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THE COMMON FOREIGN AND SECURITY POLICY AND THE REST: A DIFFERENCE IN NATURE?

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Common Foreign and Security Policy v the Rest: A Difference in Degree or in Nature?

Christina Eckes*

Summary

The Common Foreign and Security Policy (CFSP) forms part of EU external relations but remains in many ways special. Rather than simplifying the Lisbon Treaty has raised a whole new set of issues regarding the relationship between the CFSP and the Union policies under the Treaty on the Functioning of the European Union (TFEU policies). This article examines the nature of the CFSP, its relationship with TFEU policies, including whether the two form part of one Union *acquis*, and draws conclusion from the post-Lisbon case law on cross-Treaty joint legal bases and institutional prerogatives under the CFSP. The most relevant consequence of the Lisbon Treaty in this regard is the fact that the Court's jurisdiction has been extended in the field of CFSP in several hidden ways that go beyond the face value of the Treaties. This will in itself trigger new constitutionalization dynamics in the area of the CFPS and lead to further approximation of CFSP and TFEU policies.

1. Introduction

The Common Foreign and Security Policy (CFSP) forms part of EU external relations but remains in many ways special. This has not changed with the entry into force of the Lisbon Treaty, under which the CFSP remains a policy apart, regulated in a separate Treaty (Treaty on European Union – TEU). The relationship between CFSP and Union policies under the Treaty on the Functioning of the European Union (TFEU policies), as well as the nature of CFSP continue to be controversial. Some scholars have long spoken of unity;¹ others have precisely denied the existence of such unity pre-Lisbon.² Since the entry into force of the Lisbon Treaty the 'abolition of the pillars' is for some a point that does not require further discussion;³ others speak of a 'collapse of the pillar structure'⁴ but indeed question how far

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¹ A. Von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organisation with a Single Legal System', 36 *Common Market Law Review* 3 (1999), 887.

² J.H.H. Weiler, 'Neither Unity Nor Three Pillars, The Trinity Structure of the Treaty on European Union' in J. Monar et al eds., *The Maastricht Treaty on European Union, Legal Complexity and Political Dynamic* (European Interuniversity, 1993), 49-62.

³ F. Laursen, 'The EU 'external actions' according to the Lisbon Treaty', in M. Wilga and I. Pawel Karolewski, *New Approaches to EU Foreign Policy* (Routledge, 2014), 17. See also: P. Koutrakos, 'The European Union's common foreign and security policy after Lisbon', in: D. Ashiagbor, N. Countouris and I. Lianos eds., *The European Union after the Treaty of Lisbon* (Cambridge University Press, 2012), speaking at p. 189 of 'formally and substantively' abolished, and at p. 192 of 'unitary structure'.

⁴ P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In search of a New Balance between Delimitation and Consistency', 47 *Common Market Law Review* 4 (2010), 987-1019, speaking at p. 1018 of a 'dual pillar structure in all but name'. M. Busuioac, *European Agencies: Law and Practices of*

the consequences of this collapse went. Again others categorise external relations as a 'third-generation hybrid' since Maastricht.⁵ Five years after the entry of the Lisbon Treaty, it is worth revisiting the nature of CFSP, including in the light of the case law of the Court of Justice of the European Union (CJEU).

The Lisbon Treaty attempted to strike a balance between protecting the differentness of CFSP while at the same time ensuring consistency, in particular between EU law and Member State action. Pre-Lisbon, CFSP could be contrasted with the *acquis communautaire*. Indeed, the old separation provision (ex-Article 47 TEU) drew a dividing line between the two. Post-Lisbon it remains unclear whether CFSP forms part of an integrated 'Union *acquis*' and whether it enjoys the same features that vest Community law with effectiveness. A comparison between CFSP and TFEU policies is enlightening for the nature of CFSP. It is also highly relevant for conclusions about the level of constitutionalization of CFSP.

Section two briefly introduces the institutional and constitutional particularities of CFSP. Section three turns specifically to the Member States' attempts to ring-fence CFSP with the amendments introduced by the Lisbon Treaty and examines to what extent these attempts were successful. Section four analyses whether CFSP now forms part of the *Union acquis* or whether it remains separate. This sets the scene for Section five, which discusses whether CFSP possesses the central features of EU law adopted under the TFEU, such as primacy. Section six analyses the post-Lisbon case law of the CJEU concerning the choice between a CFSP and a TFEU legal basis in the light of the previous sections. A final Section seven draws conclusions about the nature of CFSP, its relationship with TFEU policies, and its level of constitutionalization.

2. Procedural and Institutional Framework of the CFSP

The creation of the CFSP was motivated by a realization that the existing institutions and procedures for political and military cooperation were inadequate to reach a common European position on international issues. It has developed over the past twenty-one years

Accountability (Oxford University Press, 2013), arguing at p. 68 that even after the collapse 'the old imprints are still felt'. See also: M. Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts', *Common Market Law Review* 45 (2009), 625.

⁵ M. Smith, 'Still Rooted in Maastricht: EU External Relations as a "Third-Generation Hybrid"' in T. Christiansen and S. Duke eds., *The Maastricht Treaty: second thoughts after 20 years* (Routledge, 2013).

since it was formally introduced by the Treaty of Maastricht in 1993 and in principle the sky is the limit as to what may be dealt with as part of the EU's CFSP. Article 24(1) TEU stipulates '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'.⁶ So far a wide array of policies has been adopted under CFSP, ranging from civil and military missions aiming to preserve peace and strengthen security to diplomatic efforts to ensure international cooperation on issues such as nuclear proliferation and climate change. Imposing restrictive measures (sanctions) is the most prominent EU activity under the CFSP. It is certainly the one that has triggered most litigation.

