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The Reform of Common Rules on Exports of Dual-Use Goods under the Law of the European Union

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A. Introduction

The establishment of common rules on exports of dual-use goods had become necessary long before the adoption of Council Regulation 3381/94[1] and Council Decision 94/942/CFSP.[2] In the context of the single market, the absence of such a regime would enable exporters to evade strict export regimes by exporting their products to Member States with lax export rules and subsequently re-export them to third countries. This would lead to serious economic advantages being accrued to the Member State with more lax export controls and, consequently, to the eventual scaling down of national export policies. Furthermore, the absence of common export rules on dual-use goods would enable Member States, in order to prevent the evasion of their export policies, to impose restrictions on intra-Community trade of dual-use goods. In the light of the increasing relevance of civil goods to military production and, hence, the increase of products which could be classified as dual-use goods, the absence of common rules on exports of dual-use goods would seriously impair intra-Community trade and question the very establishment of the single market.

However, while the need for common rules was accepted by the Member States, the adoption of Council Regulation 3381/94 and Council Decision 94/942/CFSP entailed long and acrimonious negotiations. This was due to the divergent views as to the mechanism which would make the common rules under consideration operational and the legal basis under which these rules would be adopted. The former problem revealed national concerns over waiving the right to control exports

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1 Council Regulation 3381/94, OJ 1994 L 367/1.

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from their territories in so far as they have been authorized by the competent authorities of another Member State. The latter problem was focused on the list of products to be covered by the rules under consideration, the allowable destinations and the criteria under which the exports would be authorized.[3]

Essentially, the legal controversy surrounding the regulation of exports of dual-use goods was focused on the question of the appropriate legal framework. This question has arisen due to the two-fold character of dual-use goods: on the one hand, they are industrial products involving a huge market whose development is subject to various economic and technological considerations; on the other hand, exports of dual-use goods may constitute a foreign policy instrument, furthering the interests of the exporting state. This two-fold function of dual-use goods gives rise to various questions regarding the legal framework within which their exports are to be regulated. If they are deemed as merely trade instruments, then the Common Commercial Policy (CCP) of the European Community seems the appropriate legal framework to be applied; if their foreign policy implications are deemed the determining factor, then the Common Foreign and Security Policy (CFSP) of the European Union may seem the appropriate legal framework.

Accordingly, the question of the appropriate legal framework is both complex and of great significance. The reason for this is that CCP and CFSP are distinct legal regimes which produce legal effects of a different character. Regarding the former, the Court has consistently held that it should be interpreted broadly. This approach relies upon the following three inter-linked propositions. First, the enumeration of activities expressly falling within the scope of CCP under Article 133 EC is indicative rather than exhaustive.[4] Secondly, the content of the CCP must be the same as that of the external trade policy of a state.[5] Thirdly, the CCP must not be viewed as

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[2] Commission Decision 94/942/CFSP, OJ 1994 L 367/8. It was amended consecutively by Council Decision 95/127/CFSP, OJ 1995 L 90/2, Council Decision 95/128/CFSP, OJ 1995 L 90/3, Council Decision 96/173/CFSP, OJ 1996 L 52/1, Council Decision 96/613/CFSP, OJ 1996 L 278/1, Council Decision 97/100/CFSP, OJ 1997 L 34/1, Council Decision 97/419/CFSP, OJ 1997 L 178/1, Council Decision 97/633/CFSP, OJ 1997 L 266/1, Council Decision 98/106/CFSP, OJ 1998 L 32/1, and Council Decision 98/232/CFSP, OJ 1998 L 92/1. The date of application of Council Regulation 3381/94 had already been amended by Council Regulation 837/95, OJ 1995 L 90/1.

[3] For the internal negotiations prior to its adoption, see P. Cornish, 'Joint Action 'The Economic Aspects of Security' and Regulation of Conventional Arms and Technology Exports from the EU' in *Common Foreign and Security Policy. The Record and Reforms* (M. Holland (ed.)) (London 1997) p. 73, at pp. at 81–2.

[4] *Opinion 1/78*, [1979] ECR 2871, [1979] 3 CMLR 639, at para 45. Art. 133 reads as follows: '... [t]he Common Commercial Policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in cases of dumping or subsidies'.

[5] See *Opinion 1/75*, [1975] ECR 1355, at 1362, where, in applying this principle, the Court held that '... systems of aid for exports and particularly measures concerning credits for the financing of local costs linked to market operations' fall within the scope of CCP.

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confined to traditional aspects of external trade, for 'a commercial policy understood in that sense would be destined to become nugatory in the course of time[;]'[6] instead, the Court held that it must be understood as encompassing measures which aim to adapt to the changing nature of world trade.[7] This approach was further defined as requiring, in general, that 'the question of external trade must be governed from a wide point of view'[8] and in particular that an interpretation of the CCP 'the effect of which would be to restrict the Common Commercial Policy to the use of instruments intended to have an effect only on the traditional aspects of external trade' should be rejected.[9] The Court has expressly and consistently emphasized 'the open nature of the Common Commercial Policy'.[10] The CCP has been consistently held by the Court to give rise to the Community's exclusive competence,[11] for otherwise 'Member States may adopt positions which differ from those which the Community intends to adopt, and which would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest'.[12] The corollary of the Community's exclusive competence is that the Member States can only act unilaterally in areas covered by the CCP on the basis of a specific Community authorization.[13] Furthermore, the choice of Article 133 EC as the legal basis of the

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6 *Opinion 1/78*, *supra* note 4, at para 44.

7 Ibid. in *Opinion 1*/78, the Court, in applying this principle, held that the conclusion of the International Agreement on Natural Rubber under the aegis of the United Nations Conference on Trade and Development (UNCTAD) fell within the scope of the CCP under Art. 133 (ex 113) EC.

8 *Opinion* 1/78, *supra* note 4, para 44.

9 Ibid. Furthermore, the Court opined, at para 45, that '... [a] restrictive interpretation of the concept of Common Commercial Policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries'.

10 Most recently in *Opinion 1/94 on International Agreements Concerning Services and the Protection of Intellectual Property*, [1994] ECR I–5267, [1995] 1 CMLR 205, at para 41.

11 See *Opinion 1/75*, *supra* note 5, Case 41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou v. Procureur de la Republique au Tribunal de Grande Instance, Lille and Director General of Customs*, [1976] ECR 1921, [1977] CMLR 535, *Opinion 2/91 on ILO Convention 170 on Chemicals at Work*, [1993] ECR I–1061, [1993] 3 CMLR 800, *Opinion 1/94*, *supra* note 10.

12 *Opinion 1/75*, *supra* note 5, at 1364. In relation to specifically the agreement under consideration, the Court held that '... any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community whatever their nationality'.

