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Published in:
European Law Review

Publication date:
2015

Document Version
Publisher's PDF, also known as Version of record

Citation for published version (APA):
Broberg, M., & Holdgaard, R. (2015). EU development cooperation Post-Lisbon: main constitutional challenges. *European Law Review*, 40(3), 349-370.

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by

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Reprinted from European Law Review
Issue 3, 2015

Sweet & Maxwell
Friars House,
160 Blackfriars Road,
London
SE1 8EZ
(Law Publishers)

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EU Development Co-operation Post-Lisbon: Main Constitutional Challenges

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☞ Development policy; EU constitution; EU law; External relations

Abstract

The changes brought about by the 2009-Lisbon Treaty both directly and indirectly affected the EU's development co-operation policy. The Treaty's explication and reorganisation of the Union's external relations objectives and principles and the streamlining of the development co-operation policy objective (i.e. the identification of poverty reduction/eradication as a primary objective) are likely to have a lasting constitutional impact on policy-making and legal methodology in this policy area. Moreover, post-Lisbon, the Union's development co-operation policy is faced with three constitutional challenges: (1) organisation of the financial aid aspect of the Union's development co-operation policy remains crucial; (2) finding the right constitutional balance for development co-operation policy vis-à-vis other policies constitutes an area of potential conflict; (3) the relationship between the 28 Member States' development co-operation policies and that of the Union presumably forms the most significant constitutional challenge.

Introduction

On December 1, 2009 the Treaty of Lisbon entered into force. It replaced the previous three-pillar system with a unitary one, based on two treaties: The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). A central objective of the new Treaty system was to improve the Union's position on the international stage. The Lisbon changes both directly and indirectly affected the EU's development co-operation policy. In this article, we examine the institutional and substantive changes made to this policy by the Lisbon Treaty. Our aim is to assess how these changes affect the ability of the EU and Member States to act as a coherent and effective player on the international scene in the field of development co-operation.¹ The article focuses upon the legal and constitutional aspects of the

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¹ Apart from where we use quotations, as a rule, we do *not* distinguish between European Economic Community, European Community, and European Union, but instead we use the terms "EU" or "Union". On the other hand, we have been careful to distinguish between the "EC Treaty" (EC Treaty as well as EEC Treaty), "EU Treaty", "Treaty on the Functioning of the European Union" (TFEU), and "Treaty on European Union" (TEU).

EU's development co-operation, i.e. those aspects which are directly related to primary EU law, including notably the Treaties, rather than to secondary legislation. The main point is to identify the post-Lisbon legal constitutional challenges in the field of EU development co-operation and thereby to consider whether, and to what extent, the classic constitutional challenges in this policy field continue, and whether new challenges have arrived.

We first examine the Lisbon Treaty's impact on the Union's capabilities to carry out a development co-operation policy and the restraints imposed by the Treaties on the Union in this respect. This is not only a question of the way in which the Lisbon Treaty affects the scope and nature of the Union's development co-operation competence; it is also a question of whether the Lisbon Treaty imposes new obligations on the Union that may affect the latter's exercise of this competence. Thereafter we account for the institutional and organisational changes brought about by the Lisbon Treaty and their likely consequences for the Union's ability to carry out its development co-operation policy. Finally, based on our analyses we identify three main legal, constitutional challenges with which the EU's development co-operation policy is faced post-Lisbon, and we point to two overall positive tendencies produced by the Lisbon Treaty.

Capabilities and restraints—scope, exercise and nature of development co-operation competence—status quo?

Scope of the competences and restraints on the exercise of the competences

Overview

The EU's development co-operation provisions were introduced in 1992 in Title XX of the EC Treaty.² With the Lisbon Treaty these provisions became Ch.1 of Title III of the TFEU. In four ways the Lisbon Treaty entailed changes that potentially affect the scope of the EU's competence in the field of development co-operation. The first concerns the amendments made with regard to the objectives to be pursued through the development co-operation policy. Which impact, if any, do these changes have on the Union's competences in the area?

Secondly, the Lisbon Treaty imposes a number of obligations on the Union, which it must observe in its exercise of development co-operation competence. Are these obligations legally enforceable? Do they impact on the way in which the Union can act in this policy field in the future? In particular, art.3(5) TEU now appears to impose an obligation on the EU to promote "European values" in the wider world. Does this affect the way in which the Union can exercise its development co-operation policy competence?

Thirdly, the Lisbon Treaty has made a number of technical amendments of which three deserve particular mention: (1) With the Nice Treaty which was signed in 2001 the EU was given specific powers in the field of "economic, financial and technical co-operation with third countries". This new power gave rise to tensions with the existing powers in the field of development co-operation. Article 212 TFEU, where we now find the provision on "economic, financial and technical co-operation with third countries", has been amended in certain respects. (2) The Lisbon Treaty has introduced a specific provision on humanitarian assistance, which now requires its own space, possibly to the detriment of the scope of development co-operation policy competence. (3) Finally, the Lisbon Treaty has altered the constitutional framework that governs the EU's financing of activities in the field of development co-operation.

²For an examination of the EU's development co-operation policy prior to the Maastricht Treaty, see M. Broberg and R. Holdgaard, *EU External Action in the Field of Development Cooperation Policy: The Impact of the Lisbon Treaty* (Stockholm: SIEPS, 2014), pp.10–20.

Amendments to the objectives of EU development co-operation policy—streamlining and reorganisation

The Lisbon Treaty has reshuffled and explicated the objectives of the EU in several regards, including with respect to development co-operation policy. Prior to the Lisbon Treaty, art.177(1) of the EC Treaty provided that the EU’s development co-operation policy should foster,

- “• the *sustainable economic and social development* of the developing countries, and more particularly the most disadvantaged among them,
- the smooth and gradual *integration of the developing countries into the world economy*,
- the *campaign against poverty* in the developing countries.”³

Article 177(2) EC provided that:

“Community policy in this area shall contribute to the general objective of developing and consolidating *democracy* and the *rule of law*, and to that of *respecting human rights and fundamental freedoms*.”⁴

Following the entry into force of the Lisbon Treaty, the corresponding provision—art.208(1) TFEU—now provides:

- “1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union’s external action ...
Union development cooperation policy shall have as its primary objective the *reduction and, in the long term, the eradication of poverty*. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.”⁵

This reshuffling entails two interesting changes: first, with the second paragraph of art.208(1), the Union’s development co-operation objectives are *streamlined*. This means a much stronger focus on the primary objective, i.e. the fight against poverty in the developing countries. Secondly, the remaining, and previously broadly defined, objectives of the Union’s development co-operation policy (such as the promotion of democracy and the rule of law) have not disappeared, but have been *reorganised* and now form part of the general “framework of the principles and objectives of the Union’s external action”,⁶ which must be respected in all the Union’s external activities.⁷

Article 21(1) and (2) TEU list these principles and objectives as follows:

- “1. The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: *democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law*.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the

³ Emphasis added.

⁴ Emphasis added.

⁵ Emphasis added.

⁶ Cf. first paragraph of art.208(1) TFEU.

⁷ Cf. also art.205 TFEU and art.21(3) TEU.

- first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.
2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
- (a) safeguard its values, fundamental interests, security, independence and integrity;
 - (b) *consolidate and support democracy, the rule of law, human rights and the principles of international law*;
 - (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
 - (d) *foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty*;
 - (e) *encourage the integration of all countries into the world economy*, including through the progressive abolition of restrictions on international trade;

...⁸

It is still too early to say what consequences this streamlining and reorganisation have for the Union's priorities and competences in the field of development co-operation. To some extent it may be considered to be a matter of political preference whether one believes that these changes entail a strengthening or a dilution of the previously defined development co-operation objectives. However, from a legal constitutional perspective, the interesting question is whether the changes affect the scope of the Union's competences or its ability to exercise these competences. The answer to that question is not clear-cut.