The main procedural difference between the CFSP and TFEU policies is the weight given to the national executive. In particular, the Council gains from the European Parliament when an act is adopted under the CFSP. This gives the (representatives of the) Member States a more dominant position than in other policy areas. Legislative acts cannot be adopted and special procedures apply (Article 24(1) TEU). The European Parliament and the Commission have *a specific role* in this area, which is considerably more limited than under TFEU. The European Parliament is informed and consulted but does not have a formal decision-making role.⁷ Formally, the Commission only has a limited role, e.g. lacks its role as the watchdog of Member States' compliance. Yet in its limited role it is involved at all levels of decision-making: at the highest level, by extension through and with the High Representative⁸ to the level of the working groups and committees, including the European Political Committee (EPC). The jurisdiction of the CJEU continues in principle to be excluded. Different actors would hence benefit from an encroachment in either direction. The decision-making procedures under the TFEU give more powers to the Commission and to the Parliament, while the intergovernmental set-up of the CFSP requires unanimity amongst the Member States privileging the will of the individual Member State. Furthermore, when the Union exercises its CFSP competences Member States are not pre-empted or prevented from taking national action.⁹ Yet Member States are subject to a special duty of sincere cooperation, which is in its wording in the Treaties more stringently formulated than the general duty of sincere cooperation. Article 24(3) TEU stipulates that '[t]he Member States

⁶ Emphasis added.

⁷ See Article 36 TEU.

⁸ E.g. Article 30 TEU.

⁹ Declarations 13 and 14.

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.' Compliance with this duty is ensured by the Council and the High Representative. Finally, the European Council's task of defining the EU's strategies cuts across the board and includes the EU's external actions both in the area of CFSP and TFEU policies. Indeed, the European Council has regularly played an important role in strengthening the EU's position as a global actor including in matters of CFSP.

3. The Lisbon Treaty: Ring-Fencing the CFSP or Approximation of External Relations Policies?

David Miliband explained that the constitutional changes under the Lisbon Treaty were intended to make 'clear that the implementation of other Community policies [which are set out in the TFEU] cannot affect the procedures and powers of the institutions when taking action under CFSP. This is designed to ensure the "ring-fencing" of CFSP as a distinct, equal area of action.'¹⁰ The objective of ring-fencing CFSP is to preserve its special nature and protect it from the EU's integration through law and constitutionalization processes under the TFEU, which follows the same logics as the former Community pillar. Did the Lisbon Treaty achieve this objective?

The Treaty of Lisbon has indeed fundamentally changed the relationship between the CFSP and non-CFSP or 'TFEU policies'. Whether it has really ensured the 'ring-fencing' of CFSP requires a more detailed analysis. Signs of both dynamics are perceivable: separation and protection of the CFSP's special features, as well as approximation and constitutionalization. On the one hand, the pillars have been integrated. This places the CFSP in a less special position and rather works against 'ring-fencing' it. Constitutionalising dynamics, like the establishment of a single international personality, as well as the application of one duty of sincere cooperation across the board¹¹ and a consolidated list of objectives for all external actions,¹² have made the Union a more unified actor exercising power across the board. Indeed, post-Lisbon most of the legal concepts, which are

¹⁰ Letter from the Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs, Foreign and Commonwealth Office, to Mike Gapes MP, Chairman of the House of Commons Foreign Affairs Select Committee, 18 October 2007.

¹¹ The Court had considered the duty of sincere cooperation as applicable to the Union pillars before the entry into force of the Lisbon Treaty, see Case C-355/04 P, *Segi and others v Council* [2007] ECR I-1657. Yet, since the entry into force of the Lisbon Treaty this has been codified in Article 4(3) TEU.

¹² Article 21 TEU.

universally valid for all activities of the Union, have been pulled together in the EU Treaty, such as the principle of conferral, subsidiarity and proportionality (Article 5 TEU). Union citizenship in Articles 18 et seq TFEU remains exceptional in that it is an overarching concept that is located in the TFEU and seems for that reason separate from CFSP. In particular, the principle of consistency¹³ as a centrally unifying principle, has received new prominence under the Lisbon Treaty. Consistency is mentioned in a broad range of Treaty articles addressing institutional, as well as substantive consistency,¹⁴ most important in the present context is Article 21(3) TEU, aiming in particular to ensure the consistency between the different external policies of the EU.¹⁵

On the other hand, the issue of delimitation between CFSP and TFEU policies has changed but has not disappeared. Strong support for the ‘ring-fencing’ narrative can be found in Article 40 TEU. This provision introduces a metaphorical fence between the TEU and the TFEU, with the CJEU in charge of mending this fence. It prohibits any mutual invasion of territory between the ‘Union competences referred to in Articles 3 to 6 [TFEU]’, i.e. the former first and third pillar competences, now collected in the TFEU, and the CFSP. Article 40 s.1 TEU provides that the CFSP ‘shall not affect the application of the procedures and the extent of the powers of the institutions’ for the exercise of the Union’s TFEU powers (in German: “lässt ... unberührt”; in French: “n’affecte pas”). This first sentence is similar to the pre-Lisbon situation under ex-Article 47 TEU but because of the changes in the rest of the provision and in the EU’s constitutional structure more general it cannot be interpreted in the same way. Hence, Article 40 s. 1 TEU cannot be interpreted on the basis of the case-law of the Court of Justice on ex-Article 47 TEU. The new ‘mutual non-affection’ clause requires hence judicial clarification in light of the new wording but also in light of the new relationship between CFSP and TFEU policies.

The *prima facie* answer to whether the Lisbon Treaty has ring-fenced and hence protected CFSP from constitutionalization is consequently: *yes and no*. What it has certainly done: it has introduced a number of new arrangements that require judicial interpretation

¹³ For the purpose of this paper no distinction is made between consistency and coherence.

¹⁴ See e.g.: Articles 13, 16(6), 18(4), and 26(2) TEU; Article 7 TFEU.

¹⁵ See for more detail: C. Eckes, ‘Judicial Control of the Common Foreign And Security Policy (CFSP): Constitutionalization Through Ambiguity and Human Rights?’, presentation at ARENA (Oslo, 6 November 2014 and 3 February 2015).

and create potential for controversy. This will in any event open new avenues for the CJEU to exercise jurisdiction over CFSP, which may develop its own constitutionalization dynamics.

4. One Union *Acquis*?

Previously, under the old pillar structure the separation provision (ex-Article 47 TEU) was understood to protect the *acquis communautaire* from policies under the second and third pillar.¹⁶ Post-Lisbon, the situation has become less clear. Is there now one Union *acquis*? What are the consequences of speaking of one 'Union *acquis*', comprising CFSP and TFEU policies?

