

# The European Union's Common Foreign and Security Policy after the Treaty of Lisbon



Panos Koutrakos

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Security Policy after the Treaty of Lisbon**

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# Preface

The Common Foreign and Security Policy (CFSP) is a relatively recent add-on to the external action toolkit of the European Union. Introduced as a distinct policy framework cohabitating with that of the classic Community external relations, its hallmark remains its predominant intergovernmental nature. Yet, through various treaty revisions, the Member States have further embedded the CFSP into the mainstream EU legal order, strengthening the importance of EU norms in its elaboration and application, entrenching its development in the general normative framework of the EU external action, and furthering the role of Union's institutional framework in its operation, including that of the European Court of Justice.

In this report, Professor Panos Koutrakos provides a perceptive and timely analysis of the particular impact that the Lisbon Treaty has had on the CFSP, within the broader constitutional and substantive legal context of the Union. It also deciphers the implications of the Lisbon reforms on the EU as a global actor more generally. This is the ninth report which SIEPS publishes in the context of the research project *The EU external action and the Treaty of Lisbon*.

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Professor Koutrakos is also the joint editor of *European Law Review* and, since February 2016, a member of Monckton Chambers.

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# Executive summary\*

The Common Foreign and Security Policy (CFSP) of the European Union (EU) has gradually taken its place at the centre of EU activities. Developed organically from a set of practical arrangements, it is governed by a set of rules and procedures which have been formalised and strengthened over the years. In introducing their current manifestation, the Lisbon Treaty appeared to bring this area of activity closer to the mainstream of the Union's external action. It strengthened its procedural and substantive underpinnings, reconfigured its position in the constitutional architecture of the Union legal order, and introduced a new institutional actor intended to give the policy sharper focus and raise its visibility. This report sets out the relevant legal framework, analyses it within the broader constitutional and substantive legal context of the Union's legal order, and explores its implications for the Union's role as global actor. It highlights the following points.

First, for all its gradual repositioning within the EU's legal order closer to the more traditional strands of external action, the CFSP remains distinct within the overall constitutional system. Its strengthened institutional structure notwithstanding, this policy area is governed by a set of rules and procedures which underline both its unique status in the EU's external action and the dominant role of the Member States. Neither the scope of the innovations introduced at Lisbon nor the intensity of the duties envisaged under the relevant provisions challenge the essential function of the political will of the Member States for any substantial development in the area.

Second, the CFSP is characterised by an enduring paradox: whilst its subject-matter lies closer to high politics than any other area of EU activity, the law that governs its conduct is heavily proceduralised. This feature by no means undermines the dominant role of the Member States in the area. It questions, however, both the effectiveness of the relevant legal provisions and their overall role in the development of the EU as a global actor. It also encourages inter-institutional skirmishes with which the Union's actors deal whilst spending considerable energy, time, and political capital.

Third, the legal framework governing the CFSP has evolved on the basis of a widely shared conviction that its success would depend on its institutional structure. This conviction is misplaced: it ignores the distinct nature of the

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\* I am grateful to referees for their comments and suggestions. All remaining errors and omissions are my own. As the judgment in Case C-72/15 *Rosneft* ECLI: EU:C:2017:236 was rendered after the text of this report had been completed, it is only addressed here in broad terms. Many thanks to Christophe Hillion for his co-operation and patience.

policy and underestimates both the practical realities of the continuing role of Member States as foreign policy actors and their perceptions by third countries. This view is supported by the post-Lisbon experience, which hardly justifies the widely anticipated impact of the CFSP's reformed institutional structure on the international stature of the EU. This is not to minimise the contribution of reforms such as the introduction of the European External Action Service. Institutional tinkering, however, cannot substitute for policy.

Finally, while the CFSP is largely excluded from the jurisdiction of the Court of Justice of the European Union, there are lingering questions about the scope of this exclusion. The recent case-law of the European Court of Justice suggests that this matter is not closed. Given its pivotal role in the development of the EU's external economic relations, it is noteworthy that the Court of Justice emerges as a potentially significant actor in an area which the Member States consider least amenable to judicial review.



# 1 Introduction

It has been more than seven years since the entry into force of the Treaty of Lisbon. Both its constitutional and substantive legal ramifications attracted considerable academic attention at the time,<sup>1</sup> not least for the constitutional reconfiguration of the much maligned pillar structure and the changes that the new Treaty introduced in relation to the role of the European Union (EU) in the world. The Lisbon Treaty had raised expectations about the impact of the new institutional panoply it introduced on the international influence of the Union. For instance, in August 2008, when the war between Russia and Georgia broke out, the then French President Nicolas Sarkozy argued that, had the Lisbon Treaty been in force, the Union would have had the institutions and tools which would have enabled it to act decisively and exert its influence.<sup>2</sup>

This report will focus on the legal rules and procedures laid down in the Union's primary rules that govern the Common Foreign and Security Policy (CFSP).<sup>3</sup> Its aim is three-fold: to set out the relevant legal framework, analyse it within the broader constitutional and substantive legal context of the Union's legal order, and explore its implications for the Union's role as global actor.

Whilst the focus of this report is legal, its subject matter may only be understood properly against the political and policy context within which the EU seeks to carve out its global role. This context is in flux and has a profound impact on the application of CFSP rules. Three developments in particular are striking. The first is related to the state of uncertainty that has characterised the Eurozone since the late 2000s. Stumbling from crisis to crisis and relying upon legal ingenuity in order to address unprecedented challenges, the Union has now had to face the emergence of painful divisions. The second development is the migration crisis and the disparate efforts of Member States to tackle it individually, before the Union intervened by seeking to contain it on the basis of various internal and external measures.<sup>4</sup> Such measures have proved controversial and have given rise

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<sup>1</sup> See, for instance, D Ashiagbor, N Countouris and I Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP, 2012), A Biondi, P Eeckhout and S Ripley (eds), *EU Law After Lisbon* (OUP, 2012), P Craig, *The Lisbon Treaty – Law, Politics, and Treaty Reform* (OUP, 2010), M Trybus and L Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (E Elgar Publishing, 2012), and J-C Piris, *The Lisbon Treaty – A Legal and Political Analysis* (CUP, 2010).

<sup>2</sup> *Le Figaro*, 18 August 2008.

<sup>3</sup> See also P Koutrakos, *EU International Relations Law 2<sup>nd</sup> edition* (Hart Publishing, 2015) Ch. 12.

<sup>4</sup> See Council Dec. 2015/1523 establishing provisional measures in the area of International protection for the benefit of Italy and of Greece [2015] OJ L 239/146 and Council Dec. 2015//1601 [2015] OJ L 248/80. On the agreement with Turkey, see COM(2016) 231 *First Report on the progress made in the implementation of the EU-Turkey Statement* (Brussels, 20 April 2016). On the recent Commission's proposals about dealing with third countries, see COM(2016) 385 fin *On Establishing a new Partnership Framework with third countries under the European Agenda on Migration* (Brussels, 7 June 2016).

to claims about non-compliance with fundamental human rights. They have also challenged the extent to which the Member States are willing to show solidarity at a time of crisis. The third development is the prospect of disintegration in the Union, raised clearly, but not exclusively, by the prospect of the withdrawal of the United Kingdom from the EU following the referendum of 23 June 2016.

These developments have given rise to a profound existential crisis for the Union. Recent polls suggest a steep decline of popularity for the EU, even in member states which have been traditionally favourable to European integration.<sup>5</sup> According to an editorial in the *Financial Times*, ‘the EU’s effectiveness as an international actor has been battered by the Eurozone crisis, its political will sapped by economic austerity and by growing public disaffection with the entire European project’.<sup>6</sup>

As the EU has been spending considerable energy, time, and political capital in its efforts to deal with these problems, the impact of the latter on the Union’s international role cannot be underestimated. This becomes all the more so given the changing and complex international framework within which the EU seeks to become an effective global actor. The refugee crisis, for instance, has been intensified following the war in Syria and the failure of the international community to deal with it effectively. The neighbourhood of the EU is not short of geopolitical challenges, a case in point being Russia and its approach to its neighbours. This evolving and multifaceted context highlights the difficulties for the EU of putting in place a coherent and unified response using all available instruments and policies, including the CFSP.

It is against this multifaceted context that the role of the law governing the CFSP ought to be assessed. As far as this report is concerned, two qualifications are in order. The first is about the Common Security and Defence Policy (CSDP). This constitutes an important component of the CFSP. The Lisbon Treaty acknowledges it as ‘an integral part of the common foreign and security policy’ (Article 42(1) of the Treaty on the European Union, TEU) and gives it greater prominence. There have been a considerable number of CSDP operations and missions which give rise to important legal and policy questions. These, however, will not be examined in this report,<sup>7</sup> which will focus, instead, on the legal framework governing the CFSP. The second qualification is about the approach that this report will adopt. This analysis will focus on the most salient features of the legal rules and procedures governing the conduct of the policy.

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<sup>5</sup> See the polls by pewglobal the results of which were made available on 7 June 2016: <http://www.pewglobal.org/2016/06/07/euroskepticism-beyond-brexit/?fcamp=crm/email/nbe/BrusselsBrief/product>

<sup>6</sup> *The Financial Times*, 23 February, 2014.

<sup>7</sup> See the analysis by this author in *The EU Common Security and Defence Policy* (OUP, 2013), in particular Chs 5-7.

The structure of this report is as follows. Having set out the historical background against which the current legal framework has developed, the analysis will explore the formal abolition of the pillars under the Lisbon Treaty and its implications for the status of the CFSP within the Union's constitutional order. It will then analyse the scope and objectives of the policy and the duties that primary law imposes on the member states and the institutions. The report will then focus on the legal instruments pursuant to which the EU carries out the CFSP and the powers with which the institutions are endowed, with emphasis on the High Representative for Foreign Affairs and Security Policy and the European External Action Service. The analysis will examine the decision-making procedures governing unilateral measures as well as international agreements. Finally, the scope of and limits on the role of the Court of Justice will be analysed.

## 2 Historical background: legalising foreign policy and safeguarding state sovereignty

In order to appreciate the specific legal features of CFSP/CSDP rules, the historical context within which these have evolved should not be overlooked. Whilst a detailed analysis of this context is beyond the scope of this report,<sup>8</sup> a brief overview sheds light on the legal and political context in which the member states and the Union institutions seek to shape the Union's role as a political actor on the international scene.

Following the failed attempt at establishing the European Defence Community in 1954<sup>9</sup> and the period of relative stagnation which ensued, the first signs of a collective effort to introduce cooperation in the area of foreign and security policy became apparent in the beginning of the 1970s. This period lasted until the adoption of the Single European Act (SEA) in 1986. The member states of the then European Economic Community sought to develop a culture of cooperation on the basis of procedures set out in three reports presented by their Ministers of Foreign Affairs to the Heads of State and Government. These reports, presented in Luxembourg (October 1970), Copenhagen (July 1973) and London (October 1981),<sup>10</sup> constituted the foundation of the precursor to the CFSP, namely European Political Cooperation (EPC),<sup>11</sup> and sought to set out the objectives and the institutional framework under which the Member States attempted to formulate their stance on the international scene.

It is not only for historical reasons that this informal phase of European foreign policy is interesting; it also reveals the presence of a number of political and

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<sup>8</sup> See E Denza, *The Intergovernmental Pillars of the European Union* (Oxford: OUP, 2002) Ch 2 and Koutrakos, *The EU Common Security and Defence Policy*, Ch. 1.

<sup>9</sup> See the analysis in M Trybus, 'The vision of the European Defence Community and a Common Defence for the European Union' in M Trybus and N White (eds), *European Security Law* (OUP, 2007) 13.

<sup>10</sup> These Reports may be found in *European Political Co-operation (EPC)* (5th ed, Bonn: Press and Information Office of the Federal Government, 1988) at 24 ff, 34 ff and 61 ff respectively.

<sup>11</sup> On EPC in general, see D Allen, R Rummel, and W Wessels, (eds), *European Political Cooperation: Towards a Foreign Policy for Western Europe* (London: Butterworths, 1982), Holland, M. (ed.), *The Future of European Political Cooperation: Essays on Theory and Practice* (London: Macmillan, 1991), P Ifestos, *European Political Cooperation – Towards a Framework of Supranational Diplomacy?* (Aldershot: Avebery, 1987), S Nuttall, *European Political Cooperation* (Oxford: Clarendon Press, 1992), P de Schoutete de Tervarent, *La Coopération Politique Européenne* (2nd edn Brussels: Editions Labor, 1986).

legal factors which are still central to the conduct of CFSP. The three Reports formalised to a considerable extent *ad hoc* arrangements, some of which had already been carried out by national officials as a matter of practice. The emerging EPC was incremental in nature, a fact acknowledged by the European Council itself, when it referred to the ‘vocation of the Union to deal with aspects of foreign and security policy, in accordance with a sustained evolutionary process and in a unitary manner’.<sup>12</sup>

Another interesting feature of that phase of EPC development was the acknowledgment that security policy had not only political but also economic aspects, and that it was not possible completely to dissociate the former from the latter. Inevitably, this gave rise to the question of how to ensure the creative interaction of those elements without undermining their distinct legal characteristics. The member states were acutely aware of this tension and did their utmost to ensure that the intergovernmental character of the EPC would not be undermined by the existence of Community institutions and the implementation of the Community policies method. Whilst their sensitivity was understandable in light of the embryonic development of European foreign policy, it did reach considerable levels of absurdity: in 1973, for example, having met in the morning in Copenhagen under the Danish Presidency in order to discuss EPC matters, the Foreign Affairs Ministers were prevented from discussing EEC issues in the Danish capital; instead, the French Minister insisted that they all flew to Brussels so that they could discuss these issues as the Council of the European Communities in the afternoon of the same day.<sup>13</sup>

More than forty years later, this incident may appear amusing. In terms of our understanding of the CFSP, however, it is instructive in two ways: on the one hand, it makes it clear that in the area of foreign and security policy semantics matter and national governments are keen to stress to their domestic audience that they remain at the core of decision-making; on the other hand, the formulation of foreign policy pursuant to common rules would not only need to take into account the constitutional particularities underpinning the structure of European integration but would also have to address them in a convincing manner. Therefore, the effectiveness of foreign policy becomes only one of the aims of the relevant legal rules. The regulation and management of decision-making pursuant to common rules turns out to be as much about the internal constitutional balance as about external action. This inward preoccupation, apparent in the conduct of foreign policy at the European level, inevitably produced an equally inward preoccupation regarding the choice of legal rules. In other words, procedural and institutional preoccupations became at least as important as matters of substance.

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<sup>12</sup> Conclusions of the Rome European Council of Dec [1990] Bull EC 12–1990 at 7.

<sup>13</sup> E Stein, ‘European Political Cooperation (EPC) as a Component of the European Foreign Affairs System’ (1983) 43 *ZaöRV* 49 at n14.

The above characteristics of foreign policy were also apparent in the next stage of the development of foreign policy cooperation which was marked by the attribution of Treaty status to the EPC. The Single European Act laid down a set of rules which sought to formalise the existing legal arrangements. These were couched in distinctly non-committal wording which indicated that the new Treaty arrangements aimed to establish a culture of cooperation amongst the member states rather than define a set of specific legal duties.<sup>14</sup>

In light of the above, the then emerging EPC framework, whilst incorporated into the Treaty structure, in fact retained its distinctive character. Following the establishment of the pillar structure at Maastricht, its consolidation at Amsterdam and Nice and its proposed abolition in the Treaty establishing a constitution for Europe and the Lisbon Treaty, this arrangement may appear uncontroversial in terms of its implications for the role of the member states as fully sovereign subjects of international law. However, the formalisation of EPC in the 1980s was far from uncontroversial as it gave rise to an action against the process of ratification in Ireland before the Supreme Court.<sup>15</sup>

The establishment of the European Union at Maastricht marked the transformation of EPC into a new legal regime which, whilst retaining its distinct legal characteristics, provided for tighter legal duties. The new legal framework, entitled the Common Foreign and Security Policy, was tighter and accommodated within the new constitutional structure for the newly established European Union. This was the pillar structure which became a constant until the entry into force of the Lisbon Treaty. It divided the activities of the Union into three distinct sets of rules, the European Community, the Common Foreign and Security Policy, and the Co-operation in Justice and Home Affairs (succeeded later by the Police and Judicial Cooperation in Criminal Matters framework), the latter two sets of rules contained separately in the Treaty on the European Union.

Central to the pillar structure was the organization of the CFSP framework on the basis of essentially intergovernmental principles. To that effect, the unique normative features of the Community legal order, which had shaped its *sui generis* nature and in light of which the Court of Justice had pronounced it 'a new

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<sup>14</sup> See S Nuttall, 'European Political Co-operation and the Single European Act' (1985) 5 *YEL* 203, S Perrakis, 'L'incidence de l'Acte Unique Européen sur la Coopération des Douze en Matière de Politique Etrangère', (1988) *XXXIV AFDJ* 807. On the legal effect of those provisions, see C Bosco, 'Commentaire de l'Acte Unique Européen des 17–28 février 1987' (1987) *XXIII CDE* 355 at 381, J-P Jacqué, 'L'Acte unique européen' (1986) 22 *RTDE* 575 at 611.

