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CONTRIBUTION OF THE LEGAL SERVICE¹

To: Delegations

Subject: Capacity building in support of security and development - legal issues

Introduction

1. A number of legal issues have been raised in relation to current discussions on possible EU instruments to finance measures in support of strengthening the security sector in third countries ("capacity building for security and development" (CBSD) or previously "train and equip").²

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

² See e.g. para. 7 of the Conclusions of the 19-20 December 2013 European Council (EUCO 217/13); para. 16 of the Council Conclusions on CSDP of 18 May 2015 (doc. 8971/15; inviting “*the EEAS and the Commission services to further work ... on the full potential of all relevant Union instruments taking into account their legal bases, and to assess the feasibility of: an adaptation of the African Peace Facility to address its limitations; the establishment of a EU facility linking closer peace, security and development in the framework of one or more existing EU instruments; and a dedicated instrument to this effect, ..., while improving the coherence with Member States’ own instruments and addressing medium-term term challenges*”); The Joint Communication to the European Parliament and the Council, Capacity building in support of security and development - Enabling partners to prevent and manage crises (JOIN (2015)17 and doc. 8504/15) and ‘Capacity building in support of security and development - Implementation Plan - Non-paper by the EEAS and Commission services’ (doc. 13869/15).

2. Representatives of the Legal Service have already commented orally on some of these issues during discussions in the relevant Council instances and in the Political and Security Committee on 22 October and on 13 November 2015, the Legal Service was requested to express its views in writing, in particular on the interpretation of Article 41(2) TEU.
3. This contribution elaborates and complements the views already expressed by the Legal Service. It covers the use of existing instruments as well as the creation of any new dedicated instrument to fund CBSD measures, both under the Union's Common Foreign and Security Policy (CFSP) and under other relevant Union policies. In relation to CFSP instruments, it also considers the scope of the exclusion of the use of the EU budget under Article 41(2) TEU. This contribution is not an exhaustive analysis of all legal issues relating to CBSD and the Legal Service may issue further advice in relation to any future proposals for CBSD funding.

1. Scope and legal basis of Union instruments

4. Funding for CBSD measures has been proposed and provided using instruments adopted both under the CFSP and other Union policies. In determining which instrument may be used, regard must be had both to the legal basis and the scope of each instrument.
5. According to settled case-law, "*the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure*"³.

³ Case C-130/10, *Parliament v Council*, judgment of 19 July 2012, EU:C:2012:472, para. 42. This means that the question whether adequate funds are available under any budget line cannot affect the choice of legal basis. Should it be considered that the funds in a budget line are insufficient to meet the political priorities, then the legally correct solution is to increase those funds.

6. In this respect, it should be recalled that the general objectives and principles of EU external action⁴ as well as the aim to achieve consistency and the pursuit of a “comprehensive approach” must be read and applied in conjunction with the distinct legal bases for the various specific EU external policies.⁵
7. In applying an instrument, it is necessary to have regard to the legal basis in the Treaty under which that instrument was adopted. An overly broad interpretation of an instrument’s provisions may lead to the adoption of measures that no longer pursue the objectives of its legal basis, thereby violating it.⁶ This consideration is particularly important for instruments such as the Instrument contributing to Stability and Peace,⁷ which may appear to allow considerable latitude in their scope.⁸ The legal basis under which an instrument is adopted also determines the extent to which the scope of that instrument may be extended through amending it.
8. Moreover, each EU instrument defines its objective(s) as well as the scope and nature of the measures that can be adopted under that instrument. All such measures must remain within the scope of the instrument or risk being annulled in case of a legal challenge. For example, in its judgment of 23 October 2007 in Case C-403/05 (*Parliament v Commission*), the Court of Justice annulled a Commission decision approving a project relating to border security in the Philippines adopted on the basis of Regulation (EEC) No 443/92 on financial and

⁴ See especially Article 21 TEU.

⁵ See e.g. the Opinion of Advocate General Bot in Case C-658/11, *Parliament v Council*, 30 January 2014, EU:C:2014:41, para. 88 (“*in so far as Article 21(2) TEU sets out the common objectives of the Union’s external action, that provision should be read in conjunction with the more specific provisions applicable to each policy in order to determine the Union policy to which a certain objective is more specifically related*”).