Presumably the treaty-makers intended these changes to have a real impact on the Union's external relations, including on its development co-operation policy. Therefore, it could be expected that the streamlining and reorganisation will have a noticeable impact, at least in the long run: first of all, to elevate some objectives which could previously be found in the Chapter on the Union's development co-operation policy (e.g. to support democracy and the rule of law) to horizontal objectives, which must guide all the EU's actions in the field of external relations, suggests that these objectives have been strengthened from a constitutional point of view.⁹ For example, we should expect to see reference to these objectives and principles in more political and legal documents in various fields of the Union's external relations. Moreover, over time, one could expect the Court of Justice to use these objectives and principles as legitimate teleological guidelines in its interpretation of legal acts in all external relations policy areas, including e.g. the Common Commercial Policy. More broadly, a likely consequence of this generalisation of objectives and principles which previously belonged to specific policy areas is that they will become more firmly embedded in the Union legal order. Secondly, the streamlining—i.e. the fact that art.208 TFEU explicitly lays down that the reduction/eradication of poverty constitutes a “primary objective” of European Union development co-operation policy—necessarily suggests that within the field of development co-operation this objective will now be accorded particular weight, e.g. in cases of conflict with other objectives.¹⁰ In this respect, it appears arguable that this new primary objective has been strengthened with the amendment. The requirement that poverty reduction/eradication should be a “primary objective” therefore suggests that, among the traditional economic and social objectives which have always formed

⁸ Emphasis added.

⁹ Prior to the Lisbon Treaty, art.11 TEU laid down very similar objectives for the EU's Common Foreign and Security Policy (CFSP) as those that now apply to the EU's policies and actions in all fields of international relations.

¹⁰ See in this respect also H. Klavert, “EU External Action Post-Lisbon: What Place is There for Development Policy?” (2011) 4 *Bulletin of Fridays of the Commission* 18, 18–19. Note that in contrast to the other objectives eradication of poverty appears both in art.21(2)(d) TEU and in art.208 TFEU.

a part of the Union's development co-operation policy, there should be a stronger and more specific focus on poverty reduction/eradication in the Union's policy formulation. Arguably, this would seem to mean that the EU's specific development initiatives must always (also) pursue a goal of poverty reduction. For example, an initiative aimed at improving environmental protection in a developing country should also clearly have a poverty reducing objective in order to fully comply with art.208 TFEU. Thus, it could be thought, individual development co-operation measures which do not have as their primary objective to reduce/eradicate poverty—or which, at least, do not contribute to this objective in the overall context of the Union's development co-operation policy—no longer fall within the Union's development co-operation competences.¹¹ Apart from this preference for poverty reduction/eradication, the streamlining probably does not entail new hard legal obligations as regards the Union's exercise of competence.

As regards Treaty-making competence, this has been laid down in art.209 TFEU which explicitly foresees international agreements that have as their objectives some of the horizontal objectives mentioned in art.21 TEU. In this light, the reorganisation of the Union's development co-operation objectives probably does not entail noticeable new restrictions on the Union's treaty-making competence in this area. The Court's judgment of June 11, 2014 in the *Philippines Partnership and Cooperation Framework Agreement* case arguably confirms this.¹² This judgment is the first concerning art.209 TFEU, and the Court's reasoning is interesting in several respects.

The case concerned a dispute entailing what was to be the correct legal basis for the Council Decision signing the Philippines PCFA.¹³ The Commission had proposed that the Decision be based on arts 207 TFEU and 209 TFEU (concerning common commercial policy and development co-operation policy, respectively), in conjunction with art.218(5) TFEU. The Council, however, decided to add arts 79(3) TFEU (on readmission agreements), 91 TFEU and, 100 TFEU (on sea and air transport), and 191(4) TFEU (on environmental protection). The Commission brought an annulment action arguing that these additional legal bases were unnecessary and unlawful.

The central question was whether, among the provisions of the Philippines PCFA, those relating to readmission of nationals of the contracting parties to transport and to the environment also fell within development co-operation policy or whether they went beyond the framework of that policy and therefore required the contested decision to be founded on additional legal bases.¹⁴ The Court therefore examined whether the contested provisions of the PCFA could, more broadly, fall within the Union's development co-operation policy, and whether the PCFA, in particular, pursues the objectives of that policy.¹⁵ The Court concluded that, in principle, it could.

The *PCFA* judgment is important for the understanding of how the Lisbon Treaty has affected the EU's external action in the field of development co-operation policy for two reasons: first, the judgment shows that the scope of the EU's contemporary development co-operation policy cannot be understood without understanding its evolution. In this regard the Court of Justice's 1996 ruling in the so-called *India Agreement* case¹⁶ provides a crucial backdrop for the *Philippines PCFA* case. In the *Philippines PCFA* case the Court, in broad terms, confirmed the basic principles developed in the former case.

¹¹ As will be apparent from the ruling in the Philippines PCFA case (examined immediately below) the Court of Justice does not appear to place particular emphasis on poverty reduction/eradication.

¹² *Commission v Council (Philippines PCFA)* (C-377/12) EU:C:2014:1903; [2015] 1 C.M.L.R. 2.

¹³ "Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part, annexed to Proposal for a Council Decision on the conclusion of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part" COM(2013) 925 final (the Philippines PCFA or simply the PCFA).

¹⁴ *Philippines PCFA* (C-377/12) EU:C:2014:1903 at [35].

¹⁵ *Philippines PCFA* (C-377/12) EU:C:2014:1903 at [36]–[47].

¹⁶ *Portugal v Council (India Agreement)* (C-268/94) [1996] E.C.R. I-6177; [1997] 3 C.M.L.R. 331.

Secondly, however, in the *Philippines PCFA* case the Court clearly reframed the original principles in the *India Agreement* case with a view to taking account of subsequent developments in the Union's development co-operation policy. Thus, there is an interesting evolution in the Court's reasoning. In [36]–[40], the Court appears (merely) to pay lip-service to the innovations in the Lisbon Treaty, i.e. the fact that poverty reduction/eradication is now explicitly the primary aim of the Union's development co-operation policy, and the fact that the Union, when implementing this policy on the basis of art.209 TFEU, may conclude agreements that help to achieve the general objectives referred to in art.21 TEU. However, in the Court's analysis, the real benchmark for determining the scope of the Union's development co-operation policy competence appears to be derived not from arts 208 TFEU and 209 TFEU, but from the European Consensus and the Development Cooperation Instrument.¹⁷ In particular, it is remarkable that the Court (at [55]) concludes that the provisions of the PCFA relating to the three contested areas “consistently with the European Consensus, contribute to the pursuit of the objectives of development cooperation”.

It is not entirely clear what to make of this reasoning. At first sight, one might wonder whether the Court is suggesting that the outer limits of the Union's development co-operation policy are defined by a secondary soft law measure (the European Consensus—a statement) and a secondary hard law measure (the Development Cooperation Instrument—a regulation) that were both adopted prior to the Lisbon Treaty. From a legal point of view, this would be unacceptable, since it would conflict with the principles of hierarchy of Union law norms. Thus, in our view, the Court of Justice's reasoning in the *Philippines PCFA* case differs in this respect from that normally used by the Court; in particular, it differs from the well-established principle that,

“the interpretation of a provision of European Union law requires that account be taken not only of its wording and the objectives it pursues, but also its context and the provisions of European Union law as a whole.”¹⁸

When interpreting *Treaty* provisions, the only “context” that can be taken into account is that of primary Union law.¹⁹ In fact, the Court has consistently held that a mere institutional practice cannot derogate from the rules laid down in the Treaty and therefore cannot create a precedent binding on the Union institutions with regard to the correct legal basis.²⁰ We would therefore argue that the above reasoning should be understood, instead, as a practical way of showing that the provisions of the PCFA fell within art.208(1) TFEU, cf. art.21(2) TEU. The importance attached notably to the European Consensus document should be understood as an illustration—not a justification—of the conclusion that the provisions of the PCFA fall within the scope of development co-operation. However that may be, the judgment underlines the practical importance of the European Consensus document and the Development Cooperation Instrument.²¹

The Court's reasoning is interesting for another reason. It may suggest that the requirement of policy coherence, which has been strengthened by the Lisbon Treaty, is taken seriously. More precisely, [55] may be read to the effect that if the provisions of the PCFA were not “consistent”²² with the European Consensus, the conclusion might have been different. Thus, the judgment may be thought to reinforce the requirement of policy coherence.

¹⁷ *Philippines PCFA* (C-377/12) EU:C:2014:1903 at [42]–[43], [49]–[50] and [55].

¹⁸ E.g. *Inuit Tapiriit Kanatami v European Parliament* (C-583/11 P) EU:C:2013:625; [2014] 1 C.M.L.R. 54 at [50].

¹⁹ As it was for the Court in *Inuit Tapiriit Kanatami* (C-583/11 P) EU:C:2013:625.

²⁰ Cf. e.g. *United Kingdom v Council* (68/86) [1988] E.C.R. 855 at [24]; and *Parliament v Council* (C-271/94) [1996] E.C.R. I-1689 at [24].

²¹ I.e. similar to the reasoning used by the Court in e.g. (C-91/05) *Commission v Council (ECOWAS)* (C-91/05) [2008] ECR I-3651; [2008] 3 C.M.L.R. 5 at [64]–[70].