Pre-Lisbon the Treaties and attached declarations referred several times to the '*acquis communautaire*'.¹⁷ The provision that reflects best the pre-Lisbon tension between protecting the advanced integration under the first pillar and encouraging broader political cooperation within the same institutional framework was ex-Article 3 TEU, stating: 'The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*'. The *acquis communautaire*, comprising in principle only the former first pillar (the legal *acquis* included the Community Treaties¹⁸ and all Secondary Community law), stood in tension with the rest. *While* all three pillars should co-exist in harmony, the supranational Community pillar needed to be protected from the intergovernmental Union pillars. This was the objective of ex-Article 47 TEU.¹⁹ Pre-Lisbon the Treaties further contrasted the *acquis communautaire* with the Union *acquis* when establishing that enhanced cooperation under the CFSP 'shall not form part of the Union *acquis*.'²⁰ The latter logically comprised all Union action, rather than only action under the Community Treaties. Yet, while the terms Union *acquis* and *acquis communautaire*

¹⁶ In combination with the principle of sincere cooperation (Article 4(3) TEU). Case 44/84, *Hurd v Jones (Her Majesty's Inspector of Taxes)* [1986] ECR 29; Cases C-63/90 and C-67/90, *Portugal and Spain v Council* [1992] ECR I-5073; Case C-70/90, *Spain v. Council* [1992] ECR I-5159 and Case C-71/90, *Spain v. Council* [1992] ECR I-5175.

¹⁷ Six times in total : Ex-Article 2(1) 5th indent TEU, ex-Article 3 TEU and ex-Article 43(c) TEU; Declarations 4, 5 and 30.

¹⁸ EC Treaty, Euratom and ECSC.

¹⁹ See the section on Article 40 TEU below.

²⁰ Article 44(1) TEU.

were used in the Treaties and in secondary EU law, they were never defined, not even in a general manner.²¹

Post-Lisbon, the Treaties refer to the undefined term '*acquis*' only once and only in the specific context of enhanced cooperation. The reference is not further qualified. It does not speak of 'Union *acquis*' or any other type.²² Protocol 21 and 22 however refer both to the Community and Union *acquis*,²³ and Protocol 22²⁴ and 36²⁵ respectively mention the *acquis* (of the Union) in the area of freedom security and justice. The EU Treaties further speak of the '*Schengen acquis*'.²⁶

Outside of the Treaties, the term '*accession acquis*' is possibly the oldest and most widely used form of *acquis* in the EU context.²⁷ The latter comprises not only the legal *acquis* but also the political objectives of the Treaties.²⁸ Furthermore, ever since ex-Article O TEU [Maastricht version], accession requires compliance with the 'treaties'. Without making a specific reference to *Community Treaties*,²⁹ this logically includes not only the different treaties of the three Communities (back then all three, the Euratom, the EC Treaty (now-TFEU) and the ECSC were still in force) but also the TEU. In the context of enlargement, the Commission equally deals with the CFSP and the European/Common security and defence

²¹ See on the meaning of the term "acquis communautaire": C. Delcourt, 'The Acquis Communautaire: Has the Concept had its Day?', 38 *Common Market Law Review* 4 (2001), 829–870.

²² Article 20(4) TEU: 'Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.' [Emphasis added].

²³ Article 2 of Protocol (No 21) On the Position of The United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice: '[...] none of the provisions of Title V of Part Three of the [TFEU], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; [...] and no such provision, measure or decision shall in any way affect the *Community or Union acquis* nor form part of Union law as they apply to the United Kingdom or Ireland' (emphasis added).

Article 2 of Protocol (No 22) on the Position of Denmark: '[...] and no such provision, measure or decision shall in any way affect the *Community or Union acquis* nor form part of Union law as they apply to Denmark. (emphasis added)'

²⁴ Recital of Protocol (No 22) on the Position of Denmark: 'CONSCIOUS [...] that it would be in the best interest of the Union to ensure the integrity of the *acquis* in the area of freedom, security and justice,'

²⁵ When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.

²⁶ Article 87 TFEU. Some people also speak of the EEA *acquis*, as another example where the geographical scope of the *acquis* goes beyond the outer borders of the Union.

²⁷ C.C. Cialdino, 'Some Reflections on the Acquis Communautaire', 32 *Common Market Law Review* 5 (1995), 1089-1121, 1090.

²⁸ *Ibid*, 1091.

²⁹ Euratom, EC Treaty and back then the ECSC.

policy (ESDP/CSDP) as the 31st chapter of the *acquis*.³⁰ 'External relations' are in a separate chapter 30. The Commission explains that CFSP and ESDP/CSDP

'are based on legal acts, including legally binding international agreements, and on political documents. The *acquis* consists of political declarations, actions and agreements. [...] Applicant countries are required to progressively align with EU statements, and to apply sanctions and restrictive measures when and where required.'³¹

The use of 'CFSP *acquis*' is of course possible – as it is for any other separate policy field – but such fragmented use voids the term '*acquis*' of its deeper meaning as 'that upon which has been agreed', the common ground within the EU. It would lead to a patchwork blanket and fail to ensure harmony between the different parts.

For some, the term *acquis* in itself has acquired a taste of integration and constitutionalization.³² Yet in the post-Lisbon era, if we assume that there is one Union *acquis*, it is important to identify not only the well-known core features of former Community law, such as the principle of sincere cooperation and *effet utile*, but also those elements that are intended to protect the autonomy and the political space of the Member States, such as Article 40 TEU, the parallel nature of CFSP competences,³³ and the principles of conferral and subsidiarity. One comprehensive Union *acquis* that comprises the CFSP certainly is not supranational. It also is not necessarily supporting an integration or constitutionalization dynamic, but protects the institutional balance as it is agreed upon in the different areas with their different degrees of integration. Indeed it protects a functional power balance, between the institutions and between the Union and its Member States as part of the Union *acquis*. The structural elements of the *acquis* must allow internal differentiation. While in the context of accession, *acquis* refers to the entirety of EU law and even the Union's political objectives, not every norm that forms part of the *acquis* enjoys the same status. The question of whether one area of the *acquis* enjoys primacy over another or over national law is a separate question. A well-known example is the CJEU's interpretation

³⁰ See: <http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/>.