13 See *Donckerwolcke*, *supra* note 11. However, the Court's approach to how specific the Community authorization should be has not been entirely consistent. In Case 174/84, *Bulk Oil v. Sun International,* [1986] ECR 559, [1986] 2 CMLR 732, the Court adopted a rather broad approach and held that Art. 10 of and the Annex to Reg. 2603/69 on common rules on exports to third countries constituted sufficiently specific an authorization to Member

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legal regime on exports of dual-use goods would be significant in procedural terms, for measures falling within its scope are adopted by majority voting.

On the other hand, Title V TEU which governs the Common Foreign and Security Policy is characterized by distinctive inter-governmental features.[14] In procedural terms, unanimity prevails,[15] the Commission does not enjoy the sole right of initiative,[16] the contribution of the European Parliament is marginal[17] and the jurisdiction of the Court is expressly excluded.[18] The Amsterdam Treaty introduced a number of changes of an institutional, substantive and procedural nature. A High Representative for the common foreign and security policy is to assist the Presidency,[19] a new instrument, namely a common strategy, is provided for in areas where the Member States have important interests in common[20] and the unanimity rule is qualified in two respects: first, in relation to joint actions, common positions or other decisions adopted on the basis of a common strategy; secondly, in relation to decisions adopted in order to implement joint actions or common positions.[21] Another important amendment of CFSP rules is the capacity of the Council to unanimously conclude agreements negotiated by the Presidency with the assistance of the Commission.[22] However, while generally revamping the second pillar so as to enable the Union 'to assert its identity on the international scene' in a more effective

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States to impose quantitative restrictions on exports of oil. An equally broad approach was adopted in Case 242/84. *Tezi BV v. Minister for Economic Affairs,* [1986] ECR 933, [1987] 3 CMLR 64, as opposed to that in Case 51/87, *Commission v. Council,* [1988] ECR 5459.

14 For a legal analysis of the second pillar in general, see A. Dashwood, 'The Legal Framework of the Common Foreign and Security Policy' in *Legal Aspects of Integration in the European Union* (N. Emiliou and D. O'Keeffe (eds)) (London 1997) p. 225. For the amendments introduced by the Amsterdam Treaty, see J. Monar, 'The European Union's Foreign Affairs System After the Treaty of Amsterdam: A 'Strengthened Capacity for External Action'?' in (1997) 2 *EFA Review* 413.

15 Art. 23(1) (ex J 13(1)) TEU.

16 Art. 22 (ex J 12) TEU.

17 Art. 21 (ex J 11) TEU.

18 Art. 46 (ex L) TEU.

19 Arts 18(3) (ex J 8(3)) and 26 (ex J 16) TEU.

20 Art. 13(2) (ex J 3(2)) TEU.

21 Art. 23(2) (ex J 13(2)) TEU. However, even this qualification is further qualified when a Member State invokes 'important and stated reasons of national policy'.

22 Art. 24 (ex J 14) TEU. There has been a debate as to whether this procedure involves and, ultimately, binds the Union as such or the Member States; see M. Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in *The Evolution of EU Law* (P. Craig and G. de Burca (eds)) (Oxford 1999) p. 137, at p. 168, A. Dashwood, 'External Relations Provisions of the Amsterdam Treaty' in (1998) 35 *CML Rev* 1019, at pp. 1040–1041, S. Langrish, 'The Treaty of Amsterdam: Selected Highlights' in (1998) 23 *EL Rev* 3, at p. 14. For an analysis of the Art. 24 procedure and its link with the issue of the legal personality of the Union, see N.A.E.M. Neuwahl, 'A Partner With a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam in (1998) 3 *EFA Review* 177.

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and coherent way, the Amsterdam Treaty does not drastically alter the intergovernmental qualities of the CFSP framework.

The above outline of the distinct legal character of the CCP and CFSP rules illustrates not only the different normative nature of the obligations undertaken by the Member States under the respective frameworks, but also the differential scope for unilateral action left to them. In practical terms, the resolution of the appropriate legal framework would be important in three respects: from the national perspective, it would determine the extent to which Member States may control the exercise of a specific, albeit an increasingly significant aspect of their foreign policy; from the European Union perspective, it would provide a tangible example on the basis of which the feasibility of the conduct of the Union's foreign policy could be assessed; from the European Community perspective, it would determine the scope of its CCP and the extent of its exclusive competence.

Therefore, in establishing the Community regime on exports of dual-use goods, the Member States sought to answer the following question: is there a 'zone of twilight' between what the Community's exclusive competence, on the one hand, and national sovereignty in matters with foreign policy dimensions, on the other? Whether a common regime on exports of dual-use goods falls within the scope of the CCP and, hence, within the Community's exclusive competence or is to be excluded from the Community legal framework altogether and brought within the scope of the CFSP was resolved *de lege lata* by a compromise: on the one hand, the rules setting out the principles underpinning the common rules on exports and the procedures under which they were to be applied were laid down in a Council Regulation adopted under Article 133 (ex 113) EC, namely Regulation 3381/94 setting up a Community regime for the control of exports of dual-use goods; on the other hand, the lists of products and destinations covered by this Regulation along with the guidelines under which the common rules were to be applied were set out in a Joint Action adopted under Article J.3 (now 14) TEU, incorporated in Council Decision 94/942/CFSP.

B. Outline of the Common Rules on Exports of Dual-Use Goods

Regulation 3381/94 is not intended to provide a complete harmonising framework for dual-use goods; instead, ' ... th[e] system [established by the Regulation] represents a first step towards the establishment of a common system for the control of exports of dual-use goods which is complete and consistent in all respects'.[23] The

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[23] Tenth recital of the Preamble to Reg. 3381/94. In addition, it is stated that '... in particular, it is desirable that the authorization procedures applied by the Member States should be harmonized progressively and speedily'. In addition, according to Art. 3(3) of this Regulation, goods in transit are not covered by its provisions.

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objectives of the Regulation include the elimination of controls by Member States on intra-Community trade in certain dual-use goods,[24] the improvement of the international competitiveness of European industry[25] and effective control on exports of dual-use goods on a common basis.[26]

Under Article 3, the material scope of Regulation 3381/94 is confined to the list of nine mostly high technology products annexed to Decision 94/942/CFSP. The incorporation of the above list of dual-use goods in a Title V instrument illustrates the determination of the Member States to keep what they deem as 'considerations of a strategic nature' beyond the Community legal framework. However, in addition to the products incorporated in the above list, the export of certain dual-use goods not listed therein is still subject to national authorization; this constitutes the so-called 'catch-all' clause and refers to goods which 'are or may be intended, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or the development, production, maintenance or storage of missiles capable of delivering such weapons, as covered by the corresponding non-proliferation arrangements'.[27]

The main principle of the common rules established under Regulation 3381/94 is that exports of dual-use goods falling within its ambit require an authorization which is granted by the competent authorities of the Member State in which the exporter is established and is valid throughout the Community. This principle is similar to that of mutual recognition, whereby the attribution of certain legal characteristics by one Member State is recognized as binding on all Member States save in exceptional circumstances.[28] Given that all Member States are bound by the authorization granted by another Member State, they must rely on the evaluation made by the competent authorities of the exporting state as to the threat that any export of dual-use goods may entail. This reliance requires mutual confidence between national authorities of different Member States, itself an expression of the co-operation upon which the Member States' conduct must be based under the Regulation.