²² In the French version of the judgment, the Court has termed this “en cohérence avec le consensus européen” (emphasis added).

Thirdly, the Court not only confirms that the Union's development co-operation is multi-faceted and can cover a *broad* range of policy areas, the Court also accepts that development co-operation competence can be used for relatively *deep* forms of co-operation in this broad range of policy areas. As regards the latter, the Court *repeats* the distinction made in the above-mentioned *India Agreement* case between co-operation of a declaratory nature and co-operation "in concrete terms". However, when *applying* this distinction the Court accepts that provisions in the Philippines PCFA concerning readmission contain specific legal obligations and clear rules on how to proceed (by conclusion of a readmission agreement), and which thus go beyond mere declaratory statements. In this respect, the *Philippines PCFA* case clearly takes the doctrine developed in the *India Agreement* case a step further.

This flexibility, introduced by the Court of Justice in the *Philippines PCFA* case, arguably strengthens the Commission's (and the EEAS') ability to pursue ambitious and multi-faceted types of co-operation in this policy area. From a legal point of view, this new step is not unproblematic, however. The Court—for the first time—appears to accept that clear legal obligations in the area of readmission, which has its own treaty-making competence and a specific decision-making procedure that differs from development co-operation, can be assumed on the basis of development co-operation.

In this context, it is worth turning to A.G. Mengozzi's Opinion of January 23, 2014 in the *Philippines PCFA* case. Like the Court, the Advocate General concluded that the Council wrongly included the above-mentioned legal bases concerning transport, the environment and readmission of third-country nationals. However, though he accepted the broad and multi-faceted nature of the notion of development co-operation policy, the Advocate General insisted that a careful analysis should be made before concluding that development co-operation policy competence can be used. In this respect the Advocate General, importantly, called for "a certain vigilance"²³ because, as he said, the determination of the appropriate legal basis "has constitutional significance" for the EU.²⁴

This call for vigilance seems indeed warranted. With the Lisbon Treaty's cross-reference to the Union's general objectives in its external action in art.21 TEU, and with the Court's heavy reliance on broadly defined secondary (soft and hard) law measures in its determination of the scope of the Union's competence, it is appropriate to recall the constitutional significance of the choice of legal basis: no specific power-conferring provisions of the Treaty should be allowed to become nugatory (to paraphrase the Court from Opinion 1/78²⁵ and the *India Agreement* case), and no policy competence should be allowed to take precedence over another.²⁶ Indeed, if, for example, the key elements in the Union's readmission policy and the main substantive and procedural obligations vis-à-vis specific third countries are, in reality, established in the Union's development co-operation agreements and based on art.209 TFEU, this would, arguably, be contrary to the principle of conferral. Such a practice would at least seem to be contrary to the spirit of the Treaties, which provide for an independent competence as regards readmission. Moreover, proponents of an ambitious and effective development co-operation policy should not forget that the same reasoning could be used to pursue quite deep forms of development co-operation policy within the framework of, say, the common commercial policy.

In sum, the *Philippines PCFA* judgment clarifies, in a number of ways, the method to be used for demarcating (both as regards width and depth) the Union's development co-operation policy competence. The ruling confirms that the streamlining and reorganisation of the Union's development co-operation policy competences do not restrict the Union's competences, and it clarifies the method for determining whether a multi-faceted agreement can be concluded with reference to the Union's development co-operation competence, and how deep co-operation under such an agreement can be. Overall, the judgment appears

²³ Opinion of A.G. Mengozzi in *Philippines PCFA* (C-377/12) EU:C:2014:29 at [43].

²⁴ Opinion of A.G. Mengozzi in *Philippines PCFA* (C-377/12) EU:C:2014:29 at [43].

²⁵ *International Agreement on Natural Rubber* (Opinion 1/78) [1979] E.C.R. 2871; [1979] 3 C.M.L.R. 639.

²⁶ After Lisbon, this is true also for the CFSP; compare art.40 TEU post-Lisbon with ex art.47 TEU.

to construe this competence even more generously than the pre-Lisbon *India Agreement* case did. In particular, the Court allows for a very significant interference with the Union's readmission agreement competence. At the same time, the ruling leaves several fundamental questions open.

New restraints on the Union's exercise of development co-operation competence? Policy coherence for development and value promotion

When exercising its development co-operation policy competences, the Union must comply with EU law, including the general principles. There is nothing new in this respect. However, in the field of development co-operation, after Lisbon two principles appear to require particular attention: the first is specifically concerned with development co-operation, whereas the second applies to all fields of external action:

First, in art.208(1) TFEU, the Lisbon Treaty has maintained a requirement of policy coherence for development that originally was introduced with the Maastricht Treaty. The provision formulates this requirement as follows:

“The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.”

This obliges the Union to pursue coherence between, on the one hand, its objectives in the field of development policy and, on the other hand, its other policies. The requirement laid down in art.208(1) TFEU is merely a continuation of the obligation to pursue policy coherence for development that pre-Lisbon was laid down in art.178 EC. Nothing indicates that the Lisbon Treaty has brought about any substantive changes as regards this obligation.²⁷

In order to provide a full picture it may be noted that the Treaties include other provisions which more generally require the Union to ensure policy *coherence* in its external relations, cf. notably arts 3(5) and 21(3) TEU as well as art.7 TFEU. These provisions are broadly concerned with the coherence of the Union's policies, in particular in the field of external relations—and are not particularly focused upon the Union's development policy.²⁸

The other issue that deserves particular mention is the enhanced requirement of value promotion. What impact does the above-mentioned reshuffling of the EU development co-operation policy objectives have on the Union's competence to promote its own values (such as democracy and human rights) as part of its development co-operation policy? At least since the end of the Cold War the EU has actively pursued the promotion of democracy and the respect for human rights as part of its development co-operation policy. The Court of Justice has accepted this value promotion, notably in its pre-Lisbon *India Agreement* case as well as in the post-Lisbon *Philippines Border Management Project* case.²⁹ The Lisbon Treaty, however, has taken this promotion one step further. According to art.3(5) TEU:

²⁷ It may be noted that the new art.214 TFEU on humanitarian aid in s.1 requires that “[t]he Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union”. Arguably, this is a much narrower coherence obligation than the one laid down in art.208(1) TFEU.

²⁸ On the general obligation of the EU to attain coherence in its external relations prior to the entry into force of the Lisbon Treaty, see C. Hillion, “Tous pour un, Un pour tous! Coherence in the External relations of the European Union” in M. Cremona (ed.), *Developments in EU External Relations Law: Collected Courses of the Academy of European Law* (Oxford, New York: Oxford University Press, 2008). For an examination of the same matter post-Lisbon, see C. Hillion, “Cohérence et action extérieure de l'Union européenne”, *European University Institute, Department of Law* (2012), http://cadmus.eui.eu/bitstream/handle/1814/22354/LAW_2012_14_Hillion_FINAL.pdf [Accessed April 29, 2015].

²⁹ *European Parliament v Commission (Philippines Border Management Project)* (C-403/05) [2007] E.C.R. I-9045; [2008] 1 C.M.L.R. 20.

*“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”*³⁰

This obligation to actively advance European values in the wider world is also reflected in art.21(1) TEU, which provides that:

“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world

*... ”*³¹

In this connection it may be noted that prior to the entry into force of the Lisbon Treaty, A.G. La Pergola in the *India Agreement* case—somewhat obiter—argued that the inclusion of a human rights clause constituted a condition of legality. However, the Court of Justice in its ruling in the same case refrained from taking a position in this respect. While it might be going too far to suggest that art.3(5) TEU entails that inclusion of a human rights clause in international agreements (or, at least, in international development co-operation agreements) is legally required, the introduction of the duty to promote European values does strengthen the argument that the Union might have an obligation to ensure a minimum degree of compliance—and effective remedies in case of breach—in its co-operation with developing countries.

So far, the EU institutions have only made a limited number of explicit references to the obligation in art.3(5) TEU to promote European values.³² In contrast, however, it is easy to find examples where the EU commits to generally promoting its values in the wider world. Thus, for instance, in the so-called Stockholm Programme the European Council explicitly laid down that:

*“The Union should continue to promote European and international standards and the ratification of international conventions, in particular those developed under the auspices of the UN and the Council of Europe.”*³³

Similarly, in a Communication entitled “A New Response to a Changing Neighbourhood”, the Commission observed that:

*“The EU does not seek to impose a model or a ready-made recipe for political reform, but it will insist that each partner country’s reform process reflect a clear commitment to universal values that form the basis of our renewed approach.”*³⁴

And similarly, in a Communication entitled “A dialogue for migration, mobility and security with the southern Mediterranean Countries”, the Commission observed that:

³⁰ Emphasis added.

