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The CFSP and Other EU Policies: A Difference in Nature?

Christina ECKES*

*The Common Foreign and Security Policy (CFSP) forms part of European Union (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 and its relationship with TFEU policies, drawing amongst others conclusions from the post-Lisbon case law concerning CFSP matters, such as the UN Sanctions case (C-130/10) and the Piracy Agreement case (C-658/11). It argues that the CFSP forms part of the Union *acquis* and enjoys primacy over national law. Most importantly, the article argues that the Lisbon Treaty has extended the Court's jurisdiction over CFSP matters in several hidden ways. This is likely to trigger additional constitutionalization dynamics in the area of the CFSP and further approximate CFSP and TFEU policies.*

1 INTRODUCTION

The Common Foreign and Security Policy (CFSP) forms part of the European Union (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

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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(3) *Common Mkt. L. Rev.* 887 (1999).

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

point that does not require further discussion;³ others speak of a ‘collapse of the pillar structure’⁴ but indeed question how far the consequences of this collapse went. Again others categorize 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 post-Lisbon case law of the Court of Justice of the European Union (CJEU).

The Lisbon Treaty attempted to strike a balance between protecting the distinct character 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 is unclear whether CFSP forms part of an integrated ‘Union *acquis*’ and whether it enjoys the same features that vest Community law with effectiveness, i.e., primacy. Post-Lisbon case law continues to shape the nature of CFSP and its relationship with other policies. This article argues that the CJEU’s role in determining the evolving nature of CFSP is greater than may be expected in the light of its *prima facie* very limited jurisdiction.

Section 2 examines the Member States’ attempts to ring-fence CFSP with the amendments introduced by the Lisbon Treaty. Section 3 briefly introduces the institutional and constitutional particularities of CFSP (section 3.1); analyses whether CFSP now forms part of the *Union acquis* or whether it remains separate (section 3.2); and discusses whether CFSP enjoys primacy as one of the central features of EU law adopted under the TFEU (section 3.3). Section 4 analyses the CJEU’s post-Lisbon jurisdiction over CFSP matters in the light of the findings on the nature of CFSP. It argues that the jurisdiction of the Court has been considerably extended, through formal changes (section 4.1), the recent case law of the Court (section 4.2) and through a contextual interpretation of pre-Lisbon avenues of jurisdiction (section 4.3). A final section 5 draws further conclusions about how CFSP may develop, its relationship with TFEU policies, and its level of constitutionalization.

³ F. Laursen, *The EU ‘External Actions’ According to the Lisbon Treaty*, in *New Approaches to EU Foreign Policy*, 17 (M. Wilga & I. Pawel Karolewski eds, Routledge 2014). See also, P. Koutrakos, *The European Union’s Common Foreign and Security Policy after Lisbon*, in *The European Union after the Treaty of Lisbon* (D. Ashiagbor, N. Countouris & I. Lianos eds, 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(4) *Com. Mkt. L. Rev.* 987–1019 (2010), speaking at p. 1018 of a ‘dual pillar structure in all but name’. M. Busuioc, *European Agencies: Law and Practices of 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*, 45(3) *Com. Mkt. L. Rev.* 625 (2009).

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

2 THE LISBON TREATY: RING-FENCING THE CFSP OR APPROXIMATION OF EXTERNAL RELATIONS POLICIES?

In the words of David Miliband, 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’,⁶ with the aim of preserving its special nature and protecting it from the EU’s integration through law and from the constitutionalization processes under the TFEU, which follow the logic of the former Community pillar.

But did the Lisbon Treaty achieve this objective? It is true that the Treaty of Lisbon has fundamentally changed the relationship between the CFSP and non-CFSP or ‘TFEU policies’. However, whether this has resulted in effectively it ‘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. Constitutionalizing dynamics, like the establishment of a single international personality,⁷ as well as the application across the board of a duty of sincere cooperation,⁸ as well as a consolidated list of objectives for all external action,⁹ have made the Union a more unified actor capable of exercising power across the board. Indeed, post-Lisbon most of the legal concepts, which are universally valid for all activities of the Union, have been pulled together in the EU Treaty, including the principles of conferral, subsidiarity and proportionality (Article 5 TEU). Most notably, the principle of consistency¹⁰ as a centrally unifying principle, has received new prominence under the Lisbon Treaty.