There is considerable scope for unilateral action by the Member States under Regulation 3381/94. For instance, they retain the right to impose unilateral measures in order to ensure effective control of exports of dual-use goods.[29] In addition, they

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24 See the fourth para of the Preamble to Regulation 3381/94.
25 See the fifth para of the Preamble to Regulation 3381/94.
26 See the tenth para of the Preamble to Regulation 3381/94.
27 Art. 4(1) of Regulation 3381/94.
28 In the area of free movement of goods the principle of mutual recognition can be exemplified by the idea that a product lawfully produced and marketed in one Member State is entitled to free circulation within the Community save in exceptional circumstances; see Case 120/78, *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649, [1979] 3 CMLR 494.
29 According to the thirteenth recital of Regulation 3381/94, '... [Articles 4 and 5 of this Regulation] do not prevent Member States from adopting or maintaining, for the same

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may 'carry out controls on dual-use goods in order to safeguard public policy or public security'.[30] As regards to intra-Community trade, they may require authorizations regarding a list of products of a highly sensitive nature[31] and they may maintain national controls for consignments of products specified in another list.[32] In relation to the 'catch-all clause', national authorities must be notified by an exporter in cases where the latter is aware that the goods to be exported are related to programmes of weapons of mass destruction; national authorities will, then, determine 'whether or not it is expedient to make the export concerned subject to authorization'.[33] Furthermore, Member States may adopt or maintain legislation requiring that the exporters notify the competent national authorities when they have grounds for suspecting that the goods to be exported are intended to assist programmes of weapons of mass destruction covered by the 'catch-all' clause.[34] Finally, Member States are free to determine the penalties which will be imposed in the event of breach of the Regulation in question or the national measures implementing it; these penalties 'must be effective, proportionate and dissuasive'.[35] The main type of export authorization provided under Regulation 3381/94 to be granted by the competent authorities of the Member State in which the exporter is established covers particular consignments of goods listed in Annex I to Council Decision 94/942/CFSP.[36] In addition to this individual authorization, three other types are provided for in Article 6, namely a general, a global and a simplified one. A general authorization may be granted for exports to countries listed in Annex II to Decision 94/942/CFSP upon request by the exporter, without any further formalities. A global authorization may be granted to a specific exporter for exports to one or more specified countries of goods within the scope of the Regulation. Finally, Member States are allowed to apply simplified procedures regarding an application for authorization of exports of dual-use goods not listed in Annex I to Decision 94/942/CFSP.[37]

The criteria that national authorities must take into account in order to determine whether to grant an export licence or not are listed in Annex III to Decision 94/942/

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purpose [that is to ensure effective control of exports of dual-use goods] and with due regard for the internal market, additional export control measures which are compatible with this Regulation's objectives'.

30 Fifteenth recital, according to which this right is retained by the Member States '... pursuant to and within the limits of Article 36 [now 30] of the Treaty, and pending a greater degree of harmonization'.

31 Art. 19(1)(b) of Regulation 33871/94; this list is annexed to Council Decision 94/942/CFSP.

32 Art. 20(1) of Regulation 3381/94; this list is also annexed to Council Decision 94/942/CFSP.

33 Art. 4(2) of Regulation 3381/94.

34 See Art. 4(3) of Regulation 3381/94.

35 Art. 17.

36 Art. 7(1) of the Regulation.

37 See Arts 6(1)(c) and 5 of the Regulation.

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CFSP. They consist of the commitments that the Member States have undertaken under international agreements on non-proliferation and the control of sensitive goods, their obligations under sanctions imposed by the UN Security Council or agreed in other international fora,[38] considerations of national foreign and security policy and considerations about intended end-use and the risk of diversion.[39] It is noteworthy that, in the context of 'considerations of national foreign and security policy', Annex III to Decision 94/942/CFSP makes further reference 'where relevant, [to] those covered by the criteria agreed at the European Council in Luxembourg in June 1991 and in Lisbon in June 1992 with regard to the export of conventional arms'. Of the criteria agreed at the Luxembourg European Council, Member States' commitments stemming from international non-proliferation agreements and sanctions imposed by the United Nations, along with the risk of diversion of the product in question, were expressly included in the list of Annex III to Decision 94/942/CFSP. The other criteria consisted of the purchasing country's human rights record and internal situation, the preservation of regional peace, security and stability, the national security of Member States, their territories and allied countries and the purchasing country's behaviour towards the international community.[40] An additional criterion dealing with the effect of the export in question on the purchasing country's economy was added at the Lisbon European Council.[41]

C. The Inter-Pillar Formula Underpinning Regulation 3381/94 and Decision 94/942/CFSP

An elaborate analysis of the list of criteria on the basis of which national authorities are to authorize exports of dual-use goods to third countries is beyond the scope of this article. Suffice it to say that these criteria are problematic because of their

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[38] Council Decision 96/613/CFSP, *supra* note 2, makes express reference to sanctions imposed by the European Union.

[39] It is noteworthy that the Commission's proposal included a list of criteria in the body of the proposed regulation, despite its preambular statement that such lists 'are clearly of a strategic nature and consequently fall within the competence of the Member States'; para 6 of the preamble of the proposed Regulation.

[40] Annex VII to the Conclusions of the Presidency after the Luxembourg European Council, in (1991) *Bull EC* 6, at p. 19. It was then stated that '... [i]n the perspective of political union, the European Council hopes that on the basis of criteria of this nature a common approach will be made possible leading to a harmonization of national policies'.

[41] Namely 'the compatibility of the arms exports with the technical and economic capacity of the recipient country, taken into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources' in (1992) *Bull EC* 6, at p. 17. Reference to all the above criteria was made in the Conclusions of the Amsterdam Summit in 1997.

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limited practical significance and the vague reference to fundamental parameters of national behaviour on the international scene which seriously undermine the effectiveness of the established rules.[42]

It is the incorporation of these criteria, along with that of the material scope of Regulation 3381/94 in Decision 94/942/CFSP, that is the focus of this paper. Instead of choosing between the Community legal order and the CFSP, the Member States decided to combine both sets of rules on the basis of an inter-pillar approach. As for the distinct legal features of the applicable legal frameworks, both Regulation 3381/94 and Decision 94/942/CFSP expressly state that their provisions are to operate as 'an integrated system'.[43]

The adoption of an inter-pillar approach does not constitute a novelty confined to the legal regulation of exports of dual-use goods. Instead, it has been used at various instances and in various ways since the Maastricht Treaty entered into force. Interactions between the first and second pillar have been expressed in an indirect way: measures adopted under Title V TEU make reference to activities already undertaken within the Community legal framework or envisaged as part of it in order to assist the CFSP activity in question. Council Decision 97/817/CFSP on anti-personnel landmines, for instance, refers to action in that area in the context of EC humanitarian aid and reconstruction and development co-operation.[44] However, the most direct form of the inter-pillar approach is that underpinning the imposition of sanctions on third countries. Under Article 301 (ex 228a) EC, a two stage procedure is followed: the adoption of a common position under Title V TEU is followed by a Council Regulation under Article 301 EC itself by way of a qualified majority on a proposal from the Commission. The practice so far indicates that the two measures serve distinct purposes: on the one hand, the common position expresses the political will of the Member States to impose sanctions on a third country and makes reference to the political background and the main thrust of the sanctions regime; on the other hand, the Community measure implements these sanctions at Community level.[45]

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[42] See P. Koutrakos, 'Exports of Dual-Use Goods Under the Law of the European Union' in (1998) 23 *ELRev* 235, at pp. 239–242.

