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GOOD GOVERNANCE AND EU FOREIGN, SECURITY AND DEFENCE POLICY

*'The Union's first step must be to reform governance
successfully at home in order to enhance the
case for change at an international level'.
(Commission's White Paper on European Governance, July 2002)*

1. Introduction

The European Commission's White Paper on European Governance, issued in July 2002, boosted the discussion on the reform of European governance.¹ In this document, the Commission lists five principles that underpin good governance: openness, participation, accountability, effectiveness and coherence. These principles are believed to form the basis for democracy and the rule of law in the member states, but in fact apply to all levels of government – local, regional, national, European and global.

Although 'good governance' has been on the agenda of many international organizations for fifty years – as a result of expectations regarding their increasing role in the structuring of international society – the notion originally had to do with the equal participation of states or stimulating national democracy rather than with bringing international organizations closer to the citizens.² Nevertheless, some of the principles, which featured in that debate (democratic representation, accountability, transparency) are similar to the ones which we now encounter in the discussion on the European Union and public administration.

As said, the Commission's White Paper serves as a reference framework for the current debate. While the European *Community* seems to be the main focus of

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¹ COM(2001) 428 final, Brussels, 27 July 2001.

² See N. Woods, 'Good Governance in International Organizations', *Global Governance*, 1999, p. 39-61; Th. M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, 1992, p. 46-91.

the White Paper, the numerous references to the European *Union* allow for the application of the various ideas and plans to the Common Foreign and Security Policy (CFSP) and the newly established European Security and Defence Policy (ESDP) as well.³ In fact, the above quotation from the White Paper reveals the steps foreseen by the Commission: an internal application of the principles of good governance, followed by the promotion of these principles on a global level.

The present contribution aims to follow the same path. First of all the concept of good governance will be applied to the CFSP arrangements as laid down in the Treaty on European Union. The concept itself will not be challenged; I will simply depart from the principles that are thought to underpin good governance in the White Paper as well as in surrounding literature. Secondly, at the end this chapter attempts to consider good governance as a substantive element of EU policy vis-à-vis third states. To what extent has the Union indeed been given competences to make 'a contribution to global governance' as heralded by the White Paper.

Lawyers are not yet fully accustomed – and maybe not even fully qualified – to play a part in the governance debate. They lean heavily on insights offered by scholars in sociology, political science and public administration. In fact, as one observer held, the 'governance project' of the Commission could be viewed as 'a package of innovation launched strategically into a legally undefined space that is located somewhere between administrative and constitutional reform'.⁴ At the same time a distinctive role for legal science in this debate must imply an original point of view, in which the principles underlying good governance are translated into more 'down to earth' legal terms. This has, for instance, been done with regard to the principle of coherence, which received abundant attention in the post-Maastricht literature.⁵ In the present article an attempt is made to find out to what extent the Union lives up to some of the other principles mentioned by the Commission by highlighting the competences of the Union and the legal arrangements governing the democratic and judicial accountability and transparency of decision making in the area of CFSP. This focus on legal rules and competences obviously does not reveal the practice of the involvement of civil society in CFSP (if it's at all present). Neither does it supply answers as to the effectiveness of the existing arrangements in terms of actual (political) influence on CFSP, or to the functioning of CFSP in terms of legitimacy. On the other hand, it *does* reveal the legal framework which sets the boundaries – and at the same time offers the opportunities – for applying the principles of good governance in this area.

Section two will focus on the parliamentary control of CFSP, both by the European Parliament and by the national parliaments. The reason for this is that the

³ The arrangements concerning these policies are not laid down in the EC Treaty, but in Title V of the Treaty on European Union. Parts of the present paper are based on R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*, The Hague, Kluwer Law International, 1999.

⁴ Chr. Joerges, 'Guest Editorial: The Commission's White Paper on Governance in the EU – A Symptom of Crisis?', *Common Market Law Review*, 2002, p. 441-445.

⁵ See for references R.A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations', *Common Market Law Review*, 2000, p. 1135-1171.

Treaty lays down a system in which citizen involvement is embedded in a system of democratic representation on two 'constitutional' levels.⁶ More direct possibilities for civil society, however, depend on their knowledge of what is going on in CFSP. Section 3 will investigate the legal arrangements concerning the transparency of decision making and access to information. This will be followed by a survey of the possibilities for judicial scrutiny of the CFSP decisions and procedures, at the European level, but also at the national and international levels (section 4). Finally, section 5 will look into good governance as a substantive foreign policy objective and the possibilities of the Union to contribute to 'global governance'. As most of the rules originate in the formative years of CFSP (the 1990s), occasional reference will be made to this period.

2. Parliamentary Control of CFSP Decision making

2.1. *The Competences of the European Parliament*

2.1.1 The Emergence of Parliamentary Scrutiny at the European Level

In discussing the competences of the European Parliament (EP), one enters one of the most criticized areas of European integration. Many regard the 'democratic deficit' as one of the principal shortcomings of the European Union.⁷ Regarding cooperation also in the area of foreign policy, the influence of the EP on decision making as well as its supervision has traditionally been marginal. Whereas the proposal for a European Political Union drafted by the French Government in 1960 already envisaged a democratically elected body to exert control over a European foreign policy,⁸ the EP has found itself fighting for its 'rights' ever since the creation of European Political Cooperation (EPC) at the beginning of the 1970s.⁹ The 1970 *Davignon Report* provided for a yearly 'progress report' to the EP by the Presidency ('the

⁶ See for the constitutional approach of European foreign policy in these terms my article entitled 'The Multi-Level Constitution of European Foreign Relations', in D. Curtin *et al.*, *The Emerging Constitution of the European Union*, Oxford, Oxford University Press, 2005 (forthcoming).

⁷ An extensive analysis as well as a survey of views is provided in D.M Curtin, 'Betwixt and Between: Democracy and Transparency in the Governance of the European Union', in J. Winter, *et al.* (eds.), *Reforming the Treaty on European Union – The Legal Debate*, The Hague, Kluwer Law International, 1996, p. 95-121; or D.M Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy*, The Hague, Kluwer Law International, 1997. See also E.-U. Petersmann, 'The Moral Foundations of the European Union's Foreign Policy Constitution: Defining 'European Identity' and 'Community Interests' for the Benefit of EU Citizens', *Aussenwirtschaft*, issue II, 1996, p. 151-176 and M. Hilf and F. Schorkopf, 'Das Europäische Parlament in den Außenbeziehungen der Europäischen Union', *Europarecht*, issue 2, 1999, p. 185-202.

⁸ See for the text of this proposal for instance J.C. Masclat, *L'Union politique de l'Europe*, Paris, Presses Universitaires de France, 1973, p. 45.

⁹ See in particular: G. Gaja, 'European Parliament and Foreign Affairs: (1) Political Cooperation among the Nine', in A. Cassese (ed.), *Parliamentary Control over Foreign Policy: Legal Essays*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1980, p. 191-205.

president-in-office of the Ministers for Foreign Affairs') and for 'six-monthly meetings' between the Ministers for Foreign Affairs and the EP's Political Affairs Committee. The 1973 *Copenhagen Report* doubled the frequency of these meetings as the yearly meetings of the foreign ministers increased from two to four. In fact, these provisions triggered an increase in the interest of the EP in questions of foreign policy, which had been very limited before 1973.¹⁰ On the other hand, possibilities for the EP to develop a policy were limited as well, as the EPC provisions did not confer any powers on the EP to influence or control European foreign policy. In the EP's opinion, the foreign ministers' meetings should be 'immediately followed by a colloquy between the ministers and the Political Affairs Committee',¹¹ but practice showed that the Committee's meetings were, at best, attended by the Presidency only.

An annual debate between the EP and the Presidency on the basis of the 'progress report' was introduced in 1974, but did not increase the possibilities for control, since here too the EP depended on the information provided by the Presidency and was bound to deliver *ex post facto* opinions only. The same holds true for the competence of the EP, introduced in the same year, to address 'questions on political cooperation' to the Presidency. Regardless of this competence, until May 1976 the ministers refused to recognize that such questions could be addressed during question time. The ordinary procedure often involved considerable delays, which significantly reduced the value of posing questions.¹² In 1978 the EP expressed:

'its concern at the lack of substantive and up-to-date information given to the European Parliament by the foreign ministers of the Nine concerning measures of joint foreign policy'.¹³

With the further codification of the European Political Cooperation in the Single European Act in 1986, the position of the EP did not improve, as its influence was still described as vaguely as possible:

'The High Contracting Parties shall ensure that the European Parliament is closely associated with European Political Cooperation. To that end the Presidency shall regularly inform the European Parliament of the foreign policy issues which are being examined within the framework of Political Cooperation and shall ensure that the views of the European Parliament are duly taken into consideration'.¹⁴

It proved that terms like 'closely associated', 'regularly inform', and 'taken into consideration' provided enough possibilities for the ministers to limit parliamentary control to a partial right to information.¹⁵ In general, parliamentary control over for-

¹⁰ *Ibidem*, p. 193.

¹¹ See Resolution of 6 April 1973, *OJ C* 26, 1973, p. 26.

¹² See G. Gaja, *supra* note 9, p. 195.

¹³ Resolution of 19 January 1978, *OJ C* 36, 1978, p. 33.

¹⁴ Article 30, para. 4 SEA.

¹⁵ Cf. S. Stavridis, 'The Democratic Control of CFSP', in M. Holland (ed.), *Common Foreign and Security Policy: the Record and Reforms*, London, Pinter, 1997, p. 136-147, at p. 137.

eign policy is limited on a national level as well,¹⁶ and ministers were reluctant to introduce powers in the 1986 Treaty that would constrain their traditional freedom to act according to specific circumstances in European affairs. The Treaty on European Union still reflects this idea and the competences of the EP that have developed since 1970 have found their way into the current Article 21.

2.1.2 Current Competences of the European Parliament in CFSP

Article 21 TEU reads:

‘The Presidency shall consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and shall ensure that the views of the European Parliament are duly taken into consideration. The European Parliament shall be kept regularly informed by the Presidency and the Commission of the development of the Union’s foreign and security policy.
The European Parliament may ask questions of the Council or make recommendations to it. It shall hold an annual debate on progress in implementing the common foreign and security policy’.¹⁷

The imperative nature of the norms laid down in this provision makes it clear that the Presidency is obliged to consult the EP and take its views into consideration. Furthermore, the EP’s right to be kept informed results in obligations for the Presidency and the Commission. Therefore, the problem – if one wants – lays not so much in the choice of norms, but in the contents of the obligation laid down in these norms. The terms ‘main aspects’ and ‘basic choices’ were not defined by the Treaty, which seems to leave their interpretation to the discretion of the Presidency. The same holds true for ‘takes into consideration’ and ‘regularly’.

