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27 The External Side of Parliamentary Democracy

Comment on the Case C-658/11 European Parliament v. Council of the European Union

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27.1 Introduction

The need to determine the scope of EU policies is not a new challenge in the case law of the Court. The extent of the powers of European Union institutions – beyond its constitutional significance – also bears considerable practical importance, considering factors such as decision making procedures to be applied, actors involved in the procedure, the binding force of the legal measures in question, as well as the scope of judicial review. The delimitation of EU policies raises further delicate questions in respect of the field of external actions where crucial – commercial, defence and security policy – interests of national governments are at stake, not to mention the particular interests of the other actors of EU governance.

The present case provided the first opportunity for the Court of Justice to interpret the scope of new prerogatives of the European Parliament granted by the Treaty of Lisbon, in the procedure for the conclusion of CFSP international agreements between the EU and a Third State. The action of the Parliament calls on the Court, in the context of the fight against piracy off the coast of Somalia, to clarify the boundary between three fields of the European Union's external action, namely the common foreign and security policy (CFSP), the external dimension of the area of freedom, security and justice (AFSJ) and development cooperation.

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27.2 Facts and Background

The case is related to the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force (EUNAVFOR) to the Republic of Mauritius and on the conditions of suspected pirates after transfer.[1] The agreement defines the conditions and modalities for the transfer of persons suspected of committing acts of piracy within the EUNAVFOR's operation area, and governs the treatment, prosecution and trial of such transferred persons. It also authorises the parties to develop implementing arrangements on financial, technical and other assistance to enable the transfer, detention, investigation, prosecution and trial of transferred persons.

The agreement was adopted in order to implement the Joint Action of the Union which aims to contribute to international cooperation to combat piracy and to put into effect related Security Council resolutions. In the latter resolution, the Security Council expressed its concern over the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and international navigation. "States and regional organisations," such as the EU have also been called upon "[…] to take action to protect shipping involved with the transportation and delivery of humanitarian aid to Somalia and United Nations-authorised activities".[2]

In support of these resolutions, the Joint Action provides for a military operation called "Atalanta" to be carried out in order to contribute to the protection of the vessels of the World Food Programme (WFP) delivering food aid to displaced persons in Somalia, as well as to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. The Joint Action also invites Third States to participate in the operation.

On 22 March 2010, the Council authorised the High Representative of the Union for Foreign Affairs and Security to open negotiations with a view to concluding transfer agreements with several Third States, including the Republic of Mauritius. On the same day, the Council informed the President of the Parliament of said decision. The negotiations resulted in the adoption of the contested decision on 12 July 2011,[3] by which the Council authorised the signing of the Agreement. The Agreement was signed on 14 July 2011. The contested decision and the Agreement were published in the *Official Journal of the European*

1 OJ 2011 L 254, p. 1; hereinafter referred to as: 'the contested agreement' or 'the EU-Mauritius Agreement'.

2 Resolution 1814 (2008) of the Security Council.

3 Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer. OJ 2011 L 254, p. 1 (hereinafter: 'the contested decision').

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Union on 30 September 2011. By its letter dated 17 October 2011, the Council informed the President of the Parliament of the adoption of the contested decision and of the signing of the Agreement. The Parliament asked the Court to annul the contested decision.

27.3 Arguments of the Parties

In support of its action, the Parliament put forward two pleas in law. By its first plea, it submitted that the contested decision concerned an agreement which did not relate 'exclusively' to the CFSP within the meaning of Article 218(6)(2) TFEU, and could not therefore have been adopted without the Parliament's involvement. By its second plea, it argued that, by failing to inform it 'immediately and fully' at all stages of the negotiations and of the conclusion of the EU-Mauritius Agreement,[4] the Council infringed Article 218(10) TFEU, which applies to all agreements concluded by the European Union, including those falling within the ambit of the CFSP.

As its main line of argument, the Parliament stated that Article 218(6) TFEU established a general rule that the conclusion of an international agreement by the Council must be preceded by the consent or the consultation of the Parliament. From that perspective, it was only by way of an exception that the provision authorised the Council to conclude such agreements without involving the Parliament 'where agreements relate exclusively to the [CFSP]'. Since that provision provided for an exception, it should have been interpreted narrowly.

Next, the Parliament argued against the exclusivity of the contested agreement's "CFSP-character", submitting that the EU-Mauritius Agreement, in view of its aim and content, related not only to the CFSP, but also to judicial cooperation in criminal matters, police cooperation and development cooperation. The Parliament also concluded – based on the principle of parallelism between internal and external EU competences – that since the ordinary legislative procedure applies to said fields of EU (internal) action, the contested decision should have been based on Article 218(6)(a)(v) TFEU and, therefore, adopted only after the consent of the Parliament had been obtained. The fact that the agreement implemented Joint Action 2008/851 and that the latter fell within the CFSP was not sufficient to conclude that the contested decision also fell within that policy, since they had a different scope and objectives. The tasks which had been entrusted to the representatives of the European Union under the EU-Mauritius Agreement, the Parliament maintained, were not of a military nature and went beyond the objective(s) of Atalanta.

4 The Council only informed the Parliament of the decision by which it authorised the High Representative of the Union for Foreign Affairs and Security to open negotiations with a view to concluding agreements for the transfer of persons between the European Union and certain third States, including the Republic of Mauritius, as well as of the adoption of the contested decision.

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As to its second plea, the Parliament alleged that firstly, the Council had failed to keep it informed in the course of the negotiation phase of the Agreement, and secondly, had waited more than three months before communicating to it the contested decision and the Agreement.

It is interesting to note that the substantive legal basis of the decision was not challenged in the present case. The Parliament did not claim by this plea that the contested decision should have been founded on a provision other than Article 37 TEU. Accordingly, in the action there was no reference to the breach of those Articles of the TFEU providing for the substantive legal basis of the contested actions, nor was there mention of an infringement of Article 40 TEU.[5] The Parliament did not contest that the measures at stake pursue aims which predominantly fall within CFSP with Article 37 TEU serving as an appropriate substantive legal basis. It merely stated (albeit not in the action but at the hearing) that the agreement and the contested decision should have been founded on other bases *in addition to* that provision, namely on Articles 82 TFEU, 87 TFEU and 209 TFEU.

In its defence, the Council, supported by all intervening Member States,[6] responded that the contested decision was correctly based on Article 37 TEU and Article 218(5) and (6) TFEU, given that, according to its aim and content, the EU-Mauritius Agreement related exclusively to the CFSP. Firstly, based on the "centre of gravity" test,[7] it argued that the agreement forms part of the implementation of Joint Action 2008/851 which aimed to strengthen international security in the framework of the European Union's common security and defence policy. With reference to Article 21(2) TEU[8] the Council added that the agreement included measures which had an objective – to promote the rule of law and respect for human rights in a third country: the Republic of Mauritius – that also fell within the purview of the CFSP. The Council also contested the Parliament's argument that the aims of the agreement pertained to other EU policies.

5 "The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in [the TFEU]."

6 The Czech Republic, the French Republic, the Italian Republic, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland intervened in support of the Council; and the Commission in support of the Parliament.