[43] Para 6 of the Preamble to Regulation 3381/94 and Art. 1 of Council Decision 94/942/CFSP.

[44] Commission Decision 97/817/CFSP, OJ 1197 L 338/1.

[45] Common Position 98/240/CFSP on restrictive measures against the Federal Republic of Yugoslavia, OJ 1998 L 95/1, for instance, refers to '... recent events in the Federal Republic of Yugoslavia, and in particular the use of force against the Kosovar Albanian Community in Kosovo, [which] represent an unacceptable violation of human rights and put the security of the region at risk'; it then goes on to state that 'the European Union strongly condemns the violent repression of the non-violent expression of political views ... [and] demands that the Government of the FRY take effective steps to stop the violence and engage in a commitment to give a political solution to the issue of Kosovo through a peaceful dialogue with the Kosovar Albanian Community'.

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It becomes clear that the inter-pillar approach underpinning the common rules on exports of dual-use goods is not unique within the context of the European Union. However, it differs from the approach taken in relation to sanctions. Decision 94/942/CFSP is not confined to expressing the political will of the Member States. On the one hand, it incorporates the applicable scope of Regulation 3381/94 and, on the other hand, it incorporates the guidelines which the competent national authorities must take into account when granting or refusing an export authorization under Regulation 3381/94. In legal terms, the incorporation of both the scope of application and the *modus operandi* of a Community Regulation in a non-Community instrument, seeks to serve two main objectives: first, the controversial issue of exports of dual-use goods is subject to unanimity which prevails under Title V TEU; secondly, the guidelines under which an export authorization is to be granted are excluded from the court's jurisdiction under Article 46 TEU.

However, this approach is unacceptable in legal terms and unrealistic in practical terms. As regards to the latter, the interdependence between trade and foreign policy makes it increasingly difficult to ascertain the exact degree to which a commercial measure serves a foreign policy objective or has foreign policy implications. In this respect, we may note that assistance to Russia to convert and restructure former chemical weapon factories and destroy its stockpile of weapons pursuant to the United Nations Chemical Weapons Convention (CWC) will come from the TACIS programme under Article 308 (ex 235) EC.[46]

In legal terms, the inter-pillar approach underpinning the common rules on exports of dual-use goods is fundamentally flawed because it undermines the legal effectiveness of Regulation 3381/94 in three ways. First, there are the direct implications to which this approach may give rise. In excluding the criteria of application from its scope, Regulation 3381/94 is deprived from its most important feature, that is its *modus operandi*. The result is that any control over national authorities is excluded from the Community legal framework. National authorities will grant export authorization on the basis of vaguely expressed criteria without any control from the Community framework. There arises the risk of manipulation of the control system established under Regulation 3381/94 in order to protect national exports and, hence, advance national concerns of an essentially economic nature. It follows that the legal protection of the individual exporter is at risk. This would involve, for instance, the case of an exporter refused export authorization or the refusal of the competent national authorities to recognize the validity of an export authorization already granted by the competent authorities of another Member State. Would an exporter be able to argue that the national authorities abused their rights under Regulation 3381/94? Such a manipulation of the system of common rules on exports of dual-use goods would clearly constitute behaviour contrary to the objectives of the Community regime itself as stated in Regulation 3381/94; as such, it would be contrary to the duty of co-operation which binds all the organs of the state

[46] (1997) 5:6 *European Voice*, at p. 6.

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under Article 10 (ex 5) EC.[47] It is the role of the Court, under Article 220 (ex 164) EC to ensure that the competent authorities comply with this duty.

The second objection to the legal arrangement underlying the Community regime on exports of dual-use goods focuses on the link between Regulation 3381/94 and Decision 94/942/CFSP. What the latter measure provides, namely the guidelines on the basis of which common rules are to be applied, is intrinsically linked with the effective application of the Community measure. Because of this interdependence, a Member State should not be allowed to rely upon the non-justiciable nature of the second pillar in order to protect national exporters by refusing to grant authorization to Community traders; this would radically undermine the justiciable character of Regulation 3381/94. To allow this would reduce the provisions in the preambles to both Regulation 3381/94 and Decision 94/942/CFSP which pronounce that these two measures 'constitute an integrated system' to statements of merely rhetorical significance. The legal guarantees enjoyed by the former are excluded from its most essential aspect, namely the resolution of the principles whereby the criteria underpinning the system are to be applied. In other words, the material interdependence between Regulation 3381/94 and Decision 94/942/CFSP is so close that the formula adopted by the Council undermines the very objective they purport to serve.

The third objection to the inter-pillar approach adopted in the case of exports of dual-use goods draws upon the main principles underpinning the constitutional structure of the European Union. Under Article 3 (ex C) TEU, the activities undertaken within the different pillars are to be carried out in the context of a single institutional framework which shall ensure their consistency while respecting and building upon the *acquis communautaire*. These three requirements entail that the Community and the CFSP measures are deemed parts of a truly integrated approach. Furthermore, under Article 47 (ex M) TEU, the second pillar may 'not affect the Treaties establishing the European Communities'. The current rules on exports of dual-use goods run counter to these principles as they establish a 'Community' regime deprived from essential Community law characteristics and effectively excluded from the system of controls underpinning the Community legal order.

D. The Commission's Proposals on Reforming the Common Rules on Exports of Dual-Use Goods

The main tenet of the arguments against the inter-pillar approach adopted by

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[47] See Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA,* [1990] ECR I–4135, [1992] 1 CMLR 305, at para 8.

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Regulation 3381/94 and Decision 94/942/CFSP is that essential parts of the former are incorporated in the latter, hence seriously undermining the legal effectiveness of the rules in question. Viewed from this angle, the inter-pillar approach underpinning the current regime on exports of dual-use goods should be abandoned.

The Commission addressed both the legal and practical problems to which the Community regime on exports of dual-use goods initially under Regulation 3381/94 and Decision 94/942/CFSP gave rise. In doing so, it adopted a document entitled *Proposal for a Council Regulation (EC) setting up a Community regime for the control of dual-use goods and technology*[48] whereby it suggested the amendment of the system initially established under Regulation 3381/94 and Decision 94/942/CFSP. This document was accompanied by a second one entitled *Report to the European Parliament and the Council on the application of Regulation (EC) 3381/94 setting up a Community system of export controls regarding dual-use goods*[49] in which it pointed out the deficiencies of the system under consideration.