⁶ For example, in Case C-166/07 regarding the Community financial contributions to the International Fund for Ireland, the Court of Justice ruled that, because it could not be guaranteed that funds provided under the applicable legal basis were used for purposes matching that legal basis, an additional legal basis was required to permit the use of such funds for other purposes. See Case C-166/07, *Parliament v Council*, judgment of 3 September 2009, EU:C:2009:499, paras. 58-69.

⁷ Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace, OJ L 77, 15.3.2014, p. 1.

⁸ The Legal Service has raised concerns on several occasions in respect of measures proposed under this instrument (or its predecessor: Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability, OJ L 327, 24.11.2006, p. 1) which pursued objectives that fell within the CFSP rather than development or technical and financial cooperation.

technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America. The Court found that this decision actually “*pursue[d] an objective concerning the fight against terrorism and international crime which [fell] outside the framework of the development cooperation policy pursued by Regulation No 443/92*”.⁹

1.1. Development cooperation policy and financial and technical cooperation

9. Article 208(1) TFEU defines the Union’s development cooperation policy as follows: “*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*”.
10. The scope of this policy has been interpreted rather broadly by the institutions and by the Court of Justice.¹⁰ However, the Treaty of Lisbon has underlined that it “*shall have as its primary objective the reduction and, in the long term, the eradication of poverty*”.¹¹ Also, the stipulation that “*The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries*” recognises that other policies should take account of development without however, themselves becoming development cooperation policies under the Treaties.¹²

⁹ EU:C:2007:624, see especially paragraphs 52-68 (citation from paragraph 68).

¹⁰ See Case C-268/94, *Portugal v. Council*, judgment of 3 December 1996, EU:C:1996:461, paras. 23-29 and 37-39; Case C-403/05, *Parliament v Commission*, judgment of 23 October 2007, EU:C:2007:624, paras. 56-58; Case C-91/05, *Commission v. Council (ECOWAS)*, judgment of 20 May 2008, EU:C:2008:288, paras. 64-72; and, more recently, Case C-377/12, *Commission v Council*, judgment of 11 June 2014, EU:C:2014:1903, paras. 37-44.

¹¹ See e.g. the Opinion of Advocate General Bot in Case C-658/11, *Parliament v Council*, 30 January 2014, EU:C:2014:41, paras. 125-127.

¹² See *ibid.*, para. 126 (“*The Union’s other policies, such as the CFSP, must therefore take account of the objectives of development cooperation and may therefore contribute to those objectives, which is consistent with the requirement of consistency of the Union’s external action. Consequently, the simple fact that a measure coming under the CFSP is likely to have positive incidental effects on the development of a third State does not make it a measure falling within the scope of development cooperation within the meaning of Article 208 TFEU*”). Furthermore, Article 209(2) TFEU states that “[t]he Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 [TEU] and in Article 208 of this Treaty” (emphasis added). This requires that agreements based on development cooperation must aim to achieve the development objective laid down in Article 208 TFEU as well as horizontal objectives.

11. There are moreover limits to the scope of this policy. This has been recognised by the Court, which stated before the Treaty of Lisbon that a measure does not fall within the Community's development cooperation policy "*if such a measure, even if it contributes to the economic and social development of the developing country, has as its main purpose the implementation of the CFSP*".¹³ It has also been confirmed by the Court after the Treaty of Lisbon in its judgment in Case C-377/12, stating that "*even if a measure contributes to the economic and social development of developing countries, it does not fall within development cooperation policy if it has as its main purpose the implementation of another policy*".¹⁴
12. Moreover, in view of the autonomy of the Union legal order, any definition of what qualifies as development assistance outside the framework of the Union¹⁵ cannot automatically determine the scope of the development cooperation policy under Union law.¹⁶
13. Funding for CBSD measures in support of *developed* countries, where such support does not pursue a CFSP objective, may fall under Article 212 TFEU on economic, financial and technical cooperation. The first paragraph of this Article provides that "*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*". Indeed, this provision is one of the legal bases for some of the EU's external financial instruments.

