the Cooperation Council set out by the PCAs only has a power to make recommendations, without binding character. Hence, any improvement in the PCA regime related to workers is subject to a new agreement between the Parties with the long ratification process that this may entail. In other words, the EAs have a dynamic feature that the PCAs do not have, and which from the outset, permitted to deepen the gap between the two contractual frameworks.

A cursory comparison of some of the essential substantive provisions of the EAs and PCAs demonstrates that to a large extent, the former establish a closer, stronger and more dynamic relationship between the Parties.<sup>156</sup> While the EAs are closely inspired by internal market law, the PCAs are influenced by the basic principles of international trade law, which are much less ambitious. Such differentiation is further underscored by the distinct choice of legal bases of the respective agreements.

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<sup>152</sup> Art. 36 (PCA Russia), and Annex 5. The initial draft only foresaw a “best endeavours” clause; see European Commission (1994b: 14).

<sup>153</sup> Arts. 39-43 PCA Russia.

<sup>154</sup> For instance Art. 102 EA Poland.

<sup>155</sup> Art. 105, EA Bulgaria.

<sup>156</sup> One could have also mentioned the provisions on competition. While the EAs mirror EC rules (e.g. Art. 64 EA Bulgaria), the PCAs only foresee that the “Parties agree to work to remedy or remove through the application of their competition laws or otherwise, restrictions on competition by enterprises or caused by State intervention in so far as they may affect trade between the [Parties]” (Art. 53 PCA Russia, Art. 49 PCA Ukraine). Further on EA competition and state aids rules, A.-M. van den Bossche (1997: 84) and Slot (1997).

#### 1.2.2.3. *Distinct legal foundations*

Although their conclusion follows the same procedure (Article 300(2) and (3), subparagraph 2 EC), the EAs and the PCAs rely on two clearly different legal bases. The EAs are *association* agreements, specifically provided for in the EC Treaty. Article 310 EC, (ex Article 238) stipulate that:

The Community may conclude with a third State, a union of States or an international organization, agreements establishing an association involving reciprocal rights and obligations, common actions and special procedures.

In the seminal *Demirel* case,<sup>157</sup> the European Court of Justice interpreted the association agreement concluded with Turkey on the basis of old Article 238 EEC as involving a “*privileged link*” (emphasis added) between the Community and the associated country. Such a privileged link involves the possibility for the latter to take part, at least to a certain extent, in the Community legal system.<sup>158</sup>

As suggested by Marc Maresceau, the impact of *not* using Article 310 EC as a basis for the PCA should not be underestimated,<sup>159</sup> as indeed indicated by the above brief comparison of the agreements. Because it is not an association agreement, the PCAs do not, by definition, establish such a “privileged link”, thus depriving the partner concerned from the possibility to participate in the Community legal system. The choice of different legal basis thus encapsulates a political decision not to extend the bundle of privileged links to the NIS.

#### 1.2.2.4. *A tentative explanation of the choice of agreements*

Neither Article 310 EC nor old Article 238 EEC include any indication as to which criteria determine the Community/Member States’ choice to establish an association

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<sup>157</sup> Case 12/86 *Demirel v Stadt Schwäbisch Gmünd*, para. 9.

<sup>158</sup> Further on association agreements: Gaudissart (1999), Raux (1999, 2001, 2002), Flaesch-Mougin (1979, 2001), Peers (2000a), McLeod *et al* (1995: 367), Pescatore (1961), Tavernier (1992).

<sup>159</sup> Maresceau (1992: 102).

with a third State or international organisation. One has to look at the institutional practice to establish such conditions.

Traditionally, association agreements have tended to be open to two categories of state.<sup>160</sup> First, the Community and its Member States have concluded association agreements with non-European states with which some Member States already had strong and close relationships when the agreements were signed. These associated states tend to be often former colonies of one Member State which wanted, through the Community mechanisms, to keep a close relationship with that country, allegedly with a view to promoting its development. This is for instance the case with the so-called Africa-Caribbean-Pacific (ACP) countries, which had close connections notably with either France or the United Kingdom. The development of an association with the South-Mediterranean countries is another example of such a close relationship with one or several Member States.

Secondly, association agreements have often been concluded with third *European* states, which can be divided in three groups. A first group consists of countries that are candidates for membership but which are not ready as yet to assume the obligations entailed by such membership. For instance, the Community and its Member States concluded association agreements with Greece and Turkey in the 1960s, with a clear ambition of preparing the eventual accession of these countries to the Community.<sup>161</sup> A second group comprises European states which, although eligible, prefer to stay outside the Community. They however have an interest in taking part in the integration process, albeit under a less integrationist arrangement.<sup>162</sup> This was notably the case for some countries of the European Free Trade Association (EFTA), with which association was officially conceived as a *chosen* alternative to accession for the countries concerned.<sup>163</sup> The connection between accession and

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<sup>160</sup> Gaudissart (1999; 7-15).

<sup>161</sup> Association agreement with Turkey (so-called “Ankara Agreement”) (OJ 1964 L27/3685) and Association Agreement with Greece (OJ 1963 L26/96). See, in this regard, the judgment of the European Court of Justice in case 17/81 *Pabst & Richard v Hauptzollamt Oldenburg*.

<sup>162</sup> As pointed out by Colombo (1970), “Association is not accession”.

<sup>163</sup> The initial agreements signed with EFTA countries were free trade agreements based on old Art. 113 EEC, as some of the countries were reluctant to be even associated with the Community, particularly for reasons of their neutrality. The Agreement establishing the European Economic Area

association, the latter being considered either as an alternative to or as a preparation for the former, is reflected in the system of the Treaty, and particularly by the place of old Article 238 in the EEC Treaty. In the original Treaty of Rome, the provisions on association with the Community were placed just after the provisions of Article 237 EEC that set out the modalities of accession to the EEC. In between, a third group of European countries, e.g. Cyprus and Malta,<sup>164</sup> have concluded association agreements with the Community. The rationale behind these agreements was not that the countries concerned preferred to stay outside of the Community nor that they were not ready to enter. Rather, it was simply a means to establishing a closer relationship than a mere trade agreement.

The CEECs clearly fall under the second main category, namely *European* associated states. In hindsight, one may say that the Europe Agreements concluded with these countries establish a “pre-accession association”, even if they were initially meant to be an *alternative* to accession.<sup>165</sup> Indeed, it was not a *chosen* alternative as in the case of the association agreement concluded with the EFTA states (the EEA Agreement). Rather, it was an alternative because the Member States *were not ready* to recognise the CEECs as candidates. In other words, Europe Agreements initially constituted a fourth group of association agreements with European third states. More specifically, one could recall that the Europe Agreements did not refer to accession of the associated states as a goal *shared* by the Community and its Member States. Instead, the reference to accession was inserted as the ultimate objective of the associated countries *only*.<sup>166</sup> The Member States simply agreed to acknowledge, using

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was however based on old Art. 238 EC (OJ 1994 L1/3).

<sup>164</sup> OJ 1971 L61 (Malta); OJ 1973 L133 (Cyprus).

<sup>165</sup> The Stabilisation and Association Agreements (SAAs) negotiated by the Community and its Member States with the south-eastern European countries (Albania, Bosnia & Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Serbia & Montenegro) also belong to the category of association agreements aimed at preparing the associated countries to enter the EU. The Preamble of the SAAs is more explicit in this regard than that of the EAs, see for instance SAA with Croatia (European Commission, 2001), in force on 1<sup>st</sup> Feb. 2005. Indeed, Croatia and FYROM have officially applied for membership (21 Feb. 2003 for Croatia, 22<sup>nd</sup> March 2004 for FYROM). The Commission already gave a favourable opinion as regards Croatia’s application on 18<sup>th</sup> June 2004 (European Commission, 2004e).

<sup>166</sup> Maresceau (1997b: 72ff).

constructive ambiguity in the drafting, that the Agreement would “help achieve [the associated countries’] objective” of accession.<sup>167</sup> Such ambiguity suggests that there was disagreement among the Member States with regard to the expediency of recognising the CEECs as candidates. Indeed, the wording used in the Preamble partly departs from the Commission’s proposal to conclude association agreements with the CEECs, in so far as this clearly distinguished it from the question of membership,<sup>168</sup> very much like the new European Neighbourhood Policy does today.<sup>169</sup> It is only later, following the 1993 Copenhagen European Council, and at the insistence of the third countries concerned, that such association agreements became fully fledged “pre-accession” association agreements.<sup>170</sup>

It remains that at the time the first Europe Agreements were signed, the CEECs were not officially regarded as eligible for membership by the Member States and the Community. A compromise had to be found between first, the Community’s reluctance to consider the CEECs as full-fledged candidates and the latter’s clear ambition to “return to Europe”, and secondly, between the different opinions within the Community itself. One way for the Community side to match, at least to a certain extent, the expectations of the CEECs was to accentuate the *specificity* of the Europe Agreements, particularly by making them as *exclusive* as possible.<sup>171</sup> It is perhaps in

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<sup>167</sup> For instance, the Preamble of the Europe Agreement with Poland was drafted as follows: “(r)ecognizing the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help achieve this objective” (OJ 1993 L 348/3). Alternative formula to association were envisaged, see e.g. Peers (1995a).

<sup>168</sup> European Commission (1990). While acknowledging the fact that “several governments have referred to their interest in eventual membership for their countries in the Community”, the Commission considered that “(t)his however, is not among the objectives of the association agreements discussed in this Communication. These agreements... have a special value in themselves and should be distinguished from the possibility of accession to the Community as provided in Article 237 of the EEC Treaty”.

<sup>169</sup> Communication from the Commission on the ‘European Neighbourhood Policy – Strategy Paper’ (European Commission, 2004c: 3). This Communication follows an earlier Communication entitled ‘Wider Europe – Neighbourhood: a new framework for relations with our Eastern and Southern Neighbours’ (European Commission, 2003b); see section 6.1 of this study.

<sup>170</sup> European Council (1997b). Further: Maresceau (1997a: 3), Inglis (2000: 1173), Mayhew (1998: 161ff).

<sup>171</sup> On the importance of “exclusivity v. global approach”, see Balázs (1997: 358).

this perspective that one can understand the initial signature of TCAs with the Baltic States and former Yugoslav states such as Slovenia, before their eventual replacement by EAs. But more importantly, it is in this light that the differentiated approach towards the NIS, epitomised by the PCAs, might partly be explained.<sup>172</sup>

The idiosyncrasy of the EAs would have been less evident had the Community and its Member States extended the same kind of agreement to the ex-Soviet Republics. The Commission considered that the Europe Agreements were founded on political and economic considerations that the NIS were unable to live up to at that particular stage.<sup>173</sup> Furthermore, the overall approach of the Community and its Member States towards the former Soviet Union seems to have been determined by the hope, if not the ambition, to maintain the post-Soviet region as integrated as possible.<sup>174</sup> Concluding PCAs with all the NIS underscores a EU specific *regional* approach towards the post-Soviet area that is distinct, although not disconnected, from its approach towards the CEECs region. This “NIS approach” is illustrated *inter alia* by the provisions of the PCA with Ukraine that insist on the maintenance and development of cooperation among the NIS, as an essential factor of future prosperity and stability in the region.<sup>175</sup>

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<sup>172</sup> In its Communication on the Community relationship with the Independent States of the former Soviet Union, the Commission emphasised that “les accords européens déjà signés font mention explicite de l’intention du pays partenaire d’adhérer en fin de compte à la Communauté... *C’est pour ces raisons qu’il faut adopter une nouvelle approche des relations futures avec les Etats indépendants*” (emphasis added) (European Commission, 1992b).

<sup>173</sup> European Commission (1992c: 2). The Commission had also pointed out in its 1990 Communication on the EAs that the USSR raised specific questions concerning domestic reform, relations with the Community and integration into the international economic order (European Commission (1990)). See the comments of Maresceau (2001: 21).

<sup>174</sup> Raux (1991: 41). The Community and its Member States initially foresaw the establishment of a new relationship with the Commonwealth of Independent States (Vahl, 2003; Leshukov, 1998).

<sup>175</sup> Art. 3 PCA Ukraine. Indeed, PCAs allowed a five-year derogation to the MFN treatment in relation to the advantages granted by the Partner concerned to other countries of the former Soviet Union (for instance, Art. 5 PCA with Russia). Further on the changing geography of the *Ostpolitik*, see Lippert (1995). Indeed, a comparison of all the PCAs reveals a differentiation within the “NIS approach” itself. In simple terms, the PCAs with Moldova, Russia, Ukraine and Belarus are more ambitious than the PCAs with e.g. Kazakhstan (OJ 1999 L196) or Azerbaijan (OJ 1999 L246), notably as regards the long term prospect of establishing an FTA, absent in the latter agreements; Hillion (1998a: 405ff).

Summing up, the provisions of Article 310 EC do not stipulate any particular conditions to which the establishment of an association is subject. In practice, however, association has been linked to accession, or used as a means to fostering the development of countries with which various Member States have close relations. This traditional approach was temporarily altered at the beginning of the nineties. Gradually, association of third European states became an alternative to their accession, either because they did not want to accede, or conversely because the Union did not consider them as eligible.

Having deepened the integration process in Maastricht, the Member States were probably less inclined, at the start of the nineties, to regard the CEECs as future Members. They therefore proposed an association agreement of a special kind, the “Europe Agreement”, envisaged as an alternative to accession rather than as a means to preparing it. This approach towards the CEECs clearly influenced, or even determined, the Union’s policy towards the NIS in general, and Russia and Ukraine in particular. In order to ensure the sustainability of their approach towards the CEECs, the Community and the Member States found that they had to limit the availability of Europe Agreements to a restricted number of states.<sup>176</sup> Consequently, the NIS were, from the outset, excluded from the network of associated countries.

### **1.3. Conclusion**

The PCAs replace the old 1989 TCA concluded between the Community and the Soviet Union. They upgrade the previous relationship in terms of objectives, scope and mutual commitments, thus underscoring closer links between new Partners. At the same time, the PCAs establish a less ambitious relationship than the one envisaged by the EAs concluded with the CEECs. Thus, in the typology of EC external agreements, the PCAs find their place above the TCAs, but below the Association Agreements.

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<sup>176</sup> Note in this regard the Commission’s 1992 Report “The Challenge of Enlargement”, where it is pointed out that, through the Europe Agreements, the Community policy towards Central and Eastern Europe should be moving towards the establishment of a “European political area” (European Commission, 1992e).

The decision to offer Russia and Ukraine, a *new type* of agreement defined by default, somewhere between a traditional TCA and the EAs, did not rely on a legal argumentation. Rather, it corresponded to a political choice not to include the NIS in the network of associated countries. The differentiation between the NIS and the CEECs was further entrenched by the subsequent decision of the 1993 Copenhagen European Council to acknowledge the associated countries from central and eastern Europe as eligible for membership.

The PCAs were also shaped by the new constitutional order brought about by the Treaty on European Union, and by the case law of the Court of Justice regarding in particular the definition and delimitation of the Community's external competence. Thus the PCAs embody a restatement of the rules of interaction between the Community and the Member States in the sphere of EC external relations.

More generally, the PCAs were conceived in view of the external objectives of the newly established European Union, in particular that of asserting its identity on the international scene (Article 3 TEU, ex B). Not only are the PCAs inspired by the CFSP objectives set out in the TEU, they also include areas of cooperation that, *prima facie*, fall outside the Community powers, but which are nevertheless related to the EU activities. To a certain extent, the PCAs are among the first agreements alongside the Europe Agreements, to reveal the latent "instrumentalisation" of the Community's external relations to pursue the broader aims of the embryonic EU foreign policy, as it shall be further examined in the next chapter.

## CHAPTER 2

### PROTO CROSS-PILLAR INSTRUMENTS OF EU EXTERNAL RELATIONS

The previous chapter gleaned some insight into the nature of the PCAs from the point of view of EC external relations. It was shown that the Agreements were formed in the context of a jurisprudential evolution as regards the contours and nature of external competence of the Community. This evolution can itself be related to the establishment of a new constitutional order on the basis of the TEU. Also, the geopolitical context of transformation in central and eastern Europe required from the Community and its Member States responses beyond the mere development of trade and economic cooperation.

Both elements converge in strengthening the role of the Member States in the evolution of EC external relations in general and in the development of the PCAs in particular. The enhanced role of Member States in the context of the PCAs is consolidated by the inclusion in the Agreements of provisions that fall outside the scope of Community powers altogether. While they seem to belong to Member States' competences only,<sup>177</sup> it will become apparent, in this chapter, that such "non-community dimensions" of the PCAs are nonetheless related to provisions of the TEU. They correspond in particular to the "policies and forms of cooperation" established by the Treaty of Maastricht, namely the CFSP and the JHA, also known as the second and third "pillars".

Given that, at the time of the signature of the PCAs, the TEU provided neither for an express legal personality of the Union, nor for a procedure to conclude external agreements dealing with non-Community matters, the Union itself could not be party to the PCAs. The Agreements were thus concluded by the Community and its Member States "acting in the framework" and, as this chapter argues, *on behalf* of the Union. Legally speaking, the Agreements rely on the EC Treaty and use well-established EC external relations actors and methods (including mixity) to fulfil the objectives of the EU.

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<sup>177</sup> Flaesch-Mougin (1998: 60).

Hence from the outset, the PCAs have been characterised by a “cross-pillar” dimension, and as such epitomised the emergence of “external activities” *of the Union*, resulting from the interaction between the EC, the Member States and the EU acting on the basis of Title V and Title VI. In hindsight, it may be suggested that the PCAs are not only mixed agreements in the classical sense examined in the previous chapter, they also anticipate another form of mixity, namely a *cross-pillar mixity*, inasmuch as they relate to the different sub-orders of the Union. As such, they not only reflect the evolution of the law of EC external relations, they also reveal the emerging system of *EU* external relations, encompassing and projecting externally the different facets of the Union.

This chapter will focus on specific elements of the PCAs that exemplify the presence of the Union, the Community and its Member States, in the Partnerships established with Russia and Ukraine, respectively. The first section argues that CFSP and JHA objectives are an integral part of the aims of the PCAs (2.1). The second section shows that the application and further development of the Agreements are *conditional* upon the observance of various political standards as advocated by the Union (2.2). Finally, it is argued that the political dialogue established by each PCA epitomises the interactions between the CFSP and EC provisions in EU external relations (2.3).

## **2.1. Agreements in line with the aims of the Treaty on European Union**

Each PCA contributes to fulfilling the aims of the European Union. In particular, they are inspired by the objectives of the common foreign and security policy (2.1.1), and they include areas of cooperation that correspond to the external dimension of the cooperation in justice and home affairs (2.1.2).

### **2.1.1. Agreements inspired by CFSP objectives**

The Preambles of the PCAs refer to principles stated in several political documents elaborated in the framework of international fora (2.1.1.1). The principles contained therein inspire the Partnerships established by the Agreements, and, as will be shown,

echo CFSP objectives (2.1.1.2). The inclusion of such provisions reveals a degree of interpenetration of EC and CFSP in the framework of the PCAs.

#### 2.1.1.1. *The foreign policy foundations and aims of the PCAs*

The Preambles of the PCAs with Russia and Ukraine, respectively, refer to the Parties' "firm commitment to the full implementation of all the principles and provisions contained in the Final Act of the Conference on Security and Cooperation in Europe (CSCE), the concluding documents of the Madrid and Vienna follow-up meetings, the document of the CSCE Bonn Conference on Economic Cooperation, the Charter of Paris for a New Europe and the Helsinki document 1992, 'the Challenges of Change'". In addition, the Parties undertake to promote international peace and security as well as the peaceful settlement of disputes and co-operate to this end in the framework of the United Nations and the Organisation for Security and Cooperation in Europe (OSCE, ex-Conference on Security and Cooperation in Europe - CSCE).<sup>178</sup> In the PCA with Ukraine, mention is also made of the Parties' will to encourage the process of regional integration in the areas covered by the Agreement, with the neighbouring countries in order to promote prosperity and stability of the region. At first sight therefore, the PCAs can be regarded as instruments of EC external relations which include a strong foreign policy component. They aim at promoting peace and stability, particularly in the post-Soviet area.

In legal terms, the fact that the PCAs have significant foreign policy objectives does not in itself require that the Agreements should be mixed. It is well-established in the case-law of the European Court of Justice that the foreign policy aims of an agreement can be achieved through pure Community instruments, including trade agreements based on Article 133 EC and involving Community exclusive competence. Authority for such a proposition can be found in the *Werner* judgment,<sup>179</sup> where the Court held that a measure restricting the export of products potentially used for military purposes could be based on Article 133 EC in spite of its foreign and

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<sup>178</sup> For an overview of these documents, see Dhommeaux (1998).

<sup>179</sup> Case C-70/94, *Fritz Werner Industrie – Ausrüstungen GmbH v Germany*.

security policy objectives.<sup>180</sup> Indeed, several Community agreements (i.e. non-mixed agreements), refer to political principles enshrined either in documents of global international organisations such as the United Nations, or regional fora like the CSCE/OSCE,<sup>181</sup> the TCA concluded with the Soviet Union, examined above, being a case in point.<sup>182</sup>

#### 2.1.1.2. *The correspondence between the foreign policy aims of the PCAs and CFSP objectives*

It is noticeable that the PCAs political aims, including their reference to the activities of international fora, replicate the terminology used in Article 11 TEU which lists the CFSP objectives. The latter Article (which was Article J.1 TEU when the PCAs were negotiated) provides in its paragraph 2 that the objectives of the CFSP are, *inter alia*, to “safeguard common values” and “to preserve peace and strengthen international security, in accordance with the principles of the United Nations as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter”.<sup>183</sup> This similarity indicates that there is a connection between the PCAs and the CFSP. By comprising a CFSP dimension, the PCAs are aimed at fulfilling the foreign policy objectives of the EU.

That being said, the PCAs are not CFSP *instruments* as such. The Agreements do not refer to Title V of the TEU in their legal basis. Of course, this may be explained by the fact that, at the time, the TEU did not contain any particular provision endowing the Union with the power to conclude external agreements on CFSP matters.<sup>184</sup> It could also be that, had this mechanism existed then, the CFSP objectives of the PCAs

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<sup>180</sup> See also Case C-124/95 *Centro-Com*, Case 367/89 *Criminal proceedings against Aimé Richardt and les accessoires scientifiques SNC*. Further: Cremona (1999a: 161ff), Koutrakos (2001: 119ff), Raux (1997, pt 34).

<sup>181</sup> Further: Rosas (2001), Kuijper (1993) and Dhommeaux (1998). On the relationship between the EU and the OSCE, see Cameron (1995).

<sup>182</sup> Although the Court has consistently held that a mere practice of the Council cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis; e.g. Case 68/86 *United Kingdom v Council*, para. 24; Opinion 1/94 *WTO*, para. 52.

<sup>183</sup> CSCE (1975, 1990).

would not have necessitated its use. Indeed, as recalled earlier, the case law of the Court of Justice makes it clear that political objectives such as those of the PCAs could, in principle, be included in an agreement exclusively based on the EC Treaty.<sup>185</sup>

Rather, it appears that the CFSP objectives *inspire* the political aims of the PCAs. As provisions of the TEU which is an international agreement, the provisions of Title V bind the Member States.<sup>186</sup> The latter could not therefore ignore them when establishing and developing the Partnerships.<sup>187</sup> CFSP objectives and provisions have to be taken into account by the institutions and the Member States as required by the Common Provisions of the TEU, and in view of the general objectives of the European Union. Article 2 TEU stipulates that the Union shall assert its “identity on the international scene”.<sup>188</sup> While the implementation of the CFSP is one of the means to achieving this general objective, the EC external relations equally contribute to this aim, given that the EU is, according to the third indent of Article 1 (ex A) TEU, founded on the European Communities, supplemented by the policies and forms of cooperation established by the TEU.

The PCAs, as mixed external agreements, have to be seen in this general perspective of EU external relations. Indeed, the Preamble of the PCA concluded with Russia emphasises this *unitary* character of the Union by pointing out the “commitment of the *Community and its Member States acting in the framework of the European Union by the Treaty on European Union* of 7 February 1992 and of Russia to strengthening the political and economic freedoms which constitute the very basis of the Partnership” (emphasis added).<sup>189</sup> The PCAs can, if not *should* project the

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<sup>184</sup> Like Articles 24 and 38 TEU do since the entry into force of the Amsterdam Treaty, see section 5.2.1.1.

<sup>185</sup> Case C-70/94, *Fritz Werner Industrie – Ausrüstungen GmbH v Germany*; Case C-83/94 *Leifer and others*; Case C-124/95 *Centro-Com*.

<sup>186</sup> Denza (2002: 55), Koskeniemi (1998: 27), Weiler (1993: 53), Wessel (1999), McLeod *et al.* (1996: 412), Timmermans (1996: 66).

<sup>187</sup> The Council is indeed required to take these principles into account, as suggested by Art. 3 TEU (ex-C), and Art. 11 TEU (ex J.1). See further below, section 4.2.

<sup>188</sup> Art. B TEU when the PCAs were concluded.

different facets of the *Union*, which include not only the CFSP objectives, but also JHA cooperation.

### **2.1.2. Agreements incorporating a JHA dimension**

Alongside provisions inspired by the Union's CFSP objectives, the PCAs also contain provisions which can equally be related to the other non-Community sub-order of the EU, namely Title VI on Justice and Home Affairs, as originally established by of the Treaty on European Union signed in Maastricht.<sup>190</sup> In particular, the Agreements contain provisions on cooperation to combat drugs (2.1.2.1). Moreover, the PCA with Russia specifically includes a title on cooperation on prevention of illegal activities (2.1.2.2).

#### *2.1.2.1. The provisions on cooperation to combat drugs*

Both PCAs foresee the establishment of cooperation between the Parties to combat illicit production, supply and traffic of drugs. The relevant provisions are placed under the heading "economic cooperation" in the respective agreements.<sup>191</sup> The main purpose of such economic cooperation in the case of Ukraine is to contribute "to the process of economic reform and recovery and sustainable development [and to] strengthen and develop economic links between the Parties". In the PCA with Russia, economic cooperation contributes to "the expansion of the [Parties] respective

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<sup>189</sup> The expression "acting in the framework of the European Union" was also used in the Memorandum of Understanding ("MOU") on the EU administration of Mostar, signed in Geneva on 5 July 1995. According to Alan Dashwood (1998a: 1038), the expression was invented to "avoid the impression that the Member States were acting on their own individual account". See also in this sense, Wessel (1997: 127, 1999: 269ff). Eileen Denza (2002: 119 and 121-122) has a different position: the MOU was concluded by the Presidency on behalf of the Union and any obligation thereby created were obligations of the Member States. See also Monar (1997b) and Pagani (1996).

<sup>190</sup> Title VI was partly communitarised by the Treaty of Amsterdam which renamed it "Police and Judicial Cooperation in Criminal Matters" (hereinafter "PJCCM"). Further: e.g. O'Keeffe (1999) and van Raepenbusch (1999).

<sup>191</sup> Art. 82 PCA Russia; Art. 79 PCA Ukraine.

economies, to the creation of a supportive international economic environment and to the integration between Russia and a wider area of cooperation in Europe”<sup>192</sup>

With regard to drugs cooperation more specifically, the PCA with Russia stipulates that:

The Parties shall cooperate in increasing the effectiveness and efficiency of policies and measures to counter the illicit production, supply and traffic of narcotic drugs and psychotropic substances, including the prevention of diversion of precursor chemicals, as well as in promoting drug-demand prevention and reduction. The cooperation in this area shall be based on mutual consultation and close coordination between the Parties over the objectives and measures on the various drug-related fields, and shall, *inter alia*, provide for exchange of training programmes and include, where available, technical assistance from the Community.<sup>193</sup>

The areas dealt with in this provision partly relate to the Maastricht version of Title VI of the TEU on JHA. Article K.1 TEU then provided that combating drug addiction, as well as police cooperation for the purposes of preventing and combating *inter alia* unlawful drug trafficking and other forms of international crime constitute matters of “common interest” for the Member States,<sup>194</sup> could thus be the subject of Council joint positions or joint actions. As with CFSP principles therefore, the PCAs echo the Union’s objectives in the field of JHA.

In legal terms, the inclusion of such cooperation in an external agreement does not lead to mixity any more than do foreign policy objectives. Nor does it necessarily require reference to a specific legal basis. This proposition is further supported by the

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<sup>192</sup> Art. 56 PCA Russia.

<sup>193</sup> Art. 79 of the PCA Ukraine provides that:

[w]ithin the framework of their respective powers and competences the Parties shall cooperate in increasing the effectiveness and efficiency of policies and measures to counter the illicit production, supply and traffic of narcotic drugs and psychotropic substances, including the prevention of diversion of precursor chemicals, as well as in promoting drug-demand prevention and reduction. The cooperation in this area shall be based on mutual consultation and close coordination between the Parties over the objectives and measures on the various drug-related fields.

<sup>194</sup> Further on external dimensions of the “third pillar”: Denza (2002: 63ff), Monar (2004), McGoldrick (1997: 174-178). More generally: Bieber and Monar (1995), O’Keeffe (1995), Müller-Graff (1994), Peers (2000b) and Kuijper (2004: 610).

Court's decision in the *Portugal v Council* case.<sup>195</sup> The Court was asked by the Portuguese government to review the Council Decision to conclude an EC-India Cooperation Agreement on Partnership and Development. This Agreement is based on Article 133 and 181 EC, together with the first sentence of Article 300(2) and the first paragraph of Article 300(3) EC.<sup>196</sup> The applicant argued that in view of several specific cooperation matters, such as energy, tourism and culture, the Council should have concluded the Agreement by reference to other legal bases, particularly Article 308 EC. In addition, and more importantly for present purposes, Portugal considered that the Agreement's provisions relating to drug abuse control belonged to the sphere of cooperation in the fields of justice and home affairs as envisaged in Article 29 TEU (particularly ex Article K.1(4) and (9) TEU before its revision by the Treaty of Amsterdam), which fell within the purview of the Member States, and thus required the conclusion of a mixed agreement.

As regards the specific cooperation matters, the Court held that:

the fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterisation of the agreement which must be determined having regard to its essential object and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation.<sup>197</sup>

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The mere inclusion of provisions for cooperation in a specific field does not therefore necessarily imply a general power such as to lay down the basis of a competence to undertake any kind of cooperation action in that field. It does not, therefore, predetermine the allocation of spheres of competence between the Community and the Member States or the legal basis of Community acts for implementing cooperation in such a field.<sup>198</sup>

Having examined the scope of the contentious provisions on energy, tourism and culture, the Court found that the commitments provided therein were obligations to take action "which do not constitute objectives distinct from those of development

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<sup>195</sup> Case C-268/94 *Portugal v Council*.

<sup>196</sup> OJ 1994 L 223/23.

<sup>197</sup> Case C-268/94 *Portugal v Council*, para. 39

<sup>198</sup> Para. 47.

cooperation”. Contrary to the allegations of the Portuguese government, they could lawfully be included in a Community agreement based on Article 181 EC.<sup>199</sup>

With regard to drug abuse control, the Court reasoned in two steps. To begin with, it stated that “drug abuse control cannot, as such, be excluded from measures necessary for the pursuit of the objectives referred to in Article [177 on development cooperation] since production of narcotics, drug abuse and related activities can constitute serious impediments to economic and social development”.<sup>200</sup> It then turned to the question whether the provision in question remained “within the limits which do not necessitate recourse to a competence and to a legal basis specific to the sphere of drug abuse control”.

The Cooperation Agreement with India foresees cooperation in the field of drugs along the following lines:

The contracting parties affirm their resolve, in conformity with their respective competences, to increase the efficiency of policies and measures, to counter the supply and distribution of narcotic and psychotropic substances as well as preventing and reducing drug abuse, taking into account work done in this connection by international bodies...<sup>201</sup>

This provision was found to contain nothing more than a “*declaration of intent to cooperate in drug abuse control*” (emphasis added).<sup>202</sup> The Court also referred to the proviso whereby the Contracting Parties should act in “conformity with their respective competences”, understood as a reminder of the limited powers of the Community in this area. Turning to the specific actions comprised in the drug cooperation established by the Agreement,<sup>203</sup> the Court held that they constituted

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<sup>199</sup> Para. 55.

<sup>200</sup> Para. 60.

<sup>201</sup> Art. 19(1).

<sup>202</sup> Para. 62.

<sup>203</sup> Art. 19(2) of the Agreement with India contains a list of actions that the cooperation comprises:

- (a) training, education, health, promotion and rehabilitation of addicts...;
- (b) measures to encourage alternative economic opportunities;
- (c) technical, financial and administrative assistance in the monitoring of precursors’ trade, prevention, treatment and reduction of drug abuse;
- (d) exchange of all relevant information, including that relating to money laundering.

measures falling within the sphere of the development cooperation objectives.<sup>204</sup> Given the scope of the provision on drug abuse control, its inclusion in the Agreement therefore “did not require the participation of the Member States in the conclusion of the Agreement”.<sup>205</sup>

Coming back to the relevant provisions of the PCAs, it can be wondered whether the Court’s *Portugal* approach could be applied *mutatis mutandis* to assess whether these provisions could be a source of mixity. One needs first to compare the provisions of the EC-India Agreement with those of the PCAs, taking into account the different nature and objectives of the respective Agreements.<sup>206</sup>

*Prima facie*, compared to the EC-India Agreement, the PCAs seem to establish a cooperation to combat drugs that involves a more stringent obligation to cooperate. In particular, the Agreements foresee that the Parties “shall cooperate” (emphasis added), an expression which contrasts with the EC-India Agreement whereby the Parties “affirm their resolve... to increase the efficiency of policies and measures”, and interpreted by the Court as a “declaration of intent to cooperate in drug abuse control”. Moreover, the PCA with Russia does not contain the “respective competences” proviso included in the EC-India Agreement. Such proviso was also singled out by the Court, in its decision in the *Portugal* case, to support the proposition that the provision on drugs abuse control “remains within limits which do not necessitate recourse to a competence and to a legal basis specific to the sphere of drug abuse control”.<sup>207</sup>

However, while establishing an obligation to cooperate, the PCAs do not set out any *specific* obligations under this cooperation. They merely involve mutual consultation and close coordination as regards the objectives and measures on the various drug-

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<sup>204</sup> Even as regards the action mentioned in (d) but only in so far as that exchange of information makes a contribution that is intimately linked to other measures provided for in Art. 19. It was emphasised that “that restrictive interpretation” was confirmed by the reference to “relevant” information in (d).

<sup>205</sup> Para. 68.

<sup>206</sup> Similar provisions may not necessarily have the same meaning. As the Court pointed out, the nature and the objectives of the Agreement in which the provisions under scrutiny are included, are of great significance; e.g. case 270/80 *Polydor v. Harlequin Records Shops*.

<sup>207</sup> Para. 62

related fields. The provision of the PCAs does not contain anything that prescribes in concrete terms the manner in which cooperation in each specific area envisaged is to be implemented. Indeed, the PCAs are even less detailed than the EC-India Agreement. The latter stipulates specific actions, which were nevertheless found not to be specific enough to warrant recourse to a specific competence and legal basis. The cooperation in combating drugs provided for in the PCAs does not therefore constitute objectives distinct from those of the Agreement.

Of course, the cooperation concerned in the PCAs cannot be regarded as ancillary to any *development objective*, for the PCAs are not development cooperation agreements. This cooperation can nevertheless be considered as ancillary to the broad economic cooperation set out by the Agreements, and based on Article 308 EC. One could argue, following the Court's approach in the *Portugal* case, that production of narcotics, drug abuse and related activities can constitute serious impediments to the process of economic reform and recovery, and sustainable development that the PCAs seek to achieve through economic cooperation. Indeed, as pointed out by Advocate General La Pergola in his Opinion in the *Portugal* case, Article 152 (1) EC on public health requires that a high level of human health protection shall be ensured in the definition and implementation of *all* Community policies and activities. In particular, Community action, which complements that of Member States, is directed, *inter alia*, towards reducing drugs-related health damage, including information and prevention (subparagraph 3 of Article 152(1) EC).<sup>208</sup> It thus suggests that drug-related cooperation should also be envisaged in other external agreements.

Furthermore, unlike Article 82 of the PCA with Russia, Article 79 of the PCA with Ukraine *does* include the expression “within the framework of their respective powers and competences of the Parties”. It is implausible that the absence of the said expression in the PCA with Russia should *in itself* mean that the cooperation which the Agreement foresees, implies “a general power such as to lay down the basis of a competence to undertake any kind of cooperation action in that field”. It does not, therefore, predetermine the allocation of spheres of competence between the

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<sup>208</sup> Opinion of AG La Pergola, para. 51.

Community and the Member States or the legal basis of Community acts for implementing cooperation in such a field.<sup>209</sup>

It thus becomes apparent, particularly in the light of the Court's case law, that the provisions on drugs cooperation included in the PCAs are not in themselves a case for mixity. The participation of the Member States would only be justified if the provisions were considered to establish a specific field of cooperation,<sup>210</sup> going beyond the limited powers of the Community in the field.<sup>211</sup>

#### 2.1.2.2. *Cooperation on prevention of illegal activities under the PCA with Russia*

Alongside cooperation to combat drugs, the PCA with Russia also contains other provisions arguably related to JHA. Article 84 provides that:

[t]he Parties shall establish cooperation aimed at preventing illegal activities such as:

- illegal immigration and illegal presence of physical persons of their nationality on the respective territories, taking into account the principle and practice of readmission,
- illegal activities in the sphere of economics, including corruption,

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<sup>209</sup> This conclusion would not be affected by the fact that the PCA Russia provides that the cooperation “shall, *inter alia*, provide for exchange of training programmes and include where available, technical assistance from the Community.” This type of measure was explicitly provided in the Agreement with India, without changing the ancillary nature of the cooperation.

<sup>210</sup> Flaesch-Mougin (1998 : 69).

<sup>211</sup> Indeed the Community has powers in the field as recalled by the Council in the *Portugal* case. It mentioned various Community measures which regulate several aspects of drug abuse and which are based on Arts. 308, 133 and 95 EC (Opinion La Pergola AG, Case C-268/94 *Portugal v Council*, at para 50). As pointed out by Eileen Denza (2002: 214-215), measures to combat the use of and trafficking in drugs straddle a number of legal bases which include bases in the first pillar where such measures are relevant to the free movement of both goods and persons, to the common agricultural policy, or to the CCP. Yet a number of instruments covering the same grounds as the cooperation envisaged by the PCA were adopted on the basis of Title VI. She also mentions Simone White who wrote that “regulation in the first pillar is diffuse, with drug control measures found in diverse instruments, ranging from specific precursor control measures to punitive clauses in tariff preference agreements and measures to prevent money laundering” (White, 1999: 32). See also Peers (2000c: 107).

- illegal transactions of various goods, including industrial waste,
- counterfeiting,
- the illicit traffic of narcotic drugs and psychotropic substances.

In contrast to the drugs related provisions, cooperation on prevention of illegal activities is not included in the PCA's title on economic cooperation. Instead, it constitutes itself a specific title (Title VIII), and represents therefore an important field of cooperation in the context of the PCA. Like the provisions on drugs, the cooperation on the prevention of illegal activities, whose formulation is wide, partly relates to areas covered by the provisions of Title VI TEU, in its Maastricht version.

Among the “matters of common interests” envisaged in old Article K.1 (now Article 29) TEU one finds rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon, the immigration policy and policy regarding nationals of third countries on the territory of Member States, and combating unauthorised immigration, residence and work by national of third countries on the territory of Member States.<sup>212</sup> As pointed out above, Article K.1 TEU also mentioned combating drug addiction, as well as fraud on an international scale. Both these items could be related to the illegal activities envisaged by the cooperation set out in the PCA with Russia. As in the case of the other JHA-inspired provisions of the PCA, however, it may be submitted that the cooperation thus foreseen is ancillary to the main objectives of the Agreement.

With respect to its scope, Title VIII of the PCA with Russia provides that the cooperation in the areas mentioned therein “will be based on mutual consultations and close interactions and will provide technical and administrative assistance including:

- drafting of national legislation in the sphere of preventing illegal activities,
- creation of information centres,
- increasing the efficiency of institutions engaged in preventing illegal activities,
- training of personnel and development of research infrastructures,
- elaboration of mutually acceptable measures impeding illegal activities.

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<sup>212</sup> While this is an area which has been partly communitarised by the Treaty of Amsterdam, it related at the time of the signature of the Agreement to the external dimension of the third pillar. It could also be linked to the Tampere European Council which expressed its support for regional cooperation against organised crime involving the Member States and third countries bordering on the Union (European Council, 1999b). Further: Denza (2002: 307) and Monar (2004).

Actions such as mutual consultations and “close interactions”, although ambiguous in the case of the latter, cannot be considered, to use the terminology used by the Court in *Portugal*, as imposing “such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of the [Agreement]”, and thus alter its characterisation.<sup>213</sup>

To recapitulate, while the PCAs do not establish any *specific* obligations in the field of JHA, they nonetheless include a JHA *dimension* in the Partnerships, be it in general terms.<sup>214</sup> Practice has indeed shown how this dimension has become critical in the subsequent development of the Partnerships.<sup>215</sup> More generally, this section has shown that the PCAs relate to the non-EC sub-orders of the TEU as well. The different facets of the Union are thus incorporated in the framework of the Agreements, either as general objectives, or as elements ancillary to the main purpose of the Agreements. The presence of non-EC dimensions in the Partnerships with Russia and Ukraine is further confirmed by the political conditionality they involve.

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<sup>213</sup> Case C-268/94 *Portugal v Council*, para. 39

<sup>214</sup> The PCAs provisions establishing cooperation on money laundering could also be mentioned as an additional example. Both Art. 81 PCA Russia, and Art. 68 PCA Ukraine, provide that (1) The Parties agree on the necessity of making efforts and cooperating in order to prevent the use of their financial systems for laundering of proceeds from criminal activities in general and drug offences in particular. (2) Cooperation in this area shall include administrative and technical assistance with the purpose of establishing suitable standards against money laundering equivalent to those adopted by the Community and international forums in this field, including the Financial Action Task Force (FATF). Money laundering partly relates to Title VI TEU.

<sup>215</sup> This is notably exemplified by the first meeting of the EU-Russia Cooperation Council. It adopted the “Joint Work programme for 1998”, which included the item “Justice and Home Affairs”. The document states in its pt. 17 that “[on the basis of Article 84 PCA] both sides will seek to give new impetus to cooperation in tackling organised crime including drug trafficking and illegal activities in the sphere of economics. They will explore in particular the possibilities for enhancing practical law enforcement cooperation” (EU/Russia Cooperation Council, 1998a). Further: Potemkina (2002). It should also be noted that a specific forum for discussion has been established within the institutional framework of the PCA. Not only have the Parties set out a specific PCA sub-committee on JHA, they have also decided to organise sectorial meetings of the JHA Troika with the Interior Minister of Ukraine and Russia respectively; see for instance EU Troika/Ukraine (2004b).

## 2.2. Agreements subject to political conditions advocated by the EU

The PCAs are not only *inspired* by the broad objectives set out in the TEU, their establishment, implementation and further development are also *subject* to the observance of various political principles promoted by the Union, particularly regarding the respect for human rights, democratic principles and the rule of law. After having outlined the main elements of the complex political conditionality regime incorporated in the PCAs (2.2.1), this section will shed light on its dual nature (2.2.2), and argue that it is based on the combination of Community competence and the participation of Member States acting in the framework of the Union.

### 2.2.1. The regime of political conditionality envisaged by the PCAs

The conditionality regime foreseen in the PCAs relies on several provisions (2.2.1.1),<sup>216</sup> and involves a complex suspension procedure (2.2.1.2).

#### 2.2.1.1. *The foundations of the conditionality regime*

The preamble of each PCA mentions the “paramount importance of the rule of law and respect for human rights, particularly those of minorities, [and] the establishment of a multi-party system with free and democratic elections”.<sup>217</sup> It also refers to the Parties’ commitment “to *strengthening* the political and economic freedoms” which constitute the basis of the Partnerships.<sup>218</sup>

This commitment is replicated in the operative part of the Agreements.<sup>219</sup> In particular, Article 2 of the PCA with Russia stipulates that “[r]espect for the

<sup>216</sup> For a more conceptual analysis of political conditionality, see Smith (1998, 1999).

<sup>217</sup> Indeed, as stated above, the Preamble also refers to the “common values” that the Parties share, although without specifying what such values are.

<sup>218</sup> These provisions echo the Member States’ Declaration of 16 December 1991, establishing the “guidelines on the recognition of new States in Eastern Europe and in the Soviet Union”. The text is reproduced in Annex I of Türk (1993). See also de la Serre *et. al* (1994: 144).

<sup>219</sup> Art. 1 in each of the two PCAs.

democratic principles and human rights as defined in the Helsinki Final Act and the Charter of Paris for the New Europe, underpins the internal and external policies of the Parties and constitutes an *essential element* of partnership and of the Agreement” (emphasis added). The PCA with Ukraine includes an equivalent “human rights clause”.<sup>220</sup>

The PCAs thus include more than a mere statement of principle whereby respect for economic and political freedoms is the *basis* of the Partnership, as was the case in several Community agreements at the time.<sup>221</sup> The conditionality contained in the PCAs takes a “strong form”<sup>222</sup> insofar as respect for human rights and for democratic principles constitutes an “essential element” of the Agreements. In addition, the human rights clauses of the PCAs relate to a “non-execution clause”<sup>223</sup> according to which violation of the “essential element” by any of the Parties represents a “material breach of the Agreement”.<sup>224</sup> As such, it is a “case of special urgency” which, in derogation from the rules attached to the dispute settlement mechanism established by the PCAs, allows the Party affected to suspend unilaterally the implementation of the Agreement.<sup>225</sup> This is an exceptional procedure both in the context of the dispute

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<sup>220</sup> The clause in the PCA with Ukraine refers, in addition, to the “principles of market economy, including those enunciated in the documents of the CSCE Bonn Conference” as underpinning the internal and external policies of the Parties and as constituting an “essential element” of partnership and of [the] Agreement”. This distinction might be explained by the different negotiating strength between the Russian and Ukrainian delegations - see in this regard the remarks of the Economic and Social Committee (1995), in its “Avis” on the Partnership and Cooperation Agreements with Russia, Ukraine and Belarus. The Commission (1995b) has argued against references to the market economy as an essential element, on the ground that “the reference to market economy in agreements with OSCE members creates a different perspective having no direct connection with human rights, a fact that could be prejudicial to the aim of consistency.

<sup>221</sup> E.g. Riebel and Will (1999: 726).

<sup>222</sup> Cremona (1996: 62).

<sup>223</sup> Further: Horng (2003), Fierro (2001: 42), Kuijper (1993).

<sup>224</sup> A Joint Declaration to Art. 107, annexed to the PCA with Russia (the same Declaration exists in the PCA with Ukraine, concerning Art. 102), defines the expression “material breach” by reference to Art. 60(3) of the Vienna Convention on the Law of Treaties (1969) as either a repudiation of the Agreement not sanctioned by the general rules of international law or a violation of the essential elements of the Agreement.

<sup>225</sup> This dispute settlement is set out in Art. 107 (2) of the PCA with Russia, and Art. 102(2) in the PCA with Ukraine. These provisions read as follows: “If either Party considers that the other party has failed

settlement mechanisms established by the PCAs,<sup>226</sup> and in view of public international law.<sup>227</sup> Such a clause has been referred to as the “Bulgarian clause” for it first appeared in the Europe Agreement with Bulgaria.<sup>228</sup>

#### 2.2.1.2. *The intricate suspension procedure*

As seen above, the human rights clause provided in the PCAs allows the Community and its Member States to react immediately to violation of the principles and rights promoted through the Agreements. To date, suspension of the application of the PCAs has never taken place. Instead, it has occurred at the level of ratification and signature. A case in point was the delaying of the entry into force of the Community Interim Agreement (IA) implementing the trade and trade-related aspects of the PCA with Russia.<sup>229</sup> In view of the brutal interventions of the Russian forces in Chechnya in the mid-1990s, the entry into force of the IA was suspended until a cease-fire could be

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to fulfil an obligation under the agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Cooperation Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.”

<sup>226</sup> The PCA dispute settlement mechanism normally requires that before a Party retaliates in response to the other Party’s non compliance with its obligations, the former supplies the Cooperation Council with all the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. Hence dialogue is sought until the last moment.