³¹ *Ibid.*

³² See most strongly: Delcourt (2001), *supra* n. 21.

³³ Article 2(4) TFEU mentions CFSP as a separate form competences, different from exclusive, shared and coordinating; Declarations 13 and 14.

that the ‘foundations of Union law’ are hierarchically superior to ordinary primary law.³⁴ This differentiation does not stand in contrast with the fact that states are obliged to comply with and implement the full *acquis* when they accede to the Union. It makes sense in the light of the new separation provision, Article 40 TEU, which does no longer privilege the former Community pillar. This takes away the central reason to distinguish the former *acquis communautaire*. Post-Lisbon the whole *acquis* is protected in a similar fashion – predominantly from invasion by Member States’ actions, including under public international law,³⁵ and from an elimination of political space.

In conclusion, it makes sense to speak of one Union *acquis* referring to the entire body of common rights and obligations, which bind all the Member States and the EU institutions together within the European legal order. It is a dynamic concept and refers to the current state of affairs. It comprises the provisions, principles and political objectives of the European Treaties; secondary Union law and the case law of the Court of Justice; declarations and resolutions adopted by the institutions; and international agreements concluded by the Union. It also comprises agreements concluded by the Member States between themselves in the field of the Union's activities. *Acquis communautaire* has become a historical reference.³⁶ CFSP and Area of Freedom Security and Justice (AFSJ) form now part of the *acquis*. The unique role and tasks of the institutions form part of the institutional *acquis*, including in the procedural and institutional differences in the different policy fields, such as the geographical limitations of the AFSJ.³⁷ Furthermore, the relationship between CFSP and TFEU policies forms in its dynamic (post-Lisbon) interpretation part of the

³⁴ Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International v Council and Commission* [2008] ECR I-6351, para. 304. See C. Eckes, ‘International Sanctions against Individuals: a Test Case for the Resilience of the European Union’s Constitutional Foundations’, *European Public Law Journal* 2009, pages 351-378.

³⁵ Currently in particular the public law instruments used to mitigate the Eurocrisis.

³⁶ See differently: Delcourt (2001), *supra* n. 21.

³⁷ See also the text of Article IV-438 of the Constitutional Treaty:

‘3. The acts of the institutions, bodies, offices and agencies adopted on the basis of the treaties [...] shall remain in force. [...] The other components of the *acquis* of the Community and of the Union existing at the time of the entry into force of this Treaty, in particular the inter-institutional agreements, decisions and agreements arrived at by the Representatives of the Governments of the Member States, meeting within the Council, the agreements concluded by the Member States on the functioning of the Union or of the Community or linked to action by the Union or by the Community, the declarations, including those made in the context of intergovernmental conferences, as well as the resolutions or other positions adopted by the European Council or the Council and those relating to the Union or to the Community adopted by common accord by the Member States, shall also be preserved until they have been deleted or amended.

4. The case-law of the [CJEU] on the interpretation and application of the treaties [...] shall remain, *mutatis mutandis*, the source of interpretation of Union law and in particular of the comparable provisions of the Constitution.’

structural *acquis* of the Union. Refraining from defining *acquis*, codifying the term ‘Union *acquis*’ in the common provisions, or identifying whether and how CFSP is part of the *acquis*, is an example of ambiguity, consciously accepted by the drafters of the Lisbon Treaty. Already the Constitutional Treaty did not clearly include the case law of the CJEU in the definition of the Union *acquis*.³⁸

Considering CFSP as part of the *acquis* leads to the assumption of one system of powers, including external powers, that sets out differentiated conditions for use of these powers, including different institutional involvement and prerogatives. Indeed, it entrenches the particularities of the different areas, including CFSP but makes at the same time the entire Union legal order subject to a uniform application of rules and principles. In this reading, the main purpose of the concept of a unified Union *acquis* is to protect it from Member States’ actions jointly or individually outside of the Union legal framework.

5. The Nature and Primacy of CFSP

The Constitutional Treaty had proposed a provision on the primacy of Union law in its entirety that would have confirmed that CFSP is of the same nature as TFEU policies and hence prevails over national law.³⁹ As part of the de-constitutionalization efforts after the failed referenda in 2005, the Lisbon Treaty no longer contains this provision. The only reference to primacy is now in Declaration 17, which seems not intended to make a constitutive assertion or introduce any change. However, the Declaration leaves room for interpretation on the issue of whether CFSP enjoys primacy. It reads: ‘[...] in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.’ On the one hand, law adopted on the basis of ‘Treaties’ refers to both the TEU and the TFEU. If CFSP was excluded from the primacy declaration the reference to the Treaties in the plural would be empty since the CFSP is only policy adopted on the basis of the TEU. On the other hand, the ‘law’ quality of CFSP could perhaps be questioned. As explained above, Article 24(1) TEU excludes ‘[t]he adoption of *legislative acts*’ in the area of CFSP and special procedures apply that privilege

³⁸ Ibid.

³⁹ Ex-Article I-6 Constitutional Treaty : ‘Union law – The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.’

the executive. Moreover, much of the CFSP aims to coordinate the foreign policies of the Member States rather than imposing a uniform Union policy.⁴⁰ CFSP acts usually do not have the capacity to enter directly into the national legal orders (direct applicability); yet, this does not exclude that they can directly determine the rights of individuals and consequently be of direct and individual concern to them.⁴¹ Also, actions for damages might be justified. Furthermore, legislative acts are only one particular type of law. Many other types exist, e.g. international agreements, decrees. Within the EU context for example ‘legislative acts’ can be contrasted with ‘regulatory acts’ and ‘delegated acts’ – all of which are legal acts⁴² and hence form part of ‘law’ without being legislation. The exclusion of legislative acts does not stand in the way of considering CFSP ‘law’.