7 Also known as the 'classic aim and content' test [a term borrowed from Ester Herlin-Karnell, '"Light Weapons" and the Dynamics of Art 47 EU – The EC's Armoury of Ever Expanding Competences', *The Modern Law Review* 71, 2008, p. 1002]. The formula, which is the product of established case-law, reads as follows: "The choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a measure reveals that it pursues two aims or that it has two components, and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component." See, *inter alia*, Case C-155/91 *Commission v. Council* [1993] ECR I-939, paras. 19 and 21; Case C-36/98 *Spain v. Council* [2001] ECR I-779, para. 59; and Case C-338/01 *Commission v. Council*, para. 55.

8 See analysis above.

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By invoking the principle of institutional balance, Sweden and the United Kingdom argued that the interpretation of Article 218(6) TFEU advocated by the Parliament is not in line with the strictly limited role for the Parliament in the implementation of the CFSP, which obviously follows from Article 36 TEU. Moreover, such an interpretation, would be contrary to the spirit of Article 40 TEU which guarantees that competences conferred by the TFEU do not encroach on CFSP competences.

As regards the second plea of the Parliament, the Council claimed that this was inadmissible in so far as the Court had no jurisdiction to rule on whether or not an agreement relating exclusively to the CFSP complied with the information obligation laid down in Article 218(10) TFEU.[9] In the alternative scenario, should the Court accept jurisdiction to rule on this question, the Council could not be held liable for violating that provision.[10] The Council argued that the period within which the Parliament was informed of the contested decision, "albeit slightly longer than usual, was still reasonable, taking into account also the fact that this period included the summer break."

27.4 Opinion of Advocate General Bot: The Council's Victory

27.4.1 The CFSP Takes It All

In his Opinion, AG Bot provided a detailed analysis for determining the policy area which the contested agreement belongs to. His argument began by recalling the well-known rule established in previous case-law that the question of the applicable procedure for the conclusion of an international agreement cannot be examined in isolation from the preliminary question of determining the substantive legal basis of the agreement. Contrary to the claims made by the Parliament, the AG concluded that in assessing whether or not an agreement belongs exclusively under the CFSP, it is of little importance that the agreement in question is also related, in a secondary manner, to areas than the CFSP. Such a connection was therefore in sufficient to serve as the basis for consultation of or prior consent from the Parliament required under Article 218(6) TFEU.[11]

The AG agreed with the Council that accepting the Parliament's position would have amounted to requiring the Parliament's consent for many agreements founded solely on a CFSP legal basis since such agreements often also have some connection with other

9 As a basis of this argumentation, the Council referred to the final sentence of Art. 24(1)(2) TEU and Art. 275 TFEU which (as a main rule) exclude the jurisdiction of the Court with respect to the CFSP provisions of the TEU, with the exception of monitoring compliance with Art. 40 TFEU and reviewing the legality of certain decisions as provided for under Art. 275(2) TFEU.

10 Opinion, para. 132.

11 Opinion, paras. 19 and 21.

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Union policies, given the existence of general, cross-cutting external relations objectives and the requirement of consistency (in particular because of the well-recognised interrelationship between security, development and human rights). He maintained that, due to the horizontal objectives and the requirement of consistency in the Union's external actions, the presence of aspects relating to other Union policies, if they were incidental, did not mean that the centre of gravity of the agreement was outside the CFSP.[12]

The AG also pointed out the importance of parallelism between internal and external powers on which Article 218(6) TFEU was based. He agreed with the intervening states that the interpretation advocated by the Parliament would have affected the institutional balance established in the Treaty of Lisbon, which, as the AG added, would have meant that the Parliament had greater powers in the adoption of a decision concerning the signing and conclusion of an international agreement than it enjoyed with regard to the adoption of an internal measure which had no such object.[13]

On the basis of the above consideration, the AG argued that both the context of the agreement and its aim and content suggested that the appropriate substantive legal basis for that decision is actually – and solely – Article 37 TEU. In accordance with the Council's argumentation, he also pointed out that both the contested decision and the Agreement made reference to resolutions of the United Nations Security Council and to Council Joint Action 2008/851/CFSP. Accordingly, there was a close link between the military operation provided for by the Joint Action and the provisions on the transfer and treatment of suspected pirates contained in the agreement. Such a link constituted a strong indication that the agreement was connected with the CFSP.[14]

The imperative of security, to which both CFSP and the external dimension of the AFSJ subscribe, was also highlighted in the opinion. This "common denominator" makes it difficult to draw a clear distinction between the respective scopes of the two policies. The AG saw, as decisive factors for making such a distinction, the borderline between the internal and external elements of security.[15] Based on this consideration, the AG argued that since the contested Union action formed part of an action decided upon at an international level and which sought to combat a threat to international peace and security, the action must have been adopted within the framework of the CFSP.[16]

12 Opinion, paras. 23-24.

13 Opinion, paras. 30-31.

14 Opinion, paras. 41, 44, 68 and 70.

15 Opinion, para. 112. This means, on the one hand, that the connection with the AFSJ is justified where there is a direct link between the aim of the internal security of the Union and the judicial and/or police cooperation which is developed outside the Union. On the other hand, a Union action must be connected with the CFSP where the objective of that action is, first and foremost, peace, stability and democratic development in a region outside the Union.

16 Opinion, op. cit., para. 114.

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As far as the scope of development policy is concerned, the AG did not follow the quite extensive interpretation presented in earlier case-law.[17] In his view, the assistance provided for under the Agreement does not go beyond the objectives for which the Atalanta operation was set up. Strengthening the judicial capacities of the Republic of Mauritius is not an end in itself, but is aimed at the effective repression of acts of piracy which pose a threat to international peace and security. Accordingly, its objective is certainly not the development of the Republic of Mauritius and does therefore not constitute such a policy measure.[18]

Based on the above reasons, the AG concluded that recourse to another legal basis – beyond Article 37 TEU – in the AFSJ provisions of the TFEU was not required. Nor did the Agreement include a development cooperation component which may justify the choice of an additional legal basis relating to that policy field. The adoption of the decision concluding the contested agreement did not therefore require consent from or consultation of the Parliament.[19]

27.4.2 *Granting a Right to Be Informed to the Parliament in CFSP Matters – Better Late Than Never*

As to the Council's submission regarding judicial review, the AG, in accordance with established case-law, argued that – although the Court lacks jurisdiction in matters falling within that policy – the CFSP did not completely escape the scrutiny of the European Union judicature. Moreover, the exclusive CFSP legal basis of the contested measure did not mean that the Court must decline to review whether the Council had complied with the procedural rule provided for in Article 218(10) TFEU.[20]

As far as the alternative claim of the Council is concerned, the AG recalled the judgment of the Court in the case *Parliament v. Council* stating that

> participation by the Parliament in the legislative process is the reflection, at Union level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.

17 See for instance, Case C-91/05 *Parliament v. Council*, [2008] ECR I-3651, also known as the "ECOWAS" judgment [see fn 35].
18 Opinion, op. cit., paras. 127 and 128.
19 Opinion, paras. 121, 122 and 131.
20 Opinion, paras. 136 and 138.