<sup>15</sup> See *Crotty v An Taoiseach and Others* [1987] 2 CMLR 666; for an analysis, see JP McCutcheon, 'The Irish Supreme Court, European Political Co-operation and the Single European Act' (1988) 2 *LIEI* 93, F Murphy, and A Gras, 'L'Affaire Crotty: La Cour Suprême d'Irlande Rejette l'Acte Unique Européen' (1988) 24 *CDE* 276, J Temple Lang, 'The Irish Court Case which delayed the Single European Act: *Crotty v. An Taoiseach and Others*' (1987) 24 *CMLRev* 709.

legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields',<sup>16</sup> were absent from the CFSP. The Commission did not enjoy the exclusive right to initiate legislation, but shared it with the member states. The Court of Justice was expressly excluded; the nomenclature of Community instruments (regulations, directives, decisions) was not applicable and CFSP-specific measures were introduced (common positions, joint actions and, later, common strategies); decision-making by qualified majority was initially not provided at all, and subsequently was possible only exceptionally. The European Parliament was merely to be consulted, and only on the 'main aspects' of the CFSP; a distinct CFSP-specific administrative infrastructure was set up (for instance, the Political and Security Committee comprising representatives of Member States at ambassadorial level), which operated alongside the traditional preparatory bodies of the Council, such as the Committee of Permanent Representatives, which had been central to the functioning of the Community legal order.<sup>17</sup> Primacy in the strong form developed under European Community case-law as well as uniform rules on direct effect did not apply to binding instruments adopted under the second and third pillars.

Whilst, therefore, a considerable innovation compared to the preexisting set of rules, the CFSP pillar was designed as a fundamentally distinct framework within the Union's structure. And yet, this separation in institutional and legal terms could not ignore the interactions between the areas of activities covered by the different pillars which were necessitated as a matter of fact: economic and political relations are all combined to define the international role of the Union, and it is not always easy to distinguish between them. In the words of Advocate General Jacobs: '[m]any measures of commercial policy may have a more general foreign policy or security dimension. When for example the Community concludes a trade agreement with Russia, it is obvious that the agreement cannot be dissociated from the broader political context of the relations between the European Union, and its Member States and Russia'.<sup>18</sup>

This fact was reflected by the provision of legal links between the otherwise distinct pillars: on the one hand, the Union was served by a single institutional framework, hence enabling the same institutions to carry out different functions and exercise different powers depending on the legal framework within which they acted; on the other hand, the Council and the Commission were required

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<sup>16</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1 at 12. Less than thirty years later, the Court held that the Member States had limited their sovereign rights 'within ever wider fields': *Opinion 1/91 (re: Draft EEA Agreement)* [1991] ECR I-6079 at para 21.

<sup>17</sup> See G De Baere, *Constitutional Principles of EU External Relations* (Oxford: OUP, 2008) Ch. 4.

<sup>18</sup> Case C-124/95 *The Queen, ex parte Centro-Com Srl vv HM Treasury and Bank of England* [1997] ECR I-81 at para 41.

to ensure the consistency of the Union's external activities in the context of its external relations, security, and economic and development policies.<sup>19</sup>

The logic of the pillar structure was deceptively simple: the Member States wanted to cooperate in a wide range of areas (economic, political, social, criminal), albeit at a differing pace, following different models of integration, decision-making and judicial control, all depending on the political sensitivity of the subject-matter in question. Viewed from this angle, the pillar-structure conveyed this reality clearly. However, the coexistence of different sets of rules made the Union legal system complex and, to outside observers, puzzling. It was in order to address these problems that the Union's constitutional order was re-structured at Lisbon.

At this juncture, it is worth summarising the genesis and development of the CFSP by pointing out that the DNA of the policy is characterised by two main features. The first is its dynamic and incremental development, shaped by practical considerations, emerging informally and then formalised and consolidated to adjust to any considerable amendment of the Union's constitutional structure. The second feature is its distinct position in the EU's legal order, characterised by specific features which reflected to some extent its intergovernmental origins, notably its exclusion from the jurisdiction of the Court of Justice and the dominant role of unanimous voting, the CFSP was carried out over the years on the basis of legal rules and procedures which differed from those governing the other strands of the Union's activities.

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<sup>19</sup> See Art. 3 TEU (Nice).



### 3 Constitutional reconfiguration: the distinct nature of the CFSP within the Union's restructured legal order

One of the main innovations of the Lisbon Treaty and, previously, the Constitutional Treaty was considered to be the abolition of the pillar structure. The Lisbon Treaty subsumes all three legal frameworks (EC, CFSP, PJCCM) in the EU, which now becomes a single and unitary structure. Article 47 TEU endows the Union with express legal personality. Therefore, the de-pillarization<sup>20</sup> introduced by the Lisbon Treaty is considered one of the main positive features of the current constitutional arrangements. In the words of Sir Francis Jacobs, the Lisbon Treaty removed 'a patchwork system ... widely regarded as opaque, incoherent and generally unsatisfactory'.<sup>21</sup> Reflecting this view, in a report to the European Council, the Presidency of the Convention on the Future of Europe, which drafted the precursor to the Lisbon Treaty, argued that the abolition of the pillars would respond to the requirements of clarity and simplification.<sup>22</sup>

The abolition of the pillars is also seen as establishing a unified system of external policies. By placing the CFSP, along with CSDP, within a common set of rules, the Lisbon Treaty appears to establish a unified legal system whose external policies are not governed by disparate sets of principles and rules. However, a closer look at the relevant provisions of the Lisbon Treaty tells a somewhat different story. The nature of the competence which the Union enjoys in the area of the CFSP is defined in terms which leave no doubt as to its distinct status. It is recalled that one of the main objectives of the Treaty amending process, which started with the Laeken Declaration, was the clear delimitation of competences. Article 2 of the Treaty on the Functioning of the European Union (TFEU) distinguishes between exclusive, shared, coordinating, and supporting, and supplementing competence.<sup>23</sup> However, the Union's competence in the area of the CFSP falls within none of these categories, and, instead, is listed separately in Article 2(4) TFEU.

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<sup>20</sup> See Editorial, 'The CFSP under the EU Constitutional Treaty – Issues of Depillarization' (2005) 42 C.M.L.Rev. 325.

<sup>21</sup> House of Lords Tenth Report *The Treaty of Lisbon: An Impact Assessment* (2007–2008) p S148.

<sup>22</sup> CONV 851/03, para. 7.

<sup>23</sup> For an analysis, see R Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis', (2008) 33 ELRev 709.

Article 2(4) TFEU does not elaborate on the nature of the competence to carry out the CFSP; it merely provides that the Union ‘shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy’. While the idea that this competence might be shared has been mooted,<sup>24</sup> the choice of the drafters of the Treaties to refuse to categorize it must be taken as corroboration of the distinct nature of the Union’s competence in the area.<sup>25</sup>

In this vein, Article 24(1) subparagraph 2 TEU states that the common foreign and security policy ‘is subject to specific rule and procedures’. This clear indication of distinctiveness is reinforced by other features of CFSP rules. First, despite doing away with the special nomenclature of instruments in force under the previous constitutional arrangements, the following section will show that the Lisbon amendments still maintain, in substance, the distinct nature of CFSP measures. In addition, Articles 24(1) and (3) TEU Declaration 41 state that legislative acts may not be adopted in the CFSP area.<sup>26</sup>

Second, in terms of legal effect, Article 40 TEU elevates the normative differences between the CFSP and the other EU policies to a constitutional principle. It reads as follows:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

This reflects a similar provision laid down in the precursor to the Lisbon Treaty in ex Article 47 TEU. The Lisbon Treaty adds another provision:

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

The legal implications of this addition for the EU constitutional order, the role of its institutions and the jurisdiction of the Court of Justice are examined elsewhere

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<sup>24</sup> See, for instance, R Gosalbo Bono, ‘Some Reflections on the CFSP Legal Order’, (2006) 43 CMLRev 337 at 364.

<sup>25</sup> Cremona defines this competence as *sui generis*: M. Cremona, ‘The Draft Constitutional Treaty: External Relations and External Action’ [2003] 40 CML Rev 1347 at 1354.

<sup>26</sup> See also Declaration (41) on Article 352 of the Treaty on the Functioning of the European Union annexed to the Final Act of the Lisbon IGC.

in this report.<sup>27</sup> At this juncture, suffice it to point out that Article 40 TEU cements the distinctive nature of the CFSP and highlights the presentational character of the appearance of integration which the Lisbon Treaty seeks to convey.

Third, the endowment of the Union with express legal personality under Article 47 TEU should be put in context. On the one hand, the issue of legal personality had been addressed as a matter of practice prior to the entry into force of the Lisbon Treaty, as the agreements concluded by the Union in the areas of CFSP and Police and Judicial Cooperation in Criminal Matters suggested – at least to many European lawyers – that the Union had been endowed with implied legal personality.<sup>28</sup> Therefore, the provision of Article 47 TEU may be viewed as a welcome clarification of the Union’s legal status. However, the provision for express legal personality, and its exercise by the Union, by no means simplifies the complex issues which underpin the relationship between the Union and the Member States in their conduct of foreign affairs in the area of the CFSP.

In light of the above, a paradox emerges: while the Lisbon Treaty was praised on the basis of the rhetoric of unity of the Union’s structure and the integration of foreign, security, and defence policy in its constitutional architecture, in legal terms it has only been the appearance of unity which has been achieved. The CFSP framework retains its distinct characteristics, albeit within a constitutional context which lacks obvious signs of division. Put differently, the CFSP and CSDP constitute a distinct pillar of the Union’s structure in all but name.<sup>29</sup> The reluctance of the drafters of the Lisbon Treaty to do away with the substance of the pillar structure is in itself neither indicative of constitutional timidity, nor necessarily detrimental to the Union’s external action. This is because, for all its notoriety and complexity, the pillar structure illustrated in legal terms a self-evident fact: while Member States are determined to broaden the scope of their cooperation in areas deemed to be closer to the functions traditionally carried out by states, and while they thought it sensible to rely upon institutions and processes of what used to be the Community legal order, they wish to do so at a different pace, in accordance with a different model of integration, in order to achieve qualitatively different objectives, and without compromising

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<sup>27</sup> See Sections, 7, 8 and 10, below and Koutrakos, n 3 above, 530-540. See also P Eeckhout, *EU External Relations*, 2nd ed (Oxford: OUP, 2011) 478–83.

<sup>28</sup> For an indication of the diverse analyses of the position, see U Khaliq, ‘Treaty Conflict and the European Union, or Conflicting Perspectives on the European Union?’, (2012) *ELRev* 495 at 498–9; and A Sari, ‘The Conclusion of International Agreements in the Context of the ESDP’ (2008) 57 *ICLQ* 53.

<sup>29</sup> See also P Craig, *The Lisbon Treaty – Law, Politics, and Treaty Reform* (Oxford: OUP, 2010) 40, 49–54. Cf M Cremona, ‘The Two (or Three) Treaty Solution: The New Treaty Structure of the EU’ in A Biondi, P Eeckhout and S Ripley (eds), *EU Law After Lisbon* (Oxford: OUP, 2012) 3, who argues that the distinct position of CFSP under the Lisbon arrangements is based on differences in procedures and institutional powers, rather than the more profound separation of legal orders, which existed within the previous pillar structure.

their ultimate independence in the conduct of foreign policy, which is the key characteristic of independent sovereign statehood. This differentiation is central to the organization of the Union's constitutional structure in general and external action in particular. This is what the pillar structure was intended to safeguard, and this is what the Lisbon arrangements about the distinctive legal features of the CFSP and CSDP, as outlined, also acknowledge. The difference is that, by removing the external manifestations of this fact, the Lisbon Treaty has succeeded in making the EU legal order appear less complex. However, removal of the appearance of complexity does not necessarily render the ensuing legal framework any less complex to manage in substance.

## 4 Scope and objectives

The distinct position which it occupies within the unified legal framework established by Lisbon is not the only legal characteristic of the CFSP, as the Union's primary law also suggests a degree of integration between this and the other strands of the EU's external actions. One of the innovations introduced in the Lisbon Treaty in the area of external relations is the re-organization of the relevant provisions and the articulation of an overarching set of values, principles and objectives which govern the entire spectrum of the Union's external action, including the CFSP, its distinct position in the EU legal order notwithstanding.

The language of integration used in the Lisbon Treaty as regards the rules on the Union's global role is illustrated in different ways. The Union's external policies, including the CFSP, are all part of what the Treaties describe as the Union's 'external action'.<sup>30</sup> Terms such as 'external policies' or 'actions' are avoided. Instead, the choice of reference to 'external action' signifies the design of the EU's foreign affairs as a coherent whole.

The language of integration is also reflected in the organization of the legal rules applicable to the EU's external action as well as their overarching principles and objectives. In terms of the former, the Common Commercial Policy (CCP) is grouped together with the provisions governing the other external economic and social policies of the Union.<sup>31</sup> In addition, and for the first time since the establishment of the European Economic Community, a common set of principles and objectives whose overarching scope covers all the EU's external action is set out in the TEU. This covers the entire range of the Union's external trade, economic, and political relations.<sup>32</sup> These principles are laid down in Article 21(1) of the TEU and include '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', as well as commitment to effective multilateralism.

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<sup>30</sup> See Ch. 2 TEU and Title II of Part V TFEU.

<sup>31</sup> See Part V, Title II V TEU which includes CCP (Arts 206–207 TFEU), development cooperation (Arts 208–211 TFEU), economic, financial and technical cooperation with third countries (Arts 212–213 TFEU), humanitarian aid (Art 214 TFEU), and sanctions (Art 215 TFEU).

<sup>32</sup> Arts 205 TFEU and 24(2) TEU.

The objectives of the Union's external action are set out in Article 21(2) of the TEU, and are:

- political (safeguarding the EU's values, and fundamental interests, the consolidation and support of democracy and the rule of law, the promotion of an international system based on stronger multilateral cooperation and good global governance);
- security-related (preservation of peace and prevention of conflicts);
- development-related (fostering of the sustainable economic, social and environmental development of developing countries);
- economic (encouragement of the integration of all countries into the world economy);
- environmental (assistance to the sustainable management of global natural resources);
- social (assistance to regions confronting natural or man-made disasters).

This categorization (which is set out here for the purposes of this analysis and which is not set out in the Treaty) is inevitably artificial, as the whole point of grouping together these objectives is that they all relate to each and every aspect of what the Union does in the world. Pursuant to Article 21(3), the 'Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five [TFEU], and of the external aspects of its other policies'. This is an important feature of the Union's external action. In constitutional terms, it brings together different strands of activity which, due to their differing political sensitivity, had been subject to drastically different sets of rules and procedures.

By defining principles and objectives common to all of them, their diverse subject matter notwithstanding, the Lisbon Treaty shapes a legal order which appears homogeneous and integrated. In policy terms, this function of the organization of the Union's common external policies is highlighted by the duty of consistency. This is laid down in Article 21(3) subparagraph (2) TEU which refers to the consistency 'between the different areas of [the Union's] external action and between these and its other policies'. This provision also makes compliance with the duty for consistency entrusted to the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy. Therefore, in the light of the design of the Union's external action under the Treaties, common principles and objectives aim to ensure that the various strands of the Union's external action, different though they are in their implications, political sensitivity, and applicable procedures, are consistent and coherent.

In substantive terms, the formulation of the political and security objectives set out in Article 21(2) TEU is noteworthy in terms of their content as well

as the extent to which they build upon pre-existing primary provisions. For instance, there is no reference to ‘common values’ – the Union now has ‘its values’. This suggests a shift of focus from the aggregate of the values, which all the Member States share, to those that the Union itself possesses. While there is no ensuing change in substance, the removal of any reference to the constituent Member States denotes a new emphasis on the autonomy of the Union as an international actor.<sup>33</sup> Furthermore, in Article 21(2)(c) TEU, for the first time, conflict prevention is added to the preservation of peace and the strengthening of international security, in acknowledgment of the wider scope of security and defence policy. As far as the foreign and security policy objectives in particular are concerned, they appear vague and anodyne. It would be difficult to imagine any international actor that would not proclaim to adhere by them and would not include them in any of its mission statements. This vagueness further underlines the central role of the institutional players endowed with powers under Title V TEU and, ultimately, the Member States themselves, which remain in control of the pace of developments in this area.

As Article 21 TEU aims to bring clarity to the Union’s international action, to give it a commonality of purpose, and to formalize threads which have already underpinned it as a matter of policy, it is couched in the language of integration, bringing the CFSP and CSDP rules closer to the other strands of EU external action. Put differently, the articulation of a set of common principles and objectives may appear to normalize foreign and security policy: it seeks to remove it from the special position which its sensitive nature appeared to justify and its prior status in the pillar structure conveyed, and to render it an integral part of the diverse, albeit indivisible, whole, which the totality of the Union’s external policies form. The legal implications of this integration, however, are far from clear. In particular, a question is raised as to how the CFSP/CSDP relate to these broad objectives. The Treaty itself, and in particular Title V TEU, provides two pointers: on the one hand, Article 23 TEU provides that the Union’s activities in the area ‘... shall pursue the objectives’ set out in Article 21(2) TEU; on the other hand, under Article 24(1) TEU, ‘the Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence’.