Moreover, it is striking that the two main decision making organs – the Council of Ministers and the European Council – are not accountable to the EP. The relationship of the EP with the Council is limited to its power to ask questions and to make recommendations.¹⁸ The latter possibility has only been used modestly.¹⁹ No

¹⁶ See A. Cassese, *supra* note 9. Cf. also Th. Grunert, ‘The Association of the European Parliament: No Longer the Underdog in EPC?’, in E. Regelsberger *et al.* (eds.), *Foreign Policy of the European Union: From EPC to CFSP and Beyond*, Boulder, Lynne Rienner, 1997, p. 109-132, at p. 112: ‘In the individual states, foreign and security policy is traditionally the exclusive competence of governments. Parliaments can monitor government action through questions, motions of non confidence, the adoption or rejection of international treaties, and by means of ratification procedures’.

¹⁷ Regarding PJCC, a similar regime may be found in Article 39, paras. 2 and 3. However, on the basis of paragraph 1, the Council shall consult the EP before adopting any PJCC decision other than a Common Position.

¹⁸ Parliament’s right to make recommendations on CFSP issues is confirmed in its Rules of Procedure of February 2003, Rule 104. In urgent cases, the power to issue recommendations on foreign policy is transferred to the Presidency.

¹⁹ Early examples of Recommendations of the EP concerned regions in crisis failing a strong policy by the Council (for instance Chechnya in 1995 and Kosovo in 1996). See EP Document PE 216.369/def of 30 May 1996 (Fernández-Albor Report) and Document 220.788/def of 28 May 1997 (Spencer Report).

direct link exists between the EP and the European Council, despite the fact that the latter institution is responsible for the definition of the principles of and general guidelines for the common foreign and security policy and for Common Strategies (Art. 13, paragraphs 1 and 2). It has been observed that the European Council has a *de facto* right of initiative which is not open to censure. Thus, Parliament's active participation in shaping the substance of CFSP rests with the entire discretion of the member states.²⁰ From the outset Parliament itself pointed to a need to have a mandatory right to be consulted on the formulation of general guidelines and Common Strategies.²¹

The Presidency was given the task of consulting the EP and of ensuring that its views are taken into consideration.²² In practice, however, the consultation procedure has proved to be inadequate. In October 1993, just prior to the entry into force of the Treaty on European Union, the Council drew up a number of guidelines to establish close relations with the EP in the area of CFSP;²³ nevertheless practice has not revealed any real possibilities for supervision by the EP. It is true that the EP is *informed* by the Council and the Commission concerning the main developments in CFSP, but the information often arrives too late for Parliament to share its views with the Council. The annual debate on the developments in foreign policy is by its very nature bound to be limited to an exchange of statements on and control over the activities of the European Council on the basis of the reports produced by this institution – after each meeting and yearly on the progress achieved by the Union (Art. 4 TEU) – and can only take place *ex post facto*.²⁴ In its 1995 Report on the implementation of CFSP, the EP complained that it had never been consulted on the main aspects and the basic choices of the CFSP, let alone being consulted on concrete proposals for joint actions.²⁵ In the beginning the EP did not even receive cop-

²⁰ A. Maurer, 'Democratic Governance in the European Union: The Institutional Terrain after Amsterdam', in J. Monar and W. Wessels (eds.), *The European Union after the Treaty of Amsterdam*, London/New York, Continuum, 2001, p. 96-124, at p. 116.

²¹ Opinion of the Committee on Foreign Affairs, Security and Defence Policy for the Committee on Institutional Affairs on the Operation of the Treaty on European Union with a View to the Intergovernmental Conference in 1996 (PE 211.022/fin), 21 February 1995; and Committee on Institutional Affairs, Working Document on the CFSP Process (PE 211.310), 1995.

²² Rule 103 of the EP's Rules of Procedure affirms the right to be consulted and informed on CFSP matters. The Committee on Foreign Affairs, Security, and Defence Policy is responsible for ensuring that Parliament is consulted in this area and that its opinions are taken into account. This task is carried out when Council and Commission representatives appear at the meetings of the Committee; via oral questions in plenary meetings and via the Committee's dialogue with the High Representative.

²³ The guidelines were adopted in the Council Decision of 26 October 1993. These guidelines were further elaborated by COREPER in July 1994; see Doc. SN 3258/94, *partie A, Relations entre le Parlement européen et le Conseil*, adopted by COREPER, 8 July 1994.

²⁴ The rule that the European Council shall submit to Parliament a report after each of its meetings and an annual written report on the progress achieved by the Union amounts to a consolidation of established EPC practice. See also point 2.1.4 of the Solemn Declaration of Stuttgart, 19 June 1983, *Bull. EC* 6/1983.

²⁵ Report of the Committee on Foreign Affairs, Security and Defence Policy (Rapporteur Matutes), 20 April 1995 (A4-0083/95), p. 17. Cf. also Th. Grunert, *supra* note 16, p. 113, who as-

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ies of the Declarations adopted by the Council.²⁶ In 1999 Parliament again noted that:

‘while the treaty obligations of Article 21 to keep Parliament fully informed on the development of the Union’s foreign and security policy have been fulfilled more or less satisfactorily by the Commission, the same cannot be said about the Council and the Presidency which did not make any recognisable effort to build up a fruitful relationship with Parliament on a continuous basis’.²⁷

The introduction of the High Representative on CFSP during the same year resulted in some improvement. The HR is invited to make statements in Parliament and practice reveals a constructive willingness on the part of the HR to respond to these invitations and to have discussions with the MEPs on foreign policy issues.²⁸

Irrespective of its marginal role in CFSP issues, the Commission’s activities are of interest to the MEPs as well. Controlling the Commission may formally take place by making use of existing Community procedures. In this respect, it should be noted that regarding the necessary approval by the EP of the five-year appointment of the Commission (Art. 214 EC), the EP may also take into account the position and functioning of the Commission in the area of CFSP. Likewise, the EP may make use of its right to request the Commission to submit proposals on certain CFSP positions or actions (Art. 192 EC) and the Commission is obliged to reply to questions put to it by the EP or by its members (Art. 197 EC).²⁹ Some authors have even hinted at the possibility that the EP may adopt a motion of censure, since Article 201 EC does not explicitly restrict the use of this instrument to the Community policies of the Commission.³⁰ However, unlike the other articles mentioned, Article 201 EC is not re-

serted that Parliament at that time had never been consulted beforehand and regularly on foreign policy decisions.

²⁶ See the analysis of the former President of the EP and of the Committee on Foreign Affairs and Security, E. Barón Crespo, ‘CFSP: The View of the European Parliament’, in S.A. Pappas and S. Vanhoonacker (eds.), *The European Union’s Common Foreign and Security Policy: The Challenges of the Future*, Maastricht, EIPA, 1996, p. 37-44 at p. 38. However, the above-mentioned COREPER decision of July 1994 explicitly provides: ‘les déclarations que la Présidence ou le Conseil adoptent seront transmises sans délai au Parlement par tous moyens appropriés’. According to the same decision, other Council decisions are transmitted to the EP ‘dans les meilleurs délais’; whereas responses to written questions are transmitted ‘dans un délai raisonnable’.

²⁷ Resolution on the role of the Union in the world: Implementation of the common foreign and security policy for 1998, No. A4-0242/1999.

²⁸ See also Rule 101 of the Rules of Procedure of the EP of February 2003.

²⁹ Cf. T. Heukels and J. de Zwaan, ‘The Configuration of the European Union: Community Dimensions of Institutional Interaction’, in D.M. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, vol. II, Dordrecht, Martinus Nijhoff Publishers, 1994, p. 195-228, at p. 218.

³⁰ This option seems to be included by T. Heukels and J. de Zwaan, *supra* note 29, when they refer to (ex) Article 144 in relation to (ex) Article 138b EC, at p. 218, footnote 107. A similar hint is made by N. Neuwahl, ‘Foreign and Security Policy and the Implementation of the Requirement of “Consistency” under the Treaty on European Union’, in D. O’Keeffe and →

ferred to in Article 28 TEU, which *a contrario* would exclude this possibility. But, more importantly, apart from the fact that these instruments are both very indirect and in most cases not proportional, the limited influence of the Commission on CFSP decision making has a direct effect on the Parliament's possibilities of controlling this policy through the Commission.

However, the EU's foreign policy is primarily, but not at all exclusively, to be dealt with under the CFSP provisions. A number of policy areas are included in the EC Treaty, allowing the EP to make use of the Community procedures in its supervision as well – as is the case with the Commission. First of all, Parliament can decide on general foreign policy guidelines for development cooperation, to which the co-decision procedure applies (Art. 179, paragraph 1 EC). Secondly, the assent of the EP is required for association agreements with third countries and international organizations on the basis of Article 300 EC (and for the accession of new member states on the basis of Art. 49 TEU). Finally, the EP has a direct influence once CFSP expenditure is charged to the budget of the European Communities (*infra*). On the other hand, the provision on sanctions, Article 301 EC, allows for the Council to decide to interrupt in part or completely economic relations with a third country without having to consult the EP.

It is clear that the formal competences of the EP with regard to the supervision of CFSP are limited. Parliament itself is of course very well aware of this situation and has constantly pressed for more powers in this regard.³¹ It may be true that the launching of CFSP was one of the reasons for the EP's approval of the Treaty on European Union,³² but Parliament only accepted the outcome as it regards the current situation as a transition phase, 'eventually leading to a comprehensive democratization of the process of planning and implementing CFSP'.³³ Overall, as one observer put it:

P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, London, Wiley Chancery Law, 1994, p. 227-246 at p. 243.

³¹ See in particular Resolution A3-0189/92, adopted on 20 January 1993, *OJ C* 42, 15.2.93, at 129 (the Hänsch Report); Resolution A3-0322/92, adopted on 18 December 1992, *OJ C* 21, 25.1.93, at 503 (the Verde Report); Resolution on the European Council Report Towards European Union, adopted on 11 March 1993, *OJ C* 115, 26 April 1993, at 175; Resolution A3-0041/94, adopted on 24 February 1994 (the De Gucht Report); Resolution A4-0083/95 of 20 April 1995 (the Matutes Report); and Resolution A4-0102/95, of 4 May 1995, adopted on 17 May 1995 (the Bourlanges/Martin Report).