<sup>227</sup> Art. 61(1) of the 1969 Vienna Convention on the Law of Treaties provides that the “material breach” by one Party allows the other Party to terminate the Agreement or suspend, partly or wholly its implementation, in observance of the procedure set out in Art. 65 which requires three months between the notification and the suspension. (International Law Commission, 1969). The “case of special urgency” allows derogation from the obligations set out in Art. 65 of the Vienna Convention. Further: e.g. Riebel and Will (1999: 723).

<sup>228</sup> Articles 6 and 118(2) EA Bulgaria, OJ 1994 L358/3. This expression was used by the Commission in its Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries (European Commission, 1995b). The “Bulgarian clause” contrasts with the “Baltic clause” which refers to a specific suspension provision according to which: “the parties reserve the right to suspend this agreement in whole or in part with immediate effect if a serious violation occurs in the essential provisions of the present agreement”. See e.g. Trade and Commercial and Economic Cooperation Agreement with Estonia (OJ 1992 L 403/1).

<sup>229</sup> OJ 1995 L247/1.

established.<sup>230</sup> Other EC agreements with Russia have also been postponed. For instance, in reaction to the second Russian campaign in Chechnya, the signature of the Scientific and Technological Agreement, aimed at elaborating the cooperation provisions of the PCA was delayed in 2000.<sup>231</sup> It is noticeable that the PCA itself, which had entered into force in the meantime, was not suspended. Indeed, such a consistent absence of suspension of the PCAs is not necessarily a sign of success of the system of political conditionality established by the Agreement.

As argued by Barbara Brandtner and Allan Rosas, the decision to suspend the Agreements generally entails an intricate procedure that can be dissuasive.<sup>232</sup> Indeed, views have long diverged as to what exactly the procedure for suspension of the Agreements should be in case of violation of an essential element of mixed agreements.<sup>233</sup> Since the Treaty of Amsterdam, suspension of an external agreement is expressly provided and governed by the provisions of Article 300 EC. The second subparagraph of its paragraph 2 stipulates that suspension is decided by the Council acting by qualified majority, on the basis of a Commission proposal.<sup>234</sup> Unanimity is however required when the suspension concerns an area for which unanimity applies for the adoption of internal rules, and for association agreements based on Article 310 EC. The European Parliament is only informed *a posteriori*.<sup>235</sup>

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<sup>230</sup> e.g. Declaration of the EU on Chechnya, 17 January 1995 (Council 1995a). Further: e.g. Riebel and Will (1999: 741) and Hillion (1998a: 417). Another application of conditionality *ex-ante* is the suspension of the ratification process of the PCA with Belarus due to the political situation therein, see Hillion (2001). Further on the political situation of Belarus and the EU reactions, see Guicherd (2002).

<sup>231</sup> General Affairs Council (2000a). This decision follows the Declaration of the 1999 Helsinki European Council on Chechnya condemning the intense bombardments of various Chechen cities. The European Council recommended “to draw the consequences from [the] situation for the Partnership and Cooperation Agreement, some of the provisions of which should be suspended” (European Council, 1999f).

<sup>232</sup> Brandtner and Rosas (1999: 708). See also Brandtner and Rosas (1998), Pollet (1997 at 298) and Riebel and Will (1999: 746).

<sup>233</sup> Lenaerts and de Smijter (1996: 46) have pointed out that it is not clear how the clause is to be applied in practice.

<sup>234</sup> The TEU under Maastricht was silent on the procedure to follow in order to suspend external agreements. It was introduced by the Treaty of Amsterdam. Further: Dashwood (1998a, 1999: 205) and de Walsche (1999 : 67).

<sup>235</sup> Art. 300(2) subparagraph 3, EC.

If it is accepted that the suspension procedure of Article 300(2) EC applies also in relation to mixed agreements following a breach of an essential element,<sup>236</sup> an ambiguity nevertheless remains. One is unsure as to who in the EU context should establish the third Party's failure to respect human rights and democratic principles promoted through the human rights clause. In view of Article 300 EC, it appears that in the specific context of the EC Treaty, the Commission has to propose the suspension. Yet, one may wonder about the criteria which should be applied by the Commission to make such a highly political assessment. In this context, it should be recalled that outside contractual frameworks, EC economic sanctions against a third state require a prior decision of the Council on the basis of Title V on CFSP.<sup>237</sup> The political assessment is thus left to the Council. Given that suspension is a form of sanction against the partner state, the same arrangement could operate also in the more specific context of contractual relations, unless the agreement itself provides otherwise, as in the case of the Partnership Agreement with the ACP countries.<sup>238</sup> In other words, while it is established that suspending an Agreement based on Article 300 EC requires a Commission proposal, a prior Council or European Council position establishing the violation of human rights could be envisaged, if not required.<sup>239</sup> Indeed, in the case of reactions against Russia evoked earlier, action was taken at the level of the Community after the Helsinki meeting of the European Council had asked the institutions to take actions.<sup>240</sup> In any event, the Commission

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<sup>236</sup> It has been suggested that if suspension affects the whole of the agreement of those parts of it which belong to Member States competences, the participation of the latter becomes an issue. See Rosas (1998: 135).

<sup>237</sup> Art. 301 EC.

<sup>238</sup> See e.g. Internal Agreement between the representatives of the governments of the Member States meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the EC-ACP Partnership Agreement (OJ 2000 L317/376); Council decision on the procedure for implementing Art. 366a of the fourth ACP-EC Convention (OJ 1999 L75/32). Further: Fierro (2003).

<sup>239</sup> Des Nerviens (1997: 804) points out that several Member States had proposed this option. It could also be suggested that the Commission shares its initiative with the Member States, as in the case of the ACP procedure, or indeed with the Member States and the Parliament as in the context of Art. 7 TEU. It will be seen in section 6.2 that the Treaty establishing a Constitution for Europe revisits this procedure.

would not make a proposal to suspend an agreement without being certain that it would get the support of the Council.<sup>241</sup>

Arguably, the ambiguity and the complexity of the procedure has to do with the limited Community powers with respect to the protection of human rights,<sup>242</sup> as indeed emphasised by the Court of Justice, as will be seen below.

### **2.2.2. A human rights dimension with dual origins**

The human rights clause included in the PCAs is symptomatic of the growing importance of the human rights dimension of Community external relations, particularly since the beginning of the 1990s.<sup>243</sup> When the PCAs were negotiated with Russia and Ukraine, an equivalent clause was also included in a growing number of bilateral trade and cooperation agreements, particularly development cooperation agreements,<sup>244</sup> as well as in association agreements, viz. the Europe Agreements.<sup>245</sup> Agreements with e.g. the countries of the Andean Pact,<sup>246</sup> the Baltic States and Albania equally contained such a clause.<sup>247</sup>

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<sup>240</sup> The General Affairs Council of 24 Jan. 2000 adopted sanctions, without suspending the PCA (General Affairs Council, 2000a). Further: Fierro (2001: 53).

<sup>241</sup> In his speech at the 56<sup>th</sup> Session of the Human Rights Commission 27 March 2000, Chris Patten (2000) made the following remarks: “it is for the fifteen EU governments to decide whether or not the EU can agree a united view on the human rights record of an individual country, and to do so preferably in concert with other like-minded countries. The European Commission is not, of course, a government... We can make our voice heard, but the member states are in the driving seat”.

<sup>242</sup> Further: Eeckhout (2004: 470), Liñán Noguerras and Hinojosa Martínez (2001: 313ff).

<sup>243</sup> European Commission (1995b). Further: Cremona (1996), Smith (1998) and Ward (1998).

<sup>244</sup> Communication from the Commission on human rights, democracy and development cooperation (European Commission, 1991), endorsed in a Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development (Council, 1991).

<sup>245</sup> It may be recalled that such clause was absent from the first three Europe Agreements concluded with the then Czech and Slovak Federation, Hungary and Poland, but were inserted in the following EAs, including those with the Czech Republic and Slovak Republic. On the conditionality included in the EAs: Maresceau (1997: 3), Cremona (1996: 68), Pollet (1997), King (1996), Lannon *et al* (2001), Rideau (1999).

<sup>246</sup> OJ 1998 L 127/11.

<sup>247</sup> European Commission (1995b: 3).

Arguably, the importance of human rights was catalysed by the establishment of the European Union by the Treaty of Maastricht which enhanced the political dimension of the EC external relations by assembling in a single Treaty framework the renamed EC and the CFSP (replacing the EPC), as both constituent and interconnected parts of the Union.<sup>248</sup> Indeed, the “Common Provisions” of the TEU comprise an explicit reference to the Union’s obligation to respect fundamental rights,<sup>249</sup> without distinguishing between the different sub-orders or between its internal and external activities. With regard to the latter, the importance of human rights was made more explicit, first, in Title V on CFSP, particularly in what was then Article J.1 (now Article 11) TEU which sets out the objectives of the “Union and Member States” common foreign and security policy. Secondly, it was expressly introduced in the EC Treaty specifically in relation to “Development Cooperation” (Title XVII), whose aims are, *inter alia*, to “contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.”<sup>250</sup> Human rights were also mentioned in the Title on Justice and Home Affairs.<sup>251</sup> In other words, the protection of human rights became an integral part of the Union’s policies in general, and of its external activities in particular.

Unlike the EC provisions on development cooperation, the legal bases of other EC external agreements did not, until the entry into force of the Treaty of Nice, explicitly refer to the objective of respecting human rights.<sup>252</sup> In the case of the PCAs, a Joint

<sup>248</sup> European Commission (1995e). Further: Edwards (1993, 1994) and Nuttall (1987).

<sup>249</sup> Art. F(2) TEU, see further below.

<sup>250</sup> Art. 130u(2) EC.

<sup>251</sup> Art. K.2 TEU. Further: Peers (1999).

<sup>252</sup> The Treaty of Nice introduced a specific legal basis for “Economic, financial and technical cooperation with third countries”, namely Art. 181A EC, which like Article 181 EC on development cooperation, refers to the objective of respecting human rights and fundamental freedoms. It stipulates in its para. 1.

Without prejudice to the other provisions of this Treaty, and in particular those of Title XX, the Community shall carry out, within its spheres of competence, economic, financial and technical cooperation measures with third countries. Such measures shall be complementary to those carried out by the Member States and consistent with the development policy of the Community.

Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and

Declaration to the Agreement with Russia<sup>253</sup> suggests that the “Community’s policy in the area of human rights” in the PCA context conforms to the 1992 Council Declaration.<sup>254</sup> The latter requires the “inclusion... of the reference to the respect for human rights constituting an essential element of the Agreement and to cases of special urgency” in cooperation or association agreements between the Community and CSCE partners.<sup>255</sup> The Declaration also points out that such inclusion flows from “the attachment of both Parties to the relevant obligations, arising in particular from the Helsinki Final Act and the Charter of Paris for a new Europe.”

By mentioning the 1992 Council Declaration, the EU-Russia Joint Declaration implicitly recalls that there is no express legal basis in the EC Treaty to support the inclusion of the human rights clause in the PCAs. Instead, this inclusion is based on the Council Declaration that sets out a regional policy of the Union towards CSCE countries, drawing on the principles promoted in the CSCE/OSCE context,<sup>256</sup> and referred to in the CFSP objectives. Legally speaking, such a *Declaration* remains essentially a political document. At most, it is a soft law instrument.<sup>257</sup> At the same time, by referring to the “*Community’s* policy in the area of human rights” (emphasis added), the Declaration gives the impression that this field is a matter of Community powers. While there might be arguments in this sense,<sup>258</sup> other elements could support the opposite view, particularly in the light of the European Court of Justice’s case law

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fundamental freedoms.

The EC Treaty thereby provides an express legal basis for introducing human rights clauses in cooperation agreements, other than development agreements. It should be recalled that the Commission has already suggested the use of Art. 181A for concluded new PCAs with the remaining NIS, see European Commission, 2003a).

<sup>253</sup> Joint Declaration on Arts. 2 and 107, PCA with Russia.

<sup>254</sup> Council (1992).

<sup>255</sup> The fact that the Declaration was issued in 1992 explains why the first EAs did not include a human right clause, as pointed out above.

<sup>256</sup> Cremona (1996: 69).

<sup>257</sup> Other instruments relating to human rights in the Community seem to belong to the same category of soft law instruments: e.g. Declaration on Human Rights of the Luxembourg European Council of June 1991 (European Council, 1991) and Council Resolution on Human rights, democracy and development of 28 November 1991 (Council, 1991). Further: Clapham (1990: 345ff), Rideau (1997) and Fierro (2001: 43). On the use of soft law instruments, see Snyder (1993).

<sup>258</sup> Further: Rosas (1998, 2000).

concerning, first, the legality of the inclusion of human rights clauses in EC external agreements based on Article 177 EC, and secondly, Community powers, or absence of powers to conclude human rights agreements based on Article 308 EC. In the light of this case law, it is argued that the human rights dimension of the PCAs is partly founded on the EC Treaty (2.2.2.1), but, straddling the pillars, it relates more globally to the Union (2.2.2.2), thereby consolidating the proposition that the PCA is a proto cross-pillar instrument.

#### 2.2.2.1. *A human rights clause with an EC dimension*

The legality of human rights clauses in Community external agreements has so far been acknowledged by the European Court of Justice in relation to development cooperation agreements. In the *Portugal v Council* case,<sup>259</sup> the Court held that the EC-India Development Cooperation Agreement based on Article 181 (old Article 130y) EC could lawfully include a human rights clause. Such inclusion did not require the recourse to Article 308 EC.<sup>260</sup> The Court's approach has two strands.

First, it relied on the *wording* of Article 177 (ex 130u(2)) EC according to which, the Community policy in the sphere of development cooperation “shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms”. That “very wording”, added the Court, “demonstrates the importance to be attached to respect for human rights and democratic principles, so that, amongst other things, development cooperation policy must be adapted to the requirement of respect for those rights and principles”.<sup>261</sup> Article 177 EC is thus an express constitutional duty for the Community to adapt its development cooperation to those principles, in the sense of subordinating it to their observance.<sup>262</sup> The Court added that, in this perspective, the

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<sup>259</sup> Case C-286/94 *Portuguese Republic v Council*; see section 2.1.2.1 for the factual background of the case.

<sup>260</sup> The Court recalled that Art. 308 should only be used if no other provision of the Treaty endows the Community with the necessary powers, citing Case 45/86 *Commission v Council (GSP)*.

<sup>261</sup> Case C-286/94, *Portuguese Republic v Council*, para. 24.

<sup>262</sup> The Advocate General even suggested in his conclusions that the legality of development cooperation agreements would depend on the inclusion of such clause (Case C-268/94 *Portugal v.*

clause is “an important factor for the exercise of the right to suspend or terminate the development cooperation agreement in case the country concerned has violated human rights”. While the conditionality inherent in the clause relates *prima facie* to the provisions of Article 177 EC, the judges also pointed out that “the importance of human rights in the context of development cooperation was emphasised in various declarations and documents of the Member States and the Community institutions which had already been drawn up, before the TEU, and in consequence Title XVII of the EC Treaty, entered into force”. They thereby suggested that the recognition of human rights’ importance in development policy agreements is nothing new. The wording of Article 177 EC is thus a consolidation of that recognition, but reinforces it by requiring development policy to be adapted to the requirement of respect for those rights and principles.

Secondly, the Court found that the question of human rights and democratic principles did not constitute a specific field of cooperation provided for in the Agreement. Considering that the human rights clause was included in Article 1 headed “basis and objectives”, and in view of its wording, it did not involve specific obligations on the Community,<sup>263</sup> and thus did not require recourse to another legal basis.<sup>264</sup> It thereby indicated that the Community competence to insert human rights clauses in development cooperation agreements on the basis of Article 177 EC is limited.

In the light of this approach, the following discussion focuses on the nature of the human rights clause incorporated in the PCAs, and seeks to determine whether it is a factor of mixity. Such discussion has an academic flavour, given that the PCAs may contain whatever provisions the Member States agree to include therein, considering that they are mixed agreements.<sup>265</sup> However, establishing the nature of the clause will bring additional light on the nature of the PCAs themselves.

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*Council*, para. 29). Further: annotation by Kokott and Hoffmeister (1998), Peers (2000c: 203).

<sup>263</sup> Para. 28.

<sup>264</sup> The Court said that “Article 1 of the Agreement headed ‘basis and objectives’ and the wording of the first paragraph of that provision, provide confirmation that the question of respect for human rights and democratic principles is not a *specific* field of cooperation provided for by the Agreement” (para. 28).

<sup>265</sup> Indeed, as pointed out above, the Treaty of Nice introduced a new Art. 181A which solves the problem.

As a preliminary point, it appears that the *recognition of the importance of human rights* in the context of the PCAs does not require a specific legal basis. It can follow “declarations and documents of the Member States and Community institutions” which emphasise the importance of those rights, such as the 1992 Council Declaration does, in the case of the PCAs (and the Europe Agreements).<sup>266</sup>

The next point is to establish whether, the *human rights clause itself*, and the conditionality it involves could be inserted in the PCAs *without* the participation of the Member States. In its *Portugal* judgment, the Court seemed to suggest that it is the *wording* of Article 177 EC which required that development cooperation be *adapted* to the requirement of respect for human rights and democratic principles.<sup>267</sup> Some observers, like Angela Ward, have indeed argued that the Court upheld the legality of the inclusion of the “essential element” clause in the cooperation agreement on “extremely narrow grounds”. She suggests that the Community’s *authority* to include human rights as an “essential element” in external agreements should thereby be restricted to accords concerning development cooperation.<sup>268</sup> The question is therefore whether the PCAs human rights clause can nevertheless be supported by the legal bases of the PCAs, and particularly Articles 133 and 308 EC.

While not mentioning the objective of respect for human rights, it may be recalled that Article 133 EC has been used in practice as a single basis for Community commercial agreements including human rights clauses. For instance, the interim agreement with Russia, concluded by the Community alone on the basis of Article

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<sup>266</sup> One could equally refer to the documents relied on by AG La Pergola in para. 27 of his Opinion in Case C-268/94 *Portugal v Council*, in particular, the European Council of 26 and 27 June 1992 which reaffirmed that “the respect, promotion and safeguarding of human rights is an essential element in international relations and therefore one of the cornerstones of cooperation”, attaching “special importance to positive initiatives designed to ensure active support to those countries which are instituting democracy, improving human rights performance as well as promoting good governance” (European Council, 1992).

<sup>267</sup> Para. 24.

<sup>268</sup> Ward (1998: 531). She indeed refers to a Council Legal Service Opinion to support this restrictive interpretation. This Opinion was issued following the Commission’s Communication for a Regulation on Human Rights (European Commission, 1997c). Further: Weiler and Fries (1999).

133 EC, contained a human rights clause drafted in terms that were similar to those of the PCAs. As a matter of fact, the conclusion of the interim agreement with Russia by the Community was delayed because of the second Russian campaign in Chechnya, and the violation of human rights recorded.<sup>269</sup> The clause was not therefore a *clause de style*. Practice is even more elaborate with respect to Article 308 EC. In particular, it was used prior to the introduction of Article 181 EC, to support human rights clauses in development cooperation agreements.<sup>270</sup>

However, such practices are not entirely irrefutable. For one thing, a mere institutional practice cannot create precedent binding on Community institutions with respect to the correct legal basis of Community acts.<sup>271</sup> In this regard, the practice of inserting human rights clauses in pure commercial agreements based on Article 133 EC is controversial and has been criticised.<sup>272</sup> Without entering the debate, it will become apparent, in the light of the following developments, that the inclusion of such a clause in the interim agreement with Russia might not be legally sound considering particularly the wording of the clause concerned.

With respect to Article 308 EC,<sup>273</sup> the Court of Justice has on several occasions shed light on its limits.<sup>274</sup> In Opinion 2/94 on accession of the Community to the European Convention of Human Rights, the Court held that Article 308 EC “cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions that define the tasks and the activities of the Community”.<sup>275</sup>

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<sup>269</sup> Declarations of the European Union on Chechnya (Council, 1995a, 1995b, 1995c).

<sup>270</sup> As recalled *inter alia* by the Portuguese government itself, human rights clauses were included in development cooperation agreements before the TEU on the basis of old Art. 235 EC; see para. 15 of the Court’s decision. Further: Peers’ annotation on the *Portugal* case (Peers, 1998a) and Brandtner and Rosas (1998).

<sup>271</sup> Case 68/86 *United Kingdom v Council*, para. 24; Opinion 1/94 *WTO*, para. 52.

<sup>272</sup> See in this respect the criticism by Bulterman (2001). For a different view, see Fierro (2001: 51ff) and Eeckhout (2004: 472).

<sup>273</sup> Further: Dashwood (1998b).

<sup>274</sup> Case 242/87 *ERASMUS*. Further: Dashwood (1996b), who accurately points that the “Community [cannot] continue practising the trick of self-levitation through pulling on its own boot straps”.

<sup>275</sup> Para. 30. See also in this regard, Case C-106/96 *United Kingdom v Commission*: which suggests that many projects on human rights lacked a satisfactory legal basis. Further, Eeckhout (2004: 469), Weiler and Fries (1999: 147) and Fierro (2001).

In particular, it cannot support the conclusion of an agreement *specifically aimed* at ensuring respect for human rights and democratic principles.<sup>276</sup> Incidentally, the Court found that no Treaty provision confers upon the Community institutions any *general power* to enact rules on human rights or to conclude international conventions in this field.<sup>277</sup> Examining the scope of the human rights dimension incorporated in the PCAs thus becomes critical. The Court's approach in the *Portugal* case can be useful in this regard.

As in the EC-India Agreement, the PCAs human rights clause is *situated* in the first Title headed "general principles". As such, it does not, *prima facie*, establish a specific field of cooperation. However, the *wording* of the human rights clause in the respective agreements differs slightly. Article 1(1) of the EC-India Agreement states that: "respect for human rights and democratic principles is the basis for cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement". This provision is silent notably on the principle that the respect of those rights and principles equally "underpins the internal and external policies of the Parties", as stated in the PCAs with Russia and Ukraine. At first sight it is doubtful that this additional element means that the human rights clause included in the PCAs has a scope that is different from the clause in the EC-India Agreement. For one thing, other development cooperation agreements based

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<sup>276</sup> Dashwood (1996a) and Arnall (2000). Interestingly, in the *Portugal* case, Denmark argued that if protection of human rights was the *main* field of cooperation, then the agreement would need to be adopted on the basis of old Art. 235 EC.

<sup>277</sup> Opinion 2/94, para. 30. For Steve Peers (2000c), Opinion 2/94 suggests that the Community is free to subordinate any treaty it wishes to human rights clauses without any risk of exceeding its competence unless it wishes to agree a treaty *solely* about the protection of human rights.

on Articles 133, 177 and 300 EC<sup>278</sup> have included a similar expression.<sup>279</sup> It may be suggested that the expression could have been inserted in the EC-India clause without the Court's view on the latter's scope being altered. That said, it still does not mean that the clauses of the PCAs would necessarily have the same meaning and scope. The Court has always held that the extension of the interpretation of a provision "to a comparably, similarly or even identically worded provision... depends, *inter alia*, on the aim pursued by each provision in its own particular context."<sup>280</sup>

An examination of the objectives, the context, as well as the provisions of the PCAs, suggests that the clauses that these Agreements contain differ from the one included in the EC Agreement with India. First, the Preamble of each PCA underlines the "paramount importance of the rule of law and respect for human rights", and refers to the commitment of the Parties "to *strengthening the political and economic freedoms* which constitute the very basis of the partnership[s]" (emphasis added). Moreover, it makes it clear that the "full implementation of the partnership[s] presupposes the continuation and accomplishment of [each partner's] political and economic reforms." The PCAs' objectives to *strengthen* political and economic freedoms, and to support the Partner's efforts to *consolidate* its democracy are echoed in Article 1 of each PCA. Article 2 then contains the essential element clause, and Article 107 (Russia) / Article 102 (Ukraine) includes the suspension clause, to be activated in case of a material breach of the Agreements. Compared to the EC-India Agreement scrutinised

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<sup>278</sup> E.g. the EC-South Africa Cooperation Agreement (OJ 1994 L341/61) in its Art. 1 provides that "Relations between the Community... and South Africa... shall be based on respect of human rights and democratic principles which guide the internal and international policy of the Contracting Parties and constitute an essential element of this Agreement". Also the agreement between the EC and the Democratic Socialist Republic of Sri Lanka on Partnership and Development (OJ 1995 L85/32) says in its Art. 1: "cooperation ties between the Community and Sri Lanka and this Agreement in its entirety are based on respect for democratic principles and human rights which inspire the domestic and external policies of both the Community and Sri Lanka and which constitute an essential element of the Agreement." Various agreements with Latin American countries also contain this formula, although not the "essential element" clause, i.a. Cooperation Agreements with Argentina (OJ 1990 L295/67), Chile (OJ 1991 L79/2), Paraguay (OJ 1992 L313/72) and Uruguay (OJ 1992 L94/2).

<sup>279</sup> With the caveat that mere practice of the Council cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on the Community institutions, with regard to the correct legal basis; see e.g. Opinion 1/94 *WTO*, para. 52.

<sup>280</sup> Case C-312/91 *Metalsa*.

by the Court in the *Portugal* case, the PCAs thus appear to have more ambitious aims as regards respect for human rights and democratic principles, including a formulation suggesting a more pro-active role for the Parties in promoting respect for these rights and principles.

Secondly, as pointed out above, the *wording* of the human rights clauses in the PCAs and the EC-India Agreement, respectively, differ. The “human rights and democratic principles” included in clause of the PCAs’ refers to principles and rights “as defined in particular in the Helsinki Final Act and the Charter of Paris for a new Europe”, whereas the EC-India clause is silent on this point. It is suggested that this difference has significant implications inasmuch as the references to external documents contained in the PCAs human rights clauses warrant specific obligations for the Community in the field of human rights. In the light of the *Portugal* jurisprudence, such specific obligations presupposes a relevant competence, founded on a relevant legal basis, which arguably is lacking in the field of human rights as emphasised by the Court in its Opinion 2/94. Absent such Community competence, the inclusion of the particular human rights dimension in the PCAs implied Member States’ support.<sup>281</sup> The following will show that the PCAs human rights clause defines the human rights to be respected and establishes positive obligations for the Parties.

The Charter of Paris to which the PCAs human rights clause relates contains a section headed “Human rights, Democracy and Rule of Law”. Human rights included therein comprise notably the freedom of thought, conscience and religion or belief, freedom of expression, freedom of association and peaceful assembly and freedom of movement. The text also foresees that everyone has the right “to enjoy his economic, social and cultural rights, to own a property alone or in association and to exercise individual enterprise”. The Helsinki Final Act equally contains a chapter entitled “Respect for human rights and fundamental freedoms...”. It stipulates in its first sentence that “the participating States will respect human rights and fundamental freedoms including the freedom of thought, conscience, religion and belief, for all

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<sup>281</sup> Indeed, the Paris Charter for a new Europe and the Helsinki Final Act could not be considered as part of *ius cogens*, which binds the Community. See in this regard the Court’s decision in case C-162/96 *Racke*. Rosas (1998: 144), Timmermans (1999), Lowe (1998) and Lenaerts and de Smijter (1999-2000: 122ff).

without discrimination as to race, sex, language or religion.” So far as democratic principles are concerned, the Charter states that democracy, “with its representative pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. Indeed, “[d]emocratic government is based on the will of the people, expressed regularly through free and fair elections....”<sup>282</sup>

The human rights clauses included in the PCAs require respect for democratic principles and human rights “as defined” in particular in those regional political documents.<sup>283</sup> The principles and rights to be respected are thus *defined* in substance. Moreover, such respect being an *essential element* of the Agreement, the human rights and democratic principles thus referred to, have more than a guiding function, they are bestowed with a legal value for the Parties and they imply positive obligations for the latter.<sup>284</sup> Indeed, non-compliance with those obligations potentially activates the

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<sup>282</sup> The Helsinki Final Act of 1975 is more restrictive, on state institutions and political system and rather focuses on *Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief* (part I.VII) (CSCE, 1975).

<sup>283</sup> Neither of these documents is legally binding. The Final Act of Helsinki Summit reads : “... the undersigned High Representatives of the participating States, *mindful of the high political significance which they attach to the results of the Conference, and declaring their determination to act* in accordance with the provisions contained in the above texts, have subscribed their signatures below” (italics added); the Charter of Paris follows the same line: “...we, the undersigned High Representatives of the participating States, *mindful of the high political significance we attach to the results of the Summit Meeting, and declaring our determination to act in accordance with the provisions we have adopted, have subscribed our signatures below*” (CSCE, 1975).

<sup>284</sup> Echoing Article 2 of the PCA with Russia, the Joint Declaration attached to the Agreement indicates that “the inclusion in the agreement of the reference to the respect for human rights constituting an essential element of the Agreement... flows from... the *attachment of both Parties to the relevant obligations*, arising in particular from the Helsinki Final Act and the Charter of Paris on a new Europe” (emphasis added). While the terms of this Declaration are not unambiguous, it is noteworthy that the Parties foresee the respect of human rights and democratic principles not only as they are *defined* in those international documents, but also as flowing from their “attachment... to the *relevant obligations, arising in particular from*” these documents (emphasis added). The Charter of Paris includes an Annex I that sets out several obligations to be fulfilled by the “participating States”. For instance, they undertake “to build, consolidate and strengthen democracy as the only system of government”. This type of obligations could be considered as constituting the “relevant obligations” to which the Parties are attached. It should be recalled that, while declarations are not binding, they

suspension mechanism. The interpretation thus proposed suggests that the PCAs potentially entails more than just “an important factor for the exercise of the right to have an agreement suspended or terminated where the partner has violated human rights”, as put by the Court in the *Portugal* case.<sup>285</sup> It also has a substantive aspect,<sup>286</sup> and could imply specific commitments for the Parties.

It should be added that the PCAs’ human rights clause stipulates that respect for those rights and principles should “underpin the internal and external policies” of the Parties. However ambiguous the expression “underpin” may be, the PCAs thus provide that the Parties to the Agreements are bound by these principles<sup>287</sup> in the context of their relationship, but also internally.<sup>288</sup> Through the PCAs, the Community is thereby subject to external scrutiny as regard respect for human rights.<sup>289</sup>

To summarize, it may be argued that the human rights clause included in the PCAs entails *specific* obligations for the Parties.<sup>290</sup> Given the case law on the Community competence in the field of human rights, and on the meaning and scope of Article 308 EC,<sup>291</sup> it may be doubted that the Community itself could include such potentially far-reaching human rights provisions.<sup>292</sup>

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should nevertheless be taken into account to interpret the Agreement (e.g. Case C-192/99 *Kaur*). The human rights clause should thus be understood in the light of the Joint declaration.

<sup>285</sup> Para. 27. Indeed, the Court seemingly left the door open for this other meaning of human rights clauses when mentioning that the clause was “amongst other things” this important factor for the exercise of the suspension/termination right.

<sup>286</sup> Fierro (2001).

<sup>287</sup> It should be pointed out that the Commission’s Communication on the “inclusion of respect for democratic principles and human rights in agreements between the Community and third countries” mentions in its annexes that in the context of the “regional European framework”, the provisions and principles of e. g. CSCE, Helsinki Final Act, the Charter of Paris “should be fully implemented” (European Commission, 1995b: 21).

<sup>288</sup> Riedel and Will (1999: 728).

<sup>289</sup> Bulterman (2001).

<sup>290</sup> Kokott and Hoffmeister (1996 : 668). For an opposite view, see Flaesch-Mougin (1998 : 62).

<sup>291</sup> Weiler and Lockhart (1995). This proposition can be further supported by a proper application of Art. 308 EC whose recourse is subordinate to the demonstration that the action is “necessary to attain, *in the course of the operation of the common market*, one of the Community objectives”; see in this sense, Dashwood (1996b).

#### 2.2.2.2. *A human rights clause with an EU dimension*

If it is accepted that the human rights components of the PCAs goes beyond Community powers, it consequently entails the participation of the Member States to support it. As pointed out above, the Community concluded the Agreements jointly with the Member States “acting in the framework of the Union”. The latter’s objectives should thus be taken into account.<sup>293</sup>

First, Article 11 TEU (ex-J.1) emphasises that the Union shall define but also *implement* a common foreign and security policy, the objectives of which are *inter alia* “to safeguard the common values... of the Union, and to *develop* and *consolidate* democracy and the rule of law”. Seemingly, the terminology of Article 11 TEU establishes an obligation of conduct on the part of the Union.<sup>294</sup>

Secondly, Article 6 (ex Article F) TEU provides in its second paragraph that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human rights and as they result from the constitutional traditions common to the Member States, as general principles of Community law.<sup>295</sup> The third paragraph of the same Article stipulates that the Union “shall provide itself with the means necessary to attain its objectives and carry through its policies”. The combination of the two paragraphs suggests that Article 6 TEU establishes an obligation of result.<sup>296</sup>

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<sup>292</sup> It should be pointed out that, although represented, the Community did not formally take part as “a participating State” in the international fora within which the documents referred to in the PCAs were elaborated. Arguably, the restricted participation of the Community in these organisations confirms the limits, to say the least, to its ability to include itself a reference to the documents in the operative parts of the Agreements. On the problem of legitimacy that this state of affairs creates with respect to the conditionality, see Liñán Noguerras and Hinojosa Martínez (2001: 331ff).

<sup>293</sup> See section 2.1.1.2.

<sup>294</sup> As pointed out by Wessel (1999: 69), CFSP objectives are not static but imply positive actions. In particular, being an objective, development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms brings an active element to the external relations of the Union in this area.

<sup>295</sup> Cf. Dewost (1993: 64), who considers that Art. 6 (ex Art. F) TEU encapsulates what the Court held in Case 44/79 *Hauer*.

<sup>296</sup> In that respect: Fouwels (1997: 294).

Given that the Union itself could not formally take part in the PCAs, both Community, within its competence, and Member States “acting in the framework of the Union” are involved in pursuing the general EU human rights objective.

The foregoing suggests that the conditionality envisaged by PCAs stems from a combination of the EC developing and yet limited “competence” in the field of human rights and the CFSP objective to consolidate democracy, the rule of law, respect for human rights and fundamental freedoms. They both contribute to achieving the general objectives of the European Union, set out in the “Common Provisions” of the TEU.<sup>297</sup>

While the PCAs contribute to the observance of political principles advocated by the EU through conditionality, the Agreements also establish a political dialogue to further the political partnership between the Parties, which accentuates the cross pillar character of the Agreements and consolidate the thesis that the PCAs is concluded and implemented on behalf of the EU.

### **2.3. Agreements including a systematic political dialogue**

Alongside the human rights dimension of the PCAs, the inclusion in the Agreements of a political dialogue gives further evidence of the interconnection of the different sub-orders of the Union within the Partnerships. Political dialogues relate to the competences of Member States and thus require their participation. At the same time, the inclusion of political dialogues is intimately connected to the objectives of the European Union (2.3.1), and involves its institutions (2.3.2).

#### **2.3.1. A political dialogue straddling the pillars**

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<sup>297</sup> As pointed out by Dominic McGoldrick (1999: 249), “evolution of the broader human rights dimensions of the EU now requires that the whole of the post-TEU constitutional structure be considered, and in particular the relationship between different pillars”. See also Eeckhout (2004: 472).

The establishment of a political dialogue is one of the objectives of each PCA. According to Article 1 of both Agreements, the Partnership is to provide an appropriate framework for the political dialogue between the Parties “allowing the development of close relations between them in this field”. The political dialogue constitutes an entire title (Title II) placed at the very beginning of the Agreement, following the Title on “General Principles” and preceding that on “Trade in Goods”. It therefore has a prominent place in the system of the Agreements, an indication of the significant role it plays in the Partnerships.

The objective of this dialogue, which the Parties intend to develop and intensify, is to accompany and consolidate the *rapprochement* between the European Union and Russia/Ukraine respectively. More particularly, it seeks to support the political and economic changes underway in Russia and Ukraine, and should contribute to the establishment of new forms of cooperation with the partner concerned. Moreover, it aims at bringing about increasing convergence of the Parties’ positions on international issues of mutual concern, thereby enhancing security and stability. Finally, it shall “foresee that the Parties endeavour to cooperate on matters pertaining to the observance of the principle of democracy and human rights, and hold consultations, if necessary, on matters related to their due implementation”.<sup>298</sup> In other words, the political dialogue is all-encompassing. It aims at strengthening the links between the Parties, in all their dimensions.<sup>299</sup>

Like human rights clauses, political dialogues have become common features of external agreements to which the Community is Party, despite the fact that their presence entails mixity. They touch upon diplomacy and security issues for which the Community does not have powers.<sup>300</sup> Indeed, Member States could have adopted a joint political declaration to establish political dialogues with the partners concerned outside the framework of the PCAs. This has been done on several occasions in relation to other third countries in the pre-Maastricht period,<sup>301</sup> particularly in the context of the EPC.<sup>302</sup> Externalising the political dialogue would possibly mean

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<sup>298</sup> Art. 6 PCA Russia; Art. 6 PCA Ukraine.

<sup>299</sup> Further on the objectives of the PCA, see Raux (1998 : 171).

<sup>300</sup> Case 124/95 *Centro-com*, paras 24-25.

avoiding recourse to mixed agreements.<sup>303</sup> Arguably, the Member States' decision to include a political dialogue in the framework of mixed agreements provides yet another illustration of the will to integrate the various facets of an external relation with a particular country in one single and qualitatively richer framework.

At the same time, it has to do with the fact that they act “in the framework of the EU”. Indeed, political dialogues represent an instrument of “EU foreign policy”,<sup>304</sup> insofar as it corresponds to the CFSP objectives.<sup>305</sup> Particularly, the aims of the political dialogue are seen as attaining the objectives set out in Article 11 TEU,<sup>306</sup> *inter alia*, to “strengthen the security of the Union and its Member States in all ways”; “to preserve peace and strengthen international security in accordance with the principles of the United Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter; to promote international cooperation; to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”.

There is therefore a connection between the objectives of the political dialogue established by the PCAs and those of the CFSP, and consequently, of the European

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<sup>301</sup> E.g. in relation to the United States of America (Transatlantic Declaration of November 1990, which provides for a biannual meeting) and Japan (EU/Japan Summit, 1991). Member States also signed common declarations on political dialogue with the ASEAN countries back in the 70s, the Andean Pact countries, with countries from Central America. Further: Monar (1997a), McGoldrick (1997: 198ff), Redmond (1992).

<sup>302</sup> See the EPC London Report of 1981, reproduced in de Schoutete (1986).

<sup>303</sup> Allan Rosas (1998: 145) explains that the inclusion of a political dialogue “which could be considered a ‘II pillar’... issue” is also a “‘legal compromise’ for the Commission to accept mixity. He adds that “in such a situation of ‘mixity at all cost’, the Commission [finds] itself in the strange role of insisting on a clause making mixity legally necessary”. This view has been confirmed by official of the cabinet of the Commissioner on external relations.

<sup>304</sup> Fouwels (1997: 301).

<sup>305</sup> It should be noted that the remit of political dialogues were designed by the Political Committee in a document of 7 June 1996, for approval by the Council; see Document 8255/96. Political dialogue were meant to cover: an exchange of views and information on political questions of mutual interest; the identification of areas suitable for an enlarged cooperation on the basis of a greater confidence between the different actors on the international scene; and the adoption of joint positions and actions in relation to existing international problems.

<sup>306</sup> Wessel (1999: 114).

Union. The inclusion of provisions on political dialogue in the Agreements further illustrates the presence of EU sub-orders in the Unions' relations with Russia and Ukraine.<sup>307</sup>

Although the political dialogue consolidates the integration of the different EU facets within the same framework, it does not however entail a complete fusion of the EU external dimensions within the Partnerships. It is noteworthy that although included in the provisions of the PCAs, the political dialogue is presented as “accompanying” the rapprochement between the EU and Russia/Ukraine. Indeed, in the Joint Statement of the EU-Russia Summit in May 2000 mentioned that “[the] Partnership *and [the] reinforced political dialogue* aim at promoting a stable and prosperous Europe, and are founded on the principles of democracy, respect for human rights, the rule of law and on the market economy” (emphasis added).<sup>308</sup> It is symptomatic that the Partnership and the political dialogue are distinguished by the actors involved, even if such dialogue is formally part of the PCAs as stipulated in Article 1 of each PCA.

Similarly, at the first meeting of the Cooperation Council with Russia, the Parties pointed out that “implementing the PCA would ensure greater coherence between the various aspects of their relations, such as the political dialogue on foreign policy issues of mutual interest; cooperation in the fight against organised crime; trade relations and economic cooperation”.<sup>309</sup> Having pointed out the constituting aspects of the Partnership, which indeed correspond to the different policy areas of the EU, the Cooperation Council nevertheless endorsed the “Joint Work Programme for 1998” on the one hand, and “Conclusions on foreign policy subjects” on the other hand. In other words, the Parties deal with CFSP matters and other PCA affairs differently, although

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<sup>307</sup> It is noticeable that the agreement with Russia refers more to the European Union than to the Community, as does the Agreement with Ukraine. For instance, while Art. 6 of the PCA with Russia mentions the establishment of a political dialogue to accompany and consolidate the rapprochement between “the European Union and Russia (sic)”, Art. 6 of the PCA with Ukraine rather talks of a political dialogue to accompany and consolidate the rapprochement between the Community and Ukraine.

<sup>308</sup> This statement was reiterated at the sixth EU-Russia Summit in Paris on 30 October 2000 (EU/Russia, 2000b).

<sup>309</sup> Press Release of the first Cooperation Council between the EU and the Russian Federation (EU/Russia Cooperation Council, 1998b). The theme of coherence was equally prominent at the first meeting of the EU-Ukraine Cooperation Council (EU/Ukraine Cooperation Council, 1998).

meeting in the same framework. This substantive distinction is replicated by an institutional distinction.

### **2.3.2. A political dialogue involving the EU institutional framework**

The political dialogue is systematic and institutionalised. First of all, the Agreements provide for consultations at the highest political level. The PCA with Russia foresees regular meetings between the President of the Council of the EU and the President of the Commission on one side, and the President of the Russian Federation, on the other. The practice of presidential meetings has also developed in the context of the EU-Ukraine Partnership, although not explicitly provided for in the PCA.<sup>310</sup> This formula has become the so-called “EU-Russia [or Ukraine] Summits”.

Secondly, the political dialogue takes place at ministerial level within the Cooperation Council, set out in the Title “Institutional, General and Final Provisions” of each PCA. This body assembles once a year the members of the Council of the EU and members of the Commission on the one hand, and members of the Partner’s Government, on the other, but can meet more often when circumstances require.<sup>311</sup> A Cooperation Committee, made of representatives of EU Member States and Commission on the EU side and representatives of the Partner’s Government on the other, assists the Cooperation Council in performing its duties at senior civil servant level.<sup>312</sup> The Cooperation Council essentially monitors the implementation of the Agreement, and “examine[s] any major issues arising within the framework of the Agreement and any other bilateral or international issues of mutual interest for the purpose of attaining the objectives of the Agreement”.<sup>313</sup>

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<sup>310</sup> EU/Ukraine Summit (1998).

<sup>311</sup> In practice, the Cooperation Council has met in Troika formations; see EU-Russia Summit (2003a).

<sup>312</sup> In addition, sub-committees and working parties operating under its aegis assist the Committee (Arts. 92-93, PCA Russia; Arts. 87-88, PCA Ukraine).

<sup>313</sup> Art. 90 PCA Russia; Art. 85 PCA Ukraine. The President of the Cooperation Council is alternatively a “representative of the Community” and a member of the Government of the Partner. The PCAs are ambiguous as regards the “Community side”. One has to look at the provisions of the two Council and Commission Decisions on the Conclusion of the Agreements to understand the expression “representative of the Community”. Art. 2(2) of the two Decisions provides that the President of the

The remit of the Cooperation Council is potentially very wide and yet its powers are legally limited. Each PCA endows it with the power to make *recommendations* on further developments and interpretation of the Agreement, or indeed to settle disputes. In contrast to decisions adopted by the Association Councils set up by e.g. the Europe Agreements, such recommendations do not in principle have binding effect on the Parties. In other words, the Cooperation Council cannot legally develop the Partnership in the same manner as the Association Council may develop the Association. Indeed, while the PCAs clearly provide that the Parties undertake to consider the development of the relevant titles of the Agreements, as circumstances allow, any such development can only be put in effect by virtue of another agreement between them in accordance with their respective constitutional procedures.<sup>314</sup>

As regard the determination of the common positions on the Union side, one has to look at the two Decisions on the Conclusion of the Agreements.<sup>315</sup> Article 2(1) of each Decision provides that the position to be adopted “by the Community” in the Cooperation Council and the Cooperation Committee has to be “determined by the Council, on a proposal from the Commission, or where appropriate, by the Commission, in each case in accordance with the relevant provisions [of the EC/ECSC/EAEC Treaties]”.

Considering that the political dialogue falls outside the Community remit, the position of “the Community” has to be supplemented by a Union’s position on the non-Community issues. In accordance with Article 27 TEU, this additional position is established by the EU Presidency, and the Commission is fully associated.<sup>316</sup> The General Affairs Council plays a crucial role in ensuring consistency of the

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Council shall chair the Cooperation Council and shall present the Community’s position. A representative of the Commission shall have a similar role in the Cooperation Committee.

<sup>314</sup> Art. 3 PCA Russia; Art. 4 PCA Ukraine

<sup>315</sup> Art. 300(2) second subpara. (introduced by the Treaty of Amsterdam) concerning the procedure to establish the positions to be adopted on behalf of the Community in a body set up by an agreement do not in principle apply here, for they apply only to bodies that are called upon to adopt decisions having legal effects. Further: Dashwood (1998a: 1025).

<sup>316</sup> In practice, it may even propose a common position under the non-Community aspects of the PCAs. Its involvement depends on the political sensitivity of the issue (interview, EU official).

Community position and the position to be defended under the political dialogue heading.<sup>317</sup> The combination of both positions constitutes the overall *Union* position, which is then presented by the Presidency of the Council in the Cooperation Council.<sup>318</sup>

Thirdly, the political dialogue involves parliamentarians.<sup>319</sup> The Parliamentary Cooperation Committee, consisting of members of the European Parliament on the one hand, and of members of the Partner's parliament on the other, may require information on the Agreement's implementation. It has the right to be informed of the recommendations formulated by the Cooperation Council, which is free to publish them. The Parliamentary Committee can itself make recommendations to the Cooperation Council.

This systematic and institutionalised political dialogue involves each political institution of the EU mentioned in Article 3 TEU. For instance, the Summits involve not only the President of the Council (Member State holding the Presidency of the Union) and the President of the Partner country, but also the President of the Commission. Together, they deal with all matters covered by the PCAs, including sometimes bitter trade disputes.<sup>320</sup> Moreover, since the Amsterdam Treaty, the Secretary General of the Council/High Representative (HR) for CFSP has taken part in the meetings of both the Cooperation Council and the Summits. The HR's participation indeed conforms to Article 26 of the TEU (Amsterdam version), which

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<sup>317</sup> Art. 13(3) TEU (ex Art. J.8(2)) TEU. See, for instance, the conclusions of the GAC 19 July 1999, which with respect to the EU-relations with Ukraine, "took note of the information given by the Presidency on the preparation of the Ukraine Summit to be held in Kiev on 23 July 1999... the Council also established the position of the EU for the Second Cooperation Committee meeting to be held in Kiev on 28 July 1999" (General Affairs Council, 1999b).

<sup>318</sup> An equivalent process takes place for preparing the position to be presented at the Summit level. In cases where no common position has been established in the context of the political dialogue, no position is presented at all, and Member States are not supposed to voice their individual position in this context (interview, EU official).

<sup>319</sup> The Parliamentary Cooperation Committee, consisting of members of the European Parliament on the one hand and of members of the partner's parliamentary body, may require information on the Agreement's implementation. It shall be informed of the recommendations adopted by the Cooperation Council, who is free to publish them, and can itself make recommendations to the latter.

<sup>320</sup> E.g. the Daewoo case in the context of EU-Ukraine relations. Hillion (1998c).

provides that the HR shall lead the political dialogues.<sup>321</sup> His/her presence at the Cooperation Councils incidentally confirms the connection between the PCAs and the CFSP as suggested above.