The Commission proposals are based on the idea of the abolition of the inter-pillar approach. The framework suggested therein is to be established under a Council Regulation adopted pursuant to Article 133 (ex 113) EC. This measure is to incorporate the substantive content of Decision 94/942/CFSP, namely both the material scope of the common rules and the guidelines on the basis of which national authorities are to grant export authorizations. The Commission proposal seeks to strike a balance between, on the one hand, the status of export controls as within the CCP and, on the other hand, the adoption of security-related decisions by the national authorities.

In its evaluation of the functioning of Regulation 3381/94 and Decision 94/942/CFSP, the Commission referred to two main achievements: the first deals with the establishment, in practical terms, of the free movement of dual-use goods within the Community from which both companies and national administrations have benefited; the second achievement refers to the development of the administrative co-operation between the competent authorities of the Member States. In this respect, not only has a network of national officials responsible for export controls been developed, but also practical difficulties were dealt with efficiently by the Co-ordinating Group.[50] As regards to the problems to which the application of the common regime has giver rise, the Commission focused on the following two: first, the discrepancy between national licensing systems has enabled national authorities to enquire about the validity of authorizations given by other Member States, hence causing considerable delays for the exporter; secondly, the administrative co-operation between the Member States is inherently limited because it is confined to

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[48] COM (1998) 257 final, adopted in Brussels on 15 May 1998.

[49] COM (1998) 258 final, adopted in Brussels on 15 May 1998.

[50] A list of practical issues over which the Co-ordinating Group has reached agreement is annexed to COM (1998) 268 final at 13 *et seq* under the title ‘Elements of Consensus’.

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the Member States directly involved, hence excluding the possibility of a supervisory role being played by the Commission itself.[51]

In addressing the above problems, the Commission proposal is underpinned by three principles. The first consists of the harmonization of trade-related issues regarding the exports of dual-use goods. In this respect, it suggests the introduction of a general Community Licence; this licence would cover exports to ten countries which raise no proliferation concern and towards which the export policies of the Member States have already converged.[52] In order to cut down on the delay caused by differing authorization policies, the Commission suggests the adoption of a common licence form in relation to exports of dual-use goods not covered by the Community General licence. Furthermore, the Commission suggested the reinforcement of the administrative co-operation between the Member States and the imposition of a duty to provide a similar level of guidance to exporters affected by the Community regime on exports of dual-use goods.

The second principle underlying the Commission proposals is the abolition of controls over the intra-Community trade of dual-use goods. This would cover, on the one hand, the authorizations all Member States were required to impose in relation to certain dual-use goods and, on the other hand, those that certain Member States were allowed to maintain regarding other, specifically defined, goods under Regulation 3381/94 and Decision 94/942/CFSP. However, in order to ensure that free intra-Community trade will not undermine the effective control of exports to third countries, the licensing requirement covering the intra-Community trade of specifically defined sensitive products under Regulation 3381/94 and Decision 94/942/CFSP is to be replaced by an *ex post* notification requirement.

The final suggestion put forward by the Commission deals with the enhancement of the effectiveness of the Community regime on exports of dual-use goods by closing two main loopholes. On the one hand, the 'catch-all' clause is proposed to cover transactions not only potentially related to programmes of weapons of mass destruction, as is the case under the current system, but also to conventional armaments in so far as the exports in question are directed to countries subject to a United Nations arms embargo. On the other hand, the ambit of the common rules is proposed to extend to technology transfers by intangible means.[53]

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[51] Another practical problem highlighted by the Commission is the fact that the 'catch all' clause of Council Regulation 3381/94 has been applied inconsistently due to the varying extent to which national governments inform their exporters of sensitive end-users.

[52] The destinations covered by a Community general licence are suggested to be Australia, Canada, Japan, New Zealand, Norway, Switzerland, USA, Poland, Czech Republic and Hungary.

[53] These would cover PC, fax and telephone.

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E. Comment on the Commission Proposal

The main tenet of the rationale underpinning the Commission proposal is not fundamentally distinct from that of Regulation 3381/94 and Decision 94/942/CFSP, namely the separation of trade and foreign policy within the constitutional order of the European Union. Indeed, the Commission proposal seeks to address the main interests upon which this rationale draws, that is, on the one hand, the right of the Member States to determine whether their security is in danger and, on the other hand, recourse being had to Community law. The feature of the Commission proposal that is fundamentally distinct to the existing Community regime on exports of dual-use goods is how these interests are addressed: instead of conflicting, they are viewed as essentially interdependent. In this respect, they are viewed as capable of being protected within the Community legal order.[54]

Indeed, the Commission proposal makes clear that the Community legal order offers the legal guarantees necessary to ensure both the effectiveness of the measures in question and the right of the Member States to determine their foreign policy. On the one hand, the provision for certain dual-use goods to be covered by the Community General licence merely formalizes what has already been standard practice amongst the Member States. On the other hand, decisions over exports of dual-use goods not covered by a Community General licence are to be taken by the competent national authorities, which, therefore, remain solely responsible to determine the effect of the exports in question on national security. While ensuring that it would not encroach upon the right of the Member States to protect their security, the legal regulation of exports of dual-use goods within the Community legal order effectively addresses the problems raised by the inter-pillar approach underpinning the existing regime. The legal effectiveness of the Council Regulation is not subject to non-Community instruments and, hence, is to be protected on the basis of the legal guarantees provided under Community law and supervized by the Court.

However, while the substantive amendments suggested by the Commission have been received rather favourably by the Member States, the adoption of a Community regime under solely Article 133 (ex 113) EC has yet to be agreed upon.[55] The reluctance of the Member States to abandon the inter-pillar approach to the legal regulation of exports of dual-use goods is essentially based on the 'sensitive

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[54] In this respect, it is interesting that the Head of the unit of Commission's DG I responsible for dual-use goods, in a speech delivered at the University of Muenster/Westfalen, does not cease to emphasize that, according to the Commission proposals, a Community regime should focus on trade matters, for decisions on security-sensitive exports will be taken by national administrations in accordance with national policies; this speech is entitled 'Dual-Use Export Controls: The Common European Export Control Regime and How to Improve it' at <http://www/europa.eu.int/comm/dg01/dualuse5.htm>.

[55] See (1997) 5:6 *Agence Europe*, at p. 6.

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character' of dual-use goods. The views commonly shared by Member States in this respect may be formulated as follows: first, the Member States should be responsible for authorizing their exports; secondly, the Court would be too intrusive and its role would impinge upon the sovereignty of the Member States to determine their foreign policy and assess whether their security is at risk.