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At the same time, the AG pointed out, also on the basis of the case-law, that the framers of the Treaty of Lisbon had made the choice to confer 'a more limited role on the Parliament with regard to the Union's action under the CFSP'.[21]

As regards the Parliament's right to be informed in the procedure of the conclusion of international agreements, the AG also made a distinction between agreements which exclusively relate to CFSP and those which do not. He considered that the Council could legitimately be expected to provide the Parliament with information relating to an international agreement more quickly and in fuller detail – so that it could give an informed opinion – where the Parliament was required to give its consent or to be consulted pursuant to Article 218(6)(2) TFEU than where consent from or consultation of the Parliament was not necessary. The Court's review of compliance by the Council with the information obligation under Article 218(10) TFEU must therefore in each case have taken into account the nature of the agreement in question and the Parliament's powers under Article 218(6) TFEU to influence the substantive content of that agreement.[22]

Accordingly, the AG established, on the one hand, that the Council had informed the President of the Parliament directly and personally of the opening of negotiations, then of the adoption of the contested decision and the signing of the Agreement. On the other hand, he acknowledged that it would have been more in keeping with the spirit of Article 218(10) TFEU if the Parliament had been informed before the publication of the contested decision and the Agreement in the *Official Journal of the European Union*. Finally, however, he came to the conclusion that the conditions for establishing a violation of Article 218(10) TFEU were not given, since the Agreement related exclusively to the CFSP, and the period of three months which had elapsed before informing the Parliament had neither infringed the latter's prerogatives, nor could it have influenced the content of the Agreement.[23]

27.5 The Judgment of the Court: The People Win the Second Game

27.5.1 Parallel Internal and External Institutional Powers

Not surprisingly, the Court began its reasoning in relation to the first plea by recalling the "centre of gravity" test. Unlike the AG, it did not go into further detail about the demarcation between the areas of CFSP and other EU policies. Instead, the Court went on to search for those common points in which there was an agreement between the parties. In doing so, it established that the Parliament expressly recognised that the decision and the EU-

21 Opinion, para. 140.
22 Opinion, paras. 142-143.
23 Opinion, paras. 155 and 157.

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Mauritius Agreement pursue as their main aim that which fell within the CFSP and to which the other objectives of the agreement – notwithstanding their importance – were only incidental.[24]

Based on this observation, the Court continued by investigating whether the undisputed, exclusively CFSP legal basis entails the exclusivity of this policy in the sense of Article 218(6) TFEU. Although it acknowledged that the primarily CFSP aim of the contested agreement did not automatically mean that it was related 'exclusively to the [CFSP]',[25] it also invoked the principle of parallelism, by arguing that Article 218(6) TFEU established symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements in order to guarantee that the Parliament and the Council enjoyed the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties. Such a requirement of symmetry also meant that the rule identified by case-law – that is the substantive legal basis of a measure which determines the procedures to be followed in adopting that measure – applied not only to internal law-making but also to the conclusion of international agreements. Therefore, where the decision concluding the agreement in question was legitimately founded exclusively on a substantive legal basis falling within the CFSP, the type of procedure provided for in the first part of Article 218(6)(2) TFEU applied which did not require the consent or consultation of the Parliament. Such an interpretation was justified, particularly in the light of requirements relating to legal certainty. The interpretation advocated by the Parliament, the Court argued, would have had the effect of introducing a degree of uncertainty and inconsistency into that choice, in so far as it would have been liable to result in the application of different procedures to acts of EU law which had the same substantive legal basis.[26]

The Court gave an affirmative answer to the question of its jurisdiction to rule on the second plea, by arguing – not surprisingly and in accordance with earlier case-law[27] – that the scope of the limitation on its jurisdiction envisaged in the final sentence of Article 24(1)(2) TEU and in Article 275 TFEU did not preclude the Court from having jurisdiction to interpret and apply a provision such as Article 218 TFEU which "does not fall within the CFSP, even though it lays down the procedure on the basis of which an act falling within the CFSP has been adopted."[28]

24 Judgment, paras. 44-45.
25 Judgment, para. 50.
26 Judgment, paras. 56, 57, 59, 60 and 62.
27 See in particular the broad interpretation on the scope of the Court's jurisdiction to monitor compliance with Art. 40 (ex-Art. 47) TEU in cases C-170/03 *Commission v. Council* [1998] ECR I-2763, paras. 13-18; ECOWAS, op. cit., para. 31-34.
28 Judgment, para. 73.

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27.5.2 Parliamentary Right to Be Informed in EU Treaty-Making – No Differences between Policies

As regards the merits of the second plea, the Court did not confirm the AG's conclusion. It held that the Parliament had not been immediately informed at all stages of the procedure for negotiating and concluding the EU-Mauritius Agreement, since the Council had not informed it on the adoption of the contested decision and the signing of that agreement until three months later and 17 days after their publication in the OJ.[29]

The Court continued by stressing that

> the information requirement arising under Article 218(10) TFEU is prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the European Union's external action…[30]

That rule is an expression of the democratic principles on which the European Union was founded and may not be fulfilled through official publication, since the latter satisfies another requirement, i.e. publicity requirements to which an EU act is subject if it is to enter into force. The Treaty of Lisbon had even enhanced the importance of said rule in the treaty system by inserting it in a separate provision within Article 218 TFEU. The information requirement laid down in Paragraph (10) applies, therefore, to any procedure for concluding an international agreement, including agreements relating exclusively to the CFSP. Finally, on the basis of the above reasons, the Court found the second plea to be well founded and annulled the contested decision.[31]

27.6 Comment

The constitutional significance of the case is beyond doubt. With the recognition of the Parliament's right to be informed in the procedure of concluding CFSP related international agreements the Court opened a door for the institution which had previously remained closed for so long and been heavily guarded by the shield of national sovereignty. At the same time, certain parts of the reasoning and the outcome of the judgment raise further questions which call for a more detailed analysis. This is particularly the case in light of the relevant modifications of the EU constitutional order brought about by the Lisbon treaty.