¹³ Case C-91/05, *Commission v. Council (ECOWAS)*, judgment of 20 May 2008, paras. 71-72. This was recalled by Advocate General Bot in his opinion in Case C-658/11, *Parliament v Council*, 30 January 2014, EU:C:2014:41, para. 123. See also Case C-403/05, *Parliament v Commission*, especially paras. 59-69.

¹⁴ Case C-377/12, *Commission v Council*, judgment of 11 June 2014, EU:C:2014:1903, para. 44.

¹⁵ Such as the definition of 'official development assistance' developed by the OECD's Development Assistance Committee.

¹⁶ See Case C-155/07, *Parliament v Council*, Judgment of 6 November 2008, EU:C:2008:605, para. 52 (in relation to defining which countries are developing countries).

14. However, just like the development legal basis, this legal basis is similarly subject to limits. The Legal Service has already outlined some of these limits in relation to international agreements.¹⁷

1.2. CFSP

15. When CBSD measures pursue objectives in the field of international peace and security, they fall within the scope of the CFSP. CFSP is defined broadly in Article 24(1) TEU, which provides that “*The Union's competence in matters of [CFSP] shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence*”. Thus a number of the external relations objectives set out in Article 21(2) TEU relate to the CFSP, including:

“(a) *safeguard its values, fundamental interests, security, independence and integrity;*

...

(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*”.¹⁸

¹⁷ See the Legal Service opinion/contribution in doc. 15192/2013 (“*The use of Article 212 TFEU should, however, be carefully delimited. Article 212 cannot serve as a legal basis for substantive agreements going beyond economic, financial and technical cooperation measures with third countries in specific policy areas, even if several such areas are the subject of a single agreement. The relevant specific legal basis (or bases) should be used for this purpose. Concerning third country participation in Union programmes, Article 212 can only serve as a legal basis for establishing framework agreements for cooperation in relation to programmes which themselves foresee the possibility for such third countries to participate. In that way, it is clear that the decision concerning participation of third countries in each programme is taken in accordance with the specific legal basis applicable for that programme. Article 212 may only be relied on for horizontal arrangements for cooperation which are necessary.*”).

¹⁸ See also the Opinion of Advocate General Bot in Case C-658/11, *Parliament v Council*, 30 January 2014, EU:C:2014:41, para. 87 (“the objectives set out in Article 21(2)(a) to (c) and (h) TEU, are among those that are traditionally assigned to the CFSP”).

16. These objectives correspond to pre-Lisbon Treaty CFSP objectives under ex Article 11(1) TEU and the Court of Justice has confirmed their CFSP nature in relation to measures aimed at strengthening international security also after the Treaty of Lisbon.¹⁹
17. There is currently no CFSP instrument specifically providing for CBSD measures except where these are part of a CSDP mission. It would however be possible to set up such an instrument for such CBSD measures falling within the scope of the CFSP under Article 28 TEU: “[w]here the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation”.²⁰
18. As noted above, the choice of whether an instrument on CBSD measures is based on a CFSP or non-CFSP (and specifically development cooperation policy and/or technical or financial cooperation) legal basis must rest on objective factors and in particular its aim and content. The Union’s competence in the field of the CFSP, which is still “*subject to specific rules and procedures*” (Article 24(1) TEU), must not affect its competences in respect of other Union policies and *vice versa* (Article 40 TEU).²¹ Moreover, the fact that there may be a nexus between security and development does not mean that measures which have a positive impact on development but whose primary objective is security should be considered as development cooperation measures or *vice versa*.