In other words, the institutional framework of the PCAs appears to materialise the different facets of the Union on the international stage. This is typified by the way the meetings in the context of the Partnerships are usually referred to in official Press Releases, namely as *EU-Russia/Ukraine Summits* and *EU-Russia/Ukraine Cooperation Councils*.<sup>322</sup> At the same time, the plurality of external dimensions of the Union (CFSP, EC, and Member States) has ramifications in the institutionalised dialogue of the Partnerships.<sup>323</sup>

## 2.4. Conclusion

This chapter has shown that the PCAs represent instruments of EU external activities. They are inspired by the Union's multifarious objectives and include provisions that relate to all its sub-orders. The Agreements notably echo the CFSP objectives and

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<sup>321</sup> The PCAs institutional framework follows intimately the institutional evolution of the EU, see further chapter 5.

<sup>322</sup> The first meeting of the cooperation council established by the PCA with Russia was referred to as "meeting of the EU/Russia cooperation council" (EU/Russia Cooperation Council, 1998b). That was the same with the first meeting of the Cooperation Council established by the PCA with Ukraine (EU/Ukraine Cooperation Council, 1998).

<sup>323</sup> The PCA also foresees a potential role for the Union Troika, by mutual agreement (Art. 7(2) PCA Russia; Art. 7, PCA Ukraine). In addition, it envisages the setting up of other procedures and mechanisms for political dialogue. On this point, the two agreements slightly differ. The PCA with Russia envisages particularly biannual meetings at senior official level between the EU Troika and officials of the partner country. It also invites the Parties to take full advantage of diplomatic channels, and to set up any other means including the possibility of expert meetings that could contribute to consolidating and developing the dialogue (Art. 8 PCA Russia). The PCA with Ukraine does not mention the biannual meetings of the Troika but refers to "regular meetings" at the level of senior official between representatives of Ukraine and "the Community" respectively. It is more elaborate on the diplomatic channels by mentioning contacts in the bilateral and multilateral field for instance in the United Nations and CSCE meetings. In contrast to the PCA with Russia, it also envisages exchange of information on matters of mutual interest concerning political cooperation in Europe (Art. 8 PCA Ukraine).

encompass external dimensions of the JHA cooperation. Moreover, they incorporate a strong political conditionality which straddles the pillars and contributes to fulfilling the objectives, if not obligations, of the European Union. Finally, the PCAs establish a political dialogue which enhances the foreign policy dimension of the Partnership and involves the Union's institutional framework, to develop the relationship in all its dimensions. The PCAs thus bring together the different facets of the Union within the same framework.

The Union lacking treaty-making capacity at the time of concluding the Agreements, it could not itself be party to the PCAs, which are thus *proto* cross pillar agreements. Instead, it is through the participation of the Member States alongside the Community, and thus through the mixity of the Agreement, that the objectives of the Union could be fulfilled. Mixity is used by default to project the Union externally, in its different facets. This functional view of mixity is illustrated by the phrase "Community and Member States acting in the framework of the European Union" which was referred to in the Preamble of the PCA with Russia.

The PCAs therefore represent a new formula of mixed agreements, involving a two-dimensional mixity. The first dimension of mixity in the PCAs relates to the distribution of powers between the Community and its Member States, as clarified by the Court. Various areas of the PCAs deal with shared competences, such as trade in services and establishment and thus require the Member States' participation alongside the Community, as discussed in chapter 1. An emerging second dimension of mixity, explored in this chapter, flows from the new constitutional architecture of the Union, and particularly the distribution of decision-making powers between the EU sub-orders, enshrined in the TEU. In this context, the Member States take part in the PCAs acting in the framework of the Union and thus bound by the principles and provisions of the non-EC sub-orders. The twofold dimensions of mixity illustrated by the PCAs, thus involves complex interactions between the sub-orders and the Member States which are characteristic of the emerging system of EU external relations. The next part will examine the principles that organise these interactions, to ensure their overall coherence.

## PART II

### A MIXITY GOVERNED BY THE CONSTITUTIONAL PRINCIPLES UNDERPINNING THE SYSTEM OF EU EXTERNAL RELATIONS

Mixity carries the potential for developing EU external relations, as exemplified by the PCAs. It also entails a number of procedural complications which have to do with the simultaneous presence of the Community, the Member States and the Union, acting on the basis of Titles V and VI TEU. Organising the interactions between the sub-orders and the Member States is critical to ensure a coherent EU action through instruments such as the PCAs.

This part posits that, in law, two categories of complementary principles govern the interactions between the Community, the Member States and the EU. They have been formulated, by the Court of Justice and by the *pouvoir constituant*. The first category consists of the “duty of cooperation” which governs the interplay between the Community and the Member States, on the international stage, particularly in the context of mixed agreements such as the PCAs (chapter 3). The second category comprises principles that notably organise the interactions between the different sub-orders of the Union, namely the duty to maintain the *acquis communautaire*, and the principle of consistency of EU external activities, backed by the EU’s single institutional framework (chapter 4). These devices will be examined in turn to shed light on the organising principles of the system of EU external relations.

## CHAPTER 3

### PRINCIPLES ORGANISING THE INTERACTIONS BETWEEN UNION SUB-ORDERS AND MEMBER STATES

The Treaty on European Union is not generous in principles governing the interaction between the EU sub-orders and Member States on the international plane,<sup>324</sup> and particularly not as regards the management of mixed agreements, such as the PCAs. The European Court of Justice has partly filled the gap.<sup>325</sup> It has notably established and developed a *duty of cooperation* as a device to guide this interaction in the context of mixed agreements. Described as the “overarching legal principle governing mixity”,<sup>326</sup> the significance of this device can hardly be overestimated. Indeed, given the *significance* and *function* of mixity highlighted in the previous chapters, the duty is an essential element of the system of EU external relations. This chapter will establish the judicial nature of the duty of cooperation (3.1), and shed light on its wide scope of application (3.2).

#### 3.1. The judicial nature of the duty of cooperation

The Court of Justice established the duty of cooperation in Ruling 1/78 in the context of the Euratom Treaty,<sup>327</sup> which, in contrast to the EC Treaty, explicitly envisages the possibility of mixed external agreements.<sup>328</sup> Relying on the provisions of Article 192 EAEC, which are similar to those of Article 10 EC on the principle of loyal

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<sup>324</sup> Weiler (1991).

<sup>325</sup> Heliskoski (1999: 64). As he points out in footnote 22, any proposal designed to incorporate the requirement of unity and duty of cooperation into the EC Treaty were rejected at the 1996-97 IGC. Further: Torrent (2000: 231ff).

<sup>326</sup> Eeckhout (2004: 209).

<sup>327</sup> Ruling 1/78 *Draft Convention of the International Atomic Energy Agency on the physical protection of nuclear materials, facilities and transports*. It has however been suggested that the Court had already hinted at the need for the Community and the Member States to cooperate in the conduct of external relations in two previous judgments in Case 22/70 *Commission v Council (ERTA)* and Joined Cases 3, 4 & 6/76 *Kramer*, paras 34-35. Further: Eeckhout (2004: 193), Heliskoski (2001: 62) and Temple Lang (1986).

<sup>328</sup> Art. 102 EAEC.

cooperation between the Member States and the institutions,<sup>329</sup> the Court emphasised the need for “close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion, and in fulfilment of obligations entered into” on the basis of the mixed agreement in question.

In its Opinion 2/91 concerning Convention 170 of the International Labour Organisation, the Court held that such “duty of cooperation... must also apply in the context of the EEC Treaty”.<sup>330</sup> This principle was thereafter confirmed, particularly in Opinion 1/94 on the WTO Agreement, in the *FAO* judgment,<sup>331</sup> and lately in Opinion 2/00 on the Cartagena Protocol on Biosafety.<sup>332</sup> The duty of cooperation is a well-established device whose purpose is to ensure a harmonious interaction between the Community institutions and Member States in establishing and implementing agreements whose subject matter falls partly within the competence of the Community and partly within that of the Member States.

Having established this duty of cooperation, the Court has remained elliptic with respect to the nature and scope of application of such a duty.<sup>333</sup> It is noteworthy that, in contrast to Ruling 1/78, Opinion 2/91 did not explicitly relate such a duty to the general principle of loyal cooperation, articulated in Article 10 in the EC context. The Luxembourg judges instead considered that it “results from the requirement of unity in the international representation of the Community”. It is however submitted that the duty of cooperation is intimately linked to the constitutional principle of loyal

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<sup>329</sup> According to Art. 192 EAEC, Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measures which could jeopardize the attainment of the objectives of this Treaty.

<sup>330</sup> Opinion 2/91 *Convention 170 of the International Labour Organisation concerning safety in the use of chemicals at work (“ILO”)*.

<sup>331</sup> Case C-25/94 *Commission v Council*.

<sup>332</sup> Opinion 2/00 *Cartagena Protocol on Biosafety*, para. 18. Dashwood (2002b), Koutrakos (2004), AG Tesouro’s Opinion in Case C-53/96 *Hermès International v FHT Marketing*, and the Court’s judgment in Case C-392/98 *Parfums Christian Dior v Tuk Consultancy*.

<sup>333</sup> Heliskoski (1996: 126-127), Common Market Law Review (1995), Neuwahl (1996).

cooperation, articulated in Article 10 EC, and should be envisaged in this general perspective.

### **3.1.1. A duty derived from the Community principle of loyal cooperation**

On the basis of the principle of loyal cooperation, articulated 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 jeopardise the attainment of the objectives of this Treaty.<sup>334</sup> While the Court has consistently refrained from mentioning it in relation to the duty of cooperation, it may be argued that this principle of loyalty is nonetheless intrinsic to the latter, as supported by the doctrine (3.1.1.1), and confirmed by legal arguments (3.1.1.2).

#### *3.1.1.1. A connection acknowledged by the doctrine*

The proposition that the duty of cooperation is derived from the general principle of loyal cooperation has been supported by the legal doctrine on various occasions. It has been suggested that the duty of cooperation is a specific application of the principle of loyal cooperation, or at least that there is a connection between the two.<sup>335</sup> For instance, Marise Cremona considers that the loyalty obligation enshrined in Article 10 EC “has evolved in the context of external policy” into “a duty of close cooperation” arising whenever external competence is shared between the Community and its Member States. Similarly, McLeod *et al* consider that the duty of close cooperation may be traced back to the Treaties themselves, and in particular to the duty of loyal cooperation derived by the Court from *inter alia*, Articles 192 EAEC and Article 10

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<sup>334</sup> Further on Art. 10 EC and the duty of loyal cooperation, see e.g. Mortelmans (1998), Temple Lang (1990), Constantinesco (1987: 97) and Blanquet (1994 : 417-426).

<sup>335</sup> Cremona (1999a: 170).

EC.<sup>336</sup> Joni Heliskoski also finds the origins of the duty of cooperation in the Treaties in general, and in Article 10 EC and Article 3 TEU, in particular,<sup>337</sup> and Rachel Frid even considers that “the [duty of cooperation] can be legally based on Article [10] EC, and complementary on Article [3] Union Treaty”.<sup>338</sup>

Elaborating on this connection, Christiaan Timmermans suggests that the duty (of Member States) to cooperate is “more specific” than the general principle of loyalty or *bundestreue*, under Article 10 EC. It is more specific in that it is directly linked by the Court to the “requirement of unity in the international representation of the Community”.<sup>339</sup> In addition, he points out that the duty of cooperation is a *Community law* obligation which also governs the co-ordination of *national* competences. As a consequence, the infringement procedure of Article 226 EC should be available where Member States breach their duty of cooperation, for instance by breaking Community solidarity and acting single-handedly in the negotiation or conclusion stage.<sup>340</sup> Recently, Piet Eeckhout related the duty of cooperation to the principle of loyal cooperation, suggesting that the principle of loyalty and the requirement of unity in the international representation of the Community can be seen as the twin foundations of this duty.<sup>341</sup>

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<sup>336</sup> They also refer, in this context, to the Court’s emphasis on the need for Community solidarity in asserting the Community’s exclusive competence; on this last point they refer to the Court’s Opinion 1/75 *OECD Local Costs Standard*, and Opinion 1/76 *Draft Agreement on a laying up fund for the Rhine*. See McLeod *et al* (1996: 145).

<sup>337</sup> Heliskoski (2001: 64).

<sup>338</sup> Frid (1995: 149).

<sup>339</sup> Timmermans (2000: 241). On this link, see also Koutrakos (2002: 49), who writes that the principle of cooperation was articulated by the Court to ensure that mixity would not undermine the unity in the international representation of the Community.

<sup>340</sup> He also relates the duty of cooperation to old Article 116 EEC, which was repealed by the Treaty of Maastricht. This Article provided that from the end of the transitional period onwards, Member States were, in respect of all matters of *particular* interest to the common market, to proceed within the framework of international organisations of an economic character only by common action. Consider also the Editorial Comments of the *Common Market Law Review* (1995). Takis Tridimas (2000: 59) considers that the duty of cooperation however goes further than old Article 116 EEC. The duty of cooperation seeks to exploit the collective bargaining power of the Community and the Member States in international relations in general. See also P.L.H. Van den Bossche (1997: 62) and the views of Heliskoski (1998: 276-77) and Leal-Arcas (2001).

### 3.1.1.2. *A connection implied by the case law*

More specifically, it may be argued that the duty of cooperation is *derived* from the principle of loyal cooperation. Indeed, the Court's initial formulation of the duty of cooperation, in Ruling 1/78, included a direct reference to the principle of loyal cooperation.<sup>342</sup> In Opinion 2/91, the Court *imported* this very duty in the context of the EEC Treaty although, arguably, without changing its nature and ultimate legal foundation.

The terms of the Opinion suggest that it is the same duty that applies. In particular, the Court explicitly says: “[t]his duty of cooperation, to which attention was drawn in the context of the EAEC, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community”.<sup>343</sup> The expression “to which attention was drawn in the context of the EAEC” suggests that the duty of cooperation is not specific to the EAEC context; rather, “attention was drawn” in Ruling 1/78 to a general principle that transcends the boundaries of the different Community Treaties, and which belongs to the Community legal order as a whole.<sup>344</sup>

It is indeed in this perspective that the other expression “since it results from the requirement of unity in the international representation of the Community” may be understood. The latter expression is, arguably, first and foremost a justification of the fact that the duty of cooperation must *also* apply in the context of the EEC Treaty. The term “unity” in “requirement of unity in the international representation of the *Community*” (emphasis added) appears to refer to the single international representation of the Community legal order, which involves a single set of foundations and principles, and a single set of fundamental duties for both Member

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<sup>341</sup> The author adds that, by insisting on unity, loyalty and cooperation the Court expresses a particular conception of mixed external action where competences are truly shared or joint, necessitating a common approach maintaining unity (Eeckhout, 2004: 215).

<sup>342</sup> The general principle of loyal cooperation is articulated in Article 192 in the context of the EAEC Treaty.

<sup>343</sup> Para. 36, Opinion 2/91.

<sup>344</sup> Dashwood (2004b: 377).

States and Communities, despite the existence of distinct treaties establishing the Communities.<sup>345</sup> In that sense, it is only at a later stage that the expression “requirement of unity in the international representation of the Community” has been extracted from this initial context. It has been progressively associated with, and used as a *justification* for the duty of cooperation as such. It is in this perspective that it has henceforth been understood and applied, as a mechanism to administer “joint competence”. The duty of cooperation is however a principle of the Community legal order which remains ultimately based on the principle of loyal cooperation, either explicitly in the context of the EAEC, or implicitly in the context of the EC.

If, as it is asserted, the duty of cooperation derives in effect from the constitutional principle of loyal cooperation, its application should consequently be envisaged in the light of the latter. In particular, the duty of cooperation involves, in the specific context of mixed agreements, the negative and positive obligations imposed on Member States and institutions that derive from the principle of loyal cooperation.<sup>346</sup> It means that Member States and Community institutions shall both facilitate the achievement of the Community’s external tasks, as well as abstain from any measure which would jeopardise the attainment of the objectives of Community’s external relations as derived from the EC Treaty.<sup>347</sup> Both the general principle of loyal cooperation and the duty of cooperation are expressions of Community solidarity,

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<sup>345</sup> In this regard, see Opinion 1/91 *Draft Treaty on a European Economic Area*, where the Court refers to the Community Treaties that established a *new legal order* for the benefit of which the Member States have limited their sovereign rights. Further: Schermers (1992) and Burrows (1992). Another authority to support this proposition is: C-221/88 *European Coal and Steel Community v Faillite Acciaierie e ferriere Busseni SpA*, where the Court insists on the cohesion and coherence of the Community Treaties, see paras 10-17.

<sup>346</sup> Temple Lang (1990), Mortelmans (1998) and Wessel (1997: 120-121), citing O. Due, “Artikel 5 van het EEG-Verdrag. Een bepaling met een federal karakter” (1992) *SEW* 82.

<sup>347</sup> As summarised by Wessel (1997: 120), it includes more specifically: the obligation to take all appropriate measures necessary for the effective application of Community law; the obligation to ensure the protection of rights resulting from primary and secondary Community law; the obligation to act in such a way as to achieve the objectives of the Treaty, in particular when Community actions fail to appear; the obligation not to take measures which could harm the *effet utile* of Community law; the obligation not to take measures which could hamper the internal functioning of the institutions; and the obligation not to undertake actions which could hamper the development of the integration process of the Community.

which, as the Court has already suggested, is the basis of the whole Community system.<sup>348</sup>

The duty of cooperation, as a specific application of the principle of loyal cooperation therefore represents, as indeed suggested by various authors,<sup>349</sup> a key legal principle that governs and organises the interactions between the Community and the Member States externally, in the particular context of mixed agreements. The various implications of the general principle of loyal cooperation have to be kept in mind in establishing the nature of the duty of cooperation and in envisaging its application, particularly its potential enforcement.<sup>350</sup>

With respect to the nature of the duty of cooperation, a key question is whether it constitutes a *political principle* or a *legal obligation*. The answer to this question will shed further light on the rules governing the interactions between the Community and Member States in the context of the PCAs. Two judgments of the Court of Justice, in the *FAO* case (3.1.2) and in the *Dior* case (3.1.3), reveal that the duty of cooperation has indeed a legal nature. These cases concern the duty of cooperation in the context of two mixed agreements involving the Community's participation in international organisations. The Court's pronouncements are valid also to decrypt the duty of cooperation in the context of bilateral mixed agreements, such as the PCAs.

### **3.1.2. A duty involving legal obligations: the *FAO* case**

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<sup>348</sup> Case 6 & 11/69 *Commission v France*, para. 16: the Court refers to “[t]he solidarity which is at the basis of... the whole of the Community system in accordance with the undertaking provided for in [ex] Article 5 of the Treaty”.

<sup>349</sup> While Eeckhout (2004: 205) presents it as the “overarching legal principle governing mixity”, it is envisaged as “one of the fundamental principles of the external relations of the Communities” by McLeod *et al* (1996: 145).

<sup>350</sup> See in this regard, C-374/89 *Commission v Belgium*; Case C-35/88 *Commission v Greece*; Case C-48/89 *Commission v Italy*; Case 272/88 *Commission v Greece*. It should be pointed out that the Article 10 is not a free-standing obligation. The obligations it involves are to be established in conjunction with other provisions of the EC Treaty; Case 78/70 *Deutsch Grammophon*.

The question of whether the duty of cooperation involves legal obligations for the Member States and the Community institutions was partly addressed by the Court of Justice in its *FAO* judgment.<sup>351</sup> Without dwelling too much on the factual details of the case,<sup>352</sup> suffice to say that in the context of the Community's participation to the Food and Agriculture Organisation,<sup>353</sup> an Arrangement was agreed by the Commission and the Council to decide who, of the Community or the Member States, should exercise the responsibilities at FAO meetings.<sup>354</sup> In particular, Section 2.3 of the Arrangement provides that, when an agenda item deals with matters containing elements of national and of Community competence, the Commission shall express the common position achieved by consensus when the thrust of the issue lies in an area *within* the exclusive competence of the Community. The Commission should then vote in accordance with this common position. By contrast, when the thrust of the issue lies in an area *outside* the exclusive competence of the Community, the Presidency expresses the common position, and Member States vote in accordance with that position.

In the *FAO* case, the Commission challenged a Council decision, based on a previous decision of the COREPER, which gave the voting rights to the Member States for an agreement to promote compliance with international conservation and management measures by vessels fishing on the high seas. The Commission contended that, in view of the Community competence on fisheries, the thrust of the agreement laid within Community powers. Consequently, in accordance with the Arrangement, the Commission should have voted. The Court indeed found that the thrust of the issue was in an area of exclusive Community competence, and held that by giving the right to vote to the Member States, the Council had breached the Arrangement, and particularly Section 2.3. Consequently, it annulled the Council decision.

The significant contribution of the case to the present discussion is that the Court considered that the Arrangement constituted a *legal* instrument involving obligations

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<sup>351</sup> Case C-25/94 *Commission v Council*.

<sup>352</sup> Further, see Heliskoski (2000: 79).

<sup>353</sup> The Community is a Member of the FAO. Further: e.g. Schwob (1993).

<sup>354</sup> Arrangement between the Council and the Commission regarding the preparation for FAO meetings and statements and voting, reproduced in Frid (1995: 398-402).

for its signatories.<sup>355</sup> Indeed, the Court underlined that “Section 2.3 represents a *fulfilment* of [the] duty of cooperation”.<sup>356</sup> It thereby recognised that it is possible, even informally, to conclude some form of inter-institutional agreement materialising and specifying the duty of cooperation in case of mixed external action, and that such an agreement binds the institutions.<sup>357</sup>

Moreover, while the Arrangement was concluded by the Commission and the Council, it has been suggested that it also binds the Member States on the grounds that it defines clear obligations for them for the purpose of ensuring unity in the international representation of the Community.<sup>358</sup> Indeed, the terms of the Arrangement suggests that it directly concerns the Member States, and that the Council signed the Arrangement on their behalf.<sup>359</sup> Furthermore, the Court itself pointed out that the Arrangement represented a “fulfilment of the duty of cooperation *between the Community and the Member States within the FAO*” (emphasis added). Arguably, it would not be a fulfilment of that duty had the Arrangement not bound the Member States as well.

Having established that the duty of cooperation can be enforced, the next question is whether such enforceability is conditional upon its prior “fulfilment” through an inter-institutional agreement such as the FAO Arrangement, or whether it could be relied upon *as such*, either against an institution, or a Member State. Since the Court underlined that the Arrangement represented fulfilment of the duty of cooperation “within the FAO”,<sup>360</sup> it is submitted that the duty of cooperation may be, or even *has*

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<sup>355</sup> Contrary to what was suggested by AG Jacobs who considered this arrangement as “pragmatic” (para. 61), [1996] ECR I-1469. Sack (1995), Tridimas (2000: 59).

<sup>356</sup> Emphasis added; “fulfilment” is translated as “mise en oeuvre” in the French version of the Court decision.

<sup>357</sup> Eeckhout (2004: 214).

<sup>358</sup> Timmermans (2000: 244).

<sup>359</sup> Section 5 of the Arrangement provides that at the request of a Member State the coordination procedure will be reviewed, taking account of experience gained from its operation.

<sup>360</sup> Annex II of the Arrangement indeed contains a statement by the Council and the Commission which states that “this arrangement reflects the special circumstances of Community participation in the FAO and has no implications regarding other international organizations, including those of the United Nations system”.

to be fulfilled also in other frameworks. It can either take the form of specific arrangements,<sup>361</sup> or apply and be enforced as such, without being conditional upon the adoption of further instruments, as will be demonstrated below.

### 3.1.3. A directly applicable duty: the *Dior* case

In the *Dior* case,<sup>362</sup> the Court of Justice seemed to support the proposition that the duty of cooperation applies notwithstanding the absence of specific inter-institutional arrangements. In this case, the Court was asked to give a preliminary ruling on the interpretation of Article 50 of TRIPs which, following Opinion 1/94 on the WTO Agreement, was concluded by the Community and its Member States under joint competence.<sup>363</sup>

Article 50 TRIPs concerns provisional measures for the protection of intellectual property rights. Although the Court had already had an opportunity to establish its jurisdiction on this provision in a previous ruling in the *Hermès* case,<sup>364</sup> this jurisdiction was nonetheless disputed in the present instance on the ground that the national court's reference concerned the application of Article 50 TRIPs to an area (industrial design) where the Community had not yet legislated, in contrast to the situation at issue in *Hermès* (trade marks). Allegedly therefore, the national court was asking the Court of Justice to interpret a provision of a mixed agreement which, in this particular instance, applied to a situation falling *outside* the scope of Community law.

Relying on the fact that TRIPs was concluded by the Community and the Member States under joined competences, the Court held that where a case is brought before it in accordance with the provisions of the Treaty, it has jurisdiction to define the

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<sup>361</sup> E.g. Arrangement between the Council and the Commission concerning participation in international negotiations on raw materials (so-called "Proba 20"), reproduced in Völker and Steenbergen (1985: 48). Further: Neuwahl (1996: 678ff).

<sup>362</sup> Joined Cases C-300/98 *Parfums Christian Dior SA v Tuk Consultancy* and C-392/98 *Assco Gerüste GmbH, Rob van Dijk and Wilhelm Layher GmbH Co. KG, Layer BV*.

<sup>363</sup> OJ 1994 L336/1.

<sup>364</sup> Case C-53/96 *Hermès International v FHT Marketing Choice BV*.

obligations which the Community has thereby assumed and, for that purpose, to interpret TRIPs. It added that, in particular, it has jurisdiction to interpret Article 50 of TRIPs in order to meet the needs of Member States' courts when they are called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under Community legislation falling within the scope of TRIPs.

Elaborating on what it had already held in *Hermès*, the Court opined that “where a provision such as Article 50 TRIPS can apply both to situations falling within the scope of national law and to situations falling within that of Community law, as is the case in the field of trade marks, [it] has jurisdiction to interpret such provision in order to forestall future differences of interpretation”.<sup>365</sup> It added that “[i]n that regard, the Member States and the Community institutions have an *obligation of close cooperation* in fulfilling the commitments undertaken by them under joint competence when they concluded the WTO agreement, including TRIPs” (emphasis added).<sup>366</sup> Such an “obligation of close cooperation” requires the judicial bodies of the Member States and the Community, “for practical and legal reasons”, to give a *uniform* interpretation to Article 50 TRIPs, for it constitutes “a procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situation covered by Community law.”

For the purposes of the present analysis, the *Dior* ruling is significant for at least two reasons. First, the Court's pronouncement suggests that the duty of cooperation need *not* be formalised in an inter-institutional agreement such as the FAO Arrangement to apply and generate legal consequences. The *Dior* formulation of the duty of cooperation suggests that it binds, *in itself*, both Community institutions and Member States, without being conditional upon further “*mise en oeuvre*”.<sup>367</sup> It thus applies directly. *In casu*, the Court considered that it concerns and indeed binds the *jurisdictions* of the Member States and Community, respectively. Both levels of jurisdiction are, together with the *political* authorities of the Member States and the Community, respectively, equally involved in ensuring the fulfilment of the

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<sup>365</sup> Para. 35, which refers to *Hermès*, particularly paras 28-29 and 32-33.

<sup>366</sup> Para. 38.

<sup>367</sup> See the French version of the *FAO* judgment.

“commitments undertaken by the Member States and the Community under joint competence”.<sup>368</sup> As such they are bound by the same obligation of cooperation.<sup>369</sup> In this regard, the Court’s verdict echoes Advocate General Tesauro’s Opinion in the *Hermès* case. He suggested that the interpretation the Court is called upon to give represents its contribution to the fulfilment of the duty of cooperation between institutions and Member States.<sup>370</sup>

Secondly, and following the previous point, the duty of cooperation is used by the Court in *Dior* to validate its jurisdiction to interpret a provision of a mixed agreement, regardless of the fact that this provision applies *outside* the context of Community law.<sup>371</sup> As already suggested in *Hermès*, the Court considers that such a provision falls under its jurisdiction insofar as it is “*capable* of applying both to situations covered by national law and to situations covered by Community law” (emphasis added). Because of this potential, this provision should be interpreted uniformly,<sup>372</sup> and

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<sup>368</sup> Koutrakos (2002: 38-39 and 49) argues that the Court seeks to articulate the principle of cooperation between the Community judiciary and national courts “as an essential adjunct to the cooperation between the Member States and the Community institutions”.

<sup>369</sup> Consider in this regard the Court’s judgment in case C-224/01 *Gerhard Köbler* of 30 September 2003, which puts additional pressure on the national courts to fulfil their Community law obligation as one of the authorities of a Member State. Non-fulfilment by a national court of its Community obligations could lead to the liability of the Member State to which the national court belongs.

<sup>370</sup> Tesauro AG had already made this connection in para. 21 of his Opinion in *Hermès* (Case C-53/96). He also pointed out that “the absence of centralised interpretation could completely undo the results achieved by the obligation to cooperate in the negotiations and conclusion of the provisions in question”. The AG therefore implicitly considers that the *effet utile* of the duty of cooperation at the negotiation and conclusion levels may require centralised interpretation by the Court of Justice at the level of implementation.

<sup>371</sup> In principle, the Court’s jurisdiction under Art. 234 EC is limited to questions of interpretation and validity of Community law; see e.g. Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*; Case 6/64 *Costa v ENEL*.

<sup>372</sup> The Court had already developed a similar approach in relation to preliminary references involving domestic rules referring to or incorporated provisions of Community law: Case C-222/01 *British American Tobacco Manufacturing BV and Hauptzollamt Krefeld*, Case C-300/01 *Doris Salzmann*, Case C-130/95 *Giloy v Hauptzollamt Frankfurt am Main-Ost*, Case C-28/95 *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, Case C-297/88 *Dzodzi v Belgium*, Case C-231/89 *Gmurzynska-Bscher v Oberfinanzdirektion Köln*, Case 166/84 *Thomasdunger*, Case 384/89 *Tomatis and Fulchiron*. For reservations on this analogy, see AG Tesauro in his Opinion in Case C-53/96 *Hermès*, p. 3620, footnote 29. Further: Lefevre (2004), de la Marre (1999: 219) and Heliskoski (2001:

“[o]nly the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article [234] of the Treaty is in a position to ensure such uniform interpretation” (emphasis added).<sup>373</sup>

As suggested above, the Court’s interpretation represents its self-established contribution to the fulfilment of the duty of cooperation. The Court thereby proposes a wide understanding of such duty. It is envisaged as the duty to forestall any differences of interpretation of the provision concerned, and as a subsequent obligation for the national court to ensure such uniform interpretation, even when dealing with a purely national situation. According to this line of reasoning, the outcome of the duty of cooperation is to ensure *unity* in the implementation of the provision at stake. The Court’s *pre-emptive* interpretation thus limits,<sup>374</sup> if not annihilates the margin of manoeuvre of the national court, also where, as in the present instance, the provision is to be applied in the context of national law.<sup>375</sup> Indeed, such an authoritative interpretation has consequences in other Member States as well.<sup>376</sup> The duty of cooperation can therefore be envisaged as ensuring uniformity in the application of a provision of a mixed agreement, as soon as this provision is capable of applying at national and Community level.

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<sup>373</sup> Para. 38. Further: Dashwood (2000b: 173-174).

<sup>374</sup> On the idea of pre-emptive jurisdiction, although in the context of another procedure, see Plender (2000: 203).

<sup>375</sup> The Court thus seems to confirm the connection between the duty of cooperation and the constitutional principle of loyal cooperation, discussed above. It builds upon the well established judicial cooperation based on Article 10 EC and aimed at ensuring the effectiveness of Community law and the integrity of the EC legal order (Case 14/83 *Van Colson and Kaman v Land Nordrhein-Westfalen*, Case 79/83 *Dorit Harz v Deutsch Tradax GmbH*, Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*, Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd and others*, Case 811/79 *Ariete SpA v Amministrazione delle finanze dello Stato*) and based on uniform application (Case C-99/00 *Kenny Roland Lyckeskog*). For a thorough analysis on the role of the Court of Justice influence on the national judicial systems, see Dougan (2002, 2004).

<sup>376</sup> Cases 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie*, Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*. Further: Trabucchi (1974) and Rasmussen (1984).

Given the far-reaching implications of the Court's interpretation for the Member States' judicial authorities, the distinction between provisions that are "capable of applying both to situations covered by national law and to situations covered by Community law"<sup>377</sup> and those which are *not* capable of this double application becomes crucial.<sup>378</sup> The word "capable" suggests that the dual application of the provision is not necessary in *actual* terms, but needs only be *potential* for the Court to require and give a uniform interpretation.<sup>379</sup> Uniform application of the provisions of a mixed agreement is not necessarily connected to the exclusive competence of the Community. A provision falling under non-exclusive Community competence may also have to be applied uniformly, irrespective of the fact that it relates to an area which is not actually, but only potentially covered by Community law. It however leaves open the question of whether the Court has jurisdiction to interpret the provisions of the agreement that do *not* fall under the category of Community potential competence.

Furthermore, the *Dior* conception of the duty of cooperation, applied at the judicial level, might have an impact on how this duty is to be envisaged more generally.<sup>380</sup> The Court considers that in certain instances, the provisions of a mixed agreement shall apply uniformly throughout the Community even where they concern an area not yet covered by Community rules. It could be argued that as a result, other national authorities might also be expected to ensure the same level of harmony in the implementation of the provisions of a mixed agreement meeting the same conditions,

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<sup>377</sup> The French version of the ruling uses an expression that seems more open than the English phrase "capable of applying": "lorsqu'une disposition... *peut trouver à s'appliquer* aussi bien à des situations relevant du droit national qu'à des situations relevant du droit communautaire... la Cour est compétente pour l'interpréter afin d'éviter des divergences d'interprétation futures" (emphasis added).

<sup>378</sup> In this regard, see the Opinion of Tizzano AG of 29 June 2004 in case C-245/02 *Anheuser – Bush Inc. v Budejovický Budvar, národní podnik* (paras 110-115), and judgment of the Court of 16 November 2004 (para. 41).

<sup>379</sup> This scenario had already been envisaged by Dashwood (2000b: 173-174). Indeed, AG Tesaro in *Hermès* talks of "potential competences", namely areas where the Community has competence but the latter has not yet been exercised, meaning that it remains vested on the Member States.

<sup>380</sup> The duty of cooperation binds all the Member State's authorities. There is no reason why the duty should have a different application depending on the national authority involved, i.e. judicial, legislative or executive.

e.g. provisions “capable of applying both to situations covered by national law and to situations covered by Community law”.

More generally, the *Dior* formula of the duty of cooperation further supports the proposition that such a duty involves obligations of a legal nature. Indeed, it is noticeable that the Court does not use the word “duty” at all in the *Dior* case, but refers to “obligation”, thereby consolidating the legally binding character of cooperation already hinted at in the case law.<sup>381</sup> Arguably, the duty of cooperation is also strengthened by the Court’s use of the expression “*close cooperation*”, in contrast to cooperation *tout court*.

To sum up, it appears that the duty of cooperation potentially entails far-reaching legal obligations for the institutions of the Community and for the Member States authorities, above all the courts. This duty can be articulated in various ways, being for instance specified in an inter-institutional arrangement, or be relied upon as such to ensure harmonious fulfilment of the commitments undertaken under joint competences. It can even involve uniform interpretation of these commitments by the courts, if they are capable of having national and Community applications.<sup>382</sup> Having determined the legal nature of the duty of cooperation, its scope of application should be examined. The next section will argue that it is potentially wide.

### **3.2. The wide scope of application of the duty of cooperation**

In its various pronouncements, the Court has repeatedly held that first, the duty to cooperate is triggered “where it is apparent that the subject matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States.”<sup>383</sup> Secondly, the duty operates “between the Member States and the Community institutions, both in the process of negotiation and

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<sup>381</sup> The Court had already used the word “obligation” before, particularly in Opinion 1/94, para. 108.

<sup>382</sup> For the national courts, the duty of cooperation thus means that they do not distinguish between acting *qua* national courts and acting *qua* judge of Community law.

<sup>383</sup> E.g. Opinion 1/94, para. 108.

conclusion, and in the fulfilment of the commitments entered into”.<sup>384</sup> Thirdly, it is “for the Member States and the Community institutions to take all the measures necessary so as best to ensure such cooperation”.<sup>385</sup>

Thus, the duty of cooperation potentially has a wide scope of application. From the point of view of the present analysis on management of mixed agreements such as the PCAs, and in the light of the above discussion, one needs to examine, first, how far the Member States’ actions are affected by this duty. Although it has been argued after *Dior* that the duty of cooperation concerns Member States while acting in an area where the Community is competent there is a need to establish whether it also applies when they act in areas where the Community has no competence at all, not even potential (e.g. when they act in their own right or in the framework of the Union). Also more needs to be said about the *type* of “cooperation” that is expected from both the Member States and the Community institutions.

A distinction has been made, notably in the literature, with regard to the intensity of the application of the duty. First, in the case of agreements which contain provisions involving inextricably interlinked exercise of Member States and Community competences, the case law suggests a strong application of the duty of cooperation (3.2.1). Second, the duty of cooperation does not apply as strongly, but applies nonetheless in situations where both Member States and Community exercise their own competences (3.2.2). In the later case, the duty of cooperation may have to be envisaged in the context of the TEU (3.2.3).

### **3.2.1. The application of the duty of cooperation in the context of mixed agreements involving “inextricably interlinked” exercise of Member States and Community competences**

Where the exercise of Community and national competences is “inextricably linked”, Christiaan Timmermans proposes a stronger application of the duty of cooperation. For this author, the expression “inextricably linked” refers to a situation “where the action in a particular case cannot be reserved either to the Community or to the

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<sup>384</sup> E.g. Opinion 1/94, para. 108; Opinion 2/91, para. 36.

<sup>385</sup> Para. 38, Opinion 2/91.

Member States”, but “where they are condemned to act together”.<sup>386</sup> In this case of mixity, Member States, when acting together with the Community, “should present a common, coherent approach”, and Community action should not be hampered or undermined by countervailing action by Member States.

According to Timmermans, the duty of cooperation is indeed “directly linked by the Court to the requirement of unity in the international representation of the Community”.<sup>387</sup> In practical terms, if Member States fail to co-ordinate their positions and/or to ensure coordination of their common position with that of the Community, there should be *no action*. Allowing Member States to go their own way where shared competences at issue are inextricably linked would be incompatible with the requirement of unity in the international representation of the Community. Timmermans concludes that, in this type of situation, the principle is either joint action or no action at all, be it at the level of negotiation or conclusion, implementation being governed by the division of internal powers between the Community and the Member States.<sup>388</sup> In other words, when “the competences are inextricably linked”, the duty of cooperation implies that the Member States and the institutions have *an obligation of result*.

The potentially strong application of the duty of cooperation in certain types of mixed agreements (or within one subject area of a mixed agreement) partly finds support in the Court of Justice’s case law. In particular, the Court has insisted on the duty being “more necessary” when Member States have to act on behalf of the Community when the latter cannot be represented in an international organisation.<sup>389</sup> The duty is also “more imperative” when the mixed agreement is constituted by sub-agreements which are “inextricably interlinked”.<sup>390</sup>

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<sup>386</sup> Timmermans (2000). It has also been said that “[t]hey are prisoners of one another”, see *Common Market Law Review* (1995: 385).

<sup>387</sup> See discussion above under 3.1.1.

<sup>388</sup> Timmermans (2000: 241-243).

<sup>389</sup> In Opinion 2/91, the Court emphasises, in para. 37 that “cooperation between the Community and the Member States is *all the more necessary* in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO conventions and must do so through the medium of the Member States”.

On the basis of this case law, McLeod *et al* however point out that a duty to *reach* a common position is always equally “imperative”. Only a duty to strive to reach a common position can be “more imperative” in some cases than in others.<sup>391</sup> Put differently, unlike what Timmermans suggests, they consider that the duty of cooperation remains, in any event, an obligation of *conduct* rather than an obligation of *result*. It is only in matters falling under the exclusive competence of the Community that failure to agree a position within the Council entails no action at all, because by definition, there is no position taken. Indeed, Member States do not in principle have competence to act on their own in these matters, for the very exclusive nature of the Community competence excludes them from the field.<sup>392</sup> By contrast, as regards matters in respect of which the Community and the Member States share competence, the duty of cooperation does not entail an obligation to reach a common position. Member States are only bound by *an obligation to use their best endeavours to reach a common position*,<sup>393</sup> but if no such common position is reachable, it will be for each Member State to defend its own interests as seems best to it.<sup>394</sup> The duty of cooperation cannot prevent this, all the less that, as pointed out by Hyett,<sup>395</sup> the duty of cooperation involves *mutual* obligations for the Community institutions and the Member States, and not only for the latter, as Article 10 EC seems to provide.<sup>396</sup> It means that on the one hand, Member States should use their best efforts to come to a common position, but on the other hand, Community institutions should also recognise and give full force to the competence of the Member States when competence is shared.

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<sup>390</sup> In para. 109 of Opinion 1/94, the duty of cooperation is held to be “all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which are inextricably interlinked, in view of the cross retaliation measures established by the Dispute Settlement Understanding”

<sup>391</sup> McLeod *et al* (1996: 149).

<sup>392</sup> This principle applies both in case of *a priori* exclusivity, and exclusivity resulting from the *ERTA* effect. For an illustration of Member States prevented to act internationally on their own in an area covered by internal rules, see the *Hushkits* dispute between the EU and the USA in the context of the International Civil Aviation Organisation. Further: Rosas (2003: 312-313).

<sup>393</sup> In this regard, see Opinion of AG Tesouro in Case C-53/96 *Hermès*, para. 21, and footnote 33.

<sup>394</sup> McLeod *et al* (1996: 149).

<sup>395</sup> Hyett (2000: 250).

<sup>396</sup> The principle of loyal cooperation as embodied in particular in Article 10 EC is a principle of mutual cooperation which may bind institutions as well: Case C-230/81 *Luxembourg v European Parliament*, para. 37, Case C-65/93 *European Parliament v Council*, para. 23.

Further support for this understanding of the duty of cooperation as an obligation of conduct rather than obligation of result, can be found in the Court's pronouncement in Opinion 2/91. Here, the Luxembourg judges held that the Community institutions and the Member States have to take "all the *necessary measures so as best to ensure cooperation*" (emphasis added). The italicised expression indicates that it is not an obligation of result but that it implies *efforts* to ensure such cooperation. In addition, while it held that the duty of cooperation stems from the requirement of unity in the international representation of the Community on the international stage, the Court did not say that the Member States and the Community must take all measures necessary so as best to ensure such "unity". To refer to Hyett again, the unity of representation of the Community and the duty of cooperation are two different concepts. The former is not an obligation as such when competence is shared, it is the *cooperation* that involves an obligation between the institutions and the Member States.<sup>397</sup> It could be added that the FAO Arrangement which the Court interpreted as "fulfilment of the duty of cooperation" confirms this understanding of the duty of cooperation as an obligation of conduct rather than obligation of result.

The view of McLeod *et al* should be partly qualified however, particularly as regards the application of the duty of cooperation at the level of *implementation*. In the light of the Court's formulation of the duty of cooperation in the *Dior* judgment, it appears that in certain circumstances, cooperation may indeed entail an obligation of *result*, namely the *uniform application* of a provision of a mixed agreement. As already pointed out, the Court said that in case the provision of a mixed agreement is "capable of applying both to situations covered by national law and to situations covered by Community law" it has to be interpreted uniformly throughout the Community, such uniform interpretation being a fulfilment of the duty of cooperation. Here, the *cooperation* does not seem to involve any margin of manoeuvre for the national authorities in the application of the provision concerned, despite the fact that the latter does not relate to the exclusive competence of the Community, but only to its potential competence. More than doing their best to ensure cooperation, national courts should ensure a uniform application of the provision. One could thereby speak of an obligation of result, although only in the specific *Dior* type circumstances of

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<sup>397</sup> Hyett (2000: 250).

potential dual application, when the autonomy of the EC legal order is at stake. Outside these specific circumstances, the application of the duty of cooperation between the Community institutions and the Member States is likely to be more intense in a situation where the mixed agreement contains elements which are “inextricably interlinked”.

What remains to be examined is whether, and if so how, the duty of cooperation applies in situations where Member States and Community act independently from one another, although in the context of a mixed agreement. The following section will argue that the duty of cooperation may also apply in those situations as well, although with a different intensity.

### **3.2.2. The application of the duty of cooperation where Member States and Community exercise their competences independently**

Where the Community is exclusively competent, it is well established that Member States cannot act on the area covered by this exclusive competence,<sup>398</sup> unless authorised by the Community. By contrast, in areas of Member States’ reserved competence, Member States may still be affected by the application of Community law. Whether it might be the case for the duty of cooperation is subject to different views.

In general, McLeod *et al* consider that “in respect of matters exclusively within Member States’ competence, the Community Treaties have in principle nothing to say, although the provisions of Titles V and VI might be relevant”.<sup>399</sup> To take an example, with respect to a mixed agreement containing provisions on the CCP, on the one hand, and defence, on the other, Community law has in principle no relevance whatever as regards the negotiation, conclusion and implementation of the latter provisions.

Contrasting this view, Ami Barav, for instance, considers that “Member States are bound by certain duties and obligations imposed by the [EC] Treaty, even in the fields

<sup>398</sup> Case 22/70 *Commission v Council (AETR)*.

<sup>399</sup> McLeod *et al* (1996: 149).

in which they retained reserved powers”.<sup>400</sup> To take the hypothetical example mentioned above, Member States’ negotiation, conclusion and implementation of the defence parts of the agreement could still be influenced by principles and obligations of a Community law nature.

It is submitted that although acting on the basis of their reserved competences in the context of a mixed agreement, Member States may indeed be bound by several obligations, notably as they derive from Community law,<sup>401</sup> and in particular from the duty of cooperation.<sup>402</sup> In other words, mixed agreements which do not involve inextricably linked aspects can still involve the application of the duty of cooperation between the Community institutions and the Member States, albeit not in the same imperative fashion as in the situations discussed in the previous section. Various arguments seem to support such a proposition.

First of all, the case-law of the Court of Justice does not seem to exclude it. To start with, in all the pronouncements of the Court, the element triggering the application of the duty of cooperation is broadly formulated, namely “where it is apparent that the subject matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States”.<sup>403</sup> The duty of cooperation thus appears to apply irrespective of whether the competences of the Community and that of the Member State, respectively, are “co-existent” (the mixed agreement contains provisions on both trade and defence, for example) or “concurrent” (such as agreements in the field of trade in services).<sup>404</sup> The type of

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<sup>400</sup> Barav (1981), “The division of external relations power between the European Economic Community and the Member States in the case law of the Court of Justice” in Timmermans, C W A and Völker, E L M (eds.), *Division of powers between the European Communities and their Member States in the field of external relations* (Kluwer), p. 29 at 90, cited in Heliskoski (2001: 233), footnote 82.

<sup>401</sup> Alan Dashwood (1996b: 114) has pointed out that the application of Community law and the scope of Community competence should be distinguished.

<sup>402</sup> On the application of Art. 10 EC beyond the scope of Community competence, Blanquet (1994: 306).

<sup>403</sup> See e.g. Ruling 1/78, paras 34-36, Opinion 2/91, para. 36, Opinion 1/94, para. 108 and Opinion 2/00, para. 18.

<sup>404</sup> On different forms of mixed agreements: see e.g. Schermers (1983), Rosas (1998: 128-133, 2000: 206), Dolmans (1985: 39-42) and Allott (1983: 118-119).

mixity only matters when it comes to the *intensity* of the obligation of cooperation involved in the duty of cooperation.