It is suggested that to rely upon the 'sensitive character' argument in order to justify the exclusion of dual-use goods form the Community legal framework is highly problematic. This argument relies upon an inherently indeterminate criterion which is alien to legal analysis. The increasing interdependence between trade and foreign policy renders a number of policies of 'a sensitive character'. In this respect, the Opinion of Advocate General Jacobs in *Centro-Com* is noteworthy; he argued, very succinctly, that '[m]any measures of commercial policy may have a more general foreign policy or security dimension. When for example the Community concludes a trade agreement with Russia, it is obvious that the agreement cannot be dissociated from the broader political context of the relations between the European Union, and its Member States and Russia'.[56] Furthermore, the post-Cold War international environment has illustrated that, in the absence of an on-going conflict of universal dimensions, trade and economic policies have been rendered at the very centre of inter-state relations. Finally, in the light of the foreign policy implications inherent in most trade measures, to rely upon them in order to absolve the Member States from their Community law obligations would be tantamount to undermining the effectiveness of Community law. This was clearly endorsed by the Court itself in its *Centro-Com* judgment, where it held that 'the powers retained by the Member States must be exercised in a manner consistent with Community law'.[57]

It follows that the 'sensitive character' of dual-use goods cannot in itself justify insistence on the inter-pillar approach and it clearly does not preclude the Court from exercising its jurisdiction as to whether the dividing line between the pillars lie. What needs, then, to be examined is the view of Member States that the abandonment of the inter-pillar approach would leave issues touching upon national sovereignty subject to the integrationist agenda of the Court. Having argued above that the inter-pillar approach itself does not exclude the role of the Court, insistence on retaining this arrangement is not only unduly legalistic but also clearly unnecessary. The question which then arises is whether the substance of the concerns shared by various Member States is justified: does the Court have a hidden agenda to expand its jurisdiction to areas excluded under the Treaty?

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[56] Case C-124/95, *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England,* [1997] ECR I–81, at para 41.

[57] *Ibid.* at para 25. The Court also referred to Joined Cases 6/69 ad 11/69, *Commission v. France,* [1969] ECR 523, [1970] CMLR 43, at para 17, Case 57/86, *Greece v. Commission,* [1988] ECR 2855, at para 9, Case 127/87, *Commission v. Greece,* [1988] ECR 3333, at para 7 and Case C-221/89, *Factortame and Others,* [1991] ECR I–3905, [1991] 3 CMLR 589, at para 14.

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It is suggested that the Court is neither prepared nor willing to immerse itself into the foreign affairs arena and, hence, undermine the prevailing inter-governmental character of the second pillar. Instead, it has been very careful in its external relations jurisprudence to strike a balance between Community competence and national competence. This argument is based on the judicial approach to three distinct, albeit interrelated, areas.

The first deals with exports of dual-use goods and focuses on the *Richardt* judgment[58] and most significantly those in *Werner*[59] and *Leifer* cases.[60] These judgments are dealt with elsewhere in this volume. For the purposes of this analysis, suffice it to say that they illustrate an approach to the interactions between trade and foreign policy underpinned by a remarkable sense of balance. The thrust of these judgments may be summarized as follows: first, exports of dual-use goods do fall within the scope of the CCP and, therefore, Member States may only deviate on the basis of an express and specific Community law authorization; secondly, national restrictions may be justified under the public security proviso of Council Regulation 2603/69 on export[61] which is construed in broad terms so as to cover the external security of the Member States; thirdly, the national restrictions in question must be appropriate and no more restrictive than necessary. In these judgments, the Court strikes a balance between various interests, namely the effectiveness of Community law and its CCP and the right of the Member States to determine whether their foreign policy is undermined.[62]

The second area regarding 'sensitive issues' in which the Court has been remarkably careful concerns the imposition of sanctions on third countries. This is another area involving trade measures which serve foreign policy objectives. The foreign policy dimension of these measures gave rise to considerable controversy as to the scope of the CCP. Two main theories have been put forward, namely the teleological and the instrumentalist. According to the former, it is the objective of the measure in question which determines whether it must be adopted under the CCP rules. If this objective is alien to the aims of the CCP, then it falls beyond its scope

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[58] Case C-367/89, *Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC,* [1991] ECR I–4621. For an analysis of the judgment, see I. Govaere and P. Eeckhout, 'On Dual Use Goods and Dualist Case Law: The *Aimé Richardt* Judgment on Export Controls' in (1992) 29 *CML Rev* 941.

[59] Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v. Federal Republic of Germany,* [1995] ECR I3189.

[60] Case C-83/94, *Criminal Proceedings against Peter Leifer and Others,* [1995] ECR I–3231. The dispute arose prior to the adoption of Regulation 3381/94 and Decision 994/942/ CFSP; the same applies to both the *Richardt* and *Werner* cases.

[61] Council Regulation 2603/69, OJ 1969 L 324/25; amended by Council Regulation 3918/91, OJ 1991 L 372/31. The adoption of Regulation 3381/94 and Decision 94/942/CFSP followed the references to the Court from German courts.

[62] For an analysis of *Werner* and *Leifer* from this point of view, see P. Koutrakos, *supra* note 42, at pp. 243 *et seq*. Also, N. Emiliou, annotation on *Werner* and *Leifer* in (1997) 22 *EL Rev* 68.

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and does not give rise to the Community's exclusive competence.[63] According to the instrumentalist approach, it is the nature of the measure in question that determines the appropriate legal framework. If the measure in question constitutes an instrument regulating international trade, then it is covered by the CCP and gives rise to the Community's exclusive competence irrespective of its objective.[64] In relation to the imposition of sanctions on third countries, the debate regarding the scope of the CCP was sidelined through a legal formula applied since the early 1980s and up until the entry of the Maastricht Treaty into force. This consisted of the adoption of a Council Regulation under Article 113 (now 133) EC prior to a decision reached within the framework of the precursor of the Common Foreign and Security Policy, namely the European Political Co-operation.[65]

A series of preliminary references arose regarding the interpretation of Council regulations imposing trade sanctions on Serbia and Montenegro.[66] In responding to these references, the court with subtlety set out the principles defining its stance towards disputes with foreign policy implications. A detailed examination of the Court's judgments is beyond the scope of this analysis.[67] Of direct relevance is the main rationale of the Court, summarized as follows. First, notwithstanding their adoption pursuant to a decision taken in the framework of the European Political Co-operation, the Community Regulations adopted within the CCP were taken by the Court to be fully within the Community legal order. Indeed, the Court repeated the principle already spelled out in *Werner*[68] that the foreign policy and security objectives of a national measure whose effect is to prevent or restrict the export of certain products does not take it outside the scope of the CCP.[69] Furthermore, the Court stressed that '[i]t was indeed in the exercise of their national competence in matters of foreign and security policy that the Member States expressly decided to

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63 This approach has been supported by the Council; see its submissions in *Opinion 1/78*, *supra* note 4, at pp. 28892891.

64 For the Commission's analysis of this approach, see its submissions in *Opinion 1/78*, *supra* note 4, at pp. 28802887.