¹⁹ Case C-130/10, *Parliament v Council*, judgment of 19 July 2012, EU:C:2012:472, paras. 61-65 (regarding counter-terrorism measures). See also the Opinion of Advocate General Bot in Case C-658/11, *Parliament v Council*, 30 January 2014, EU:C:2014:41, para. 89 (“[w]ith regard, in particular, to the objective of preserving international peace and strengthening security, *Parliament v Council*, militates in favour of it being related to the CFSP”). See also Case C-658/11, *Parliament v Council*, Opinion of Advocate General Bot of 30 January 2014, EU:C:2014:41, para. 129 (“*The type of assistance is not the determining factor and none comes by nature under development cooperation (...) assistance such as ‘technical and logistical assistance ... in the fields of revision of legislation, training of investigators and prosecutors, ...’ (...) may be provided perfectly well within the framework of the CFSP, and in particular the CSDP, as has been shown above, in order to ensure security and to promote human rights and the rule of law*”).

²⁰ This could be done in the form of a general instrument that would require implementing decisions for each specific case. It could also be done in the form of specific Council decisions in each case (as is done in the field of disarmament and non-proliferation; see e.g. the example in note 32 below). Obviously, this would require that the necessary funding is made available in a corresponding budget line within the CFSP budget.

²¹ *Ibid.*, para. 86.

1.3. Article 41(2) TEU

19. Article 41 TEU, which is part of Chapter 2 of Title V TEU (dealing with the CFSP), provides that:

"1. Administrative expenditure to which the implementation of this Chapter gives rise for the institutions shall be charged to the Union budget.

2. Operating expenditure to which the implementation of this Chapter gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise. ..." (emphasis added).

20. It follows that the two circumstances in which expenditure is not charged to the Union budget apply only where the expenditure arises from the **implementation of the CFSP chapter**, that is, in relation to measures adopted pursuant to Chapter 2 of Title V TEU. In these cases the practice to date has been for funding to be provided by Member States. Therefore, the Athena mechanism was established to manage the common costs of EU operations having military or defence implications, which cannot be charged to the Union budget and are funded by Member States outside the Union budget.²² The Council also unanimously decided that the EU Satellite Centre,²³ the European Defence Agency,²⁴ and the EU Institute for Security Studies²⁵ would be funded by Member State contributions.²⁶

²² Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena), and repealing Decision 2011/871/CFSP, OJ L 84, 28.3.2015, p. 39.

²³ Council Decision 2014/401/CFSP of 26 June 2014 on the European Union Satellite Centre and repealing Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre, OJ L 188, 27.6.2014, p. 73 (Article 10(3)).

²⁴ Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency (recast), OJ L 266, 13.10.2015, p. 55 (Articles 13(9) and 16).

²⁵ Council Decision 2014/75/CFSP of 10 February 2014 on the European Union Institute for Security Studies, OJ L 41, 12.2.2014, p. 13 (Article 10(3)).

²⁶ As indicated below, the Council nevertheless chose to allow for possible contributions from the Union budget in some cases, in addition to the main contributions from Member States.

21. As regards the first of these two exceptions, which has been raised on a number of occasions in the discussions on CBSD, there are two distinct elements both of which must be satisfied. The expenditure must (i) arise from operations and (ii) such operations must have military or defence implications. Neither "operations" nor "military and defence implications" are defined in the Treaties.
22. As regards "operations", Article 42(1) refers to providing the Union with an "operational capacity" drawing on civilian and military assets for use on "missions outside the Union for peace-keeping, conflict prevention and strengthening international security". Similarly, Article 38, second and third paragraphs, TEU, which defines the role of the Political and Security Committee, relates to "*crisis management operations referred to in Article 43 [TEU]*". The term "operations" may therefore reasonably be regarded as referring to the Crisis Management Operations, civilian or military, carried out pursuant to the CSDP provisions of CFSP. There is also some support for this interpretation in the apparent rationale for this provision to ensure full Member State control over such operations, including their funding.²⁷
23. This would therefore not extend to activities which, while relating to military or defence matters, do not do not take the form of a CSDP operation (for example, the provision of training and/or equipment when provided outside the framework of a CSDP operation,²⁸ or the European Security and Defence College²⁹).³⁰ It would also not extend to support for

²⁷ The clause did not appear in the initial TEU (see Article J.11, which provided that the Council could decide whether or not to charge CFSP operational expenditure to the Community budget). It was introduced by the Amsterdam Treaty (Article J.18(3) TEU), which enabled the creation of the EU's security and defence policy (in June 1999). The same paragraph stated that for expenditure arising from operations having military or defence implications, Member States whose representatives in the Council had made a qualified abstention were not obliged to contribute to the financing thereof. This would suggest it was meant to apply to the EU's own operations.