³¹ Emphasis added. See also art.21(2)(a)–(c) TEU as well as art.205 TFEU.

³² See for example European Parliament Resolution on the Discrimination against Girls in Pakistan, in particular the case of Malala Yousafzai [2014] OJ CE72/43; *Commission v Kadi* (C-584/10 P, C-593/10 P and C-595/10 P) EU:C:2013:518; [2014] 1 C.M.L.R. 24 at [103]; and the pending case *Front Polisario v Council* (T-512/12).

³³ The *Stockholm Programme—An open and secure Europe serving and protecting citizens* [2010] OJ C115/1, para.7.6. For another example, see Commission Staff Working Document accompanying the Communication from the Commission, “Tax and Development: Cooperating with Developing Countries on Promoting Good Governance in Tax Matters” SEC(2010) 426 final.

³⁴ Commission, “A New Response to a Changing Neighbourhood” COM(2011) 303 final (emphasis added).

“The EU stands ready to continue supporting all its Southern neighbours who are willing to commit to democracy, human rights, good governance and rule of law, and to enter into Partnerships with those countries to achieve concrete progress for the people.”³⁵

The question is, then, to what extent the obligation to further European values affects the EU’s competence in the field of development co-operation?³⁶ Here, the answer is probably twofold. First, the obligation in art.3(5) TEU makes it clear that the EU must work actively to further its own values.³⁷ It also means that art.3(5) TEU cannot simply be ignored, not even temporarily, in the Union’s policy formulation. This should make it easier, both internally and externally, to promote the agenda of value promotion in the Union’s external activities, including in the specific legal instruments. However, the extent to which the requirement to uphold and promote the Union’s values will limit the Union’s external actions in practice depends on whether it is considered to be an obligation that should be achieved in the Union’s overall policy formulation, or an obligation that more specifically requires the Union to take such actions whenever the opportunity arises in its external actions. In any case, art.3(5) TEU probably entails that the Union cannot *disregard* the obligation in its long-term co-operation with third countries.

Secondly, art.3(5) TEU does not impose specific obligations as to *how* the EU must further its own values. For example, the new provision does not entail that a human rights clause in a co-operation agreement with a developing country is a condition of internal legality under EU law. Even before the entry into force of the Lisbon Treaty, the EU was rather active in promoting its own values in the wider world. Overall, in our view, art.3(5) TEU appears to be important mainly for the Union’s international identity, including for its external relations discourses. However, it is questionable whether the requirement to promote its own values in the world is also a legal obligation in specific relations with third countries. Moreover, *nothing* indicates that art.3(5) TEU requires a *more intensive* effort in this regard.³⁸

Other amendments that impact on the scope of the Union’s development co-operation policy competence

Development co-operation versus co-operation with third countries In 1993 the Maastricht Treaty introduced a specific Title, “Development Cooperation”, into the EC Treaty (Title XX), and in 2003 the Nice Treaty introduced another Title, “Economic, Financial and Technical Cooperation with Third Countries”, into the EC Treaty (Title XXI). It was not immediately clear to what extent the introduction of Title XXI into the EC Treaty narrowed the scope of that Treaty’s Title XX. In the *European Investment Bank case*³⁹ the Court of Justice effectively ruled that it did not.

³⁵ Commission, “A Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries” COM(2011) 292 final.

³⁶ In some contexts, prior to the Lisbon Treaty, the Court has rejected that *policy* objectives and preferences impose legal limitations on the Union institutions, cf. e.g. *United Kingdom v Council* (C-150/94) [1998] E.C.R. I-7235; [1999] 1 C.M.L.R. 367 at [67]–[69] (the aim of trade liberalisation in the Common Commercial Policy); and *Spain v Council* (C-342/03) [2005] E.C.R. I-1975; [2006] 1 C.M.L.R. 8 at [18]–[19] (the principle of “Community preference” in the Common Agricultural Policy). However, the wording of art.3(5) TEU suggests that it is not merely a list of policy objectives.

³⁷ M. Broberg, “From Colonial Power to Human Rights Promotor: On the Legal Regulation of the European Union’s Relations with the Developing Countries” (2013) 26 *Cambridge Review of International Affairs* 675, 682–683.

³⁸ On the consequences flowing from art.3(5) TEU, see also M. Broberg, “What is the Direction for the EU’s Development Cooperation after Lisbon?: A Legal Examination” (2011) 16 *European Foreign Affairs Review* 539, 548–554; and Broberg, “From Colonial Power to Human Rights Promotor” (2013) 26 *Cambridge Review of International Affairs* 675, 682–683.

³⁹ *European Parliament v Council (European Investment Bank)* (C-155/07) [2008] E.C.R. I-8103; [2009] 1 C.M.L.R. 23.

Following the entry into force of the Lisbon Treaty, we find the previous Title XXI of the EC Treaty in Ch.2 of Title III, Pt 5 TFEU. Article 212 TFEU provides as follows:

“Economic, financial and technical cooperation with third countries

Article 212 TFEU

1. *Without prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211, the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action. The Union’s operations and those of the Member States shall complement and reinforce each other.*
2. The European Parliament and the Council, acting in accordance with *the ordinary legislative procedure*, shall adopt the measures necessary for the implementation of paragraph 1.
3. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.
The first subparagraph shall be without prejudice to the Member States’ competence to negotiate in international bodies and to conclude international agreements.”⁴⁰

With regard to the delimitation between the TFEU’s Chapter on development co-operation and the same Treaty’s Chapter on economic, financial and technical co-operation with third countries, we observe that whereas the previous art.181(a) EC provided “[w]ithout prejudice to the other provisions of this Treaty, and in particular those of Title XX [on development co-operation]”, the new art.212 TFEU provides “[w]ithout prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211 [on development co-operation]”. Moreover, whereas art.181(a) EC provided that “[s]uch measures shall be complementary to those carried out by the Member States and consistent with the development policy of the Community”, art.212 TFEU now refers to “assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union ...”. The only apparent difference between art.181(a) EC and art.212 TFEU therefore seems to be that the latter now explicitly lays down that it applies to “third countries other than developing countries”. This is, however, merely a codification of the Court of Justice’s above-mentioned ruling in *European Investment Bank* on the scope of art.181(a) EC.

Thus, it seems fairly safe to conclude that there is no substantive difference between the two provisions when it comes to the effect they may have on the scope of the EU’s development co-operation policy. The Lisbon Treaty has also harmonised the decision-making procedure so that the ordinary legislative procedure applies irrespective of whether a measure is adopted on the basis of one or the other of the two competences.⁴¹ This means that the European Parliament will take full part irrespective of which legal basis is being invoked, thus removing a source of potential inter-institutional conflict.

Humanitarian aid With the Lisbon Treaty, the EU in art.214 TFEU has been given explicit powers in the field of humanitarian aid. Prior to the introduction of art.214 TFEU, EU humanitarian aid was provided on the basis of the Union’s competence in the field of development co-operation, although it was rather

⁴⁰ Emphasis has been added in the quotation of art.212.

⁴¹ With the exception of cases falling under art.213 TFEU.

doubtful whether that competence could be used to this end.⁴² With the introduction of art.214 TFEU, any doubts with regard to whether the Union has competence in the field of humanitarian aid have been dispelled. At the same time, based on a *lex specialis* interpretation, it has become equally clear that the Union's competence in the field of development co-operation can no longer be used to provide humanitarian aid. When it comes to the Union's competence in this area, art.4(4) TFEU lays down that the EU and the Member States shall have parallel competences (shared competence without pre-emption).⁴³

Financing development co-operation assistance Financing has always been a central issue in the field of development co-operation. And in this respect, development co-operation policy differs considerably from other Union policies since the Member States have insisted on keeping the so-called European Development Funds (EDFs)—a main financing instrument with regard to EU development co-operation—outside the Union framework.