The Court's case law also supports the proposition that Member States are bound to observe Community law, including their duty to facilitate the achievement of Community's tasks, while they act in the sphere of their own powers. In particular, the Court held in the *Centro-Com* case that:

the powers retained by the Member States must be exercised in a manner *consistent* with Community law... [W]hile it is for the Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless *respect* the provisions adopted by the Community in the field of the common commercial policy (emphasis added).<sup>405</sup>

While the Court initially used the expression “consistent”,<sup>406</sup> the italicised term “respect” could be understood as more than simply absence of legal contradiction. Arguably, it may also involve, in fulfilment of the duty of cooperation based on the principle of loyal cooperation, that the Member States refrain from taking actions which would undermine the Community CCP. As Marise Cremona pointed out, the Court's pronouncement reflects the general loyalty obligation enshrined in Article 10 EC, an obligation to facilitate achievement of the Community's tasks and abstain from measures which could jeopardize the attainment of the Community's objectives.<sup>407</sup> One could also mention in this sense the judgment of the Court of Justice in *Annunziata Matteuci*,<sup>408</sup> where it was held that:

Article [10 EC] provides that the Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty. If, therefore, the application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a

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<sup>405</sup> Case C-124/95 *The Queen v HM Treasury and Bank of England, ex parte Centro-Com Srl*, paras. 25 and 27. Further: Koutrakos (2001: 138-139) and case-note of Vedder and Folz (1998).

<sup>406</sup> The Court also held that “[e]ven if a matter falls within the power of the Member States, the fact remains that the latter must exercise that power consistently with Community law” in Case 466/98 *Commission v UK*, para. 41; also in Case C-221/89 *Factortame and Others*, para. 14 and Case C-264/96 *ICI v Colmer*, para. 19.

<sup>407</sup> Cremona (1999a: 170). See also Opinion of AG Jacobs in the *Centro-Com* case, paras 40-44.

<sup>408</sup> Case 235/87 *Annunziata Matteuci v Communauté française de Belgique*, para. 19.

duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law.

Secondly, in relation to their non-EC related obligations under a mixed agreement, the actions or inactions of Member States may interfere with the implementation of a mixed agreement in general, and affect the rights and obligations of the Community in particular. The interference of Member States' action with Community rights and obligations under the agreement could occur even where such action does not *prima facie* breach Community law.

In principle, a clear division of competence between the Community and the Member States, known in advance by the partner concerned, could help it determine who, of the Community or the Member State(s), is liable on the Community side for non-compliance with obligations set out in a mixed agreement. In effect, only those parts of the agreement that are based on EC competences would be binding on the institutions and the Member States (Article 300(7) EC),<sup>409</sup> and thus entail their liability in case of non-compliance; the remainder being binding on the Member States only.<sup>410</sup>

However the practice of the institutions and Member States has been, with the blessing of the Court of Justice, not to allocate powers and obligations in advance.<sup>411</sup> Indeed, it has been suggested that mixity is often used precisely to avoid having to divide the competences in the context of a particular agreement.<sup>412</sup> Such a reluctance

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<sup>409</sup> Article 300(7) EC states that Agreements concluded under the conditions set out in Article 300 EC, shall be binding on the institutions of the Community and on Member States. As settled in the case law, both Member States and Community are thus expected to implement the agreement and observe their obligations, as a matter of Community law (Case 104/81 *Hauptzollamt Mainz v Kupferberg*). The Court held that, in ensuring respects for commitments arising from an agreement concluded by the Community, Member States fulfil an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Case 12/86 *Demirel*), para. 11).

<sup>410</sup> Rosas (1998: 142), Kaddous (1998: 173-174), Groux and Manin (1984: 150).

<sup>411</sup> Ruling 1/78 *Draft Convention of the International Atomic Energy Agency on the physical protection of nuclear materials, facilities and transports*. See also Opinion of Jacobs AG in Case C-29/99 *Commission v Council*, paras 112-113.

<sup>412</sup> Heliskoski (2001: 11 and 69). See also Schermers (1982: 170), who points out that "mixity is a problem shifter". Cp. Opinion of AG Tesauro in Case C-53/96 *Hermès*, para. 14, footnote 13.

to allocate competences makes it difficult, particularly for the third party to a mixed agreement, to know who might be held responsible for potential non-compliance.<sup>413</sup> In this situation, it has been suggested that the principle should be that Community and Member States are jointly liable.<sup>414</sup>

Even if specific obligations were seen as binding upon Member States only, on the ground that internally, the subject matter falls within the scope of their own competences, it could be argued that breach of their obligations could have implications for the Community, notwithstanding the latter's "incompetence" in the field(s) where the breach arose.<sup>415</sup> The violation of one particular obligation under a mixed agreement may affect the performance of some, if not all other obligations set forth by the instruments. As convincingly shown by Joni Heliskoski, the disputed conduct on the one hand and the consequences or implications thereof, on the other hand, might well fall within *distinct spheres of legal authorities*.<sup>416</sup> The fact that the Community's rights and obligations might be affected, although indirectly, by a Member State breach of a mixed agreement's provision related to its own competence, may be a case for taking preventive steps. While it seems legally difficult to envisage an enforcement procedure against a Member State on the ground that it does not fulfil *its* non EC-obligations under the mixed agreement,<sup>417</sup> one could however argue that the duty of cooperation should nonetheless apply and guide

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<sup>413</sup> As Christian Tomuschat (1983: 130) pointed out, if the Community and its Member States wilfully and purportedly refrain from formally publicising their demarcation line between their respective areas of jurisdiction, their partners cannot be expected to make the necessary inquiries themselves.

<sup>414</sup> Opinion Jacobs AG in Case C-316/91 *European Parliament v Council*, para 69, Case C-53/96 *Hermès*, para. 24. Further: Tomuschat (1983: 125), Gaja (1983: 137ff) and Kovar (1975: 916-917).

<sup>415</sup> Opinion of AG Tesouro in Case C-53/96 *Hermès*, para. 20.

<sup>416</sup> Heliskoski (2001: 211). Gaja (1983: 140) also points out that matters can be interlinked, even if apparently relating to clearly different legal authorities.

<sup>417</sup> Enforcement proceedings are available only in relation to the application of EC law, see the broad interpretation of the Court in Case C-13/00 *Commission v Ireland*; Case C-239/03 *Commission v France*. Cp Ehlermann (1983: 21), who goes as far as to suggest that the Community should thus have the right to take preventive steps against the Member State whose action risks engaging the Community's responsibility. In particular, he considers that "it would be unavoidable to allow the Community to use the infringement procedure in spite of the fact that the Member State acts within its sphere of competence."

Member States' conduct in the context of the whole agreement, irrespective of the fact that the Member States might be acting in areas of reserved competences.

Indeed, the influence of Member States' actions on Community rights and obligations is not inconceivable in the context of the PCAs with Russia and Ukraine. Their provisions on retaliation in case of non-fulfilment of its obligations by one of the Parties states that:

[i]f either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take *appropriate* measures. Before so doing, except in cases of special urgency, it shall supply the Cooperation Council with all relevant information required for thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

In the selection of these measures, priority must be given to those which least disturb the functioning of the Agreement. These measures shall be notified immediately to the Cooperation Council if the other Party so request (emphasis added).<sup>418</sup>

The PCAs define the term "Parties" on the EU side as "the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers".<sup>419</sup> This expression does not give the partner any indication on the allocation of powers between the Member States or the Community. Furthermore, most of the PCA provisions use the word "Parties", or "the Community and its Member States".<sup>420</sup>

However, in the specific context of the procedure for dispute resolution, the Community and the Member States shall be deemed to be one Party to the dispute.<sup>421</sup> Arguably, this *unity* applies also in the context of the above provisions, as suggested by the wording "either Party" v. "the other Party", in the singular form. These

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<sup>418</sup> Art. 107(2) PCA Russia and Art. 102(2) PCA Ukraine.

<sup>419</sup> Art. 104 PCA Russia; Art. 99 PCA Ukraine.

<sup>420</sup> The use of the term "Party" throughout the agreement contrasts with previous practice where the allocation of competence was hinted at by the use of "Community", or "Member States", or "Community and its Member States" in the provisions of the agreement, depending on the subject matter. In this regard, see Tomuschat (1983: 128), who cites the Lomé II Convention (OJ 1980 L 347/1) as an example of this careful drafting.

<sup>421</sup> Art. 101(3), last sentence, PCA Russia; Art. 96(3), last sentence, PCA Ukraine.

provisions imply that if Ukraine, for instance, considers that the Community and/or its Member State, as the other Party has failed to fulfil one of its obligations, it may take “appropriate measures” against the Community and Member States, together as the “other Party” to the PCA. The only conditions set out by the PCA as regard the adoption of appropriate measures are first, that Ukraine should bring the matter to the Cooperation Council with a view to seeking a solution acceptable to the Parties.<sup>422</sup> Secondly, if the dispute is not solved by the Parties, the PCA requires that priority be given to those measures which least disturb the functioning of the Agreement, and thirdly, the measures have to be notified to the Cooperation Council. Provided they fulfil these conditions, appropriate measures against non-compliance, e.g. in the field of establishment, could involve measures concerning the PCA provisions on goods.<sup>423</sup> In other words, retaliation against a breach attributable to one or several Member States could have implications for the implementation of the PCA provisions falling under the CCP, which in principle is an exclusive competence of the Community.<sup>424</sup> It could indeed be the other way round, namely a failure by the Community to fulfil its obligation could have consequences for Member States’ rights and obligations under the Agreement.<sup>425</sup> Member States and Community would thus be required to cooperate to solve the issue.

This example involved a case of concurrent Community’ and Member States’ competences. But, consider another hypothetical situation where Russia would allege that a violation of the rights of the Russian-speaking minority is taking place in one of the Member States,<sup>426</sup> in contravention to the PCA human rights clause. In principle, as a breach of one of the essential elements of the Agreement, it is a matter of urgency

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<sup>422</sup> Art. 107(2) PCA Russia and Art. 102(2) PCA Ukraine. See also the new rules of procedure for the settlement of disputes under the PCA with Russia; particularly Art. 6, paras 6-8, on “application of appropriate measures”. The new rules were adopted by the Council on 15 Dec. 2003 on the basis of a proposal from the Commission (European Commission, 2003c).

<sup>423</sup> Nothing in the PCA obliges the injured Party to adopt appropriate measures in the same subject-matter.

<sup>424</sup> Opinion 1/75 *Understanding on a local cost standard*.

<sup>425</sup> In this regard, one may recall that the Community behaviour may indeed have consequences for the Member States in terms of liability, for instance in the context of the WTO or the ECHR, further on the latter, e.g. Schermers (2001).

<sup>426</sup> A claim that is regularly made by the Russian authorities, in relation to some of the Baltic States; notably by the Russian Duma; see RFE/RL Newswire, 14 October 2003; Maresceau (2001: 15; 2005).

and Russia would be entitled to react without prior consultation.<sup>427</sup> Its reaction could be to suspend parts, or the whole of the Agreement, as appropriate. It appears that while respect for the protection of minorities in the Member States falls outside the Community powers,<sup>428</sup> its violation by one Member State could have implications for the Community as Party to the PCA.

More precisely, Member States' actions in the context of a mixed agreement may interfere with the rights and obligations of the Community under that mixed agreement, even if no Community law has been *prima facie* violated. There is therefore a strong case for suggesting that the duty of cooperation between Member States and Community institutions applies systematically, whatever the form of mixity of the agreement, in order to guarantee its full implementation.<sup>429</sup>

Incidentally, the PCAs themselves contain provisions stating that the Parties shall take any general or specific measures required to fulfil their obligations under the Agreements, and they shall see to it that the objectives set out in the Agreement are attained.<sup>430</sup> The term "Parties" could be said to refer, as in the context of the dispute resolution to the Community and Member States as one Party, and the Russian Federation, or Ukraine, as the other Party. Support for this proposition can be found in the use of Party, in singular, in the following paragraph of the same Article: "[i]f either Party considers the other Party has failed to fulfil an obligation under the Agreement...." If this holds true, the above-mentioned obligation of conduct is addressed to Russia or Ukraine on the one hand, and the Community and the Member States as *one Party* on the other hand. This arguably is another indication of their common commitment *vis-à-vis* the third party to fulfil their obligations, and conversely a tacit acknowledgment that they would be jointly liable in case either of them does not comply with its obligations.

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<sup>427</sup> Art. 107(2) PCA Russia and Art. 102(2) PCA Ukraine.

<sup>428</sup> Further on the question of competence in the field of minority protection, see e.g. Hillion (2004a).

<sup>429</sup> On the necessity of coordination, Henry Schermers (1983: 32) suggested that: "as partly the Community and partly the Member States are responsible for the application of mixed agreements, coordination will often be necessary".

<sup>430</sup> Art. 107(2) PCA Russia and Art. 102(2) PCA Ukraine.

The foregoing further supports the proposition that, in the context of a mixed agreement, the duty of cooperation binds the Community institutions and Member States, even where the latter act in areas of retained powers. Not only should they refrain from acting inconsistently with the Community law aspects of the agreement, but more generally they should also abstain from actions that could impinge on the rights and obligations of the Community. It becomes apparent that Member States' political choice to include, in a mixed agreement, provisions relating to their own powers carries with it a responsibility, if not a commitment, *vis-à-vis the Community* to comply with obligations derived from these provisions. They commit themselves not only to perform all their obligations in *bona fide vis-à-vis* the third party as a matter of international law, but they also commit themselves *vis-à-vis* the Community, jointly liable for ensuring full compliance with the Agreements obligations. This proposition may be said to build on the principle established by the Court in its *Kupferberg* decision, whereby in implementing the provisions of an Agreement, Member States fulfil an obligation of Community law as well.<sup>431</sup> The normative value of the duty of cooperation in the present context is limited however. Indeed, it is unlikely, and this is a euphemism, that it would open the way to legal proceedings, for instance in the form of an enforcement procedure based on Article 226 EC against the Member State concerned, on the ground that it infringes the provisions of a mixed agreement.<sup>432</sup> It nevertheless remains a principle *guiding* the conduct of the Member States, in the context of a mixed agreement.

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<sup>431</sup> Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG*, where the Court held in para. 13 that “[i]n ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement.” Further: Cheyne (2000: 25) and Nolte (1988).

<sup>432</sup> Case C-13/00 *Commission v Ireland*. It should be noticed that, following Article 39 of the Act of Accession 2003 (OJ 2003 L236/33), the Commission is entitled to take safeguard measures outside the scope of Community law, in the “area of freedom, security and justice” against the ten new Member States in case of “serious shortcomings or any imminent risks of such shortcomings in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the EU Treaty and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the EC Treaty in a new Member State”.

Such a Member States' responsibility flows more generally from the requirement of solidarity embodied in the principle of loyal cooperation which, as suggested earlier, is the basis of the duty of cooperation.<sup>433</sup> Moreover, it is motivated by the necessity to ensure the full application of the Agreement on the Community side and thus to forestall any liability which could involve the Community. Although acting in a field outside the scope of Community law, a Member State's action affecting the Community could be considered contrary to its obligation to abstain from any measure which would jeopardise the attainment of the objectives of the EC Treaty, and to take appropriate measures to "facilitate the achievement of Community's tasks", as more generally required by the principle of loyal cooperation.<sup>434</sup> It could be added that ensuring compliance with obligations set out in mixed agreements contributes to ensuring consistency in the external activities of the Union.

Indeed, having established that the duty of cooperation applies where Member States exercise their reserved competence, it remains to be seen whether the fact that Member States action is taken "in the framework of the Union" changes the situation. The next section will examine this question, and argue that, in such a situation, the application of the duty of cooperation may be nuanced.

### **3.2.3. The application of the duty of cooperation in the context of the EU**

The *Centro-Com* case evoked above emphasised that Member States have to respect the CCP provisions when they adopt measures of foreign policy in the exercise of their national competence. As it was pointed out in chapter 2, as Parties to a mixed agreement, Member States may also act "in the framework of the EU". As such, they are bound not only by obligations of a Community law nature including the duty of cooperation, they also have to take into account the obligations flowing from the non-

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<sup>433</sup> See above, section 3.1.1.

<sup>434</sup> This partly echoes the views of Ehlermann mentioned above. It should be added that the Community is also under a duty of cooperation with the Member States, inasmuch as it should not act in a way that could lead to the liability of Member States.

EC provisions of the TEU, such as the general objectives of the Union, and the specific aims, provisions and instruments of Title V on CFSP.<sup>435</sup>

Title V contains several provisions supporting the binding nature of CFSP measures. In particular, Member States are expected to ensure that their national positions conform to common positions adopted in the context of the CFSP, and to uphold the common position in international organisations and conferences. Similarly, joint actions “commit the Member States in the positions they adopt and in the conduct of their activity”.<sup>436</sup> Moreover, Title V includes what could be regarded as a principle of loyal cooperation. It is encapsulated in Article 11(2) TEU which 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.

These provisions establish a broad principle of loyalty in relation to the Union’s foreign and security policy as a whole. Not only the secondary CFSP instruments, but also the objectives of the CFSP bind the Member States in terms of public international law, despite the fact that these provisions are not judicially enforceable before the European Court of Justice.<sup>437</sup> Such a CFSP principle of loyalty involves

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<sup>435</sup> On the legal effects of CFSP acts, see e.g.: Koskenniemi (1998: 27), Wessel (1999: 150ff), Eeckhout (2004: 138ff), Denza (2002: esp. chaps. 2, 4 and 9), Hendry *et al* (1996: 412), Koutrakos (2001: 44), Eaton (1994: 215), Weiler (1993: 53), Willaert and Marqu ez-Ruiz (1995) and Jacqu e (2001: 512-516).

<sup>436</sup> See Arts. 15 (ex-J.5) and 14(3) (ex-J.4) TEU, respectively. Further: McLeod *et al* (1996: 412ff). It has been suggested that the International Court of Justice could adjudicate on Member States disputes on compliance with CFSP obligations (...), although this option has also been assessed as not very realistic in practice (Denza, 2002: 322; Eaton, 1994: 222; Lenaerts and van Nuffel, 1999: 672).

<sup>437</sup> See e.g. Denza (2002: 311-312), Monar (1993: 144), Wessel (1999: 104) and Weiler (1993: 54ff).

both negative (“refrain from”) and positive (“shall support”) obligations<sup>438</sup> which to a certain extent remind of the provisions of Article 10 EC.<sup>439</sup>

In the case of mixed agreements such as the PCAs, Member States and Community institutions are bound to cooperate, notably to ensure the full implementation of the Agreement. At the same time, Member States, “acting in the framework of the Union”, are expected to support the Union’s foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. This is particularly the case in the context of the political dialogues, where Member States, represented by the Presidency, in principle have to promote the objectives of the European Union, under the supervision of the Council.<sup>440</sup> This second level of loyalty of Member States acting in the framework of the Union has to be combined with their Community duty of cooperation.

The presence of the two levels of Member States’ loyalty raises the question of how potential tensions or incompatibilities between provisions of the two loyalties are to be resolved. It is submitted that while conflict should be solved to the benefit of the Community, CFSP rules may nevertheless affect EC rules, without violating Community law.

To begin with, a conflict between Member States’ actions and Community law should be resolved by the principle of supremacy of EC law as developed by the Court.<sup>441</sup> Indeed, as pointed out above, the Court has emphasised on several occasions that the powers retained by the Member States must be exercised in a manner consistent with Community law.<sup>442</sup> Member States thus have to give way to the application of

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<sup>438</sup> Loyalty is also formulated in Article 14(7) TEU (ex J.3(7)) concerning Joint Actions: “Should there be any major difficulties in implementing a joint action, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the joint action or impair its effectiveness.” For a critical assessment of this obligation of loyalty, see Koskenniemi (1998).

<sup>439</sup> Fink-Hooijer (1994: 177).

<sup>440</sup> Art. 11(2), second indent [ex Art. J.1(4)] TUE. Wessel (1997: 119ff).

<sup>441</sup> Case 6/64 *Costa (Flaminio) v ENEL*; Case 106/77 *Simmenthal v Amministrazione delle finanze*.

<sup>442</sup> Case C-124/95 *The Queen v HM Treasury and Bank of England, ex parte Centro-Com Srl*.

Community law in case of conflict with their national rules.<sup>443</sup> Arguably, the same applies in situations of conflict between EC law and CFSP commitments. In principle, Member States should not be able to rely on CFSP to disengage themselves from their Community obligations. Save in certain limited circumstances, they cannot adopt a CFSP measure that contradicts EC law, including any EC external agreements, be they Community or mixed agreements.<sup>444</sup> Indeed, the Commission would be in a position to sue the Member State on the basis of Article 226 EC if the latter acted, or failed to act, in breach of a Community obligation derived from an external agreement to which the Community is party. This primacy of EC law over conflicting national norms tends to be confirmed by other provisions of the TEU, as it will be seen in the next chapter.<sup>445</sup>

The difficulty appears where a CFSP measure adopted in relation to a third party affects rights and obligations of the Community, although *without involving a breach of Community law*. That could be the case in a situation where the CFSP instrument revisits the provisions of a pre-existing mixed agreement where such provisions fall outside the scope of Community law. It would be the case if Member States were to reinforce the political conditionality through a CFSP measure. At first sight, such a CFSP measure would neither concern nor indeed infringe Community law, given that the CFSP-inspired provisions of the mixed agreement have not become part of the Community legal order.<sup>446</sup> Moreover, as a matter of Union law, Member States should indeed be free to adopt CFSP measures, provided they do not affect the EC Treaty or acts supplementing it.

In the light of the analysis of the previous section however, the Community rights and obligations under the mixed agreement, may be affected by the CFSP decision concerned, to the same extent as its rights and obligations could be altered by the action of Member States, acting in their own rights.<sup>447</sup> In particular, the effect of the CFSP measure on the terms of the Agreement may lead the other party to react by

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<sup>443</sup> Unless Member States act on the basis of the derogatory provisions of the EC Treaty, e.g. Art. 297 EC, see case C-120/94 *Commission v Greece*. Further: Koutrakos (2000) and Emiliou (1996).

<sup>444</sup> Article 47 TEU, see section 4.1 below.

<sup>445</sup> Case C-13/00 *Commission v Ireland*. Further, see Weiler (1993).

<sup>446</sup> Case 13/00 *Commission v Ireland*.

<sup>447</sup> See above, section 3.2.2.

adopting “appropriate measures”, on the ground that it allegedly constitutes a breach of the agreement. As suggested earlier, the third party is not necessarily deprived, in this context, of the possibility to cross-retaliate particularly if the allocation of powers is not known. For instance it can decide to suspend the provisions relating to trade in goods.<sup>448</sup> The Community could thereby be indirectly affected by a CFSP decision.<sup>449</sup>

As also submitted above, the duty of cooperation developed by the Court in the Community context entails that Member States should take all measures necessary to ensure cooperation with the Community institutions in order to guarantee full implementation of mixed agreements.<sup>450</sup> In particular, Member States have a responsibility vis-à-vis the Community to fulfil *all* their obligations under the agreement, as a means to facilitate Community’s compliance with its obligations. It implies that Member States should in particular refrain from acting in a way that would be detrimental to the Community.<sup>451</sup> Adopting a CFSP measure which involves negative consequences for the Community could thus be deemed incompatible with the duty of cooperation.

At the same time, Member States are bound by CFSP objectives and measures, which also contribute to fulfil the general objective of asserting the Union’s identity on the international scene. They are indeed bound by the CFSP principle of loyalty. It is difficult to envisage the development of a genuine foreign policy if it were to remain subject, in any case, to existing Community trade commitments. Adapting the CFSP, which arguably covers all aspects of foreign policy,<sup>452</sup> to EC law could make the

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<sup>448</sup> Without prejudice to the provisions of GATT, although in the case of Russia and Ukraine it would not be too much of a concern, given they are not members yet. Further on the WTO dimension of sanctions, see Brandtner and Rosas (1999: 699).

<sup>449</sup> If the Member States decided to suspend the application of the Agreement, such a suspension would still need to be compatible with the UN Charter and GATT/WTO law. The Community is bound by the two instruments, it would thus be affected by a Member States action.

<sup>450</sup> As per Opinion 2/91. Bogdandy and Nettesheim (1996: 283) suggest that this cooperation might indeed involve that when examining national implementation acts of Title V or Title VI decisions, the national courts can ask the ECJ – following the procedure of Article 234- whether the national measure, issued to implement a Council decision under a competence of Title V or VI TEU, violates Article 10 EC.

<sup>451</sup> See above, section 3.2.2.

CFSP objectives and provisions become nugatory.<sup>453</sup> Indeed, as suggested above, the duty of cooperation also binds the Community institutions vis-à-vis the Member States.

Arguably, the Court's pronouncement in *Centro-Com* whereby Member States' foreign policy measures must "respect the provisions adopted by the Community in the field of the common commercial policy"<sup>454</sup> has to be nuanced, where Member States act in the framework of the Union. Indeed, the TEU foresees the possibility for Member States to act under Title V to establish sanctions against a third state,<sup>455</sup> with subsequent obligations for the Community institutions to take measures in the context of the EC Treaty.<sup>456</sup> In the same vein, human rights clauses inserted in mixed agreements, imply the possibility for the EU to review Community commitments vis-à-vis a third country in consideration of a change in the political situation. CFSP actions can affect Community law, without being considered to be violating EC law. It would be inconceivable that the trade commitments of the Community would prevent the Member States, acting in the framework of the Union, from reviewing the trade regime even where the other party violates principles promoted by the EU.

### 3.3. Conclusion

Based on the constitutional principle of loyal cooperation, the duty of cooperation is a key principle governing the interaction between the Community and the Member

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<sup>452</sup> Council (1994): Avis du Service Juridique: "Une position commune définie par le Conseil sur la base de l'Article J.2 du Traité sur l'Union européenne et qui est destinée à établir une approche globale de la politique à mener par l'Union européenne à l'égard d'un pays tiers peut-elle tenir compte et mentionner les aspects (notamment économiques) des relations avec le pays tiers en cause à propos desquels la Communauté serait compétente pour adopter des mesures concrètes". Fink-Hooijer (1994).

<sup>453</sup> Art. 13 TEU points out that the Council shall ensure the "unity, consistency and *effectiveness* of action of the Union."

<sup>454</sup> Case C-124/95 *The Queen v HM Treasury and Bank of England, ex parte Centro-Com Srl*.

<sup>455</sup> Art. 301 EC. Further: e.g. Koutrakos (2001: 67ff).

<sup>456</sup> See also the provisions of Article 20 TEU which provide that "[t]he diplomatic and consular missions of the Member States and the Commission Delegations in third countries and international conferences, and their representations to international organisations, shall cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented."

States in the context of mixed agreements. It aims at ensuring a smooth interplay between them, with a view to ensuring the effectiveness of the Community external action, and incidentally of the overall EU external relations, particularly given the specific function of mixity, examined in the previous chapter. As such the duty of cooperation is a key principle underpinning the system of EU external relations.

In legal terms, the duty of cooperation entails an obligation of conduct which may vary depending on the nature of the mixity of the agreement concerned. It can imply uniformity in the application of provisions of a mixed agreement, where they are capable of applying at national and Community levels. Moreover, its application also concerns Member States exercising their retained competences. The application of the duty of cooperation should however be nuanced in the context of a mixed agreement where Member States act in the framework of the Union, as in the case of the PCAs. In particular, the duty of cooperation has to be reconciled with other rules and principles of the Union. On the one hand, Member States' decision to include non-EC provisions in a mixed agreement entails, as a result of the duty of cooperation, their responsibility vis-à-vis the Community to implement all the provisions fully, in order to forestall any risk of liability on the side of the Community. On the other hand, Member States acting in the framework of the Union operate in consideration of the CFSP objectives, principles and rules, as emphasised by the CFSP principle of loyalty. As the next chapter will show, other principles underpinning the system of EU external relations also come into play to organise these interactions.

## CHAPTER 4

### PRINCIPLES ORGANISING INTERACTIONS BETWEEN THE SUB-ORDERS OF THE EUROPEAN UNION

Alongside the principles governing the interactions between the EU sub-orders and the Member States, the system of EU external relations is also underpinned by principles organising the interactions between the sub-orders of the Union. Article 3 TEU, included in the Common Positions of the Treaty, provides that:

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

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies...

This chapter examines the three key principles, contained in these provisions: first, the duty to maintain and build upon the *acquis communautaire* (4.1); secondly, the duty of *consistency* between the various external activities of the European Union (4.2), and thirdly, the singleness of the Union institutional framework as an additional aspect of consistency (4.3).

#### 4.1. The principle of preservation and development of the *acquis communautaire*

The interactions between the different sub-orders of the EU in general, and the interplay between the EC external relations and the CFSP/JHA in particular, are first governed by the principle that the *acquis communautaire* should be preserved in full and built upon.<sup>457</sup> This principle, enounced in Article 2 (ex B) TEU, is also one of the Union's objectives. Indeed, Article 3 (ex Article C) TEU emphasises that the institutions "should ensure the consistency and *the continuity of the Union's activities*

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<sup>457</sup> On the notion of *acquis communautaire*, see e.g. Delcourt (2001), Curti Gialdino (1995), Weatherill (1998).

in order to attain its objectives *while respecting and building upon the acquis communautaire*” (emphasis added). This section will show the hierarchy this principle establishes between the EU-sub-orders (4.1.1), the role of the Court in upholding it (4.1.2.) and the limits to the principle (4.1.3).

#### **4.1.1. A principle establishing a hierarchy among the EU sub-orders**

The TEU appears to establish a hierarchical superiority of the *acquis communautaire* over the rules of the other EU sub-orders.<sup>458</sup> The emphasis put on the “continuity of the activities”, mentioned in Article 3 TEU, further expresses the prime importance of the *acquis*,<sup>459</sup> and the *supplementary* character of Titles V and VI 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”. Consequently, as argued by Wessel, “any indistinctiveness in case of overlapping CFSP and EC objectives should always be solved to the benefit of the latter”.<sup>460</sup>

Indeed, the rationale of the requirement encapsulated in Article 3 TEU is to ensure that Community norms and method are not “contaminated” by other non-EC instruments adopted in the context of either of the two other sub-orders of the Union,<sup>461</sup> following a less “integrationist” methodology.<sup>462</sup> In effect, it is designed to

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<sup>458</sup> The provisions of ex Article B on the maintenance of the *acquis* also provided that the Union should build upon with a view to considering, through the procedure referred to Article N(2) [establishing the procedure for revising the TEU], 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”. 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 to increase Community powers; see e.g. Demaret (1993a: 42-43, 1993b: 6-7) and Willaert and Marqués-Ruiz (1995: 37).

<sup>459</sup> Constantinesco *et al* (1995: 73).

<sup>460</sup> Wessel (1999, 2000b: 1147).

<sup>461</sup> Timmermans (1996), Eeckhout (2004: 146), Cloos *et al* (1993: 117).

<sup>462</sup> Weiler (1993: 54).

preserve the autonomy of the Community<sup>463</sup> in the EU constitutional order.<sup>464</sup> The express inclusion in the Treaty of the duty to maintain the *acquis* was encouraged by several Member States supported by the Commission to counter-balance the introduction of alternative methods of cooperation within the framework of the TEU. Placed in the Common Provisions of the Treaty, this *conservatory* principle 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 system of EU external relations, in particular.<sup>465</sup>

Indeed, it is reinforced by the provisions of Article 47 (ex Article M) included in the Final Provisions of the TEU. This Article stipulates that “[s]ubject to the provisions amending the [EEC Treaty] with a view to establishing the European Community, the [ECSC Treaty and the EAEC Treaty], and to [the TEU] final provisions, *nothing in [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them*” (emphasis added).<sup>466</sup> Piet Eeckhout considers this provision as being aimed at creating watertight compartments in the EU vessel between the Community, on the one hand, and Title V and Title VI, on the other.<sup>467</sup> The particular significance of these provisions in the EU

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<sup>463</sup> On the autonomy of the Community legal order, see Lenaerts and van Nuffel (1999: 666).

<sup>464</sup> Transposing Alan Dashwood’s dialectic “conservatory/constitutionalising” elements in the perspective of the relationship between EU’s sub-orders, one could regard that requirement as belonging to the category of “conservatory” elements of the EU constitutional order. Dashwood (1998c: 201) calls the “conservatory elements” of the European Union’s constitutional order, those elements that are designed to preserve the position *of the Member States*. The author distinguishes them from “constitutionalising elements” such as direct effect, the primacy of Community law and the set of fundamental values expressed by what the Court of Justice calls “the general principles of law”, including the protection of fundamental rights.

<sup>465</sup> See in this regard, Report of the Reflection Group IGC (1995), Edwards (1994) and Koutrakos (2001: 44).

<sup>466</sup> Article 32 of the Single European Act already provided that “nothing in this Act shall affect the Treaties establishing the European Communities or any subsequent Treaties and Acts modifying or supplementing them”.

<sup>467</sup> Eeckhout (2004: 146). One could also mention the provisions of Article 29 TEU which stipulate that Title VI cooperation should be carried out “without prejudice to the powers of the European Community”.

constitutional order stems from their inclusion within the jurisdiction of the Court of Justice, in contrast to the provisions of Article 2 TEU.<sup>468</sup>

#### 4.1.2. A principle guaranteed by the European Court of Justice

Article 46 TEU (ex L) provides in its subparagraph c) that the Court has jurisdiction to ensure that the requirement of primacy of Community law over the norms of other EU sub-orders, set out in Article 47, is observed.<sup>469</sup> 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.<sup>470</sup>

The Court’s constitutional control over the distribution of powers between the different sub-orders of the Union was exercised for the first time in the *Airport Transit Visa* case.<sup>471</sup> The Commission, supported by the European Parliament, challenged the legality of a Council Joint Action concerning airport transit arrangements, which was adopted on the basis of then Article K.3(2)(b) (now Article 31) TEU.<sup>472</sup> According to the second recital of the Preamble, the contentious Joint Action aimed at harmonising Member States’ policies as regards the requirement of an airport transit visa. It also sought to “improve control of the air route, which, particularly when applications for entry or de facto entry are involved in the course of airport transit, represents a significant way in with a view in particular to illegally taking up residence within the territory of the Member States”. The Commission

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<sup>468</sup> See the order of the Court in Case C-167/94 *Criminal proceedings against Juan Carlos Grau Gomis and others*, where the Court held that, “[b]y virtue of [ex] Article L of the Treaty on European Union, a national court may not refer to the Court a question on [ex] Article B of the Treaty on European Union in application of [ex] Article 177 of the Treaty. The Court therefore clearly has no jurisdiction to interpret that article in the context of such proceedings.”

<sup>469</sup> Denza (2002: 319).

<sup>470</sup> Dewost (1993: 64). See in this regard, T-338/02 *Segi and others v Council*, order of 7<sup>th</sup> June 2004, n.y.r. Again, the provisions of Article 46 are not new as Article 31 SEA which limited the Court’s jurisdiction to the provisions of Title II nevertheless extended it to the provisions of Article 32 SEA.

<sup>471</sup> Case C-170/96 *Commission v Council*. See also Oliveira (1999) and Koutrakos (2001: 159-161).

<sup>472</sup> Joint Action 96/197/JHA (OJ 1996 L 63/8).

considered that by adopting the measure on the basis of ex Article K.3 TEU, the Council had acted in breach of ex Article 100c EC. It argued that the latter Article was the correct legal basis for adopting such a measure, for it gives the Community the power to determine the third country whose nationals must be in possession of a visa when crossing the external borders of the Member States.<sup>473</sup>

The Court was thus given the opportunity to consider its jurisdiction to adjudicate upon the distribution of powers between the different suborders of the Union. It was also an occasion to shed light on the duty to maintain the *acquis*, as articulated in Article 47 TEU.

The Court's jurisdiction was contested by the United Kingdom. The British Government relied on the provisions of ex-Article L TEU which, then, excluded the Court from the framework of Title VI TEU. In particular, it was submitted that since the Act was adopted on the basis of ex-Article K.3(2) TEU, it belonged to those measures which could not be annulled by the Court pursuant to ex-Article 173 (now Article 230) EC.

The Court brushed the British argument aside and, following the Opinion of Advocate General Fennelly,<sup>474</sup> held that it was competent to review the Joint Action. It found that Articles 46 and 47 (ex-Articles L and M) TEU endow it with the task of ensuring that acts which according to the Council, fall within the scope of ex-Article K.3 TEU do not encroach on the powers conferred on the Community by the EC Treaty. The Court proceeded and reviewed the content of the Council measure in the light of ex-

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<sup>473</sup> Ex Article K.3 TEU gave the Council the power to adopt joint action in areas referred to Article K.1 TEU.

<sup>474</sup> In his Opinion in the *Airport Transit Visa* case (C-170/96), Fennelly AG considered that: “[t]he Court must ... be able to determine whether anything in ‘this Treaty’, being the Treaty on European Union, and including acts adopted thereunder, does ‘affect’ the Community Treaties. Indeed, in my view, Article M was inserted in the Treaty on European Union with the very purpose of ensuring that, in exercising their powers under Titles V and VI of that Treaty, the Council and the Member States do not encroach on the powers attributed to the Communities under the respective founding and amending Treaties”. He concluded that “the provisions of Title VI may not be applied so as to restrict in any way the scope of the provisions of the EC Treaty, interpreted in accordance with the normal canons of construction of Community law”.

Article 100c EC, in order to ascertain whether it affected the powers of the Community under that EC provision. In *casu*, the Joint Action was held to be lawfully adopted in the basis of ex Article K.3 TEU. The Commission's application was thus dismissed.<sup>475</sup>

The Court thereby made it clear that it would police the distribution of power between the legal sub-orders of the EU, and ensure that the Member States and institutions would not use the non-EC frameworks to act in areas that fall under the scope of the EC Treaty.<sup>476</sup> In other words, the Court appears to act as a guarantor of Community powers against unlawful EU encroachment. Its pronouncement implicitly indicates, contrary to what Denmark had contended in its observations,<sup>477</sup> that the Council has no discretion to rely on Article K.3 TEU if the conditions for the application of Article 100c EC are fulfilled. Therefore, if a subject matter falls within the scope of the EC Treaty, the Member States and the Council cannot address this subject matter by relying on the provisions of Title VI of the TEU. Indeed, while in this case the dilemma was between the EC Treaty and Title VI, it can be suggested that the Court's approach would be similar in a case involving the EC Treaty and Title V.<sup>478</sup>

It becomes apparent that the duty to maintain and build upon the *acquis* organises, in several ways, the powers of the institutions and of the Member States acting in the framework of the EU. First, they are forced to ascertain whether they should act through the Community law-making procedures before they adopt any measure under Title V or IV. They may act in the latter context only if the EC route proves to be legally unpractical, notably because the planned action falls outside the conferred powers of the Community.<sup>479</sup> As suggested by Eeckhout, where the EC Treaty confers upon the Community powers for a specific form of foreign policy such as commercial

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<sup>475</sup> Paras. 16-17.

<sup>476</sup> The *Portugal* case that was examined in Chapter 2 (*C-268/94 Portugal v Council*), also offers an illustration of the Court's role in policing the demarcation between the Community framework and the third pillar. It may be recalled that the Court found that the Agreement's provisions on drugs were not more than ancillary to the general objective of the agreement. As such they did not require a reference to the provisions of ex Article K, as argued by the Portuguese government.

<sup>477</sup> See also Opinion of AG Fennelly, para. 9.

<sup>478</sup> See Peers (1998b).

<sup>479</sup> As provided in Article 5(1) EC.

policy, those powers take precedence. These can be approached as a *lex specialis*, although not confined by the TEU provisions on the CFSP.<sup>480</sup> Secondly, the duty to maintain and build upon the *acquis* may limit the *scope* of measures which are adopted in the contexts of titles V and VI. The latter should not in principle impinge on the provisions of the EC Treaty. *A fortiori*, Title V and Title VI measures should not contradict Community norms.

The provisions of Article 47 TEU can be used before the Court to challenge a measure which would violate the principle it encapsulates, but the latter principle also *guides* the action of the institutions in the context of the Union in general, and in the system of EU external relations in particular.<sup>481</sup> As with the duty of cooperation examined in the previous chapter, the obligation to maintain and develop the *acquis* stems from the requirement of Member States and institutions' loyalty vis-à-vis the Community.<sup>482</sup> In the context of a mixed agreement, the duty of cooperation aims at ensuring that mixity does not undermine the Community external action. Similarly, the duty to preserve the *acquis* is a guarantee that development of alternative methods of cooperation among the Member States in the context of the EU, do not duplicate and/or contradict actions of the Community or develop at the latter's expense. The duties thus complement one another. The provisions of the Treaty, as well as the Court case law, suggest that, like the duty to maintain and build upon the *acquis*, the duty of cooperation has to be nuanced in the context of the EU constitutional order.

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<sup>480</sup> Eeckhout (2004: 151).

<sup>481</sup> For a recent illustration of the guiding role of Article 47 TEU, see Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency (OJ 2004 L245/17), particularly Art. 1(2).

<sup>482</sup> Arguably, it also represents an additional element to guarantee the autonomy of the Community legal order, which had already been emphasised by the Court on several occasions, particularly in the context of external relations. See e.g. Opinion 1/76 *Laying-up Fund*, Opinion 1/91 *EEA*; Opinion 1/92, and Opinion 1/00 *ECAA*; where the Court insists on the preservation of the autonomy of the Community legal order, from external interference. The Court held that “where an agreement more clearly separates the Community from the other Contracting Parties from an institutional point of view and no longer affects either the exercise by the Community and its institutions of their powers by changing the nature of those powers, or the interpretation of Community law, the autonomy of the Community legal order can be considered to be secure”.

#### 4.1.3. A principle qualified by other fundamentals of the EU constitutional order

The duty to maintain and build upon the *acquis* has to be considered in the more general context of the TEU, and notably in conjunction with the other principles of the Union's constitutional order.

First, Article 2 provides that “the objectives of the Union shall be achieved as provided in the [TEU] and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 [EC]”. According to the principle of subsidiarity, the Community will take action in areas which do not fall within its exclusive competence only and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States.<sup>483</sup> While Member States are in principle precluded from acting outside the Community framework in areas of Community exclusive competences,<sup>484</sup> they can act in their own right, alone or collectively, including meeting *qua* states within the Council but outside the Community law framework, in spheres where the Community has non-exclusive competence.<sup>485</sup> Member States' freedom to act outside the Treaty framework in areas of shared competence has indeed been acknowledged by the Court of Justice, particularly in fields such as development cooperation, where Community and Member States competences are *complementary*.<sup>486</sup> Therefore, the duty to

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<sup>483</sup> For a demarcation between areas falling within Community exclusive competence and those falling outside, see Wyatt and Dashwood (2000: 158-159), cp. Toth (1994: 39-40).

<sup>484</sup> Case 804/79 *Commission v United Kingdom*. See also Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others*.

<sup>485</sup> As suggested by Alan Dashwood (1996b: 115), the function of subsidiarity is to “guide the decision whether powers given to the Community should actually be used, in cases where the objective in question can also be pursued by the Member States individually”. Further on the principle of subsidiarity in the post-Maastricht context, see Cass (1992), Steiner (1994: 49), Emiliou (1994: 65) and Flaesch-Mougin (1993: 370ff). For more recent analysis: e.g. de Búrca (1998, 2001: 131), de Búrca and de Witte (2002: 201), Bermann (2002: 75) and Weatherill (2005 forthcoming).

<sup>486</sup> See in this regard Joined Cases C-181/91 & 248/91 *Parliament v Council and Commission (Bangladesh)*; the Court held since the Community does not have exclusive competence in the field of humanitarian aid, consequently the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it. In the same vein, see Case C-316/91 *Parliament v Council (EDF)*. See also Declaration No 10 on ex-Articles 109, 130r and 130y of the EC Treaty; attached to the Final Act of the Treaty of Maastricht. Further: Pernice and Thym (2002: 387). It should

maintain and build upon the *acquis* does not force the Member States to act in the context of the Community whenever the subject matter concerns an area of non-exclusive competence of the Community. Instead, it implies that if they decide to act at EU level in spheres of potential Community competence, Member States and institutions, and notably the Council, are precluded from taking the route of Title V or VI.<sup>487</sup> They have to observe the TEU constitutional distribution of decision-making authority, priority being given to the Community method, under the supervision of the Court.

Secondly, and as evoked in the previous chapter, the EC Treaty provides for potential and sometimes mandatory CFSP interference with the functioning of the Community legal order. A case in point is the provision on the adoption of sanctions against third states. Article 301 EC (ex-228a) provides that:

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

The Community power to establish sanctions against a third state thus derives from the prior adoption of a CFSP common position or joint action, requiring action at the EC level.<sup>488</sup> While the Commission remains in charge of the proposal to establish sanctions by the Community, the latter is determined by the CFSP act taken by the Council.<sup>489</sup> Measures within the Community are based on Article 133 EC to restrict imports and exports of goods towards the state concerned,<sup>490</sup> whereas restrictions on

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be recalled that the principle of subsidiarity applies not only in the EC context but more generally in the context of the other EU sub-orders; see in this respect: Fink-Hooijer (1994: 178).

<sup>487</sup> Eeckhout (2004: 150), see also *Common Market Law Review* (1995).

<sup>488</sup> Further: e.g. Denza (2002: 296), Koutrakos (2001: 67), Wessel (1999: 175), Ryba (1995: 21-22), Fink-Hooijer (1994: 175). Also on the older practice of sanctions: Kuijper (1993: 387).

<sup>489</sup> One could also mention the specific regime on dual use goods until it was finally decided that it should be based on Art. 133 EC. Further: Koutrakos (2001), esp. chap. 5, Eeckhout (1994: chap. 7) and Denza (2002: 301-304).

<sup>490</sup> For instance, EC Council Regulation 3274/93 (OJ 1993 L295/1) based on the previous Council common position with regard to the reduction of economic relations with Libya (OJ 1993 L 295/7).

capital and payment are established on the basis of Article 60 EC, and restrictions on the movement of persons, and particularly visas restrictions are adopted on the basis of Article 62 EC.

The CFSP influence on the functions of Commission's delegations abroad could also be mentioned as another example of interactions between the CFSP and the EC. In particular, the TEU provides that they shall cooperate with Member States' diplomatic and consular missions in ensuring that the common positions and common measures adopted by the Council are complied with and implemented.<sup>491</sup>

The foregoing shows that the duty to maintain the *acquis* has to be nuanced. Interference from Title V with the EC legal order, in particular, is possible, if not sometimes required, for the Community to exercise its powers.<sup>492</sup> If one elaborates on Eeckhout's naval metaphor mentioned earlier, it appears that the compartments in the EU vessel between the Community, on the one hand, and Title V and Title VI, on the other, are not fully watertight.<sup>493</sup> Leaks of CFSP into the EC compartment can and should occur to keep the boat afloat.<sup>494</sup>

Thirdly, the *acquis* is called upon to evolve. The Community legal order is by definition dynamic and it is inconceivable that maintaining the *acquis* should be understood as a legal/regulatory status quo. The duty of Article 2 TEU seems to imply that building upon the *acquis* has more to do with respecting and possibly widening the application of the Community method, than simply expanding in quantitative terms the substantive body of EC law.<sup>495</sup> Indeed, the introduction of the principle of

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<sup>491</sup> Art. 20 TEU (ex-Art. J.6 TEU – Maastricht version). Further: Fink-Hooijer (1994: 191).

<sup>492</sup> Of course, the role of the European Council could also be underlined as another example of significant extra Community influence on the development of EC law. The next chapter will come back to this point.

<sup>493</sup> Eeckhout (2004: 146).

<sup>494</sup> See further below. Catherine Flaesch-Mouglin (1993 : 374) considered that the Community decision to establish sanctions, on the basis of a Council CFSP action “revient à une exécution des décisions politiques plus qu'à une véritable recherche de cohérence et fait de la Communauté le bras séculier de la PESC”.

<sup>495</sup> To be sure, it could be recalled that the duty to maintain and build on the *acquis* was formulated from the outset in Article B (and then in Article 2) as follows: “with a view to considering... to what

subsidiarity mentioned earlier has had the effect of stimulating the revision of existing EC legislation, or even sometimes the withdrawal of legislative proposals.<sup>496</sup> In other words, the Community method could be used also to revisit and update the *acquis*,<sup>497</sup> particularly in the light of the objectives of the Union.

To sum up, the duty to maintain and build upon the *acquis communautaire* guides the institutions and Member States when they operate in the framework of the Union in general, and as they act within the system of EU external relations in particular. They have to refrain from acting in breach of the Community *acquis* in its substantive aspects, but they must also observe the *acquis* in methodological and institutional terms, in the sense of favouring the Community method wherever possible, under the supervision of the Court. As with the duty of cooperation, the duty to maintain and develop the *acquis* stems from the need to establish an underlying sense of allegiance of Member States and institutions towards the Community. They both ensure, under the supervision of the Court, that Member States and institutions act with a view to helping the Community fulfil its tasks. At the same time the Community's tasks are to be fulfilled in the general framework of the Union, taking account of its other fundamental principles, particularly the principle of consistency.