In light of this, may the Union rely upon CFSP rules in order to adopt measures pursuing the entire range of objectives set out in Article 21(2) TEU? Or is there an inherent limit on the scope of these rules? Put differently, does Article 24(1) TEU only confer on the Union the power to act ‘in all areas of foreign policy and all questions relating to the Union’s security’ in accordance with the rules laid

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<sup>33</sup> Art. 11 TEU (Nice) already referred to the fundamental interests, independence, and integrity of the Union, as well as its security, which would be strengthened in all ways.

down in Title V TEU, or does it also include the economic and social objectives laid down in Article 21(2) TEU?

In addressing these questions, a narrow approach is appropriate.<sup>34</sup> First, the wording, and context of the Lisbon Treaty leave no doubt as to the distinct normative position of the CFSP and CSDP in the EU constitutional framework. The competence conferred upon the Union is qualitatively different from the competences covering the other areas of Union activity. Article 2(4) TFEU refers to the competence to carry out the CFSP as if it were a stand-alone competence, and the Lisbon Treaty maintains similarly distinct legal mechanisms for the exercise of this competence.

Secondly, in historical terms, the pre-existing constitutional arrangements, from Maastricht to Amsterdam to Nice, were clear as to the distinct nature of the CFSP within the Union's constitutional configuration, and the history and content of the Lisbon Treaty provide no indication of a rupture in this respect. In fact, the contrary is the case. Article 40 TEU suggests that the implementation of neither the CFSP nor the other policies covered by the Union's other competences should affect each other. By elevating the CFSP to the special status and protection that the Community legal order was granted under the previous constitutional arrangements, the Lisbon Treaty stresses the distinct nature of the two types of policies and the competence which covers them.

Thirdly, the discussions at the European Convention, which preceded the drafting of the Treaty Establishing a Constitution for Europe on which the Lisbon Treaty is based, suggest that the rationale of Article 21 TEU was not to render the CFSP competence unlimited in scope. Instead, it aimed to provide the Union's international role with a sharper focus, and facilitate the substantive consistency of its external policies.<sup>35</sup> It is for this reason, for instance, that Article 21(3) TEU refers expressly to the consistency not only between the different areas of the Union's external action, but also between these and the Union's other policies.

Fourthly, the terms 'foreign policy' and security, used in Article 24(1) TEU, are so broad that, if interpreted literally, they would render the external policies governed by Part Five TFEU devoid of any substance, and the procedures for their implementation irrelevant. This is even more so in light of the intense securitization which has characterized the conduct of the Union's external policies recently.<sup>36</sup>

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<sup>34</sup> The role of the institutional input in ensuring coherence in the EU's external action is examined below in this report.

<sup>35</sup> See, to this effect, G Grevi, 'The Institutional Framework of External Action' in G Amato, H Bribosia and B De Witte (eds), *Genesis and destiny of the European Constitution* (Bruxelles: Bruylant, 2007) 773 at 784–5.

<sup>36</sup> See the analysis in Koutrakos, *The EU Common Security and Defence Policy* (2013) Ch. 4.



In light of the above, the scope of the CFSP, and consequently of the CSDP, must be understood as inherently limited to the pursuit of the political and security objectives laid down in Article 21(2) TEU.<sup>37</sup> However, this conclusion must be viewed against considerations of a practical nature. As the globalized international environment renders the economic and social objectives of external relations increasingly linked to political and security objectives, the interactions between measures pursuing these objectives are considerable, and there is a growing tendency in the Union, as well as among other international players, to frame external policies in broad terms. It must be accepted, therefore, that, while the CFSP competence may only be used in order to pursue the political and security objectives laid down in Article 21(2) TEU, a rigid distinction between them and the other objectives laid down therein may be not only difficult to draw but also, in certain cases, impractical to maintain.

The multiplicity of objectives is not only a matter of fact, but also seems to be accepted by the architecture and wording of Article 21 TEU. This by no means suggests that all these objectives may carry the same weight in relation to a Union measure: a CFSP measure is required to have a different degree of congruence with its security and political objectives than with the economic and social ones. To establish such congruence, however, is no mean feat. Distinguishing between and prioritising different policy aspects of the Union's activities has been a constant theme in EU law. This is due to the constitutional significance of the choice of the appropriate legal basis in light of the principles of conferred powers and the institutional balance which are reflected by the existence of different legal bases governing decision-making in different policy areas.<sup>38</sup>

The complexity of the choice of the appropriate legal basis and the legal and practical difficulties to which it has given rise are neither novel nor unexplored in academic literature.<sup>39</sup> The provision of common objectives in Article 21(2) TEU for the Union's external action, however, adds another layer to this exercise insofar as it renders the multifarious policy objectives of the different strands of the Union's global role an inherent element of each and every specific external policy. As a matter of policy, the choice of the CFSP framework over a TFEU

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<sup>37</sup> As Eeckhout puts it, 'there should be a footnote to Article 24(1) TEU stating that this provision applies only insofar as there is no other EU external competence': 'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism', in Biondi, Eeckhout and Ripley (eds), n29 above, at 290. See also M Cremona, 'Defining competence in EU external relations – Lessons from the Treaty reform process' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge CUP, 2008) 34 at 45–6, and A Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences' in *ibid*, 70 at 102.

<sup>38</sup> See, for instance, Opinion 2/00 [2001] ECR I-9713, para. 5.

<sup>39</sup> See, for instance, P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M Cremona and B De Witte (eds), *EU Foreign relations Law – Constitutional Fundamentals* (Hart Publishing, 2008) 171.

legal basis will be made pursuant to, amongst others, pragmatic considerations.<sup>40</sup> However, by elevating a hitherto increasingly prominent policy feature to a legal characteristic of the EU's external policy, what is designed to elucidate the wide reach of the Union's global action is, in fact, contributing further to the complexity of the choice of the appropriate legal basis. This is even more so in light of the persisting distinct character of CFSP within the Union's constitutional architecture.

Viewed from this angle, the implications of Article 21(2) TEU are twofold. On the one hand, the scope for inter-institutional wrangles is still wide and the appetite of the institutions and the Member States for them undiminished. On the other hand, the role of the Court of Justice is not only still central in the area of external relations, but also likely to be further politicised, given the interests to which CFSP actions pertain while this domain is in principle excluded from the Court's jurisdiction. In light of the overall emphasis of the process that led to the Lisbon Treaty on simplification and better division of competence,<sup>41</sup> it is somewhat ironic that the reorganisation of the rules governing the EU's external actions would introduce further complexity to a legal framework which hardly constituted an example of clarity.

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<sup>40</sup> See A Dashwood, M Dougan, B Rodger, E Spaventa and D Wyatt, *Wyatt and Dashwood's European Union Law* (Hart Publishing, 2011, 6<sup>th</sup> ed) 908.

<sup>41</sup> See Laeken Declaration on the Future of the European Union (December 14-5, 2001).

# 5 Duties

Member States have three main obligations in the area of CFSP. The first is a general loyalty obligation set out in Article 24(3) TEU, which reads:

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

This provision suggests a twofold duty: a positive duty to take action in accordance with the Union's policy, and a negative duty not to engage in behaviour which would run counter to the Union's action. The reference to 'mutual solidarity' is noteworthy, and raises the question whether its definition is as imprecise as might appear at first sight. In its second subparagraph, Article 24(3) TEU deals not with the definition of the term, but rather its development:

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

Compliance with these principles is for the High Representative of the Union for Foreign Affairs and Security Policy and the Council to ensure. The second indent of the provision appears to be in the wrong place: it belongs rather to the first subparagraph of Article 24(3) TEU, as it highlights the negative dimension of the general obligation which EU law imposes on Member States in the area of foreign and security policy. As for the reference to mutual political solidarity, the duty imposed by Article 24(3) subparagraph 2 TEU ('shall') is at best irrelevant and at worst superfluous. It is difficult to envisage how political solidarity may be developed pursuant to a legally binding obligation imposed by primary law. Involving a community of states, each of which may have differing foreign policy interests but all of which are committed to respecting these interests and finding common ground for action, political solidarity is unlikely to emerge from the application of legal obligations. Rather, it is the outcome of a constantly evolving process of understanding and osmosis, which is brought about gradually, incrementally, and often indirectly and imperceptibly. What legal rules and procedures, such as those set out in Title V TEU, may do is to contribute to a culture of cooperation among Member States, which is central to the development of political solidarity.

The second obligation imposed on Member States is also general in its scope and is about consultation. It is set out in Article 32 TEU, which reads as follows:

Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.

The provision for a duty to consult may appear unnecessary in the context of Title V TEU. After all, consultation is an essential component of the duty of Member States to support the Union's external policy and, as such, it follows from Article 24(3) TEU. However, the specific provision for consultation is explained by two considerations. First, historically, since the very first efforts to formalize its conduct, consultation was central to European foreign policy. Indeed, the European Political Cooperation Reports set out principles about consultation, and the very first elaboration of foreign policy rules in primary law, namely the Single European Act, had a specific provision on the matter.<sup>42</sup> Therefore, specific reference to cooperation is explained in historical terms.

Secondly, this provision of Article 32 TEU acknowledges that EU foreign policy may not replace national foreign policies, and that a common policy does not amount to a single policy. In essence, what underpins these distinctions is the existence of distinct national interests in the foreign policy sphere – as a common policy cannot replace them, the Treaty sets a forum within which consultation would either achieve their convergence, or manage their differences. In this respect, the wording of Article 32 TEU is noteworthy: it is 'the convergence of [the Member States'] actions' which will make the Union 'able to assert its interests and values on the international scene'. This makes consultation all the more significant. Viewed from this angle, by articulating consultation as a distinct duty, the Treaty acknowledges that the definition of the common foreign and security policy is the outcome of a continuous and incrementally evolving process of establishing a culture of cooperation between Member States with different, and therefore at times differing, foreign policy interests. What is noteworthy, nonetheless, is the broad wording of Article 32 TEU, which, if applied literally, could be seen as imposing a considerable constraint on independent action by the Member States.<sup>43</sup>

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<sup>42</sup> The SEA provided that the 'High Contracting Parties undertake to inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through co-ordination, the convergence of their positions and the implementation of joint action' (Art 30(2)).

<sup>43</sup> See Denza, 'Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy' in Tridimas and Nebbia (eds), n29 above, at 269–70.

The third duty which is imposed on Member States is specific and relates to CFSP instruments. Article 28(2) TEU provides that decisions defining actions to be undertaken by the Union 'shall commit the Member States in the positions they adopt and in the conduct of their activity'. As for decisions defining the approach of the Union to a particular matter of a geographical or thematic nature, Member States 'shall ensure that their national policies conform to the Union positions'.<sup>44</sup>

In addition to the above, the Treaty also refers expressly to the diplomatic missions of the Member States in third countries and at international organizations: along with the Union delegations, they 'shall cooperate and shall contribute to formulating and implementing the common approach'.<sup>45</sup>

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<sup>44</sup> Art 29 TEU.

<sup>45</sup> Art 32 subpara 3 TEU.

# 6 Instruments

Title V TEU provides for a set of formal CFSP-specific instruments, each of which is designed to carry out a specific function. Article 25 TEU (a) TEU refers to the definition of the Union's general guidelines, the adoption of decisions, and the strengthening of systematic cooperation between Member States in the conduct of policy.

Article 25 TEU, then, distinguishes between three types of decisions. The first defines an action to be undertaken by the Union. These are measures of an operational character: the Union expresses its intention to act in a specific manner in order to tackle a specific situation which has arisen, and the Council adopts the relevant measures under Article 28 TEU. Such measures lay down the objectives, scope, and Union means, as well as the duration and conditions for their implementation; should a change in circumstances having a substantial impact on the subject matter of such action occur, the Council may review the principles and objectives of the decision in question. An example of such a measure is provided by Council Decision 2012/422/CFSP in support of a process leading to the establishment of a zone free of nuclear weapons and all other weapons of mass destruction in the Middle East.<sup>46</sup> Another example is the establishment and functioning of the European Union Institute for Security Studies.<sup>47</sup> Significantly, the measures establishing the Union's CSDP missions are also such measures and are adopted on the basis of Article 28 TEU.<sup>48</sup>

In the context of decisions on actions, Article 26(2) TEU also provides that the Council shall make decisions aimed at defining and implementing the CFSP on the basis of the general guidelines and strategic lines defined by the European Council. An example of an instrument adopted on that legal basis is provided by Council Decision 2012/281/CFSP in the framework of the European Security Strategy in support of the Union proposal for an international Code of Conduct on outer-space activities.<sup>49</sup> Another example of such a measure is provided by Council Decision 2012/421/CFSP in support of the Biological and Toxin Weapons Convention (BTWC), in the framework of the EU Strategy against Proliferation of Weapons of Mass Destruction.<sup>50</sup>

Secondly, the Union may adopt decisions defining its position on a particular matter. These are not of an operational character and apply the general guidelines, as defined by the European Council, to a particular matter of a geographical or

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<sup>46</sup> [2012] OJ L 196/67.

<sup>47</sup> Council Dec. 2014/75/CFSP [2014] OJ L 41/13.

<sup>48</sup> For an analysis of CSDP operations and missions, see Koutrakos, n7 above, chs 5-6.

<sup>49</sup> [2012] OJ L 140/68, amended by Council Dec. 2014/42/CFSP [2014] OJ L 26/42.

<sup>50</sup> [2012] OJ L 196/61.

thematic nature.<sup>51</sup> Measures imposing restrictions on third countries are adopted in this form under Article 29 TEU. An example of such a measure is provided by the Union's reaction to the Russian operation in Ukraine in early 2014.<sup>52</sup> Another example is the Union's position on the International Criminal Court.<sup>53</sup>

Thirdly, the Union may adopt decisions defining arrangements for the implementation of decisions on an action to be undertaken or a position to be taken by the Union.

The term 'decision', which also refers to one of the types of legal acts used for other activities carried out by the Union,<sup>54</sup> was introduced by the EU in the CFSP context in order to replace the CFSP-specific instruments which had been adopted in the post-Maastricht era and until the entry into force of the Lisbon Treaty. The removal of these instruments and their replacement with 'decisions' was viewed as 'a major terminological simplification'.<sup>55</sup> However, while the denomination of CFSP legal acts has now been unified, the set of formal instruments currently available in this area is identical in substance to that laid down in the precursors to the Lisbon Treaty in all but name.

This raises the question of the purpose of the rebranding exercise that the Lisbon Treaty carried out in the area of CFSP instruments. It is recalled that one of the objectives of the long process which led to the drafting of the Constitutional Treaty, as well as that of the Lisbon Treaty, was the simplification of the Union's primary rules.<sup>56</sup> Along with the abolition of the pillar structure, the abolition of CFSP-specific instruments appears to serve this objective. It also appears to bring the CFSP machinery closer to the rules governing the other EU external activities, hence suggesting the convergence of the different strands of EU external action. However, just as the abolition of the pillar structure removed the appearance of complexity while in reality merely submerging that complexity, so does the introduction of decisions in the CFSP framework. Similarly, the formal integration of sets of rules by no means ensures the substantive convergence of their legal effects.

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<sup>51</sup> Art 29 TEU.

<sup>52</sup> See Council Dec. 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78/16.

<sup>53</sup> Council Dec. 2011/168/CFSP [2011] OJ L 76/56.

<sup>54</sup> See Art. 288 TFEU.

<sup>55</sup> B De Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Wien, New York: Springer 2008) 79 at 90.

<sup>56</sup> See the Declaration on the Future of the Union annexed to the Nice Treaty, as well as the Laeken Declaration in Conclusions of the Laeken European Council (14–15 December 2001), Annex I, at 2.

The EU may also conclude international agreements in the areas covered by CFSP. These are examined further in Section 9 of the report.

Finally, and in addition to the formal CFSP instruments outlined above, there are some others which are not identified in the Treaties. For instance, the High Representative of the Union for Foreign Affairs and Security Policy, like foreign ministers of States, issues political declarations and statements regularly in order to express the position of the Union on a specific development in the world, but without seeking to produce binding legal effects.<sup>57</sup>

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<sup>57</sup> See, for instance, the Statement by High Representative/Vice-President Federica Mogherini on the general elections in Myanmar (Brussels, 9 November 2015, 151109\_01\_en).



# 7 Institutional infrastructure

The institutional machinery of the CFSP has been modified substantially by the Lisbon Treaty. In fact, the changes it introduces are viewed as being among its most significant achievements.

## 7.1 The European Council

Over the years, the role of the European Council has become more prominent in the Union's constitutional architecture. Once considered a political actor, potentially unsettling the institutional balance and the carefully calibrated decision-making principles of the Union,<sup>58</sup> it has now become deeply embedded in the institutional life of the EU by being endowed for the first time with the status of an EU institution and with a formal decision-making power.<sup>59</sup> The financial crisis facing the Union in the last few years has raised its profile, the general expectation for its more active involvement in tackling the problems of the Eurozone, and its real and over-arching powers. The Lisbon Treaty has underlined further the significance of the European Council for the Union's external action in general and the CFSP/CSDP in particular.<sup>60</sup>

Article 26(1) TEU endows the European Council with the power to 'identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications' and to 'adopt the necessary decisions'.