Another argument against the primacy of CFSP is that the declaration mentions an opinion of the Council Legal Service that refers exclusively to the primacy of ‘Community law’. Most relevant for its interpretation however is perhaps that the declaration refers to ‘well settled case law’. The Court had not (and still has not) explicitly confirmed the primacy of the CFSP. At the same time, in the cases of *Pupino* and *Segi* the Court appears to presume implicitly such primacy,⁴³ by requiring national courts to apply the principle of consistent interpretation under the former third pillar and by applying the principle of sincere cooperation under the Union pillars. Hence, while the Court has never explicitly conferred primacy on Union law and while Declaration 17 only refers to ex-first pillar case law, pre-Lisbon case law does not exclude the assumption of a supreme nature of Union law in its entirety. To the contrary, it implicitly assumes it. The lack of pre-emption and direct applicability of CFSP may rob primacy of its sharpest enforcement teeth and makes it less likely that the issue comes up in litigation before the CJEU. This may create problems of diverse interpretation of Union acts by national courts and may even, as Professor Denza put it, when taken together with a number of other specific changes to the rules governing the CFSP, be ‘sufficiently fundamental to call into question the ultimate independence of the Member States in the conduct of their foreign policy.’⁴⁴ Yet all this does not constitute a

⁴⁰ See e.g. Articles 28 and 29 TEU.

⁴¹ E.g. visa bans.

⁴² J. Bast, ‘New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law’, 49 *Common Market Law Review* 3 (2012), 885-928.

⁴³ Case C-355/04 P, *Segi*, (*supra* n. 11); Case C-105/03, *Pupino* [2005] ECR I-5285.

⁴⁴ House of Lords, report, available at:

<http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/47/4706.htm>.

problem of principle opposed to assuming the primacy of CFSP, nor does it exclude litigation as a matter of principle.

6. Increased Jurisdiction of the CJEU over CFSP Matters

Post-Lisbon the CJEU's jurisdiction over CFSP remains limited but has been extended in several ways. Some avenues of jurisdiction are directly related to formal changes of the text of the Treaties; others result from the recent case law of the CJEU; again others existed before but develop in the post-Lisbon context new potential for litigation.

6.1 Formal Changes and Their Consequences

Two formal changes of the Treaties have directly extended the Court's jurisdiction over CFSP. First of all the Lisbon Treaty extended the Court's jurisdiction in a direct but limited way in Article 275(2) TFEU. This provision gives the CJEU jurisdiction over restrictive measures against individuals. This has been widely discussed. What is less well-known is the exceptionally high number of actions against restrictive measures.⁴⁵ Restrictive measures are by far the most judicially contested type of CFSP measure. At the time of writing about one hundred cases are pending before the General Court. Ten appeals were brought to the CJEU in 2013 and 2014 only. More than 500 cases have been decided by the two Courts that relate to restrictive measures. The high amount of litigation concerning sanctions gives the Court ample opportunity to rule on CFSP matters.

Secondly, the formal changes to the relationship between CFSP and TFEU policies in Article 40 TEU made inter-institutional litigation more likely.⁴⁶ Article 40 TEU serves the legitimate aim to protect the intergovernmental decision-making space of the Member States in the area of CFSP from encroachment by supranational Union policies. Yet, it has the side effect of changing the relationship between the CFSP and TFEU policies and abolishing the default preference for TFEU policies. Post-Lisbon, the two fields are competing on eye-level and the outcome is uncertain.⁴⁷ This has already and will lead to further litigation.

⁴⁵ C. Eckes, 'EU Restrictive Measures Against Natural and Legal Persons: From Counter-Terrorist to Third Country Sanctions', 51 *Common Market Law Review* 3 (2014), 869-906.

⁴⁶ See above; see also: P. Van Elswege (2011), 'The Adoption of 'Targeted Sanctions' and the Potential for Inter-institutional Litigation after Lisbon', 7 *Journal of Contemporary European Research* 4, 488-499.

⁴⁷ In the below discussed *UN Sanctions* case the Court accepted the Council's preference for using a hybrid CFSP-TFEU provision, Article 215 TFEU, rather than the 'pure' TFEU competence in Article 75 TFEU.

6.2 Post-Lisbon Case Law of the CJEU

Beyond the potential for jurisdiction that flows directly from the EU Treaties, the CJEU has twice given judgment in cases concerning the relationship between the CFSP and the Union's TFEU policies since the entry into force of the Lisbon Treaty. Both rulings have the potential to trigger more litigation. In the *UN Sanctions* case (2012), the CJEU accepted as a matter of principle the combination of a CFSP and a TFEU legal basis.⁴⁸ This stands in stark contrast to its pre-Lisbon case law, in which the Court had held that ex-Article 47 TEU made a cross-pillar joint legal basis between the second and the first pillar as a matter of principle 'impossible'.⁴⁹ In the *Piracy Agreement* case (2014), the Court engaged with the procedural requirements applicable to international agreements concluded by the EU that fall exclusively within the CFSP.⁵⁰ A third case is at present pending, which equally concerns the relationship between CFSP and TFEU policies.⁵¹

In the *UN Sanctions Case*⁵² the Parliament challenged the legal basis chosen by the Council to give effect to UN Security Council resolutions imposing sanctions against terrorist suspects. The Council had based the sanctions on Article 215 TFEU, which is an exceptional 'hybrid CFSP-TFEU provision' requiring a prior CFSP decision (under the TEU) for the Union to take action under the TFEU. The Parliament argued that the correct legal basis would have been Article 75 TFEU, which provides for the adoption of counter-terrorist sanctions as part of the Area of Freedom Security and Justice (AFSJ).⁵³ Legal instruments based on the latter provision are adopted pursuant to the ordinary legislative procedure, while Article 215 TFEU only requires that the Parliament be informed. The Court found Article 215 TFEU to have been the correct choice.

The *UN Sanctions Case* is interesting both because of what the Grand Chamber said explicitly and implicitly. It spent a first lengthy section, which was not even strictly necessary

⁴⁸ Case C-130/10, *Parliament v. Council*, Judgment of 19 July 2012, nyr.

⁴⁹ Case C-91/05, *Commission v. Council (ECOWAS)* [2008] ECR I-3651, para. 75 *et seq.* See also: G. de Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008), 295 *et seq.*

⁵⁰ Case C-658/11, *Parliament v Council*, Judgment of 8 August 2014, nyr.