65 See J.M. Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy' in *The European Community's Commercial Policy after 1992: The Legal Dimension* (M. Maresceau (ed.)) (Daventer 1993) at p. 395 and J. Verhoeven, 'Sanctions Internationals et Communautes Europeennes—A Propos de l'Affair des Iles Falklands (Malvinas)' in (1984) *CDE* 259.

66 Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General,* [1996] ECR I–3953, [1996] 3 CMLR 257 dealt with the interpretation of Regulation 990/93 concerning trade between the Community and FRY, OJ 1990 L 102/14. Case C-124/95, *Centro-Com, supra* note 56, was about the interpretation of Regulation 1432/92, OJ 1992 L 151/4. Case C-177/95, *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and Ministero dell' Interno*, [1997] ECR I–1111, [1997] 2 CMLR 24 was about Regualtion 990/93.

67 See C. Vedder and H.-P. Folz, in (1998) 35 *CML Rev* 209.

68 *Supra* note 59, at para 10.

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have recourse to a Community measure, which became ... Regulation [990/93], based on Article 113 [now 133] of the Treaty'.[70] Secondly, the interpretative method that this approach entails, namely an assessment of the wording, the context and the objectives of the measures in question, leads to the examination of the goals pursued by the UN Security Council Resolution which the Community measure under consideration implements. Thirdly, in examining the UN Security Council measure, the Court demonstrates great reluctance to restrict in any way its scope. Making effective the sanctions set out by the Security Council was the prevailing interpretative aim of the Court.

Finally, a third area which is relevant to this analysis is the interpretation of Article 297 (ex 224) EC. This provision reads as follows:

> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the Common Market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

Not only does Article 297 EC authorize Member States to deviate from Community law *in toto*, but also applies to national measures of unlimited scope. It is on this basis that the Court has characterized it 'a wholly exceptional clause'[71] and, hence, a clause which must be strictly construed. The application of this provision is subject to the extraordinary jurisdiction of the Court under Article 298 (ex 225) paragraph 2 EC following an action by the Commission or a Member State. The Court has not adjudicated upon any dispute arising from the application of Article 297 EC. Recently, Greece imposed a trade embargo on Former Yugoslav Republic of Macedonia (FYROM) which, according to the Commission, was not justified under Article 297. This embargo was lifted following an agreement between Greece and FYROM, before the Court could deliver its judgment under Article 298. However, Advocate General Jacobs gave his Opinion which contains a succinct and thoughtful analysis on the balance which needs to be struck between, on the other hand, the sovereign right of the Member States to protect their essential interests

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69 *Centro-Com, supra* note 56, at para 26.

70 Ibid. para 28. The Court further added in para 29 that '... [a]s the preamble to the Sanctions Regulation shows, that regulation ensued from a decision of the Community and its Member States which was taken within the framework of political co-operation and which marked their willingness to have recourse to a Community instrument in order to implement in the Community certain aspects of the sanctions imposed on the Republics of Serbia and Montenegro by the United Nations Security Council'.

71 Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary,* [1986] ECR 1651, [1986] 3 CMLR 240, at para 27.

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and, on the other hand, the requirement for compliance with Community law.[72] He stressed the following three points. First, the determination of whether the conditions laid down in Article 297 EC are met clearly constitutes a justiciable issue. Secondly, however, the nature of the determination of a complex foreign policy issue such as the existence of war or serious international tension constituting a threat of war 'severely limit[s] the scope and intensity of the review that can be exercised by the Court' due to 'a paucity of judicially applicable criteria';[73] thus, it renders judicial control over such matters of 'extremely limited nature'.[74] Thirdly, it follows from the above that determination of whether recourse to Article 297 is justified depends to a considerable extent upon the subjective point of view of the Member State concerned. Advocate General Jacobs stresses that:

> ... the question must be judged from the point of view of the Member State concerned. Because of the differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third state. Security is, moreover, a matter of perception rather than hard fact.[75]

In outlining the Court's approach to the above three areas where the relationship between trade and foreign policy is acute, the following argument emerges: in exercising its jurisdiction over disputes with significant foreign policy overtones, the Court has not reduced its role on the basis of the inherently indeterminate criterion of the 'sensitive nature' of the dispute before it; nor has it ignored the right of the Member States to determine whether their security is at risk. Viewed from this angle, the concern of certain Member States that the Court is to pursue a hidden agenda by expanding its jurisdiction in the sphere of foreign policy is unfounded.

F. The Inter-Pillar Approach in the Light of an Analysis of EC and CFSP as a Functional System

The above analysis illustrated that the concerns on the basis of which Member States are reluctant to abandon the inter-pillar formula underlying Regulation 3381/94 and Decision 94/942/CFSP are unfounded. The Court has made clear that it has neither the intention nor the inclination to exercise control upon the core of the political will

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72 Case C-120/94, *Commission v. Greece,* [1996] ECR I–1513.
73 Ibid. at para 50.
74 Ibid. at para 60.
75 Ibid. at para 56.

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of the Member States in the foreign policy arena. The question which then arises is whether the legal formula of the current regime on exports of dual-use goods serves the legal purposes which justified its adoption. In other words, whether it does actually prevent the Court from exercising its jurisdiction on important parts of a Community measure incorporated in a non-Community instrument.

The answer to this question is negative. The legal formula adopted by the Council regarding Council Regulation 3381/94 and Decision 94/942/CFSP, whereby the *modus operandi* of a Community system is incorporated in an instrument excluded from the Community legal order and the Court's jurisdiction, runs counter to the thrust of the Court's jurisprudence. This jurisprudence establishes that the foreign and security policy implications of a trade measure do not necessarily exclude it from the ambit of Community law. It was on this basis that, in *Werner* and *Leifer*,[76] exports of dual-use goods were approached as within the CCP, while the public security proviso was interpreted broadly thus limiting the scope for judicial control. Viewed from this angle and in the light of the fundamental role of the principle of 'full effectiveness of Community law'[77] in the development of the Community legal order, the following conclusion is inevitable: in so far as the guidelines set out in Annex III to Decision 94/94/CFSP are concerned, the adoption of the latter pursuant to Title V TEU cannot be considered sufficient as to exclude it from the Court's jurisdiction under Article 46 (ex L) TEU. In other words, the criteria on the basis of which Regulation 3381/94 operates, excluded though they are from the Community framework, must be viewed as incorporated by reference into Regulation 3381/94. This approach is supported by the Advocate General Jacobs' argument in *Centro-Com* about '[t]he need for measures adopted in the framework of the Common Commercial Policy to be effective (the principle of effectiveness or *effet utile*)'.[78] It is also fortified by his conclusion that 'the interpretation of a Community act depends on its objectives, its terms and its context. The fact that it has a foreign or security policy dimension may therefore have an impact on its interpretation, but it does not in principle mean that the Member States have more leeway'.[79]

Therefore, the Court may exercise its jurisdiction over the interpretation of the guidelines set by Decision 94/942/CFSP as a matter of Community law; judicial protection over the application of Regulation 3381/94, both directly under Article 226 (ex 169) EC and indirectly under Article 234 (ex 177) EC, cannot possibly

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76 *Supra* notes 59 and 60 respectively.