²⁸ See for example some of the suggestions in a 2013 EEAS note on priority setting for CFSP actions (doc. 15515/13, p. 5). For an indication of the positions of Member States' delegation in the RELEX Working Party on possible recourse to Article 28 TEU as a basis for such measures, see doc. 5512/14. See also para. 15 above.

²⁹ See Council Decision 2013/189/CFSP of 22 April 2013 establishing a European Security and Defence College (ESDC) and repealing Joint Action 2008/550/CFSP, OJ L 112, 24.4.2013, p. 22. The ESDC is of a mixed civilian-military nature (as are its activities) and its funding includes a contribution from the Union budget (see *ibid.*, Article 16).

³⁰ See the Legal Service contribution in doc. 15146/03, para. 8. Compare with the similar position expressed by the EEAS in doc. 9589/14, p. 7, para. 27.

activities carried out by third countries or international organisations even where their activities are operations having military or defence implications. Such measures would fall to be adopted under Article 28 TEU³¹ where they pursue a CFSP objective of international peace and security - a number of measures pursuing CFSP objectives have been adopted on this basis, notably in the field of non-proliferation and disarmament.³²

24. However, this prohibition on funding such EU operations from the Union budget could be circumvented by using the latter to fund such operations conducted by Member States in other frameworks such as NATO or a coalition comprising Member States. It should therefore be understood as covering not only Union operations but also any operations in which one or more Member States participate, to the extent that such operations are considered to have military or defence implications.
25. Moreover, the exclusion only relates to *specific* operations and consequently to the incremental costs incurred for such operations.³³ E.g., even in relation to the CSDP, it does not cover military exercises even though these clearly prepare for operations.³⁴
26. As regards “military and defence implications”, the TEU distinguishes in particular between civilian and military matters (see eg Article 42(3) and 43(1)). Thus missions of a civilian character set up under the Union's Common Security and Defence Policy (CSDP) would not have military or defence implications. This has been consistently reflected in the Council's

³¹ Article 28 TEU, which refers to “operational action”, is included in the general first section of the CFSP chapter and not under the specific provisions on CSDP operations in the second section of this chapter. This clearly implies that “operational action” is broader than CSDP operations.

³² E.g. Council Decision (CFSP) 2015/259 of 17 February 2015 in support of activities of the Organisation for the Prohibition of Chemical Weapons (OPCW) in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction, OJ L 43, 18.2.2015, p. 14.

³³ In this sense, see the Legal Service contribution in doc. 15146/03, para. 7(b).

³⁴ This was the view taken by the Legal Service: see doc. 15146/03, para. 8. Following this view, the Council decided to fund military CSDP exercises from outside the Union budget but as a decision under the second exception in Article 41(2) TEU. See doc. 6077/04, para. 5(b) (which agrees on exercises being treated in a manner which most resembles the way they would be treated “*were the exercise to be a[n] ... operation*”, thus accepting that an exercise is not an operation).

practice and the Council has stated that it “decides on a case-by-case basis whether an operation has military or defence implications, within the meaning of Article 41(2) [TEU]”.³⁵ This interpretation does not exclude support through an EU supporting mission under the CSDP which would itself not have military or defence implications, and which would accordingly be funded from the CFSP budget.³⁶

2. Pursuing CFSP and non-CFSP objectives

27. First of all, there is no legal obstacle to a coordinated use of distinct concrete projects under different instruments in the same country, where one project pursues CFSP objectives and another development or technical or financial cooperation objectives.³⁷ This would also be in line with the pursuit of consistent EU external action.