Article 22 (1) TEU reads as follows:

On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or

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<sup>58</sup> See the concerns expressed early in A Dashwood, 'Decision-making at the Summit, (2000) 3 CYELS 79.

<sup>59</sup> See European Council Dec. 2009/882/EU of 1 December 2009 adopting its Rules of Procedure [2009] OJ L 315/51.

<sup>60</sup> See Y Devuyt, 'The European Council and the CFSP after the Lisbon Treaty', (2012) 17 EFA Rev 327.

may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.

This provision confirms that the European Council is granted decision-making power. In doing so, it provides for the adoption of a measure under the generic title ‘decision’ which denotes a legal act but is neither a legislative nor an implementing act.<sup>61</sup> In fact, such decisions may carry out the function of common strategies, a CFSP instrument provided for in the pillar-based legal order<sup>62</sup> to which the characteristics set out in Article 22 (1) subparagraph 3 allude.

Another feature illustrating the central role of the European Council is the introduction of the post of the President of the European Council. He is elected by the latter by qualified majority for a term of two and a half years, renewable once, in accordance with Article 15(5) TEU. In light of the significant role of the European Council in CFSP, the relevance of the post of its President for this domain becomes immediately apparent. The introduction of this post was proposed by the United Kingdom Government, which was keen on the idea of strengthening the intergovernmental part of the EU at the expense of its supranational one.<sup>63</sup>

To his general duties, which Article 15(6) TEU sets out (to chair the European Council and drive forward its work, to ensure the preparation and continuity of its work, to facilitate cohesion and consensus within it, and to present a report to the European Parliament after each of its meetings), there is one function which is particularly pertinent:

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

The introduction of this post, together with that of High Representative, sought to address the growing need for the EU to be represented by a recognizable figure

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<sup>61</sup> See Craig, n29 above, 384.

<sup>62</sup> See Art. 13(2) TEU (Nice).

<sup>63</sup> See J Powell, *The New Machiavelli: How to Wield Power in the Modern World* (Vintage: 2011) 257.

which would not change every six months, that is every time the Presidency rotates among Member States. In his autobiography, former British Prime Minister Tony Blair describes the failure of the then United States President George W. Bush to recognize the then Belgian Prime Minister Guy Verhofstadt at a G8 meeting. Once Blair explained to him who he was, he had to address Bush's query as to whether Belgium was a member of G8. When he heard that Verhofstadt represented the EU because Belgium held the Presidency, Bush responded by shaking his head and wondering aloud 'You got the Belgians running Europe?'.<sup>64</sup> Quite apart from the subtle way of thinking of the former United States President, this episode illustrates the power of personification for international actors such as the Union, an issue which will also be discussed in relation to the High Representative.

The provision of Article 15(6) TEU is quite opaque: it does not delineate clearly the representation functions of the President of the European Council vis-à-vis the High Representative in the CFSP except by reference to the 'level' at which the representation is exercised, but nonetheless seeks to preserve the latter's prerogatives ('without prejudice'). In fact, the Treaty on the European Union in general and in this provision in particular merely sets out the canvas on which the Union's leaders are expected to define the job description of this post and, therefore, to shape the extent to which its holder may influence the conduct of the EU's foreign affairs. This issue will be explored in relation to the High Representative. The first President was Herman Van Rompuy – he had been the Prime Minister of Belgium for nine months. His term as the President of the European Council was renewed in March 2012. In August 2014, and after considerable wrangling, the European Council elected Donald Tusk, until then Prime Minister of Poland, as its new President.<sup>65</sup>

## **7.2 The High Representative of the Union for Foreign Affairs and Security Policy**

A main innovation of the Lisbon Treaty was the establishment of a post specifically catering to the Union's foreign and security policy, namely that of the High Representative of the Union for Foreign Affairs and Security Policy. This is, in all but name, the post of the Foreign Affairs Minister established under the Constitutional Treaty. The choice of the rather inelegant title at Lisbon is due to the effort by the drafters of the Treaty to remove from the successor of the Constitutional Treaty any remnants of the constitutional nature of the document and, more importantly, any suggestion that its innovations would seek to duplicate functions of a sovereign State in a Union context. The term 'Foreign Minister' had connotations of aspiration towards statehood, which some Member States found intolerable, all the more so in light of the negative

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<sup>64</sup> T Blair, *A Journey* (London: Hutchinson 2010) 557.

<sup>65</sup> European Council Decision 2014/638/EU of 30 August 2014 electing the President of the European Council [2014] OJ L 262/5.

referenda in France and The Netherlands. Once again, the drafters of the Treaty followed a pattern in dealing with what has proved to be controversial, that is, by stripping it of its facade while maintaining its substance.

The new post was not created in a legal and policy vacuum. The Amsterdam Treaty had introduced the post of High Representative for the common foreign and security policy who was also the Secretary General of the Council.<sup>66</sup> This role was considerably more clearly defined than that which was introduced at Lisbon. However, during the decade he was in office,<sup>67</sup> its first and only holder, Javier Solana, worked with enthusiasm, imagination, and dynamism. His previous role as the Secretary General of NATO had given him considerable experience in international affairs as well as access to the highest level of government internationally.<sup>68</sup>

Under the Lisbon Treaty, the High Representative is appointed to the European Council by a qualified majority, and his term may end by the same procedure.<sup>69</sup> Her position in the Union's institutional constellation is unique: besides her main role as High Representative for the CFSP, she also presides over the Foreign Affairs Council,<sup>70</sup> she is one of the Vice Presidents of the European Commission.<sup>71</sup> The mandate of the High Representative as regards the EU's external action is thus dual: she 'shall conduct the Union's common foreign and security policy'<sup>72</sup> and he is responsible within the Commission for 'external relations and for coordinating other aspects of the Union's external action'.<sup>73</sup>

In essence, the introduction of the post of High Representative aims to achieve two main objectives. The first objective is external: it is to provide the Union's international role with a face, hence facilitating the contacts of the Union with its international partners, and ultimately raising its profile. The second objective is internal: it is about ensuring greater coherence in external policy, about bringing together the strands of the Union's external policies.<sup>74</sup>

In relation to CFSP responsibilities, the brief is broad. First, the High Representative enjoys the right of initiative: either on her own, or with the

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<sup>66</sup> Art. 26 TEU (Amsterdam).

<sup>67</sup> From October 1999 until December 2009.

<sup>68</sup> See 'Javier Solana: Europe's diplomat-in-chief', *The Economist*, 8 April 2000, at 58.

<sup>69</sup> Art. 18(1) TEU.

<sup>70</sup> Art. 18(3) TEU.

<sup>71</sup> Art. 18(4) TEU. This explains the involvement of the Commission's President in his appointment: Art. 18(4) TEU stipulates that it is with the latter's agreement that the High Representative is appointed by the European Council.

<sup>72</sup> Art. 18(2) TEU.

<sup>73</sup> Art. 18(4) TEU.

<sup>74</sup> On coherence on the basis of the Lisbon arrangements, see M Cremona, 'Coherence in EU Foreign Relations Law' and S Duke, 'Consistency, coherence and EU external action: the path to Lisbon and beyond' in P Koutrakos, *European Foreign Policy – Legal and Political Perspectives* (Cheltenham: E Elgar Publishing, 2011) 55 and 15 respectively.

Commission's support, she<sup>75</sup> may submit to the Council initiatives or proposals.<sup>76</sup> She has the power, via her own motion, or at the request of a Member State, to convene an extraordinary Council meeting in cases requiring a rapid decision within 48 hours or, in an emergency, within a shorter period.<sup>77</sup> In cases where a decision by a qualified majority at the Council is not possible because a Member State invokes vital and stated reasons of national policy, she will search for a solution acceptable to that State.<sup>78</sup>

These are significant powers because, to a certain extent, they enable the High Representative to shape the agenda. It is recalled that this right has rendered the European Commission a central player in policy-making in the Union legal order. However, there is no genuine parallel between these two contexts: the Commission's power is exclusive and accompanied by procedural devices, which entrench its contribution to the legislative outcome,<sup>79</sup> whereas the High Representative shares the right of initiative with all Member States and her contribution to the Council's decision is dependent entirely upon the willingness of the latter to accept her proposals. Her position as permanent Chair of the Foreign Affairs Council, however, may place her in a strategic position to steer the Council in the direction she wishes. There is, however, one case where the High Representative's right of initiative is exclusive: it is his proposal which triggers the process of the appointment of a special representative by the Council in relation to a particular policy issue and it is under his authority that such representatives act.

Secondly, the High Representative enjoys 'executive' powers, as she is entrusted with the implementation and conduct of the CFSP. She carries out the policy as mandated by the Council, whose decisions, along with those of the European Council, she is responsible for implementing using national and Union resources.<sup>80</sup> An important aspect of the job is to be involved in the ways in which Member States choose to discharge their duties under Title V TEU. The High Representative coordinates with the Ministers for Foreign Affairs of the Member States within the Council in relation to a common approach adopted by the latter,<sup>81</sup> and is responsible for the organization of the coordination of Member States action in international organizations and at international conferences.<sup>82</sup> She is also kept informed of any matter of common interest by Member States

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<sup>75</sup> The Treaty uses 'he' throughout in relation to post holders.

<sup>76</sup> Art. 30(1) TEU. This is a right which he shares with any Member State. This right is also set out in the context of CSDP (Art. 42(4) TEU).

<sup>77</sup> Art. 30(2) TEU.

<sup>78</sup> Art. 31(2) subpara. 2 TEU.

<sup>79</sup> See Art. 17(2) TEU. Under Art. 294(9) TFEU, the Commission's negative opinion on proposals by the European Parliament in the context of the ordinary legislative procedure may be bypassed by the Council only unanimously.

<sup>80</sup> Art. 26(3) TEU.

<sup>81</sup> Art. 32 TEU.

<sup>82</sup> Art. 34(1) TEU.

represented in international organizations or international conferences where not all Member States participate.<sup>83</sup>

Thirdly, the High Representative is responsible for the international representation of the Union in CFSP matters. She carries out political dialogue with third countries and international organizations on the Union's behalf and expresses the Union's position in international organizations and at international conferences.<sup>84</sup> In this role, the High Representative relies on and is assisted by the EU delegations in third countries and international organisations which 'represent the Union' under Article 221(1) TFEU. Furthermore, in cases where the EU has defined a position on a subject to be discussed at the United Nations Security Council, the Member States which sit on it must request that the High Representative be invited to present the Union's position.<sup>85</sup>

In discharging the responsibilities outlined above, the High Representative is assisted by the European External Action Service (EEAS),<sup>86</sup> which is examined below in this section.

Crucially, the High Representative is mandated with monitoring the application of the principles which constitute a *conditio sine qua non* for the Union's foreign and security policy. She is responsible for ensuring that the Member States comply with their duties under Title V TEU, mainly 'to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity' and 'to refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations'.<sup>87</sup> She is also responsible for ensuring 'the unity, consistency, and effectiveness of action by the Union'.<sup>88</sup> In relation to both of these, she shares his responsibilities with the Council.

The introduction of the post of High Representative was heralded as an innovation central to the effectiveness of the EU foreign policy. A former Commissioner, Günter Verheugen, referring to the post of Foreign Minister, which had been provided for by the Constitutional Treaty, argued that its holder 'may not yet provide the proverbial single telephone number for European foreign policy, but the office is exceedingly powerful ... The position is so strong that individual Member States will find it very difficult to resist the pressure'.<sup>89</sup>

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<sup>83</sup> Art. 34(2) TEU, which also refers specifically to Member States which participate in the UN Security Council.

<sup>84</sup> Art. 27(2) TEU.

<sup>85</sup> Art. 34(2) third subpara. TEU.

<sup>86</sup> Art. 27(3) TEU.

<sup>87</sup> Art. 24(3) TEU.

<sup>88</sup> Art. 26(2) subpara (2) TEU.

<sup>89</sup> Mentioned in J Rogers, 'From "Civilian Power" to "Global Power": Explicating the European Union's "Grand Strategy" Through the Articulation of Discourse Theory', (2009) 47 JCMS 831 at 854.

The influence resulting from the chairmanship of the Foreign Affairs Council is also an important element in policy formation. It was in part the need for the personification of the Union's international role which led to the introduction of the new post and the enhancement of its powers. As for the various institutional hats of the High Representative, they were viewed as contributing to enhancing the coherence of the Union's actions. In the words of the then British Foreign Secretary David Miliband, 'the double-hatting, or the merger of the two posts into a single post, is a worthwhile reform ... two people doing one job is not a very sensible way of proceeding. [The new post is] therefore [...] a sensible rationalisation'.<sup>90</sup> The expectations from the introduction of the new post were high.

This innovation does appear to clarify the somewhat opaque institutional and legal framework of CFSP: it seeks to bring together different strands of EU external relations, to define their common threads, to streamline the process of policy-shaping and to bring clarity to the international representation of the Union. The extent, however, to which the High Representative could contribute to substantive, policy-oriented changes aiming to render the different strands of the Union's foreign policy into a cohesive whole is subject to factors extraneous to the design of the post itself.

In fact, the primary rules governing the function of the High Representative are somewhat opaque about a number of important issues. While, for instance, construing the High Representative's mandate in broad terms, there is very little in Title V TEU about its exact scope. In practical terms, this is determined on the basis of various considerations, not least practical (the portfolio of the High Representative must be manageable by one holder of the post), and political (the understanding of the Member States and the President of the Commission). The latter factors are in themselves subject to continuous redefinition, as they reflect shifts in political power in both the EU institutions and the Member States. Another significant factor is also the personality of the post holder: a dynamic, energetic, and independent-minded High Representative would gradually render the post a focal point for the overall EU external action, whereas a timid and cautious one would contribute to its narrow construction and, over time, its diminishing stature. In August 2014, while negotiations for the appointment of a new High Representative were under way, the *Financial Times* published an editorial in which they urged the EU leaders to appoint a heavy hitter who would bolster the Union's international role at a time of considerable political instability in Europe's neighbourhood.<sup>91</sup> All in all, the legal provisions setting out this innovation leave its construction subject to inherently indeterminate factors to be settled by political agreement and by practice.

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<sup>90</sup> UK House of Commons Select Committee on Foreign Affairs, (2007–2008) Third Report, *Foreign Policy Aspects of the Lisbon Treaty*, Question 506.

<sup>91</sup> 'Europe's Next Foreign Policy Chief', *The Financial Times*, 28 August 2014, p8.

Another issue which is not settled in primary law is related to the different institutional affiliations of the High Representative. Again, the extent to which these would be held effectively is bound to be determined on the ground and in light of ostensibly practical considerations, not least the personality of the relevant post holders. In this respect, one notes the increasing number of joint initiatives undertaken by the Commission and the High Representative.<sup>92</sup>

In relation, in particular, to the international representation of the EU in the field of the CSDP, the High Representative shares the stage with the President of the European Council. Even though the latter should only exercise his role 'at his level' and 'without prejudice' to the role of the High Representative their delimitation, their delimitation is bound to be subject to a range of mainly political and practical considerations.<sup>93</sup> Indeed, prior to the appointment of the first President of the European Council, a protracted debate took place as to the type of job which the Member States wanted. The then French President Sarkozy stated that 'there are two different theories out there: should we choose a strong and charismatic president, or a president who facilitates the search for a consensus position, and who organises the work of the Council?'.<sup>94</sup>

Indeed, the wording of Article 15(6) TEU suggests that the international representation of the Union in the CFSP is still not envisaged to be the responsibility of just one actor. Therefore, far from endowing the EU's external action with clarity and ensuring its coherence, the responsibilities of the post of High Representative as set out in the Treaty on the European Union are to a large extent left to be determined as a matter of practice by its holder and the various actors with whom the post holder interacts and competes for power and influence. The latter should not be underestimated: the choice of person for each post is bound to have an impact on the effectiveness of the other, and the relationship of their holders would have profound implications for the character of both posts.<sup>95</sup> It may further be noted that pursuant to Article 15 (2) TEU the High Representative participates in the work of the European Council. While it appears to suggest that the High Representative will work hand in hand with its President, it nonetheless highlights the issue of delimitation of the two roles

In other words, it is their ability and willingness to delineate their role in the area of foreign policy which would assess the genuine contribution of the post to the effectiveness and coherence of EU foreign policy. Viewed from this angle,

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<sup>92</sup> See, for instance, JOIN (2015) 50 final *Review of the European Neighbourhood Policy* (Brussels, 18 November 2015).

<sup>93</sup> In addition, the Declaration 6 on Articles 15(5) and (6), 17(6) and (7), and 18 TEU provides that, in the process of choosing the holders of the posts of the European Council President, the Commission President and the High Representative, due account should be taken of the need to respect the geographical and demographic diversity of the Union and its Member States.

<sup>94</sup> Interview in *Le Figaro*, 15 October 2009.

<sup>95</sup> '[I]f the president is a big-hitter whose name opens doors in Beijing and Washington, he will surely overshadow his rival': *The Economist*, 10 October 2009, p at 56.



primary law merely sets out the legal framework in broad terms within which the political actors are expected to put flesh on an arrangement, which would reflect their understanding of managing foreign policy.