At the same time, the issue of delimitation between CFSP and TFEU policies has (perhaps changed but) not at all 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 keeping the gate, so to speak. The article prohibits any invasion of territory

⁶ *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 Oct. 2007).*

⁷ See Arts 1 & 47 TEU: The Union has succeeded the Community. There are no longer two (Union and Community) legal persons active on the international plane.

⁸ Pre-Lisbon the Court already considered the duty of sincere cooperation as applicable to the Union pillars, 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 Art. 4(3) TEU.

⁹ Article 21 TEU.

¹⁰ For the purpose of this article no distinction is made between consistency and coherence.

either way between the ‘Union competences referred to in Articles 3–6 [TFEU]’, i.e., between the former first and third pillar competences now contained in the TFEU on the one hand, and the CFSP on the other. Article 40 section 1 TEU protects TFEU policies from CFSP invasion and 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, the CJEU’s case law on ex-Article 47 TEU is no longer applicable to the relationship between CFSP and TFEU policies. In other words, the new ‘mutual non-affection’ clause requires judicial clarification not only in the light of the new wording but also in the 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 and that created potential for controversy. This will open new avenues for the CJEU to exercise jurisdiction over CFSP, which may be expected to further approximate CFSP and the rest.

3 THE NATURE OF CFSP

3.1 PROCEDURAL AND INSTITUTIONAL FRAMEWORK OF THE CFSP

The CFSP has greatly expanded ever 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 today. Article 24(1) TEU stipulates ‘[t]he Union’s competence in matters of [CFSP] shall cover *all areas* of foreign policy and *all questions* relating to the Union’s security’.¹¹ 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.

Three dimensions should be distinguished, in which CFSP differs from TFEU policies. The first concerns the inter-institutional relations. Relatively more weight is given to the EU institutions in which the national executive is represented. In particular, the Council by far outweighs the European Parliament when an act is adopted under the CFSP. Indirectly, this gives the (representatives of the) Member States a more dominant position than in other policy areas. The European

¹¹ Emphasis added.

Parliament and the Commission have a *specific role* in this area, which is considerably more limited than under TFEU. Legislative acts cannot be adopted, and special procedures apply (Article 24(1) TEU). The European Parliament is informed and consulted but does not have a formal decision-making role.¹² Formally, also the Commission's role is limited, e.g., lacking the power of watchdog of Member States' compliance.¹³ 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. One can easily imagine that different actors would be tempted to try and encroach upon procedural requirement in either direction. While the decision-making procedures under the TFEU give more powers to the Commission and to the Parliament, the intergovernmental set-up of the CFSP requires unanimity amongst the Member States, privileging the will of the national executive in the Council.

The second difference pertains to the relationship between the Union and its Member States. CFSP competences are parallel competences, i.e., when the Union exercises its CFSP competences Member States are not pre-empted or prevented from taking national action.¹⁴ And even if 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,¹⁵ ensuring compliance with this duty largely remains a political process in the hands of the Council and the High Representative, rather than the Commission and the Court. Because of this legal set-up judicial review is not likely.

Third, the Union's relationship with the individual differs in the area of CFSP from its relationship with individuals under the TFEU. CFSP acts do not have the capacity to enter directly into the national legal orders (direct applicability). CFSP acts often establish general positions or determine institutional. Much of the CFSP aims to coordinate the foreign policies of the Member States rather than imposing a uniform Union policy.¹⁶ Hence, individuals are as a rule not directly affected. However, exceptionally scenarios exist where CFSP directly determines the rights of individuals (direct effect) and is of direct and individual concern to individuals.

¹² See Art. 36 TEU.