See on the contributions of the EP to the 1990/91 IGC also S. Vanhoonacker, 'The European Parliament', in F. Laursen and S. Vanhoonacker (eds.), *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community*, Maastricht, EIPA, 1992, p. 215-228. In fact, the EP had wanted to approve the 'important interests in common' that would be defined by the European Council. See the Resolution of 10 October 1991 on the IGC on Political Union, *OJ* 1991 C 280, p. 148.

³² See E. Barón Crespo, *supra* note 26, p. 38.

³³ See the Resolution of the European Parliament of 18 December 1992, Doc. A3-0322/92. A 'comprehensive democratization' would, however, also call for a different attitude of the EP's standing committees. Parliament's internal procedures for scrutinizing CFSP are often affected by rivalries between these committees. Thus, the REX Committee and the Budgets

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'the current situation confirms the old prejudice surrounding governments' exclusive role in foreign policy, to be exercised in total secrecy and away from the 'intrusions' of representative organs and the public eye. EU ministers exercise their foreign policy-making independently from the European Parliament, especially in the field of CFSP which is still a broad framework rather than an inclusive system'.³⁴

However, in the meantime, the EP found some ways to supervise CFSP regardless of its limited Treaty competences. This is above all reflected in the regular dialogue with the Council, which is used by Parliament to question the passivity of CFSP in relation to certain issues (like for instance the Russian military actions by Chechnya or democratization in the Mediterranean). The EP's Annual Reports usually strongly criticize the (absence of) actions by the Council under CFSP, besides suggesting alternative approaches, and in some cases Parliamentary pressure has indeed led to a modification of Joint Actions (for instance concerning Mostar).³⁵ In addition, the Committee on Foreign Affairs, Human Rights, and Common Security and Defence Policy as well as the President of Parliament frequently meet with Foreign Ministers and Presidents of third states, allowing the EP to contribute to the foreign policy debate.³⁶ This more positive dimension formed a reason for Bieber to conclude:

'The European Parliament's activities in the sphere of general international politics provide the most striking example of a parliament's modern role in this field. Without any powers to compel the member states' governments - let aside powers to impose its views on third countries - the European Parliament has developed a strong international consciousness. The responsibility of European people in world affairs and the need to voice diverging views on common values found a unique forum in the European Parliament. No national parliament so frequently debates events of other parts of the world, denounces violations of human rights, peace and freedom. Correspondingly statesmen from all over the world seek the opportunity to address via the European deputies, the European peoples'.³⁷

Moreover, and most effectively, Parliament found a way to use its budgetary competences to supervise at least part of the CFSP actions of the Council.

Committee both tend to interfere occasionally with matters which the Foreign Affairs Committee considers to be of its own domain.

³⁴ D.M. Viola, *European Foreign Policy and the European Parliament in the 1990s: An Investigation into the Role and Voting Behaviour of the European Parliament's Political Groups*, Aldershot, etc., Ashgate, 2000, p. 43.

³⁵ See for instance the Reports of 20 April 1994, 30 May 1996 and 28 May 1997. Cf. also S. Keukeleire, *Het buitenlands beleid van de Europese Unie*, Deventer, Kluwer, 1998, p. 271 and p. 314.

³⁶ See the Parliament's assessment of its own role in the *Report on the Role of the Union in the World: Implementation of the Common Foreign and Security Policy for 1997* (Spencer Report), 30 April 1998, A4-1069/98, p. 12.

³⁷ R. Bieber, 'Democratic Control of International Relations of the European Union', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, The Hague, Kluwer Law International, 2002, p. 105-116 at p. 110.

2.1.3 Budgetary Influence of the EP on CFSP: The 'Power of the Purse'

At first sight, the provision in the 1992 Article J.11 that administrative CFSP expenditure was to be charged to the EC budget, and that the Council could also decide to charge operational expenditure to that budget, did not give rise to increased possibilities for supervision by the European Parliament. Nevertheless, the provision that in that event 'the budgetary procedure laid down in the Treaty establishing the European Community shall be applicable' should have warned the drafters of the TEU. Over the years the EP has made full use of this provision to influence and supervise CFSP developments.³⁸

In the EPC period the administrative expenditure for organizing meetings and distributing documents fell under the responsibility of the Presidency. Each foreign ministry paid the travel costs of its representatives, and the small EPC Secretariat costs were kept to a minimum thanks to effective arrangements with the General Secretariat of the EC Council.³⁹ In the 1990/91 IGC it was clear from the outset that the more ambitious CFSP would need new financial arrangements, but a consensus on a new procedure was difficult to reach. Here as well the diverging views came out of a preference for either a more 'communitarized' or a strictly intergovernmental CFSP. The compromise in Article J.11, paragraph 2, reflected both views as it allowed for administrative expenditure to be charged to the EC budget and for operational expenditure to either be charged to that budget (after a unanimous decision to that end) or to the national budgets of the member states (in accordance with a scale to be decided).

The very first Joint Action of 8 November 1993 (one week after the entry into force of the TEU) already highlighted the need for member states to make use of the EC budget. It proved to be extremely difficult to finance the support for the convoying of humanitarian aid to Bosnia-Herzegovina out of the national budgets. The procedure was far from efficient, and it was a reason for the Council in some cases to refer to the administrative costs only when operational expenditure was obviously also involved.⁴⁰ The reason was that complex national budgetary mechanisms or the hesitance of some member states to fulfil their financial obligations would at least not be able to prevent the joint action from taking place.

However, sparing national budgets in this way resulted in an increase in the influence of the European Parliament. The first action of the EP in this respect took

³⁸ See in particular the studies by J. Monar, 'The Financial Dimension of the CFSP', in M. Holland (ed.), *Common Foreign and Security Policy: the Record and Reforms*, London, Pinter, 1997, p. 34-51 and The Finances of the Union's Intergovernmental Pillars: Tortuous Experiments with the Community Budget, 1 *Journal of Common Market Studies*, p. 57-78. See also B.-C. Ryba, 'La politique étrangère et de sécurité commune (PESC): Mode d'emploi et bilan d'une année d'application (fin 1993/1994)', 384 *Revue du marché commun et de l'Union européenne*, 1995, p. 14-35, that were very helpful in drafting this section. According to Ryba (p. 20) the negotiators had not foreseen the extensive influence of the EP through the budgetary regulations.

³⁹ J. Monar, *supra* note 38, p. 34.

⁴⁰ See for instance the Joint Action on the dispatch of a team of observers for the Parliamentary elections in the Russian Federation (93/604/CFSP of 9 November 1993) or the Joint Action on the inaugural conference on the Stability Pact (93/728/CFSP, 20 December 1993).

place on 28 October 1993, when it amended the draft budget by inserting one million ECU into the Commission's operational reserves for possible transfer to the operational costs of only.⁴¹ This move by the EP was meant to secure its influence on CFSP expenditure, since transfers between non-compulsory expenditure chapters proposed by the Commission can be approved or rejected by Parliament after consultation with the Council.⁴² Thus, any transfer of these finances to the regular CFSP chapter would need the approval of the EP. As we have seen, however, the Council continuously tried to limit the influence of the EP, either by using national budgets or by broad interpretations of 'administrative costs'. This practice and the Council's refusal to adopt an Interinstitutional Agreement led the EP to adopt a resolution on the guidelines for the 1995 budget, in which it insisted that the Council would have to state clearly how it was going to use funds for Joint Actions before Parliament would approve appropriations for this purpose.⁴³ Council Decisions in 1995 indeed reflect an acceptance of EC funding, and thus of Parliamentary influence, but it remained clear that member states were still reluctant to accept more Parliamentary supervision over CFSP operations. However, since 1995 the situation has somewhat stabilized, and member states at least have to accept the budgetary influence of the EP on CFSP expenditure. In 1997 Parliament finally achieved an Interinstitutional Agreement on the financing of CFSP (replaced by the Agreement on budgetary discipline of 6 May 1999).

These developments made it possible for the Amsterdam Treaty to do away the difference between administrative and operational expenditure in the TEU. Article 28 of the current Treaty stipulates that administrative as well as operational CFSP expenditure shall be charged to the budget of the European Communities. The only exceptions made concern operational expenditure arising from operations having military or defence implications (which in the view of certain member states do not allow for too much Community involvement) and cases where the Council unanimously decides that the operational expenditure is to be charged to the member states.

2.2. *The National Parliaments and CFSP*

The fact that CFSP decisions are taken by an institution of the Union – the Council of Ministers – does not contradict the fact that this institution is composed of ministers who are accountable for their international actions to their own parliaments as well. In fact, through the national political parties, the EP political groups can attempt to counterbalance the absence of their formal power in foreign affairs.⁴⁴ Nevertheless, the traditional prerogatives of the Executive in most member states in the field of foreign policy account for limited supervisory functions of the national par-

⁴¹ OJ C 315, 22 November 1993, p. 459. Cf. also J. Monar, *supra* note 38, p. 40.

⁴² See the Financial Regulation of 21 December 1997, Article 21. OJ L 356, 31 December 1977, p. 9.

⁴³ Published in OJ C 25, April 1994, p. 33.

⁴⁴ D.M. Viola, *supra* note 34, p. 44.

liaments.⁴⁵ In none of the member states – except for Denmark⁴⁶ – has CFSP decision making been subjected to prior parliamentary approval, which restricts the influence of parliament to discussing both the agenda of forthcoming Council meetings and the outcome. Thus, the Dutch Parliament accepted that they discuss CFSP issues with the Government on the basis of ‘annotated Council agendas and Reports of Council meetings’.⁴⁷ The cooperation between the Minister for Foreign Affairs and Parliament’s Standing Committee on Foreign Affairs is indeed ‘as good as it can get’ on the basis of these procedures. It remains clear, however, that supervision by national parliaments is limited to one aspect only: the *ex post facto* control on the basis of decisions that were taken (or not taken) by the Council of Ministers. Hence, even the ultimate repercussion of a motion of no-confidence will not improve the supervisory possibilities of the national parliament, albeit that this control may have a preventive effect.