#### **4.2. The principle of consistency in the external activities of the Union**

While Member States and institutions have to cooperate in the specific context of mixed agreements, and favour Community external action wherever legally possible and politically desirable, they also have to ensure consistency of the external activities of the Union as a whole. The principle of consistency has a prominent place in the

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extent the policies and forms of cooperation introduced by this Treaty may need to be revised *with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community*" (emphasis added). Von Bogdandy and Nettesheim (1996: 277): Article 46 is a provision "intended to protect the substantial *level of integration*" (emphasis added).

<sup>496</sup> Consider, in this regard, the regular Better Lawmaking reports of the Commission, e.g. "Better Lawmaking 2002" (European Commission, 2002) and the President of the Commission's report concerning the Commission's review of existing and proposed legislation in the light of the subsidiarity principle, submitted to the Edinburgh European Council in December 1992 (European Council, 1992b: 12), esp. Annex 2 to Part A of the Conclusions of the Presidency, at p. 16.

<sup>497</sup> Further: Curti Gialdino (1995: 1106).

constitutional order of the Union in general, and in the system of EU external relations in particular, given the co-existence of different bases and frameworks for elaborating the EU external dimensions.<sup>498</sup> This section sheds light on the constitutional foundations of the principle of consistency (4.2.1), its meaning as the pursuit of coherence (4.2.2) and its application, likely to remain that of a guiding principle rather than a judicial concept (4.2.3).

#### **4.2.1. The constitutional foundations of the principle of consistency**

The concept of consistency predates the TEU, and was first introduced by the Single European Act (SEA). In the latter's Preamble, reference was made 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". 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".<sup>499</sup>

The TEU echoes and elaborates on the provisions of the SEA.<sup>500</sup> The requirement of consistency appears already in Article 1 which 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". Article 3 TEU refers three times to consistency. Its first paragraph states that the Union shall be served by a single institutional framework which shall ensure such consistency. Its second indent 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. Finally, it endows the Commission and the Council with the responsibility to ensure such consistency, while the Council is charged with a specific responsibility

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<sup>498</sup> See Report of Reflection Group IGC 1996 (1995). Further: e.g. Clapham (1999: 636ff).

<sup>499</sup> Further: Allen (1998: 48ff).

<sup>500</sup> Unity and coherence were among the central aims mentioned in the Conclusions of the Dublin meeting of the Heads of States or Government in April 1990 (European Council, 1990a). They were also mentioned among the priorities of the CFSP by the Brussels European Council of October 1993 (European Council, 1993b).

under Title V to “ensure the unity, consistency and effectiveness of action by the Union”.<sup>501</sup> Consistency is thus a recurring theme in the TEU.

#### 4.2.2. The principle of consistency understood as pursuit of coherence

The concept of consistency is ambiguous in the EU context. Indeed, various observers have noted that the different linguistic versions of the Treaty contribute to this haziness. For instance, the French version refers to the term “cohérence”, which, it has been submitted, differs in meaning from the word “consistency” in English. Similar differences also exist between the English version and other versions, notably the German text which also includes the concept of “Kohärenz”.<sup>502</sup>

Commentators mostly submit that the term consistency means absence of contradiction, whereas coherence rather implies “positive connections”<sup>503</sup> or “the construction of a united whole”.<sup>504</sup> Consistency is said to encapsulate the ideas of compatibility and of making good sense, whereas coherence relates more to synergy and adding value.<sup>505</sup> Indeed, coherence in law would be a matter of degree, whereas consistency would be a static concept. Concepts of law can be more or less coherent but cannot be more or less consistent. They are either consistent or not.<sup>506</sup> In view of this ambiguity, the question has been raised as to what the correct meaning of the Treaty expression should be,<sup>507</sup> even if, as pointed out by Eileen Denza,<sup>508</sup> the whole debate tends to overlook the fact that in English “coherence” has the primary meaning

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<sup>501</sup> Last sentence of Art. 13(3) TEU.

<sup>502</sup> Further on this point, see Koutrakos (2001: 39-44), Tietje (1997: 211), Neuwahl (1994: 227), Timmermans (1996: 66), Krenzler and Schneider (1997: 133).

<sup>503</sup> Tietje (1997: 212).

<sup>504</sup> Koutrakos (2001: 39).

<sup>505</sup> Missiroli (2001: 182).

<sup>506</sup> Tietje (1997: 211), citing W. Van der Velden (1992), “Coherence in law: a deductive and a semantic explication of coherence” in B. Brouwer *et al* (eds.), *Coherence and Conflict in Law*, (Kluwer) 257. For a Spanish approach, see Torrent (1998), also available in French at: <http://www.ub.es/dpecp/ep/chap10.pdf>.

<sup>507</sup> Although, as a matter of principle, each and every official version of the Treaty is authentic; see Art. 314 EC.

<sup>508</sup> Denza (2002: 289-290).

of “making sense”, as opposed to “incoherence”. In the English language, “consistency” can indeed be used to indicate degrees of interconnection. Panos Koutrakos, among others, proposes a broad understanding of consistency which implies more than simply absence of contradiction between different instruments and actions. He uses the provisions of Article 301 EC on sanctions to support the proposition that the interaction between the sub-orders of the Union should not be merely envisaged as a non-contradictory one. Instead, it should be conceived as a relationship based on *synergy*.<sup>509</sup>

Although there is no system of linguistic majority in EU law,<sup>510</sup> an additional indication for understanding consistency as “coherence” lies in the fact that official versions of the TEU tend to refer more to the concept of “coherence” rather than “consistency”.<sup>511</sup> Moreover, the use of “coherence” has become more systematic,<sup>512</sup> even in the English version of documents relating to the establishment of the European Security and Defence Policy,<sup>513</sup> where the requirement of “inter-pillar coherence” has become critical.

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<sup>509</sup> Koutrakos (2001: 39).

<sup>510</sup> As pointed out above, the rule is rather that each and every version is authentic. This has been confirmed by the Court of Justice, e.g. in Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, para. 18. See Opinion of Stix Hackl AG in Case C-265/03 *Igor Sumitenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*.

<sup>511</sup> Wessel (2000b: 1135), Duke (1999: 4).

<sup>512</sup> 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].

<sup>513</sup> See notably the Presidency Progress Report to the 1999 Helsinki European Council on Common European Policy on Security and Defence, where it is 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 Article 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) (European Council, 1999d). More recently 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 (European Council, 2004a). Indeed, “coherence” is also used by the legal service of the Council (2000).

Perhaps more importantly, there is a legal argument to support the proposition that the TEU principle of consistency relates to the pursuit of coherence. Simply, the principle set out in Article 3 TEU would be deprived of any *raison d'être* if it were merely to prevent legal contradictions between measures taken by institutions and Member States. As it was pointed out above, the TEU foresees other devices to tackle such legal contradictions, under judicial supervision. First, the principle of supremacy ensures that Member States measures conflicting with Community law give way to the application of the latter. Secondly, the duty of Article 47 TEU to maintain and build on the *acquis* guarantees the primacy of EC law over Titles V and VI norms. Thirdly, in case a CFSP measure is adopted to fulfil the objectives of the EU, the EC may, in certain circumstances, consequently have to act accordingly as suggested earlier.

The foregoing argument supports the view that the principle of “consistency” established by the TEU should be viewed as the pursuit of coherence in the external activities of the Union based on synergy and thus integration of the different components of the EU external relations, rather than simply absence of legal contradiction.<sup>514</sup>

#### **4.2.3. The principle of consistency as a guiding principle for EU external action**

The requirement of consistency established in the Common Provisions of the TEU has a wide scope of application. While Article 1 TEU tends to focus on its internal application, both Article 3 TEU and Article 13(3) TEU concern the external activities of the Union “*as a whole* in the context of its external relations, security, economic and development policies” (emphasis added). Placed at the beginning of the TEU, it guides the activities of the EU as a whole. Both institutions and Member States are expected to take account of the requirement of consistency.<sup>515</sup>

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<sup>514</sup> Cremona (1999a: 169). Pascal Gauttier (2004: 26).

<sup>515</sup> Consistency equally concerns each of the institutions. The requirement of consistency is equally relevant in the relationship between the different Directorate-Generals in the Commission, or indeed within the Council, see in this regard the Final Report of the Working Group VII “External Action”, established in the context of the European Convention on the Future of Europe (European Convention,

In more practical terms, the Council and the Commission are made responsible for ensuring such consistency.<sup>516</sup> The Treaty of Amsterdam reinforced this provision by establishing an *obligation* upon them to “cooperate to this end” (Article 3 TEU), thus mirroring the duty of cooperation between the Member States and Community institutions.<sup>517</sup> In reality, the institutional cooperation might be more difficult than it seems,<sup>518</sup> as it will become apparent in the next chapter. By contrast, the role of the Court is minimal, as it does not have jurisdiction over the Common Provisions of the TEU.<sup>519</sup> It ensures that the law of Article 47 TEU is observed, notably by ensuring that the right legal basis (EC/CFSP/PJCCM) is chosen for EU acts.<sup>520</sup> As pointed out earlier, the case law on this issue is hitherto scarce,<sup>521</sup> and limited to the control of consistency in the restrictive sense (absence of contradiction between the different external actions), by opposition to a control of coherence (complementarity and synergy of these actions) which would imply a political assessment, which is arguably better left to the decision-making entities.

In relation to the other principles and duties pointed out above, the principle of consistency appears to *complement* the duty of cooperation between Member States and institutions in the context of mixed agreement, and the duty of loyalty in the

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(2002b: 17), and further below, section 6.2.

<sup>516</sup> Art. 3(2) TEU.

<sup>517</sup> Eeckhout (2004: 154, footnote 60).

<sup>518</sup> Further: Allen (1998: 48ff).

<sup>519</sup> In accordance with Article 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 case C-167/94 *Criminal proceedings against Juan Carlos Grau Gomis and others*, para. 6. Further: Neuwahl (1994: 235ff).

<sup>520</sup> The Court is to assess the true nature of the contested measure in order to determine its relevant legal basis, along the lines of its *Titanium Dioxide* jurisprudence: Wessel (2000b: footnote 88).

<sup>521</sup> The intervention of the Court under the heading consistency could also occur in situations of conflict between EC rules and national rules implementing an EU measure based on title V or VI. The issue here would be of supremacy of EC law, and the Court of Justice could ask the national court to set aside the contested national measure.

context of CFSP.<sup>522</sup> Rather than being devices to guarantee the multifarious division of competences, these duties of cooperation, loyalty and consistency, in principle, aim at moderating the implications of such division.<sup>523</sup>

### **4.3. The Union's single institutional framework as factor of consistency**

It has been seen that the system of EU external relations is underpinned by, first, the duty to cooperate between Member States and Community, complemented by the CFSP principle of loyalty, secondly, the duty to maintain and build upon the *acquis*, and thirdly, the principle of consistency. In addition, the Treaty on European Union provides in its Article 3 that:

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*.

Also included in the Common Provisions of the TEU, Article 5 states 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). The TEU thus establishes a single institutional framework, as a *factor* of consistency in the Union's activities (4.3.1), but involving differentiated forms of interaction between the institutions (4.3.2).

#### **4.3.1. A single set of institutions for the EU**

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<sup>522</sup> As indicated in chapter 3, this complementary character has been pointed out by Frid (1995: 149). Heliskoski (2001: 64) has also highlighted the link between the duty of cooperation and Art. 3 TEU.

<sup>523</sup> Willaert and Marqu ez-Ruiz (1995: 39). Piet Eeckhout (2004: 153) has a more cynical approach to the principle of consistency suggesting that “the constitutional emphasis on consistency is something of a subterfuge, an attempt to cover up inter-institutional strife, to throw a constitutional blanket on the struggles between the Council and the Commission, not to mention the Parliament”.

Each of the institutions evoked in Article 5 TEU is equally mentioned in the specific context of the EC Treaty, in Article 7, and extensively dealt with in its Part V. Title V and Title VI of the TEU refer to several provisions notably of Part V of the EC Treaty. For instance, Article 41 (ex K.13) TEU provides that “Articles 189, 190, 195, 196 to 199, 203, 204, 205(3), 206 to 209, 213 to 219, 255 and 290 of the [EC] Treaty... shall apply to the provisions relating to the areas referred to in this Title”. This cross-referencing confirms that the institutions of the Union are the same as those of the Community,<sup>524</sup> established by the Treaties of Paris and Rome, and thereafter merged on the basis of the Merger Treaty.<sup>525</sup> The “loan”,<sup>526</sup> or “sharing”<sup>527</sup> of the Community institutions to serve the Union in the context of Titles V and VI, can contribute to the continuity that Article 5 TEU refers to and calls upon.

#### **4.3.2. A single framework involving differentiated institutional interactions**

While the institutional framework is single in terms of the institutions it involves, it is however plural in terms of the interactions taking place within it. The interplay between the institutions takes different forms, for the powers and role of each

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<sup>524</sup> In case C-176/96 *Jyri Lehtonen v Castors Canada Dry Namur-Braine ASBL*, para. 33, the Court referred to the “institutions of the European Union”. Also Article 51(1) of the EU Charter of Fundamental rights states that its provisions are “addressed to the institutions and bodies of the Union” (OJ 2000 C364/01).

<sup>525</sup> Treaty establishing a Single Council and a Single Commission of the European Communities, signed in Brussels on 8 April 1965.

<sup>526</sup> Expression used by Curtin (1993: 67).

<sup>527</sup> The glossary of the European Convention on the future of Europe’s website defines the single institutional framework as follows: “The single institutional framework means the Union acting through shared institutions, whatever its area of action, in order to ensure the consistency and continuity of that action. This applies equally to differentiated integration operations which do not involve all Member States.”

institution vary, depending on the EU sub-order in which it act,<sup>528</sup> and on the subject-matter of the action within each of these sub-orders.

There is no need to recall each and every subtle difference in institutions' powers under and within the various sub-orders in the context of the TEU.<sup>529</sup> Suffice to say that, first, the Council invariably enjoys the same role in each sub-order as it is the essential decision-making body in the Union as a whole.<sup>530</sup> Secondly, the other institutions, particularly the Parliament, the Commission and the Court have different roles according to the matter in question. For instance, in the context of Title V, the Commission is "fully associated" with the work carried out in the CFSP field,<sup>531</sup> and together with the Presidency in the Union's representation and in the implementation of decisions taken under Title V.<sup>532</sup> Furthermore, it shares a power of initiative with the Member States,<sup>533</sup> and is responsible, together with the Council, of ensuring the consistency of the Union's external activities.<sup>534</sup> As regards the European Parliament, it has to be consulted by the Presidency on the main aspects and the basic choices of

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<sup>528</sup> Art. 28(1) TEU (Title V) provides that the provisions of Articles 189, 190, 196 to 199, 203, 204, 206 to 209, 213 to 219, 255 and 290 of the EC Treaty shall apply to the provisions relating to the areas referred to in... title [V]". Article 41(1) TEU (Title VI) also states that "Articles 189, 190, 195, 196 to 199, 203, 204, 205(3), 206 to 209, 213 to 219, 255 and 290 of the Treaty establishing the European Community shall apply to the provisions relating to the areas referred to in this title. Hence the provisions of the EC concerning the institutions apply only in a selective fashion in the context of the other sub-orders. The provisions of Articles 195 (on the Ombudsman) and 205(3) (constructive abstention within the Council) EC apply in the context of Title VI, but not in the context of Title V.

<sup>529</sup> Further on this point: Cremona (1994: 255ff), Flaesch-Mougin (1993: 388ff), Macrae (1994: 171), van Solinge (1993: 113) and Fink-Hooijer (1994: 186ff).

<sup>530</sup> This unvarying function partly explains why it sees itself as an institution of the Union. Just a few days after the entry into force of the Maastricht Treaty, the Council renamed itself "Council of the European Union". Council Decision 93/591 of 8 November 1993 (OJ 1993 L281/18) concerning the name to be given to the Council following the entry into force of the Treaty on European Union states that: "[t]he Council shall henceforth be called the 'Council of the European Union' and shall be so designated, in particular in all the acts which it adopts, including those adopted under Titles V and VI of the Treaty on European Union; political declarations which the Council adopts under the common foreign and security policy will thus be made in the name of 'the European Union'".

<sup>531</sup> Art. 27 TEU.

<sup>532</sup> Art. 18(4) TEU.

<sup>533</sup> Art. 22(1) TEU.

<sup>534</sup> Art. 3(2) TEU.

the CFSP. Its views should be duly taken into consideration. It should also be kept regularly informed, by the Presidency and the Commission, of the development of the Union's foreign and security policy. It may also ask questions to the Council or make recommendations to it.<sup>535</sup> Indeed, the Parliament, through its budgetary powers, has influence on the financial aspects of Title V.<sup>536</sup> Finally, with respect to the Court, the CFSP falls outside the scope of its jurisdiction altogether.<sup>537</sup> As suggested above, it can only review a CFSP measure on the basis of Article 230 EC on the ground that it has been adopted in breach of the EC Treaty.<sup>538</sup>

The differentiated roles and powers of the institutions, albeit acting within a single framework, have led to the view that the Treaty establishes a single institutional framework *en trompe l'oeil*.<sup>539</sup> It has indeed generated numerous turf-battles as regards the respective roles and competences of the different institutions. This state of affairs has contributed to increased fragmentation of EU external relations, rather than to consistency and coherence, as it shall be seen in the next chapter.<sup>540</sup> At the same time, 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.<sup>541</sup>

The single institutional framework and the consistency to which it contributes, is also underpinned by the interactions between each institutions' administrations and civil servants.<sup>542</sup> The entry into force of the TEU generated widespread restructuring within each institution in order to give more content to the concept of single institutional

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<sup>535</sup> Art. 21 TEU.

<sup>536</sup> See Commission report on the functioning of the Treaty on European Union (European Commission, 1995e: note 157).

<sup>537</sup> Art. 46 TEU. Case T-201/99 *Royal Olympic Cruises and Others v Council and Commission*.

<sup>538</sup> See the Court's ruling in Case 170/96 *Airport Transit Visa*, and discussion above.

<sup>539</sup> Timmermans (communication au Colloque de l'Université Libre de Bruxelles, *L'Union européenne après Maastricht* (Bruxelles, 1992), cited in Flaesch-Mougin (1993: 376). Deirdre Curtin (1993 27-30) speaks of a "fiction". See also Weiler (1993: 58ff), von Bogdandy and Nettesheim (1996).

<sup>540</sup> Schwalz (1998: 427), Allen (1998: 41).

<sup>541</sup> Weiler (1993: 58ff). See also von Bogdandy and Nettesheim (1996) and evidence of J-C. Pirié before the Working Group III (Legal personality) of the European Convention 26 June 2002 (Pirié, 2002: 9-10).

<sup>542</sup> Further: Koutrakos (2001: 38ff), Pernice and Thym (2002: 386ff).

framework.<sup>543</sup> Moreover, the unity of orientation of the institutional framework is also stimulated by the enhanced role of the European Council. Although not considered an institution *stricto sensu*,<sup>544</sup> the European Council has become increasingly involved in the activities of the EU, as will become particularly evident in the next Part of this study.<sup>545</sup> Indeed, its composition gives it a particular influence on all the activities of the Union, Community activities included. In particular, the presence of the President of the Commission entails that the latter becomes in effect committed by its orientations,<sup>546</sup> which subsequently influence the Commission's power of initiative.<sup>547</sup>

To recapitulate, the single institutional framework foreseen by the TEU is conceived as an additional factor of consistency in the activities of the European Union in general.<sup>548</sup> Commissioners, Parliamentarians and Ministers may have several hats, they only have one head.<sup>549</sup> Unlike the duty of cooperation, the duty to maintain the *acquis* and the principle of consistency, the single institutional framework is not, in itself, a principle *guiding* the action of the Community and the Member States in the framework of the Union. Instead, it is a procedural and organisational device to foster the overall consistency of Union's activities. Moreover, it does not concern the relationship between the Member States and the Community and Union, but relates to, and partly attenuate, the distribution of competences between the EU sub-orders.

#### **4.4. Conclusion**

This chapter has examined the principles contained in the TEU which govern and organise the interactions between the Union's sub-orders in the system of EU external relations. These principles have different functions and a distinct nature. The duty to

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<sup>543</sup> See Fink-Hooijer (1994: 190) on the revised role of the Political Committee, the COREPER and the working groups.

<sup>544</sup> In particular the European Council is not understood as one of the institutions whose decisions can be challenged before the Court of Justice. See order of the Court in Case C-253/94P *Olivier Roujansky v Council of the European Union*, confirming the findings of the CFI in Case T-584/93 *Roujansky v Council of the European Union*.

<sup>545</sup> Further: Dashwood (2000a), de Schoutheete and Wallace (2002) and Neuwahl (1994: 239).

<sup>546</sup> Dashwood (1998a: 1031).

<sup>547</sup> See further developments on Chapter 4 of this study.

<sup>548</sup> Jacqué (2001: 169).

<sup>549</sup> To paraphrase Sir Alec Douglas Home, former British Foreign Minister, cited in Allen (1998: 53).

maintain and build upon the *acquis communautaire* entrenches the division of powers between the Community and the non-Community aspects of EU external relations. Interactions between them are determined by this division whose respect is guaranteed by the Court of Justice. By contrast, the principle of consistency aims at fostering synergy and coherence in the external activities of the Union. It is supported by the single institutional framework, but not guaranteed by the Court of Justice. As such it essentially has a guiding role, and its effectiveness is highly dependent on good will. Together with the duty of cooperation examined in the previous chapter, these principles underpin the system of EU external relations. They aim at ensuring the coherence of the EU external action. The next part will examine how these principles have influenced, if at all, the institutional practice as evidenced in the development of the Partnerships with Russia and Ukraine.

### **PART III**

#### **AN EVOLVING SYSTEM OF EU EXTERNAL RELATIONS TESTED IN THE PARTNERSHIPS WITH RUSSIA AND UKRAINE**

The second chapter of this study drew attention to the proto cross-pillar aspects of the PCAs. It was seen that the Agreements cover not only areas of EC external competence, they also enclose provisions which relate to Titles V and VI of the TEU. The connection between the PCAs and the non-EC aspects of the EU was made possible, in particular, thanks to the participation of the Member States “acting in the framework of the Union”. In the absence of EU legal personality, the mixity embodied by the Agreements was found to be conducive to the projection of the Union in its various facets, thus remedying its inability to conclude external agreements.

The previous part underlined that the modalities of this projection are governed by the principles which underpin the system of EU external relations, namely the duty of cooperation, the maintenance of the *acquis* and the requirement of consistency, fostered by a single institutional framework. The combination of these devices aims to ensure the coherence of the external action of the Union, thus ultimately contributing to the TEU objective of asserting its identity on the international scene.

The present Part looks at the contribution of institutional practice as evidenced in the Partnerships with Russia and Ukraine against this conceptual background, and in the context of rapid constitutional evolution in the EU. Chapter 5 focuses on the effects of Treaty changes on the development of the Partnerships, contrasting the pre- and the post-Amsterdam periods, in the system of EU external relations. It will be seen that institutional practice has oscillated between the orthodox respect for the constitutional distribution of powers, and the quest for coherence, through informal arrangements between institutions. Chapter 6 argues that the enlargement process epitomises such informal arrangements, and that the Partnerships integrate some of the elements of the specific enlargement methodology, anticipating various changes included in the Constitutional Treaty.

## CHAPTER 5

### THE ELUSIVE QUEST FOR COHERENT PARTNERSHIPS IN AN INCREASINGLY POLARISED SYSTEM OF EU EXTERNAL RELATIONS

In the aftermath of the entry into force of the TEU signed in Maastricht, several complementary measures were adopted by the EU institutions towards Russia and Ukraine. While some of these initiatives were specifically foreseen by the PCAs,<sup>550</sup> other non-EC measures have mushroomed with the stated aim to invigorate the Partnerships (5.1).

The constitutional reforms brought about by the Treaty of Amsterdam, and consolidated by the Treaty of Nice, catalysed the development of non-EC external dimensions of the EU. Indeed, several new initiatives were launched by the Union in the context of the Partnerships with Russia and Ukraine on the basis of Titles V and VI TEU. Such additional measures arguably had the effect of introducing the entrenched pillar structure of the EU therein, thereby complicating the quest for coherent Partnerships (5.2).

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<sup>550</sup> As regards Russia, e.g. Agreement on cooperation in science and technology between the European Community and the Government of the Russian Federation (OJ 2000 L299/15), renewed in 2003 for a period of five years, by a Council Decision of 5 June 2003 concerning the conclusion of an Agreement aimed at renewing the Agreement on cooperation in science and technology between the European Community and the Government of the Russian Federation (OJ 2003 L299/20); Agreement between the European Community and the Russian Federation on trade in textile products (OJ 1998 L222/2); Agreement between the European Coal and Steel Community and the Government of the Russian Federation on trade in certain steel products (OJ 2002 L195/55), amended by Council Regulation (EC) No 1386/2004 of 26 July 2004 OJ 2004 L255/1. As regards Ukraine, e.g. Agreement between the European Economic Community and Ukraine on trade in textile products (OJ 1994 L123/718), extended and amended by an Agreement in the form of an Exchange of Letters between the European Community and Ukraine concerning the extension and amendment of the Agreement between the European Economic Community and Ukraine on trade in textile products initialled on 5 May 1993, as last amended by the Agreement in the form of an Exchange of Letters initialled on 15 October 1999 (OJ 2001 L16/3); Agreement on cooperation in science and technology between the European Community and Ukraine (OJ 2003 L36/32) renewed by Council Decision of 22 September 2003 concerning the conclusion of an Agreement renewing the Agreement on cooperation in science and technology between the European Community and Ukraine (OJ 2003 L267/24).

The adoption of several non-EC instruments to foster the development of the Partnerships begs the question of their relation with the PCAs. This question has broader ramifications. It concerns the interface between EC based instruments and EU based instruments. It therefore puts the principles examined in the previous Part of this discussion to the test.

### **5.1. EU instruments developed towards Russia and Ukraine post-Maastricht**

Following the entry into force of the TEU various instruments have been adopted by EU institutions, with the recurrent aim of ensuring a coherent development of the Partnerships with Russia and Ukraine. One of these instruments is provided by the TEU, namely the Common Position (CP) (5.1.1), while others, such as “Action Plans”, are more informal instruments with no specific legal basis (5.1.2).

It will be argued that the former encompasses the inherent tension between the EU sub-orders, and set in motion the constitutional principles governing their interaction. By contrast, the latter instruments result from ad hoc interactions that are not specifically anchored in one sub-order. Such informal interactions tend to supersede “pillar politics”, thanks to the political endorsement of the European Council.

#### **5.1.1. The EU Common Position towards Ukraine: a CFSP instrument igniting institutional tension**

On the occasion of the signature of the PCA in Corfu in 1994, the European Council asked the Council to continue formulating a strategy towards Ukraine.<sup>551</sup> It is in this

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<sup>551</sup> European Council (1994a). Pt. I of the conclusions read as follows:

The European Council invites the Council to continue its work on the formulation of an overall policy towards Ukraine. In elaborating such a policy, drawing on the full range of instruments available under the Treaty on European Union, including possible joint actions, the Council should follow these general guidelines:

- sustained support for the consolidation of democratic institutions, for respect for human rights and for the achievement of market oriented economic reforms;
- the promotion of good neighbourly relations between Ukraine and its neighbours;

context that a Common Position was adopted by the Council. Ukraine was thereby the first post-Soviet country to be the subject of such a *formalised* expression of political interest on the part of the Union.<sup>552</sup> The CP covers the same substantive aspects as the PCA (5.1.1.1), thus raising the question of the interface between the two instruments, particularly from an institutional point of view (5.1.1.2).

5.1.1.1. *The substantive overlaps between the Common Position and the PCA*

The CP was adopted by the Council on 28 November 1994,<sup>553</sup> a few months after the signature of the PCA with Ukraine. It was based on ex Article J.2 TEU and defined the EU objectives towards Ukraine in the following terms:

A. The European Union shall pursue the following objectives and priorities in its relations with Ukraine:

1. To develop a strong political relationship with Ukraine and increase cooperation between Ukraine and the European Union. The European Union will continue to support the independence, territorial integrity and sovereignty of Ukraine.
2. To support democratic development in Ukraine, through offering advice on legislation and practical assistance in establishing democratic institutions, and through contacts between Ukrainian and European officials, parliamentarians and non-governmental organizations at different levels.
3. To support economic stabilization and reform based on the agreement with the IMF and support from the IFIS, considering that the establishment of a market economy is a prerequisite for economic development and would enhance political

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- cooperation with Ukraine in multilateral fora in support of regional and international stability and the peaceful settlement of disputes;

- support for the full implementation of nuclear and conventional disarmament agreements;

- acceptance by Ukraine of internationally accepted nuclear safety standards within an overall energy policy.

<sup>552</sup> Verrue (1995), "Ukraine and European Security - outline of intervention" in Gnauk and Sachs (eds.), *Die Ukraine und die europäische Sicherheit. Bericht über eine Konferenz des Aspens Instituts* (Berlin, 8-10 April 1995), cited in Alexandrova (1998: 160).

<sup>553</sup> Common Position defined by the Council on the basis of Article J.2 of the Treaty on European Union on the objectives and priorities of the European Union towards Ukraine (OJ 1994 L313/1). The adoption of the CP was welcome by the 1994 Essen European Council (European Council, 1994b).

and social stability. The early entry into force of the Partnership and Cooperation Agreement is important in this context.

To support the integration of Ukraine into the world economic order.

4. To continue to provide assistance for the process of nuclear disarmament, while attaching, in the context of its cooperation with Ukraine, the greatest importance to the implementation of Ukraine's obligations regarding nuclear disarmament and accession to the Non-Proliferation Treaty as a non-nuclear weapons State at the earliest possible time, which would free the way for the full implementation of the Start I and Start II agreements and while valuing the progress made so far in nuclear disarmament.

To promote Ukraine's cooperation as a neighbouring country in the Stability Pact, support the active membership in NACC and the rapid development of a Partnership for Peace programme, and encourage the development of dialogue and cooperation with the WEU.

To support also CSCE efforts to offer assistance in resolving tensions in the Crimea, within the context of Ukrainian territorial integrity and sovereignty.

To promote good neighbourly relations between Ukraine and its neighbours.

5. To promote early implementation of the EU/G7 action plan on nuclear safety and reform of the energy sector, which, in particular, would lead to the closure of Chernobyl.

On various accounts, the multifaceted aims of the CP echo the objectives already set out in the PCA, thereby illustrating a substantive correspondence between the two instruments. First, point 1 above relates to the PCA objective of “[establishing] a framework for the political dialogue allowing the development of close relations between the Parties in this field”.<sup>554</sup> Secondly, support for the independence, territorial integrity and sovereignty of the Ukraine is clearly spelled out in the PCA.<sup>555</sup> Thirdly, objective 2 echoes the human rights principles enshrined in the Agreement. Fourthly, the support towards Ukraine’s integration in the world economic order mentioned in the CP is also referred to in the PCA.<sup>556</sup>

While it brings the security element of Title V into the Partnership, the CP appears to cover the same grounds as the PCA by recalling and reiterating its political and economic objectives. On the one hand, the CP re-affirmation of the *political*

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<sup>554</sup> Art. 1 PCA.

<sup>555</sup> Seventh indent of the Preamble.

<sup>556</sup> Preamble, 15<sup>th</sup> indent.

objectives of the Agreement may be regarded as an implementation of the duty of cooperation. In effect, through the CP, the Member States reiterate their commitment to fulfil the non-EC objectives of the PCA, thereby facilitating the full-implementation of the Agreement. On the other hand, recalling the *economic* objectives of the Partnership set out in the PCA means that the CP covers areas which relate more to the sphere of EC external relations. This overlap raises the question of the interface between the two instruments, and more generally of the interaction between two of the Union's sub-orders.

5.1.1.2. *The contentious interface between the Common Position and EC law*

The CP inserts the previous Community measures and programmes, including the PCA, into a global EU policy towards Ukraine. One of the recitals of the CP points out that account is taken of “the measures and programmes that the Community has undertaken with regard to Ukraine”. Moreover, the operative part expressly calls on the Member States to ensure the PCA early entry into force, to help achieving the objectives and priorities stated in the CP. The Agreement is thereby presented as a means to achieving the objectives of the EU towards Ukraine, as articulated in the CP.

Indeed, the CP includes, in its operative part, a section concerning its effects on the Member States and on the EU sub-orders. It recalls that the CP is binding on the Member States<sup>557</sup> which shall ensure that their national policies conform to it.<sup>558</sup> Moreover, the CP states that:

*The Council notes that the Commission will direct its action towards achieving the objectives and priorities of this common position by appropriate Community measures (emphasis added).*<sup>559</sup>

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<sup>557</sup> Further on the legal aspects of Common Positions, see Wessel (1999: 170-182).

<sup>558</sup> They shall also uphold the common position in international organizations and at international conferences, Art. J.2 (3) TEU.

<sup>559</sup> Pt. B. It also provided that “[t]he Council will undertake the necessary measures to promote the abovementioned objectives and priorities, where appropriate on the basis of Commission proposals.”

The terms of the CP are clear as regards the latter's implications for the Community. The Commission is expected to act in the EC context with a view to fulfilling the objectives of the CP. While this approach may foster coherence in the overall EU approach towards Ukraine,<sup>560</sup> it was not unanimously welcome. In particular, some observers, including from the legal service of the Commission, felt that the terminology used notably in the CP suggested that the monopoly of initiative of the Commission in the context of the EC Treaty was being trespassed by the Council, acting on the basis of Title V. In other words, the compatibility of the CP with the constitutional duty to maintain the *acquis*, provided in Article 2 TEU was doubtful. In particular, Christiaan Timmermans has considered that instructions to act directed at the Commission, which are contained *in the operative parts* of Common Positions, encroach on the Community competences. Such encroachment breaches the decision-making procedures foreseen in the TEU. In Timmermans' words, this phenomenon is symptomatic of a "constitutional erosion".<sup>561</sup>

The Council's position in this debate was reflected in a legal opinion given by its legal service concerning the scope of a similar CP towards Rwanda, and in particular on its interface with EC law.<sup>562</sup> Here, the legal service pointed out that a common position not only can, but *must* take into account economic and other aspects of the EU relations with a third country. It found that it would be unconceivable for a global policy covering "all areas of foreign and security policy" to ignore the economic aspect of the relations with third countries.<sup>563</sup> Furthermore, the principle of

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<sup>560</sup> In this regard, the Preamble explicitly mentions the provisions of ex-Article C TEU, according to which the Council and the Commission are responsible for ensuring consistency in the external activities of the Union.

<sup>561</sup> Timmermans (1996: 61), Koutrakos (2001: 45).

<sup>562</sup> Council (1994): Avis du Service Juridique: "Une position commune définie par le Conseil sur la base de l'Article J.2 du Traité sur l'Union européenne et qui est destinée à établir une approche globale de la politique à mener par l'Union européenne à l'égard d'un pays tiers peut-elle tenir compte et mentionner les aspects (notamment économiques) des relations avec le pays tiers en cause à propos desquels la Communauté serait compétente pour adopter des mesures concrètes".

<sup>563</sup> The legal service relies on the provisions of Art. 11(1) TEU (ex Art. J.1), which envisage a common foreign and security policy "covering all areas of foreign and security policy", to reject the exclusion from its ambit of aspects relating to Community external relations.

consistency articulated in Article 13(3) TEU (ex Article J.8)<sup>564</sup> and Article 3 TEU, which also refers to the single institutional framework, aims at ensuring that the different external dimensions of the Union are consistent and coordinated to ensure the development of a true foreign policy of the Union, and the assertion of its identity on the international scene, as foreseen in Article 2 TEU.

In view of these arguments, the legal service considered that common positions should mention the objective and priorities of the EU foreign policy towards that country in general terms, even if specific measures were to be eventually adopted by one of the Union components, such as one or more Member States or the Community. Indeed, limits to this approach were highlighted, in view of the duty to maintain the *acquis communautaire* enshrined in Article 2 TEU. In particular, the CFSP measure cannot impose any obligation on the European Communities or their institutions. They remain empowered to propose, adopt and implement Community measures in accordance with their respective powers and in compliance with the applicable rules and procedures.

This legal opinion was followed by the establishment of an unpublished *mode d'emploi* endorsed by the Council in agreement with the Commission. It was agreed that common positions may refer to the Union's external activities as a whole. It was also emphasised that the "power specific to [Unions'] institutions shall be preserved at any stage", and that "[c]are shall be taken to ensure that the power of initiative held by the Commission under the Treaties is preserved". Timmermans has noted that the *mode d'emploi* may have reconciled "the ambition to allow the CFSP to potentially cover the full scope of external action of the Union with the orthodoxy of decision-making procedures, as clearly distinct between pillars". He also pointed out that the decision-making practice following the adoption of the *mode d'emploi* has nevertheless not been as considered.<sup>565</sup>

It is noteworthy that in a later Communication on "future EU-Russia relations" proposing the adoption of a Common Position on Russia, the Commission gave its

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<sup>564</sup> According to Art. 13(3), last indent, of the TEU: "The Council shall ensure the unity, consistency and effectiveness of action by the Union."

<sup>565</sup> Timmermans, (1996: 63).

own version of what the implications of a CP should be. As regards the Member States, Part B of the proposed CP simply recalled the TEU provisions that they should ensure that their national policies conform to the CP. Part C concerns the implications of the CP for the Community. Much more elaborate than the CP with Ukraine on this point, the proposed CP on Russia is drafted as follows:

“The Council notes that the Community on the basis of the Commission’s initiatives will contribute to the above objectives and priorities in particular through:

1. the taking of all necessary steps to ensure, at such time as the criteria laid down by the European Union have been substantially fulfilled, the prompt signature of the Interim Agreement and early ratification of the [PCA];
2. the pursuit of the dialogue with the Russian Federation concerning its application for Membership of international organisations, including the current application to WTO;
3. implementation of programmes in support of the democratic process and establishment of human rights in the Russian Federation, on the basis of among others, the EU’s Democracy Programme and in cooperation with the relevant programmes of the Member States, and support for other forms of cooperation at various levels between the Russian and European opinion-leaders, parliamentarians and representatives of governmental and non-governmental organisations, both at the centre and in the regions
4. continuing to refine and develop its technical assistance programmes, while working towards more effective coordination between donor organisations implementing programmes with the Russian Federation, an in particular to ensure that the new TACIS regulation is adopted in due time, before the end of 1995;
5. working with the Russian Federation to promote European cooperation aimed at ensuring the rational and equitable exploitation of energy resources, within the framework of the European Energy Charter;
6. reconsidering the question of the Russian Federation eventual access to certain of the European Union’s financial instruments, particularly in the context of the Trans-European Networks;
7. continuing to provided humanitarian assistance where necessary;
8. continuing to cooperate with the Russian Federation in the filed of education and training, environmental protection and nuclear safety, industrial cooperation, information technology and telecommunications, transport, science and research;

9. implementation of new information actions to ensure among opinion leaders and public in the Russian Federation a deeper knowledge of the European Union and its concerns.

The measures and programmes evoked by the Commission relate to the *Community* activities in relation to Russia. It is a non-exhaustive list of measures that the Community may take “to contribute to the... objectives and priorities [of the CP]”. It indicates that on these issues, the Community would act on the basis of the “Commission’s initiatives”.

This formulation of the CP implications for the Community, and more particularly with regards to the Commission’s involvement in fulfilling the objectives of the CP, contrasts strikingly with the expression used by the *Council* in the CP on Ukraine, mentioned above. While the Council’s CP contains a short statement establishing what appears to be an obligation of conduct (“the Commission *will* direct its action towards achieving the objectives and priorities” – emphasis added), the Commission’s proposal includes a different formula which tends to emphasise its discretion (“the Community on the basis of the Commission’s initiatives will contribute to the above objectives and priorities”). Through the latter expression, the Commission acknowledges its obligations under Article 3 TEU, to ensure the consistency of the EU external action, but clearly underlines the idea that it does not regard itself as being directly bound by the Council’s measure. The words “initiatives” and “contribute” seem particularly significant in this respect.

To recapitulate, the Common Position establishing the priorities and objectives of the EU towards Ukraine is a global instrument which covers the same grounds as the PCA. It potentially fosters coordination between the EU and the Member States by recalling the latter’s commitments under the PCA. The overlap between the scope of the CP and EC scope of competence however sparked an institutional battle between the Council and Commission, as regards the interface between CFSP measures and the Community legal order. The provisional outcome of the battle, expressed in the *mode d’emploi*, suggests that, in the name of coherence, Common Positions may cover all aspects of the external policy of the Union. However, they may not impose *detailed* obligations on Community institutions which could have the effect of

limiting the discretionary power of the Commission, in breach of the duty to maintain the *acquis*, enshrined in Articles 2 and 47 TEU.

Through this first illustration of the constitutional principles at work, it appears that the quest for coherence allows a certain flexibility as regards the orthodoxy of the decision-making procedures. It confirms that the compartments of the EU vessel are not watertight.

### **5.1.2. The burgeoning of all-encompassing instruments involving the European Council**

Following the entry into force of the TEU, the practice of including references to the different elements of the EU policy towards a third country within the same comprehensive EU foreign policy document became commonplace. Alongside the Common Position on Ukraine, the EU adopted several such measures with the general ambition to develop the Partnerships with Russia and Ukraine. In contrast to the CP on Ukraine however, these measures were not formally based on the provisions of the TEU. They did not therefore openly raise concern about their interface with existing instruments and more generally with the EC legal order. Indeed, it is as if these measures had been elevated above “pillar-politics”. First, they were elaborated through an *ad hoc* interaction between the Council and the Commission, detached from the procedural rules of any specific sub-order. Secondly, they reveal an increased involvement of the European Council, working in tandem with the Council in the conduct of the Partnerships. It will thus be argued that institutional practice has tended to supersede constitutional provisions when it comes to ensuring coherence in external activities of the EU in general, and in the partnerships in particular.

This tendency is apparent both in the 1996 EU Action Plan for Russia (5.1.2.1), and the EU Action Plan on Ukraine, adopted the same year (5.1.2.2).

#### *5.1.2.1. The EU Action Plan for Russia: elevating the Partnership above “pillar-politics”*

A EU Action Plan for Russia, adopted by the Council on 13 May 1996,<sup>566</sup> exemplifies the tendency for EU institutions to adopt *sui generis* measures to define all-encompassing policies towards Ukraine and Russia,<sup>567</sup> thereby developing more pragmatic methods to ensure coherence.

The process leading to the adoption of the AP epitomises the development of ad hoc institutional interactions between the Commission and Council, involving also the European Council. This process started at the end of May 1995 when the Commission published the communication, mentioned in the previous section, and entitled “the European Union and Russia: the future relationship”.<sup>568</sup> It proposed the adoption of a Common Position on the basis of Title V TEU on CFSP,<sup>569</sup> with a view to defining the objectives and priorities of the Union in its relations with the Russian Federation.<sup>570</sup> The Communication points out that it was “announced” at an informal (so-called “*Gymnich*”)<sup>571</sup> meeting of the EU Foreign Ministers in Carcassonne in March 1995.<sup>572</sup> The expression “announced” would tend to suggest that the Commission

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<sup>566</sup> General Affairs Council (1996).

<sup>567</sup> The AP establishes a long list of measures and initiatives under five themes. The first foresees measures that underpin the EU “contribution to Russia’s democratic reforms”, mentioning in particular election monitoring, support for contacts between parliaments, support also for the development of regional and local administration and legal training. The second entitled “economic cooperation” is itself divided in subsections on “development of trade relations and integration of Russia into the international economy”, “regional cooperation”, “nuclear energy and nuclear safety”, “environment”, “modernisation of the production system” and “humanitarian aid”, all foreseeing measures of support and encouragement. Section III focuses on the “cooperation in the field of justice and home affairs”, and foresees actions to combat organised crime, particularly drug-related crime, money laundering, terrorism, actions to combat illegal immigration and cooperation on asylum and readmission policy. The fourth section deals with “security in Europe”, underlining initiatives to develop contacts within the frameworks of existing mechanisms to exchange expertise on disarmament, non proliferation, arms export controls, conflict prevention and management, and “continued promotion of information activities”. Finally, section V deals with “foreign policy” which recommends, inter alia, the strengthening of the political dialogue with Russia, “in accordance with the provisions of the PCA”.

<sup>568</sup> European Commission (1995a).

<sup>569</sup> Further on the Commission’s Strategy, see Haukkala (2001: 28-30).

<sup>570</sup> Part A of the CP.

<sup>571</sup> The name “Gymnich” was given to this informal gathering of the EU Foreign Ministers after the first meeting of this kind held in 1974 in Schloss Gymnich near Bonn, Germany. There is no formal agenda, official press release or conclusions.

spontaneously decided to prepare it. Had it followed a Ministers' invitation, the Commission would probably have mentioned it in the introduction of its Communication.

Such an initiative could be related to the general ambition of EU Member States and institutions to instil a new momentum in the EU relations with Russia following the Union's enlargement, and amid concerns over Russia's political and economic development.<sup>573</sup> In terms of objectives, the communication recommended to deepen and expand the Union's relationship with Russia, with the aim of achieving partnership while respecting democratic principles and human rights. To achieve this aim, three main tasks were set out for the Union, in cooperation with its principal partners. First, the Union was to reinforce the political, social and economic stability in Russia and the countries of the region. Secondly, it had to work towards improving living standards for the Russian population, and thirdly, it had to enhance "cooperation in addressing the major regional and global issues of concern".<sup>574</sup> The

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<sup>572</sup> It has been reported that the Communication sprang from the request from this Carcassonne meeting; see *Euro-East* No 34 – June 1995, 14.

<sup>573</sup> In its introduction, the Communication points out that "it will take many years for Russia to overcome the Soviet legacy, and no certain prediction can be made about the road Russia will follow towards political and economic reform". It also underlines that "it is time that the European Union and Russia recognized their historical vocation as the two principals European powers and in, the common interest, sought to develop the close and mutually enriching partnership" (European Commission, 1995a: 1-2).

<sup>574</sup> Five priorities were envisaged in order to tackle these different tasks. A first priority was to involve Russia further in the development of the European security architecture, with the "overriding aim to avoid new divisions in Europe". A second priority was to develop further the democratic norms, institutions and practices, the respect for human rights, individual liberties and the rule of law. Further progress towards economic reform and encouragement of EU/Russia economic interaction was the third priority, with the aim to ensure Russia's economic liberalisation and establishment of the market economy, while taking account of the need to mitigate the social consequences of economic reform, and its gradual participation into a wider European economic zone of prosperity. A fourth priority was to intensify cooperation in other fields, inter alia the field of crisis prevention and management. The fifth and final priority was to extend open and constructive dialogue at different levels and in various fora, covering all matters of common interest, in particular, security, European integration, support for political and economic reform in the Russian Federation and the prevention and resolution of crises so that the views of the European Union and the Russian Federation are heard in due time and at appropriate level. In this context, the political dialogue was to be developed.

document proposed by the Commission is thus all-encompassing, dealing with foreign and security issues, as well as social and economic reform.

There may also be an institutional rationale underlying this proposal. It is not improbable that the Commission wanted fully to use and exercise the powers bestowed on it by Title V of the TEU, and assert its role in CFSP matters. It is noticeable in this regard that it also published two other communications on the future EU relations with the three Trans-Caucasian Republics<sup>575</sup> and with the Republics of Central Asia.<sup>576</sup> Proposing CFSP measures towards these regions was probably the best way for the Commission to make itself useful.<sup>577</sup> These Communications were presented to the General Affairs Council meeting in June 1995.<sup>578</sup> The latter then instructed the COREPER and the “relevant working group” to examine what it referred to as “major” Communications. The European Council thereafter took “note” of the Commission’s Communication on Russia in its meeting in Cannes, in June 1995.<sup>579</sup> It indeed confirmed the EU commitment to developing the European Union’s relations with Russia, “a process which is essential to the stability of the European continent”. Particularly, it reiterated “the European Union’s resolve to establish a substantive partnership with Russia, *on the basis of the strategy adopted in Carcassonne in March 1995*” (emphasis added). While taking note of the Commission Communication, the European Council thus made it clear that when it comes to the *strategic* orientations of the EU Partnership with Russia, it would turn to the *Ministers* rather than to the Commission.