29 Judgment, paras. 76 and 77.
30 Judgment, para. 79.
31 Judgment, paras. 79, 82, 87.

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27.6.1 *Abolition of the EU Pillar System by the Lisbon Treaty – What Are the Consequences?*

In the pre-Lisbon period, the task of identifying the appropriate legal basis was further complicated by the Union's "pillar structure".[32] It soon became obvious, in particular following the ECOWAS (also known as "Small arms and light weapon") judgment, that a watertight separation of the different EU policy fields was not feasible.[33] In the spirit of "clarity, consistency and rationalisation", the Treaty of Lisbon abolished the former pillar system of the EU; however, the results of this modification are not self-evident. AG Bot also began his Opinion by establishing that

> This case nevertheless demonstrates once again[34] […] that despite the formal disappearance of the pillars the entry into force of the Treaty of Lisbon has not obviated the need to delimit the respective scopes of the Union's different policies.[35]

The above statement is particularly true where the contested EU measure – be it an internal action or an international agreement to be concluded with third parties – concerns both CFSP objectives and other EU policies at the same time, since the main characteristics of the former were retained, even after the entry into force of the Lisbon Treaty. The limited role of the Parliament in decision-making procedures is also an important piece of the 'CFSP picture'. A *de facto* dichotomy between EU (CFSP) measures and *acquis communautaire* can therefore still be discerned, and the latter so frequently cited category remains obscure.[36] As Herlin-Karnell remarked, "there is consequently reason to believe that the […] Treaty adds to rather than resolves the many constitutional complexities within the CFSP area."[37]

The present case, in which the Court for the first time interpreted the parliamentary involvement in the procedure for the conclusion of a CFSP related international agreement definitely affirmed the above claims. It has become clear (in particular when reading the AG's argumentation) that it is not merely the delimitation of respective policy aims that

32 For a detailed analysis in this regard, see: Joni Heliskoski, 'Small Arms and Light Weapons within the Union's Pillar Structure: An Analysis of Art. 47 of the EU Treaty', *European Law Review* 33, 2008, p. 899.

33 Hillion, Christophe and Wessel, Ramses A., 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?', *Common Market Law Review* 46, 2009, p. 551.

34 A reference was made here to the judgment in C-130/10 *Parliament v. Council*, EU:C:2012:472 which, as we will see below, concerned the fight against international terrorism.

35 Opinion, op. cit., para. 2.

36 The nature of the 'Acquis Communautaire' was defined this way by S. Weatherill, 'Safeguarding the Acquis Communautaire', in: T. Heukles et al. (Eds.), *The European Union after Amsterdam*, The Hague: Kluwer, 1998, p. 153.

37 Herlin-Karnell, op. cit., p. 1002.

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is questionable, but additional problems may also arise. Here, the Court had to face further challenges – such as the close connection between the contested agreement and the Joint Action; the overlapping scopes of the general horizontal aims of EU external actions (which are all CFSP objectives without further specification) and particular policy-related ones; as well as the not so obvious differences between the internal and external sides of security – in ascertaining the policy field whose objectives the contested agreement pursues.

This case also justifies an observation that there is a difference in the approaches outlined in the Court's decisions before and after 1 December 2009. While the rulings delivered (ever since the failure of the Constitutional Treaty in 2005 and before the entry into force of the Treaty of Lisbon) show that the Court has subscribed to a depillarisation trend (at least in the relation between the old First and Third Pillars),[38] in the post-Lisbon judgments – that is, after (!) the de facto abolition of the pillar-structure –, it seems to have taken a step backwards, by stressing the characteristics of decision-making in the field of CFSP, at least as far as the Parliament's rights are concerned.

27.6.2 *Parallelism between Internal and External Actions – Does the Implied Power Doctrine Really Work for Institutional Powers?*

As regards the conclusion of international agreements between the EU and third parties, the Treaty of Lisbon extended the Parliament's right to consent to all areas in which the EP has the power of co-decision under the ordinary legislative procedure (Art. 218 TFEU). In practice, this means that the EP acquired the capacity to ratify international agreements in key areas such as trade, agriculture and internal security matters – areas from which it had previously been excluded.[39]

The aim of such an extension of parliamentary power, as the Court explained, is to establish a symmetry between internal and external EU actions and the Court based, in essence, its conclusion concerning the first plea on this consideration.

Emphasising the parallelism (symmetry) of internal and external parliamentary powers is important, particularly when we look back to the evolution of the rights of institution in the process of European integration from a broader perspective. History shows that while the Parliament was afforded an ever greater role in internal decision-making through the introduction and extension of the co-decision procedure to more and more policy fields, the procedure for the conclusion of international agreements persistently maintained the respective prerogatives of the Commission and the Council.[40] This is not surprising,

38 Herlin-Karnell, op. cit., p. 1003.

39 Ariadna Ripoll Servent, 'The role of the European Parliament in international negotiations after Lisbon', *Journal of European Public Policy* 21, 2014, p. 568.

40 Daniel Thym, 'Parliamentary Involvement in European International Relations', in: Marise Cremona – Bruno de Witte (Eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart, 2008, p. 201.

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since the involvement in "external" decision-making (due to substantive differences between domestic and foreign policies[41]), traditionally remains beyond the reach of democratically elected parliaments also in national constitutional orders.[42] Viewed from this angle, the still (i.e. in the post-Lisbon period) limited role of the Parliament in CFSP decision-making (including the treaty-making procedure) is a logical consequence of the specific features of foreign affairs.[43]

All these factors can explain why the Parliament, despite its clear efforts to acquire more extensive powers in international affairs,[44] remained an outsider to the 'club' in charge of the external governance of the EU, pending the entry into force of the Lisbon Treaty. The implied power doctrine as applied by the Court for delimiting the treaty-making competences of the Community (as a whole) and according to which "the system of internal [...] measures may not [...] be separated from that of external relations" has not been extended to the institutional rules governing the exercise of powers in pre-Lisbon case-law.[45]

Returning now to the requirement for symmetry between internal and external parliamentary powers, it is apparent that the Court regarded the proper determination of legal basis (viewed through the lens of the "centre of gravity test") as one of the main instruments for ensuring such a parallelism. A direct linkage between the parallelism of institutional prerogatives and legal basis is not, however, in every case so obvious as the Court claims it to be in the present case, since the aims of the internal and external activities of the EU in a given policy field are not necessarily the same and the external instruments may often be more complex (which, in the author's view, is also manifest in the present case).[46]

Furthermore, the link between parallelism and legal basis as interpreted by the Court in its reasoning regarding the first plea also appears to be problematic in the light of the implied powers case-law. Related decisions essentially focus on whether the conclusion of an agreement by Member States (and not the EU) affects internal EU rules. As to determining whether the EU has implied external powers or not, the Court expressly excluded the applicability of the centre of gravity test:

41 Following Thym's approach (Thym, op. cit., pp. 201-202), foreign policy can be seen as predominantly governed by executive bodies and as being generally less about legal rule-making for a political community and much more about requiring political positioning towards third international parti(es), identification of strategic goals as well as flexibility in adaptation of methods for its realisation and implementation.

42 Thym, op. cit., p. 201.

43 Peter Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency', *Common Market Law Review* 47, 2010, p. 999.

44 In detail, see: Thym, op. cit., pp. 203-210.

45 Thym, op. cit., p. 202.

46 This consideration will be further elaborated below (section 27.6.4).

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> the legal basis for the Community rules [...] are, in themselves, irrelevant in determining whether an international agreement affects Community rules: the legal basis of internal legislation is determined by its principal component, whereas the rule which may possibly be affected may be merely an ancillary component of that legislation. The purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law and the proper functioning of the systems established by its rules, independently of any limits laid down by the provision of the Treaty on which the institutions base the adoption of such rules.[47]

Such an approach was amenable to a rather extensive interpretation of the scope of EU implied external powers, which is to some extent independent of the legal basis of internal rules adopted in a given policy field. If the treaty-making power of the EU (as a whole) maybe interpreted in this way, why can the Parliament's "treaty-making rights" not be approached in a similarly flexible and less legal basis oriented manner? A combined result of the process in fact makes the people the loser of the competence-game: the broad interpretation of the EU's exclusive treaty-making power deprives national assemblies of the right to take part in control-mechanisms which would be possible under the procedure for concluding mixed agreements,[48] whereas the prerogatives of the EP are strictly interpreted where the EU exercises its exclusive treaty-making power. On the one hand, a less flexible interpretation of the Parliament's prerogatives can definitely be traced back to (as previously explained) the traditional limited parliamentary involvement in foreign affairs. On the other hand, there may also be an argument for a more extensive approach, in particular in light of pre-Lisbon case-law and recent tendencies in EU treaty-making practice, as will be detailed below.