Nevertheless, the national representatives at the Maastricht IGC adopted two declarations aiming at an increased involvement of national parliaments. Declaration No. 13 reads:

‘The Conference considers that it is important to encourage greater involvement of national Parliaments in the activities of the European Union.
To this end, the exchange of information between the national Parliaments and the European Parliament should be stepped up. In this context, the governments of the Member States will ensure, *inter alia*, that national Parliaments receive Commission proposals for legislation in good time for information or possible examination.
Similarly, the Conference considers that it is important for contacts between the national Parliaments and the European Parliament to be stepped up, in particular through the granting of appropriate reciprocal facilities and regular meetings between members of Parliament interested in the same issues’.

Furthermore, Declaration No. 14 adds that the European Parliament and the national parliaments may meet, as necessary, as a Conference of the Parliaments (or ‘Assises’) to be consulted on the main features of the European Union on the basis of reports by the Presidency and the Commission.

The added value of these initiatives lies essentially in the increased possibilities for national parliaments to obtain information. It is doubtful, however, whether an increase in possibilities for supervision will result from the inter-parliamentary contacts. In the Netherlands, at least, this situation has resulted in an ongoing discussion on the need for parliamentary approval for decisions of international organizations, which by virtue of the Constitution (Art. 94) prevail over national

⁴⁵ See on this issue for instance L. Henkin, *Constitutionalism, Democracy and Foreign Affairs*, New York, Columbia University Press, 1990; and L. Henkin, *Parlement en buitenlands beleid*, Publikaties van de Staatsrechtkring, No. 5, Zwolle, Tjeenk Willink, 1993.

⁴⁶ The Danish Minister can only vote in the Council on the basis of an explicit mandate given by the Danish *Folketing*.

⁴⁷ See the Documents of the Second Chamber, ‘Goedkeuring Maastricht’, *Memorie van Antwoord*, *Kamerstukken II 1992-1993*, 22 647 (R 1437), No. 13, p. 147.

legislation whenever they have a generally binding character.⁴⁸ Despite the available instruments to make use of this possibility in relation to decisions within the framework of the (former) Schengen Agreement, PJCC, and Title IV EC, no initiatives have been developed to extend this possibility to decision making in the area of CFSP.⁴⁹

With regard to information to be provided to national parliaments, the Amsterdam IGC adopted a Protocol 'on the role of national parliaments in the EU'. The Protocol focuses on improving the access of national parliaments to timely information, with a view to influencing their national governments under whatever national constitutional arrangements apply.⁵⁰ In line with current practice, the Protocol calls for legislative proposals to be forwarded to national parliaments. The significance can be found in the fact that documents are henceforth no longer forwarded indirectly via national governments but directly to the national parliaments. Moreover, Commission proposals must be made available in good time (a minimum time-limit of six weeks), so that national parliaments can actually have the possibility of receiving them in time to discuss their content, before their government participates in the decision making procedure. However, CFSP decisions are almost never based on Commission proposals, but are prepared by the working groups and the Political Committee upon an initiative of the Presidency or any other member state. Therefore, in the current situation this improvement is of limited value and relates only to 'foreign policy' proposals of the Commission that find their basis in Community law. The conclusion that the Protocol excludes all CFSP documents seems to be justified.⁵¹

A second innovation in the Amsterdam Protocol concerns the right of the Conference of European Affairs Committees (COSAC) to make any contribution it deems appropriate for the attention of the institutions of the European Union, in particular on draft legal texts which representatives of governments of the member states may decide by common accord to forward to it, in view of the nature of their subject matter. Again, however, the Protocol does not seem to have the intention of including CFSP, as COSAC may only examine 'any legislative proposal or initiative in relation to the establishment of an area of freedom, security and justice', 'legislative activities of the Union, notably in relation to the application of the principle of subsidiarity', and 'questions regarding fundamental rights'. This has led one ob-

⁴⁸ See for instance: B.P. Vermeulen, 'Slikken of stikken? De invloed van het parlement op het buitenlands beleid', *Staatscourant*, 120, 29 June 1993.

⁴⁹ As for instance suggested by L. Besselink, 'Tussen supranationaliteit en soevereiniteit: over het niet-communautaire recht van de Europese Unie', in L.F.M. Besselink *et al.* (eds.), *Europese Unie en nationale soevereiniteit*, Publicaties van de Staatsrechtkring, Deventer, Tjeenk Willink, 1997, p. 125-150 at p. 150.

⁵⁰ Cf. D.M. Curtin, 'The Fundamental Principle of Open Decision-Making and EU (Political) Citizenship', in D. O'Keefe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Oxford, Hart Publishers, 1999, p. 69-91.

⁵¹ Cf. A. Maurer, *supra* note 20, p. 116.

server to conclude that 'democratic control of action in this field is completely excluded'.⁵²

3. Transparency of Decision Making and Access to Information

3.1. Transparency of Decision Making by the Council

Effective supervision by the parliaments, or more directly by civil society, is hindered by the confidential and thus not too transparent nature of CFSP decision making in the Council. As Curtin stated: '[t]he term 'transparency' evokes the image of a clear pane of glass through which light can shine in an unrestrained fashion'. She continued that:

'[t]ransparency refers not only to access to government-held information by individuals and legislative assemblies (both the European Parliament and the national parliaments), but also, more widely, to open government as such (the question of opening up meetings, rule-making proceedings and governmental deliberations to the public)'.⁵³

This idea does seem to be reflected in Article 1 of the new TEU that 'decisions are taken as openly as possible'.

It seems that this new rule should be used in interpreting the Council's Rules of Procedure, which in Article 5 provide that: 'Meetings of the Council shall not be public except in the cases referred to in Article 8'.⁵⁴ According to Article 8, Council deliberations on acts to be adopted in accordance with the co-decision procedure are open to the public by way of transmission of the Council meeting by audiovisual means. In addition, the Council shall 'as far as possible' inform the public in advance of the dates and approximate time on which such audiovisual transmissions will take place. Paragraphs 2 and 3 of Article 8 furthermore provide that the General Affairs and External Relations Council holds a public policy debate every year and that the Council shall hold at least one public debate on important new legislative proposals. All in all, the situation seems to be improving, at least where legislative decisions are concerned. It should be kept in mind, however, that CFSP decisions are regularly considered not to have a legislative nature. Moreover, it is obvious that CFSP decisions are never adopted through the co-decision procedure of Article 251 EC. This means that the regime is only relevant in relation to the Community part of external policy decisions. In addition, the results of votes on CFSP decisions are made public only in case of a unanimous Council or COREPER decision taken at the request of one of its members.⁵⁵ This provision reflects that, irrespective of Article 1 of the EU Treaty, the transparency of decision making is not the rule in CFSP.

⁵² *Ibidem*, p. 117.

⁵³ D.M. Curtin, *supra* note 50, p. 66.

⁵⁴ Council Decision of 22 March 2004 adopting the Council's Rules of Procedure (2004/338/EC, Euratom), OJ L 106, 15.04.2004.

⁵⁵ Article 9, para 2 of the Council's Rules of Procedure.

3.2. Access to Information on Foreign, Security and Defence Policy

Apart from this procedural secrecy where decision making is concerned, the access to documents and information from the very beginning of CFSP also depends on the Council's willingness to submit information on the existence of documents. Article 18, paragraph 3, of the 1992 Rules of Procedure provided that the decision to publish the CFSP decisions in the Official Journal was in each case to be taken by the Council acting unanimously when the said instruments were adopted. This of course implied that any single member state can object to the publication of CFSP decisions and prevent it. Irrespective of the discussion on openness of information since then, this regime has not been modified. The 2004 Rules of Procedure still allow the Council and COREPER to decide unanimously, on a case by case basis, whether CFSP decisions should be published in the Official Journal (Art. 17, paras. 3 and 4). When they are not published, Common Strategies, Joint Actions and Common Positions are to be notified to their addressees (Art. 18, para. 2). However, in this way many *sui generis* CFSP decisions as well as Resolutions run the risk of becoming invisible to the public.

The Amsterdam Treaty modified the EC Treaty in which Article 255, paragraph 1, now provides:

'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraph 2 and 3'.

Indeed paragraphs 2 and 3 reveal that there is still no unrestrained access to information, since limits on grounds of public or private interest are to be determined by the Council and the European Parliament (co-decision) within two years of the entry into force of the Amsterdam Treaty (paragraph 2) and each institution shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents (paragraph 3).⁵⁶ Nevertheless, it is held that the fact that this obligation is now laid down in the text of the Treaty itself was a step forward with regard to the previous *status quo*, where the rather reluctant practice of several institutions was based upon an interinstitutional Code of Conduct, implemented separately by the three institutions in question.⁵⁷

For the purpose of the present contribution, however, it is striking that while Article 1 TEU refers to decisions that are taken as openly as possible and as closely as possible to the citizen, the right of access to documents is only implemented in the EC Treaty and not in the Union Treaty. According to Curtin this seems to be an attempt to deny the fundamental status of the individual's right to information.⁵⁸ On

⁵⁶ The Council has done so in Annex II of its Rules of Procedure.

⁵⁷ D.M. Curtin, *supra* note 50, p. 68. A reason for Curtin to note this as an improvement is the 'non-binding' nature of the Code of Conduct.

⁵⁸ In Curtin's interpretation the choice for Article 255 EC does not limit the greatest possible level of openness aimed at by Article 1 TEU. The fact that only three institutions are men-
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the other hand, it seems clear that placing this right in the EC Treaty does not prevent its Union-wide application. Article 1 TEU, as the overarching general principle, explicitly refers to the new stage in the process of creating an ever closer Union among the peoples of Europe and is obviously meant to cover the whole Union. Moreover, Article 255 EC is explicitly referred to in Article 28 EU as one of the EC provisions that shall apply to CFSP and it is presented in the EC Treaty as one of the 'Provisions common to several institutions'.⁵⁹

As the Court of First Instance confirmed in the *Svenska Journalistförbundet* case in 1998,⁶⁰ the fact that documents deal with matters that fall under Title V of the Treaty (CFSP) does not affect the jurisdiction of the Court. In that case Decision 93/731/EC on public access to Council documents was said to apply to all Council documents, irrespective of their content. This was confirmed in the *Hautala* case, a year later, in which the confidentiality of a CFSP document was questioned.⁶¹ On 14 November 1996, the Finnish Member of the European Parliament, Ms. Heidi Hautala, asked a written question to the Council in order to seek clarification on the criteria which have been adopted at EU level for the export of conventional arms. The Council answered that the member states had agreed on common criteria with regard to arms exports in 1991 and 1992 and that the decision as to whether an authorization can be granted for exports and the procedures in that context, is governed by the national legislation of the member states. The Council also referred to a report from the Political Committee on Conventional Arms Exports, adopted on 14-15 November 1996. A request from Ms. Hautala to obtain access to this report was denied by the Council because the report would contain 'highly sensitive information, disclosure of which would undermine the protection of the public interests, as regards public security'. In response to a confirmatory application by Ms. Hautala the Council added that 'disclosure of the report in question could be harmful for the EU's relations with third countries'. Other arguments used by the Council included the fact that the document was exchanged via the COREU network and was therefore of a confidential nature, and the fact that the report was drafted for internal use and not intended to be made public.