³⁵ Recital 10 of Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena), and repealing Decision 2011/871/CFSP, OJ L 84, 28.3.2015, p. 39. The Council has considered in one case that a CSDP mission which provides support for the reform of the armed forces and ministry of defence of a third country does not have military or defence implications (EUSEC RD Congo). This mission was initially established by Council Joint Action 2005/355/CFSP of 2 May 2005 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC), OJ L 112, 3.5.2005, p. 20. The mission of EUSEC RD Congo included to provide practical support for the integration of the Congolese army and good governance in the field of security and its tasks included support in the field of administration and human resources management. By contrast, the Council decided that the EU Training Missions for Somalia and Mali as well as the EU Military Advisory Mission in CAR have military or defence implications.

³⁶ The EU established a supporting mission for the African Union Mission in Sudan (AMIS II) in 2005. This supporting mission, set up as a CSDP operation, comprised a civilian (police) and military component, supporting AMISOM in those two areas. The civilian component was funded from the CFSP part of the EU budget, whereas the military component was funded from the Athena mechanism as regards common costs. See Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, OJ L 188, 20.7.2005, p. 46.

³⁷ Such as the complementary use of cooperation between the CSDP operation Atalanta and some countries in the Horn of Africa, on the one hand, and projects under the Instrument for Stability in support of those countries, on the other hand.

28. Second, as specific CBSD measures might pursue objectives falling within the CFSP and/or objectives falling within the Union's development cooperation policy or financial and technical cooperation, the question arises as to whether a single instrument could be adopted pursuing those objectives or whether funding for a specific project pursuing both these objectives³⁸ might otherwise be combined.
29. The Court of Justice's settled case-law is that "*With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one's being incidental to the other*"³⁹ "*such a measure will have to be founded, exceptionally, on the various corresponding legal bases*" but that "None the less, ... recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other".⁴⁰

³⁸ For example, a project to equip border guards in a conflict area in a developing country in order to increase their ability to detect (and prevent or at least make more difficult) border crossings by illegal armed groups (security objective) and to detect smuggling and facilitate the collection of customs duties (development objective).

³⁹ By contrast, "*[i]f examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component*" (Case C-130/10, *Parliament v Council*, judgment of 19 July 2012, EU:C:2012:472, para.43). The Court recently appears to have indicated that it would apply this case-law also in relation to a predominant CFSP aim/component of an international agreement: see Case C-658/11, *Parliament v Council*, judgment of 24 June 2014, EU:C:2014:2025, paras. 44-45 (in fact, it was contested in that case whether there was a non-CFSP component at all and the Court did not really look into this; since the Parliament accepted that the alleged non-CFSP component was ancillary and did not justify an additional legal basis, the Court did not further address the legal basis question in this case).

⁴⁰ See e.g. Case C-130/10, *Parliament v Council*, judgment of 19 July 2012, EU:C:2012:472, paras.44-45.

30. In addition to the specificities of CFSP (Article 241(1) TEU; see above), it is clear from the Court's judgment in Case C-130/10 that the procedures for adopting a CFSP decision and those for adopting a legal act under the development cooperation policy or financial and technical cooperation are incompatible and therefore such a dual legal basis is not possible⁴¹ except for decisions on the signing or conclusion of international agreements.⁴²
31. The question arises whether a particular CBSD project pursuing both security and development (or technical or financial cooperation) objectives⁴³ could be co-funded from a CFSP and a non-CFSP instrument.

⁴¹ *Ibid.*, paras. 47-49 (“while Article 75 TFEU provides for application of the ordinary legislative procedure, ..., Article 215(2) TFEU, ..., entails merely informing the Parliament. In addition, recourse to Article 215(2) TFEU, ..., requires a previous decision in the sphere of the CFSP, As a general rule, adoption of such a decision calls for unanimous voting in the Council acting alone. ... Differences of that kind are such as to render those procedures incompatible. ... It follows from the foregoing that, even if the contested regulation does pursue several objectives at the same time or have several components indissociably linked, without one's being secondary to the other, the differences in the procedures applicable under Articles 75 TFEU and 215(2) TFEU mean that it is not possible for the two provisions to be cumulated, one with the other, in order to serve as a twofold legal basis for a measure such as the contested regulation”).