The Commission Communication was not forgotten however. Having recalled what the Cannes European Council had agreed,<sup>580</sup> the General Affairs Council, meeting in July 1995, pointed out that the Communication had been examined within its services,

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<sup>575</sup> European Commission (1995g).

<sup>576</sup> European Commission (1995f).

<sup>577</sup> See the conclusions of the June 1992 Lisbon European Council (European Council, 1992a) and conclusions of the Brussels extraordinary European Council of 29 October 1993 (European Council, 1993b). Further: Fink-Hooijer (1994: 184), Willaert and Marquéz-Ruiz (1995: 66) and Denza (2002: 95).

<sup>578</sup> General Affairs Council (1995a).

<sup>579</sup> European Council (2000a: pt. II.3).

<sup>580</sup> General Affairs Council (1995b).

but considered it “necessary to study a number of questions in detail in the coming months so as, in due course, to have practical guidelines available for future relations between the European Union and Russia, which *might, if need be*, take the form of a common position” (emphasis added). The Council thereby emphasised the entire discretion it enjoyed as regards the form and expediency of any new instrument.<sup>581</sup> Indeed, the General Affairs Council eventually adopted a “Strategy on EU-Russia Relations”, in November 1995. It is noticeable that the Strategy does not foresee the adoption of a Common Position proposed by the Commission. It is essentially a political text without legal basis, which cannot immediately be related to any of the Union’s pillars. Officially, it finds its origins in the Carcassonne “gymnich” meeting, being thereafter formulated by the General Affairs Council. It was finally endorsed by the European Council in Madrid in December of the same year. Indeed, the European Council “confirmed the *European Union's overall political approach* to its future relations with Russia, *as formulated by the General Affairs Council on 20 November 1995*” (emphasis added).<sup>582</sup> While the Commission proposal was not mentioned at all, the Strategy and the Communication have several common elements which tend to suggest that the latter was not ignored.

It was on the basis of the Strategy that the Council eventually adopted the AP for Russia on 13 May 1996,<sup>583</sup> thereafter “welcomed” by the Florence European Council of June 1996. In the words of the European Council, “[t]his Action Plan... [would] be implemented promptly and efficiently in full cooperation with the Russian authorities.

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<sup>581</sup> The Council added that the meeting of Ministers for Foreign Affairs scheduled for the beginning of September 1995 would enable the Council's conclusions to be supplemented in preparation for the high-level meeting between the EU and Russia on 13 September 1995. It then instructed the COREPER to summarize the proceedings of the various competent bodies and report back in time for its meeting on 2 October 1995. The Council thus suggests that its own services were in really in charge of matter. Then, the GAC took stock of the work done in accordance with its decision of 17 July regarding future relations with Russia. It held an exchange of views in the light of the outcome of the EU-Russia Summit held on 7 September 1995. The Council agreed to adopt its conclusions concerning relations with Russia at its meeting in November (General Affairs Council, 1995c).

<sup>582</sup> European Council (1995b: pt. B), see also Annex 8.

<sup>583</sup> The last point of the Council’s document stipulates that “on the basis of the [Strategy’s] objectives and priorities, the Council [would] decide upon an action-programme, establishing in detail short and long-term measures which could be taken.”

It provides the basis for continuing fruitful cooperation and the strengthening of relations between the European Union and Russia.”<sup>584</sup>

This foregoing description of the process leading to the adoption of the AP hints at the development of ad hoc interactions between the Council, the European Council and the Commission. What is also noticeable is the use of informal instruments, despite the fact that Title V of the TEU on CFSP had just established specific instruments. While they appear to be of a foreign policy nature, it is noteworthy that the Council and European Council decided not to use the instruments provided thereunder, as proposed by the Commission.<sup>585</sup> Rather, *sui generis* instruments with no express legal basis in the Treaty such a strategy and action plan were favoured. This disconnection between the instruments and Title V suggests that the policy towards Russia is extracted from the pillar structure.

5.1.2.2. *The EU Action Plan for Ukraine: embedding the Partnership in a broader political perspective*

Like the Partnership with Russia, the EU Partnership with Ukraine has been supplemented by a variety of non-EC instruments, set out soon after the entry into force of the TEU. In addition to the CP evoked above, an Action Plan was established to identify the priorities for action to develop the EU Partnership with Ukraine. The AP was adopted on 6 December by the General Affairs Council.<sup>586</sup>

Like the AP for Russia, it is an all-encompassing instrument. It identifies the priority actions that the Union can contribute to the process of democratic and economic reform of Ukraine and foster sustainable development in country. Point 5 of the AP stipulates that:

[t]hese actions fall into several broad areas of the relations between the Union and Ukraine

(a) Support for democratic reform and development of civil society

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<sup>584</sup> Declaration by the European Union on Russia, annexed to the Florence European Council Conclusions (European Council, 1996b).

<sup>585</sup> Catherine Flaesch Mouglin (1998: 82) has pointed out the legal uncertainty and the lack of transparency of this type of instrument.

<sup>586</sup> General Affairs Council (1996).

- (b) Support for economic reform, development of trade and economic cooperation
- (c) Reinforcement of political dialogue and support for Ukrainian participation in European security architecture
- (d) Support for regional cooperation
- (e) Consolidation of contractual relations, in particular through the Partnership and Cooperation Agreement
- (f) Reform of the energy sector

On a number of accounts, the AP's objectives mirror those of the PCA,<sup>587</sup> as well as those of the 1994 Common Position. Indeed, the Council expressly referred to them as still "valid".<sup>588</sup> The AP thus built on the previous instruments, drawing in particular on an earlier Commission communication, which proposed the adoption of such an Action Plan.<sup>589</sup> The list of the AP objectives is basically the same as the list of six directions proposed by the Commission to support Ukraine's transformation.<sup>590</sup> Similarly, the concrete actions envisaged to meet the objectives of the AP echo to a large extent the actions advocated by the Commission. The connection with the Commission's document is clearly underlined by the Council itself, which "takes note of and welcomes the Commission's very comprehensive Communication", seen as "a significant contribution to the achievement of the aim of developing relations with Ukraine and also to the elaboration of an Action Plan". The Council adds that it "regards the paper as an important aid and tool to the EU's activities with regard to Ukraine during the upcoming years."<sup>591</sup> As in the case of the AP for Russia, the

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<sup>587</sup> The connection with the PCA is further articulated in pt. 6 of the AP which states that ratification of the Agreement "will establish a new basis for cooperation and partnership. The development of the full potential of the contractual relation provided by the PCA should lead to progressive developments in most areas of economic cooperation and harmonisation of laws. The PCA also represents a framework for sustained cooperation in the key areas of social transformation: education, transport, or of direct concern for the anchoring of Ukraine in Europe: protection of the environment, custom cooperation, control of illegal immigration, drug trafficking and money laundering".

<sup>588</sup> Pt. 2, Introduction, AP.

<sup>589</sup> European Commission (1996a).

<sup>590</sup> See section "EU objectives and actions guidelines" in the Commission's communication (European Commission, 1996a).

<sup>591</sup> Pt. 4, Introduction, AP. In a report on the Commission Communication on an Action Plan for Ukraine, the European Parliament made a more direct connection between the Communication and the Action Plan. On page 12 of its report it states that the AP was "adopted by the Commission on 20 November 1996 (pt 10)... This [AP]... was approved by the General Affairs Council on 6 December 1996" (European Parliament, 1998a).

Commission thus appears to play a significant role in providing the background orientations for the Council's eventual decision. The latter nonetheless retains full control of the expediency of such decision.

The AP for Ukraine was elaborated through ad hoc interactions between the Council and the Commission, and eventually welcomed by the Dublin European Council of December 1996.<sup>592</sup> As with the EU measures adopted in relation to Russia, the AP appears to be elevated above pillar-politics. Indeed, it contains provisions whereby the actions it proposes would need to be developed “through the implementation of *all instruments at the Community and Member State's disposal*, in particular through the maximum possible use of the possibilities afforded by the contractual relations between the Union and Ukraine, including the Interim Agreement. The AP was thus clear that it commits not only the Member States but also the Community and thus the Commission. Indeed, the Commission itself pointed out the transversal character of the Action Plan. It considered in its Communication that:

whilst the Union's strategy with regard to Ukraine constitutes a coherent whole, the legal bases of the concrete initiatives are various. The projects mentioned could give rise to (i) assistance initiatives under the responsibility of the Community, covered by the TACIS regulation, (ii) initiatives under the responsibility of the Community in implementation of the Interim Agreement, (iii) initiatives under joint responsibility in implementation of the PCA when this has been ratified, (iv) initiatives under Titles V and VI of the TEU, (v) initiatives under the exclusive responsibility of the Member States for which the latter will take any decisions.<sup>593</sup>

To recapitulate, since the entry into force of Maastricht Treaty, the EU Partnerships with Russia and Ukraine, established on the basis of the PCAs, have been developed through the adoption of various instruments. In the first place, the Council relied on Title V to supplement the Partnerships, which at times generated tensions between the Commission and the Council on the potential scope of CFSP instruments, and more generally on the interpretation of the constitutional principles governing the interactions between sub-orders of the Union. The institutional battle concerning the effects of the Common Position on the Community legal order is a case in point.

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<sup>592</sup> European Council (1996c).

<sup>593</sup> Section “Available Documents”.

Instruments of a soft law nature were also adopted, as exemplified by the APs on Russia and Ukraine respectively. These instruments were elaborated through interactions between the Council and the Commission acting outside specific Treaty procedures, under the overall supervision of the European Council, which progressively emerges as an important actor in the development of the Partnerships. It may be wondered why such *sui generis* instruments were favoured. First, it could be suggested that the Member States felt it more appropriate and less intrusive in their own foreign policy choices to agree on this type of non-committal instruments. Secondly, it was easier to give them an all-encompassing scope. Had they been based on Title V, they would have to be more restricted and perhaps more contentious. The informal character and the comprehensive scope allowed the APs to be elaborated without being determined by pillar-politics.

## **5.2. EU instruments towards Russia and Ukraine post-Amsterdam**

The Treaty of Amsterdam had a profound impact on the system of EU external relations. In the garb of asserting the identity of the Union on the international scene, the treaty introduced a plethora of new devices of EU external relations, predominantly in Title V of the TEU. In particular, it brought in a new instrument labelled “common strategies”, to be adopted by the European Council, with the aim, *inter alia*, to strengthen coherence in EU external relations. This new device was used for the first time in relation to Russia and Ukraine.

It will be argued that the introduction of new CFSP mechanisms strengthened the “pillar” structure established by the TEU<sup>594</sup> which in turn added strain on the coherence of its external action (5.2.1). Indeed, while aimed at promoting integration

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<sup>594</sup> The third EU/Russia Summit, 18 February 1999, pointed out that the entry into force of the Treaty of Amsterdam would “have considerable implications for the development of a Common Foreign and Security Policy.” (EU/Russia Summit, 1999a). The fourth Summit, 22 October 1999, stated: “based on the preparatory work done by the EU Foreign Ministers Troika meeting with Foreign Minister I. Ivanov in Moscow on 7 October, the Parties reached an agreement on measures to enhance EU/Russia political dialogue in order to make it more flexible and efficient. In particular, new possibilities opened up with the development of the CFSP and the appointment of the Secretary General of the EU Council and the High Representative of the CFSP will be considered (EU/Russia Summit, 1999b).

and complementarity of the external activities of the Union, the common strategies towards Russia and Ukraine may themselves be viewed as a source of incoherence in relation to already existing instruments, *inter alia* the PCAs (5.2.2).

### **5.2.1. A plethora of new CFSP devices adding strain on the coherence of EU external activities**

New mechanisms of EU external relations were added to the TEU by the Treaty of Amsterdam, aimed at enhancing efficiency and consistency of the Union's external activities.<sup>595</sup> The most significant changes concerned Title V although changes were also introduced in the EC Treaty.<sup>596</sup> With respect to Title V, the Maastricht provisions were replaced by an entirely revamped set of provisions. The external dimensions of the *EU* did not however replace the external relations of the *EC*. The need to coordinate the two henceforth became more pressing, and contentious, than ever. Three particular devices are worth pointing out in the context of the present discussion: first, the introduction in Title V (and VI) of a procedure to establish EU contractual relations with third countries and international organisations (5.2.1.1); secondly, the creation of a High Representative for CFSP (5.2.1.2) and thirdly, the introduction of “common strategies” (5.2.1.3).

#### *5.2.1.1. Differentiating the EU external contractual relations: the procedure of Article 24 TEU*

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<sup>595</sup> Further: Dashwood (1998a) and des Nerviens (1997).

<sup>596</sup> As regards EC external relations, Art. 113, renumbered 133 EC, was extended by the Treaty of Amsterdam with a fifth paragraph enabling the Council to widen the scope of the CCP to the fields of services and intellectual property not already contained therein, thereby possibly undoing the consequences of Opinion 1/94. Further: Cremona (1999b: 225). Art. 133 was then further amended by the Nice Treaty to include, at least to certain extent, these subject matters within the scope of the CCP (Cremona, 2001b: 61; Grard, 2000: 378-385). In addition, the Treaty of Amsterdam elaborated on the procedural provisions of Art. 228, renumbered Art. 300 EC, to include procedures on the provisional application and suspension of Community external agreements. New provisions were also introduced to determine the procedure for establishing the Community position to be defended in decision making bodies set up by external agreements (Dashwood, 1998a: 1025; des Nerviens, 1997: 804).

Already a bone of contention in the context of the Maastricht Treaty,<sup>597</sup> the issue of granting the Union legal personality was also contentious also during the 1996 Inter-Governmental Conference leading to the Treaty of Amsterdam.<sup>598</sup> Then, the EU Heads of State or Government eventually agreed not to include an express conferral of the international legal personality to the European Union.<sup>599</sup> The Treaty of Amsterdam nonetheless introduced a procedure for negotiating and concluding agreements on behalf of the European Union in the fields covered by Title V and Title VI.

Article 24 TEU provides:

When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them.

The provisions of this Article shall also apply to matters falling under Title VI.<sup>600</sup>

The issue of whether or not this procedure involved an implicit recognition of an international capacity for the European Union has been widely debated.<sup>601</sup> Subsequent institutional practice and the Nice Treaty partly settled the issue. Without being more successful than the previous one on introducing an express reference to the legal personality of the EU, the 2000 IGC revisited the terminology of Article 24 TEU in a sense which supports the view that the EU implicitly has legal personality.<sup>602</sup> In particular, it introduced the possibility that an Article 24-agreement be provisionally

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<sup>597</sup> Federal Constitutional Court Decision Concerning the Maastricht Treaty, 33 I.L.M. 388, 411 (BVerfG 1994). Denza (2002: 162), McLeod *et al.* (1996: 25), Cloos *et al.* (1993).

<sup>598</sup> A text of the Irish Presidency submitted by the Irish Presidency to the European Council in Dublin in December 1996 proposed to establish the legal personality of the EU alongside that of each Community (European Council, 1996a).

<sup>599</sup> Marquardt (2001: 331).

<sup>600</sup> Art. 38 TEU.

<sup>601</sup> Wessel (1997: 109), des Nerviens (1997: 801), Dashwood (1998a: 1019).

<sup>602</sup> Common Market Law Review (2001: 825), Grard (2000: 375-378), Wessel (2000a: 507).

applicable to the whole of the Union, pending ratification in a Member State which has indicated that such ratification is necessary. Moreover, the new provision makes it clear that agreements concluded in accordance with Article 24 TEU are binding on the Union's institutions, including Members of the Council.<sup>603</sup>

The introduction of such a procedure has meant that it is henceforth possible to give an external contractual dimension to Title V and Title VI of the TEU. Consequently, adding non-EC aspects to Community agreements may turn out not to be as necessary as previously. It was suggested in chapter 2 that mixed agreements, such as the PCAs, were used by default as a medium of *EU* external relations, to ensure the projection of the Union as whole. Article 24-agreements have made it possible, at least in principle, to reduce instances of cross-pillar mixity by allowing all provisions relating to Title V and Title VI to be dealt with separately, in specific EU agreements, and severed from mixed agreements.<sup>604</sup> At the same time, it increases the polarisation of the system of EU external relations. In this regard, it is noteworthy that the Commission has resisted the development of Article 24 TEU agreements, promoting instead the use of mixed agreements such as the PCAs, to keep the Community involved in non-EC subject-matters.

5.2.1.2. *Incarnating the polarisation of the system of EU external relations: the High Representative for CFSP*

The increasing importance of the external dimension of the Union, distinct from EC external relations, was also underscored by the creation of the post of High Representative (HR) for CFSP. The rationale behind this creation was to give more visibility to the CFSP. The Treaty of Amsterdam introduced an Article 26 TEU which provides:

The Secretary-General of the Council, High Representative for the common foreign and security policy, shall assist the Council in matters coming within the scope of the common foreign and security policy, in particular through contributing to the formulation, preparation and implementation of policy

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<sup>603</sup> Piris (2000: 27). See also the IGC Legal Adviser's "Comments on the draft amendments to Article 24 TEU" (Intergovernmental Conference, 2000).

<sup>604</sup> Given the Council's interpretation of the scope of the CFSP, the fear has been in the Commission that Art. 24 Agreements could cover the whole breadth of external policy.

decisions, and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties.<sup>605</sup>

The function of the HR is thus combined with that of Secretary-General of the Council. His or her tasks have been to assist the Presidency in charge of representing the Union in CFSP issues. S/he also assists the Council particularly by contributing to the shaping and implementation of the CFSP, with the help of a “policy planning and early warning unit”.<sup>606</sup> Also, s/he leads the political dialogues with third countries under instructions from the Council.

The creation of the post of HR for CFSP undoubtedly enhanced the visibility of the EU foreign policy, based on Title V. However, the post incarnates further institutionalisation of the distinction between the various strands of EU external relations, thereby entrenching pillar-politics in the system. Indeed, the presence of two official EU figures in charge of external policy with no clear division of tasks, and acting within different institutional logics, potentially leads to competition and overlaps, thus increasing the strain on the institutional coherence of the system of EU external relations.

### 5.2.1.3. *Introducing a new CFSP instrument: the common strategy*

In addition to Joint Actions and Common Positions envisaged by the Treaty of Maastricht, the Treaty of Amsterdam foresaw the creation of a new instrument, with the particular aim to foster efficiency in the CFSP, notably by introducing qualified majority voting in this policy area.<sup>607</sup> Article 13 (ex J.3) TEU provides that:

The European Council shall *decide on common strategies* to be implemented by the Union in areas where the Member States have important interests in common” (emphasis added).

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<sup>605</sup> Art. 207(2) EC provides that the HR/SG is appointed by the Council by qualified majority voting.

<sup>606</sup> Marquardt (2001: 331). On the policy Unit, see also Declaration 6 of the Amsterdam Treaty, “on the establishment of a policy planning and early warning unit” within the Secretariat General of the Council.

<sup>607</sup> On the background of the CS, see Haukkala (2001: 33ff).

The Council of the EU shall recommend the Common Strategies (CS) to the European Council,<sup>608</sup> following the principles and general guidelines previously defined by the latter.<sup>609</sup> As pointed out above, the Commission is entitled by the TEU to be “fully associated” with the work carried out in the CFSP. This involvement may include a role in defining and implementing the CS.<sup>610</sup> The European Parliament may equally make recommendations to the Council and it shall also be consulted by the Presidency of the Union on *the main aspects and the basic choices of the CFSP*; its views shall be duly taken into consideration.<sup>611</sup>

While aimed at ensuring coherence, the CSs also epitomised further polarisation in EU external relations. This is well illustrated by the implementation of the first CSs that were adopted in relation to Russia and Ukraine.

### **5.2.2. The Common Strategies on Russia and Ukraine: a limited contribution to furthering coherence**

The adoption of CSs in relation to Russia and Ukraine consolidated the practice of establishing all-encompassing instruments to develop the Partnerships. It also reflects the increasing involvement of the European Council in EU external relations (5.2.2.1). While the aim of the CSs is to foster coherence, their implementation has paradoxically catalysed the fragmentation of the Partnerships (5.2.2.2).

#### *5.2.2.1. A codification of the decision-making role of the European Council in EU external relations*

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<sup>608</sup> Second subpara. of Art. 13(3) TEU.

<sup>609</sup> Art. 13(1) TEU. Marc Maresceau (2004: 181) wrote that the purpose of Art. 13 TEU seemingly was not to create, through the new Common Strategies, a new category of legally binding instrument. Alan Dashwood (1998a: 1019) on the other hand, considers that Art. 13 TEU is a novelty in so far as it endows the European Council with a power to take legally binding decisions. The three CSs that were adopted hitherto were indeed published in the Official Journal of the EU, series Legislation. In hindsight, the *legal* character of the CSs is being confirmed by the Treaty establishing a Constitution for Europe. Art. III-293 talks about “decisions” of the European Council, which are defined as non-legislative act, binding in their entirety (Art. I-33(1), 5<sup>th</sup> subpara. TCE). See further section 6.2.3.2.

<sup>610</sup> Art. 22 (ex J.12) TEU.

<sup>611</sup> Art. 21 (ex J.11) TEU.

The European Council meeting in Cologne decided on the Common Strategy on Russia in June 1999.<sup>612</sup> The CS on Ukraine was adopted at the Helsinki European Council in December same year.<sup>613</sup> Both CSs were established for an initial duration of four years with the possibility of being prolonged, reviewed and if necessary adapted by the European Council, on the recommendation of the Council.<sup>614</sup>

So far as their objectives are concerned, the CSs towards Russia and Ukraine were conceived by the EU, first and foremost, as means to strengthening its “strategic partnership[s]” with the two countries.<sup>615</sup> They are based on the “strategic goals” of the EU and determined by its “vision of the partnership” with respect to each of the two addressees. In the case of Russia, the EU seeks a “stable, open and pluralistic democracy [...], governed by the rule of law and underpinning a prosperous market economy benefiting alike all the people of Russia and of the EU”. In addition, the Union wishes “to maintain European stability promoting global security and responding to the common challenges of the continent through intensified cooperation with Russia”.

As for Ukraine, the Union wants “to contribute to the emergence of a stable, open and pluralistic democracy, governed by the rule of law and underpinning a stable functioning market economy which will benefit all the people of Ukraine; to cooperate with Ukraine in the maintenance of stability and security in Europe and the wider world, also in finding effective responses to common challenges facing the

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<sup>612</sup> European Council (1999a: pt. 78).

<sup>613</sup> European Council (1999c: pt. 56).

<sup>614</sup> They were renewed in 2003 for another year. Common strategy 2003/471/CFSP of the European Council of 20 June 2003 amending Common Strategy 1999/414/CFSP on Russia in order to extend the period of its application (OJ 2003 L157/68); Common Strategy 2003/897/CFSP of the European Council of 12 December 2003 amending Common Strategy 1999/877/CFSP on Ukraine in order to extend the period of its application (OJ 2003 L333/96).

<sup>615</sup> Para. 4 of Part I (“Vision of the EU for its Partnership with Russia”) in the CS on Russia, and the para. 7 of Part I (“Vision of the EU for its Partnership with Ukraine”) in the CS on Ukraine; see also European Council (1999a: pt. 78).

continent”, and finally “to increase economic political and cultural cooperation with Ukraine as well as cooperation in the field of justice and home affairs”.<sup>616</sup>

As provided by the TEU under Title V, the tandem European Council - Council, representing the Member States, had a major role in elaborating the CSs. Already before the entry into force of the Amsterdam Treaty, the Vienna European Council invited the Council, following the latter’s recommendations,<sup>617</sup> to prepare CSs on Russia, Ukraine, the Mediterranean region, as well as on the Western Balkans, on the understanding that the first CS would be on Russia.<sup>618</sup> The recommendations made by the Council underlined that the first CSs “should focus on the neighbouring regions of the EU. Not least in the context of enlargement and the development of the *acquis*; it is there that the EU has the greatest long term common interests and the greatest need for coherence and effectiveness”.<sup>619</sup> The Council underlined that the CSs should add weight and coherence in the external relations of the EU, making full use of all the means and instruments available to it. It thereby underlined its all-encompassing character.

With respect to the procedural arrangements upstream, the report of the Council to the Vienna European Council had pointed out that “the COREPER was to ensure, in conformity with Article 151 of the TEU (sic), that all preparatory bodies contribute in a coordinated manner to the elaboration of these Common Strategies, respecting the decision-making procedures foreseen by the Treaties and in conformity with Article M”.<sup>620</sup> The Vienna report also added that “the Commission would contribute fully to the Council’s work in this context”. As a matter of fact, each presidency associated the Commission to the work, in accordance with the TEU.<sup>621</sup> In particular, its services

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<sup>616</sup> The draft of the CS on Ukraine stated exactly the same “strategic goals” as the one set out in the CS on Russia.

<sup>617</sup> Document submitted to the Vienna European Council, December 1998 (European Council, 1998).

<sup>618</sup> European Council (1998: pt. 74).

<sup>619</sup> Document submitted to the Vienna European Council, December 1998 (European Council, 1998)..

<sup>620</sup> Indeed, the draft CS was introduced on the agenda of the GAC meeting on 17/5/1999 for approbation, after consensus had finally emerged at the level of both the Committee of the Permanent Representatives (COREPER) and the Political Committee (Doc. *Europe* No 7465, 15 May 1999, 8).

<sup>621</sup> The involvement of the European Commission in the drafting of the CSs was confirmed in the course of several interviews the author conducted with members of the legal services of the Council

were solicited on various occasions during the drafting. Moreover, as evoked in the previous section, the Commission had prepared, already before Amsterdam, the draft of a “Common Position on European Union - Russia relations” included in a Communication “on the future relations between the European Union and Russia”.<sup>622</sup> Another Communication containing the draft of “an Action Plan for Ukraine” was presented to the Council in 1996.<sup>623</sup> These texts had an influence on the drafts of the APs on Russia and Ukraine in the mid-nineties. A brief comparison of the provisions of the Commission and Council documents, respectively, provides evidence of this substantive correspondence. Similarly, the provisions of the CSs draw on the previous all-encompassing initiatives.<sup>624</sup>

As to the European Parliament, it had adopted several resolutions,<sup>625</sup> one of which preceded the adoption by the European Council of the CS on Russia. Complaining about the lack of consideration accorded to its work the EP asked, in a recommendation to the Council, to be formally consulted on CSs, arguing that the latter constitute “a basic choice of the CFSP”.<sup>626</sup> It also called for such consultation on

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and of the Commission, respectively.

<sup>622</sup> European Commission (1995a).

<sup>623</sup> European Commission (1996a).

<sup>624</sup> Although there was no EU obligation to discuss the CS with its addressee, it was nonetheless presented to Russian officials during the second EU-Russia Summit on 18 February 1999 (there was also an “exchange of information” on the CS towards Ukraine and on the Ukraine’s strategy of integration with the EU at the EU-Ukraine Summit on 23 July 1999 (EU/Ukraine Summit, 1999: para 4). The same day as it was introduced on the agenda of the GAC of 17 May 1999, the EU briefed Russian authorities on the CS within the Cooperation Council (EU/Russia Cooperation Council, 1999).  
<sup>625</sup> See for instance Report of 12 February 1998 on the Commission Communication “The future of relations between the European Union and Russia” and the Action Plan “The European Union and Russia – the future relationship” (European Parliament, 1998b), Report of 11 February 1998 on the Communication from the Commission to the Council on an Action Plan for Ukraine (European Parliament, 1998a), Report of 19 February 1999 on the Commission Communication “Towards a European Union strategy for relations with the Independent States of Central Asia” (European Parliament, 1999c) and Report of 13 September 1996 on the Commission Communication “Towards a European Union strategy for relations with the Transcaucasian Republics” (European Parliament, 1996).

<sup>626</sup> The EP claimed that “the provisions of Art. J.11 (new Art. 21 TEU), already in the Maastricht Treaty, *have never been applied*, despite [its] repeated calls... notably during the annual debate on the CFSP” (italics added). See Report containing a proposal for a European Parliament recommendation to the Council on the common strategy towards the Russian Federation (European Parliament, 1999b).

CSs to be made “the subject of an inter-institutional agreement which spells out the respective responsibilities and commitment of Parliament, the Commission and the Council (in particular of its Presidency and High Representative for the CFSP)”.<sup>627</sup>

By involving the EU single institutional framework, and through its wide scope, the CSs potentially foster the coherence of EU external activities. Indeed, the CS on Ukraine states that “the EU and its Member States will develop the coordination, coherence and complementarity of all aspects of their policy towards Ukraine. The Union, the Community and its Member States will also work together with and within regional and other organisations and with like-minded partners to meet the objectives set out in the PCA and in this Common Strategy”.<sup>628</sup> In other words, the aim is to promote smooth interactions between the EU, the EC and the Member States.

The granting of decision-making power in external relations to the European Council, “the only institution which has an overall competence covering all Union activities”,<sup>629</sup> is however not unproblematic. The fact that this decision-making power is intrinsically linked to one sub-order, namely Title V, tends to upset the constitutional balance introduced by the TEU. It suggests that CFSP instruments can prevail over EC instruments, a prevalence which sits uncomfortably with the duty to maintain the *acquis communautaire*. Moreover, while having an all-encompassing scope, the CSs have catalysed a fragmented,<sup>630</sup> if not “pillarised” development of the Partnerships, as will be argued below.

#### 5.2.2.2. *A catalyst for the fragmentation of the Partnerships*

The scope of the CSs embraces the whole breadth of EU external relations. In terms of its effects on existing instruments, the CSs recognise that “the core of the relationship between the Union and Russia remains the PCA”<sup>631</sup> and that “the legal

<sup>627</sup> *Ibid.*

<sup>628</sup> Para. 8 of Part I of the CS on Ukraine. Part I of the CS on Russia contains the same provisions except that it refers only to the objectives of the CS but not to “the objectives of the PCA”.

<sup>629</sup> Timmermans (1996: 68).

<sup>630</sup> On fragmentation, see Weatherill (2000), Curtin and Dekker (1999: 83).

<sup>631</sup> Para. 5, Part I of the CS on Russia.

basis of the relationship between the EU and Ukraine is the PCA”.<sup>632</sup> However, both CSs call on the Council, the Commission and the Member States to review, according to their powers and capacities, existing actions, programmes, instruments and policies to ensure their consistency with the CSs.<sup>633</sup> They shall also make full and appropriate use of existing instruments and means, in particular the PCAs, to implement the Strategies.<sup>634</sup> It appears therefore that in adopting CSs, the European Council mobilises *all* existing and future EU instruments and institutions, as well as Member States, to achieve the objectives set out therein.<sup>635</sup> In that sense, the CSs are of a “cross-pillar” nature.<sup>636</sup>

Paradoxically however, the *implementation* of the CSs has seemingly catalysed the fragmentation of the Partnerships.<sup>637</sup> The provisions of the CSs on Russia and Ukraine, respectively, state that they shall be implemented in accordance with the applicable procedures of the Treaties. A Declaration of the European Council attached to both CSs clarifies the procedural aspects of their implementation.<sup>638</sup> It underlines that the

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<sup>632</sup> Para. 7, Part I of the CS on Ukraine.

<sup>633</sup> pt. 41 in “Instruments and Means” of the CS on Ukraine; pt. 2 of “Instruments and Means” in the CS on Russia. Moreover, the CS on Ukraine requires the positions taken by the Community and its Member States in all relevant fora to conform to the CS, see pt. 8 of Part I of the CS on Ukraine. In that sense, the CS on Ukraine goes further than the CS on Russia which obliges only the Member States to conform their positions to the CS in all relevant fora, not the Community; see para. 5 of Part I.

<sup>634</sup> *ibid.*

<sup>635</sup> One may recall that the Council, in its report submitted to the Vienna European Council, pointed out that the CSs should add weight and coherence in the external relations of the EU, making full use of all the means and instruments available to it. It also added that the GAC would be responsible for ensuring coherence in the Common Strategies on all aspects of the EU external relations.

<sup>636</sup> The Finnish Presidency’s Progress Report on the Implementation of the Common Strategy of the EU on Russia and the Presidency Work Plan, submitted to the Helsinki European Council, clearly recognised the “cross-pillar” feature of the CS (European Council, 1999e). In its Report on the CS towards the Russian Federation, the EP considers that “the purpose of the common strategy should be both to add value to the existing partnership and to ensure the coherence and consistency of the EU’s relationship with the Russian Federation, *both within and between each of the pillars of the EU’s activities* (“cross-pillar approach”) (emphasis added)” (European Parliament, 1999a).

<sup>637</sup> Art. 13 TEU provides that the CSs are “implemented by the Union” and adds that the Council takes the decisions necessary for implementing the CS, through instruments such as joint actions and common positions (Art. 23 TEU).

<sup>638</sup> “European Council Declaration on the Common Strategy on Russia” attached to the CS Russia; and “European Council Declaration on the Common Strategy on Ukraine” attached to the CS Ukraine.

Council acts by qualified majority when adopting joint actions, common positions or any other decisions within the scope of Title V of the TEU, on the basis of the CS. However, “acts adopted outside the scope of Title V of the TEU shall continue to be adopted according to the appropriate decision-making procedures provided by the relevant provisions of the Treaties, including the Treaty establishing the European Community and Title VI of the Treaty on European Union” (*italics added*).<sup>639</sup>

For instance, two EU measures adopted to implement the CS on Russia offer a contrasting picture of the contribution of the CS to the overall coherence of the Partnership. The first measure is a Council Joint Action (JA) that was adopted in December 1999, establishing a EU cooperation programme for non-proliferation and disarmament in the Russian Federation.<sup>640</sup> It is based on Article 14 (ex J.4) TEU which is the legal basis for the adoption of Joint Actions, and Article 23 (2) (ex J.13) TEU allowing the use of qualified majority voting within the Council when adopting Joint Actions on the basis of a CS.<sup>641</sup> The JA also conspicuously states in its Preamble that it derives from the CS on Russia. The Programme established by the JA establishes aims at supporting Russia in its efforts towards arms control and disarmament, in line with the “strategic goals” and the “specific initiatives” included in the CS. In addition, the Preamble specifies that the JA also corresponds to the objectives of the PCA, as it promotes “*inter alia* an increasing convergence of Parties’ positions on international issues of mutual concern thus increasing security and stability”.

The combination of these references underlines the ambition of the Council to ensure coherence in the Partnership with Russia. Indeed, the Preamble stressed that the activities covered by the programme would take place in parallel with activities carried out by the EC and the Member States, implying co-ordination to the greatest extent possible to avoid unnecessary duplication. Furthermore, the provisions of the

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<sup>639</sup> Para. 2 of the Declaration.

<sup>640</sup> Council Joint Action 1999/878/CFSP of 17 December 1999 establishing an EU cooperation programme for non-proliferation and disarmament in the Russian Federation (OJ 1999 L331/11).

<sup>641</sup> Art. 23 TEU provides that, by derogation from the rule applying in the field of CFSP, namely decisions being taken by unanimity at the Council, “the Council shall act by qualified majority when adopting joint actions, common positions or taking any other decision on the basis of a common strategy”.

JA underline that the latter is subject to bilateral consultations with Russia and other partners within the framework of existing political meetings, i.e. including within the institutional framework established by the PCA. The JA also recalls the Council and Commission's general obligation to ensure co-ordination between the programme, Community assistance and the bilateral assistance provided by the Member States. Overall, the JA tends to show that the implementation of the CS is done in co-ordination with existing frameworks in order not to impede the coherent development of the Partnership.<sup>642</sup>

A second measure, the EU Action Plan (AP) "on Common Action for the Russian Federation on combating organised crime", was adopted by the Council in 2000 "in fulfilment of the EU Common Strategy on Russia as adopted by the European Council in Cologne".<sup>643</sup> The specificity of the AP is that in principle, it touches upon all three pillars of the Union. It should therefore embody a high level of co-ordination. It is a measure implementing the CS on Russia adopted on the basis of Title V (CFSP),<sup>644</sup> it concerns criminal matters referred to in Article 29 TEU (Title VI, on Police and Judicial Cooperation in Criminal Matters),<sup>645</sup> and also covers issues such as money laundering dealt with in the EC framework.<sup>646</sup>

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<sup>642</sup> This impression is further supported by the subsequent Council CFSP decision implementing the JA. Based on the Joint Action it entrusted the Commission with the task of supervising the proper implementation of the projects envisaged by the Decision (OJ 2001 L180/2).

<sup>643</sup> OJ 2000 C106/5.

<sup>644</sup> Pt. 4 of the "Areas of Action" in the CS on Russia provides that the EU will cooperate with Russia in *inter alia*, fight against organised crime, money laundering and illicit traffic in human beings. Moreover, the "Specific Initiatives" include provisions on fight against organised crime whereby the Union is "proposing to set up a plan focused on common action with Russia to fight against organised, including actions to fight corruption, money laundering, trafficking in drugs, human beings and illegal immigration".

<sup>645</sup> Art. 29 (ex K.1) TEU, para. 2 states that the objective linked to the police and judicial cooperation in criminal matters shall be achieved by "preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud".

<sup>646</sup> Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L166/77) was adopted on the basis of Art. 47(2) (ex 57(2)) EC, included in free movement of persons, services and capital, and Art. 95 (ex 100a) EC, thus dealing with the internal market. At the time of adoption, a new proposal had been prepared by the Commission for a EP and Council Directive amending Council Directive 91/308/EEC (European

It should also be recalled that the AP deals with a subject covered by the fields of cooperation included the PCA. Although the Agreement with Russia does not explicitly mention the concept of “organised crime”, it does contain, provisions on the prevention of illegal activities (Title VIII), drug trafficking (Article 82) and money laundering (Article 81), which, as discussed in chapter 2,<sup>647</sup> relate the judicial cooperation in criminal matters mentioned in Article 29(2) (ex K.1) TEU. Furthermore, the field of Justice and Home Affairs was included from the outset in the PCA work programme approved by the Parties,<sup>648</sup> and has been a key area of cooperation ever since.<sup>649</sup>

To be fair, the AP *mentions* the PCA. Its Preamble “takes into account” the fact that it “entered into force”.<sup>650</sup> It also recalls the “reference” of the PCA to the cooperation against illegal activities including money laundering and drug trafficking, and acknowledges the “work on organised crime undertaken by the relevant sub-committee established under the PCA”.<sup>651</sup>

This being said, the provisions of the AP do not seem to use the PCA as a *basis* for promoting such cooperation. They rather envisage a cooperation based on the third pillar of the TEU as defined by the Amsterdam Treaty, and following “the commitment of the Cologne European Council to set a durable and effective

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Commission, 1999b). Since then: Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ 2001 L344/76).

<sup>647</sup> Section 2.1.2.

<sup>648</sup> See Annex in press releases of the first meetings of the EU-Russia Cooperation Council (1998b), and of the EU-Ukraine Cooperation Council (1998).

<sup>649</sup> It is a recurrent theme of the Cooperation Councils and Summit meetings. Indeed, a specific framework was set up at ministerial level, in the context of the PCAs, to discuss and develop cooperation in the field of JHA; see e.g. Meeting on Justice and Home Affairs between the Troika of the European Union and Ukraine Brussels, 29 March 2004 (EU Troika/Ukraine, 2004b).

<sup>650</sup> Fifth indent, Preamble of the AP.

<sup>651</sup> The Presidency also underlines that concerning cooperation in Justice and Home Affairs, the “PCA Sub-Committee 6 (dealing, inter alia, with fight against crime) is a central common institution for dialogue in this area”. (European Council, 1999e).

cooperation with Russia in the area of Justice and Home Affairs”.<sup>652</sup> In the light of the Tampere European Council, the AP is also conceived as a EU external action contributing to the establishment of an area of freedom, security and justice.<sup>653</sup> Finally, the General Principles (Part III) of the Plan mention that “account should be taken of related work already pursued by *individual Member States or carried out in other international forums* and of the possible need for coordination in that regard” (italics added).

The AP thus introduces a new development in the EU-Russia relations by establishing a specific framework for cooperation in one area of justice and home affairs.<sup>654</sup> It does so by disconnecting the matter from the PCA. In concrete terms, Part D of the AP dealing with the “implementation of the Action Plan” underlines the EU’s ambition “urgently [to] consider the question of developing an agreement under Article 38 TEU with the Russian Federation for the purpose of implementing this Action Plan”.<sup>655</sup> Article 38 TEU, which is the only reference the AP makes to the TEU and more

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<sup>652</sup> Before any reference to the PCA, the Preamble of the AP refers to the Common Strategy on Russia endorsed by the 1999 Cologne European Council and to Russia’s “Medium-term strategy for development of relations between the Russian Federation and the EU (2000 to 2010)” (Russian Federation, 1999), then to the Union’s Action Plan on organised crime (Council, 1997), endorsed by the Amsterdam European Council in 1997 and to the EU drug strategy (2000-2004) (Council, 1999), endorsed by the Helsinki European Council in 1999.

<sup>653</sup> The AP refers to para. 56 of the Conclusions of the Tampere European Council, requiring “all competences and instruments, particularly external relations to be used in an *integrated and consistent way* to build an area of freedom, security and justice” (italics added) (European Council, 1999b).

<sup>654</sup> The JHA Action Plan on organised crime was drafted by the DG JHA in the Council Secretariat General, without coordination with DG External Relations (interviews, Council legal service).

<sup>655</sup> The overall approach follows the “Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice”, adopted by the Justice and Home Affairs Council of 3 December 1998 (Council, 1998a). Part E of the Plan’s introductory part states that “the advances introduced by the Amsterdam Treaty will also enhance the Union’s role as a player and partner on the international stage (...), this external aspect of the Union’s action can be expected to take on a new and more demanding dimension. Full use will need to be made of new instruments available under the Treaty (...). In those subjects which remain in Title VI of the TEU, the Union can also make use of the possibility for the Council to conclude international agreements in matters relating to Title VI of the Treaty, as well as for the Presidency, assisted by the General Secretariat of the Council and in full association with the Commission, to represent the Union in these areas”.

precisely to Title VI, provides for the possibility to conclude EU agreements, with one or more states or international organisations in the framework of Title VI, by reference to the new mechanism of Article 24 (Title V) TEU.<sup>656</sup>

The implementation of the AP, as foreseen therein, illustrates that following the Amsterdam Treaty and catalysed by the CS, the distinct modes of decision-making of the EU pillars have further penetrated the Partnership with Russia. While the CS may have created a new momentum for strengthening the Partnership when it was adopted,<sup>657</sup> it however had a limited added value in terms of enhancing coherence in the EU relations with Russia and Ukraine,<sup>658</sup> fostering instead fragmentation of the Partnerships.

### **5.3. Conclusion**

The adoption of additional instruments to further the Partnerships has at times proven to be problematic, particularly in view of the constitutional principles underpinning the interaction between the EU sub-orders. A case in point is the Common Position on Ukraine which sparked tension between the Council and the Commission as to the scope of CFSP instruments and their impact on the EC legal order. Arguably, this tension is intrinsic in the constitutional order established by the TEU. In this context, the Action Plans may be interpreted as a pragmatic response to pillar politics. In particular the APs foreshadow the enhanced role of the European Council as guarantor of coherence, alongside institutions constitutionally endowed with this task.

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<sup>656</sup> See above, section 5.2.1.1.

<sup>657</sup> In a speech given on 29 May 2000 at Maly Manege in Moscow, Romano Prodi, President of the Commission, explained why the CS had been adopted: “It was essential to bring our partnership into line with the new emerging dimensions of the EU – the introduction of the Euro and the significant headway made in the fields of Justice and Home Affairs and of our Common Foreign and Security Policy. Russia was the obvious choice for our very first Common Strategy, which is a new foreign policy tool under the Amsterdam Treaty” (Prodi, 2000).

<sup>658</sup> The CS, as instrument, has been strongly criticised, particularly by the High Representative for CFSP Javier Solana (High Representative for CFSP, 2000). See also the criticism of the CS by the UK government as exposed in the Twenty-Seventh Report of the House of Commons Select Committee on European Scrutiny (House of Commons (2003). Further: Maresceau (2004), Pernice and Thym (2002: 375), de Spiegeleire (2001: 81).

Institutional practice thus tended to supersede constitutional provisions in the quest for coherence in the development of the Partnerships.

The Treaty of Amsterdam codified the strengthened role of the European Council in EU external relations, but paradoxically by granting it a decision making power in the CFSP title. Moreover, it brought about several new mechanisms which developed the non-EC external dimensions of the EU and further entrenched the polarisation in the system of EU external relations. Given this new constitutional context, the quest for coherence has become an uphill battle which the common strategies, introduced as device for coherence, coordination and complementarity, only partly managed to address.

## CHAPTER 6

### THE PARTNERSHIPS AFTER ENLARGEMENT: TOWARDS AN INTEGRATED FORMULA OF EU EXTERNAL ACTION

While the EU Partnerships with Russia and Ukraine have evolved as a result of Treaty changes, and ensuing institutional practice, they have also been affected by the decision of the Union to enlarge to central, eastern and southern Europe. In particular, it meant that the PCAs had to be “enlarged” to the new Member States, in the sense that the latter had to become parties to the Agreements,<sup>659</sup> alongside the other Member States.<sup>660</sup> Furthermore, the new Member States now have direct influence on the elaboration of the EU external relations, including on the development of the EU Partnerships with Russia and Ukraine, which are the direct neighbours of many of the newcomers.<sup>661</sup> Indeed, enlargement has entailed the establishment of new EU eastern borders with Russia and Ukraine,<sup>662</sup> which has notably complicated the transit of persons and goods between the Russian *Oblast* of Kaliningrad and mainland Russia,<sup>663</sup> and included Russian-speaking minorities within the European Union.<sup>664</sup> The Russian

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<sup>659</sup> Art. 6 of the Act of Accession 2003 (OJ 2003 L236/33). See also Protocol on the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States on the one part and the Russian Federation on the other part to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union (Council, 2004). Further: Hillion (2004c: 607).

<sup>660</sup> If need be, the new Member States also had to adjust the international agreements they may have concluded with Russia and Ukraine prior to their accession; Case 812/79 *Burgoa*; Case C-62/98 *Commission v Portugal*; Case C-84/98 *Commission v Portugal*. On the external implications of enlargement, see in particular Cremona (2003b) and Hillion (2002b).

<sup>661</sup> Sjursen (1998).

<sup>662</sup> For an overview of the issue, see Amato and Batt (1999), Grabbe (2000), Anderson and Bort (2001: ch. 6), Hill (2000).

<sup>663</sup> See e.g. Vinokurov (2004), van Elsuwege (2002a), Fairlie and Sergounin (2001), also the various contributions in Baxendale *et al* (2000).

<sup>664</sup> Further: van Elsuwege (2004), Hillion (2004a), Minority Rights Group (2003), Open Society Institute (2002), Dorodnova (2000).

and Ukrainian authorities have also pointed out the potentially negative repercussions of accession on their trade relations with the CEECs.<sup>665</sup>

These multifarious implications which highlight that the Partnerships and enlargement are intimately linked,<sup>666</sup> have made it more pressing for the EU to tackle the external effects of its own expansion.<sup>667</sup> It is in this context that the Union has set out to develop a new global policy towards its neighbours, in the shape of a European Neighbourhood Policy with respect to Ukraine, and the establishment of “Common Spaces” with Russia. These initiatives are to some extent based on the same premises, in that they both find their *raison d’être* in the Union expansion to central and eastern Europe. More significantly, the modalities of such initiatives are inspired by the specific *methodology* of the EU enlargement policy.<sup>668</sup>

Enlargement policy is *par excellence* an EU policy, in that it encompasses all the Union’s substantive and institutional facets. As such, it constitutes an instructive precedent of institutional and substantive coherence in the conduct of a EU policy in relation to third parties. In this chapter, it will be argued that some elements of this policy are being transplanted to the context of the Partnerships, with the potential effect that the polarisation highlighted in the previous chapter could be overcome (6.1). This trend towards better substantive and institutional coherence in the conduct of the EU external action, as lately evidenced by the Partnerships, appears to be consolidated by the provisions of the Treaty establishing a Constitution for Europe, signed in Rome in October 2004 (6.2).<sup>669</sup>

### **6.1. EU enlargement policy: a model for integrating the Partnerships**

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<sup>665</sup> “Chernomyrdin says EU enlargement must not damage Russia” *Interfax News Agency*, 23/1/1998. Closer to the actual accession of ten new states, the Russian authorities sent to the EU a list of 14 concerns related to the trade and economic, as well as political implications of enlargement; *Financial Times*, 2/2/2004; *EUobserver*, 4/2/2004. See in this regard, Winters (2000).