⁵¹ Case C-263/14, *Parliament v Council*, Action brought on 28 May 2014, concerning the signing and conclusion of the agreement between the EU and Tanzania on the conditions of transfer of suspected pirates and associated seized property.

⁵² Case C-130/10, *Parliament v Council* (*supra* n. 37). See also: Andrea Ott, 'Case C-130/10, European Parliament v. Council of the European Union, Judgment of 19 July 2012, not yet reported', *Maastricht journal of European and comparative law* (2012), 589.

⁵³ See for an in-depth discussion of the choice of the legal basis: C. Eckes, 'EU Counter-Terrorist Sanctions against Individuals: Problems and Perils', *European Foreign Affairs Review* (2012), 113-132.

to give a ruling in the case at hand, on the question of whether and under which conditions different legal bases can be combined. As it is often, the starting point of the CJEU allows conclusions regarding the broader viewpoint of the Court. The Court explained that the correct legal basis is to be determined pursuant to the centre of gravity test, including where a CFSP provision is considered a possibility.⁵⁴ The centre of gravity test requires, in the words of the Court that

[i]f examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component.

With regard to a measure that simultaneously pursues a number of objectives, or that has several components which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases.

None the less [...] recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other.⁵⁵

Most relevant in the present context is that the Court *did not rule out* the use of a *cross-Treaty joint legal basis* (CFSP-TFEU) as matter of principle but instead defined the general conditions for joint legal bases so narrowly that a cross-Treaty joint legal basis was *procedurally excluded*. Indeed, the Court specifically explained that the ordinary legislative procedure could not be combined with a provision where Parliament is only informed.⁵⁶ The specificity of Article 215(2) TFEU, requiring a prior CFSP decision (unanimity), is only mentioned as an *additional*⁵⁷ argument. Implicitly, the Court hence assumed that the nature of CFSP does not stand in the way of a cross-Treaty joint legal basis. It herewith acknowledged the efforts of the Lisbon Treaty to approximate the TEU and the TFEU. Explicitly however, it interpreted the general need for procedural compatibility between joint legal bases so strictly that a cross-Treaty legal basis is impossible in the vast majority of the cases. The Court's decision to walk the middle ground may have been a politically sensible choice; yet it is likely to stir up more controversy and hence litigation.

⁵⁴ This was already established in *ECOWAS* (*supra* n. 38), para. 60, 73 and 75.

⁵⁵ Case C-155/07, *Parliament v Council (European Investment Bank Guarantees)* [2008] ECR I-8103, para. 35-37.

⁵⁶ Case C-130/10, *Parliament v Council*, (*supra* n. 37), para. 47.

⁵⁷ 'In addition'; 'ausserdem'; 'en outre'; 'voorts'.

Indeed, cross-Treaty joint legal bases will remain a contentious issue because the requirements of international cooperation cannot be fitted neatly into the Union's internal treaty structure. The extended external competences of the Union under the Lisbon Treaty will only contribute to the need of clarification in this regard. Substantively it is often impossible to distinguish between CFSP and TFEU policies. In *UN Sanctions*, it was possible to *formally* distinguish between EU, national and international legal instruments. Yet *substantively* CFSP is difficult to identify, particularly after the introduction of the common horizontal objectives. To take the example of security, internal (TFEU) and external (CFSP) security issues have become one where issues such as terrorism or energy security are concerned.

Pre-Lisbon, only the distinction between the first and the third pillar had given rise to significant litigation, not the distinction between the second and the third pillar. Logically, a cross-pillar joint legal basis between the former Union pillars (second and third) was possible before Lisbon.⁵⁸ Post-Lisbon, the dividing line between the AFSJ (former third pillar policies, now part of the TFEU) and CFSP is more pronounced but the Union will still have to bridge this split to accommodate external demands. Since the entry into force of the Lisbon Treaty the Union has concluded nine international agreements in the area of CFSP, four concerning the protection of classified information,⁵⁹ two concerning piracy,⁶⁰ and three concerning participation in the European Union's crisis management operations.⁶¹ So far none of them

⁵⁸ See in particular Case C-355/04 P, *Segi* (*supra* n. 8) and Case T-338/02, *Segi and others* [2004]

ECR II-1647 and Council Decision 2007/551/CFSP/JHA on the 2007 US-EU PNR agreement. The chapter on the former third pillar referred to the CFSP provision on the conclusion of international agreements; see also already C. Eckes, 'How not being sanctioned by a Community instrument infringes a person's fundamental rights: the case of SEGI', *King's College Law Journal* (2006), 144-154.

⁵⁹ Council Decision of 17 November 2009 on the Russia-EU Agreement on the protection of classified information, OJ L155 of 22/06/2010, 56; Council Decision 2010/404/CFSP of 14 June 2010 EU-Liechtenstein Agreement on security procedures for exchanging classified information, OJ L187 of 21/07/2010, 1; Council Decision 2010/587/CFSP of 14 June 2010 on the EU-Montenegro Agreement on security procedures for exchanging and protecting classified information, OJ L260 of 02/10/2010, 1; Council Decision 2012/486/CFSP of 23 July 2012 on the Agreement between the Organisation for Joint Armament Cooperation and the European Union on the protection of classified information, OJ L229 of 24/08/2012, 1.

⁶⁰ Council Decision 2010/199/CFSP of 22 March 2010 on the EU-Montenegro Agreement on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atlanta), OJ L88 of 08/04/2010, 1; Council Decision 2011/640/CFSP of 12 July 2011 on the EU-Mauritius Agreement on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ L254 of 30/09/2011, 1.

⁶¹ Council Decision 2011/133/CFSP of 21 February 2011 on the signing and conclusion of the EU-Montenegro Agreement establishing a framework for the participation of Montenegro in European Union crisis management operations, OJ L57 of 02/03/2011, 1; Council Decision 2011/318/CFSP of 31 March 2011 on the

is based on a cross-Treaty joint legal basis. This does not exclude that such a choice may be substantively the most sensible in the future, in the light of the single international personality of the EU and in the light of the described approximation between CFSP and TFEU policies. The choice of the correct legal basis will remain a hotly contested issue in inter-institutional relations.