As if the uncertainty and the scope for inter-institutional wrangling are not enough, there is also a third actor who may compete for a role, namely the Commission and its President. Article 17(1) TEU provides that, '[w]ith the exception of the common foreign and security policy, and other cases provided for in the Treaties, the Commission shall ensure the Union's external representation'. As the dividing line between the CFSP and other policies has become increasingly blurred, a dynamic and ambitious Commission President may find it difficult to resist turf wars with his Vice President, double-hatted as High Representative, whose allegiances also lie with the Council. Furthermore, it must be stressed that the rotating Presidency continues to chair all Council formations, other than the Foreign Affairs Council, which is chaired by the High Representative, and as well the Council Working Groups not dealing with CFSP matters, i.e., also those dealing with external policies. In practice, therefore, the Presidency retains an important influence on external policy-making.

All in all, it does not necessarily follow from the existence of the post of High Representative that the Union would speak with a single voice on the international scene, nor does it follow that that voice would be sufficiently influential on the international stage. Menon wonders '[w]ho really believes that particularly the larger Member States would call this individual prior to dealing with Washington or Beijing?'.<sup>96</sup> In this vein, it is telling that during the crisis in Ukraine following the Russian annexation of Crimea and its intervention in eastern Ukraine, the Union's foreign policy response was led and articulated decidedly by the national governments rather than the High Representative.

The relationship between the High Representative and the other actors involved in the Union's external relations, with all the uncertainty and problems to which the opacity of the relevant Treaty provisions give rise, is essentially dynamic in nature. The balance of powers established by the appointment of their first holders by the European Council is far from static: the performance of the relevant actors, the changing dynamics in political power in Europe, the direction of the Union, and international geopolitical developments, may all be reviewed and assessed in ways which may entail a different institutional constellation in the governance of the Union's foreign affairs. All in all, however, it is practice, rather than law, that determines both the direction and impact of the role of the High Representative - and the above analysis suggests that this is what the relevant provisions of the Treaties envisage.

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<sup>96</sup> A Menon, *Europe – The State of the Union* (London: Atlantic Books, 2008) 195.

The first holder of the post of High Representative was Baroness Catherine Ashton.<sup>97</sup> Prior to her appointment, she had been Trade Commissioner for a year and had started her political career in the United Kingdom as the Head of a regional Health Authority. Her lack of experience in international affairs and previous low profile made her appointment somewhat underwhelming. The public horse trading between the Member States and the European Parliament which preceded her appointment did not particularly help her profile. During her tenure, and in particular in its first couple of years, Baroness Ashton was attacked over what was perceived as lack of enthusiasm and a low profile. She also argued with national governments about her proposal for an increase in the budget of the EEAS for 2012.<sup>98</sup> Her performance illustrated the point made above in this analysis about the mark which the first incumbent of the High Representative was effectively invited to make on the post. For instance, Baroness Ashton, who was particularly interested in issues of non-proliferation, was active in representing the Union as a leading interlocutor during the various phases of the negotiations with the West on the country's nuclear capabilities. Her role was significant in leading and co-ordinating the final round of negotiations. She was also active in promoting dialogue between Serbia and Kosovo and brokering a deal in 2013 which normalised their relations. In contrast, she did not exhibit notable enthusiasm for security and defence policy and her overall performance was somewhat underwhelming

A proper assessment of the record of the first High Representative should take into account the heavy task of setting up the European External Action Service and its impact on her effort to, effectively, define her job. There is, however, a clear limit not only to what any incumbent may bring to the role, but also to what the role itself may add to the Union's international stature. A case in point is the conflict between Ukraine and Russia that started in 2013. The role of the High Representative was marginal at best and it was for individual Member States to intervene and seek to broker a deal.<sup>99</sup> Whilst political realists may not find this state of affairs all that surprising, it is nonetheless noteworthy if viewed against the high expectations that preceded the Lisbon reforms. Let us recall, for instance, the statement mentioned in the Introduction to this Report by the then French President Sarkozy in the midst of the Georgia-Russia conflict in 2008. He had argued that, had the Lisbon Treaty been in force, the Union would have had the institutions and tools which would have enabled it to act decisively and exert its influence.<sup>100</sup> The Lisbon innovations, however, did not have an impact on the politics of tackling the Russia-Ukraine crisis after 2013.

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<sup>97</sup> European Council Dec. 2009/880/EU [2009] OJ L 315/49.

<sup>98</sup> This was described by the UK Minister for Europe David Lidington as 'somewhat ludicrous': *Financial Times*, 24 May 2011, p8at 8.

<sup>99</sup> See F Hoffmeister, 'Of Presidents, High Representatives and European Commissioners – The External Representation of the European Union seven years after Lisbon' (forthcoming).

<sup>100</sup> *Le Figaro*, 18 August 2008.

In practical terms, it was not the absence of legal reforms that prevented the Union from emerging as a central player after all.

In August 2014, Federica Mogherini was appointed by the European Council as the Union's second High Representative.<sup>101</sup> Whilst more familiar with foreign policy at the time of her appointment than her predecessor, she had been the Italian Foreign Affairs Minister for only eight months. She appears to place more emphasis on her role as Vice President of the Commission and has reactivated the group of Commissioners responsible for external policies. This constitutes a shift of focus compared to the work of her predecessor. As such, it provides yet another concrete illustration of the dynamic character of her role and the leeway she is granted under the Treaties to define it.

A forum in relation to which there has been particular focus on the representation of the EU and, therefore, the role of the High Representative, is the United Nations. Following the entry into force of the Lisbon Treaty, the EU made efforts to raise its profile. Following protracted negotiations, the United Nations General Assembly adopted Resolution 65/276 on May 2011.<sup>102</sup> This provides for enhanced rights, including the right to be inscribed on the list of speakers along with the representatives of major groups, and the right to have its communications circulated directly as documents of the UN General Assembly. The EU may also present proposals and amendments, albeit 'as agreed by the State members of the European Union' which may be put to a vote only at the request of a Member State.<sup>103</sup>

The Union's upgraded status did not provide an answer to all the problems with the effectiveness of the EU's international representation.<sup>104</sup> These remained considerable. A case in point is illustrated by the following question: in whose name the High Representative would speak and to what extent could Member States speak in addition to the EU. The United Kingdom, for instance, feels strongly that Member States should protect their speaking rights in areas where they retain competence. Five months following the adoption of UNGA Resolution 65/276, the Council adopted a document entitled 'EU Statements in multilateral organisations – General Arrangements'.<sup>105</sup> It set out certain principles and practical guidelines which aimed to reach a compromise between an active

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<sup>101</sup> European Council Decision 2014/639/EU of 30 August 2014 appointing the High Representative of the Union for Foreign Affairs and Security Policy [2014] OJ L 262/6.

<sup>102</sup> UNGA A/RES/65/276 (2011).

<sup>103</sup> *Ibid.*, Annex. Art. 1(d).

<sup>104</sup> For an early assessment of the Resolution, see P Serrano de Haro, 'Participation of the EU in the work of the UN: General Assembly Resolution 65/276', (2012) CLEER Working Paper 4. For its implications for the EU in the context of the wider UN context, see J Wouters, A.-L. Chane and J. Odermatt, 'Improving the EU Status in the UN and the UN System: an Objective Without a Strategy?' in C Kaddous (ed.), *The European Union in International Organisations and Global Governance* (Hart Publishing, 2016) 45.

<sup>105</sup> 15901/11 (Brussels, 24 October 2011).

EU and the right of Member States to make their presence felt in international organisations. These arrangements are based on the principle of linking the right to make a statement with the existence of competence: 'the EU can only make a statement in those cases where it is competent and there is a position which has been agreed in accordance with the relevant Treaty provisions'. The rights of Member States are also affirmed, if not enhanced, by a degree of vagueness which is present in the relevant principles: 'Member States agree on a case by case basis whether and how to co-ordinate and be represented externally' and 'may complement statements made on behalf of the EU whilst respecting the principle of sincere cooperation'.

The analysis so far has highlighted three main points. First, the effective and coherent international representation of the EU has been largely dependent upon internal factors related both to the Union's institutional actors and the Member States. Second, the legal rules and procedures governing the institutional infrastructure responsible for international representation are limited in their impact, vague in their implications and leave considerable scope for the incumbents of the relevant posts to define their role. Third, pragmatic considerations the focus of which may shift over time are central to the functioning of the institutions and actors which are responsible for the conduct of the CFSP. These points will also emerge from the analysis of the EEAS.

### 7.3 The European External Action Service

The establishment of the European External Action Service (EEAS) was viewed at the time as 'one of the most significant changes introduced by the Treaty of Lisbon'.<sup>106</sup> Aiming to assist the High Representative by working in cooperation with the diplomatic services of the Member States, the EEAS consists of Commission and Council officials, as well as diplomats seconded from the Member States.<sup>107</sup> The introduction of the EEAS was not uncontroversial – in the United Kingdom, for instance, the then Conservative Shadow Foreign Secretary William Hague (subsequently Foreign Secretary) saw it as yet another illustration of 'a power grab by the EU'.<sup>108</sup> In some circles, the establishment of the EEAS was vilified as likely to reduce national embassies to irrelevance and foreshadow their closure.<sup>109</sup> In order to dispel such scepticism, the establishment of the EEAS was mentioned in Declaration 13 on the common foreign and security policy as one of the developments which 'do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations'.

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<sup>106</sup> Council Conclusions of 26 April 2010 (8967/10), at 8.

<sup>107</sup> Art. 27(3) TEU.

<sup>108</sup> *The Daily Telegraph*, 3 May 2008.

<sup>109</sup> See, for instance, the debate at the House of Lords on 30 April 2009: HL Deb, 30 April 2009, c326 *et seq.*

Introducing the EEAS is an eminently sensible innovation. Its benefits may be both tangible (to provide a focal point for the EU as an international actor, to facilitate the gathering of information, streamline the conduct of different external activities, and enhance coordination between both the EU services and national administrations and coherence between the relevant policies)<sup>110</sup> and intangible (to foster a culture of cooperation between officials from Member States and the EU institutions and establish a framework within which a common language will be gradually developed and shared).

However, not for the first time, the Lisbon Treaty was silent on the specifics about the Service's mandate and function besides 'assisting' the High Representative in her work: the scope of the policies it oversees, the definition of the lines of authority between the Union institutions involved, and its precise role in the conduct of the Union's foreign affairs were all left for subsequent resolution among the Member States and institutions. Against this blank canvas, the organization and management of the EEAS provided the playground for the kind of inter-institutional disputes which its establishment had purported to address.

Just how broad the scope for the EU's actors and the Member States to shape the EEAS was apparent from the early and intensive work in which they engaged even before the Lisbon Treaty was ratified.<sup>111</sup> In fact, it had already started, following the conclusion of the Constitutional Treaty. After the Commission established a steering group, High Representative Solana and the Commission President presented a joint progress report.<sup>112</sup> The European Parliament asked for clarification of the Service's function repeatedly, suggesting that it be part of the Commission, and that joint training programmes be organized.<sup>113</sup> In addition, various non-papers were circulated by different countries expressing different views on the establishment and role of the service: the BENELUX countries suggested it should have a separate legal personality, a broad scope for its activities, funding from the EU budget, and a *sui generis* nature which would ensure its association with both the Council and the Commission without being part of either;<sup>114</sup> Poland argued for the status of an executive agency, half the personnel of which would come from Member States, and which, at some point would even become a common visa application centre.<sup>115</sup>

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<sup>110</sup> See S Duke, 'The European External Action Service: Antidote against Incoherence?', (2012) 17 EFA Rev 45.

<sup>111</sup> This was provided for in Declaration 15 on Article 27 TEU which provide that, 'as soon as the Treaty of Lisbon is signed, the Secretary-General of the Council, High Representative for the common foreign and security policy, the Commission and the Member States should begin preparatory work on the European External Action Service'.

<sup>112</sup> Doc 9956/05, CAB 24, RELEX 304 of 9 June 9, 2005.

<sup>113</sup> See, for instance, P6\_TA(2005)0205 [2006] OJ C 117E/232.

<sup>114</sup> The document, entitled 'Mise en œuvre du traité de Lisbonne' was probably leaked and became available online (see, for instance, <http://bruxelles2.over-blog.com/article-37152063.html>).

<sup>115</sup> The two page-long paper was dated 5 October 2009 (<http://euobserver.com/9/28851>) (last accessed on 25 October 2012). See also *Financial Times*, 9 October 2009, at 8.

Two particularly controversial issues arose at a later stage of the negotiations. The first was about development cooperation and the various financing instruments which it covers, such as the Development Cooperation Instrument and the European Development Fund: should it be integrated in the tasks entrusted to the EEAS, or should it remain a distinct and autonomous policy within the Union's external action? The Commission was hostile to the former, as it felt that it would undermine its powers as set out in Article 17(1) TEU: these include the Union's external representation, with the exception of the common foreign and security policy, the execution of the budget and the management of programmes, and the exercise of coordinating executive and management functions as laid down in the Treaties. These are sensitive matters: their resolution touches upon issues of efficiency and effectiveness, practical considerations (the development budget is very considerable), as well as institutional powers deeply entrenched through successive rounds of Treaty amendments. The proposal made by the High Representative in March 2010 suggested the integration of development policy in the functions of the EEAS, and turned out to be controversial.<sup>116</sup> Most non-governmental organizations viewed it as a Trojan horse, which would undermine both the integrity of development policy and the powers of the Commission.<sup>117</sup> The Parliament, on the other hand, was keen not only to avoid the contamination of the Community (now Union) method, which governs development cooperation, by a new autonomous body belonging neither to the Council nor the Commission, but was also keen to increase its leverage in the conduct of the EU's external action by intervening directly in the funding of the Service and the appointment of Heads of Delegation.

The input of the Parliament turned out to be the second controversial issue, as the only directly elected Union institution was keen to underline the political accountability of EEAS and ensure that the latter would not be diluted by the management structure of the Service. One of the issues about which it felt strongly was to ensure that the person deputized for the High Representative before the Parliament would be politically accountable, and not an official. In order to appreciate its role in the establishment of the EEAS, it must be stressed that, while required only to be consulted on the establishment of the Service,<sup>118</sup> the Parliament was responsible for giving its consent to the amendments of the Staff and Financial Regulations, which were necessary for the EEAS to become operational. Therefore, not for the first time following the entry into force of the Lisbon Treaty, the Parliament was in a position to flex its muscles.<sup>119</sup>

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<sup>116</sup> 8029/10 (Brussels, 25 March 2010).

<sup>117</sup> See, for instance the press statement of 26 April 2010 issued by CIDSE, Oxfam International, APRODEV, CONCORD, EUROSTEP, and One International ([www.concordeurope.org/Files/media/0\\_internetdocumentsENG/5\\_Press/1\\_Press\\_releases/5\\_Press\\_releases\\_2010/MEDIA-STATEMENT-on-EEAS--26-04-2010---EN.pdf](http://www.concordeurope.org/Files/media/0_internetdocumentsENG/5_Press/1_Press_releases/5_Press_releases_2010/MEDIA-STATEMENT-on-EEAS--26-04-2010---EN.pdf)).

<sup>118</sup> Art. 27(3) TEU.

<sup>119</sup> See its rejection of the EU-US SWIFT Agreement in February 2010, as well as its attack against the Anti-Counterfeiting Trade Agreement (ACTA), which led the Commission to refer its legality to the Court of Justice under Art. 218(11) TFEU in February 2012 (*Opinion 1/12*, pending). ACTA was rejected nonetheless by the Parliament on 4 July 2012.

Following intense inter-institutional haggling, the final outcome, set out in Decision 2010/427/EU establishing the organization and functioning of EEAS,<sup>120</sup> follows the logic of integrating development within the EEAS functions. However, it does so through a very delicate and complex balancing exercise. The High Representative is responsible for coordination between all the EU financial instruments, but the management of these programmes remains under the responsibility of the Commission,<sup>121</sup> and the EEAS shall ‘contribute to the programming and management cycle’ of these instruments, and shall be responsible for ‘preparing Commission decisions on the strategic, multi-annual steps within the programming cycle’.<sup>122</sup> All proposals are to be prepared following Commission procedures, and the role of the Commissioner responsible for development is pronounced; for instance, in relation to the European Development Fund and the Development Cooperation Instrument in particular, that is, the programmes involving the majority of the development policy budget, both the EEAS and the Commission are to make any proposals under the supervision of the Development Commissioner.<sup>123</sup>

Furthermore, the High Representative adopted a Declaration on political accountability in which she sets out the practicalities of her interactions with the Parliament.<sup>124</sup> These include an exchange of views with newly appointed Heads of Delegations to countries and organizations which the Parliament considers strategically important (while the latter had argued originally, and rather unrealistically, for exchanges with all Heads of Delegations). It also provides for the person who would deputize for the High Representative before the Parliament, namely a Commissioner or a minister from the rotating Presidency (or the trio Presidencies) depending on the subject matter of discussion.

Couched in vague language and based on complex arrangements, this compromise seeks to strike a balance between competing claims to influence by interacting Union institutions.<sup>125</sup> While understandable for practical reasons and political expediency, this compromise cannot hide the fact that its success in practice depends on many variables, including the willingness of the Union institutions to take a leap of faith and cooperate in order to make the policies in which the EEAS participates truly coherent, and the personality of the relevant post holders and their ability to navigate their way through the compromises enshrined in Decision 2010/427/EU. Another consideration to be taken into account is the response of diplomats of Member States. Both Article 27(3) TEU

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<sup>120</sup> [2010] OJ L 201/30.