<sup>666</sup> Maresceau (2001: 21).

<sup>667</sup> Dehaene (2001), Reflection Group IGC 1996 (1995), Maresceau (2004: 216).

<sup>668</sup> On the concept of enlargement “policy”, see Hillion (2004b: 13).

<sup>669</sup> Treaty establishing a Constitution for Europe (OJ 2004 C310).

Through enlargement, the EU projects itself as a whole, and the state that aspires to become member of the Union has to embrace it as such, in the sense of accepting the EU norms and principles in their entirety. Indeed, the development of mechanisms to ascertain that the candidates *fully* take on the EU *acquis* is one of the many specificities of the Union's enlargement to the east. Through a sophisticated policy, the so-called "pre-accession strategy" (6.1.1), the EU has closely monitored the accession preparation of candidates. Perceived as a successful policy, the institutional routines which were established in the context of this pre-accession seem progressively to penetrate the system of EU external relations, as evidenced in the latest developments of the Partnerships with Russia and Ukraine (6.1.2).

#### **6.1.1. The pre-accession methodology: the promotion of a fully integrated EU on the international plane**

The pre-accession methodology consists of two key elements. In the first place, it involves the promotion of the *EU acquis* as a whole towards the candidates, through a system of conditionality (6.1.1.1). Secondly, it entails novel interactions between EU institutions in the conduct of a policy which is addressed to third countries, namely the candidate states (6.1.1.2).

##### *6.1.1.1. The promotion of the *acquis* as a whole towards third states*

The Treaty provisions concerning accession are rather meagre. Article 49(1) TEU states that:

Any European State which respects the principles set out in Article 6(1) may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

In order to be eligible, a state has to meet two constitutional conditions. First, it must be a European state<sup>670</sup> and secondly, it must respect the political principles set out in Article 6(1) TEU.<sup>671</sup>

In practice, accession to the European Union is also subject to the acceptance of the *acquis communautaire* by the candidate.<sup>672</sup> While it has always been a prerequisite for accession,<sup>673</sup> acceptance of the *acquis* was particularly accentuated in the context of the accession of the CEECs. The 1993 Copenhagen European Council which defined the so-called “Copenhagen [accession] criteria” insisted on the obligation of the candidates “to take on the obligations of membership including adherence to the aims of political, economic and monetary union”.<sup>674</sup> Although the requirement has been understood as the candidate’s acceptance of the *acquis communautaire*, it however relates more broadly to the *whole corpus* of the Union’s norms and aims. The applicant state should not only accept and be ready to observe EC rules, it should also take on the provisions of the other sub-orders of the EU, namely CFSP principles and measures, as well as all the norms related to the JHA/PJCCM.

It becomes apparent that the division of the EU in sub-orders does not matter in the accession process. The latter is all-encompassing by definition. Indeed, the place of Article 49 TEU in the system of the Treaty, namely under the Final Provisions of the TEU, suggests that it is not directly connected to any specific EU sub-order. It rather belongs to its “pediment”, like other common and final provisions of the TEU concerning e.g. the Union’s obligation to respect fundamental rights, or the procedure to revise the TEU.

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<sup>670</sup> On the definition of “European”, see the Commission report to the 1992 Lisbon European Council European Commission (1992e: 11).

<sup>671</sup> According to Article 6(1) TEU: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. Further: de Witte and Toggenburg (2004: 59).

<sup>672</sup> On accession conditionality: Cremona (2001a), Hoffmeister (2002: 90-91), Smith (2003: 105).

<sup>673</sup> The Hague Conference of the Heads of State or Government, Dec. 1969, Bull. EEC 1/1970, 16. Preston (1995: 452).

<sup>674</sup> Hillion (2004b: 3).

The comprehensive character of the enlargement policy has been further articulated by the “pre-accession strategy”.<sup>675</sup> The latter was launched by the Essen European Council with a view to ensuring that the candidates would be as prepared as possible to enter the Union.<sup>676</sup> Various mechanisms were put in place by the EU institutions to support and guide the adaptation of the candidates to the requirements of membership. To start with, the Europe Agreements were turned into full pre-accession instruments. Such political “re-orientation” of the EAs led notably to a hardening of their provisions on legal approximation,<sup>677</sup> while the institutional system they set up became instrumental to the management of the pre-accession strategy.<sup>678</sup> The European Council also agreed to consolidate the political dialogue with the candidates in the form of a “structured dialogue”, to allow the candidates to become progressively familiar with the various activities of the Union.<sup>679</sup> The pre-accession strategy thus widened and deepened the existing relationships between the Union and the CEECs, based on the EAs, progressively to encompass the whole range of EU activities.<sup>680</sup>

Consolidated after the Commission had rendered its first Opinions on the CEECs’ applications for membership,<sup>681</sup> the pre-accession strategy, re-branded “enhanced pre-accession strategy”,<sup>682</sup> relied particularly on a new instrument, the “Accession Partnership” (AP).<sup>683</sup> Adopted as a Council regulation based on Article 308 EC, the

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<sup>675</sup> For an exhaustive analysis of the pre-accession strategy, see Maresceau (2001: 3, 2003: 9).

<sup>676</sup> The Conclusions of the 1994 Essen European Council state that: “The European Council has decided on a comprehensive strategy submitted by the Council and the Commission at the request of the European Council in Corfu for preparing these countries for accession to the European Union”. Annex IV of the conclusions contained the Report from the Council on a strategy to prepare for the accession of the associated Central and Eastern European countries (European Council, 1994b).

<sup>677</sup> Inglis (2000: 1173)

<sup>678</sup> Maresceau (2003: 17).

<sup>679</sup> Maresceau (2003: 20), Lippert and Becker (1998: 341).

<sup>680</sup> As countries associated to the Community, the CEECs already took part, at least to a certain extent, in the Community system, Case 12/86 *Demirel*, para. 9, see discussion in chapter 1.

<sup>681</sup> European Commission (1997a).

<sup>682</sup> Reinforcing the pre-accession strategy was articulated by the European Commission (1997a) in its Agenda 2000, see pt III.2 of Part II “The challenge of enlargement”.

<sup>683</sup> Council Regulation No 622/98 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships (OJ 1998 L85/1).

AP established a system whereby the adaptation of the candidates to all *EU* standards was guided, monitored and assessed by the EU institutions.<sup>684</sup> Indeed, the Justice and Home Affairs dimension was particularly prominent in this enhanced strategy.<sup>685</sup>

The all-embracing feature of the pre-accession strategy is further underscored by the EU monitoring of the progress made by the applicant to meet the Copenhagen criteria. The Commission evaluated each candidate's progress in meeting the various objectives and priorities set out in the APs, including in non-EC areas. Its findings were recorded in Annual Reports, whose scope equally goes well beyond EC law.<sup>686</sup> For instance, the Commission 2000 Report on Poland contained a section on the ability of the candidate to assume the obligations of Membership. It includes an assessment of Poland's progress in aligning itself to the requirements of EC competition law, to the standards of EU cooperation in the field of justice and home affairs, or to the EU foreign and security policy.<sup>687</sup> In other words, the pre-accession strategy transcends the boundaries of EC law.<sup>688</sup>

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<sup>684</sup> On Accession Partnership, see Grabbe (1999), Inglis (2002: 103), Raux (2001: 42), Hillion (1998b, 2002a: 416).

<sup>685</sup> The 1999 Accession partnership with Poland (European Commission, 1999a) contained among the "short term" priorities and intermediate objectives, (section 4.2) a sub-section on Justice and Home Affairs according to which Poland had to:

– adopt and implement national integrated inter-agency border management strategy with particular attention to the budgetary requirements of the Eastern Border.

– strengthen national co-ordination body for all law enforcement services at central, regional and local level.

– upgrade institutional capacity regarding the fight against organised crime and drug trafficking.

– implement an anti-corruption and anti-fraud programme (particularly customs service, police and judiciary); strengthen capacities to deal with money laundering; ratify the Council of Europe 1990 Convention on Laundering Search, Seizure and Confiscation of the proceeds of Crime, the European Criminal Convention on Corruption and the OECD Convention on Bribery."

<sup>686</sup> Maresceau (2003: 32).

<sup>687</sup> Regular Report from the Commission on Poland's progress towards accession, 8 Nov. 2000 (European Commission, 2000c).

<sup>688</sup> Indeed the pre-accession strategy goes well beyond the Commission 1995 White paper on the integration of the CEECs into the internal market of the Union which laid down a specific programme of legal approximation (European Commission, 1995h). Further: Gaudissart and Sinnaeve (1997: 41).

Finally, the comprehensive nature of the enlargement process is evidenced by the accession *negotiations*.<sup>689</sup> The Union's *acquis* was divided in 31 chapters, and negotiations took place chapter by chapter, following similar arrangements, irrespective of the Community or non-Community character of the matter. For instance, chapter one concerned the free movement of goods, chapter 24 was about the cooperation in the field of justice and home affairs, while chapter 27 dealt with the common foreign and security policy. Each and every chapter was negotiated in the same overall framework. indeed, leading to one single and comprehensive Treaty of accession to the European Union.<sup>690</sup>

6.1.1.2. *A methodology based on an integrated functioning of the EU institutional framework*

While the whole body of EU norms is projected towards the candidate states, irrespective of the distinction between sub-orders, the methodology underlying this projection involved novel interactions between the EU institutions. Such interactions are noticeable in that they seem less determined by pillar-politics than in the “normal” functioning of the EU, as particularly evidenced by the last chapter.

In principle, the enlargement procedure, as established by the Treaty, only foresees a limited contribution from the institutions. According to Article 49 TEU:

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<sup>689</sup> <http://www.europa.eu.int/comm/enlargement/negotiations/index.htm>

<sup>690</sup> See e.g. Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union” (OJ 2003 L236).

... [the candidate] shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. The agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.<sup>691</sup>

In practice however, institutions have played significant roles, particularly the Commission and the European Council, working in tandem with the Council. The involvement of these institutions involvement has developed in an incremental fashion, through ad hoc arrangements. It has evolved in consideration of the particular needs of the process, and to a great extent *outside* Treaty provisions. The new interactions between the institutions are apparent in the elaboration of the accession conditions, the establishment and management of the pre-accession strategy, and the accession negotiations.

The development of additional institutional arrangements started at the level of the definition of the accession criteria, in particular at the Copenhagen European Council in 1993. The Heads of State or Government, together with the President of the Commission, established the so-called Copenhagen criteria, following earlier suggestions from the European Commission.<sup>692</sup> Thereby, the European Council supplemented the general provisions of Article 49 TEU and refined the constitutional framework for enlarging the European Union. It further elaborated these conditions, notably at its meetings in Madrid in 1995, and in Helsinki in 1999.<sup>693</sup> The European Council thus established itself, as the key player in defining, with the help of the Commission,<sup>694</sup> the overall framework for conducting the enlargement policy.

Indeed, following the formulation of the accession criteria, the European Council endorsed the pre-accession strategy at its Essen meeting, previously adopted by the Council on the basis of a Commission's proposal.<sup>695</sup> This strategy not only involved

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<sup>691</sup> Case 93/75 *Mattheus v Doego*.

<sup>692</sup> Mayhew (1997: 25); Smith (1999: 113), Maresceau (2005).

<sup>693</sup> Hillion (2004b: 17).

<sup>694</sup> Maresceau (2005).

<sup>695</sup> European Council (1994b).

the projection of the whole body of EU norms, as pointed out above, it also entailed the establishment of an institutional cooperation between the Commission, the Council and European Council in the definition of the enlargement policy and its management, through a system of compliance control and sanctions.<sup>696</sup>

A case in point is the management of the Accession Partnership. As evoked above, the AP endowed the Commission with a remarkable power to monitor the preparation for membership of the applicant states. In particular, on the basis of the AP regulation, the Commission drafted individual accession partnerships, in consultation with each the candidates, containing a list of principles, priorities, intermediate objectives and conditions on which the adaptation of the candidate should focus to meet the Copenhagen criteria. The accession partnerships were then presented to the Council for adoption by qualified majority voting, and then to the candidates, in the context of the institutional framework of the EAs.<sup>697</sup> On the request of the European Council,<sup>698</sup> the Commission produced detailed evaluations on each candidate's performance in implementing the APs, through the publication of annual reports. This regular reporting on candidates' progress contrasts with previous accession procedures in which only *two* opinions were given by the Commission on the membership application of third European states. Furthermore, it is noticeable that the Commission provided an assessment of the progress of the candidates in meeting *all* the Copenhagen accession criteria, including the political conditions, such as protection of minorities.<sup>699</sup> Thereby, the Commission, with the political blessing of the European

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<sup>696</sup> Having established the criteria, the 1993 Copenhagen European Council declared that it would "continue to follow closely progress in each associated country towards fulfilling the conditions of accession to the Union and draw the appropriate conclusions" (European Council, 1993a).

<sup>697</sup> Art. 2 of Council Regulation 622/98 (OJ 1998 L85/1).

<sup>698</sup> The 1997 Luxembourg European Council decided that "[f]rom the end of 1998, the Commission will make regular reports to the Council, together with any necessary recommendations for opening bilateral intergovernmental conferences, reviewing the progress of each Central and Eastern European applicant State towards accession in the light of the Copenhagen criteria, in particular the rate at which it is adopting the Union *acquis* ... The Commission's reports will serve as the basis for taking, in the Council context, the necessary decisions on the conduct of the accession negotiations or their extension to other applicants. In that context, the Commission will continue to follow the method adopted by Agenda 2000 in evaluating applicant States' ability to meet the economic criteria and fulfil the obligations deriving from accession" (European Council, 1997b: pt. 29).

Council, was granted a pivotal function as a “screening actor” on behalf of the *Union*.<sup>700</sup> By promoting and controlling the progressive application of the wider *Union’s* *acquis* in relation to potential future members, it acted well beyond its traditional role of “guardian of the [EC] Treaty” vis-à-vis the current Member States.<sup>701</sup> On the basis of the Commission annual reports, the Council determined the pace of negotiations, and the allocation of pre-accession financial assistance. Indeed, the accession partnership established a system whereby the Council, on a proposal from the Commission, could *review* the pre-accession financial assistance, if progress in meeting the Copenhagen criteria was found insufficient.<sup>702</sup> The Council then reported to the European Council, acting as the final political arbiter.<sup>703</sup>

Summing up, the management of the accession partnership exemplifies the development of new roles for the institutions, and new forms of interactions between them. In the framework of the EU enlargement policy, the Commission has become *de facto* the guardian and promoter of the EU *acquis vis-à-vis* the candidate states, and a monitor of the latter’s progress in observing the *acquis*. As to the Council, it decides, on the basis of the Commission’s assessment, the development of the policy. It is also empowered to sanction deficiencies in the adaptation process of the candidates. Doing so, it works in tandem with the European Council, which acts as

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<sup>699</sup> As regards more particularly the scrutiny of the political conditionality, see Williams (2000: 609), Smith (2003: 105).

<sup>700</sup> Everson and Krenzler (1998), esp. section III. 1. On the “screening” process, see Maresceau (2003: 30).

<sup>701</sup> The Commission also supervises the progress made by the candidate in adopting the *acquis* in Justice and Home Affairs, and CFSP; see chapters 24 and 27 of the regular reports for each candidate country.

<sup>702</sup> Art. 4 of Council Regulation 622/98.

<sup>703</sup> For instance, at its meeting on 9 November 1998, the General Affairs Council, “took note of a presentation by the Commission of its first regular reports on progress towards accession by Cyprus, the ten candidate States of Central and Eastern Europe, and Turkey, in line with the conclusions of the European Council at its meetings in Luxembourg and Cardiff. In a broad exchange of views, Ministers made preliminary comments on the Commission’s progress reports. The Council asked the Permanent Representatives Committee to examine the documents submitted by the Commission and to present a report to the Council for its meeting on 7 December 1998, with a view to preparing the Vienna European Council” (General Affairs Council, 1998b).

the ultimate judge on the pace of the accession process, on behalf of the Member States.<sup>704</sup>

The involvement of the EU institutional framework in the enlargement policy has also materialised at the level of accession *negotiations*. While the Treaty provisions suggest that the process essentially concerns the Member States, on the one hand, and the applicant state, on the other, in practice institutions have been directly involved in the conduct of these negotiations. To start with, the common position presented by the Presidency in accession conferences, was first unanimously agreed within the General Affairs Council, on the basis of drafts prepared by the Commission on each of the 31 chapters,<sup>705</sup> for each of the candidates.<sup>706</sup>

Another illustration of the institutions' role in accession negotiations is the establishment of so-called "roadmaps". Based on a Commission "enlargement strategy paper",<sup>707</sup> the roadmaps were devised to speed up accession negotiations. They were welcomed by the Council, as "a framework, which is both ambitious and realistic, for continuing accession negotiations",<sup>708</sup> and "a frame of reference which reflect[ed] the Union's commitment, for its part, to tackling problems raised by the negotiations, including requests for transitional arrangements, and to adopting negotiating positions on chapters of the *acquis* based on a given timetable, with a view to the provisional closure of the various chapters once the conditions are met". The European Council, meeting in Nice, thereafter "endorsed" the Council conclusions.<sup>709</sup> It thus appears that the cooperation between the Commission – Council – European Council was pivotal in determining the *framework* of negotiations, on behalf of the Member States.<sup>710</sup>

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<sup>704</sup> Maresceau (2001: 3).

<sup>705</sup> See the Guide to the Negotiations prepared by the Directorate General Enlargement (DG Enlargement 2004), Maurer (2002: 113), Brandtner (2002).

<sup>706</sup> Indeed, the accession process and the definition of common positions are closely related to the pre-accession strategy, in so far as progress in implementing the AP determines the pace of negotiations, as reflected in the annual progress reports prepared by the Commission.

<sup>707</sup> European Commission (2000b). Further: Maurer (2002: 126).

<sup>708</sup> General Affairs Council (2000b).

<sup>709</sup> See conclusions of the Nice European Council (European Council, 2000b).

<sup>710</sup> Further on this involvement: Puissochet (1974).

Moreover, the Commission maintained close contacts with the candidate countries to envisage solutions to problems arisen in the context of accession negotiations. The Directorate General for Enlargement was particularly active in this regard. Also, the Secretariat General of the Council provided secretarial support of the negotiations on the EU side. The European Parliament was kept informed,<sup>711</sup> and made its views known through the adoption of regular reports following the Commission annual progress assessment of the candidates. Indeed, its views could not be ignored in practice, considering that it has to give its assent to the eventual Accession Treaty.<sup>712</sup>

The foregoing illustrates that the EU enlargement policy involves a close cooperation among the institutions of the European Union, and between the institutions and the Member States. As demonstrated above, such cooperation is clearly visible at the level of the definition of accession conditions, the establishment of the specific framework to guide their fulfilment by the candidates, and also at the level of accession negotiations.

More generally, the EU enlargement process entails the projection, and eventually the expansion of the Union order in its entirety, with no distinction between its sub-orders. Accession is a package deal, and the candidates have to accept the Union's *acquis* as a whole. Candidates' adaptation and accession negotiations are not segmented in terms of inter-governmental/Community aspects. Such a projection is managed and monitored through an integrated cooperation between the institutions. As a result, there does not seem to be competition between different instruments, or between the different institutions, as appears in the context of the Partnerships, particularly post-Amsterdam, as suggested in the last chapter.

Put differently, the enlargement process is underpinned by a high level of coordination among EU sub-orders. Enlargement involves, a *de facto modus vivendi* for conducting what is essentially an *EU* policy in relation to third states, even though the latter are destined to enter the Union. As such the conduct of enlargement may be

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<sup>711</sup> <http://www.europa.eu.int/comm/enlargement/negotiations/index.htm>

<sup>712</sup> OJ 2003 L236.

attractive as a model for an integrated conduct of EU external policies in general, and of the Partnerships in particular.

### **6.1.2. A methodology penetrating the Partnerships with Russia and Ukraine**

The enlargement methodology has inspired developments in other spheres of EU external relations,<sup>713</sup> in particular the EU relations towards its neighbours.<sup>714</sup> In the case of Russia, the Union aims at developing the concept of “common spaces” (6.1.2.2), while Ukraine is included in a wider “European Neighbourhood Policy” (6.1.2.1).

#### *6.1.2.1. Fostering the integration of the Partnership with Ukraine through the European Neighbourhood Policy*

The methodology of the enlargement policy appears to have penetrated the EU partnership with Ukraine, through the emerging European Neighbourhood Policy of the Union. The latter embeds the PCA in a new policy framework, which involves the key characteristics of the pre-accession strategy, notably the all-encompassing projection of the European Union towards the neighbours, underpinned by an integrated and “de-pillarised” participation of the EU institutions.

Before turning to the substantive and institutional implications of the ENP for the Partnership, its origins and objectives should be briefly recalled. For present purposes, suffice to note that, following the 2002 Copenhagen European Council,<sup>715</sup> the Commission published a policy paper on “Wider Europe”<sup>716</sup> which launched the

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<sup>713</sup> See for instance the development of the relations with the western Balkans: Pippan (2004), Cremona (2000).

<sup>714</sup> Indeed the enlargement policy has been regarded as “the most successful act of foreign policy that the EU has ever made” (Kok, 2003). For commentary on these views, see Cremona (2004a).

<sup>715</sup> Conclusions Copenhagen European Council, 12-13 December 2002 (European Council, 2002).

<sup>716</sup> European Commission (2003b). It followed a seminal speech by then Commission President Prodi “A Wider Europe - A Proximity Policy as the key to stability”, given at the Sixth ECSA-World Conference, Brussels, 5-6 December 2002 (Prodi, 2002). It itself follows various initiatives developed

“European Neighbourhood Policy”. Further articulated in a Strategy Paper of 2004,<sup>717</sup> this new framework policy covers the countries on the eastern and the southern borders of the enlarged EU,<sup>718</sup> and aims at drawing them into an increasingly close relationship with the Union, offering them “the chance to participate in various EU activities, through greater cooperation on political, security, and economic issues as well as culture and education”.<sup>719</sup> In the east, this policy framework covers *inter alia* Ukraine, Russia being treated differently.<sup>720</sup>

Although not designed to prepare membership, the ENP implants key features of the enlargement *methodology* in the context of the Partnership. In effect, to paraphrase Maresceau and Montaguti,<sup>721</sup> it sparks a “political re-orientation” of the Partnership. Without being formally renegotiated, the terms of the Agreement have been further articulated to fit in the overall policy framework set out by the ENP. The latter also relies on the institutional framework established by the PCA in the conduct and management of the new policy, while involving the ad hoc institutional arrangements specific to the pre-accession strategy. In methodological terms, the ENP thus has an impact on the Partnership which mirrors the implications that the pre-accession strategy had on the EAs with the CEECs.<sup>722</sup>

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in relations to the neighbours, involving both the Commission and the SG/HR for CFSP. The General Affairs Council had already made suggestions to promote the establishment of new links with the neighbours, followed by a joint letter of HR for CSFP Solana and Commissioner Patten addressed to the Danish Presidency ([http://www.europa.eu.int/comm/world/enp/pdf/\\_0130163334\\_001\\_en.pdf](http://www.europa.eu.int/comm/world/enp/pdf/_0130163334_001_en.pdf)).

On the background of the ENP, see Cremona (2004b), Lannon and van Elsuwege (2003: 21), Attinà and Rossi (2004).

<sup>717</sup> European Commission (2004c: 6).

<sup>718</sup> The so-called “western NIS” (Belarus, Moldova, Ukraine); the “southern Mediterranean countries” (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria, Tunisia). While Russia was initially covered by the Wider Europe Communication, the 2004 strategy paper mentions that “together, Russia and the EU have decided to develop further their strategic partnership through the creation of four common spaces. The southern Caucasian countries were added to the list of “neighbours” covered by the ENP.

<sup>719</sup> European Commission (2004a: 2).

<sup>720</sup> See below.

<sup>721</sup> Maresceau and Montaguti (1995: 1327).

<sup>722</sup> See above section 6.1.1.

In substantive terms, the ENP promotes the projection of EU principles, norms and standards towards Ukraine. Such projection does not only concern the Community but involves the Union *as a whole*. Indeed, the Commission has emphasised that the ENP is “a comprehensive policy integrating related components from all three ‘pillars’ of the Union’s present structure”.<sup>723</sup> It offers “a means for an enhanced and more focused policy approach of the EU towards its neighbourhood, *bringing together the principal instruments at the disposal of the Union and its member States*. It will contribute to further advancing and supporting the EU’s foreign policy objectives” (emphasis added).<sup>724</sup> The Commission also pointed out the full accordance of the ENP with the goals of the European Security Strategy, proposed by High Representative for CFSP Javier Solana, and endorsed by the European Council in December 2003.<sup>725</sup>

The projection of the Union as an integrated whole towards Ukraine is not only illustrated by the list of objectives of the ENP.<sup>726</sup> It is also evidenced in the so-called “action plans” (APs), which constitute the key element of the European

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<sup>723</sup> European Commission (2004c: 6).

<sup>724</sup> European Commission (2004c: 8).

<sup>725</sup> According to the Security Strategy: “Even in an era of globalisation, geography is still important. It is in the European interest that countries on our borders are well-governed. Neighbours who are engaged in violent conflict, weak states where organised crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems for Europe. The integration of acceding states increases our security but also brings the EU closer to troubled areas. Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations” (High Representative of CFSP, 2003) The strategy was approved by the European Council in Brussels, 12 December 2003 (European Council, 2003) and drafted under the responsibilities of EU High Representative Javier Solana.

<sup>726</sup> First, emphasis is put on the neighbours’ commitment to shared values in the field of fundamental rights (political and social), as advocated by the Union, and derived from various international norms to which the Member States are committed. The ENP also promotes a more effective political dialogue with the partners, inspired by CFSP objectives and principles. It also foresees possible involvement of the partner countries in aspects of CFSP and ESDP, and participation in EU-led-crisis management operations. With respect to trade, economic and social policies, the ENP “offers [the partner countries] ... the prospect of a stake in the internal market”, subject to legislative and regulatory approximation by the partner country to EU standards. On Justice and Home Affairs, the ENP promotes effective functioning of public administration, ensuring high standards of administrative efficiency, particularly as regards border management (European Commission, 2004c).

neighbourhood policy.<sup>727</sup> The APs contain a set of priorities “whose fulfilment will bring [the neighbour] closer to the European Union”. They are comprehensive, covering “political dialogue and reform; trade and measures preparing the partner for gradually obtaining a stake in the EU’s Internal Market; justice and home affairs; energy transport, information society, environment and research and innovation, and social policy and people-to-people contacts”.<sup>728</sup> These priorities were set out by the EU, particularly the Commission, in consultation with the authorities of the countries concerned,<sup>729</sup> taking account of prior “country reports”, compiled by the Commission services.<sup>730</sup> Such country reports provided an assessment of bilateral relations between the EU and each of the neighbours concerned, and included an overview of the political, economic, social and legislative situation. In the case of Ukraine, the report assessed the progress made in implementing the PCA, and “describe[d] the current situation in selected areas of particular interest for this partnership”.<sup>731</sup>

The AP seeks to support and stimulate Ukraine’s fulfilment of its obligations established by the PCA, which remains a “valid basis of EU-Ukraine cooperation”, but in the all-encompassing perspective of the neighbourhood policy.<sup>732</sup> It sets out

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<sup>727</sup> European Commission (2004c: 3).

<sup>728</sup> European Commission (2004a: 2).

<sup>729</sup> Within the Commission, the “Wider Europe” task force is in charge of establishing the AP. It draws on officials from both the external relations Directorate General, and DG enlargement. It is headed by the Deputy Director General of DG external relations: ([http://www.europa.eu.int/comm/world/enp/task\\_force\\_en.htm](http://www.europa.eu.int/comm/world/enp/task_force_en.htm)).

<sup>730</sup> Commission Staff Working Paper “European Neighbourhood Policy - Country Report – Ukraine” (European Commission, 2004d).

<sup>731</sup> Namely, “the development of political institutions based on the values... underlined in the Agreement, regional stability and cooperation in justice and home affairs, and economic and social reforms... and further liberalisation of trade and for gradual participation in the Internal Market” (European Commission, 2004d)

<sup>732</sup> Legally, the AP is not a binding instrument. An earlier version of the AP on Ukraine envisaged by the Commission contained a proposal for a Council Decision on the “position to be adopted by the Community and its Member States within the cooperation Council established by the [PCA]... with regard to the adoption of a Recommendation on the implementation of the EU-Ukraine Action Plan” (European Commission, 2004f). With respect to its legal basis, the proposal first mentioned Art. 2(2) of the Council and Commission decision on the conclusion of the PCA, and also refers to Art. 15 TEU on CFSP Common positions. It thereby confirms its cross-pillar dimension. The draft decision contains a single article which provides that the position to be adopted by the Communities and their Member States within the Cooperation Council shall be based on the draft Recommendation of the Cooperation

concrete steps, targets and priorities “covering a number of key areas for specific action”<sup>733</sup> with a view to giving practical guidance to Ukraine to further its compliance with the rules of the Agreement. Indeed, more than recalling the terms of the PCA, the AP appears to elaborate and build upon some of the Agreement’s provisions, in view of the objectives of the neighbourhood policy.

In particular, the section of the AP entitled economic and social reform and development contains a sub-section on “functioning market economy”, followed by a section on trade, market and regulatory reform. Here, trade and economic commitments contained in the PCA are being partially reformulated. For instance, with respect to the provisions on movement of workers mentioned in chapter 1, the AP not only calls for the fulfilment of the PCA commitments, it also elucidates what the commitment is and *how* it should be fulfilled. More precisely, the AP foresees that to comply with the PCA labour provisions, the partners have to “ensure full application of the “best endeavours” clause by abolishing all discriminatory measures based on nationality which affect migrant workers, as regards working conditions, remuneration and dismissal”. In legal terms, a “best endeavours” clause, such as the one included in the PCA provisions on workers,<sup>734</sup> does not, by definition, establish an obligation of result. The AP nevertheless says otherwise when requiring that all discriminatory measures should be abolished. Notwithstanding the apparent contradiction in terms of these provisions, the latter seem to suggest that the AP hardens up some of the PCA obligations.<sup>735</sup> Moreover, the CFSP dimension of the

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Council, which is annexed to the Decision. The recommendation is based on Art. 85 PCA establishing the Cooperation Council. It contains a sole Article whereby the Cooperation Council recommends that the Parties implement the AP annexed, insofar as such implementation is directed towards attainment of the objectives of the PCA. Art. 85 PCA Ukraine provides that “A cooperation is hereby established which shall supervise the implementation of this Agreement. It shall meet at ministerial level once a year and when circumstances require. It shall examine any major issues arising within the framework of the Agreement and any other bilateral or international issues of mutual interest for the purpose of attaining the objectives of this Agreement. The Cooperation Council may also make appropriate recommendations, by agreement between the Parties.”

<sup>733</sup> European Commission (2004c: 3).

<sup>734</sup> See further section 1.2.

<sup>735</sup> Pt. 2.3.4. AP. The AP also seeks “full implementation of PCA commitments in the sphere of trade in goods” (pt. 2.3.1. AP). Equally, with respect to the conditions affecting establishment and operation of companies, the AP calls for “the full implementation of title IV, chapter II of the PCA, and in particular

Partnership, as well as the JHA dimension,<sup>736</sup> have also been developed and strengthened,<sup>737</sup> in line with the ambitions set out in the ENP.<sup>738</sup>

The foregoing suggests that the ENP embeds the Partnership into a new policy framework within which the Union further projects its trade, economic, social and political standards and principles. Furthermore, the AP which articulates the ENP reformulates the commitments contained in the PCA with a view to ensuring their fulfilment by the Ukrainian authorities. It appears that under the guise of explanation, the content of the Agreement is partly revisited to fit in the new policy framework. This development is reminiscent of the one that took place in the context of the pre-accession strategy, particularly in relation to the Europe Agreements with the CEECs. In addition, as the Accession Partnership did in the context of the pre-accession strategy, the AP introduces further conditionality in the relationship. In this sense, the ENP suggests that once the AP priorities are fulfilled, the PCA could be replaced by a

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of the most favoured nation and national treatment principles” (pt. 2.3.2. AP).

<sup>736</sup> Pt. 2.4. AP. A specific action plan on Justice and Home Affairs with Ukraine had been set out on 10 December 2001, and cooperation in this field will continue to be based on this specific AP and will be complemented by the ENP AP. See in this regard the press release following the meeting on JHA of the EU Troika and Ukraine, 29 March 2004 (EU/Ukraine Cooperation Committee, 2001).

<sup>737</sup> Pt. 2.1. AP.

<sup>738</sup> For instance, the AP with Ukraine starts off by a section on political dialogue and reform, which comprises a sub-section on democracy, rule of law human rights and fundamental freedoms. It also includes a sub-section on cooperation on foreign and security policy, weapons of mass destruction (WMD) non-proliferation and disarmament, conflict prevention and crisis management. Furthermore, the AP provides that Ukraine should continue administrative reform and strengthening of local self-government, through appropriate legislation, particularly in line with the standards contained in the European Charter on Local Self Government. Equally, Ukraine should ensure implementation of recent reforms of civil, criminal and administrative codes and codes of procedure based on European standards; and continue the reform of the prosecution system in accordance with the relevant Council of Europe Action Plan (pt. 2.1. AP).

new contractual framework,<sup>739</sup> as indeed often requested by the Ukrainian authorities.<sup>740</sup>

In institutional terms, the definition and the conduct of the ENP are reminiscent of the ad hoc interactions developed between the Commission and the Council in the context of the enlargement policy. In contrast to the latter however, the HR for CFSP has a significant role in the ENP. As regards the definition of the EU policy towards the new neighbours, the April 2002 General Affairs Council, following suggestions from some Member States,<sup>741</sup> “held an exchange of views on relations between the future enlarged EU and its eastern neighbours” under the heading: “*Wider Europe: relations between the future enlarged EU and its eastern neighbours*”.<sup>742</sup> A joint letter of External Relations Commissioner Patten and the HR for CFSP Solana, entitled

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<sup>739</sup> The ENP Strategy Paper evokes the establishment of a “European Neighbourhood Agreement” that would replace the present generation of bilateral agreements (European Commission, 2004c: 5). It however remains elliptic as to what this new Agreement would be in terms of content and objectives. It only points out that “its scope would be defined in the light of progress in meeting the priorities set out in the AP” (European Commission, 2004c: 4) and “the overall evolution of EU-Ukraine relations” (pt. 1 (Introduction) AP). The nature of this new type of agreement is no less unclear. It is particularly uncertain whether it would be an association-type agreement based on Article 310 EC, involving a *privileged* relationship. The terminology used in the introductory section of the AP hints at the progressive establishment of a relationship that includes various features of association as defined by the European Court of Justice’s *Demirel* judgment [Case 12/86] at para. 9: an “association agreement creat[es] special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system”. In particular, the AP mentions the perspective of moving beyond cooperation to a significant degree of integration... and the possibility for Ukraine *to participate progressively in key aspects of EU policies and programmes*. This seems to echo the formula used by the Court.

<sup>740</sup> Alexandrova (1998: 160).

<sup>741</sup> That was particularly the case of the UK and Sweden (*EUobserver* 17/04/2002). Jack Straw sent a letter to the then Spanish Presidency of the EU calling for “special neighbour status” to Ukraine, Belarus and Moldova, meaning “free trade rights with the EU and a close relationship on border, justice, home affairs, security and defence issues” (*The Independent*, 16/04/2002; *The Financial Times*, 15/04/2002). The first signs of the willingness to address the EU relationship with the future neighbours appeared in 1997 in the Commission’s Agenda 2000, which timidly pointed out the need to address the external implications of enlargement (European Commission, 1997a: pt IV.2, Part I “the policies of the Union”).

<sup>742</sup> General Affairs Council (2002).

“Wider Europe” was sent thereafter to the EU Presidency.<sup>743</sup> In preparation of the Copenhagen European Council of December 2002, the General Affairs Council stated that:

the EU wishes to put in place further conditions which would allow it to enhance its relations with its Eastern European neighbours: Ukraine, Moldova and Belarus. There is a *need for the EU to formulate an ambitious, long-term and integrated approach towards each of these countries*, with the objective of promoting democratic and economic reforms, sustainable development and trade, thus helping to ensure greater stability and prosperity at and beyond the new borders of the Union (emphasis added).

This statement was echoed thereafter by the European Council.<sup>744</sup> Subsequently, the Commission published its Communication on “Wider Europe”,<sup>745</sup> together with contributions from the HR for CFSP, which were “welcomed” by the General Affairs Council, in March and June 2003.<sup>746</sup>

The emerging EU Wider Europe policy is not based on specific Treaty provisions. Rather, the foregoing shows that the policy initiative is the product of informal interactions between the Commission and the Council together with the European Council. It is also noticeable that the External Relations Commissioner and the HR for CFSP have played a significant part in formulating this policy, from its very inception onwards.

The informal interactions between the EU institutions are also at work in the conduct of the policy, and particularly as regards the elaboration and *suivi* of the APs. In the case of Ukraine, the Commission started the elaboration of the AP, following its country report,<sup>747</sup> “in close coordination with the Member States”. The Commission Communication on the AP emphasises that the successive presidencies, the Council Secretariat and representatives of HR Solana participated in all consultations with

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<sup>743</sup> Joint letter by EU Commissioner Chris Patten and the EU High Representative for the Common Foreign and Security Policy on Wider Europe. 7 August 2002. [http://www.europa.eu.int/comm/world/enp/pdf/\\_0130163334\\_001\\_en.pdf](http://www.europa.eu.int/comm/world/enp/pdf/_0130163334_001_en.pdf)

<sup>744</sup> European Council (2002).

<sup>745</sup> European Commission (2003b).

<sup>746</sup> General Affairs Council (2003a, 2003b).

<sup>747</sup> European Commission (2004d).

partners.<sup>748</sup> In particular, the representative for the HR was involved on all discussions “regarding the political dialogue and cooperation, and CFSP issues”.<sup>749</sup> Once adopted by the Commission,<sup>750</sup> the AP was swiftly endorsed by the Council,<sup>751</sup> before its final presentation to the Cooperation Council of the PCA for approval.<sup>752</sup>

As regards the *suivi*, the ENP foresees that it is the responsibility of the Commission to draw up periodic progress reports, on the implementation of the AP,<sup>753</sup> in cooperation with the HR for CFSP on issues related to political dialogue and cooperation, and the CFSP.<sup>754</sup> These reports are then transmitted to the Council which decides, in tandem with the European Council,<sup>755</sup> on the development of the

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<sup>748</sup> European Commission (2004a: 3).

<sup>749</sup> This participation is recurrently emphasised in all policy documents of the Commission related to the ENP. It follows the formula envisaged by the Council.

<sup>750</sup> See the press-conference given by Commissioner Ferrero-Waldner on the launch of the first seven APs under the ENP, Brussels, 9 December 2004 (Ferrero-Waldner, 2004).

<sup>751</sup> The Council adopted the AP on 13 December (General Affairs Council, 2004), after the Commission had adopted them on 9 December. This swift adoption by the Council can be taken as evidence of his earlier involvement. The APs were transmitted to the European Parliament, the Economic and Social Committee, and the Committee of the region for information.

<sup>752</sup> The Council invited the Committee of Permanent Representatives to prepare the necessary decisions enabling the Co-operation Councils with the respective ENP partners to confirm these action plans and to launch their implementation. As pointed out by the Council, it is only a *confirmation*. The APs were in practice already “agreed” with the partner countries concerned even before the Commission, as a college, had formally adopted them on 9 December 2004.

<sup>753</sup> It should be noted that 2003 Accession Treaty has partly maintained this extraordinary role for the Commission, by endowing it with the power to adopt specific safeguard measures in the field of Justice and Home affairs, with no equivalent in the context of the TEU; see Art. 39 of the Act of Accession (OJ 2003 L236/33). Further: Inglis (2004: 77), Hillion (2004c: 583).

<sup>754</sup> At its meeting on 13 Dec. 2004, the GAER Council recalled its intention to undertake a first review of the implementation of the action plans at the latest two years from their adoption, on the basis of assessment reports to be prepared by the Commission, in close co-operation with the Presidency and the SG/HR on issues related to political cooperation and the CFSP, and with the contribution of ENP partners (General Affairs Council, 2004). At its meeting on 16/17 December 2004, the European Council also invited the Commission and the High Representative to report regularly on progress accomplished (European Council, 2004b). This joint exercise by the Commission and the HR, which contrasts with the enlargement policy, seemingly prefigures the “double-hatting” system introduced by the Constitutional Treaty; see further below, section 6.2.3.2.

<sup>755</sup> It should be pointed out that the Cooperation Council, Committee and sub-committees are endowed with the monitoring of the implementation of the AP. Such use of the institutional framework of the

Partnership, and as the case may be, on opening negotiations with a view to establishing a “European Neighbourhood Agreement”.

It becomes apparent that the methodology that the ENP introduces in the Partnership heavily draws on the techniques developed in the context of the enlargement policy. First, through the ENP, the Partnership involves the projection of the Union as a whole. It is a policy aimed at handling the multi-faceted external implications of the 2004 enlargement, itself an all-encompassing process. Secondly, the development of the relationship is made conditional upon Ukraine’s ability to meet the priorities defined in the AP, and thus relies heavily on benchmarking and monitoring, which were so typical of the enlargement methodology. Thirdly, in institutional terms, the ENP introduces ad hoc interactions between the EU institutions in the Partnership. These interactions draw on the institutional arrangements developed in the context of the enlargement policy, which are detached from the constitutional requirements of the TEU.

One of the spin-offs of the accession process has therefore been to inspire and instil new methodological arrangements in the conduct of the Partnership with Ukraine. These arrangements appear, at this stage, to bring to a standstill the increasing fragmentation of the Partnerships, highlighted in the previous chapter.

#### *6.1.2.2. New concepts for an all-encompassing EU cooperation with Russia: the “Common Spaces”*

While being the main neighbour of the enlarged Union, Russia is not formally covered by the European Neighbourhood Policy. Instead, a new approach has been envisaged, which involves the creation of four “common spaces” between the EU and Russia, namely a common European economic space (CEES), supplemented by a common space of freedom, security and justice (CSFSJ), a common space of cooperation in the field of external security (CSES), and a space of research and

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Agreement again draws on the enlargement methodology; see Council Regulation 622/98 establishing the Accession Partnership which emphasises that “the role played by the bodies set up by the EAs is central to ensuring the proper implementation and follow up of these action plans”, see 11<sup>th</sup> Recital of the Preamble (OJ 1998 L85/1).

education, including cultural aspects (CSRE).<sup>756</sup> These spaces are to be developed gradually “in the framework of the PCA”.<sup>757</sup>

The creation of the common spaces appears, at this stage, to be a tidying-up exercise. They *integrate* the different strands of the Partnership,<sup>758</sup> which have been developed according to the procedures and logics of the different EU sub-orders, particularly following the adoption of the 1999 Common Strategy.<sup>759</sup> The following will focus on the first of the common spaces, namely the CEES, hitherto the most articulated of the four. It will become apparent that elements of the enlargement methodology can be depicted in the new initiative, although in a more diffuse and implicit fashion than is the case in the ENP. This is particularly the case with regard to the significance of legislative approximation in the Partnership. At the same time, it appears that the integrated interaction of the EU institutions, typified by the ENP and the enlargement policy, has had difficulties penetrating the Partnership with Russia.

To start with, legislative convergence is envisaged as a critical means to foster greater economic integration between Russia and the EU, which is the very aim of the CEES.<sup>760</sup> This was emphasised by the joint high-level group (HLG), established

<sup>756</sup> It was a decision of the St Petersburg Summit on 31 May 2003, on the occasion of the 300<sup>th</sup> anniversary of the city, to supplement the CEES with three other common spaces (EU/Russia Summit, 2003a).

<sup>757</sup> The idea was further worked out at the EU-Russia Summit in Rome in November 2003. The Joint Statement mentions each of the four spaces. Under the CEES, the Joint Statement includes the Parties' discussions on Kaliningrad, Russia's accession to the WTO, Energy Dialogue, Transport networks, and environmental challenges. Under the CSFSJ, discussions on visa free-travel, EU-Russia readmission agreement and action plan on organised crime, as well as the signature of the EUROPOL – Russian Federation agreement. Under the CSES, the Parties foresee the development of their dialogue and cooperation on political and security matters. They mention their ambition to explore possible cooperation in the field of civil protection and long-haul air transport for crisis management. Finally, under the heading CSRE, the Joint Statement covers the renewal of the agreement on Science and Technology Cooperation, the accession of Russia in the Bologna Process, and the participation of Russia in the EU Erasmus Mundus programme (EU/Russia Summit 2003b).

<sup>758</sup> The combination of the common spaces has indeed been characterised as a “comprehensive” initiative by the Parties, the four spaces forming part of a “single package”, which integrates the different facets of the Partnership with Russia (EU/Russia Summit 2004a).

<sup>759</sup> See section 5.2.2.

<sup>760</sup> EU/Russia Summit (2001b).

within the framework of the PCA by the EU-Russia Summit in 2001<sup>761</sup> to elaborate the concept of CEES.<sup>762</sup> In its second report,<sup>763</sup> the HLG emphasised that the overall aim of the CEES is “to link the EU and Russia in a privileged relationship, *focusing on regulatory and legislative convergence* and trade and investment facilitation” (emphasis added).<sup>764</sup> The Group confirmed that “the broad objective of regulatory convergence is *in itself* a desirable goal that should bring substantial benefits to both the EU and Russia, not least in permitting economic agents to operate subject to common rules and conditions” (emphasis added).

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<sup>761</sup> The HLG was established by the Brussels EU-Russia Summit of October 2001 (EU/Russia Summit, 2001b), in accordance with Art. 93 of the PCA. Meeting twice a year, the HLG was co-chaired by representatives of the Russian Federation and of the EU. In practice, vice-Prime Minister Khristenko and External Relations Commissioner Patten, later replaced by Enlargement Commissioner Verheugen, chaired the HLG. The decision to establish the HLG was taken by the Russia-EU Summit meeting in Moscow in May 2001 (EU/Russia Summit, 2001a) following a meeting in Stockholm in March 2001 between the Heads of State and Government of the EU and the President of the Russian Federation, where the idea of CEES was reinvigorated.

<sup>762</sup> The PCA with Russia already included the objective of integrating Russia into a wider zone of cooperation in Europe. The 12<sup>th</sup> recital of the Preamble of the PCA states “the utility of the Agreement in favouring a gradual rapprochement between Russia and a wider area of cooperation in Europe and neighbouring regions”. Indeed, one of the objectives of the Partnership as provided in Art. 1 of the Agreement is “to provide an appropriate framework for the gradual integration between Russia and a wider area of cooperation in Europe”. Furthermore, the 1999 Common Strategy also mentioned the “integration of Russia into a common European economic and social space” as one of Union’s “Principal objectives” (Pt. 2), and as one of its “Areas of Action” under the CS (OJ 1999 L157/1).

<sup>763</sup> A first report was submitted to the May 2002 EU-Russia Summit. It endorsed the work plan for the CEES established by the HLG, and its approach in defining ultimate objectives. A list of key issues for work was agreed, with possible objectives and practical steps to achieve regulatory approximation, including sectors where cooperation is expected to boost trade and investment and where the trade interest of the EU and Russia is strong. The list was said to “reflect the achievements and experience of integration in the EU”. It also considered that in terms of timing, a first stage should be devoted to prepare the ground for work to achieve regulatory approximation.

<sup>764</sup> The second Report of the HLG was presented at the EU-Russia Summit in November 2002. It was established in view of studies it had commissioned from research institutes in order to assess the impact of economic integration. Again, particular consideration was devoted to regulatory convergence, the HLG noting that particular emphasis was placed by the studies on the relevance of regulatory approximation (EU/Russia High Level Group, 2002; EU/Russia Summit, 2002: 9).