¹³ Notwithstanding this limitation, it is involved at all levels of decision-making: at the highest level, by extension through and with the High Representative to the level of the working groups and committees, including the European Political Committee (EPC). See e.g., Art. 30 TEU.

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

¹⁵ Article 24(3) TEU stipulates that '[t]he 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.'

¹⁶ See e.g., Arts 28 and 29 TEU.

The most relevant example are restrictive measures, which are adopted as hybrid CFSP-TFEU measures first requiring a CFSP decision.¹⁷ Also, actions for non-contractual damages are imaginable in the context of CFSP, where individuals suffer losses caused by Union action.¹⁸ Hence, litigation scenarios are perceivable in this context.¹⁹

3.2 ARTICLE 40 TEU AND THE 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.²⁰ Post-Lisbon, the separation provision has become the mutual non-affection clause and the situation has become less clear.

Pre-Lisbon, the provision that reflects best the tension between protecting the advanced integration under the first pillar and encouraging intergovernmental cooperation within the second and third pillar 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* comprised the Community Treaties²¹ and all Secondary Community law (former first pillar). ‘[A]ctivities carried out in order to attain its [i.e., the Union’s] objectives’ referred to the Union’s activities under all three pillars. 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*’.²² Yet, while the terms Union *acquis* and *acquis communautaire* were used in the Treaties and in secondary EU law, they were never defined, not even in a general manner.²³ CFSP formed part of the Union *acquis*²⁴ but logically not the *acquis communautaire*.²⁵

¹⁷ For example economic sanctions, travel or visa bans.

¹⁸ For example, a situation similar to *Behrami v. France and Saramati v. France, Germany and Norway*, Judgment of 2 May 2007, App. No. 71412/01 and 78166/01.

¹⁹ See also, C. Hermann & T. Kruis, *Keine Befehle aus Brüssel! GASP Massnahmen und das Verbot des Angriffskrieges*, Jura, 472–478 (2008).

²⁰ In combination with the principle of sincere cooperation (Art. 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.

²¹ EC Treaty, Euratom and ECSC.

²² Ex-Article 44(1) TEU.

²³ See, C. Delcourt, *The Acquis Communautaire: Has the Concept had its Day?*, 38(4) Com. Mkt. L. Rev. 829–870 (2001).

²⁴ See implicitly ex-Art. 44(1) TEU.

²⁵ Ex-Article 47 TEU.

Post-Lisbon with the disappearance of the Community, *acquis communautaire* has become a historic reference. The Treaties refer to the term ‘*acquis*’ only once in the specific context of enhanced cooperation and without further qualification.²⁶ Outside of the Treaties, the term ‘accession *acquis*’ continues to be the most widely used form of *acquis*.²⁷ In the context of enlargement, the Commission deals with the CFSP and the European/Common Security and Defence Policy (ESDP/CSDP) as the thirty-first chapter of the *acquis*.²⁸ Hence, the present Union *acquis* comprises all Union policies, including CFSP.

To some this may sound odd because to them the term *acquis* in itself has acquired a taste of integration and constitutionalization.²⁹ Yet in the post-Lisbon era, it makes sense to speak of Union *acquis* as 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. In this reading, the Union *acquis* comprises not only the well known core features of the former Community pillar, such as primacy and *effet utile*, but also those elements that are intended to protect the autonomy and the political space of the Member States, such as the parallel nature of CFSP competences. Furthermore logically this Union *acquis* cannot be supranational in character. Instead, it protects the institutional balance as it is agreed upon in the different areas with their different degrees of integration.

Union *acquis* is a dynamic concept that refers to the current state of affairs. It comprises the provisions, principles and political objectives of the European Treaties; secondary Union law and the CJEU’s case law; declarations and resolutions adopted by the institutions; and international agreements concluded by the Union. The unique role and tasks of the institutions form part of the institutional *acquis*, including the procedural and institutional differences in the different policy fields. The relationship between CFSP and TFEU policies in its dynamic interpretation is also part of the Union *acquis*. Indeed 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. 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. This is in line with the common horizontal objectives of Union external actions in Article 21 TEU, as well as the new mutual non-affectation clause

²⁶ Article 20(4) TEU. Several protocols mention the term *acquis*: Art. 2 of Protocol 21; recitals and Art. 2 of Protocol 22; Protocol 36.