Assistance to the African, Caribbean and Pacific (ACP) states falling under the Cotonou Agreement is financed via consecutive EDFs, whereas all other development assistance is financed through the EU's budget. Financing via an EDF essentially means that the funding does not come under the EU's general budget, but instead is funded by the Member States, is subject to its own financial rules, and is managed by a specific committee. The consequence of the special scheme set up with regard to the EDFs is that while this assistance is administered by the European Commission under Regulation 617/2007,⁴⁴ the Member States themselves decide the size of the contribution and also control the funds so that the EU institutions have rather limited powers in this respect. This framework continues in the 11th EDF, which covers a seven-year period running from 2014 to 2020.⁴⁵ However, the Commission and the European External Action Service (EEAS) have ambitions of bringing the aid scheme to ACP and OCT countries closer to the Union budget.⁴⁶ In this regard the Lisbon Treaty does not explicitly change the existing dual financing system, but it may be thought to facilitate such transition. Hence, prior to the Lisbon Treaty, art.179(3) EC explicitly provided that “[t]he provisions of this Article shall not affect cooperation with the African, Caribbean and Pacific countries in the framework of the ACP-EC Convention”. After the entry into force of the Lisbon Treaty, art.179 EC has been replaced by art.209 TFEU, but art.179(3) EC's explicit reference to the EU's co-operation with the ACP countries has been deleted. This deletion, it has been argued, means that a formal obstacle to Union budgetisation of EDF funds has been removed.⁴⁷

The Commission and the EEAS consider the Lisbon amendments and the development in EU external relations in general to signal a desire to move the EDF funds closer to the Union budget. However, the Lisbon Treaty amendments in themselves have not been sufficient to foster this development, and further integration on this point seems to have been postponed until negotiations on the post-2020 financing.

⁴² See M. Broberg, “Undue Assistance?: An Analysis of the Legal Basis of Regulation 1257/96 Concerning Humanitarian Aid” (2009) 34 E.L. Rev. 769; P. Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, New York: Oxford University Press, 2011), pp.128–129; A. Dashwood, “External Relations Provisions of the Amsterdam Treaty” in D. O’Keefe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland OR: Hart Publishing, 1999), p.223; and J. Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor?, And Other Essays on European Integration* (Cambridge, New York: Cambridge University Press, 1999), p.54 fn.117.

⁴³ See also the below section entitled “Nature of the competences”.

⁴⁴ Regulation 617/2007 on the Implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement [2007] OJ L152/1.

⁴⁵ See Commission and the High Representative to the European Parliament and the Council, “Global Europe: A New Approach to Financing EU External Action” COM(2011) 865 final.

⁴⁶ See Commission and the High Representative, “Global Europe: A New Approach to Financing EU External Action” COM(2011) 865 final, p.11, where it is said that “Member States’ contribution keys to the 11th EDF should be brought closer to the general EU budget contribution keys in order to facilitate the integration of the EDF in the EU budget at a later stage”.

⁴⁷ Cf. Klavert, “EU External Action Post-Lisbon” (2011) 4 *Bulletin of Fridays of the Commission* 18, 21–22.

Nature of the competences Prior to the entry into force of the Lisbon Treaty, development co-operation was a shared competence between the EU and the Member States. This is clear from art.177 EC, which laid down that the EU’s policy in the sphere of development co-operation should be complementary to the policies pursued by the Member States, and it was confirmed by the Court of Justice’s ruling in the *Lomé IV* case.⁴⁸ One of the novelties of the Lisbon Treaty is that in arts 2–6 TFEU, the Treaty drafters have explicitly categorised the nature of the EU’s competences in the various fields of EU law. With regard to the areas of development co-operation (and humanitarian aid), art.4(4) TFEU provides that,

“the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.”

It thus follows from art.4(4) TFEU that the EU and the Member States have shared competence, and that the Union’s exercise of its competence does not pre-empt that of the Member States.⁴⁹ Both the Union and the Member States have parallel competences in the field of development co-operation. The parallel nature of EU and Member State competence is confirmed by arts 208 and 209 TFEU. Article 208(1) TFEU lays down the complementarity obligation (as did art.177 EC referred to above). It provides *inter alia*: “[t]he Union’s development cooperation policy and that of the Member States complement and reinforce each other.”

If the EU had held exclusive competence in the area of development co-operation, the complementarity obligation would not make sense. Moreover, if competence in the field of development co-operation had been shared with pre-emption, it would seem more logical to render the Member States’ competence complementary to that of the Union, whereas art.208 TFEU categorises the competences of the two sides as mutually complementary.⁵⁰ This is further corroborated by art.209(2) TFEU on the entering into international agreements in the field of development co-operation. It provides:

“2. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty.

The first subparagraph shall be without prejudice to Member States’ competence to negotiate in international bodies and to conclude agreements.”

Article 209(2) TFEU thus vests in the EU competence to conclude international agreements in matters of development co-operation, but adds, in line with art.4(4) TFEU, that this does not pre-empt the competence of the Member States. Thus, the EU and the Member States continue to have shared competence without pre-emption in the field of development co-operation policy.⁵¹ As Eeckhout notes:

⁴⁸ *European Parliament v Council (Lomé IV)* (C-316/91) [1994] E.C.R. I-625; [1994] 3 C.M.L.R. 149.

⁴⁹ See likewise M. Cremona, “External Relations and External Competence of the European Union: the Emergence of an Integrated Policy” in P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford, New York: Oxford University Press, 2011), p.253.

⁵⁰ Prior to the entry into force of the Lisbon Treaty, the competence of the EU was complementary to that of the Member States. The Lisbon Treaty thus has made a change in this regard, which we consider below.

⁵¹ By contrast, Duke and Blockmans appear to take the view that, prior to the Lisbon Treaty, EU and Member State competences in the field of development co-operation were shared *without* pre-emption, whereas following the entry into force of the Lisbon Treaty, the competences have become shared *with* pre-emption. See S. Duke and S. Blockmans, “The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service”, CLEER Legal Brief (May 4, 2010), http://www.asser.nl/upload/documents/542010_121127CLEER%20Legal%20Brief%202010-05.pdf [Accessed April 29, 2015].

“The lack of pre-emptive effect on Member States competences is in the nature of development co-operation policies, which do not involve any law-making of the kind justifying such pre-emption.”⁵²

This does not exclude, of course, that general principles of EU law, such as the duty of loyal co-operation and the principle of supremacy of EU law, may require that Member States do not act in ways that conflict with or undermine the Union’s development co-operation activities.

In sum, as regards the scope and nature of the Union’s development co-operation policy, very little has changed with the Lisbon Treaty. However, the Lisbon Treaty has subtly amended the hierarchical relationship between Union and Member State development co-operation policies. As noted above, art.208(1) TFEU lays down that the EU’s development co-operation policy and those of the Member States complement and reinforce each other. This differs from the pre-Lisbon situation where art.177 EC provided that the EU’s policy in the sphere of development co-operation should be complementary to the policies pursued by the Member States. Hence, whereas Member State policies previously took precedence over the Union’s development co-operation policy, today neither can claim superiority over the other. This amendment may provide an important constitutional foundation for a strengthening of Union development co-operation policy vis-à-vis the Member States’ policies. In particular, it may provide a stronger basis for requiring Member States to comply with general principles of EU law, including the principle of supremacy and the duty of loyal co-operation, also in this field. In the short-term day-to-day policy formulation, however, the change is unlikely to have a real substantive impact.

The EU’s and the Member States’ parallel competences in the field of development co-operation leave more room for Member State action than what we find in most other policy areas with shared competence. This fact, together with the duty to attain coherence,⁵³ complementarity⁵⁴ and co-ordination,⁵⁵ arguably highlights the fundamental EU principle of loyal co-operation between the different actors. In this respect, the fact that the Union and the Member States are under an obligation to co-ordinate their development co-operation policies so as to ensure the effectiveness thereof implies that, in practice, Member State policies must pursue the development co-operation objectives that are laid down in the Treaties—objectives which to a considerable extent are a reflection of objectives originally established within international fora. Like the Union institutions, several Member States nevertheless pursue broader foreign policy objectives through their development co-operation policy, and these broader objectives are sometimes inconsistent with those found in the Treaties. Arguably, this may infringe the general EU law principle of loyal co-operation.

Institutional changes—streamlining or new areas of conflict?

Overview

The Lisbon Treaty has brought about certain institutional changes. A number of these changes are likely to impact on the EU’s development co-operation policy. Below we first consider how the Lisbon changes have affected the European Parliament’s and the Commission’s powers in the legislative process. Next, we consider how the Lisbon Treaty’s fundamental changes to the so-called comitology system may lead to thorough changes in the balance between the Member States and the Commission with regard to the practical implementation of the Union’s development co-operation policy. Finally, and most importantly, we will consider the consequences which the creation of the post of High Representative and of the European External Action Service will have on EU development co-operation.

⁵² Eeckhout, *EU External Relations Law* (2011), p.139.

⁵³ Article 208(1)(2) TFEU.

⁵⁴ Article 208(1)(1) TFEU.

⁵⁵ Article 210 TFEU.