Indeed, in a so-called “Concept Paper”, submitted to the Rome EU-Russia Summit of November 2003,<sup>765</sup> the HLG defined the CEES as “an *open and integrated market between the EU and Russia, based on implementation of common and compatible rules and regulations*, including compatible administrative practices, as a basis for synergies and economies of scale associated with a higher degree of competition in bigger markets. It shall ultimately cover substantially all sectors of the economy”. In particular, the HLG foresees that the framework for cross-border trade in goods, covering substantially all industrial and agricultural goods, should include “the *necessary rules - whether set by standards, technical specifications or other regulatory and legal requirements* – organisational structures and procedures; while ensuring that these do not create unnecessary obstacles to trade, and *promoting equivalent levels of the protection of safety, health and the environment*” (emphasis added).<sup>766</sup> The Report also emphasised that “Cooperation... particularly *with regard to legislative approximation is an essential element* in order to promote trade and investment between the EU and Russia”.<sup>767</sup>

The foregoing overview of the conceptual elaboration of the CEES by the HLG demonstrates the pivotal role that legislative approximation is expected to play in the establishment of the Common European Economic Space. It should be noted that such an approximation is limited, compared to the one envisaged in the ENP, and *a fortiori* in the context of the pre-accession strategy. In particular, the language used by the HLG does not directly refer to EU standards when dealing with approximation, thereby avoiding giving the impression that the Union is imposing its norms on Russia.<sup>768</sup> Indeed, the HLG reports carefully chose references to concepts of “approximation”, “convergence”, or even “compatibility”. A speech given by (then) External Relations Commissioner Patten uses a language that is even weaker, pointing out that “co-operation with Russia should promote *coherence* between our *respective legislative standards* based on studies of the likely benefits for Russian industries” (emphasis added).<sup>769</sup>

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<sup>765</sup> EU/Russia Summit (2003b). Further Vinokurov (2004).

<sup>766</sup> EU/Russia High Level Group (2003: pt. 18).

<sup>767</sup> *Ibid.*, pt. 19.

<sup>768</sup> Pursiainen (2004).

<sup>769</sup> Patten (2002).

Despite the rhetoric however, the convergence envisioned in the CEES arguably implies that the burden of legislative adaptation falls essentially on Russia.<sup>770</sup> It does not seem to entail that the Union envisages a potential revision of its own *acquis*. Support for this interpretation can be found in the concept paper itself, whose section “guiding principles” [of the CEES] establishes that the latter will be based on existing and future commitments of the Parties *in the PCA* and WTO. One may recall, in this respect, that the PCA provisions include a specific article on legislative cooperation whereby Russia endeavours to ensure that its future legislation is compatible with Community law.<sup>771</sup> Nowhere is it envisaged in the Agreement that the EU should do the same with respect to Russia’s legislation. It appears therefore that, albeit more subtly formulated than in the case of the ENP, the legal approximation envisaged by the CEES essentially involves a projection of norms and standards of the EU towards Russia, on the basis of the PCA.<sup>772</sup>

While legislative approximation is reminiscent of the ENP, the *institutional* dimension of the common spaces appears to give more room to joint and equal participation of the Partners. Moreover, the development of the new framework remains tightly controlled by the Presidency and the European Council, leaving less margin of manoeuvre for the Commission and the HR.<sup>773</sup> Arguably the relations with Russia are too sensitive to be included in the ENP and managed by its integrated institutional framework, where Member States seem less directly influential. As a result, the penetration of the enlargement methodology in the EU-Russia relations has

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<sup>770</sup> Shemiatenkov (2002).

<sup>771</sup> The PCA contains in its Art. 55, provisions on legislative cooperation by reference to the *acquis*, in the particular fields of company law, banking law, company account and taxes, protection of workers at the work place, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, customs law, technical rules and standards, nuclear laws and regulation, transport.

<sup>772</sup> Indeed, the concept paper mentions the elaboration of action plans for making the concept of CEES operational, and particularly to transform the objectives of the CEES into specific goals and actions (EU/Russia High Level Group, 2003: pt. 22).

<sup>773</sup> Even if, from the outset, the Commission has attempted to include Russia in its Wider Europe initiative/ENP, see European Commission (2003b, 2004b).

been less evident than in the Partnership with Ukraine<sup>774</sup> As pointed out above, the ENP was first and foremost conceived in the services of the Commission and of the HR for CFSP, respectively, and then presented to the country concerned, after approval by the Council.<sup>775</sup> By contrast, the creation of the CEES does not appear to be based on *policy* papers of the Commission and the HR for CFSP, at least not to the same degree. It was the HLG, appointed jointly by the Parties, that was instrumental in establishing what the CEES should be.<sup>776</sup> Indeed, the Group has already suggested that it could play a role in the establishment of action plans for making the concept of CEES more operational.<sup>777</sup> Its activities have also been monitored by the common institutions of the PCA, particularly the EU-Russia Summits which have played a pivotal role in the development of the Partnership. In other words, the Parties have emphasised the *joint* character of the initiative to create common spaces, which contrasts with the essentially unilateral feature of the ENP. Illustrating the point, the EU-Russia Summit pointed out that the process of creating the common spaces “is to be approached in a systematic way and on an *equal footing*, with specific targets *and reciprocal arrangements* in each space, with roadmaps being elaborated where appropriate” (emphasis added).<sup>778</sup> Through the HLG, it appears that the development of the *common* spaces is based on a concern to establish a *shared* agenda.<sup>779</sup>

To recapitulate, although less evident in institutional terms, the enlargement methodology subtly influences the development of the EU relationship with Russia. Through the proposed CEES, it is apparent that the EU attempts to project its norms

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<sup>774</sup> The only reference to the CEES in the Council conclusions concerns the reports on the implementation of the Common Strategy with Russia, whereas the press releases of the EU-Russia Summits, and the Conclusions of the European Council deal with the CEES in an extensive manner. See for instance European Council (2003: pt. 66).

<sup>775</sup> A formula which has nonetheless been branded “joint ownership”, see European Commission, 2004c: 8).

<sup>776</sup> It is recalled that it was co-chaired by External relations Commissioner Patten, thereafter replaced by Enlargement Commissioner Verheugen, thereby suggesting that the Commission was indirectly influential in determining the positions taken by the HLG.

<sup>777</sup> EU/Russia High Level Group (2003: pt. 22).

<sup>778</sup> EU/Russia Summit (2003b).

<sup>779</sup> This is also a noticeable feature of the so-called “Northern Dimension” initiative, which involves Russia ([http://www.europa.eu.int/comm/external\\_relations/north\\_dim/index.htm#4](http://www.europa.eu.int/comm/external_relations/north_dim/index.htm#4)), see Leshukov (2001: 135).

and standards, in the garb of regulatory convergence, through ad hoc mechanisms and *sui generis* institutional arrangements. As already alluded to, inserting elements of the enlargement methodology in the Partnerships, may improve interactions within the system of EU external relations thereby fostering coherence of the Union's external action in the context of the Partnerships. Indeed, the core of this methodology consists of promoting the EU principles, standards and norms, relying on a de-pillarised institutional framework.

Nevertheless, this transplant of pre-accession elements in the Partnerships may raise various concerns. First, it may carry with it the deficiencies of the pre-accession strategy itself. In particular, the discrepancy which has appeared between what the EU promotes in terms of values and principles vis-à-vis the candidates and what it requires from the Member States, might contaminate its approach towards the neighbours, and be detrimental to its credibility.<sup>780</sup> Secondly, while it might help integrating the Partnership, the methodology might be inappropriate given the different premises and objectives of the respective policy frameworks, namely preparation of accession on the one hand, and hypothetical upgrading of the Partnership, on the other hand. Importing the enlargement methodology within the Partnerships, does not obliterate its essential quality, namely to prepare for accession.<sup>781</sup>

## **6.2. The Constitutional Treaty: a partial consolidation of the system of EU external relations as evidenced in the Partnerships with Russia and Ukraine**

It has been argued that enlargement has instilled new methodological routines in the management of the Partnerships. It has also catalysed a debate on the constitutional design of the Union, which led to the eventual signing of the Treaty establishing a

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<sup>780</sup> On double standards: see Hillion (2004a).

<sup>781</sup> Prodi (2002). Further: Hillion (2004b).

Constitution for Europe (TCE),<sup>782</sup> based on a blueprint drafted by the European Convention.<sup>783</sup>

While the TCE enshrines for the first time “Partnership” in the constitutional law of EU external relations,<sup>784</sup> it also affects the *tendances lourdes* of the evolving system of EU external relations<sup>785</sup> evidenced in the EU Partnerships with Russia and Ukraine. In the following and concluding section, it will be seen that instances of mixity, as incarnated by the PCAs, are likely to be reduced in the new constitutional framework, although not disappearing altogether (6.2.1). The constitutional principles organising interactions within the system of EU external relations will thus keep their relevance in ensuring the overall coherence in the conduct of EU external relations in general, and of the Partnerships in particular (6.2.2). Finally, it appears that the TCE confirms and builds upon the institutional practice developed in the context of the enlargements policy and translated in the Partnerships, notably by strengthening mechanisms of external projection of EU norms and “values” (6.2.3).

### **6.2.1. Reviewing the new formula of mixity illustrated by the PCAs**

In the first part of this study, it was argued that the PCAs illustrate a new formula of mixity, resulting from the judicial fine-tuning of Community external competence, inspired by the new EU constitutional order. It was also argued that the PCAs include

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<sup>782</sup> Treaty establishing a Constitution for Europe (OJ 2004 C310). On the connection between the constitutional reform and enlargement, see e.g. Edwards (2004: 23).

<sup>783</sup> For commentaries of the text drafted by the European Convention, see for instance Dashwood (2002c: 395, 2004a: 45), Dougan (2003: 763, 2003), Temple-Lang (2004: 544).

<sup>784</sup> Article III-292(1), subparagraph 2, provides that “[t]he Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph [e.g. democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law]...”

<sup>785</sup> For a more comprehensive analysis of the constitutional external relations regime based on the Conventions’ draft, see Cremona (2003a: 1347), de Witte (2004: 95), Denza (2004: 259), Herrmann (2004: 291), Griller (2003: 133).

provisions relating to the non-EC pillars of the Union, thereby giving the Agreements a proto-cross pillar nature, enhancing the projection of the EU in all its facets.

In the following section, it will be seen that the TCE reviews this complex formula of mixity. First, the new constitutional framework should reduce causes of mixity by widening the scope of Union's exclusive external competence (6.2.1.1). Secondly, the TCE appears to abolish the formula of cross-pillar mixity altogether, in view of the so-called "de-pillarisation" of the EU, and the express recognition of its single legal personality (6.2.1.2).

#### 6.2.1.1. *The widening of the Union's exclusive external powers under the Constitution*

The TCE increases the list of exclusive external powers of the Union in two ways. First, it widens the scope of *a priori* exclusive external powers, notably by expanding the ambit of the common commercial policy, and secondly, it appears to facilitate the *acquisition* of external exclusive powers by the Union, by reformulating the conditions of such an acquisition.

Article I-13 TCE provides in its first paragraph that the common commercial policy (CCP) belongs to the Union exclusive competence defined in Article I-12 TCE as areas "where only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts". While this provision is unexceptionable given the well-established case law of the Court of Justice concerning the CCP,<sup>786</sup> it is nevertheless significant when read jointly with the provisions of Article III-315 TCE. The latter Article stipulates in its first paragraph that the CCP includes the conclusion of agreements on trade in goods, services, the commercial aspects of intellectual property and foreign direct investment. Intended to reflect the remit of the WTO,<sup>787</sup>

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<sup>786</sup> Opinion 1/75 *Local Cost Standard*.

<sup>787</sup> Eeckhout (2004: 54). Although the expression "commercial" in "commercial aspects of intellectual property" is different from "trade aspects of intellectual property" to which WTO law refers; see further on this difference the remarks of Cremona (2002: 70), cf. Heliskoski (2002: 6), Hermann (2002:

the TCE thus considerably extends the scope of the CCP, by comparison to Article 133 EC.<sup>788</sup> The extension of the CCP has the effect of widening the scope of *a priori* exclusivity of Union external trade powers, and conversely of decreasing causes of mixity, at least in trade policy. In addition, it should also be assumed to replace instances of exclusivity acquired through the *ERTA* effect,<sup>789</sup> thus reducing the influence of Member States in the fields concerned.

With respect to the exclusive external powers acquired by the Union, Article I-13 TCE stipulates in its second paragraph that “[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.” While it appears to be an attempt to codify the case law of the European Court of Justice on exclusive external Community powers,<sup>790</sup> the formula used by the TCE has been characterised as partly “inaccurate”, “misguided” and “misleading”,<sup>791</sup> in so far as it represents an inept rendering of the principles established by the case law.<sup>792</sup> It appears that, by loosening the conditions for

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<sup>788</sup> The Nice Treaty already modified the scope of the CCP by including agreements on trade in certain services and on commercial aspects of intellectual property therein, thus partially revisiting the Court conclusions in Opinion 1/94. On the complicated Nice version of the CCP, e.g. Cremona (2002: 61), Herrmann (2002: 7), Krenzler and Pitschas (2001: 291), Grard (2000: 378).

<sup>789</sup> Indeed, some of the subject matters included in the Constitution’s version of the CCP have hitherto fallen outside the scope of the CCP, but have been partly or wholly governed by common rules, thereby precluding Member States from taking autonomous measures in the fields covered. While this exclusivity could be revisited by a common decision to repeal the common rules, this will not be the case any longer if the Constitution enters into force. Member States will be precluded from acting without authorisation, regardless of whether the Union has acted or not.

<sup>790</sup> As indeed suggested by the TCE, particularly in Art. IV-438(4). On the case law concerned, see Dutheil de la Rochère and Slot (2003: 697), Holdgaard (2003: 365), Dashwood and Heliskoski (2000: 3).

<sup>791</sup> Dougan (2003: 770), Cremona (2003a: 1362), Arnall (2004: 527).

<sup>792</sup> Dashwood (2004b: 372), referring first to the principle of “necessity” established by the Court in Opinion 1/76 *draft Agreement establishing a European laying up fund for inland waterways vessels*, as clarified by Opinion 1/94 *WTO*; and the principle of Case 22/70 *Commission v Council*.

acquiring such powers, this new formulation could in effect lead to a considerable extension of the scope of exclusive external powers of the Union.<sup>793</sup>

The combination of the widening of the scope of the CCP exclusivity and the new formulation of acquired exclusive external powers, should have the effect of reducing recourse to mixed agreements in EU external relations, if the TCE enters into force.<sup>794</sup> Indeed, it suggests that the legal bases of agreements such as the PCAs would be streamlined and several provisions to which they refer would not need to be mentioned any longer in future similar agreements.<sup>795</sup> For instance, the provisions on establishment and trade in services would arguably be covered by the exclusive competence of the Union under Article III-315 TCE, on the CCP. As to the multidimensional cooperation established by the PCAs,<sup>796</sup> it could be based on Article III-319 TCE,<sup>797</sup> which should replace the provisions of current Article 181A EC.<sup>798</sup>

More generally, the invigorated formula of mixity post-Opinion 1/94, already partly revisited by the Treaty of Nice, is further reviewed by the Constitutional Treaty. The latter gives the Union the power to deal with international partners on its own, in a broader range of areas concerning particularly trade and economic issues. However, mixity is not likely to disappear from the system of EU external relations altogether, even if the doctrine of mixity is still not formally codified in the Constitution.<sup>799</sup> First,

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<sup>793</sup> De Witte (2003: 100-101). On necessity, see also Dutheil de la Rochère and Slot (2003: 697).

<sup>794</sup> The text of Art. I-12 proposed by the Convention did not contain the word “insofar” in its last limb. The Convention’s text instead stated “or affects an internal Union act”, which led Alan Dashwood (2004b: 371) to consider that this formulation would render the recourse to “the mixed agreement” formula practically impossible.

<sup>795</sup> That was partly the case after the Treaty of Nice.

<sup>796</sup> See Section 1.1.2.2. above.

<sup>797</sup> Thus, if the Union was to conclude the proposed PCA with Belarus after an eventual entry into force of the Treaty establishing the Constitution, it could be done on the basis of Articles III-315 and III-319 TCE.

<sup>798</sup> See Communication from the Commission on the effects of the entry into force of the Nice Treaty on current legislative procedures (European Commission, 2003a: 61), where the Commission indicated that future PCAs (e.g. with Belarus; COM(1995) 150) could be based on Arts 133 and 181A EC, the latter replacing Art. 308 EC.

<sup>799</sup> It is noticeable that, although significantly affected by TCE, the doctrine of mixity was not extensively discussed in the Working Group VII on external action. Indeed, it is practically absent from

the principle of conferred powers remains a key principle of the Union constitutional order (Article I-11 TCE), which means that Member States remain full-fledged actors on the international stage. Secondly, albeit extended by the TCE, instances of exclusive external powers of the Union are still limited,<sup>800</sup> while several subject matters fall within the ambit of shared or complementary competence, the latter excluding exclusivity altogether.<sup>801</sup> An agreement including provisions in fields falling outside Union exclusive powers, or Union powers altogether, should consequently continue to require the participation of the Member States, unless those provisions are ancillary to the main purpose of that agreement.<sup>802</sup>

6.2.1.2. *The formal “de-pillarisation” and express recognition of the single legal personality of the EU*

It was suggested in chapter 1 of this study that the mixity of the PCAs partly results from the trade and economic provisions of the Agreements, in view of the case law of the Court of Justice. Chapter 2 emphasised that the mixity of the PCAs also stems from the non-EC provisions included therein, notably the political dialogue and, arguably the specific human rights conditionality. Going beyond the scope of Community competence, these provisions, insofar as they were not ancillary to the main objectives of the Agreements, could only be inserted in the PCAs thanks to the participation of the Member States. It was nonetheless argued that such participation was guided by the provisions of the TEU. When negotiating, concluding and implementing the PCAs alongside the Community, Member States have also acted *in*

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its final report (European Convention, 2002b). By contrast, the doctrine of implied powers is codified. The TCE provides in its Article III -323 that “[t]he Union may conclude an agreement with one or more third countries or international organisations not only where the Constitution so provides, but also where first, the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Constitution, secondly where it is provided for in a legally binding Union act, thirdly where it is likely to affect common rules or alter their scope.”

<sup>800</sup> Dashwood (2004b: 370).

<sup>801</sup> See Arts I-14 and I-17 TCE, in combination with the provisions of Art. I-12 (2) and (5) TCE.

<sup>802</sup> Indeed Article III-315 TCE emphasises in its sixth paragraph that “[t]he exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Constitution excludes such harmonisation”.

*the framework of the Union*, and arguably *on its behalf*, given the latter's incapacity to be party itself to the Agreements. Concluded by the Community and the Member States acting in the framework of the EU, the PCAs could also include dimensions which relate to the other sub-orders of the Union, such as the political dialogue which relates to the CFSP. The correspondence of the PCAs with the other EU sub-orders led to the conclusion that the Agreements are proto cross-pillar agreements.

This specific aspect of mixity is also likely to be affected by the TCE. Not only does it explicitly endow the Union with a legal personality, but also and more significantly, it “demolishes” the three-pillar structure of the Union,<sup>803</sup> whose “external action” should be more integrated as a result.

Article I-7 TCE provides that the “Union shall have legal personality”. It is a short provision which consolidates practice already developing under the TEU.<sup>804</sup> Since the Treaty of Amsterdam in particular, the Union has become Party, on its own, to several international agreements,<sup>805</sup> including in relation to Russia and Ukraine, respectively.<sup>806</sup> Conferring the legal personality on the Union does not in itself affect the distribution of competence between the Member States and the Union. Indeed, the TCE is clear on the point that endowing the Union with a legal personality should be *disconnected* from the question of competence.<sup>807</sup>

What is more significant in terms of the conduct of EU external relations is that the Union is established as a *single* legal personality.<sup>808</sup> It replaces the other existing legal

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<sup>803</sup> The expression is borrowed from Eeckhout (2004: 162).

<sup>804</sup> The specific Working Group on legal personality, set up in the context of the European Convention, unanimously supported the explicit conferral of the legal personality to the European Union (European Convention, 2002a: pt. 8).

<sup>805</sup> E.g. Dashwood (2002a: 17). See also references in the previous chapter, under section 5.2.1.

<sup>806</sup> E.g. Agreement between the European Union and the Russian Federation on the participation of the Russian Federation in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) (OJ 2003 L 197/38); Agreement between the European Union and Ukraine on the participation of Ukraine in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) (OJ 2003 L239/38).

<sup>807</sup> As pointed by Arnall (2004: 526). See also Duke (2003: 5).

<sup>808</sup> There was a broad consensus in favour of this option in WG III on legal personality.

personalities, namely those of the Communities.<sup>809</sup> The latter are abolished and the TCE obliterates the pillar structure altogether. Community powers should thus be transferred to the Union,<sup>810</sup> and all external agreements will henceforth be concluded by the Union,<sup>811</sup> and if need be together with the Member States. In the context of the Partnerships, the Parties to the PCAs will include the Union, which will thus expressly become Partner of Russia and Ukraine, replacing the Community.

It also means that the potential for cross-pillar mixed agreements should vanish.<sup>812</sup> Rather, external agreements should all be agreements of the Union. Indeed, the TCE provides for a single provision on the negotiation and conclusion of external agreements, in Article III-325 TCE.<sup>813</sup> The Commission, or the Union Minister for Foreign Affairs<sup>814</sup> “where the agreement envisaged relates exclusively or principally to the common foreign and security policy”, shall submit recommendations to the Council. The Council authorises the opening of negotiations, adopts negotiating directives if need be, and authorises the signing of agreements and concludes them. Except where agreements relate exclusively to CFSP matters, the Council shall adopt a European decision concluding the Agreement after obtaining the consent of the European Parliament, or after consulting it, depending on the nature and subject

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<sup>809</sup> Art. IV-437 TCE on repeal of earlier treaties.

<sup>810</sup> Art. III-438 TCE on succession and legal continuity.

<sup>811</sup> Para 3 of Art. III-438 TCE.

<sup>812</sup> It should be recalled that the Union could hitherto be party to external agreements on the basis of Article 24 and/or 38 TEU. Although it hardly occurred in practice, this EU legal basis could be used in combination with EC legal bases to conclude an Agreement that would include both CFSP and EC matters, neither of which being ancillary to the other. Following the Court of Justice case law concerning the choice of legal basis in the EC context (e.g. Case C-336/00 *Huber*; Case C-281/01 *Commission v Council*; Opinion 2/00), it could be argued that the Agreement should be based on the two EC and CFSP provisions, with the result that it would be fully “cross-pillar”. On the other hand, relying on the “*Titanium dioxide*” case law (Case C-300/89 *Commission v Council*), the Community procedure may arguably have to be favoured (i.e. classical mixity rather than full cross-pillar mixity) as it indeed seems to have been, in view of the constitutional duty to maintain the *acquis*. Be it as it may, the TCE disposes of this potential scenario of cross-pillar mixity by abolishing the Community altogether.

<sup>813</sup> The TCE provides for specific provisions which derogate from the standard procedure in relation to the common commercial policy (Art. III-315 TCE) and to monetary matters (Art. III-326 TCE).

<sup>814</sup> See further below, section 6.2.3.2

matter of the Agreement.<sup>815</sup> The Council should in principle act by QMV throughout the procedure, although the TCE also provides that “it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article III-319 with the States which are candidates for accession.”<sup>816</sup> The foregoing arrangements indicate that the constitutional distinction between the mechanism of Article 24/38 TEU and Article 300 EC, and conversely, the distinction between EC external agreements and EU external agreements, formally disappears. It confirms that full-fledged cross-pillar mixed agreements, based on both Article 300 EC and Article 24/38 TEU, will not exist under the Constitution. One will thus only speak of *EU* external agreements.

In practical terms, the combination of the EU legal personality and the collapsing of the pillar structure should permit the inclusion of a political dialogue in a EU external agreement without the participation of the Member States being required. Arguably, the Union should be able to do so by itself.<sup>817</sup> Indeed, the inclusion of a political dialogue is to be proposed by the newly established Union Minister for Foreign Affairs (UMFA), as foreseen by the procedure of Article III-325 TCE, and decided upon by the Council. Furthermore, the political conditionality which, as suggested in chapter 2, could be a case for mixity, should no longer require the participation of the Member States under the TCE either. Several provisions of the Constitutional Treaty relate to the protection of fundamental rights confirming the Union’s objectives to pursue their protection on the international stage.<sup>818</sup> The Union itself should thus be able to introduce strong human rights clauses such as the one included in the PCAs. As regards the suspension procedure, the TCE stipulates that the Council, on a

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<sup>815</sup> According to Art. III-325 (6) TCE, the consent of the Parliament is required in the following cases (i) association agreements; (ii) Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

<sup>816</sup> Art. III-325(8) TCE.

<sup>817</sup> This is also the view of Eeckhout (2004: 224).

<sup>818</sup> Further: Dutheil de la Rochère (2004: 345).

proposal from the Commission or the UMFA, shall adopt a European decision suspending application of an agreement.<sup>819</sup> While confirming the dual nature of the suspension procedure of an external agreement, this revamped *modus operandi* could solve some of the difficulties highlighted in chapter 2,<sup>820</sup> although it remains to be seen whether its use will thereby be *facilitated*.<sup>821</sup>

On the whole, a single personality of the Union and the collapsing of the pillar structure should reduce the causes for mixity in the system of EU external relations. Indeed, in the specific case of the Partnerships, mixity would appear to be unnecessary under the new regime. This development should facilitate the management of the PCAs, which already included the different facets of the Union, but whose implementation became more difficult with the entrenchment of pillar-politics.

It should however be pointed out that while the TCE appears to “de-pillarise” the Union, the specificity of the CFSP (and of the Common Security and Defence Policy) has survived the transmutation of the Union’s constitutional order. Article I-16 TCE deals specifically with the common foreign and security policy, stipulating in its first paragraph that “[t]he Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.” This Article, situated between the provisions on shared competence and the “areas of supporting, coordinating or complementary action”, illustrates that the CFSP does not fit in any of the categories of competence envisaged by the TCE in Article I-12 TCE. Indeed, the differentiated procedural arrangements of the CFSP are maintained, including the exclusion of some EU institutions from the process.<sup>822</sup> The remaining dualism in external relations is also inherent in the

<sup>819</sup> Art. III-325(9) TCE.

<sup>820</sup> Section 2.2.1.

<sup>821</sup> See also the provisions of Art. III-322 TCE on “restrictive measures” involving a joint proposal from the UMFA and the Commission.

<sup>822</sup> See Part III, Title V, Chapter II of the TCE. With regard to the institutions, the limited role of the European Parliament and the quasi-exclusion of the European Court of Justice remain. As to the instruments, only “decisions” are to be used. They are defined in Art. I-33(1) TCE as “a non-legislative act, binding in its entirety.” In the context of CFSP, they are to be adopted by the Council or European Council. Further: de Witte (2004: 98).

streamlined procedure for the conclusion of EU external agreements provided in Article III-325 TCE, evoked above. A procedural differentiation remains between agreements dealing essentially with CFSP matters and agreements dealing with other EU matters.<sup>823</sup> The former will imply a proposal from the UMFA, while the latter will require a proposal from the Commission. In other words, although the pillar structure may be badly damaged, it is not entirely demolished, and the second pillar is seemingly still standing, alongside the other standard procedure for organising the EU external relations.<sup>824</sup>

To recapitulate, the TCE reduces instances of mixity by actually and potentially widening the scope of Union's exclusive external powers. In particular, the new constitutional arrangement finishes the job of undoing Opinion 1/94 for the conduct of EU external trade Agreements. Moreover, the quasi obliteration of the pillar structure and the establishment of a single legal personality able to conclude agreements on the whole range of EU activities eradicate the future of cross-pillar mixity as we know it. It was however pointed out that mixity may still be required in law in view of the list of shared, complementary powers contained in the TCE, or indeed desired in practice by the Member States. Moreover, strong substantive and procedural differentiation has not entirely disappeared. Hence the key principles underpinning the system of EU external relations, to manage such plurality and ensure coherence, are likely to remain significant.

### **6.2.2. The continued significance of the principles underpinning the system of EU external relations envisaged in the Constitution**

Part II of the present study attempted to articulate the key principles which guide and inform the conduct of the multifarious EU external relations under the TEU, as evidenced in the PCAs. The aim of such principles is to promote coherence and efficiency of the Union's external action, and ultimately to assert its identity on the international stage. It was seen that the duty of cooperation obliges the Member States and the Community to cooperate, in the context of mixed agreements. This obligation stems from the principle of loyal cooperation enshrined in Article 10 EC, which

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<sup>823</sup> See further below.

<sup>824</sup> Cremona (2003a: 1354), Nuttall (2004).

forces the Member States and the institutions to ensure the fulfilment of the Community's tasks and objectives, and which co-exist with the CFSP principle of loyalty. In combination with this duty of cooperation, it was seen that the TEU contains constitutional principles which guide the interactions between the various EU sub-orders, namely the duty to maintain the *acquis communautaire*, and the principle of consistency supported by the Union's single institutional framework.

While the de-pillarisation and the establishment of the single EU legal personality contribute, in themselves, to furthering the coherence of EU external relations, the TCE also confirms and builds upon the constitutional principles and devices.<sup>825</sup> They remain particularly significant in view of the maintained procedural differentiation in the EU external relations (6.2.2.2), and considering the room left for joint participation of EU and Member States in the external action of the Union (6.2.2.1).

6.2.2.1. *The consolidation of the principles governing the interactions between the EU and its Member States*

While instances of mixity should be reduced under the TCE, it has been suggested above that mixed agreements are not likely to disappear altogether. Indeed, the Union, endowed with conferred powers,<sup>826</sup> does not replace the Member States which remain full-fledged actors on the international stage. Outside the field of *a priori* exclusive external competence, the Member States will still be entitled to act in an area where, and for as long as the Union has not legislated internally. They should thus remain empowered to participate to the negotiation and conclusion of an agreement which covers the area concerned. Although not codified as such, the duty of cooperation examined in chapter 3 of this study is thus likely to persist as a key principle to organise the interactions between the Union and the Member States.

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<sup>825</sup> Indeed, the quest for coherence in the EU external action was one of the main preoccupations of the Working Group on External Action, as suggested by its Final Report, esp. Part V (European Convention, 2002b).

<sup>826</sup> Art. I-11 TCE.

As in the context of the EC Treaty, the duty of cooperation should be related to the general principle of loyal cooperation, which has been re-branded “sincere cooperation” in the TCE and provided in its Article I-5(2):

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 Constitution.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution 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.

It is noticeable that in the de-pillarised Union, the principle of sincere cooperation operates between the Member States and the *Union*, and thus appears to cover the relationship between them on the whole of Union's activities. Yet, the TCE does not suppress the principle of loyalty specific to the CFSP, provided in Article 11 TEU. Article I-16 TCE provides in its second paragraph that

Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness.

As with the current “Community” principle of loyalty, the CFSP loyalty has therefore found its place in the new constitutional framework. The dualism is astonishing and somewhat confusing considering the “de-pillarisation” of the EU. While it confirms the remaining differentiation between the CFSP and other EU provisions, the two principles do not seem necessary given the formulation of the principle of sincere cooperation.<sup>827</sup> As suggested earlier, the latter principle covers the relation between the Member States and the *EU*, and should therefore apply also where a EU agreement deals with CFSP.

#### 6.2.2.2. *The consolidation of the principles governing interactions between sub-orders*

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<sup>827</sup> For a more streamlined approach to the principle of loyalty, see Dashwood *et al* (2003: 12).

As pointed out above, the procedural differentiation within the EU has survived in the Constitutional Treaty, particularly as regards the external action of the Union. The principles guiding the interactions between the EU sub-orders will thus remain, at least in principle, important guides for the conduct of EU external activities. Indeed, like differentiation, they have a place in the Constitution.

First, Article III-308 TCE stipulates that:

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 Constitution for the exercise of the Union competences referred to in Articles I-13 to I-15 and I-17. 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 Constitution for the exercise of the Union competences under this Chapter.

This is a reminiscence of Article 47 TEU. The presence of the above provisions in the TCE confirms, in itself, the remaining differentiation between CFSP and other EU external powers.<sup>828</sup> These provisions aim at preventing the application of CFSP specific procedures where the standard EU procedures should be used, the latter providing notably for full involvement of the European Parliament and judicial control.<sup>829</sup> While the Constitution entrenches the principle of single institutional framework, the different roles of the institutions, depending on the sphere of action, remain. The Court, which keeps its jurisdiction for policing the boundaries between CFSP matters and other EU matters, is thus expected to play an important role in supervising the new distribution of powers.<sup>830</sup>

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<sup>828</sup> Another spectre of pillar-politics appears in Art. I-1 TCE which provides that: “The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a *Community* basis the competences they confer on it” (emphasis added).

<sup>829</sup> Article III-376 provides that: “The Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-40 and I-41 and the provisions of Chapter II of Title V concerning the common foreign and security policy and Article III-293 insofar as it concerns the common foreign and security policy. However, the Court shall have jurisdiction to monitor compliance with Article III-308 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V.”

<sup>830</sup> This might be particularly significant in the case of external agreements. The EP, excluded from CFSP agreements, could well consider that an agreement, alleged to be of a CFSP nature by the UMFA

Secondly, the principle of consistency, as notably provided in Article 3 TEU, is re-affirmed on several occasions in the Constitution. In particular, Article III-115 TCE provides that “The Union shall ensure consistency between the policies and activities referred to in this Part, taking all of its objectives into account and in accordance with the principle of conferral of powers.” This provision is included in Title I that establishes “provisions of general application”, which as such inform the whole action of the Union.<sup>831</sup> It confirms the inherent tension between coherence and division of competences. Indeed, the TCE provides for new devices for promoting coherence, arguably inspired by previous ad hoc institutional practices.

### **6.2.3. Further substantive and institutional integration of the system of EU external relations**

Part III of the dissertation gleaned some insight into evolving institutional practices following treaty changes and enlargement. In particular, chapters 5 and 6 emphasised the rising role of the European Council as guarantor of coherence, above the institutional battles between the Commission and the Council. The increasing tendency for the Union to project itself as an integrated whole, not only through enlargement, but also increasingly, in the context of the Partnerships, was also highlighted.

Arguably, the TCE codifies and builds upon these practices. It appears that the Constitutional Treaty carries the possibility of enhancing the coherence of the Union’s external action through the integration of the latter’s objectives within a single provision, while upholding their more assertive promotion (6.2.3.1). Moreover, the TCE attempts to enhance coherence through institutional means. First, it consolidates the pivotal role of the European Council, and secondly it establishes a Union Minister for Foreign Affairs (6.2.3.2).

#### *6.2.3.1. Substantive integration*

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and the Council, is in fact an EU agreement.

<sup>831</sup> Further: Wessel (2004).

The TCE fosters the substantive integration of external relations of the EU through first, the streamlining of its objectives and principles, and secondly, by providing for a more assertive projection of its values, particularly towards its neighbourhood.

The value-promotion feature of the EU external relations is made more evident and strengthened.<sup>832</sup> Article I-3 TCE sets out the objectives of the Union. It notably refers to the aim “to promote peace and its values”. The latter are set out in Article I-2 TCE, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Article I-2 also adds that “these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

More significantly for present purposes, Article I-3 TCE provides in its fourth paragraph that “in its relations with the wider world, the Union shall *uphold and promote* its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter” (emphasis added).

Part III of the TCE elaborates on this objective of upholding and promoting the values of the Union. The Constitution captures, in one provision “having general application” the objectives which should guide the whole of EU external relations, be they trade related, development oriented, or dealing with CFSP matters. This provision simplifies and clarifies the aims of the Union external action,<sup>833</sup> some of which have hitherto been scattered around in various parts of the Treaty, others being mentioned explicitly for the first time in the Constitutional text.

Article III-292 TCE states that

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<sup>832</sup> Further: Cremona (2004c: 553), Leino (2002).

<sup>833</sup> Cremona (2003a: 1348), de Witte (2004: 100).

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

Integrating all objectives of EU external relations in a single and all-encompassing provision further enhances the coherence of the Union's external action. The provision of Article II-292 codifies and develops the trend of including the EC and mixed external agreements in all-encompassing policy frameworks. This trend, developed in a piecemeal fashion from the entry into force of the TEU, was exemplified by the PCAs and subsequent Action Plans. It has also been typified in the neighbourhood policy, which finds its inspiration in the methodology and principles of the enlargement policy. Through these policies, the Union has increasingly projected itself, as a whole, towards the outside world, by increasingly making references to "values".<sup>834</sup> Indeed, it is noticeable that reference is made in Article III-292 TCE to the principles which have inspired not only the Union's creation but also its *enlargement*. This may be interpreted as a confirmation of the observation made above that the enlargement principles have become a reference for the EU external action.

While establishing a single list of objectives and principles which underscore the Union's external action, the TCE also contains an entire Title on the EU relations with its neighbourhood ("immediate environment").

Article I-57 on "The Union and its neighbours" stipulates that:

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

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<sup>834</sup> Cremona (2004d).

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

This provision is new and corresponds to an issue of growing importance while the European Convention was debating. As pointed out by Bruno de Witte, it is not evident why this type of external relations deserves to be singled out, rather than other, close long-standing, foreign links of the EU with countries that have concluded association agreements.<sup>835</sup> Be it as it may, this provision appears to “constitutionalise” the ENP as a more assertive promotion of the Union as a whole towards its “near abroad”. It also appears to constitutionalise the differentiation introduced in the EU *Ostpolitik*. It prefigures the end of the enlargement process and policy, and contrasts with the call of the founding fathers made to all European peoples that share the ideals of the Community to join in their efforts.<sup>836</sup>

#### 6.2.3.2. *Institutional integration*

Article I-19 TCE on the Union’s institutions stipulates that the Union has an institutional framework which shall aim to promote its values. Building on the existing institutional configuration of the EU, the Constitutional Treaty nevertheless introduces various noteworthy innovations.

One of the most celebrated institutional novelties brought about by the TCE is the merger of the functions of External Relations Commissioner with those of the High Representative for CFSP, the “Patana” formula.<sup>837</sup> The result is the creation of the Union Minister for Foreign Affairs.<sup>838</sup> Article I-28 TCE provides that he or she shall be appointed by the European Council acting by QMV. His or her function is to conduct the CFSP and CSDP of the Union, contributing through the submission of

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<sup>835</sup> De Witte (2004: 98).

<sup>836</sup> The preamble of the EEC Treaty signed in Rome in 1957, read “calling upon the other peoples of Europe who share their ideal to join in their efforts”. The Schuman Declaration spoke of “une organisation ouverte à la participation des autres pays d'Europe” (Schuman, 1950).

<sup>837</sup> Cameron (2004), referring to the merger of former External Commissioner Patten and HR Solana.

<sup>838</sup> Dashwood and Johnston (2004: 1481).

proposals to the development of those policies, which s/he carries out as mandated by the Council.<sup>839</sup>

Institutionally, the UMFA presides over the Foreign Affairs Council.<sup>840</sup> At the same time, s/he is one of the Vice-Presidents of the Commission. S/he is “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 [UMFA] shall be bound by Commission procedures to the extent that this is consistent with his or her other functions within the Council.”<sup>841</sup> This arrangement has been referred to as “double-hatting”.

The creation of the double-hatted post of UMFA may be a consolidation of the increased symbiotic cooperation between the Commission and the HR, as seen already in the framework of the ENP. With one foot in the Commission and the other in the Council, the Minister is expected to incarnate the consistency of the Union's external action. Whether the pillar-politics between the Council and the Commission will turn into a schizophrenic double-hatted Minister remains to be seen.<sup>842</sup> The hope of course is that with only one head, the UMFA will effectively provide a sense of direction to the EU external action. In this task, s/he is to be assisted by a European External Action Service (EEAS) that should work in cooperation with the diplomatic services of the Member States,<sup>843</sup> thereby fostering the interactions between the Member States and the Union. In addition to staff seconded from national diplomatic services of the Member States, the EEAS is also made of officials from relevant

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<sup>839</sup> S/he shall conduct the political dialogues with third states, as provided in Article III-296 TCE, and the position to be that s/he would present would be decided by the Council. According to Art. III-325(9) TCE, the Council on a proposal by the UMFA establishes the positions to be adopted on the Union's behalf, in CFSP matters, in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

<sup>840</sup> Art. III-296(1) TCE. This formula was seen by the WG on external action as advantageous from the point of view of continuity and consistency (European Convention, 2002b: pt. 26).

<sup>841</sup> Art. I-28(4) TCE.

<sup>842</sup> On this point, see Crowe (2004).

<sup>843</sup> For a concise analysis of this EEAS, see Cameron (2004). See also Hill (2003).

departments of the General Secretariat of the Council and of the Commission, thus hopefully enhancing cooperation between these two institutions.<sup>844</sup>

The UMFA also takes part in the work of the European Council.<sup>845</sup> This is thus likely to be a powerful figure, insofar as s/he will have a say in all the key institutions shaping the external action of the Union.<sup>846</sup> It should be added that the President of the European Council should ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the UMFA.<sup>847</sup> Given that the Minister is to share this role with the President of the European Council, it will be crucial that the division of tasks be clear. In practical terms, it means that in political dialogues, such as the ones established by the PCAs, the EU may be represented at Summit level by the President of the European Council, together with the President of the Commission and the UMFA. The relationship between these powerful figures, not to mention with the President of the European Commission, may thus be critical.<sup>848</sup> Moreover, loyalty and institutional logics will continue to be pivotal in the functioning of the system.<sup>849</sup>

While the TCE establishes the UMFA, integrating the former external relations foes, the EU institutional framework also includes the European Council among its institutions, endowing it with key powers with respect to the definition of the orientations of the Union's external action. It shall identify in "European decisions" the strategic interests and objectives of the Union, on the basis of the principles and objectives of Article III-292 mentioned above. Article III-293 provides that:

European decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy *and to other areas of the external action of the Union*. Such decisions may concern the

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<sup>844</sup> Art. III-296(3) TCE. The organisation and functioning of the European External Action Service shall be established by a European decision of the Council. The Council shall act on a proposal from the Union Minister for Foreign Affairs after consulting the European Parliament and after obtaining the consent of the Commission.

<sup>845</sup> Art. I-21(2) TCE.

<sup>846</sup> Arnulf (2004: 524ff).

<sup>847</sup> Art. I-22(2) TCE.

<sup>848</sup> "New EU foreign minister to complicate institutional power balance" (*EUobserver*, 13.08.2004).

<sup>849</sup> Jacqué (2004).

relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. European decisions of the European Council shall be implemented in accordance with the procedures provided for in the Constitution.

2. The Union Minister for Foreign Affairs, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.

The TCE thus codifies a trend which appeared under the TEU, particularly post-Amsterdam, whereby the European Council defined the policy framework within which the EU relations with a third country had to be developed. In the case of the Partnerships, this trend was epitomised by the Common Strategies.<sup>850</sup> While the latter disappear as CFSP instruments, the method they embodied has seemingly been generalised by the TCE. The practice of inserting agreements of the Union in a broader strategic perspective defined by the European Council and committing all institutions and Member States is thus consolidated.<sup>851</sup> The Constitution thereby codifies the leading role of the European Council for the whole range of EU external relations,<sup>852</sup> and fosters the “unity of policy design”.<sup>853</sup>

### **6.3. Conclusion**

The extraordinary institutional practice developed in the context of the enlargement process epitomises new forms of interactions between the institutions and the Member States in shaping the Union’s action towards third countries. These interactions facilitate the projection of a fully integrated EU on the international stage, both in substantive and institutional terms.

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<sup>850</sup> Hillion (2000: 1224, 2002c: 32).

<sup>851</sup> Decisions are defined as “a non-legislative act, binding in its entirety” (Art. I-33(1), 5<sup>th</sup> subpara. TCE).

<sup>852</sup> It also defines the general guidelines for the common foreign and security policy, including for matters with defence implications (Art. III-295 TCE).

<sup>853</sup> De Witte (2004: 100).

The Partnerships exemplify the current tendency of the Union to transplant this enlargement methodology in other frameworks of EU external relations. In particular, the development of the European Neighbourhood Policy and the Common Spaces introduces elements of the pre-accession strategy into EU relations with Russia and Ukraine, thereby potentially enhancing the coherence of the Union's action towards these two partners. At the same time, it has become apparent that the methodology has not penetrated the two Partnerships to the same degree. Notably, the development of the EU relationship with Russia has remained governed by the formal division of competence between sub-orders and Member States, to a larger extent than the EU Partnership with Ukraine.

The coherence of the EU action in the context of the Partnerships may also be enhanced by the new constitutional framework based on the TCE, which indeed codifies certain elements of the institutional practice developed in the pre-accession strategy. For instance the substantive and institutional integration of the system of EU external relations could put on hold the fragmentation of the Partnerships that was observed in the aftermath of the Amsterdam Treaty. More generally the formal de-pillarisation and the express legal personality of the EU will consolidate the Union as the Partner of Russia and Ukraine, thus replacing the Communities and their Member States acting in the framework of the Union.

## CONCLUSION

Founded on the PCAs and supplemented by other EU instruments, the Partnerships with Russia and Ukraine have been chosen as case studies to decrypt the evolution of the system of EU external relations. The contours of this system emerged in the aftermath of the Treaty of Maastricht establishing the European Union and while the PCAs were being negotiated. It has evolved as a function of four main factors of change, as evidenced by the foregoing study of the Partnerships.

First and foremost, EU constitutional law, based on the Treaties, has not only established the foundations of the system, it has also revised and adjusted the parameters of interactions between the EU, the EC and the Member States. The Partnerships exemplified the impact of such Treaty changes on the functioning of the system. A particularly significant evolution was the fragmentation of the Partnerships in the aftermath of the Treaty of Amsterdam, which entrenched the pillar structure of the Union. Moreover, the development of the Partnerships has also been coloured by the tension inherent in the constitutional charter of the Union between the devices guaranteeing the division of competences and the principles promoting coherence in the EU external action.

Secondly, and as a result of this tension, the institutional practice has oscillated between the utilisation of orthodox decision making procedures and the quest for coherence. The Common Position on Ukraine typified the pillar-politics fuelled by the duty to maintain the *acquis*, and the inability of the system to get rid of the competence obsession while functioning *within* the framework of the Treaty. It is indeed symptomatic that the quest for coherence has been most successful outside the Treaty framework, through the adoption of informal instruments and ad hoc interactions between institutions, with the political blessing of the European Council. A case in point is the 1996 Action Plan on Ukraine. One could also mention, outside the Partnership framework, the “pre-accession strategy”. Indeed, many of these institutional practices have thereafter been codified on the occasion of Treaty reforms, as well illustrated by the growing role of the European Council in defining the orientations of the Union’s external action.

Thirdly, the case law of the European Court of Justice has been instrumental in articulating the system, essentially by clarifying the division of competences between the EU sub-orders, and between the Community and its Member States. For instance, in Opinion 1/94, the Court shed further light on the boundaries of the Common Commercial Policy and clarified the conditions for the Community to acquire exclusive external competence. It had the effect of stimulating the recourse to mixed agreements in the development of EC external relations. In this context, the Court also fleshed out the duty of cooperation between the EC and the Member States to ensure coherence in the external action of the Community, and incidentally of the Union. This evolving jurisprudence had a direct impact on the conclusion and implementation of the PCAs, which were the first agreements to incorporate the implications of Opinion 1/94.

Finally, the evolution of the system has been influenced by the Partners of the Union, and the latter's differentiated objectives towards them. A case in point is the differentiated *Ostpolitik* established by the Union at the dawn of the nineties. Moreover, the adoption of EU action plans prior to the Treaty of Amsterdam, revealed a distinction between the EU approach towards Russia and Ukraine, respectively. In particular, the Council and the Member States were significantly more receptive to the proposals of the Commission in relation to Ukraine than they were in relation to Russia. The same holds true with respect to the penetration of the pre-accession methodology in the Partnerships, which has been more tangible in the relationship with Ukraine than with Russia.

The Treaty establishing a Constitution for Europe announces profound changes in the system of EU external relations explored in this study, such as “de-pillarisation”, the extension of exclusive competence of the Union, and the creation of the post of Union Foreign Affairs Minister. Yet, fundamental features of the system, and indeed its determinants, remain. In particular, the TCE encompasses the tension between the quest for coherence and the division of competences, a dialectic that will continue to define the EU capacity to assert itself on the international stage.

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