The Court of First Instance held that the Council has a certain discretion which is connected with the political responsibilities conferred on it by Title V of the Treaty and that it must determine the possible consequences which the disclosure of documents may have for the international relations of the Union. In those circum-

tioned does not rule out that other institutions, agencies and organs with rule-making activities are subject to the general principles laid down in Article 1 TEU. In addition, limiting the right of access to 'documents' does not exclude information contained in electronic form. Finally, the term 'documents' in Article 255 is not to be interpreted as referring to 'documents originating from the institutions', but rather to all incoming documents. In short, as a matter of general principle all the institutions and agencies and other EU bodies should be covered by the general obligation to provide extensive access to all documents in their possession (*cf.* also Case C-58/94, *The Netherlands v. Council*, and the Ombudsman's Annual Report for 1996).

⁵⁹ Regarding PJCC a similar reference can be found in Article 41 TEU.

⁶⁰ Case T-174/95 *Svenska Journalistförbundet v. Council* [1998] ECR II-2289, paras. 81-82.

⁶¹ Case T-14/98, *Heidi Hautala MEP v. Council of the European Union* [1999] ECR II-2489.

stances, any review by the CFI must be limited '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' (para. 72). The discretion of the Council is, however, not unrestricted. Both in the *Svenska Journalistförbundet* and the *Hautala* cases, the Court referred to the objective of the Decision of access to documents to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration. Exceptions, therefore, should be construed and applied strictly, in a manner which does not defeat the application of the general rule. The Council is even obliged to examine whether partial access should be granted to the information not covered by the exceptions.

'In that connection, the principle of proportionality would allow the Council, in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the interest in public access to those fragmentary parts against the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration' (para. 86).

More recent cases confirm the view that possible damage to the relations between the EU and third states may not automatically form a reason for the Council to deny public access to documents. In the case *Kuijjer I*, the applicant – a university lecturer and researcher in asylum and immigration matters – requested access to certain documents containing information concerning the situation in third countries or regions from which many asylum seekers originate or in which they reside.⁶² The Council had denied access, claiming that the reports contain very sensitive information about the political, economic and social situation in the countries. According to the Council the disclosure of this information might damage the relations between the EU and these countries. The Court (of First Instance) held that the decision of the Council did not satisfy the requirements governing the statement of reasons under Article 190 EC as it did not explain the reasons for denying access to the individual documents that were requested. Thus, the Council produced a new decision, in which it explained that the reports had certain features in common which made it necessary to treat them in the same way. In addition, the Council repeated that disclosure of the information was potentially damaging to the Union's relations with the countries in question. For *Kuijjer* this decision formed a reason to commence a procedure for annulment once again. In this second case (*Kuijjer II*), the Court for the first time considered the *contents* of the documents at issue.⁶³ *Kuijjer II* is important for the future possibilities of citizens to obtain access to CFSP documents. In the most crucial paragraphs (60-64) the Court held:

⁶² Case T-188/98, *Aldo Kuijjer v. Council of the European Union*, [2000] ECR II-1959.

⁶³ Case T-211/00, *Aldo Kuijjer v. Council of the European Union*, [2002] ECR II-485. This time it was easier for the Court as – on the basis of the amended Rules of Procedure of 28 November 2002 – it could itself actually ask for a disclosure of the documents in order to study them.

'[...] the mere fact that certain documents contain information or negative statements about a political situation, or the protection of human rights, in a third country does not necessarily mean that access to them may be denied on the basis that there is a risk that the public interest may be undermined. [...]

As regards their contents, the reports at issue do not concern directly or primarily the relations of the European Union with the countries concerned. [...]

The information frequently relates to facts which have already been made public, for example how the political, economic or social situation has developed in a country concerned'.

Nevertheless, these cases have not prevented the Council from adopting a rather restrictive set of security regulations on 19 March 2001 (the judgement in *Kuijjer I* was on 6 April 2000). On 26 July 2000 COREPER already adopted a decision drafted by the General Secretary of the Council, Mr. Solana, to amend the 1993 Decision of access to documents. This 'Solana Decision' was formally approved by the Council (through a written procedure) on 14 August 2000 and excluded documents related to European Security and Defence Policy when classified as TRÈS SECRET/TOP SECRET, SECRET or CONFIDENTIAL, from the general rules on public access to documents.⁶⁴ Top secret documents were documents whose disclosure 'could cause extremely serious prejudice to the essential interests of the Union'. The strict security arrangements were thought to form a necessary element of the Interim Security Arrangements agreed on between the Secretaries General of NATO and the EU on 26 July 2000 to, *inter alia*, protect and safeguard information and material from NATO present at the EU's Council Secretariat.⁶⁵ A major problem concerning transparency was caused by the fact that the classified documents would not be referred to in the public register and that requests for access would no longer be considered by the Information Working Party, but by special security-vetted personnel.

The Solana Decision was severely criticized by the European Parliament (partly because of the 'secret' adoption procedure during the time that Parliament was not in session) and by some member states. The EP and the Netherlands even started (separate) proceedings before the CFI against the Decision. In 2001, however, the Council agreed on new regulations, which led the Netherlands and the EP to withdraw their cases. On 19 March 2001, the Council replaced the Solana Decision by adopting a new set of security regulations which brought the classification rules into line with NATO standards.⁶⁶ In fact this decision anticipated the adoption of the new general Regulation regarding public access to European Parliament, Council and Commission documents, which was adopted two months later.⁶⁷ It is particularly in Article 9 of the new Regulation in which the current regime on access

⁶⁴ Decision 2000/527/EC, *OJ L* 212/9, 23.08.2000.

⁶⁵ See the exchange of letters between Solana and Robertson of 26.7.00, published by Statewatch (<<http://www.statewatch.org/news/2002/mar/16solana.htm>>).

⁶⁶ Council Decision 2001/264/EC of 19 March 2001, *OJ L* 101/1, 11.4.2001.

⁶⁷ Regulation (EC) No. 1049/2001 of 30 May 2001, *OJ L* 145/43, 31.5.2001. See on this Regulation H.R. Kranenborg, 'De Eurowob in de hand, de EU transparent?', *Tijdschrift voor Europees en Economisch recht*, 2002, p. 447-456.

to CFSP documents can be found. This provision – entitled ‘Treatment of sensitive documents’ – still echoes the Solana Decision as it introduces a special treatment for:

‘documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as ‘TRÈS SECRET/TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIAL’ in accordance with the rules of the institutions concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters’.

Article 4(1)(a) provides that the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards: public security; defence and military matters; international relations; and the financial, monetary or economic policy of the Community or a member state.

The current regime thus reflects a not too transparent system, in which sensitive documents are exempted from the regular rules on access to documents. They are to be handled by special (‘vetted’) personnel only (Art. 9(2)), and are recorded in the register or released only with the consent of the originator (para. 3). When a document is to be classified is decided by the institutions themselves on the basis of their own definition of ‘sensitivity’. The conditions for and limitations on public access cannot be found in the Regulation itself (as seems to be required by Article 255 TEU), but in the various special arrangements adopted by the Institutions (like the Council Decision of 19 March 2001). The Regulation even goes beyond the Solana Decision as it is not restricted to foreign, security and defence documents, but covers international relations in general and even the financial, monetary or economic policy of the Community or a member state. The Council’s security decision makes clear that the regulations not only concern the Institutions, but even the member states. Article 2(2) of this Decision obligates the member states to take the appropriate measures to ensure that, when EU-classified information is handled, the regulations are respected. The legality of this provision in a decision which is based on Article 207(3) EC (allowing the Council to adopt its internal Rules of Procedure) has been questioned.⁶⁸ Nevertheless, to oblige member states to consult with the institutions concerned whenever they receive a request for a document in their possession, returns in Article 5 of the Regulation.

All in all, the conclusion seems justified that the ambitions of the Union in the area of security and defence policy – for the fulfilment of which close cooperation with NATO is needed – have resulted in a stricter regime when access to sensitive documents is concerned. In March 2003 this new regime was laid down in an Agreement on the Security of Information between the EU and NATO.⁶⁹ In itself, this is something we are used to when access to the documents of national Ministries for Foreign Affairs or Defence are concerned, and in that respect it is a logical

⁶⁸ See in general on this issue: M. de Leeuw, *Open Government in the EU: A Legal Analysis of a Fundamental Principle*, dissertation European University Institute Florence, 2003.

⁶⁹ NATO Press Release (2003)022, 14 March 2003; and EU Council Decision 2003/211/CFSP of 24 February 2003, OJ L 80, 27.3.2003, which contains the text of the Agreement.

consequence of the development of the Union towards a security organization. On the other hand, it is clear that the current regime is not too transparent concerning the reasons to classify the documents and it even entails a potential to broaden the scope of secrecy now that vague terms such as ‘public security’ and even the financial, monetary and economic policy of the Community or a member state are explicit reasons to deny access to documents.

4. Judicial Scrutiny of CFSP Decisions and Procedures

4.1. *The European Court of Justice*

Limited parliamentary control may to some extent be compensated by judicial control. With respect to CFSP (Title V), however, the powers of the Court of Justice are excluded by Article 46 TEU. This was in line with the preference of most member states at the time of the Maastricht IGC because of possible integrative actions by the Court in this sensitive area. Even the Commission’s opinion reflected a clear reservation as it pointed to highly political and sensitive dimensions

‘des actions mises en œuvre au cours de l’exercice de la politique étrangère ou de sécurité commune, qui ne sont pas soumises, en règle générale, au contrôle judiciaire’.⁷⁰

Or, as Everling put at the time:

‘L’exclusion de la compétence de la Cour, prévue à l’article L [now 46; RAW] du traité sur l’Union, pour le contrôle des activités de l’Union en dehors des domaines des Communautés, est l’expression d’un déclin de confiance du public envers la jurisprudence de la Cour. Quelques formulations pour le moins étonnantes du récent arrêt de la Cour constitutionnelle allemand concernant le traité de Maastricht confirment cette impression’.⁷¹

On the other hand, the first Dutch Draft Treaty at the time allowed the Court to ‘review [...] the legality of the application of the procedures for deciding upon the joint action referred to in this Title of the Treaty’, but this provision lacked the necessary consensus and it did not make it to the final Draft.⁷²

⁷⁰ Working Document of the Commission SEC (91) 500, 15 May 1991, p. 41, quoted by L. Pliakos, ‘La nature juridique de l’Union européenne’, 2 *Revue trimestrielle de droit européen*, 1993, p. 208-213, at p. 199, note 56.