27.6.3 Determination of the Substantive Legal Basis of EU Norms – The People versus the Centre of Gravity Test

The argumentation of the Court concerning the first plea does not fully match the spirit of earlier case-law, although the above conclusion can certainly be explained by the principle of legal certainty and thus by a formalistic "legal basis focused" argumentation. However, having regard in particular to the principle of democratic participation highlighted in earlier case-law, it may also be argued that the Court could have found a solution

47 Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145.

48 For a more detailed analysis of this mechanism, see: Thym, op. cit., p. 213; Angéla Juhász-Tóth, 'The Europeanization of the Hungarian National Assembly' (PhD thesis, Debrecen, 2014) p. 58.

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which ensures a stronger role for the Parliament in the procedure (that is the right to be consulted) but, at the same time, does not impinge upon the requirements arising from legal certainty. At this point, it is worth analysing this issue more deeply.

Looking back to early jurisprudence, in the *Titanium-Dioxide* judgment delivered in 1991, the Court seemed to be more receptive to the importance of democratic participation in the decision-making procedure, than in our times, in 2014. It annulled the contested regulation of the Council which was based on two relevant provisions of the Treaty instead of one. Although the use of both enabling provisions had not been excluded in earlier case-law,[49] the Court found that it was not applicable in the present *Parliament v. Council* case, since the joint legal basis would have divested the cooperation procedure of its very substance[50] as the weight of the amendments to the Council's common position proposed by the Parliament would have been lost.[51] Such an interpretation has been confirmed by subsequent rulings, pointing out that "recourse to a dual legal basis is not possible where […] the use of two legal bases is liable to undermine the rights of the Parliament".[52]

It is further worth recalling the *Kadi* case. Although the policy-classification of the contested measure was not the focus here, the approach to the issue of legal basis applied by the Court of First Instance (CFI, now General Court) and, in essence, confirmed by the Court of Justice, is quite interesting. In comparison with the present case, a much more flexible attitude was demonstrated, since the CFI found that "recourse to the cumulative legal bases [i.e. ex-Articles 60 EC, 301 EC and 308 EC] makes it possible to attain, in the sphere of economic and financial sanctions, the objective pursued under the CFSP by the Union and its Member States […] despite the lack of any express attribution to the Community of powers to impose economic and financial sanctions on individuals or entities with no sufficient connection to a given third country […]". Instead of emphasising the limited powers of the EU institution in CFSP and the unique character of the (ex-)second pillar, the Court stated that the contested "action by the Community is […] in actual fact action by the Union" and that "account has to be taken of the bridge […] between Com-

49 See, *inter alia*, the judgment delivered in Case 165/87 *Commission v. Council*, [1988] ECR 5545, para. 11, in which the Court held that "where an institution's power is based on two provisions of the Treaty, it is bound to adopt the relevant measures on the basis of the two relevant provisions."

50 Under the cooperation procedure, the Council acts by a qualified majority where it intends to accept amendments to its common position proposed by the Parliament and included by the Commission in its re-examined proposal, whereas it must secure unanimity if it intends to take a decision after its common position has been rejected by the Parliament or if it intends to modify the Commission's re-examined proposal. As a result of simultaneous reference to Arts. 100a and 130s, the Council was required, in any event, to act unanimously.

51 One of the provisions at issue (ex-Art. 100 EC) foresaw recourse to the cooperation procedure, whereas the other (ex-Art. 130s EC) required the Council to act unanimously after merely consulting the Parliament.

52 See C-178/03, para. 57. See also Joined Cases C-164/97 and C-165/97 *Parliament v. Council* [1999] ECR I-1139, para. 14; and Case C-338/01 *Commission v. Council*, [2004] ECR I-4829, para. 57.

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munity actions imposing economic sanctions [...] and CFSP objectives."[53] Nor did the CFI consider the multiplication of legal bases here to be problematic. On appeal against the CFI's judgment, the Court of Justice further pointed out that

> adding Article 308 EC to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles 60 EC and 301 EC, no role is provided for that institution.[54]

Taking the *Titanium-Dioxide* and the *Kadi* rulings together, there is one common point: the "principle of conferral",[55] which lies at the heart of the strictly legal basis focused arguments, has not been at the forefront of the reasoning. The Court(s) laid more emphasis – and in both cases in favour of the Parliament – on other fundamental principles, such as "the peoples should take part in the exercise of power through the intermediary of a representative assembly" or the implementation of effective instruments to ensure international peace and security.

The *ECOWAS* case offered the first opportunity for the Court to examine a legal basis conflict between the ex-first and ex-second pillar. The case made it clear that in such a context the centre of gravity doctrine is difficult to apply.[56] The Court found the contested decision to be unlawful and in breach of ex-Article 47 (now 40) TEU since it was adopted exclusively on the basis of the CFSP provision of the EU Treaty, whereas, for falling both within EC development cooperation policy and CFSP, it had been founded on the EC legal basis relating to the former policy. In comparison with our judgment, a more "Community-friendly" (which also means, in our view, Parliament-friendly[57]) approach was demonstrated here. Firstly, because the judgment suggests that if the measure is both about EC and CFSP

53 Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3353; and T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, [2005] ECR II-3649, paras. 159-161. It should, however, be noted that the Court of Justice held, on appeal in *Kadi*, that such a view runs counter to the very wording of ex-Art. 308 TEC and, in relation to ex-Arts. 60 and 301 TEC, only found the above statement correct in case the text expressly referred to a connection between CFSP objectives and economic sanctions of the EC. Nevertheless, the Court also established that the former article (together with the other two provisions) could legitimately be regarded an appropriate foundation for the contested regulation which is also linked to the operation of the common market within the meaning of Art. 308 TEC. (See Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, [2008] ECR I-6351.)

54 C-402 & 415/05 P, op. cit., para. 235.

55 See Art. 5(1) TEU: "The limits of Union competences are governed by the principle of conferral." and Art. 4(1) TEU: "... competences not conferred upon the Union in the Treaties remain with the Member States."

56 Hillion and Wessel, op. cit., p. 576.

57 In the area of development cooperation the ex-Art. 179(1) TEC provided that 'the measures necessary to further the objectives referred to in ex-Art. 177 [TEC]' are to be adopted by the Council acting in accordance with the so-called co-decision [after the entry into force of the Lisbon Treaty ordinary legislative] procedure.'