<sup>121</sup> [2010] OJ L 201/30, Art. 9(1) and (2).

<sup>122</sup> [2010] OJ L 201/30, Art. 9(3).

<sup>123</sup> [2010] OJ L 201/30, Art. (4).

<sup>124</sup> [2010] OJ C 210/1, and [2010] OJ C 217/12.

<sup>125</sup> See S Duke, ‘A difficult birth: the early days of the European External Action Service’ in P Koutrakos (ed.), *The European Union’s External Relations a year after Lisbon*, 2011/3 CLEER Working Papers 69.



and the Decision refer to the cooperation of the EEAS with the diplomatic services of the Member States. How committed would the missions of the big Member States be to sharing information, given that their foreign policy stature depends on it, and that the Lisbon provisions on Common Foreign and Security Policy enable them to retain their foreign policy role? Was it not likely that the big Member States would view the new Service as a potential rival, whereas the small Member States would see themselves as overshadowed by the big ones, given the influence of the latter in shaping foreign policy?<sup>126</sup>

The effective functioning of EEAS is a process which is bound to take time and constant adjustment.<sup>127</sup> However, the legal and policy issues which its functioning raises within the multilayered system of foreign affairs set out in the Union's primary rules have been formidable.<sup>128</sup> Following the first two years of its operation, and in accordance with Council Decision 2010/470/EU,<sup>129</sup> Baroness Ashton carried out a review of the Service and, in July 2013, made a number of short and medium term recommendations, some of which were a matter of administrative practice while others required a broader amendment of existing legal rules.<sup>130</sup>

#### 7.4. The European Parliament

Whilst its role in EU external relations in general has been strengthened considerably (and used spectacularly) after Lisbon,<sup>131</sup> the European Parliament has very limited input into CFSP. Article 36 TEU provides for its role as follows:

The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament.

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<sup>126</sup> See M Kluth and J Pilegaard, 'The Making of the EU's External Action Service: A Neorealist Interpretation', (2012) 17 EFA Rev 303.

<sup>127</sup> See S Blockmans, *The European External Action Service on year on: First signs of strengths and weaknesses*, CLEER Working Papers 2012/12 at 37.

<sup>128</sup> For a negative early assessment, see A E Juncos and K Pomorska, 'Manufacturing *Esprit de Corps*: The Case of the European External Action Service', (2014) 52 JCMS 302.

<sup>129</sup> Art. 13(3) of Council Dec. 2010/428/EU.

<sup>130</sup> See EEAS Review, July 2013 ([http://eeas.europa.eu/library/publications/2013/3/2013\\_eeas\\_review\\_en.pdf](http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf)). For its implementation, see HR(2015) 170 Report of the High Representative of 22 December 2015 to the Council on implementing the EEAS Review. See also S Blockmans and C Hillion (eds), *EEAS 2.0* (Stockholm: SIEPS, 2013) (<http://www.sieps.se/sites/default/files/EEAS%20%20%20.pdf>) and S Duke, 'Reflections on the EEAS Review', (2014) 19 EFA Rev 23.

<sup>131</sup> See Koutrakos, *EU International Relations Law* 2<sup>nd</sup> ed (2015) at 149 *et seq.*



The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.

It follows from this that the Parliament does not have an automatic right to consultation on all CFSP measures initiated by the High Representative and adopted by the Council. This limited formal input has to be viewed in light of the assertive approach that the Parliament adopted in the process of the establishment of the EEAS<sup>132</sup> as illustrated by the Declaration by the High Representative on political accountability annexed to Council Decision 2010/427/EU.<sup>132</sup> Among others, these include an exchange of views prior to the adoption of mandates and strategies, enhanced and more regular briefings about missions funded by the EU budget and the need for beefed-up arrangements for access to and handling of confidential information, not least related to CSDP missions.

As far as CFSP international agreements are concerned, the right of the Parliament to be ‘immediately and fully informed at all stages of the procedure’ pursuant to Article 218(10) TFEU is also applicable. This will be analysed in Section 9 below.

The limited powers bestowed on it in the CFSP area notwithstanding, the Parliament has one strong instrument through which to exercise pressure in the area and ensure that its views are heard by the decision-making institutions. This is its role in the budget of the EU and, therefore, the financing of CFSP (and CSDP) activities. It is no coincidence that that aspect should have a prominent position in the Declaration by the High Representative on Political Accountability.

## 7.5 The Council and the Commission

The role of the European Commission in the CFSP, and its stark contrast to its rights in the other areas of EU activities, illustrate further the distinct nature of this policy within the Union’s constitutional architecture. On the one hand, it is involved in the functioning of EEAS, as it contributes one third of the latter’s personnel.<sup>133</sup> On the other hand, it is referred to in Article 30 TEU, according to which the High Representative may refer any CFSP question to the Council either on his own or ‘with the Commission’s support’. Other than these, Title V TEU provides for no direct involvement of the European Commission in the shaping and conduct of the CFSP.

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<sup>132</sup> [2010] OJ C 210/1 (and corrigenda in [2010] OJ C 217/12).

<sup>133</sup> Under Art. 27(3) TEU, the Commission’s consent was also required for the Council measure establishing the EEAS.

However, to assume from the paucity of references in primary law that the role of the Commission is negligible would be tantamount to ignoring the realities of foreign policy in the Union's complex constitutional order. For instance, the Commission is responsible for the implementation of the Union budget.<sup>134</sup> This enables it, along with the Parliament, to have an impact which would not be immediately apparent from the wording of CFSP provisions.

Most importantly, however, the indirect impact of the Commission is felt in the light of its prominent role in policy areas such as development cooperation, the conduct of which has become increasingly central to CFSP and CSDP activities over the years. Given the gradual widening of the notion of security and the emergence of substantive links between it and other fields of external action, the role of the Commission in the latter is bound to have an impact on the conduct of the Union's foreign policy.<sup>135</sup>

As for the Council, it is the main decision-making actor in the area. Along with the European Council, it is entrusted with the definition and implementation of the CFSP.<sup>136</sup> Article 26(2) TEU provides that it 'shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council'.

In addition, and along with the High Representative, it is responsible for ensuring 'the unity, consistency and effectiveness of action by the Union'.<sup>137</sup> The significance of this role may not be overstated. Given that foreign and security policy touch upon the core of national sovereignty, the contribution of the institution which expresses the collective interests of the Member States is essential to both the effectiveness and consistency of what the Union does in the world.

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<sup>134</sup> See Art. 137 TFEU.

<sup>135</sup> The links between the different strands of EU external actions are explored in Koutrakos, n3 above, Ch. 14.

<sup>136</sup> Art. 24(1) TEU.

<sup>137</sup> Art. 26(2) subpara. 2 TEU.

## 8 Decision-making

In the area of CFSP, the rule of unanimity prevails in accordance with Article 31(1) TEU. However, Article 31(1)-(3) TEU also provides for certain exceptions. These may be divided into three cases. The first is about implementation: a Council measure may be adopted by a qualified majority if it is related to another measure which has already been agreed upon unanimously.<sup>138</sup> To that effect, the following situations are envisaged: a decision defining a Union action or position on the basis of a European Council decision relating to the EU's strategic interests and objectives, a decision defining a Union action or position pursuant to a proposal by the High Representative, which has been submitted upon a specific request from the European Council, and a decision implementing another decision defining a Union action or position.

The second exception is about special representatives who are appointed by qualified majority.<sup>139</sup>

The third exception is set out in Article 31(1) TEU, which provides for the possibility of 'constructive abstention': any Member State may abstain, and may even qualify its abstention by making a formal declaration, the effect of which would be to exempt the State in question from the requirement to apply the decision, while accepting its binding effects on the Union.<sup>140</sup> However, if a large number of Member States make such a declaration (one third of the Member States representing one third of the Union population), the decision may not be adopted. There has been one case of abstention so far, namely by Cyprus in relation to the adoption of the CSDP measure setting up the EU mission in Kosovo in 2008.<sup>141</sup>

Whilst the Treaty provides for the above exceptions to the principle of unanimity, there is also an 'emergency brake' on their application: in cases where a Member State relies upon 'vital and stated reasons of national policy' and expresses its intention to oppose the adoption of a decision under that procedure, a vote

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<sup>138</sup> This is not a novelty introduced at Lisbon: the Maastricht Treaty which established the EU enabled the Council to define the aspects of a joint action, which could be implemented by measures adopted by a qualified majority (Art. J.3(2) TEU ), and permitted measures implementing common strategies to be adopted by qualified majority in the Council.

<sup>139</sup> Art. 31(2) TEU with reference to Art. 33 TEU.

<sup>140</sup> Art. 31(1) TEU also provides that '[i]n a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision, and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted'.

<sup>141</sup> Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L 42/92.

shall not be taken.<sup>142</sup> This provision originates in the Treaty of Amsterdam<sup>143</sup> and the Treaty of Nice.<sup>144</sup> However, the Lisbon provision differs from the previous Treaties in two respects. First, by requiring reliance upon ‘vital and stated’, rather than ‘important and stated’, reasons of national policy, it appears to set the bar higher for the use of the emergency brake. Secondly, it provides a more elaborate procedure for the ensuing impasse to be addressed: the High Representative is to search for a solution acceptable to the Member State involved and in close consultation with it; in case this does not prove to be fruitful, the Council may decide by qualified majority to refer the matter to the European Council for a unanimous decision.

Article 31(2) subparagraph 2 TEU clearly suggests that a derogation from the qualified majority exception should be construed narrowly, and that every effort should be made for a mutually agreeable solution to be found. However, neither the tighter wording nor the procedural framework set out therein can prevent a Member State from abusing it. The foreign policy nature of the decisions involved, the inherently exceptional circumstances in which a State would deem reliance upon it politically convenient, and the domestic political reflexes, which the loss of veto in foreign policy invariably provokes, all suggest that no effective mechanism for regulating the use of an emergency brake is set out in the Treaty. And no such mechanism may be set out in primary law, other than a political framework within which the institutional actors of the Union may reach a compromise. Viewed from this angle, the wording of Article 31(2) subparagraph 2 TEU is significant in terms of semantics, rather than substance: it conveys the message that the exceptional provisions for qualified majority voting should not be riddled with further unnecessary exceptions.

In a step further towards the use of qualified majority, the Lisbon Treaty views the above exceptions from the unanimity rule as non-exhaustive: under Article 31(3) TEU, the European Council may decide that the Council shall act by a qualified majority in cases other than those referred to in Article 31(2) TEU. However, there is a serious caveat, as the European Council’s decision is to be adopted unanimously. In other words, this provision illustrates that, whilst it is possible for the Member States to increase the pace of developments in the CFSP sphere, it is entirely for them to decide where to do so, and each one of them may block this path.

The exceptions to the unanimity rule set out in this section are not relevant to the CSDP. In accordance with Article 31(4) TEU, the exceptions regarding implementing measures, the appointment of special representatives, and the possibility of extension of qualified majority decision-making by the European

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<sup>142</sup> Art. 31(2) subpara. 2 TEU.

<sup>143</sup> Art. J.3(2) TEU (Amsterdam).

<sup>144</sup> Art. 23(2) TEU (Nice).

Council ‘shall not apply to decisions having military or defence implications’. On the other hand, the rule about constructive abstention set out in Article 31(1) TEU does apply.

The exceptions to the principle of unanimity introduced at Lisbon are of limited significance. This is not because of the ‘emergency brake’ set out in Article 31(2) TEU. It is partly because their exercise depends on the prior adoption of a unanimous CFSP measure and partly because they are entirely consistent with the logic of the pre-existing exceptions. The prevailing role of unanimity and the limited function of qualified majority voting may be viewed as undermining the ability of the Union to act effectively and swiftly and, therefore, may be considered difficult to reconcile with one of the objectives of the Union, namely to ‘reinforc[e] the European identity and its independence in order to promote peace, security and progress in Europe and in the world’.<sup>145</sup> In this vein, it is worth pointing out that decision-making procedures are central to the pace of integration achieved in other areas of EU action. It is often recalled, for instance, that a major factor in the success of the establishment of the internal market was the introduction of qualified majority voting for the adoption of harmonising legislation by the Single European Act.<sup>146</sup>

However, while important, the decision-making rules laid down in Title V TEU ought to be placed in their proper political context. As CFSP activities are carried out in the sphere of high politics, law is only one of the factors which determine policy – and quite often, it is not even the most important factor. There is an inherent limit to what procedural rules may contribute: they may facilitate the adoption of efficient action but they cannot substitute for substantive policies in areas at the core of national sovereignty where it is notoriously difficult to attract broad agreement. Put differently, decision-making rules reflect the political realities within which the Union may choose to act and the dominant role of States in international policy-making. They also reflect the weight which the Union’s action would have if backed up by all its Member States and, in particular the big States. Procedures, however, may not substitute for policies and the effectiveness of the latter in the CFSP sphere depend entirely on the will of the Member States to render the Union an effective global player – no decision-making rule would make this happen.

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<sup>145</sup> TEU preamble, 11<sup>th</sup> recital.

<sup>146</sup> Art. 114 TFEU.

## 9 International agreements

Over the years, the Union has concluded a considerable number of international agreements in the CFSP area. Most of these fall within the scope of the CSDP.<sup>147</sup> Such agreements are concluded under Article 37 TEU which provides that the Union ‘may conclude agreements with one or more States or international organisations in areas covered by this Chapter [ie Chapter 2 entitled ‘Specific provisions on the common foreign and security policy’]’.

The process of treaty-making is governed by the rules and procedures laid down in Article 218 TFEU.<sup>148</sup> The process is initiated by a recommendation to the Council by the High Representative under Article 218(3) TFEU. Such recommendation is provided for ‘where the agreement envisaged relates exclusively or principally to the common foreign and security policy’. The Council may then ‘adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team’ (Article 218(3) TFEU).

The assessment of whether an agreement relates ‘exclusively or principally’ to the CFSP is not easy. The difficulty is illustrated with painful clarity by past experience in relation to agreements with no CFSP dimension. For instance, inter-institutional disputes about the extent to which international agreements relate to trade or environmental policy have been frequent, and the case law of the Court of Justice could be easier to follow or apply.<sup>149</sup>

In any case, the very nature of CFSP renders the application of Article 218(3) TFEU even more complex. This report referred to the broad definition of the scope of CFSP in Article 24(1) TEU as well as the implications of the list of a common set of objectives for the entire spectrum of the Union’s external action in Article 21(2) TEU. There are also other policy and legal factors which compound the difficulties of locating an international agreement firmly within the scope of CFSP for the purposes of Article 218(3) TFEU. In policy terms, the notion of security, which underpins the conduct of CFSP and CSDP is construed broadly by the EU institutions and its multifarious dimensions are linked to other EU external policies, such as development, trade, environment, energy, humanitarian aid, and organized crime.<sup>150</sup> These links are made clear in

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<sup>147</sup> See the analysis in P Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013) Ch. 7.

<sup>148</sup> Dashwood describes Art. 218 TFEU as the ‘procedural code’ of the EU’s treaty-making: A Dashwood, M Dougan, B Rodger, E Spaventa and D Wyatt, *Wyatt and Dashwood’s European Union Law* (Hart Publishing, 2011, 6<sup>th</sup> ed) at 936.

<sup>149</sup> For an analysis, see Eeckhout, n27 above at 42 *et seq* and Koutrakos, n3 above, 53 *et seq*.

<sup>150</sup> See P Koutrakos, *The EU Security and Defence Policy* (OUP, 2013) Ch. 4.

the European Security Strategy,<sup>151</sup> and also emerge in the 2008 Report on the Implementation of the European Security Strategy.<sup>152</sup> The increasingly direct interactions between security and other external policies are also acknowledged in policy documents which were adopted in order to enhance the ensuing need for coherence in decision-making and implementation, a case in point being development and humanitarian aid.<sup>153</sup> To acknowledge these interactions is to accept that, to a considerable extent, the EU external action has a distinct security dimension, and that the CFSP/CSDP is instrumental in the effective conduct of the other strands of the Union's external action.

In legal terms, the assessment of whether an agreement is related 'exclusively or principally' to the CFSP is further charged by its implications for the Union's institutions in treaty-making. On the one hand, the Council concludes CFSP-only agreements by unanimity in accordance with Article 218(8) subparagraph 2 TFEU. On the other hand, the European Parliament is not granted any formal role in the process of the negotiation and conclusion of CFSP agreements other than being 'immediately and fully informed at all stages of the procedure' pursuant to Article 218(10) TFEU. Its impact for the powers of the institutions renders the assessment of whether an agreement relates exclusively or principally to CFSP a politically charged exercise.