⁷¹ U. Everling, ‘L’avenir de l’organisation juridictionnelle de l’Union européenne’, in G. Versanden (ed.), *La Réforme du Système Juridictionnel Communautaire*, Bruxelles, Éditions de l’Université de Brussels, 1994, p. 19.

⁷² See for the Draft Treaties: F. Laursen and S. Vanhoonacker, F. Laursen and S. Vanhoonacker (eds.), *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community*, Maastricht, EIPA, 1992.

This is not to say that the CFSP provisions are not at all relevant for the European Court of Justice.⁷³ According to Article 47 TEU, nothing in the Treaty shall affect the Community Treaties or the subsequent Treaties and Acts modifying or supplementing them. On the basis of Article 46, this provision falls under the competence of the Court. This implies that the Court has been given the competence to guard the preservation of the *acquis communautaire*.⁷⁴ One may argue that on this basis the Court is competent to take into account CFSP decisions that are related to Community policies, and that it may even annul (parts of) CFSP decisions that would harm the *acquis communautaire*.⁷⁵ It has even been argued that the adjudication of such cases might entail an incidental review of the guidelines of the European Council on their compatibility with EC law, thus subjecting the European Council to the indirect scrutiny of the Court of Justice,⁷⁶ but the Court's case law as reflected in, for instance, the *Roujansky* and *Bonnamy* cases seems to exclude this possibility.⁷⁷

A role of the Court seems to be permitted, or indeed required, whenever member states evade Community procedures by dealing with certain issues under CFSP and when, in particular, these decisions would conflict with the loyalty obligation as laid down in Article 10 of the EC Treaty. In those cases the Court would be obliged to intervene – perhaps upon a request from the Commission. The loyalty obligation in Article 10 EC extends to the external relations of the Community, including the actions that are explicitly linked to CFSP operations. This would mean that Article 10 EC prohibits actions outside the Community framework that could harm the Community's development, *even* when these actions are taken within the broader framework of the European Union. Related problems may occur when the implementation of CFSP obligations by national authorities gives rise to a problem

⁷³ Cf. already the Court's opinion on this matter in its Report on the implementation of the Treaty on European Union, 1995; and the Report of the EP's Commission on Institutional Affairs (Rothley Report) on the Role of the European Court of Justice, A3-0228/93, 6 July 1993.

⁷⁴ This is a reason why Edward stated that 'Article L [now 46; RAW] constitutes the rule of recognition of the *Community* legal order', since 'from a legal point of view, Article L can be seen as defining the line of demarcation between the aspects of Maastricht that are 'supra-state' and legally binding, on the one hand, and those that are 'intergovernmental' and purely diplomatic, on the other'. D.A.O. Edward, 'Is Art. L of the Maastricht Treaty workable?', *Europarecht*, supplement 2, 1995, p. 23-25, at p. 23. This rather simplistic statement is obviously in contrast to the findings in the present contribution.

⁷⁵ Cf. also M.R. Eaton, 'Common Foreign and Security Policy', in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, London, Wiley Chancery Law, 1994, p. 215-226, at p. 221 and S. Peers, 'National Security and European Law', *Yearbook of European Law*, 1996/1997, p. 363-404, at p. 398-399.

⁷⁶ U. Everling, 'Reflections on the Structure of the European Union', *Common Market Law Review*, 1992, p. 1053-1077, at p. 1063; P.J.G. Kapteyn, 'Inleidende beschouwingen over het Verdrag betreffende de Europese Unie', *Tijdschrift voor Europees en Economisch recht*, 1992, p. 667-673, at p. 671 and T. Heukels and J. de Zwaan, *supra* note 29, p. 224.

⁷⁷ Cases C-253/94p and C-264/94p respectively. The Court in these cases ruled that decisions of the European Council cannot be challenged by a request for annulment. See also D.M. Curtin and R.H. van Ooik, 'Een Hof van Justitie van de Europese Unie?', *SEW, Tijdschrift voor Europees en Economisch recht*, 1999, p. 24-38, at p. 27.

of Community law.⁷⁸ Finally, with regard to the budgetary competences of the European Parliament, one could even envisage this institution bringing a case before the Court concerning the misuse of certain EC funds for CFSP purposes when a CFSP decision is *prima facie* incompatible with Community budgetary regulations.

These observations underline that the Court of Justice is the ultimate arbiter in deciding where the line of demarcation between the Union's issue-areas lies. Examples of cases in which the Court of Justice has declared its own competence in relation to foreign policy issues can in particular be found in the judgements on the Community's sanctions legislation. Since 1995 a number of cases have been referred to the Court by national courts in relation to the Yugoslav sanctions and some plaintiffs have initiated legal proceedings against the Council of Ministers for damage which they suffered pursuant to the sanctions against Iraq. Many of these cases challenged the national implementation of Community legislation (*Bosphorus*, *Centro-com* and *Ebony Maritime*), while the validity of Community legislation withdrawing preferences from Yugoslavia in 1991 has also been challenged (*Racke*).⁷⁹ The *Centro-com* judgement in particular clarified a number of long-disputed issues concerning the relationship between sanctions and the EC's common commercial policy and the question of whether sanctions were commercial policy, or at least affected commercial policy. Despite the recognition by the Court that member states retained national competence over foreign and security policy, it pointed out that sanctions are a part of Community commercial policy and that national competences in the field of foreign policy still had to be exercised in accordance with Community law whenever they concern the imposition of economic sanctions.

In addition, we have seen that the Court made clear that wherever access to information is concerned no distinction is made on the basis of the content of the requested document (the *Svenska Journalistförbundet* case).⁸⁰ Despite the fact that the case concerned access to a document related to Cooperation in Justice and Home Affairs (CJHA), the language used in the judgement enabled it to be applied to CFSP as well. The Court (of First Instance) based its argument on the above-mentioned Decision 93/731/EC on public access to Council documents and continued:

'The fact that the Court has, by virtue of Article L [now Article 46; RAW] of the EU Treaty, no jurisdiction to review the legality of measures adopted under Title VI does not curtail its jurisdiction in the matter of public access to those measures. The assess-

⁷⁸ See also H.G. Krenzler and H.C. Schneider, 'Die Gemeinsame Außen- und Sicherheitspolitik der Europäischen Union - Zur Frage der Kohärenz', 2 *Europarecht*, 1994, p. 144-161, at p. 157-159; M. Pechstein, 'Das Kohärenzgebot als entscheidende Integrationsdimension der Europäischen Union', 3 *Europarecht*, 1995, p. 247-258, at p. 258 and P. Gilsdorf, 'Les réserves de sécurité du Traité CEE, à la lumière du Traité sur l'Union Européenne', 374 *Revue du Marché commun et de l'Union européenne*, 1994, p. 17-25.

⁷⁹ Cases C-84/95, *Bosphorus*; Case C-124/95, *Centro-com*; C-177/95, *Ebony Maritime*; and C-162/96, *Racke*. See for an analysis of these cases: S. Peers, 'Common Foreign and Security Policy 1995-6', *Yearbook of European Law*, 1996/1997, p. 611-644.

⁸⁰ More implicitly this was already accepted by the Court in Case T-194/94, *Carvel*. Cf. D.M. Curtin and R.H. van Ooik, *supra* note 77, p. 25.

ment of the legality of the contested decision is based upon its jurisdiction to review the legality of decisions of the Council taken under Decision 93/731, on the basis of Article 173 [now Article 230; RAW] of the EC Treaty, and does not in any way bear upon the intergovernmental cooperation in the spheres of Justice and Home Affairs as such'.⁸¹

This implies that CFSP documents would be treated in the same way as Community documents.

Another example of the Court's willingness to review the legality of a Council act adopted under a non-Community provision can be found in the *Airport transit visas* case.⁸² In this case the Court declared an annulment action under Article 173 EC (now Art. 230) to be admissible for the purposes of reviewing the content of a CJHA Joint Action in the light of ex Article 100c EC but subsequently dismissed the action as a matter of substance. In the final analysis, however, the Court did not shy away from the possibility that it would actually annul an act adopted in the context of the non-Community areas pursuant to Article 173 EC. The Court made clear that it is prepared to police the activity of the Council within the European Union as a whole. This implies that even CFSP Decisions are not 'untouchable' when it is claimed that a Community legal basis should have been used. The Court's competence in this regard is based on Article 47 TEU, which makes no distinction between CFSP and Police and Judicial Cooperation in Criminal Matters (PJCC), but instead provides that nothing in the TEU shall affect the Community treaties.⁸³ Nevertheless, challenging CFSP decisions as such before the Court (of First Instance) remains to be excluded. While recent case law (the *Segi* case) seems to confirm the willingness of the Court to indeed judge the legal basis of a decision, legal protection remains absent where, for instance, individuals challenge their presence on a list of terrorists annexed to a CFSP Common Position.⁸⁴

Finally, it has been argued, following the *Foto-Frost* line of reasoning, that this role of the Court implies that a national court must refer a question on the validity of a measure adopted in the context of CFSP and PJCC under the Article 234 EC mechanism.⁸⁵ Indeed the possible use of Article 234 EC is not *a priori* excluded in cases where the legal basis of a CFSP Decision that has been implemented on the national level is questioned by individuals before a national court.⁸⁶

While recent case law thus indicates that the Court of Justice is increasingly seen as the Court of the European Union,⁸⁷ it remains clear that the current regime

⁸¹ Para. 85.

⁸² Case C-170/96, *Commission v. Council*.

⁸³ Cf. D.M. Curtin and R.H. van Ooik, *supra* note 77.

⁸⁴ Case T-338/02, *Segi a.o.* Similar cases are currently pending before the Court of First Instance: T-318/01, *Olthman*; T-315.01, *Kadi*; T-306/01, *Aden a.o.*; T-228/02, *Organisation des Modjahedines du peuple d'Iran*; T-47/03, T-110/03, T-150/03 and T-405/03, *Sison*.