In the second case, the *Piracy Agreement* case, Parliament challenged the Council's CFSP decision on the signing and conclusion of an agreement with Mauritius concerning the treatment of suspected pirates and associated seized property.⁶² Parliament aimed to defend its increased prerogatives in the area of external relations. Article 218 TFEU lays down a general procedure for the conclusion of international agreements, including CFSP agreements, and has significantly extended the EP's involvement. As TFEU provision, Article 218 TFEU falls under the jurisdiction of the Court, including where the conclusion of a CFSP agreement is contested.⁶³ Article 218(6) and (10) TFEU are of particular interest to the present discussion. Article 218(6) TFEU requires consent or consultation of Parliament for the conclusion of many international agreements. It also sets out an exception for agreements that relate exclusively to the CFSP, where the EP has no say. Article 218(10) TFEU gives Parliament the right to be informed. The central point of contention in the *Piracy Agreement* case was whether the agreement related *exclusively* to CFSP. If that were the case, it would fall under the exception in Article 218(6) TFEU and Parliament would neither have to be consulted nor give consent. The CJEU found the CFSP legal basis the correct choice. Hence, Parliament did not assert its rights as regards the *conclusion* of the agreement in this particular case. Yet the CJEU explicitly confirmed that the EP's right to be informed during the *negotiations* under Article 218(10) TFEU cuts across all different procedures, including procedures that culminate in the conclusion of CFSP agreements.⁶⁴ This can only be seen as a procedural victory for the EP. As a result, not only Parliament's extended involvement in the conclusion of international agreements but also its information rights are a new avenue for the Court to exercise jurisdiction over CFSP matters.

US-EU Framework Agreement on the participation of the United States of America in European Union crisis management operations, OJ L143 of 31/05/2011, 1; Council Decision 2012/315/CFSP of 19 December 2011 on the EU-New Zealand Agreement establishing a framework for the participation of New Zealand in European Union crisis management operations, OJ L160 of 21/06/2012, 1.

⁶² Case C-658/11, *Piracy Agreement* (*supra* n. 39).

⁶³ *Ibid*, para. 73.

⁶⁴ *Ibid*, para. 54 and para. 80-86.

6.3 Contextual Strengthening of Existing Avenues of Jurisdiction

Based on the Court's pre-Lisbon case law,⁶⁵ it can further be assumed that the Court protects certain procedural rights under CFSP, in particular access to documents and access to justice. The Court will continue to do so after Lisbon. Indeed, the emphasis on transparency and the increased efforts to regulate the treatment of confidential information, *e.g.* in a more elaborated system of classified documents, potentially increase the relevance of actions to obtain access to information.

In *Svenska Journalistförbundet*⁶⁶ and *Hautala*⁶⁷, the Court of First Instance (CFI) reviewed the legality of decisions denying access to documents used in the Union pillars, while emphasising that its review served exclusively 'to verifying whether the procedural rules have been complied with, the contested decision is properly reasoned, and the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.'⁶⁸ However later cases, notably *Kuijer II* (asylum matters before Lisbon)⁶⁹ and *in 't Veld I* (AFSJ, post-Lisbon),⁷⁰ suggest that again in strictly circumscribed circumstances, the review extends to the content of the documents at issue.⁷¹

With the Lisbon Treaty's emphasis on openness and transparency as central principles governing the Union *acquis* and increasing attention of the legislator for the treatment of confidential information⁷² this avenue of involvement of the Court in CFSP matters will only increase in the future. This is also reflected in the proposed changes to the Rules of Procedure of the General Court, which have introduced several new provisions specifically addressing how the Court should deal with confidential information.⁷³ A whole chapter is included to address the particular problems arising from the review of restrictive measures,

⁶⁵ See also: C. Eckes, *EU counter-terrorist policies and fundamental rights: the case of individual sanctions* (Oxford University Press, 2009), Chapter 6.

⁶⁶ Case T-174/95, *Svenska Journalistförbundet* [1998] ECR II-2289.

⁶⁷ Case T-14/98, *Heidi Hautala MEP* [1999] ECR II-2489.

⁶⁸ *Ibid*, para. 72.

⁶⁹ Case T-211/00, *Aldo Kuijer* [2002] ECR II-485.

⁷⁰ Case T-529/09, *In 't Veld v Council (SWIFT agreement)*, Judgment of 4 May 2012. See also: C. Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures', 12 *International Journal of Constitutional Law* 4 (2014), 904-929.

⁷¹ W. Wessel, 'Good Governance and EU Foreign Security and Defence Policy', *CES Working Paper* No 2/04, 14.

⁷² Access to documents and treatment of EU classified information (EUCI) are regulated in greater detail and more specifically for individual EU actors; yet at the same time the EU's approach is increasingly streamlined, see: D. Curtin and C. Eckes, 'Secrecy in the EU's External Relations', SIEPS report 2015, *forthcoming*.

⁷³ The draft rules of procedure of the General Court were submitted to the Council in March 2014, see document 7795/14, COUR 12, INST 157, JUR 164 [for the revision procedure, see Articles 253(6) and 254(5) TFEU]. See in particular draft Articles 103-105.

which are, as was explained above, hybrid CFSP-TFEU measures. The proposed changes in the General Court's rules of procedure make no distinction between CFSP and TFEU policies and would hence be directly relevant for CFSP.⁷⁴ The institutional accommodation of confidential information is a result of the numerous challenges of CFPS measures. It also makes the institutional framework more apt to deal with challenges to CFSP measures.

Another avenue for direct judicial review of CFSP by the EU Courts is the right of access to justice. The principle of effective judicial protection is a fundamental part of the EU's commitment to act in compliance with fundamental rights and the rule of law. Judicial review of legally relevant acts is so central to the European legal order that the EU courts have introduced a principle of interpretation called 'wider jurisdiction'. By virtue of this principle the EU courts have accepted cases outside the express limits of their jurisdiction in the Treaties.⁷⁵ This opens another avenue for judicial review of CFSP to the extent that it directly affects individuals. As part of the Union *acquis* and enjoying primacy over national law CFSP will need to meet the 'Union of law' standard. In the past, national courts have been firm in making their acceptance of primacy dependent on human rights protection by the CJEU.⁷⁶

The EU's accession to the European Convention on Human Rights (ECHR) might additionally push the CJEU to exercise jurisdiction where fundamental rights are allegedly violated. This may further strengthen the principle of wider jurisdiction in particular in the area of CFSP. The final draft accession agreement, as taken note of by the Committee of Ministers on 11 September 2013, equates CFSP with TFEU policies.⁷⁷ They will hence as a matter of principle be treated the same within this multi-layered structure of human rights protection. Indeed, one of the five reasons for which the CJEU declared the draft agreement incompatible with the EU Treaties was that it only has limited jurisdiction over CFSP but that

⁷⁴ The introduction to Chapter 7 specifically refers to restrictive measures, even if Article 105 is phrased in general terms and could be applied to other security matters.