²⁷ C. C. Cialdino, *Some Reflections on the Acquis Communautaire*, 32(5) Common Mkt. L. Rev. 1089–1121, 1090 (1995).

²⁸ See, <http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/>.

²⁹ For example, Delcourt, *supra* n. 23.

in Article 40 TEU, which does no longer privilege the former Community pillar, but also protects the additional political space guaranteed by CFSP. In this reading, the main purpose of the concept of a unified Union *acquis* is to protect it from Member States' actions and prevent joint or individual national action to undermine the effectiveness of EU law.

3.3 PRIMACY OF CFSP

The Treaty on the Constitution for Europe³⁰ contained a provision on the primacy of Union law as a whole that would have confirmed that CFSP was of the same nature as TFEU policies and for that reason prevailed over national law.³¹ As a result of the 'de-constitutionalization' efforts following the negative referenda in 2005, the provision did not make its way into the Lisbon Treaty. The only reference to primacy is now in Declaration 17, which does not appear to make a constitutive assertion or even to introduce any change as compared to the situation existing previously. Nevertheless, 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 [CJEU], 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, as the two basic treaties in force. If CFSP was excluded from the primacy declaration the reference to the Treaties (in the plural) would be empty since the CFSP is the 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, special procedures apply that privilege the executive and much of CFSP concerns the coordination the national foreign policies. Yet, this does not stand in the way of considering CFSP law. Legislative acts are only one particular type of law. Many other types exist, in the context of external relations for example, international agreements. Public international law is law even if nearly exclusively concerns the coordination of state action. Hence, CFSP is law, including for the purpose of Declaration 17.

Another argument against the primacy of CFSP could be advanced based on the wording of Declaration 17. The declaration refers to 'well settled case law' of

³⁰ OJ C 169, 1–150 (18 Jul. 2003); as is well known, the Treaty on the Constitution for Europe never entered into force.

³¹ 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 CJEU.³² Indeed, the Court has never explicitly confirmed the primacy of the CFSP. However in the pre-Lisbon cases of *Pupino* and *Segi*, the Court implicitly presumed the primacy of Union law (as opposed to Community law).³³ It required national courts to apply the principle of consistent interpretation under the former third pillar and extended the principle of sincere cooperation to the Union pillars. The Lisbon Treaty gives no reason to assume that this has changed. It should hence be concluded that CFSP enjoys primacy in the same way as TFEU policies.

The following section analyses the jurisdiction of the CJEU over CFSP matters in the light of the established nature of CFSP. It also advances conclusions on how this nature may change in the future.

4 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.

4.1 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.³⁴ Restrictive measures are by far the most judicially contested type of CFSP measure. At the time of writing about 100 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.

³² Declaration 17 further mentions an opinion of the Council Legal Service that refers exclusively to the primacy of 'Community law', citing ex-first pillar case law.

³³ Case C-355/04 P, *Segi* (*supra* n. 8); Case C-105/03, *Pupino* [2005] ECR I-5285.

³⁴ C. Eckes, *EU Restrictive Measures Against Natural and Legal Persons: From Counter-Terrorist to Third Country Sanctions*, 51(3) *Com. Mkt. L. Rev.* 869–906 (2014).

Second, the formal changes to the relationship between CFSP and TFEU policies in Article 40 TEU made inter-institutional litigation more likely.³⁵ 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.³⁶ This has already and will lead to further litigation.

4.2 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.³⁷ 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'.³⁸ 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.³⁹ A third case is at present pending, which equally concerns the relationship between CFSP and TFEU policies.⁴⁰

In the *UN Sanctions Case*,⁴¹ 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

³⁵ *Ibid.*; see also, P. Van Elsuwege, *The Adoption of 'Targeted Sanctions' and the Potential for Inter-institutional Litigation after Lisbon*, 7(4) J. Contemp. European Research 488–499 (2011).