77 Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd and Others,* [1990] ECR I–2433, [1990] 3 CMLR 1, at para 21, Cases C-6 and 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I–5357, [1993] 2 CMLR 66, at para 33, Cases C-46 and 48/93, *Brasserie du Pêcheur v. Germany and R v. Secretary of State for Transport, ex parte Factortame Ltd (III),* [1996] ECR I–1029, [1996] 1 CMLR 889, at para 20.

78 *Centro-Com, supra* note 56, at para 53 of his Opinion.

79 *Centro-Com, supra* note 56, at para 43 of his Opinion.

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exclude consideration of the guidelines included in Decision 94/942/CFSP.[80] To argue otherwise would be tantamount to undermining the principle of 'full effectiveness of Community law', one of the cornerstones of the development of the *acquis communautaire*.[81]

This conclusion is by no means contrary to Article 46 (ex L) TEU, which expressly excludes the second pillar from the Court's jurisdiction. This provision supports the view that the Court has jurisdiction to determine the borderline between the first and second pillar; in practical terms, this entails that any measure adopted under Title V may be controlled by the Court pursuant to the procedures provided within the Community framework from measures which should have been adopted under Community law. The *Airport Transit Visa* judgment[82] confirms this conclusion in no uncertain terms. That case dealt with an action brought by the Commission under Article 230 (ex 173) EC challenging the validity of a Joint Action adopted by the Council under Article K.3(2) (new 31) TEU. The latter measure provided for harmonized rules on granting airport visas. The Commission's action was based on the contention that such rules should have been adopted under Article 100c (pre-Amsterdam) rather than Title VI TEU. This was a clear case in which the Court was called upon to adjudicate on the dividing line between the pillars; it could not have done so without examining the content of the Title VI measure. The Court relied upon Article M (now 47) TEU, which provides that the EC Treaty must not be affected by measures adopted under the second and third pillar. It also relied upon Article L (now 46) TEU which, while excluding the second and third pillar from the Court's jurisdiction, does not exclude Article M. The Court concluded that it does 'ha[ve] jurisdiction to review the content of [Community law] in order to ascertain whether that measure affects the powers of the Community' and it does 'ha[ve] jurisdiction to annul [a measure adopted beyond the Community legal framework] if it appears that it should have been based on [a Treaty provision]'.

The action brought by the Commission was rejected on substantive grounds.[83] However, the fact that it was accepted as admissible is of immense significance. It confirms that, in relation to Title V TEU, the mere adoption of a measure beyond the Community legal framework does not automatically render it immune to judicial control; this would be tantamount to enabling the Member States to ignore the legal bases provided under the EC Treaty for the adoption of Community law. In this respect, there is no doubt that it falls within the court's jurisdiction to ensure that no measure adopted under the procedures provided in Title V undermines the *acquis*

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[80] See A. von Bogdandy and M. Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union' in (1996) 2 *ELJ* 267, at p. 283.

[81] Advocate General Jacobs referred specifically to '. . . [t]he need for measures adopted in the framework of the Common Commercial Policy to be effective (the principle of effectiveness of *effet utile*)'; *Centro-Com, supra* note 56.

[82] Case C-170/96, *Commission v. Council,* [1998] ECR I2763, [1998] 2 CMLR 1092.

[83] For a comment on the substantive part of the judgment, see the annotation by A. Oliveira, in (1999) 36 *CML Rev* 149.

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communautaire. This conclusion illustrates that the Court is prepared ensure that the normative character of the Community legal order is not to be diluted by non-Community measures. In doing so, it puts forward a conception of EC and CFSP as a functional system which may operate on the basis of the main constitutional principles of the European Union, that is within a single institutional framework which builds upon the *acquis communautaire* and is characterized by consistency.

G. Conclusion

The main thrust of this analysis is that the inter-pillar approach to the legal regulation of exports of dual-use goods underpinning Regulation 3381/94 and Decision 94/942/CFSP is fundamentally flawed. It undermines the nature of the Council Regulation as part of Community law and the effectiveness of the export rules in general. Moreover, the objective it purports to serve, namely to ensure that policy choices with significant foreign policy dimensions are not dissociated from the core of national sovereignty, is misplaced, as the Court's jurisprudence in related areas has clearly illustrated. Viewed from this angle, the legal formula underpinning the current rules on exports of dual-use goods is not only legally flawed but also politically unnecessary.

However, one concluding remark needs to be made. It does not follow from the above conclusion that the inter-pillar approach should be abandoned as a model of legal regulation within the structure of the European Union. Such a conclusion would be contrary to the constitutional structure of the Union. This structure, comprised of legally distinct, albeit interdependent, legal frameworks, has been endorsed and consolidated by the Amsterdam Treaty and, hence, has become a legal reality. The principle underpinning this structure is that the Member States, while participating in this *sui generis* structure, remain fully sovereign in terms of both their relationship with their nationals and third states.[84] This entails that, in so far as the European Union is based on this structure, there will always be at least a core of activities beyond the Community legal framework. Viewed from this angle, the argument put forward above regarding the normative interdependence between Regulation 3381/94 and Decision 94/942/CFSP does not imply that any Community instrument is to attribute Community law qualities to any accompanying Title V TEU measure. It is clearly implausible to argue that the Court may exercise its adjudicatory role over the expression of the political will of the Member States beyond the Community legal framework. It is only when, in expressing their political will, the Member States violate the constitutional principles of the Union and run

[84] This is what Dashwood defines as 'a constitutional order of states'; see A. Daswhood, 'States in the European Union' in (1998) 23 *EL Rev* 201.

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counter to Community law that the role of the Court becomes relevant. However, in the case of the common rules on exports of dual-use goods, it is the intrinsic link between Regulation 3381/94 and Decision 94/942/CFSP which distinguishes the common rules on exports of dual-use goods from other inter-pillar arrangements. To disregard this link would be tantamount to undermining the legal effectiveness of a Community measure. What renders the rules under discussion more problematic is the fact that the effectiveness of the Community measure is subject to a Title V TEU instrument which makes reference to European Council Summit conclusions. In other words, the effectiveness of every measure concerned is subject to another measure which affords considerably weaker legal protection. Because of this inadequacy, the Court's control over any blatant misapplication of the relevant criteria is essential to ensure that the effectiveness of the *acquis communautaire* is not diluted by extra-Community features and, hence, not rendered of symbolic significance. It remains to be seen whether the amendment of the common rules on exports of dual-use goods will abolish the arrangement underpinning the current regime. This article argued that such a move would not give rise to political difficulties. The rather impressive pace characterising recent activities on the development of a defence capability of the European Union may prove a positive indicator towards the establishment of a genuinely 'integrated' system of rules on the exports of dual-use goods.