Legal basis challenges by the European Parliament and the Commission

Prior to the entry into force of the Lisbon Treaty, the European Parliament vigorously defended its legislative role under the co-decision procedure (today the ordinary legislative procedure) that applied within the field of development co-operation as has vividly been illustrated by the Court of Justice's pre-Lisbon rulings in the *European Investment Bank*⁵⁶ and the *ECOWAS*⁵⁷ cases. The *European Investment Bank* case concerned the delimitation between, on the one hand, development co-operation policy and, on the other hand, economic, financial and technical co-operation with third countries, where the European Parliament was a co-decider under the former, but not under the latter. This procedural divergence has been abandoned with the Lisbon Treaty so that today the Parliament is a co-decider irrespective of whether a measure is adopted on the basis of one or the other legal basis (or both).

Likewise, in the field of humanitarian aid the new legal basis in art.214 TFEU provides that measures must be adopted according to the ordinary legislative procedure. The same procedure therefore applies regardless of whether a measure is considered to be development co-operation or humanitarian aid. It follows from this harmonisation of the legislative procedures that disputes like the one that caused the European Parliament to initiate the *European Investment Bank* case regarding the choice of legal basis are unlikely in the future.

The situation illustrated by the *ECOWAS* case was different, however. In the *ECOWAS* case the Commission challenged a measure adopted by the Council within the Common Foreign and Security Policy (CFSP) framework. While the pillar structure metaphor has been (formally) abandoned with the Lisbon Treaty, the CFSP continues to be governed by special (intergovernmental) provisions in Title V, Ch.2 of the TEU. At the same time, the new institutional structure,⁵⁸ the reorganisation of the Union's external relations objectives and the reinforcement of the obligation to ensure coherence in the external field⁵⁹ are likely to further the use of multi-faceted external relations instruments, such as those which were the subject of the *India Agreement*,⁶⁰ the *ECOWAS*⁶¹ and the *Philippines Border Management*⁶² cases. In particular, we may expect an increase in the use of measures which in practice incorporate both CFSP and development co-operation aspects. Such development gives us reasons to expect new clashes between the Council, on the one hand, and the Commission and the European Parliament, on the other.⁶³ The likelihood of such clashes is probably further increased by the procedural limitations on combining CFSP and non-CFSP legal bases.⁶⁴ Moreover, as we shall see below, the introduction of the High Representative and the EEAS may even complicate and exacerbate some of these inter-institutional conflicts.

Comitology

Prior to the entry into force of the Lisbon Treaty, comitology committees formed a central part of the EU's regulatory machinery also in the field of development co-operation. Thus, the European Commission Secretary General's Annual Reports show that during the three-year period from 2006 to 2008, 795

⁵⁶ *European Investment Bank* (C-155/07) [2008] E.C.R. I-8103.

⁵⁷ *ECOWAS* (C-91/05) [2008] E.C.R. I-3651.

⁵⁸ See also the below section entitled "High Representative and European External Action Service".

⁵⁹ Cf. Article 21(3)(2) TEU.

⁶⁰ *India Agreement* (C-268/94) [1996] E.C.R. I-6177.

⁶¹ *ECOWAS* (C-91/05) [2008] E.C.R. I-3651.

⁶² *Philippines Border Management* (C-403/05) [2007] E.C.R. I-9045.

⁶³ Indeed, a first such clash has already been played out before the Court in *Philippines PCFA* (C-377/12) EU:C:2014:29; cf. "Amendments to the objectives of EU development co-operation policy".

⁶⁴ *European Parliament v Council* (C-130/10) EU:C:2012:472 at [42]–[49].

implementing measures were adopted by the Commission under the Comitology Decision⁶⁵ in the development co-operation field.⁶⁶ Most of these measures were adopted according to the so-called management procedure. The European Parliament was not satisfied with this and therefore worked towards changing the procedure in order to increase its influence.⁶⁷

The entry into force of the Lisbon Treaty has led to an extensive overhaul of the previous comitology scheme. Articles 289–291 TFEU have introduced a distinction between *legislative acts* and *non-legislative acts*. Acts adopted by legislative procedure constitute legislative acts.⁶⁸ Articles 290 and 291 TFEU, however, provide for two categories of non-legislative acts—namely, *delegated acts* (roughly, delegation of legislative powers) and *implementing acts* (roughly, delegation of executive powers). Where the European Commission adopts a delegated act, this act will be under the direct control of the European Parliament and the Council, which can reject the act or revoke the delegation. In contrast, where the Commission adopts an implementing act, only the Member States (but *not* the European Parliament) have the power to control the implementation.⁶⁹ From the point of view of the European Parliament, the use of delegated acts possesses the attraction that the Parliament retains some control over the acts to be adopted. On the other hand, it also appears likely that in certain situations the Parliament will favour implementing acts—namely, in those situations where this means that only the precise (less important) technical details are “postponed” to the implementing act.

This novel distinction leaves considerable scope for interpretation, and disputes between the European Parliament and the Commission (and Council) have arisen in many areas,⁷⁰ including in the field of development co-operation. Thus, the Commission’s proposal to amend the regulations on the financing instruments for the promotion of democracy and human rights,⁷¹ for co-operation with industrialised and other high-income countries,⁷² and for development co-operation⁷³ led to intense discussions as to whether this should be done through the delegated acts procedure, as the European Parliament argued, or through the implementing acts procedure, as argued by the Council. In the specific case a compromise deal was struck.⁷⁴ However, similar battles are likely to arise in the future. The outcome of such future battles will be of decisive importance with regard to the institutional balance of power among the EU’s three legislative institutions: the Council, the Commission, and the European Parliament.

⁶⁵ Council Decision Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission [1999] OJ L184/23.

⁶⁶ Cf. “Opinion of the Committee on Development for the Committee on Legal Affairs on the Proposal for a Regulation of the European Parliament and of the Council Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission’s Exercise of Implementing Powers” (COM(2010)0083—C7 0073/2010—2010/0051(COD))” (Committee on Development, June 3, 2010), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/deve/ad/818/818840/818840en.pdf [Accessed April 29, 2015].

⁶⁷ The European Parliament favoured the so-called regulatory procedure with scrutiny.

⁶⁸ Cf. Article 289(3) TFEU.

⁶⁹ See Regulation 182/2011 Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission’s Exercise of Implementing Powers [2011] OJ L55/13.

⁷⁰ See for example *Commission v Parliament and Council* (C-427/12) EU:C:2014:170; and *Parliament v Commission* (C-65/13) EU:C:2014:2289.

⁷¹ Regulation 1889/2006 on Establishing a Financing Instrument for the Promotion of Democracy and Human Rights Worldwide [2006] OJ L386/1.

⁷² Regulation 1934/2006 Establishing a Financing Instrument for Cooperation with Industrialised and Other High-Income Countries and Territories [2006] OJ L405/41.

⁷³ Regulation 1905/2006 Establishing a Financing Instrument for Development Cooperation [2006] OJ L378/41.

⁷⁴ On the specific case, see further M. Malhère, “Financing Instruments for EU External Action—EP and Council Battle It out over Delegated Acts” (February 9, 2012), EUROPOSITICS, <http://www.comitology.eu/site/wp-content/uploads/2014/04/europolitics-comitology.pdf> [Accessed April 29, 2015].

High Representative and European External Action Service

Prior to the entry into force of the Lisbon Treaty, it was often argued that in international affairs the EU punched below its weight, and that an important reason for this was the Union's lack of a coherent organisation. A key objective behind the Lisbon Treaty, therefore, was to improve the Union's ability to act efficiently on the international stage. To this end, a new position as High Representative for Foreign Affairs and Security Policy was created.⁷⁵

One of the essential functions of the High Representative is to bridge both Member State and Union interests. This is reflected in the remarkable array of tasks assigned to the High Representative in arts 18(2)–(4) and 27(1)–(2) TEU. According to these provisions, the High Representative shall conduct the EU's common foreign and security policy, contribute proposals to the development of this policy, carry it out as mandated by the Council and preside over the Foreign Affairs Council. Moreover, the High Representative is one of the vice-presidents of the Commission and is generally responsible within the Commission for its external relations responsibilities and for co-ordinating other aspects of the Union's external action.⁷⁶

The creation of the position as High Representative is intended to significantly improve the EU's ability to speak with one voice, and thereby to improve coherence in its external affairs policies. In order to enable the High Representative to carry out her tasks, she is assisted by a diplomatic service—the European External Action Service (EEAS). This service is independent of the Member States as well as of the Council and the Commission. Until now, the staff has primarily been drawn from the Member States' diplomatic services as well as from the Council and the Commission.