The above analysis suggests that the application of the provision laid down in Article 218(3) TFEU may be fraught with problems. An argument against this scepticism may be the specificity of security and defence policy. In other words, it may be argued that its broad construction notwithstanding, security and defence policy lack the degree of osmosis which characterizes trade and environment. In relation to proliferation of small arms and light weapons, for instance, the Court of Justice referred to the grant of political support for a moratorium or the collection and destruction of weapons as measures which 'fall rather within action to preserve peace and strengthen international security or to promote international cooperation, being CFSP objectives stated in [primary law]'.<sup>154</sup> This may seem to suggest that, even in light of the multifarious links between CFSP and other EU external policies and the ensuing difficulty of defining their respective scope, one would be able to recognize the objectives of the former. On the one hand, the very dispute in *ECOWAS*, and the judgment rendered by the Court of Justice, may suggest that this almost intuitive approach could be misguided. On the other hand, the more recent case-law of the Court of Justice suggests a reluctance to construe the CFSP dimension of international agreements too narrowly.

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<sup>151</sup> *A Secure Europe in a Better World – European Security Strategy* (Brussels, 12 December 2003).

<sup>152</sup> *Providing Security in a Changing World – Report on the Implementation of the European Security Strategy* (Brussels, 11 December 2008).

<sup>153</sup> See *The European Consensus on Development* [2006] OJ C 646/1, and *The European Consensus on Humanitarian Aid* [2008] OJ C 25/1.

<sup>154</sup> Case C-91/05 *Commission v Council (re: ECOWAS)* [2008] ECR I-3651, para 105.

This issue about the proper locus of a CFSP agreement has arisen in two cases, first indirectly and then directly. In Case C-658/11 *European Parliament v Council*, the Parliament challenged the conclusion of the agreement between the EU and Mauritius on the transfer of individuals suspected of piracy at sea by EU personnel to Mauritius authorities.<sup>155</sup> The agreement was concluded in the context of the anti-piracy operation Atalanta which the Union has been carrying out off the coast of Somalia as part of its Common Security and Defence Policy. Somewhat bizarrely, the Parliament did not challenge the main nature of the Agreement. It accepted that the Agreement was predominantly about CFSP, but argued that, in the light of its incidental implications for the other, non-CFSP, policies, its consent was required. The Grand Chamber of the Court rejected this argument, without questioning Article 37 TEU as the proper legal basis for the conclusion of the Agreement.

In Case C-263/14 *European Parliament v Council*, the Court was asked directly to rule on the legal basis for the conclusion of the EU-Tanzania transfer agreement. The Parliament argued that, given its implications for judicial cooperation in criminal matters and police cooperation, the agreement ought to have been adopted under the joint legal bases of Articles 37 TEU and 82 and 87 TFEU. In its judgment, the Court of Justice rejected this view.<sup>156</sup> It held that the Agreement was ‘intimately linked’ to the Union’s anti-piracy operation off the coast of Somalia (Atalanta), as it set up a mechanism which constituted ‘an essential element in the effective realisation of the objectives’ of the Operation.<sup>157</sup> In the absence of the latter, the Agreement would be devoid of purpose. Viewed from that angle, the Agreement pursued the objectives of the CSDP Operation, namely to preserve international peace and security and, therefore, fell predominantly within the scope of the CFSP. It is noteworthy that, in reaching this conclusion, the Court did not follow the line of reasoning of Advocate General Kokott (even though it reached the same outcome). Advocate General Kokott had argued that the Agreement did not regulate judicial or police cooperation within the Union because it was ‘intended solely to promote *international security* outside the territory of the Union’.<sup>158</sup>

By focusing on the links between the Agreement and the CSDP Operation in the context of which it was concluded, the Court avoided the complex task of distinguishing between international and EU security. Viewed together, the judgments in the *EU-Mauritius Agreement* and *EU-Tanzania Agreement* cases suggest a reluctance by the Court to impinge upon the CFSP policy in order to enhance other policies of the EU. Given their rather narrow subject matter and focus, it remains to be seen whether these judgments illustrate a broader approach to the post-Lisbon interactions between CFSP and other EU policies.

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<sup>155</sup> ECLI:EU:C:2014:2025.

<sup>156</sup> ECLI:EU:C:2016:435

<sup>157</sup> *Ibid*, para. 51

<sup>158</sup> ECLI:EU:C:2015:729, para. 66.



There is a procedural aspect of the negotiation and conclusion of CFSP agreements that is worth examining, namely the role of the European Parliament. Article 218 TFEU does not endow the Parliament with any formal power other than the general one set out in Article 218(10) TFEU to be ‘immediately and fully informed at all stages of the procedure’. This provision applies to all agreements concluded by the EU and has been given teeth by the Court’s recent case-law. In Case C-658/11 *European Parliament v Council*,<sup>159</sup> the Parliament argued that Article 218 (10) TFEU was violated because the decision concluding the agreement with Mauritius had been sent by the Council more than three months after its adoption and the signing of the agreement, and 17 days after their publication.

The Court concluded that the Parliament’s right had been violated. It held that the provision of Article 218(10) TFEU ‘is an expression of the democratic principles on which the European Union is founded’,<sup>160</sup> and pointed out the following:<sup>161</sup>

If the Parliament is not immediately and fully informed at all stages of the procedure in accordance with Article 218(10) TFEU, including that preceding the conclusion of the agreement, it is not in a position to exercise the right of scrutiny which the Treaties have conferred on it in relation to the CFSP or, where appropriate, to make known its views as regards, in particular, the correct legal basis for the act concerned. The infringement of that information requirement impinges, in those circumstances, on the Parliament’s performance of its duties in relation to the CFSP, and therefore constitutes an infringement of an essential procedural requirement.

The duty to inform under Article 218(1) TFEU applies to all stages that precede the conclusion of an international agreement, including the negotiation phase. This was confirmed in Case C-263/14 *European Parliament v Council*<sup>162</sup> where the Parliament was informed of the opening of the negotiations of the EU-Tanzania Transfer Agreement, but was not kept informed during the negotiations and was not provided with the text of either the agreement or the decision concluding it. The Council had also failed to inform the Parliament immediately, as nine days had passed from the adoption of the decision approving the Agreement to the notification to the Parliament.

The Court of Justice concluded that, under such circumstances, the right of the Parliament had been violated. It pointed out that, whilst the right to be informed

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<sup>159</sup> ECLI:EU:C:2014:2025.

<sup>160</sup> Case C-658/11 *European Parliament v Council*, para. 81.

<sup>161</sup> *Ibid*, para. 86.

<sup>162</sup> ECLI:EU:C:2016:435.

does not extend to stages that are part of the internal preparatory process within the Council, it does cover the intermediate results reached by the negotiation, including the texts of the draft agreement and the draft decision approved by the Council's Foreign Relations Counsellors and communicated to the Union's interlocutors.

The procedural rights of the Parliament under Article 218 (10) TFEU raise its profile in an area where it does not have formal input. The interinstitutional disputes about the scope of these rights illustrate the reluctance of the Council to engage with the Parliament in CFSP agreements. It is, for instance, staggering that the Council should have seriously argued in Case C-658/11 *EU-Mauritius Agreement*<sup>163</sup> that sending the Parliament the decision adopting an agreement three months later was reasonable, or that the publication of the text of the agreement and the Council Decision concluding it in the *Official Journal* would have sufficed. The Court suggested in Case C-263/14 *EU-Tanzania Agreement* that the word 'immediately' should not be taken literally and that, in some circumstances, it might describe information delivered after a period of a few days.<sup>164</sup> The Council, however, had failed altogether to communicate the text. Quite apart from being clearly contrary to Article 218(10) TFEU, this conduct is counterproductive because it has become abundantly clear that the Parliament is not reluctant to use the powers with which it is endowed under the Lisbon Treaty.

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<sup>163</sup> ECLI:EU:C:2014:2025.

<sup>164</sup> ECLI:EU:C:2016:435, para. 82.

# 10 Judicial review

The activities of the Union under CFSP have been traditionally excluded from the jurisdiction of the Court of Justice. Since its genesis, this set of rules has been assumed to govern an area of high politics that is not amenable to judicial review.<sup>165</sup> This assumption underpins the current constitutional arrangements too. This is expressly provided in Article 24(1) subparagraph 2 TEU, which is the provision which also points out, amongst others, the specific nature of the CFSP rules and procedures and the central role of the European Council and the Council, and rules out the adoption of legislative acts. In other words, this provision illustrates in legal terms what is different about CFSP.

However, whilst maintaining the general rule of the exclusion of CFSP measures from the jurisdiction of the Court, Article 24(1) subparagraph 2 TEU provides for the first time two exceptions: the first is the Court's 'jurisdiction to monitor compliance with Article 40 of this Treaty'; the second is 'to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union'. While the first exception existed before (Article 46 (f) TEU Amsterdam), the second is new.

The first of these exceptions is about monitoring competence. It is recalled that Article 40 TEU aims to ensure that the conduct of CFSP does not undermine the powers and procedures which govern the conduct of EU policies. Similarly, it provides that the conduct of the latter policies does not undermine the powers and procedures which govern CFSP and which are set out in Title V TEU.

The second exception is about the rights of individuals. Article 275 TFEU to which Article 24(1) TEU refers expressly, reads as follows:

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

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<sup>165</sup> See A Hinarejos, *Judicial Control in the European Union – Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford: OUP, 2009).

Whilst significant, neither of the above extensions of the jurisdiction of the Court of Justice alter fundamentally the main premise of the exclusion of CFSP from the Court's jurisdiction. As Advocate General Wathelet put it in his Opinion in *Rosneft*,<sup>166</sup>

the reason for the limitation of the Court's jurisdiction in CFSP matters brought about by the 'carve-out' provisions is that CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with implementation of the CFSP, in relation to which it is difficult to reconcile judicial review with the separation of powers.

As far as the first exception to the exclusion from the Court's jurisdiction is concerned, it merely states what would have been the case even in its absence. In other words, it is for the Court to ascertain whether an EU measure is adopted under the appropriate rules and procedures, as these are laid down in primary law. After all, even in the pre-Lisbon constitutional constellation, the delimitation between the pillars was part of the Court's jurisdiction.<sup>167</sup>

As for the second exception, whilst it extends the types of measures subject to the Court's jurisdiction, it follows the logic of the jurisdiction which the Court previously exercised in the area of economic sanctions targeting individuals when these were adopted under European Community powers pursuant to CFSP measures under Articles 60 and 301 EC. The judgment in *Rosneft* has shed some light on two issues about the scope of this exception.<sup>168</sup> The first is about the definition of restrictive measures against natural or legal persons in the meaning of Article 275 second paragraph TFEU. These are measures of an individual nature that target identified natural or legal persons, as opposed to measures that are applicable generally and the scope of which is determined by reference to objective criteria.<sup>169</sup> The second issue is about the scope of the legality review envisaged in Articles 24(1) TEU and 275 TFEU. In *Rosneft*, the Grand Chamber adopted a broad approach and held that the Court had

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<sup>166</sup> Case C-72/15 *Rosneft* ECLI:EU:C:2016:381, para. 52.

<sup>167</sup> See Case C-417/96 *Commission v. Council (re: Airport Transit Visas)* [1998] ECR I-2763, Case C-176/03 *Commission v Council (re: criminal law and environmental protection)* [2005] ECR I-7879, Joined Cases C-317/04 and C-318/04 *Parliament v Council (re: Passenger Name Record Agreement)* [2006] I-4721, Case C-440/05 *Commission v Council (criminal environmental sanctions)* [2007] ECR I-9097, Case C-403/05 *Parliament v Commission (re: border support to Philippines)* [2007] ECR I-9045, Case C-91/05 *Commission v Council (re: small arms and light weapons)* [2006] ECR I-1145.

<sup>168</sup> Case C-72/15 *Rosneft* ECLI:EU:C:2017:236.

<sup>169</sup> *Ibid*, paras 97-104. The definition of such measures is also the subject-matter of on-going litigation: Joined Cases T-735/13 and T-799/14 *Gazprom Neft OAO v Council* and Case T-160/13 *Bank Mellat v Council*. In his Opinion in *H*, Advocate General Wahl had argued that the term 'restrictive measures' should not cover all EU acts adversely affecting the interests of individuals; instead, they should refer to sanctions against individuals decided and implemented in the context of the CFSP (Case C-455/14 P *H* ECLI:EU:C:2016:212 at paras 73-81. The Court did not deal with this issue in its judgment).

jurisdiction to review the legality of CFSP decisions not only in annulment actions but also in preliminary references.<sup>170</sup>

The interpretation of the above issues pertains to the general approach to the role of the Court in EU foreign affairs. This has become one of the central issues about the law of CFSP that is still contested. In *Opinion 2/13*, the Court was distinctly reluctant to rule *in abstracto* on the limits of its jurisdiction in the area.<sup>171</sup> Instead, it has gradually laid down the principle which should govern the interpretation of its jurisdiction under Articles 24(1) TEU and 275 TFEU: as these provisions introduce a derogation from the rule of the general jurisdiction conferred on the Court under Article 19 TEU, they should be interpreted narrowly.

This interpretative principle has so far been applied in two contexts. The first is procedural. The Court has jurisdiction to ensure that a CFSP agreement has been negotiated and concluded in accordance with the procedural rules laid down in Article 218 TFEU.<sup>172</sup> It also has jurisdiction to review the legality of CFSP acts imposing restrictive measures on private and legal persons pursuant to either an annulment action or a preliminary reference.<sup>173</sup>

The second context where the Court affirmed the exceptional nature of the exclusion of CFSP from its jurisdiction is about specific ('technical') aspects of CFSP missions. Two such judgments have been rendered so far, about public procurement and staff management related to CSDP civilian missions. In Case C-439/13 P *Elitaliana SpA v Eulex Kosovo*,<sup>174</sup> the Court established its jurisdiction on the basis that the award of a public contract by the Head of Mission of EULEX Kosovo gave rise to expenditures charged to the EU budget under Article 41(2) TEU, as reiterated in the Financial Regulation applicable at the time.<sup>175</sup> In Case C-455/14 P *H*,<sup>176</sup> the same conclusion was reached about a decision adopted by the Head of Mission of the European Union Police Mission in Bosnia and Herzegovina regarding the relocation of a member of staff seconded from a Member State.

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<sup>170</sup> Case C-72/15 *Rosneft* ECLI:EU:C:2017:236 (the judgment was rendered after this report had been completed). This was the view also taken by AG Wathelet (Case C-72/15 *Rosneft* ECLI:EU:C:2016:381, paras 60-66). On the other hand, in her View in *Opinion 2/13* (ECLI:EU:C:2014:2475, para. 100), AG Kokott had argued that only annulment actions would be admissible in accordance with the wording of Article 275 TFEU.

<sup>171</sup> ECLI:EU:C:2014:2454, paras. 249/257.

<sup>172</sup> Case C-658/11 *European Parliament v Council (re: EU-Mauritius Transfer Agreement)* ECLI:EU:C:2014:2025.

<sup>173</sup> Case C-72/15 *Rosneft* ECLI:EU:C:2017:236.

<sup>174</sup> Case C-439/13 P *Elitaliana SpA v Eulex Kosovo* ECLI:EU:C:2015:753

<sup>175</sup> Article 4(2)(a) of Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [2010] OJ L 311/9.

<sup>176</sup> ECLI:EU:C:2016:569.

Has the jurisdiction of the Court of Justice been construed broadly so far? The case-law outlined in this section suggests so. Such an approach has been advocated in the literature: the exceptional nature of the CFSP exclusion from the Court's jurisdiction, along with reorganization of the legal framework governing external action and the formal abolition of the pillar structure, have led to calls for a greater involvement of the Court in this area.<sup>177</sup> This argument may also find some support in the pre-Lisbon judgment in Case C-91/05 *Commission v Council (re: ECOWAS)*.<sup>178</sup> It is recalled that, in that case, the Court relied upon the precursor to Article 40 TEU (ex Article 47 TEU) in order to interpret development cooperation policy quite broadly. This author has criticised the judgment elsewhere.<sup>179</sup> For the purpose of this Report, suffice it to point out that the *ECOWAS* judgment was rendered in the pre-Lisbon constitutional constellation and that maintaining that approach<sup>180</sup> would test the limits of Article 40 TEU considerably. It should also be noted that contrary to ex-Article 47 TEU, which established an 'asymmetrical' protection of the European Community 'acquis' from encroachment by the CFSP, Article 40 TEU now works both ways, i.e., the CFSP is also protected from encroachment by the exercise of other external competences.

Three points are worth-making at this juncture. First, the case-law on CFSP jurisdiction is couched in the language of integration. In *Rosneft*, for instance, the main thread that runs through the relevant part of the judgment is about the existence of a complete system of judicial remedies in the EU legal order, the objective of the preliminary reference procedure, and the need for coherence in relation to the application of EU measures.<sup>181</sup> Reflecting the language of integration of the CFSP within the EU constitutional order, this approach sidesteps the wording of Article 215 TFEU in order to read into primary law a role for the Court that may appear ill at ease with the enduring logic of CFSP.

Secondly, when it comes to the exercise of its jurisdiction, the Court appears more cautious. It is noteworthy that all claims put forward by the applicant in *Rosneft* were dismissed. A disjunction, therefore, may emerge between the

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<sup>177</sup> See, for instance, C Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law – Constitutional Challenges* (Oxford: Hart Publishing, 2014) 47 and P Van Elswege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament v Council (Pirate Transfer Agreement with Mauritius)*', (2015) 52 CMLRev 1379

<sup>178</sup> [2008] ECR I-3651.