³⁶ In the below discussed *UN Sanctions* case the Court accepted the Council's preference for using a hybrid CFSP-TFEU provision, Art. 215 TFEU, rather than the 'pure' TFEU competence in Art. 75 TFEU.

³⁷ Case C-130/10, *Parliament v. Council*, Judgment of 19 Jul. 2012, nyr.

³⁸ 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*, 295 et seq. (Oxford University Press, 2008).

³⁹ Case C-658/11, *Parliament v. Council*, Judgment of 8 Aug. 2014, nyr.

⁴⁰ 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.

⁴¹ Case C-130/10, *Parliament v. Council*, *supra* n. 37. See also, A. Ott, *Case C-130/10, European Parliament v. Council of the European Union, Judgment of 19 July 2012, not yet reported*, Maastricht J. European & Comp. L. 589 (2012).

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).⁴² 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 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.⁴³ 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.⁴⁴

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.⁴⁵ The specificity of Article 215(2) TFEU, requiring a prior CFSP decision (unanimity), is only mentioned as an *additional*⁴⁶

⁴² See for an in-depth discussion of the choice of the legal basis, C. Eckes, *EU Counter-Terrorist Sanctions against Individuals: Problems and Perils*, 17(1) *European For. Affairs Rev.* 113–132 (2012).

⁴³ This was already established in *ECOWAS*, *supra* n. 38, paras 60, 73 and 75.

⁴⁴ Case C-155/07, *Parliament v. Council (European Investment Bank Guarantees)* [2008] ECR I-8103, paras 35–37.

⁴⁵ Case C-130/10, *Parliament v. Council*, *supra* n. 37, para. 47.

⁴⁶ ‘In addition’; ‘ausserdem’; ‘en outre’; ‘voorts’.

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.

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.⁴⁷ 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,⁴⁸ two concerning piracy,⁴⁹

⁴⁷ 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 L.J. 144–154 (2006).

⁴⁸ Council Decision of 17 November 2009 on the Russia-EU Agreement on the protection of classified information, OJ L-155, 56 (22 Jun. 2010); Council Decision 2010/404/CFSP of 14 June 2010 EU-Liechtenstein Agreement on security procedures for exchanging classified information, OJ L-187, 1 (21 Jul. 2010); Council Decision 2010/587/CFSP of 14 June 2010 on the EU-Montenegro Agreement on security procedures for exchanging and protecting classified information, OJ L-260, 1 (2 Oct. 2010); 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 L-229, 1 (24 Aug. 2012).

⁴⁹ 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 L-88, 1 (8 Apr. 2010); Council

and three concerning participation in the EU's crisis management operations.⁵⁰ So far none of them 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.⁵¹ 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.⁵² 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.⁵³ This can only be seen as a procedural victory for the EP. As a result, not only Parliament's extended involvement in the

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 L-254, 1 (30 Sep. 2011).

⁵⁰ *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 L-57, 1 (2 Mar. 2011); *Council Decision 2011/318/CFSP of 31 March 2011 on the US-EU Framework Agreement on the participation of the United States of America in European Union crisis management operations*, OJ L-143, 1 (31 May 2011); *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 L-160, 1 (21 Jun. 2012).

⁵¹ Case C-658/11, *Piracy Agreement*, *supra* n. 39.

⁵² *Ibid.*, para. 73.

⁵³ *Ibid.*, para. 54 and paras 80–86.

conclusion of international agreements but also its information rights are a new avenue for the Court to exercise jurisdiction over CFSP matters.

4.3 CONTEXTUAL STRENGTHENING OF EXISTING AVENUES OF JURISDICTION

Based on the Court's pre-Lisbon case law,⁵⁴ 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, for example, in a more elaborated system of classified documents, potentially increase the relevance of actions to obtain access to information.