Which constitutional challenges have the creation of these new actors caused for the Union's development co-operation policy? The establishment of the EEAS has been of particular importance for the internal organisation of the Union's development co-operation policy.⁷⁷ One of the most contentious issues in relation to the establishment of the EEAS has been—and continues to be—whether and, if so, to what extent this new actor should be in charge of development co-operation policy. This question was at the centre of the sometimes heated debates about the division of tasks between the Commission and the EEAS leading up to Council Decision 2010/427 establishing the organisation and functioning of the European External Action Service.⁷⁸ As Van Vooren notes,

“many in the development community were worried that giving a role to the EEAS in EU development policy was a ruse of the Member States to ensure that aid resources presently managed by the

⁷⁵ See Article 18 TEU.

⁷⁶ It has been argued that “[t]he High Representative's close link with the EU member states is pushing development cooperation closer to an intergovernmental level”: cf. J. van Seters, “EU Funding for Africa, Business as Usual or Changes Ahead?” (2011) 4 *Bulletin of Fridays of the Commission* 24, 27. Jeske van Seters apparently seems to consider this push towards an intergovernmental level advantageous with regards to improving co-ordination and complementarity between Member States and the EU.

⁷⁷ For an early examination of the EEAS, see the European Parliament study by J. Wouters et al., “The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities”, Directorate-General for External Policies of the Union (February 2013), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/457111/EXPO-AFET_ET\(2013\)457111_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/457111/EXPO-AFET_ET(2013)457111_EN.pdf) [Accessed April 29, 2015]. With particular regard to the EEAS and development co-operation policy, see pp.49–50 of the study.

⁷⁸ Council Decision 2010/427 Establishing the Organisation and Functioning of the European External Action Service [2010] OJ L210/30. See, for instance, H. Mahony, “Ashton Presents Outline of Diplomatic Service” (March 26, 2010), *EU Observer*, <http://euobserver.com/18/29769> [Accessed April 29, 2015]; and I. Tannous, “The Programming of EU's External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO” (2013) 18 *European Foreign Affairs Review* 329.

Commission would be used for strategically directed objectives rather than long-term structural development objectives.”⁷⁹

In other words, to transfer development co-operation policy competence from the Commission to the EEAS is not merely a technical question of institutional balance. The transfer of such competence to the EEAS may well lead to a higher degree of coherence between the development co-operation policy and other external policies. In particular, transferring some of this competence to the EEAS might entail a weakening of the marked distinction which hitherto the Commission has applied between, on the one hand, ACP countries and, on the other hand, other developing countries. A transfer of development policy competence to the EEAS may also entail more coherence with regards to thematic divisions, since the transfer to the EEAS means that subjects that previously were treated by different directorates-general within the Commission will now be treated under one and the same roof. However, the impetus for the EEAS to create a single, consistent external policy may mean that these policies may become so tightly interwoven that it will prove difficult to distinguish one from the other. In such a situation, it may be feared that the “soft” development co-operation policy objectives will “suffer” under the influence of other “harder” and more traditional foreign policy objectives.⁸⁰ Moreover, arguably, one should not exaggerate the positive effects on policy coherence resulting from a transfer of more development policy competence to the EEAS.⁸¹

However, the law firm of White & Case has argued that “on a strict reading of the Treaty, the role of the EEAS is restricted to the CFSP”, and that:

“It can be argued that development cooperation activities do not substantially relate to the CFSP as defined; rather these activities reside in the realm of ‘the rest of the Union’s external action’ for which the High Representative acts as Commissioner and possesses only a coordination function, and in relation to which the EEAS is to have no role.”⁸²

The law firm continues by noting that the proposal to transfer important parts of development co-operation policy from the Commission services to the EEAS “cannot alter areas of competence as defined under the Treaties, such as the ‘exclusive competence’ of the Commission in development cooperation activities”.⁸³

⁷⁹ See B. van Vooren, “A Legal-institutional Perspective on the European External Action Service” (2011) 48 C.M.L. Rev. 475.

⁸⁰ See in this respect “EEAS one year on: ‘Work in progress’ for poverty eradication” (September 4, 2012), Concord Europe, <http://www.concordeurope.org/publications/item/98-eeas-one-year-on-work-in-progress-for-poverty-eradication>; and S. Strob, “Programming financial instruments post-Lisbon: The European External Action Service and the new institutional architecture of EU external action” (May 3–5, 2012), http://www.exact.uni-koeln.de/fileadmin/home/stross/Stross_2012_Programming_financial_instruments_post-Lisbon_-_The_EEAS_and_the_new_institutional_architecture_of_EU_external_action.pdf. Contrast, however, the more optimistic view put forward by M. Varrenti, “EU Development Cooperation after Lisbon: The Role of the European External Action Service”, College of Europe, Department of EU International Relations and Diplomacy Studies (2010), https://www.coleurope.eu/sites/default/files/research-paper/edp_10_2010_varrenti.pdf [All accessed April 29, 2015].

⁸¹ Not all external policy subjects with a close connection to development co-operation policy are transferred to the EEAS. In particular, trade and humanitarian aid remain within the remit of the Commission. Hence, the partial transfer of development co-operation from the Commission to the EEAS is not likely to lead to increased coherence between development on the one hand and trade and humanitarian aid on the other. In this respect, see also G. Laporte, “The Africa-EU Partnership in a Post-Lisbon and Post-Tripoli Context” (2011) 4 *Bulletin of Fridays of the Commission* 13, 16.

⁸² White & Case LLP, “Legal Objections to the EEAS’ involvement in EU Development Cooperation Activities” (April 16, 2010), paras 3.7–3.8, http://www.cerle.lu/wp-content/uploads/imported/pdf/Legal_advice_on_EEAS_4.pdf [Accessed April 29, 2015].

⁸³ White & Case LLP, “Legal Objections to the EEAS’ involvement in EU Development Cooperation Activities” (April 16, 2010), para.3.11 and also para.3.9, http://www.cerle.lu/wp-content/uploads/imported/pdf/Legal_advice_on_EEAS_4.pdf [Accessed April 29, 2015].

And it concludes: “Detracting from the exclusive competence of the Commission would require a formal Treaty amendment.”⁸⁴ Arguments of this kind tend to rest on the Treaty provisions on external representation. Thus, art.17(1) TEU provides that it is the Commission’s competence to “ensure the Union’s external representation”, whereas arts 18 and 27 TEU explicitly provide that the High Representative is responsible for the CFSP (only), and that the EEAS is to assist the High Representative.

However, the legal situation is considerably more complex, and the better view probably is that the constitutional framework introduced by the Lisbon Treaty is ambiguous and that the Treaties leave a considerable degree of flexibility as regards the division of tasks between the Commission and the High Representative/EEAS in the field of external relations.⁸⁵ In particular, the general task of the High Representative and the EEAS to ensure consistency in EU external relations suggests that the Treaties do not preclude these new actors from playing a (partial) role also in the formulation and implementation of development co-operation policy. Arguably, the Treaties therefore do not preclude a (partial) transfer of development co-operation policy from the European Commission to the EEAS.⁸⁶ In this light, the debate surrounding the transfer of development co-operation to the EEAS should centre less on issues of legality and more on how development-related interests can be upheld in the EEAS.⁸⁷

At present, a compromise has been struck whereby the EEAS has been given the task of political co-ordination as regards a number of external assistance instruments.⁸⁸ This is merely a power of co-ordination, however. Thus, the competence actually transferred to the EEAS is procedural in nature and does not concern policy issues. The management of the Union’s external co-operation programmes remains the responsibility of the Commission.⁸⁹ As the discussions about division of development co-operation competence between the Commission and the EEAS have shown, the Lisbon Treaty’s introduction of the EEAS has created a new source of constitutional conflict. It is likely that this conflict will be revived in the next revisions of the division of tasks between, on the one hand, the Commission and, on the other hand, the High Representative and the EEAS.⁹⁰

⁸⁴ White & Case LLP, “Legal Objections to the EEAS’ involvement in EU Development Cooperation Activities” (April 16, 2010), para.3.11, http://www.cerle.lu/wp-content/uploads/imported/pdf/Legal_advice_on_EEAS_4.pdf [Accessed April 29, 2015].

⁸⁵ See Van Vooren, “A Legal-institutional Perspective on the European External Action Service” (2011) 48 C.M.L. Rev. 475, particularly 486–491.