<sup>179</sup> Koutrakos, *The EU Common Security and Defence Policy* 231-244. For another view, see C Hillion and R.A. Wessel, 'Competence Distribution in EU External Relations after *ECOWAS*: Clarification or Continued Fuzziness?', (2009) 46 CMLRev 551.

<sup>180</sup> S Blockmans and M Spornbauer suggest that, in that judgment, the Court 'seems to have seized on the opportunity to hail the "supranational" achievements of the Community legal order to which it had contributed to a considerable extent': 'Legal Obstacles to Comprehensive EU External Action', (2013) 18 EFA Rev 7 at 17.

<sup>181</sup> Case C-72/15 *Rosneft* ECLI:EU:C:2017:236, paras 60-81.

approach to the scope of the Court's jurisdiction and to the substantive issues pertaining to the interpretation and validity of CFSP measures. This state of affairs may suggest that, whilst the integration of CFSP in the EU's external action setting would encompass the Court of Justice, it would not tempt the latter to act beyond certain boundaries. This would not be novel – a similar approach emerged an analysis of the case-law on the interactions between trade, foreign policy and defence under previous constitutional arrangements.<sup>182</sup>

To what extent, however, would this approach underpin further the definition of the outer limit of the Court's jurisdiction? If so, how strictly and predictably may it be applied? If not, how can the *ratio* of the exception set out in Article 24(1) TEU and 275 TFEU be complied with? In navigating this controversial terrain, one should not lose sight of either the logic of the distinct character of CFSP within the Union's legal order or the pitfalls of endowing the Court indirectly with substantive review powers not expressly provided for in primary law.

The third point is about the role of national courts. To respect the constitutional limits on the Court's jurisdiction as laid down in primary law is not to suggest that the CFSP should amount to an area immune to judicial review. If that were the case, the EU's current constitutional arrangements would be viewed as undermining the Union's oft-repeated commitment to the rule of law and Article 21(1) TEU.<sup>183</sup> In order, however, to avoid rendering CFSP beyond, say, fundamental human rights control, it does not follow that the wish of the drafters of the Treaties about the role of the Court of Justice should be ignored.

Viewed from this angle, the role of national courts is worth exploring. After all, Article 19(1) TEU, which requires that the Member States 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', does not limit the scope of the duty of national courts in any way. Actions in relation to CFSP measures, therefore, are not excluded from its scope in principle. This conclusion is also supported by Advocate General Kokott in her View in Opinion 2/13 where she argued that the Member States 'are, in accordance with the second subparagraph of Article 19(1) TEU, expressly obliged to provide remedies sufficient to ensure effective legal protection in the CFSP, one of the fields covered by EU law'.<sup>184</sup> National courts could (and, in many respects, should) provide remedies not only in relation to acts of the authorities of their

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<sup>182</sup> See P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Hart Publishing, 2001).

<sup>183</sup> See G De Baere, 'European Integration and the Rule of Law in Foreign Policy' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP, 2012) 355 at 370 *et seq.*

<sup>184</sup> ECLI:EU:C:2014:2475, para. 97. She goes on argue that, 'in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (second paragraph of Article 275 TFEU) and partly by national courts and tribunals (second subparagraph of Article 19(1) TEU and Article 274 TFEU' (para. 103).

State but also the Union institutions. This is expressly provided for in Article 274 TFEU which provides as follows:

‘Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States’.

The role of national courts in CFSP matters was also pointed out by Advocate General Wahl in his Opinion in Case C-455/14 P *H* where he envisaged actions against the EU by applicants requesting a declaration of inapplicability of measures adopted by Heads of CFSP missions, as well as actions for damages.<sup>185</sup>

The judgment in *Rosneft* was dismissive of the role of national courts as an alternative for ensuring effective judicial protection, albeit in the more narrow context of CFSP decisions providing restrictive measures against natural or legal persons.<sup>186</sup> The construction of the Court’s jurisdiction in that area notwithstanding, there remains scope for national courts for reviewing CFSP measures. In doing so, they would carry out a function consistent with their position in the EU’s system of judicial protection. This position has become a thread in the case-law, affirmed with rigour in Opinion 1/09 where the Court held that ‘the tasks attributed to the national courts and to the Court of Justice, respectively, are indispensable to the preservation of the very nature of the law established by the Treaties’.<sup>187</sup>

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<sup>185</sup> Case C-455/14 P *H* ECLI:EU:C:2016:212, para. 99.

<sup>186</sup> Case C-72/15 *Rosneft* ECLI:EU:C:2017:236, paras 77-80.

<sup>187</sup> *Opinion 1/09* ECLI:EU:C:2011:123, at para. 85. See also *ibid*, paras 66-70, Case C-583/11 P *Innuït* ECLI:EU:C:2013:625 at para. 91, Case C-50/00 P *UPA* ECLI:EU:C:2002:462 at paras 40-1, Case C-263/02 P *Jégo-Quéré* ECLI:EU:C:2004:210 at para. 31



# 11 The challenge of coherence

The analysis in this Report highlighted the particularities of the constitutional position of the CFSP in the Union's system as they emerge from the applicable legal framework revamped at Lisbon: whilst its legal character is distinct from the other strands of the EU's external action, it is also intrinsically linked to them.

In constitutional terms, the osmosis between the CFSP and other external policies is illustrated by the consolidation of objectives for the Union's external action in Article 21(2) TEU, the requirement of consistency between the different areas of the EU's external action and between these and its other policies in Article 21(3) TEU, as well as the interacting roles with which the Union's institutional actors have been endowed.

In policy terms, the links between the CFSP and other policies emerge clearly in the Union's main strategic documents. In the *European Security Strategy*, for instance, security is construed broadly and covers, amongst others, state failure and organized crime,<sup>188</sup> to which subsequent additions included cyber security and climate change.<sup>189</sup> Such broadly understood security challenges may only be addressed on the basis of an equally broad range of instruments. This is what the EU promotes as its added value in the area of foreign affairs: based on various sets of interdependent rules which involve integration at a different pace in different areas pursuant to different methods (for instance in relation to trade, development policy, humanitarian aid, foreign policy, security and defence policy), the Union understands itself as well placed to deal with modern security threats:<sup>190</sup>

In contrast to the massive visible threat in the Cold War, none of the new threats is purely military, nor can any be tackled by purely military means. Each requires a mixture of instruments. Proliferation may be contained through export controls and attacked through political, economic and other pressures while the underlying political causes are also tackled. Dealing with terrorism may require a mixture of intelligence, police, judicial, military and other means. In failed states, military instruments may be needed to restore order, humanitarian means to

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<sup>188</sup> *A Secure Europe in a Better World – European Security Strategy* (Brussels, 12 December 2003).

<sup>189</sup> See the 2008 Report on the Implementation of the European Security Strategy (Brussels, 11 December 2008).

<sup>190</sup> *European Security Strategy*, p7.

tackle the immediate crisis. Regional conflicts need political solutions but military assets and effective policing may be needed in the post conflict phase. Economic instruments serve reconstruction, and civilian crisis management helps restore civil government. The European Union is particularly well-equipped to respond to such multi-faceted situations.

Relying upon ‘the full spectrum of instruments’, however, raises certain problems for the EU. This is because such instruments are adopted pursuant to different procedures, involve a variety of institutions acting in different capacities, give rise to different types of competence, and are subject to different types of review. In light of such differences, the coherence of the EU’s external action becomes of paramount importance. As the *European Security Strategy* pointed out:<sup>191</sup>

The challenge now is to bring together the different instruments and capabilities: European assistance programmes and the European Development Fund, military and civilian capabilities from Member States and other instruments. All of these can have an impact on our security and on that of third countries. Security is the first condition for development.

Diplomatic efforts, development, trade and environmental policies should follow the same agenda. In a crisis there is no substitute for unity of command.

This understanding of the CFSP as intrinsically linked to other external policies has also given rise to more emphasis on the linkages between this policy in particular (and external relations in general) and internal policies. The *European Agenda on Security*, for instance, stresses the link between the internal and external dimensions of security and refers expressly to the need to reinforce links between Justice and Home Affairs and the CSDP.<sup>192</sup> This is also emphasised in the 2016 Global Strategy for the European Union’s Foreign and Security Policy.

What emerges, therefore, is a twin set of linkages pertaining, on the one hand, to the relationship between the CFSP and other external policies and, on the other hand, between the CFSP and internal policies. Such linkages have become more prominent recently. A case in point is Operation EUNAVFOR MED, a military crisis operation aiming to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean.<sup>193</sup>

This author has explored elsewhere the scope and implications of the linkages between CFSP and other policies, as well as the challenges raised by their

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<sup>191</sup> *European Security Strategy*, p13.

<sup>192</sup> COM(2015) 185 final *The European Security Strategy* (Brussels, 28 April 2015) at 4.

<sup>193</sup> Dec. 2015/778 [2015] OJ L 122/31 and Dec. 2015/972 [2015] OJ L 157/51.

management.<sup>194</sup> For the purposes of this report, suffice it to point out that the quest for coherence may not be the subject-matter of a legal requirement compliance with which could be assessed on the basis of specific and easily identifiable criteria. To understand coherence in what the EU does in the world in such narrow terms is tantamount to ignoring the character of this requirement as an essentially policy imperative of which only a limited part may be dealt with in legal terms. Foreign policy is shaped on the basis of multifarious factors some of which are inherently indeterminate - to translate them in the EU's multilevel legal system in order to reflect both the integration of the CFSP in the revamped constitutional architecture and the distinctiveness of the policy from other external policies is a task which exceeds the limits of what legal rules and procedures may achieve.

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<sup>194</sup> P Koutrakos, *The EU Common Security and Defence Policy* (OUP, 2013) Ch. 8.

# 12 Conclusion

The revamping of the external relations legal framework by the Lisbon Treaty was intended to address the issues raised in the Laeken Declaration which had asked, in suitably grand terms, the following question: ‘Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?’.<sup>195</sup>

This report dealt with a part of the jigsaw that forms the legal framework governing what the Union does in the world. It identified the salient legal features of the CFSP, placed them within the Union’s constitutional order and explored their implications for the conduct of policy. In doing so, it highlighted the distinctiveness of the applicable legal framework, much of the substance of which has been maintained in the different changes introduced in the Union’s constitutional arrangements. The analysis also suggested that, the distinct nature of the CFSP legal framework notwithstanding, the policy is intrinsically linked to the other strands of the Union’s external action. This characteristic has led to constant institutional adjustments designed to facilitate these linkages and ensure the coherence of the EU’s international role.

The Lisbon reorganization of the primary rules on external action has given rise to considerable legal uncertainty as to the symbiosis between the distinct but interacting sets of rules and procedures that it has fashioned. This has been apparent in different contexts. A case in point is the inter-institutional terrain: the EU’s constitutional law on external relations has by no means reduced the likelihood of legal disputes pertaining to the conduct of CFSP and its overlaps with other strands of external action. If anything, there appears to be renewed appetite for inter-institutional skirmishes, a development that has not been prevented by the introduction of the duty of the institutions to practice mutual sincere cooperation (Article 13(2) TEU). The questions raised by the Lisbon restructuring of the rules on external action also have an impact on the role of the Court of Justice and the construction of its jurisdiction in light of the exclusion laid down in Articles 24(1) TEU and 275 TFEU. The case-law so far suggests a broad approach to the scope of the Court’s jurisdiction. This approach is couched in the language of integration that permeates aspects of the position of CFSP in the Lisbon constitutional order. It is not clear, however, to what extent it sits comfortably with another aspect of the policy also emphasised in primary law, namely its distinct nature.

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<sup>195</sup> Laeken Declaration on the Future of the European Union (December 14-5, 2001).

There are two overall characteristics of CFSP law that emerge from its development, namely its intense proceduralisation and its emphasis on institutional adjustments. These reflect a widely shared conviction that the Union's international stature depends largely on the rules and procedures that govern its CFSP. This conviction is misplaced: it ignores the distinct nature of the policy and underestimates both the practical realities of the continuing role of Member States as foreign policy actors and their perceptions by third States. It is, after all, the Member States that are at the core of any development in the area. Their willingness to rely on the Union's machinery is in direct correlation to the effectiveness of the Union's role as a global actor. This pragmatic consideration is particularly apparent in the conduct of the Union's security and defence policy in the context of which it has highlighted with painful clarity the limits of legal rules and procedures.<sup>196</sup> There is, in other words, a disjunction between the emphasis on the legal arrangements laid down in primary law and the pragmatic considerations that determine the conduct of CFSP as a matter of practice.

Managing this disjunction is a matter for both the EU institutions and the Member States. The current state of the EU, facing an alarming list of challenges (including Brexit, the state of the euro, and the management of the refugee crisis) adds yet another layer of complexity to the conduct of CFSP. Meeting, however, the high expectations articulated in the Laeken Declaration (which included playing 'a leading role ... in a new world order')<sup>197</sup> requires that the issues highlighted in this report be addressed both effectively and pragmatically.

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<sup>196</sup> This argument is developed in Koutrakos, *The EU Common Security and Defence Policy* (2013). See also P Koutrakos, 'The role of law in Common Security and Defence Policy: functions, limitations and perceptions' in P Koutrakos (ed.), *European Foreign Policy – Legal and Political Perspectives* (Elgar Publishing, 2011) 235.

<sup>197</sup> Laeken Declaration on the Future of the European Union (December 14-5, 2001).

# Svensk sammanfattning

Europeiska unionens gemensamma utrikes- och säkerhetspolitik (GUSP) har steg för steg kommit att bli en central del av unionens verksamhet. Den utvecklades genom en rad praktiska arrangemang, men styrs den i dag av ett regelverk som under åren har formaliserats och stärkts. I och med Lissabonfördraget kom politikområdet också att påminna alltmer om unionens övriga områden för yttre agerande. Fördraget stärkte den gemensamma utrikes- och säkerhetspolitikens grundvalar, omformade dess ställning i EU:s rättsordning och introducerade därmed en ny institutionell aktör med uppgift att ge politiken ett tydligare fokus och göra den synligare.

I den här rapporten presenteras och analyseras det gällande regelverket för den gemensamma utrikes- och säkerhetspolitiken och dess betydelse för EU:s roll som global aktör granskas. Framför allt är det fyra frågor som uppmärksammas:

För det första det faktum att den gemensamma utrikes- och säkerhetspolitiken – trots det stegvisa införlivandet i EU:s rättsordning har – behållit sina särdrag inom ramen för den konstitutionella ordningen. Trots den stärkta institutionella strukturen styrs politikområdet av regler som understryker såväl dess status inom EU:s yttre agerande som medlemsstaternas dominerande roll i frågan. Varken omfattningen av de nya element som tillkom med Lissabonfördraget eller de utökade uppgifter som där förutspås rubbar på något grundläggande sätt medlemsländernas politiska kontroll över politikområdet.

För det andra den kvardröjande paradox som karakteriserar den gemensamma utrikes- och säkerhetspolitiken: medan den mer än något annat av EU:s politikområden i substans ligger närmare det vi kan kalla storpolitik, är det regelverk som styr dess utövande i hög grad formaliserat. Det undergräver på inget sätt medlemsstaternas dominerande roll inom politikområdet, utan utgör snarare en begränsning av såväl regelverkets tillämpning som dess övergripande betydelse för utvecklingen av EU som global aktör. Det ger i sin tur inte sällan upphov till interinstitutionella konflikter mellan unionens olika aktörer. Konflikter som tar mycket energi, tid och politiskt kapital.

För det tredje uppmärksammas att det regelverk som styr den gemensamma utrikes- och säkerhetspolitik har växt fram mot bakgrund av övertygelsen om att dess framgång var avhängig den institutionella strukturen. Den uppfattningen är dock felaktig, eftersom den bortser från politikrådets specifika natur och underskattar såväl det faktum att medlemsstaterna alltjämt är utrikespolitiska aktörer som hur dessa uppfattas av länder utanför EU. Den tolkningen stöds också av erfarenheterna efter Lissabonfördragets ikraftträdande, som knappast motsvarar de högt ställda förväntningarna på den reformerade institutionella

strukturen av den gemensamma utrikes- och säkerhetspolitiken. Det innebär på inget sätt ett förminskande av de reformer som har genomförts – exempelvis skapandet av EU:s utrikesjänst (EEAS) – men visar att institutionellt mixtrande inte kan ersätta politik.

Slutligen konstateras att den gemensamma utrikes- och säkerhetspolitiken till stor del befinner sig utanför EU-domstolens domäner men att det alljämt finns frågetecken när det gäller den exkluderingen. EU-domstolens rättspraxis den senaste tiden tyder också på att frågan är långt ifrån avgjord. Mot bakgrund av dess centrala roll när det gäller frågan om EU:s ekonomiska relationer, är det värt att notera att EU-domstolen nu också framträder som en potentiellt betydelsefull aktör inom ett område medlemsstaterna anser vara minst lämpat för rättslig prövning.

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“There is, in other words, a disjunction between the emphasis on the legal arrangements laid down in primary law and the pragmatic considerations that determine the conduct of CFSP as a matter of practice. Managing this disjunction is a matter for both the EU institutions and the Member States.”

Panos Koutrakos



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