⁸⁵ Case 314/85, *Foto-Frost*. See D.M. Curtin and I.F. Dekker, 'The European Union as a 'Layered' International Organization: Institutional Unity in Disguise', in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, p. 83-136, at p. 47.

⁸⁶ Along the same lines D.M. Curtin and R.H. van Ooik, *supra* note 77, p. 27.

⁸⁷ *Ibidem*; and D.M. Curtin and I.F. Dekker, *supra* note 85, p. 27

regarding legal protection reveals a number of shortcomings. The most obvious lack of judicial control is apparent when competences and decision making procedures *within* the CFSP legal order are at stake. In that case, there are no possibilities for the Court to scrutinize either the decision making procedures or the legal basis chosen for a CFSP decision. This means, for instance, that neither the Commission, nor the European Parliament can commence a procedure before the Court in cases where the Council has ignored their rights and competences in CFSP decision making procedures. As far as the legal basis for decisions is concerned, there are no possibilities for the institutions or the member states to request the opinion of the Court. It is important to note that this brings about a situation in which the interpretation and implementation of the CFSP provisions (including the procedures to be followed) is left entirely to the Council. Keeping in mind their preference for ‘intergovernmental’ cooperation where CFSP is concerned, it may be understandable that member states at the time of the negotiations had the strong desire to prevent a body of ‘Union law’ coming into being by way of judicial activism on the part of the European Court of Justice,⁸⁸ but it is less understandable that they were also reluctant to allow for judicial control of the *procedural* arrangements they explicitly agreed upon (although it is acknowledged that it may be difficult to unlink procedures and content).

Furthermore, the non-justiciability of the consistency requirement in Article 3 TEU results in a situation in which this requirement is reduced (as far as judicial control is concerned) to the extent that it is covered by Article 47 (preservation of the *acquis communautaire*). This means, first of all, that the CFSP decisions cannot be adjudicated as to their conformity with the *overall* consistency of the Union’s external policy (that is in relation to other CFSP decisions or PJCC decisions);⁸⁹ and, secondly, that the Court is not allowed to view Community decisions in relation to the prerogatives or obligations of the member states in the areas of the Union.⁹⁰

This leads us to conclude that the Court of Justice is left with a limited set of possibilities. First of all, the Court is allowed to review the required compatibility of CFSP measures of the Council with Community law, including the choice of legal basis (EC or CFSP) and the consistency of foreign policy measures (‘policing the boundaries’). This includes the Court’s use of the non-judiciable CFSP provisions as aids of interpretation.⁹¹ Secondly, it seems clear that the Court has jurisdiction whenever the Council makes use of ‘hybrid’ acts, covering both matters governed by CFSP as well as matters governed by the Community Treaties.⁹² Examples could be found in the area of economic sanctions, development policy or trade policy. And, finally, it is obvious that whenever issues fall under the Community’s competence, Article 46 TEU cannot be interpreted so as to affect the existing powers of the Court related to external policy issues. This means that the Court’s competences for instance extend to international agreements concluded by the Community (Art. 300

⁸⁸ Cf. N. Neuwahl, *supra* note 30, p. 244.

⁸⁹ See also M. Pechstein, *supra* note 78, p. 258.

⁹⁰ See more extensively R.A. Wessel, *supra* note 5.

⁹¹ Cf. Case C-473/93, *Commission v. Luxembourg*, on Article F, para. 1 TEU (now Art. 6).

⁹² See also N. Neuwahl, *supra* note 30, p. 246.

EC, including *mixed agreements*), to trade policy (Art. 133 EC), visas, asylum and immigration policy (Title IV EC), the human rights principles in Article 6, paragraph 2 TEU as general principles of Community law,⁹³ or development policy (Title XX EC) – regardless of possible relations of measures in these areas with CFSP issues. In fact, because of the close connection between some CFSP and EC decisions one comes across references to CFSP decisions in judgments of the Court (of first instance) more often. The judgements concerning sanctions against the former Yugoslavia and against individuals on the basis of anti-terrorism measures form a case in point. After all, in these situations the Community measures found a direct source in CFSP common positions.⁹⁴

4.2. *The National Courts*

Already in *Van Gend & Loos*, the Court of Justice made clear that ‘the object of the EEC is to establish a common market the operation of which directly affects the subjects of the Community’. The national courts in particular are entrusted with ensuring the legal protection of citizens, a role for the courts which in the view of the Court of Justice follows from the cooperation principle of Article 10 EC⁹⁵ and from the task assigned to the Court under Article 234 EC (the preliminary rulings),

‘the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, [and which] confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals’.⁹⁶

This resulted in the rule that:

‘every national court must, in a case within its jurisdiction, apply Community law in its entirety [...] and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule’.⁹⁷

It would be interesting to know the Court’s views on the possibility of CFSP provisions being invoked before national courts. Although the issue is not agreed upon in the Treaty, it is generally held that CFSP decisions are not ‘self-executing’, in the sense that they may be relied upon by national courts.⁹⁸ It is indeed difficult to find provisions in the CFSP decisions containing rights and/or obligations for individuals. This is not to say that individuals cannot be affected at all by CFSP decisions. Despite the fact that practice has not yet called for conclusive statements in this respect, there are no reasons to exclude the direct effect of CFSP decisions in general.

⁹³ Cf. in this line also the Opinion of Advocate General Jacobs in the *Bosphorus* case (C-84/95).

⁹⁴ See in particular Cases T-306/01 R, *Aden*; T-47/03 R, *Sison*; and C-317/00 P(R), ‘*Invest’ Import and Export*’.

⁹⁵ Case 33/76, *Rewe Zentralfinanz et al. v. Landwirtschaftskammer für das Saarland*.

⁹⁶ Case 26/62, *Van Gend & Loos*, p. 12.

⁹⁷ Case 106/77, *Simmenthal*, p. 644.

⁹⁸ See for instance D.M. Curtin and R.H. van Ooik, *supra* note 77, p. 30-31.

In general, rules in the legal order of either the member states or an international organization may provide for international norms to be *applied* in relation to certain legal subjects only (e.g. EC Directives) or only after a transformation into national law. The notion of direct effect may be distinguished from this applicability in that it only becomes relevant when norms do not have the effect they purport to have and citizens wish to invoke a norm before a national judge. Even if a norm is directly applicable – in the sense that it has a function between the legal subjects within a national legal order – there may be reasons not to allow individuals to invoke it in a court of law.

This means that in order to establish the status of CFSP norms in national legal orders, we have to look for clues in either the international order, the national legal orders, or the EU legal order indicating the direct applicability, the direct effect and the hierarchical status of CFSP norms. General international law, obviously, is silent about this issue and doctrine generally reflects the principle that states are free to decide on how they want to give effect to international law in their national legal orders.⁹⁹ The constitutions of the fifteen EU member states indeed differ in this respect. But, as became clear from the development of the European Community, this issue can authoritatively be settled by norms in the supranational order of an international organization. The principles of direct applicability, direct effect and supremacy were recognized by the European Court of Justice (ECJ) as forming part of the ‘new legal order’ regulating the relationship between the EC and its member states, as well as with the legal subjects within the states (natural and legal persons).

Unlike the EC, we have seen that the non-Community parts of the Union largely fall outside the reach of the ECJ. This means that, for the time being, we cannot rely on authoritative interpretations of the Court regarding the status of CFSP norms in the national legal orders. However, the Treaty itself is not completely silent in this respect. In a recent study, Curtin and Dekker claim that, in principle, Union law is directly applicable in the national legal orders of the member states.¹⁰⁰ They base this conclusion on the fact that with regard to the new types of EU decisions introduced by the Amsterdam Treaty, the ‘framework decisions’ and ‘decisions’, the Treaty explicitly provides that they ‘shall not entail direct effect’ (Art. 35 TEU). This provision would only make sense when these types of decision could *in principle* have direct effect. Irrespective of the inherent danger in using *a contrario* arguments, its acceptance would provide an argument in favour of the direct applicability of EU norms in general, since the exclusion of direct effect only becomes relevant in the case of direct applicability.

Although this example is drawn from the provision of police and judicial cooperation and not from the provisions of foreign and security policy, there is no compelling reason to differentiate between the two substantive Union areas in this respect. The direct applicability of CFSP norms would then result in the possibility –

⁹⁹ See for instance A. Cassese, *International Law*, Oxford, Oxford University Press, 2001, chapter 8.

¹⁰⁰ D.M. Curtin and I.F. Dekker, ‘The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity’, in P. Baumont, C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law*, Oxford, Hart Publishing, 2002, p. 59-78.

and even the necessity – of using these norms in the relationships between all legal subjects within the national legal order. Administrative as well as judicial organs could invoke them, but the same holds true for citizens and companies in their mutual relations. This is not to say that all norms by definition could be invoked in national court proceedings. Just as with Community norms, this would depend on the nature of the norm (sufficiently clear and precise), which in this case would ultimately be decided by the national courts. Curtin and Dekker claim that Union norms, at least, could have an ‘indirect effect’, meaning that ‘all national authorities have the obligation to interpret national legislation and other measures as much as possible in the light of the wording and purpose of valid Union law’.¹⁰¹ This, however, implies an acceptance of the supremacy of Union law over national law. After all, ‘indirect effect’ only becomes relevant in the case of a (possible) conflict between an EU and a national norm. Curtin and Dekker, more or less implicitly, base this supremacy on the principle of loyalty, as laid down in Article 10 EC as one of the leading principles in the constitution of the *Union* entailing an obligation for national authorities to interpret national law as far as possible in conformity with these decisions (only limited by the restrictions imposed by the ECJ regarding the application of the principle of indirect effect).¹⁰²

It is probably too early to come up with definite statements like these regarding the effect of CFSP norms in the national legal orders. Nevertheless, direct applicability in the more limited definition presented earlier (using the norms in the relationships between all legal subjects within the national legal order) seems to follow from all of the above assumptions. However, it is generally held that CFSP decisions are not directly effective, in the sense that they may be relied upon by national courts.¹⁰³ Regardless of the undetermined status of CFSP provisions in the Treaty on European Union, national constitutional systems may nevertheless offer national courts the opportunity to allow individuals to invoke directly effective provisions in cases brought before them. Thus, the Dutch Constitution, for instance, provides in Article 93 that provisions in treaties or in decisions of international organizations have binding force in the Dutch legal order when they are directly effective. The latter question is decided upon by the courts.