⁷⁵ See above all the landmark judgment of *Les Verts*: Case 294/83, *Parti Ecologiste Les Verts v European Parliament* [1986] ECR 1339. See also an extensive interpretation of *Les Verts* by the CFI, allowing for judicial review of agencies with legal personality: Case T-411/06, *Sogelma v EAR*, Judgment of 8 October 2008, nyr and the arguments of the parties at: Case C-355/04 P, *Segi* (*supra* n. 8), para 28.

⁷⁶ See in particular the Solange case law of the German Constitutional Court.

⁷⁷ Explanatory Report (Doc 47+1 (2013) R008), para. 23.

CFSP could be brought before the European Court of Human Rights.⁷⁸ This discrepancy may likely push the CJEU to interpret its own jurisdiction more generously.

7. Conclusions

Overall the Lisbon Treaty, rather than ring-fencing the CFSP, brought CFSP and TFEU policies closer together. It maintains CFSP's distinct institutional setup and decision-making procedures but also makes CFSP subject to general EU principles. Article 21 TEU for example integrates CFSP and TFEU under a set of common values. Article 4(3) TEU extends the central constitutional principle of sincere cooperation to CFSP. Article 40 TEU, as compared to ex-Article 47 TEU, strengthens the CFSP and emphasizes its differentness and its separate value. Yet, it also approximates CFSP and TFEU policies by vesting them with the same constitutional status, i.e. abolishing any hierarchy between them. Post-Lisbon CFSP and TFEU policies further merge into one integrated Union *acquis*, which also entrenches and protects CFSP's special features as part of that *acquis*. CFSP enjoys primacy over national law, with the difference that CFSP and national law do not compete in the same pre-emptive relationship but may develop in parallel.

In the light of the fact that the EU is a judicial construction⁷⁹ and that the Court is the main protagonist of the constitutionalization scenario within the Union,⁸⁰ the Court's role in interpreting but also creating the nature of CFSP can hardly be overestimated. Judicial control over the exercise of public power is a central element of the rule of law. The Court's jurisdiction makes CFSP part of the Union of law, i.e. the EU legal order that is subject to the rule of law. However, it is relevant in another way as well. The more CFSP constitutionalizes, through Treaty amendments or through the judicial interpretation of the Treaties, the more avenues of litigation are opened and more cases are brought before EU courts. More litigation may then in turn further constitutionalize the CFSP and approximate CFSP and TFEU policies.

Many of the changes under the Lisbon Treaty require judicial clarification. Examples are the extended prerogatives of the European Parliament in the negotiation and conclusion

⁷⁸ Opinion 2/13, delivered on 18 December 2014, nyr.

⁷⁹ A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004).

⁸⁰ G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012).

of international agreements and the mutual non-affectedness clause. This need for clarification makes more judicial challenges likely. Additionally, the Court itself has likely contributed to more litigation. We have only seen the tip of the iceberg so far. In *UN Sanctions*, the Court further avoided addressing the nature of CFSP; yet, it implicitly opened the door to arguments in favour of a cross-Treaty joint legal basis. This allows speculating about further approximation between the CFSP and TFEU policies. In cases where there is no centre of gravity and in which CFSP and TFEU policies are inextricably linked, pre-Lisbon the logical choice under ex-Article 47 TEU was to opt for a legal basis under the EC Treaty. After Lisbon, under Article 40 TEU there is no longer a clear-cut choice.

Extended jurisdiction expands the Court's capacity to give guidance on what CFSP is and how it should be interpreted. At the same time the Court has good reasons to refrain from doing so, as it notably did in *UN Sanctions*.⁸¹ Firstly, CFSP at large does not fall within its jurisdiction. It would hence be highly controversial for the Court to pronounce on the nature of CFSP in more general terms. Secondly, there is a virtue in ambiguity. The Court takes a risk when it engages with the nature of CFSP. On the one hand the Court could have ruled in *UN Sanctions* that CFSP is fundamentally different from binding legal instruments under the TFEU, and that therefore a cross-Treaty legal basis is excluded. On the other, the Court could have ruled that the differences in nature are not that fundamental. This would be a major step towards constitutionalizing the CFSP. If the Court had made cross-Treaty joint legal bases more broadly possible this would have opened the door to an increased level of interlocking that diminishes the CFSP's particularities. Both courses have their own pitfalls. The first weakens CFSP instruments. The second may result in more extra-Treaty cooperation of the Member States on matters that fall under CFSP in order to avoid being bound by the principles of EU law.

Five years after the entry into force of the Lisbon Treaty, the full consequences of these dynamics cannot yet be fully appreciated. They will only become apparent by the actions of the Member States and crucially by the CJEU's case law in this area. Yet in the light of the Court's track record, it can be expected that the expanded jurisdiction of the Court will ultimately do more to constitutionalize the CFSP than what can at present be found in the letter of the EU Treaties. It is hence expected that CFSP will increasingly become subject

⁸¹ The Commission brought forward that the geographical differentiation in Protocols 21 and 22 should make a difference [AG Bot, C-130/10, para. 37]. The CJEU however did not pick up this argument.

to rules and dynamics of EU constitutional law. The CJEU will apply organizational principles and human rights in a *centralized* manner. This leads to the further conclusion that the main risk of the Lisbon Treaty may not be that the CFSP encroaches upon TFEU policies or *vice versa*. The main risk may rather be that Member States avoid the Union framework altogether and act under international law when dealing with matters that would have fallen under CFSP.