⁴² Such a combination of legal basis is possible for decisions on the signature and/or conclusion of an international agreement. See for example Council Decision 2012/308/CFSP of 26 April 2012 on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, OJ L 154, 15.6.2012, p. 1 (combining Article 37 TEU with Articles 209 and 212 TFEU) and Council Decision of 26 October 2015 on the signing, on behalf of the European Union, and provisional application of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, doc. 9445/15 (combining Article 37 TEU with several TFEU legal bases). Furthermore, Advocate General Kokott appears to have taken this view in her opinion of 28 October 2015 in Case C-263/14, *Parliament v Council*, EU:C:2015:729, paras. 52-53 (as regards legal bases under the CFSP and Area of Freedom, Security and Justice).

⁴³ See the example given in footnote 38 above.

32. Funding from different non-CFSP instruments for the same project has already provided for⁴⁴ and some joint CFSP – non-CFSP funding has been envisaged.⁴⁵ It should therefore be possible to combine funding from different instruments for a project pursuing objectives covered by each of these instruments provided that the decision-making under each instrument is respected⁴⁶ and that the implementing arrangements⁴⁶ are not incompatible.
33. Therefore, it would have to be examined whether and how mutually compatible arrangements could be put in place.⁴⁷ It should also be stressed that such arrangements would only be feasible in those cases where the project concerned objectively and demonstrably pursues both CFSP and non-CFSP objectives.
34. The above considerations do not apply in relation to instruments adopted *outside the Treaties* and funded by Member States or other sources than the Union budget, such as the African Peace Facility (APF) established in the framework of the European Development Fund. Such instruments could in principle pursue both security and development (and financial or technical cooperation) objectives.⁴⁸

⁴⁴ See the discussion in the Legal Service opinion in doc. 15766/13, especially paras. 13-18 and 20-22 and the conditions identified therein.

⁴⁵ See e.g. Article 15(1)(a) of Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency (recast), OJ L 266, 13.10.2015, p. 55.

⁴⁶ E.g. by the adoption of two parallel decisions that are each conditioned on the other decision being adopted.

⁴⁷ This should not be impossible, bearing in mind that, e.g., the EU Satellite Centre has contributed to actions of the Union under non-CFSP programmes while receiving funding from those actions (this possibility is *inter alia* envisaged in Article 18 of Council Decision 2014/401/CFSP of 26 June 2014 on the European Union Satellite Centre and repealing Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre, OJ L 188, 27.6.2014, p. 73 and in Article 11(1)(d) of Regulation (EU) No 377/2014 of the European Parliament and of the Council of 3 April 2014 establishing the Copernicus Programme and repealing Regulation (EU) No 911/2010, OJ L 122, 24.4.2014, p. 44).

⁴⁸ Member States are free to act in these fields, including in parallel to the Union, given the nature of these competences.

Conclusions

35. The choice of legal basis for a Union measure must rest on objective factors including its aim and content. The distinct legal bases for the various specific EU external policies under the EU Treaties must be respected and the legal basis and scope of a measure must be taken into account in its application and interpretation.
36. The respective scope of the CFSP, the Union's development cooperation policy and technical and financial cooperation is therefore important and determines the extent to which existing instruments adopted under those policies may be amended or new ones may be adopted.
37. While wide in scope, measures cannot be adopted under development cooperation policy (or technical and financial cooperation) where they pursue objectives in the field of international peace and security.
38. A CFSP instrument enabling CBSD measures pursuing security objectives could be adopted under Article 28 TEU in the form of a general instrument or of specific Council decisions in each case. This would require that the necessary funding be made available in a corresponding budget line within the CFSP budget.
39. Article 41(2) TEU excludes the use of the EU budget to fund, within the CFSP, incremental costs of CSDP operations and only where such operations have military or defence implications - it also extends to the funding of other operations having military or defence implications conducted by Member States.
40. It is not possible to adopt an instrument (other than an international agreement) under the combined legal basis of the CFSP and development cooperation policy and/or financial and technical cooperation.

41. But a coordinated use of measures under different instruments would be possible.
Furthermore, where a particular CBSD project pursues both security and development (or financial and technical cooperation) objectives, it could, in principle, be jointly funded from a CFSP and a non-CFSP instrument.
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