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matters, without one being incidental to the other, the EC legal basis wins.[58] Secondly, the Court clearly gave a broader interpretation to the scope of development cooperation policy.[59]

Contrary to the ECOWAS cases, ex-Article 47 TEU was not invoked in the present case, neither by the parties, nor by the Court,[60] although the provision reborn as a "mutual non-affectation clause"[61] in the current Article 40 TEU is definitely capable of safeguarding the immunity of the CFSP area. While Article 47 TEU[62] had a pre-emptive effect on EU external action in favour of the Community, the new Article 40[63] not only protects the *acquis communautaire*, but also the "CFSP *acquis*", both in terms of procedure and powers.[64]

It would be an exaggeration to say that there is an obvious contradiction between the previous case-law and the present judgment, but, as far as the pillars of the Court's reasoning are concerned, a shift from highlighting the need for democratic scrutiny to emphasising the inviolability of the "centre of gravity" test is evident. The present ruling is not the first one in this new line of cases. Indeed, in a recent post-Lisbon *Parliament v. Council* case where, similarly to Kadi, the legal basis of the EU regulation imposing – in the name of combating terrorism – economic sanctions against individuals was contested, the Court argued that

> while it is true that choosing between Articles 75 TFEU[65] and 215 TFEU[66] as the legal basis for the contested regulation has consequences for the Parliament's prerogatives, inasmuch as the former provides for recourse to the ordinary legislative procedure whereas, under the latter, the Parliament is merely informed, *that fact cannot, however, determine the choice of legal basis*.[67]

58 Hillion and Wessel, op. cit., p. 574.

59 See, in particular, para. 94 of the judgment: "…it cannot be inferred from the contested decision that in comparison with its objectives of preserving peace and strengthening international security its concern to eliminate or reduce obstacles to the development of the countries concerned is purely incidental."

60 Only the AG and the Kingdom of Sweden as well as the United Kingdom as interveners made a short reference to Art. 40 TEU to support their basically 'pro-CFSP' arguments.

61 A term borrowed from Elsuwege, op. cit., p. 988 and p. 1002.

62 "…nothing in [the TEU] shall affect the Treaties establishing the European Communities."

63 "The implementation of the [CFSP] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Arts. 3 to 6 of the [TFEU]. *Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under [the CFSP] Chapter*." [Emphasis added].

64 Hillion and Wessel, op. cit., pp. 582-583.

65 Ex-Art. 60 TEC. As we can see, an important difference between the old and the new version is that the former Art. 60 provides no role for the Parliament whereas the reformulated text enables the institution to take part in the decision-making process.

66 Ex-Art. 301 TEC.

67 C-130/10, op. cit., para. 79. [Emphasis added].

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It is apparent that such an approach is rather far removed from the spirit of the *Titanium-Dioxide* reasoning. Nor was the Court convinced by the argument that "it would be contrary to Union law for it to be possible for measures to be adopted that impinge directly on the fundamental rights of individuals and groups by means of a procedure excluding the Parliament's participation" and it bluntly rejected the Parliament's claim by arguing that "the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union" and "the acts referred to in [Article 75 TFEU and Article 215(3) TFEU] are to include necessary provisions on legal safeguards."

The message of the pre-Lisbon case-law for us is that ensuring the Parliament's involvement in decision-making procedures can be a legitimate influential factor in determining the legal basis of EU acts. The *Titanium-Dioxide* judgment, for instance, made it clear that the choice of dual basis must be sacrificed in order to guarantee the full protection of parliamentary prerogatives in decision-making, even if the contested EU measure (simultaneously) has aims or components falling within two EU policy fields, such that it should have been founded on two Treaty provisions. Hence, the question arises as to why such an interpretation does not work conversely? Especially when we take into consideration the general policy objectives behind the Lisbon Treaty reforms concerning EU external relations[68] and the fact that the pillar system has (at least formally) been abolished by 1 December 2009.[69] More specifically, if the measure at stake can be founded on a single legal basis (now Article 37 TEU) but definitely has (even if only incidentally) aims other than those falling within the CFSP, why have the parliamentary rights other than that to be informed, been so categorically excluded,[70] whilst the treaty text itself does not make such an explicit exception in the case of "non-exclusively" but only predominantly CFSP related agreements? The present judgment left a lacunae by not clarifying the controversy that the textual interpretation of Article 218(6) TFEU does not obviously allow for only one reading of that provision; that is, all the treaties concluded by the EU solely on the substantive legal basis provided by Article 37 TEU must be regarded as an agreement

68 The intention to establish the basis for a more integrated and coherent EU external action is also expressed in the attribution of a single legal personality to the Union (Art. 47 TEU), as well as in the common set of objectives for the EU external actions under Art. 21(1) TEU. For a supporting opinion see *inter alia* Louis, Jean-Victor, 'The European Union: from External Relations to Foreign Policy?', *EU Diplomacy Papers* 2, 2007, p. 4.

69 Nevertheless, it is also important to mention the 'pre-Lisbon cases' (such as the *ECOWAS* case discussed above) here where cross-pillar measures have been challenged (which was not the issue of the *Titanium-Dioxide* and *Kadi* cases) and where the Court refused to accept a dual legal basis because of the fundamental differences between the supranational and intergovernmental methods of cooperation. This is one aspect why the abolishment of the pillar system is (or at least could be) so important for cases where the Court should determine the legal basis of (non-exclusively) CFSP instruments.

70 As we have seen, the Court failed to acknowledge the need for both the consent and the consultation of the Parliament (see para. 52 of the judgment cited above).

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relating exclusively to CFSP. The "exclusively" in the text relates only to the link between the given contested measure and the policy area, but has not been connected to a legal basis issue. In this regard, Article 218(6) TFEU diverges from Article 207 TFEU (CCP) which expressly provides for a special procedure for the conclusion of agreements falling within the scope of this provision.

A more extensive interpretation of the scope of parliamentary prerogatives would also be feasible by taking into account the increasingly complex nature of CFSP agreements. It can generally be established that, because of this complexity, the "incidental" character of a non-CFSP aim pursued by an agreement ever less evidently justifies the conclusion that such an agreement can only regulate CFSP issues which, by their very nature, do not require parliamentary control. On the contrary, aspects concerning the particular rights of individuals are often integrated into such "clear" CFSP agreements. AG Bot expressly referred to the well-recognised interrelationship between security, development and human rights, which, as he recognized "means that it would very often be possible to argue that measures taken in one of these three areas will also have some effect on the other two areas [...] for the purposes of the application of Article 218(6) TFEU". Interestingly, this reasoning was intended to support the final conclusion of the AG that the contested agreement did not require consent from or consultation of the Parliament. However, the 'weapon' he used may also be turned against him: even the tendency that the content of such agreements has become ever so complex (and ever so focused on the individual) calls for a more flexible approach from the Court to legal basis issues. The question therefore arises as to whether the consistent application of the rigid 'centre of gravity' test is reasonable. At this point it is worth recalling the paper of Hillion and Wessel, published in 2009, which already anticipated certain problems with the above test in a cross-pillar dimension after Lisbon. The authors established that