⁸⁶ See likewise Duke and Blockmans, “The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service”, CLEER Legal Brief (May 4, 2010), http://www.asser.nl/upload/documents/542010_121127CLEER%20Legal%20Brief%202010-05.pdf. Contrast with M. van Reisen, “Note on the Legality of Inclusion of Aspects of EU Development Cooperation and Humanitarian Assistance in the European External Action Service (EEAS)” (March 5, 2010), Europe External Policy Advisors, http://www.eepa.be/wcm/dmdocuments/EEPA_briefing_paper_EEAS.pdf [Both accessed April 29, 2015]. At p.2 Van Reisen observes: “The Lisbon Treaty defines no powers to divide development cooperation policy and humanitarian assistance between the EEAS and the Commission. Any such proposals should be regarded as illegal under the Treaty.”

⁸⁷ Duke and Blockmans, “The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service”, p.14, CLEER Legal Brief (May 4, 2010), http://www.asser.nl/upload/documents/542010_121127CLEER%20Legal%20Brief%202010-05.pdf [Accessed April 29, 2015].

⁸⁸ This is in line with the *Report of 23 October 2009 from the Swedish Presidency to the European Council on the European External Action Service* (DOC 14930/09) (Presidency of the Council of the European Union), <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014930%202009%20INIT> [Accessed April 29, 2015].

⁸⁹ Council Decision 2010/427 art.9. See, generally, S. Blockmans and C. Hillion (eds), “EEAS 2.0—A Legal Commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service”, CLEER (February 2013), http://www.asser.nl/upload/documents/20130220T020029-cleer13-1_web.pdf [Accessed April 29, 2015].

⁹⁰ See Tannous, “The Programming of EU’s External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO” (2013) 18 *European Foreign Affairs Review* 329.

Conclusions and future challenges

The entry into force of the Lisbon Treaty has introduced a number of changes to the constitutional legal framework that governs the Union's development co-operation policy. Some of these changes are codifications and (technical) adjustments, which will not give rise to significant problems in the future. Other changes may have a longer-lasting impact and carry the potential for future constitutional conflicts, which may potentially influence the Union's ability to carry out an effective development co-operation policy. First and foremost, by reorganising and streamlining the development co-operation policy objectives, the Lisbon Treaty leaves a lasting constitutional impact on the Union's development co-operation policy. The explication and reorganisation of the Union's external relations objectives and principles and the streamlining of the development co-operation policy objective (i.e. the identification of poverty reduction/eradication as a primary objective) are likely to have a lasting constitutional impact on policy-making and legal methodology in this area. We expect this change to be incremental and probably largely unnoticed in day-to-day politics, however. Furthermore, our analysis of the scope and nature of the Union's competences and the institutional changes introduced by the Lisbon Treaty suggests that post-Lisbon the EU's development co-operation policy is faced with three main legal, constitutional challenges.

The first challenge concerns the organisation of the financial aid aspect of the EU's development co-operation policy. Key concerns are who decides for what purposes the money is spent and who controls the actual use of the money. An important aspect of this is control over the budget. In this regard, the European Parliament has developed into a main actor. Also, after the entry into force of the Lisbon Treaty, the organisation of the financing remains a very significant challenge for a coherent and effective EU development co-operation policy. The Lisbon Treaty means that a step—albeit only a small one—has been taken towards bringing all development co-operation under the ordinary EU budget, which particularly finds support from the European Commission and the European Parliament. However, so far little has changed, and it remains unclear whether the Lisbon Treaty will result in an improvement of the rules of this game, or, conversely, whether it has increased the number of scenarios for, and thus the probability of, conflict over budgetary matters.

Another set of potential conflicts is about striking the right constitutional balance between development co-operation policy and other policies.⁹¹ The challenge is to allow development co-operation to be a policy in its own right, while finding ways to ensure a coherent overlapping with the EU's other external policy areas. From a constitutional perspective, development co-operation policy in its own right had a difficult start, partly because of its lack of a strong, independent legal basis, and partly because of its very broad policy scope. Moreover, as became gradually clear after the entry into force of the Maastricht Treaty, the EU's development policy is by its nature multi-faceted and potentially open-ended. This makes development co-operation difficult to demarcate vis-à-vis other policy areas, as is reflected most recently in the Court of Justice's ruling in the *Philippines PCFA* case. That case shows that the dilemma of finding the right balance for this multi-faceted policy without diluting either the development co-operation competence or other competences of the Union and the Member States concerns both the width and the depth of the co-operation. This continues to be a central constitutional challenge for the Union. A serious challenge in this respect is to avoid future conflicts between the EU's common foreign and security policy (CFSP), on the one hand, and the Union's other external policies, on the other hand.⁹²

The third and possibly most significant constitutional challenge concerns the relationship between the 28 Member States' development co-operation policies and that of the EU. From a legal point of view, this challenge springs from the fact that, on the one hand, the Treaties clearly lay down that the Member States

⁹¹ Indeed, this conflict already appeared in *International Agreement on Natural Rubber* [1979] E.C.R. 2871.

⁹² I.e. ECOWAS-type conflicts.

and the Union hold parallel competences in the field of development co-operation, while, on the other hand, in judgments such as *PFOS*⁹³ the Court of Justice has made it clear that the Member States must duly observe the general principle of loyal co-operation in areas of shared competence. In the sphere of development co-operation, this might be thought to include an obligation to ensure external unity and effectiveness of Member State development policies vis-à-vis the Union's development policy. In practice, however, such an obligation arguably will imply that Member State policies must pursue the development co-operation objectives that are laid down in the Treaties and which to a considerable extent are a reflection of objectives originally established within international fora. Several Member States nevertheless pursue broader (and sometimes inconsistent) objectives than those found in the Treaties—e.g. openly geopolitical ones. Even though the Union's exercise of development co-operation competence cannot pre-empt Member State competences, after Lisbon the Member States' development co-operation policies may increasingly run counter to the reinforced horizontal requirements in EU external relations law, such as the duty of loyal co-operation. While this is not a constitutional challenge that can be attributed directly to any specific change made by the Lisbon Treaty, the general changes to the rules governing the Union's external relations introduced by Lisbon appear to have exacerbated this problem.

In addition to these three main legal, constitutional challenges, the Lisbon Treaty has introduced new battlefields for institutional conflicts, including that between the Parliament and the Commission concerning the choice between delegating and implementing acts and that concerning division of tasks between the Commission and the EEAS. The former, in our view, is a variation of the classic legal basis conflict. As regards the latter, perhaps contrary to other recent studies, we do not consider the much-debated conflict concerning the division of tasks between the Commission and the EEAS to have a constitutional impact similar to the three above-mentioned issues. In our view, though the vagueness is unfortunate, and though the conflict is intellectually challenging, we consider this challenge to be manageable.

None of the above three constitutional challenges is new, and none was unknown to the drafters of the Lisbon Treaty. There is, in fact, abundant case law on all three issues, which provides ample evidence of the interests at stake and the potential for conflicts. The vagueness with which previous Treaties have dealt with the challenges was also notorious. So, if the success of the Lisbon reform should be measured by its ability to avoid repetition of old conflicts and to introduce novel instruments for an efficient development co-operation policy, the Lisbon Treaty must be considered a modest achievement: the issue of financing has been left open; the very notion of “development co-operation policy” continues to be vague and open-ended, potentially covering any aspect of co-operation with developing countries; and the mechanisms of co-ordination between the Union and its Member States, which are essential to ensure an effective and coherent policy vis-à-vis specific third countries, are sketchy at best. It should be borne in mind, however, that the Union's development co-operation policy has been capable of evolving to what it is today within an incomplete constitutional framework.

Overall, we submit that, despite the fact that the old constitutional challenges remain, we can identify two overall positive tendencies, which are likely to continue: first, since the entry into force of the Maastricht Treaty, the EU has had a development co-operation policy framework with a global and comprehensive outlook. Secondly, thanks to four decades of Court of Justice rulings, this policy is now governed by well-known legal principles—including notably principles to define the legal basis and the duty of loyal co-operation—some of which have even been refined and, partly, codified in the Lisbon Treaty. The global outlook of the Union's development co-operation policy post-Lisbon, and the increasing institutionalisation of the legal constitutional framework that governs this policy, are positive signs that the Union and its

⁹³ *Commission v Sweden (PFOS)* (C-246/07) EU:C:2010:203; [2010] 3 C.M.L.R. 27; Commission Staff Working Document accompanying the Communication from the Commission, “Tax and Development: Cooperating with Developing Countries on Promoting Good Governance in Tax Matters” SEC(2010) 426 final.

Member States are moving towards a framework which will gradually construct a more coherent and efficient development co-operation policy for the EU.