In *Svenska Journalistförbundet*⁵⁵ and *Hautala*,⁵⁶ the Court of First Instance (CFI) reviewed the legality of decisions denying access to documents used in the Union pillars, while emphasizing 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'.⁵⁷ However later cases, notably *Kuijjer II* (asylum matters before Lisbon)⁵⁸ and *in 't Veld I* (AFSJ, post-Lisbon),⁵⁹ suggest that again in strictly circumscribed circumstances, the review extends to the content of the documents at issue.⁶⁰

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 information⁶¹ 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

⁵⁴ See also, C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Ch. 6 (Oxford University Press 2009).

⁵⁵ Case T-174/95, *Svenska Journalistförbundet* [1998] ECR II-2289.

⁵⁶ Case T-14/98, *Heidi Hautala MEP* [1999] ECR II-2489.

⁵⁷ *Ibid.*, para. 72.

⁵⁸ Case T-211/00, *Aldo Kuijjer* [2002] ECR II-485.

⁵⁹ 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(4) *Intl' J. Const. L.* 904–929 (2014).

⁶⁰ W. Wessel, *Good Governance and EU Foreign Security and Defence Policy*, CES Working Paper 2, 14 (2004).

⁶¹ 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 & C. Eckes, *Secrecy in the EU's External Relations*, SIEPS report 2015, (*forthcoming*).

deal with confidential information.⁶² A whole chapter is included to address the particular problems arising from the review of restrictive measures, 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.⁶³ The institutional accommodation of confidential information is a result of the numerous challenges of CFSP 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.⁶⁴ 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.⁶⁵

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.⁶⁶ 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 CFSP could be brought before the European Court of Human

⁶² 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 Arts 253(6) and 254(5) TFEU]. See in particular draft Arts 103–105.

⁶³ The introduction to Ch. 7 specifically refers to restrictive measures, even if Art. 105 is phrased in general terms and could be applied to other security matters.

⁶⁴ 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 Oct. 2008, nyr and the arguments of the parties at: Case C-355/04 P, *Segi*, *supra* n. 8, para 28.

⁶⁵ See in particular the Solange case law of the German Constitutional Court.

⁶⁶ Explanatory Report (Doc 47+1 (2013) R008), para. 23.

Rights.⁶⁷ This discrepancy may likely push the CJEU to interpret its own jurisdiction more generously.

5 CONCLUSIONS: THE CHANGING NATURE OF CFSP

Overall the Lisbon Treaty, rather than ring-fencing the CFSP, brought CFSP and TFEU policies closer together. It maintains CFSP's distinct institutional set-up 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 distinctness 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 construction⁶⁸ and that the Court is the main protagonist of the constitutionalization scenario within the Union,⁶⁹ 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 of international agreements and the mutual non-affectation 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

⁶⁷ Opinion 2/13, delivered on 18 Dec. 2014, nyr.

⁶⁸ A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

⁶⁹ G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012).

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*.⁷⁰ First, 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. Second, 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 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.

⁷⁰ 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.

A constitutionalized CFSP may lead to two opposing trends as regards the emerging actorness of the Union in this area. Actorness is here understood as based on four dimensions: cohesion, authority, autonomy and recognition.⁷¹ On the one hand, an integrated Union *acquis* protected by the CJEU and the enforcement of stronger constitutional principles in the area of CFSP may strengthen the cohesion and authority of the Union's actions under CFSP. This is the case if it is able to take action. On the other, when Member States flee the constitutionalized CFSP framework to escape the stricter rules this undermines the Union's ability to take action and notably its autonomy and recognition as an international actor in the area of CFSP. Hence ultimately the approximation of CFSP and TFEU and the constitutionalization of CFSP may do more to challenge the Union's actorness than to strengthen it.

⁷¹ See, J. Jupille & J.A. Caporaso, *States, Agency and Rules: The European Union in Global Environmental Politics*, in *The European Union in the World Community*, 213–229 (C. Rhodes ed., Lynne Rienner 1998). Further developed and applied by M. Groenleer & L. van Schaik, *United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol*, 45(5) *J. Com. Mkt. Stud.* 969–998 (2007).