> in adjudicating on "cross-sector" legal basis, the Court could [...] build upon the EC legal basis case law, whereby *a possible greater role of the European Parliament in the decision-making has become one factor that may be relevant for choosing a specific legal basis of an act....*[71]

The new list of comprehensive horizontal aims guiding all areas of EU external action introduced by the Lisbon Treaty, when read together with Articles 23 and 24 TEU, complicates determining the legal basis even further. The former provision only refers to the horizontal objectives laid down in Article 21(2) TEU, and the latter provides a particularly

71 Hillion and Wessel, op. cit., p. 581 [emphasis added].

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broad and general definition of the CFSP.[72] There is thus an absence of specific CFSP objectives which also makes the centre of gravity test difficult to apply.[73] Against this background, an inflexible approach to legal basis disputes seems to be even more problematic. The question is challenging, in particular, from the perspective of human rights protection which is increasingly becoming a priority objective of all policies pertaining to EU external action.[74] In light of the above, the Council's submission that the promotion of human rights protection in third countries is an objective that falls within the CFSP and therefore the CFSP legal basis – granting less parliamentary rights in the procedure – is justified, is far from convincing. A more persuasive argument is

> …if there is any ambiguity about the choice between possible legal bases or decision-making processes, the Court should ensure that EU measures concerning human rights should be decided by means of whichever process ensures the maximum possible parliamentary input and judicial control.[75]

The need for guarantees of human rights protection outside the EU justifies even more the above formulated search for a new approach to the centre of gravity test, at least where the Parliament's prerogatives in the procedure of the conclusion of international agreements are at stake.

27.6.4 How Parliamentary Prerogatives Really Work in the Procedure for the Conclusion of International Agreements

The possible length of the procedure or difficulties in bringing about a consensus between the participating actors as a determining factor of an actor's involvement naturally remains outside the scope of legal reasoning handed down by the Court in the present case. Nevertheless, it is worth examining the practical impact of the Lisbon reforms in more detail in

72 Under that provision, '[t]he Union's competence in matters of [the CFSP] 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'.

73 Elsuwege, op. cit., p. 1004. The AG also pointed out this difficulty in the present case and – in order to be able to define the boundaries between the CFSP and the Union's other policies – invoked ex-Art. 11(1) TEU, as the provision containing the 'original' CFSP objectives to which (current) Art. 21(2)(a) to (c) and (h) TEU correspond to.

74 See in particular 'EU Strategic Framework on Human Rights and Democracy' adopted by the Council in 2012 (11855/12); available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

75 In this context, Peers also referred to the significance of the elevation of the EU Charter of Fundamental Rights to the 'same legal value' as the Treaties (Art. 6 TEU). Steve Peers, 'Pirates of the Indian Ocean: Legal Base and Democratic Debate'; 30 January 2014, available at: http://eulawanalysis.blogspot.co.uk/2014/01/pirates-of-indian-ocean-legal-base-and.html#more.

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order to estimate not only the constitutional but also the practical significance of the present judgement, as well as to try and comprehend the Council's passivity.

The EU–US SWIFT Agreement was the first to be subjected to ratification by the EP after 1 December 2009.[76] The objective of the Agreement is to manage the access of US authorities to personal bank data contained in the servers of the Belgian SWIFT company. As the Member States considered the EP's ratification a formality, they were rather surprised when, on 11 February 2010, the Parliament decided to vote against the ratification of the agreement, since it did found the level of data protection granted by the agreement to be insufficient. At the same time, the Council and the US party (in agreement) shared a different understanding of the substantive problem and preferred a pull system,[77] which gave them more freedom to analyse bulk data and find useful leads in their fight against terrorism.[78] In the end, the actors of the procedure renegotiated the agreement satisfying the Parliament to ratify it. However, it was necessary to put several strategies into place to consider the EP's interests and to achieve such a positive result.[79]

It also became apparent that the EP intended to effectively exercise its new power of consent (and not only formally, as was expected by the Council and the US). Other participants of the procedure therefore needed to change their strategy – this was evident from previous experience. After the signing of the first rejected interim agreement, the others made 'last-minute' attempts to put pressure on the EP, which, as we know, failed to prevent parliamentary rejection. The defeat of the first effort to conclude the SWIFT-agreement led the actors to use their persuasive instruments and to search for a consensus with the EP right from the agenda-setting stage.[80] Just to mention one important result of this attitude, the negotiating directives of the Council openly referred to the specific objectives set out in the recommendations made by the European Parliament in its Resolution of 5 May 2010[81] as those to be achieved by the Commission in the course of negotiations. Therefore, the Commission's actions were *de facto* not only guided by the Council's mandate – as foreseen in the Lisbon Treaty – but also by the EP resolution.[82]

76 To be more precise, this second round of negotiations was the first to occur fully under the Treaty of Lisbon.
77 In the 'pull' system (in contrast with the 'push' system), the data transmission is initiated by the recipient, which means, in the present context, direct access by US authorities to European bank data bases.
78 Servent, op. cit., pp. 9-10.
79 Servent, op. cit., p. 11. The Commission, among other efforts, offered increased data protection safeguards in the new negotiating mandate; the Presidency sent an EU official to the US for the purpose of overseeing the use of European SWIFT data; the US invited key MEPs to visit the US.
80 This stage is identified following Servent, who distinguished three stages within the procedure for conclusion of international agreements, these being agenda-setting; negotiation; and ratification [Servent, op. cit., pp. 571-577].
81 P7_TA(2010)0143.
82 Servent, op. cit., p. 578.

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The subsequent practice of the conclusion of international agreements shows that such a development of the Parliament's role from a veto-maker to an agenda-setter[83] became more and more accepted and formalized.[84] Against this background, the outcome of the present judgment may have two different readings and a twofold significance. At first sight – and from a formal legal perspective – the recent decision of the Court may be considered yet another reinforcement of the principle of legal certainty, through applying a simple formula that the rights of the institutions in – either internal or internationally oriented – decision-making are strictly limited by the legal basis of the contested measure. However, beyond the surface, the political weight of the ruling seems to be much stronger. The present action of the Parliament may also be seen as an additional attempt to exploit the possibilities offered by the ambiguous Treaty-text to strengthen, by way of (the Court's) interpretation, the Parliament's role in the whole process of concluding international agreements. The Court, however, plays (yet again)[85] a braking role in the game played by the Council, the Parliament, and the Commission/HR (and eventually other participants), by rejecting the first plea and thereby delivering a message that the Parliament cannot go further down the road of increasing its involvement in such procedures, at least in the case of CFSP related agreements. In doing so, the Court, although without making any express reference on it, interpreted the principle of institutional balance in a similar way as the intervening states (in support of the Council) advocated in the present case.[86]

At the same time, the exact scope of the judgment's 'braking effect' is not obvious, particularly in light of the affirmative response given to the second plea, as the borderline between the parliamentary prerogatives granted by Article 218(6) on the one hand, and Article 218(10) TFEU on the other, does not seem to be clear. This undefined relationship led to an 'institutional uncertainty' following the entry into force of the Lisbon Treaty, which the Parliament used to successfully reinterpret its right to be 'informed' in international negotiations and transformed it into a right to be 'involved'.[87] A remarkable stage of such a transformation process is the Framework Agreement of 2010 made between the EP and the Commission, which foresees that

> the information [pursuant to Article 218(10) TFEU] shall be provided to Parliament in sufficient time for it to be able to express its point of view if appro-

83 Expressions borrowed from Servent, op. cit., pp. 581 and 582.

84 See, for instance, the EP's view as formulated in an EP recommendation: "[the EP] takes the view that adequate transparency has not been ensured throughout the negotiations on ACTA; recognises that efforts to inform Parliament have been undertaken by the Commission, but regrets that the requirement of transparency has been construed very narrowly and only as a result of pressure by Parliament and civil society."

85 See, for instance, the judgment of the Court delivered in Case C-130/10 *Parliament v. Council*, op. cit.

86 See the argumentation of Sweden and the United Kingdom in Section 27.3 above.

87 Servent, op. cit., p. 580.

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> priate, and *for the Commission to be able to take Parliament's views as far as possible into account.*[88]

Arguably, the right to be informed granted by this provision is equal, regardless of the policy field to which the contested measure pertains. Viewed from this angle, the Court's conclusion outlined above seems to be much more convincing than the artificial distinction made by the AG between agreements which exclusively relate to CFSP and those which do not.(And the Council's argumentation is even less persuasive in this regard, in which the reference to the 'summer break' sounds rather ironic.[89]) What is more, as Peers argues, Article 218(10) can also be read as suggesting that the EP should have more information, not less as regards CFSP treaties than the others, which the EP can veto on the basis of Article 218(6), whereas the content of CFSP treaties can only influenced by the EP before their signing and conclusion.[90]

27.6.5 Looking behind the Curtain: The High Representative in the Present Procedure

The Framework Agreement mentioned above also provides that

> Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives. The Commission shall act in a manner to give full effect to its obligations pursuant to Article 218 TFEU….[91]

In the present case, however, as the contested measure relates to CFSP, it is not the Commission but the High Representative of the CFSP who is in charge of conducting the negotiations, and thus providing the EP with information at this stage. The relation between the Framework Agreement and the HR's tasks is not self-evident, as she is/was[92] *de facto* a vice-president of the Commission, but, as regards CFSP matters, does not act on behalf of the latter institution.[93] At the same time, the HR committed herself to fully respect and

88 European Parliament and European Commission (2010) 'Framework agreement on relations between the European Parliament and the European Commission', Official Journal L 304/47, Points 23, 24.

89 Hardly more convincing than, as Larik wrote, "my dog ate my homework". See Joris Larik, 'Democratic scrutiny of EU foreign policy: From pirates to the power of the people' (Case C-658/11 *Parliament v. Council*); 14 August 2014, http://europeanlawblog.eu/?p=2469.

90 Peers, op. cit.

91 Agreement EP – EC, op. cit., point 23.

92 The position is currently (since 1 November 2014) held by Federica Mogherini, previously by Catherine Ashton.

93 This follows from Arts. 18 and 27 TEU and point 25 of Agreement EP – EC, op. cit.

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implement the Commission's commitments under the Framework Agreement. In the name of the "special relationship with the European Parliament" and partnership in the European policy-making process that she intended to achieve, Catherine Ashton expressly referred to information to be given to the EP on ongoing negotiations.[94] Nevertheless, such a duty also follows from Article 36 TEU which obliges the HR to "regularly consult the European Parliament on the main aspects and the basic choices of the [CFSP and CFDP] and inform it of how those policies evolve" and "ensure that the views of the [EP] are duly taken into consideration." Despite the above, the HR failed to provide the EP with information on negotiations of the agreement contested in the present case.

In light of the above, it might be argued that the HR infringed not only the promise she made previously but certain provisions of the Treaties as well. One of the reasons for the 'institutional' uncertainty mentioned above is that Article 218(10) TFEU does not clarify who is responsible for "immediately and fully" informing "at all stages", but a combined reading of Articles 36 TEU and 218(10) TFEU reveals that – beyond the Council's default which was apparent from the present judgment – the HR also failed to fulfil her obligations in the present decision-making process. Nevertheless, as EU law stands at present, the Treaty ensures no judicial remedy for cases where the HR fails to fulfil her obligation.[95] Thus, from a procedural point of view, there was no reason to make reference to such a failure, which is not legally enforceable.

27.7 Conclusions

The constitutional significance of the present judgment is unquestionable. With the recognition of the Parliament's right to be informed in the procedure for the conclusion of CFSP related international agreements the Court gives the Parliament an opportunity to exercise democratic scrutiny over a new field of the European Union's external action.

At the same time, certain parts of the reasoning and the outcome of the judgment as a whole have also left some questions open. One arises directly from the tendency that the more complex the activity of the EU on the international stage is, the less obvious the borderline between different EU policies becomes. The tension, for instance, between the claim to extend parliamentary scrutiny in order to ensure respect for human rights over all EU activities on the one hand and the rigid application of the 'centre of gravity' test on the other, remains unresolved.

94 Committee on Foreign Affairs, Notice to Members, Hearing with Baroness Ashton, Vice-President designate of the Commission/HR of the Union for Foreign Affairs and Security Policy; PE431.071v02-00, 6th of January 2010.

95 The activity of the HR falls outside the scope of Arts. 263 and 265 TFEU.

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The question therefore arises if the consistent application of the rigid 'centre of gravity' test is reasonable. An inflexible approach to legal basis disputes on the foundation of this jurisprudence might be problematic, for instance, from the perspective of human rights protection. Therefore, it is worth considering how to make the above mentioned test more applicable to those 'challenging' cases where the determination of the legal basis according to the 'centre of gravity' of the contested measure derogates other important values or interests protected by EU law (such as the parliamentary prerogatives in decision-making where people's rights are at stake). The approach used by the Court in its previous case-law[96] seems to be a good starting point in this respect. Going back to the present judgment, the 'incidental' character of a non-CFSP aim pursued by an agreement less evidently justifies the conclusion that a CFSP agreement may regulate only such issues which, by their very nature, do not require parliamentary control.[97]

All in all, by accepting the Parliament's second request for being "immediately and fully informed" the Court seems to have given the institution the green light to further strengthen its position in the EU treaty-making process; this applies to CFSP matters, as well. However, the practical significance of this prerogative can only be tested in future procedures where the Parliament will have the opportunity to step onto the stage and actually make use of its newly recognised power.

96 See especially the *Titanium-Dioxide* and *Kadi* judgments above (Section 27.6.3).

97 Viewed from this perspective, the wording of Art. 218(6) TFEU ("Except where agreements relate *exclusively* to the common foreign and security policy…" [emphasis added]) is rather misleading, since, as we explained above, it does not obviously exclude the Parliament's participation in cases of non-exclusively but only predominantly CFSP related agreements. I mean, the result of the present judgment would be more consistent with a Treaty text as follows "Except where agreements relate to the common foreign and security policy…".