Examples of potentially directly effective provisions may be found in the sanction decisions, although the actual obligations in these cases are mostly laid down in Community Regulations (which may be invoked by individuals on the basis of the EC rules on direct effect). Some CFSP decisions imposing sanctions, however, do not require a follow-up in the form of an EC Regulation, such as the decisions to impose an arms embargo on Afghanistan, Burma/Myanmar, Nigeria or Sudan.¹⁰⁴ In

¹⁰¹ *Ibidem*. See on the principle of indirect effect for instance G. Betlem, ‘The Principle of Indirect Effect of Community Law’, *European Public Law*, 1995, p. 1.

¹⁰² In particular the principle of non-retroactivity in criminal liability. See for instance P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials*, Oxford, Oxford University Press, 2003, p. 211-220.

¹⁰³ See for instance D.M. Curtin and R.H. van Ooik, *supra* note 77, p. 30-31.

¹⁰⁴ Common Positions 96/746/CFSP, 96/635/CFSP, 95/515/CFSP, and 94/165/CFSP respectively.

these cases it would be the CFSP decision itself that would need to be invoked before a national court. The same holds true regarding CFSP decisions establishing criteria or exceptions with respect to sanctions imposed on third countries. Common Position 95/544/CFSP, for instance, provided *inter alia* for an interruption of all contacts with Nigeria in the field of sports through the denial of visas to official delegations and national teams. Unlike other provisions in this Common Provision – which obligate member states to take ‘in accordance with national law such measures as are appropriate’ – this provision does not seem to be in need of national implementation measures. Another example is Council Decision 97/820/CFSP, allowing for member states to make exceptions to the sanctions imposed on Nigeria. On the basis of this decision and subject to certain conditions, member states may derogate from these rules.

A final situation in which national courts could become involved in CFSP issues, would arise in cases of an (alleged) liability of member states being brought up. In cases where neither the Communities nor the European Union could be held liable for decisions taken by the Council in the area of CFSP, third states or individuals will have to turn to the national courts of the member states to seek justice. Situations in this respect could for instance arise whenever member states cause damage in the course of an EU action (such as in the case of the military missions of the Union in Macedonia or Congo) or when member states are held liable for breaches of an agreement concluded by the Union on the basis of Article 24 TEU.

The main problem, however, is that all decisions imposing sanctions – EC as well as CFSP – are normally transposed into national legislation. Nevertheless, the original CFSP decision could play a role in a proceeding whenever its indirect effect would be accepted. Furthermore, we would need a citizen or a company from that third state to challenge the trade or travel restrictions, in which case the company in the EU member state could point to his obligations on the basis of the CFSP decision. Direct applicability only refers to this rightful reference to valid norms and the case is thus not completely incomprehensible. It is not even unthinkable that a national court would also allow this decision to have direct effect, in the sense that it may play a role in a national court proceeding. The problem, however, seems to be that in cases like this one cannot escape from dealing with the question of the supremacy of the CFSP norms over previously established (or maybe even future) national law. The principle of loyalty may prove to be a valuable candidate as a basis for the general supremacy of EU law, but at least in the area of foreign policy this issue has not yet fully blossomed.

4.3. *The International Court of Justice*

On the basis of Article 292 EC member states are not to submit a dispute concerning Community law to any method of settlement other than those provided for in the EC Treaty. A similar provision has not been included in the Treaty on European Union. In fact, Title V TEU creates obligations which are binding in international law but not (or to a minor extent only) in Community law, and these obligations have in general been excluded from interference by the EC Court. The fact that CFSP provisions are not subject to the rule in Article 292 EC, nor to a similar provision in the

TEU, raises the question whether these provisions are justiciable before the International Court of Justice. All EU member states are members of the United Nations, which makes them *ipso facto* parties to the Statute of the International Court of Justice (Art. 93, United Nations Charter). Whenever states have accepted the jurisdiction of the Court,¹⁰⁵ it may decide on cases referred to it with regard to a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; or d) the nature or extent of the reparation to be made for the breach of an international obligation (Art. 36 of the Court's Statute).

Hence, there are no reasons *a priori* to exclude the jurisdiction of the International Court of Justice concerning the CFSP provisions in the TEU and the Council decisions that are based upon them.¹⁰⁶ It is difficult, however, to imagine concrete cases that would be suitable for being brought to the Court's attention. Possibilities to sue another member state for maintaining a national policy where CFSP provisions would call for a common policy are limited. The provisions on systematic cooperation provide sufficient safeguards against member states still maintaining conflicting national policy. Moreover, there is not much sense in challenging a decision that was adopted unanimously. Only in a case decided upon by qualified majority voting (and where a member state was outvoted) would there be any reason to question, for instance, the legal basis of the decision. In addition, one could imagine the non-implementation of CFSP measures by a member state (and, in the absence thereof, a Council decision because of the requirement of an unanimous vote) being brought before the International Court.

More importantly, however, it is very unlikely that member states will bring legal CFSP issues before the International Court of Justice. In their view, any action before this Court would probably harm not only the further development of CFSP (which to a large extent depends on the development of mutual trust and cooperation), but also the member state's image as a serious player in the field. Nevertheless, it is equally clear that the International Court of Justice may play a role whenever relations with third states are concerned. In that respect, however, it is important to make a distinction between acts of the member states and acts of the European Union, since Article 34, paragraph 1, of the Court's Statute provides that only states may be parties in cases before the Court.

¹⁰⁵ The EU member states that have accepted the Court's compulsory jurisdiction on the basis of Article 36, para. 2, of the Court's Statute are: Belgium, Denmark, Finland, Greece, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. The same holds true for the following candidate countries: Bulgaria, Cyprus, Estonia, Hungary, Malta and Poland.

¹⁰⁶ See also M.R. Eaton, *supra* note 75, p. 222. Cf. Ph. Willaert and C. Marqués-Ruiz, 'Vers une politique étrangère et de sécurité commune: état des lieux', 3 *Revue du Marché Unique Européen*, 1995, p. 35-95, at p. 55: 'D'un point de vue juridique, les règles de droit international sont applicables en cas de différend entre Etats membres [...]'.

5. Good Governance as a Substantive Foreign Policy Objective

5.1. Use of 'Formal' CFSP Legal Bases

Apart from reforming governance in the European Union, the Commission's White Paper also looks into the EU's contribution to global governance.

'The objectives of peace, growth, employment and social justice pursued within the Union must also be promoted outside for them to be effectively attained at both European and global level' (p. 26).

Indeed, according to Article 11 TEU one of the objectives of the Union's foreign and security policy is 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'. In order to be able to pursue this objective, the Union can make use of the general means, described in Article 12 TEU: Common Strategies, Joint Actions and Common Positions.

Many Joint Actions entail concrete support activities in third countries. These may vary from support of the Union for the democratic development of a country to a contribution to the solution of a serious crisis. Decisions on Joint Actions that somehow concern the support of development in third countries reveal the Union's concern with a variety of issues. Joint Actions may set out a general policy to support the democratic development in a particular third country (e.g. support for the Government of Montenegro, for Republica Srpska or for Zaire),¹⁰⁷ but they may also focus on a more specific situation (e.g. assistance for mine-clearance in Croatia, a contribution to the re-establishment of a viable police force in Albania or support for the Palestinian Authority in its efforts to counter terrorist activities).¹⁰⁸ Supporting democratic developments is often pursued through the sending of observers to elections (e.g. in Bosnia and Herzegovina, the Democratic Republic of Congo or Nigeria).¹⁰⁹ And, finally, Joint Actions often form the basis for the nomination of a Special Envoy (e.g. for the Middle-East peace process, the city of Mostar, the African Great Lakes region, the Federal Republic of Yugoslavia or Kosovo).¹¹⁰

Common Positions are used for two different functions in relation to the promotion of global governance. A substantial number of Decisions relate to the im-

¹⁰⁷ See Joint Actions 98/301/CFSP of 30 April 1998, 98/117/CFSP of 2 February 1998 and 96/656/CFSP of 11 November 1996 respectively.

¹⁰⁸ See Joint Actions 98/627/CFSP of 9 November 1998, 1999/189/CFSP of 9 March 1999 and 97/289/CFSP of 29 April 1997 respectively.

¹⁰⁹ See Joint Actions 96/406/CFSP and 98/302/CFSP of 10 June 1996 and 30 April 1998 (Bosnia and Herzegovina); and 97/875/CFSP of 19 December 1997 and 98/735/CFSP of 22 December 1998 respectively.

¹¹⁰ See Joint Actions 96/676/CFSP of 25 November 1996, 96/442/CFSP of 15 July 1996, 96/250/CFSP of 10 June 1996, 98/375/CFSP of 8 June 1998 and 1999/239/CFSP of 30 March 1999 respectively.

sition of arms embargoes or the reduction of economic and financial relations.¹¹¹ Most Decisions on economic sanctions reiterate a resolution of the United Nations Security Council on the same topic. In most cases additional Community measures are required on the basis of Articles 301 EC and 60 EC,¹¹² which results in subsequent EC or ECSC decisions.¹¹³ The fact that binding United Nations Security Council (UNSC) resolutions are repeated in specific CFSP decisions may appear odd at first sight. An eventual absence of a CFSP decision would of course not affect the obligatory force of the Security Council Resolution. The reason for adopting CFSP decisions is nevertheless – apart from securing the direct effect of the SC Resolution – to be found in the system of the TEU, in which, according to Article 301 EC, economic sanctions by the Community require a prior political CFSP decision. Since the individual Security Council resolutions need to be implemented in Community legislation as well, the adoption of Community Regulations on the basis of Article 301 EC (or Art. 60 EC) is a necessary course to be followed.

Apart from decisions implementing Security Council resolutions, ‘independent’ CFSP decisions on economic sanctions are also possible. An example can be found in a Common Position on the imposition of an oil embargo against the Federal Republic of Yugoslavia which does not find a basis in a Security Council resolution. These independent EU sanctions are of an equally unconditional nature. They may impose a general arms embargo (like in the case of Sudan) or introduce a diversity of measures such as visa restrictions (Yugoslavia and Belarus) or the suspension of development cooperation (as was the case regarding Nigeria).¹¹⁴

¹¹¹ Other types of sanctions are not excluded, but rarely occur. An example of an unfriendly (but probably not illegal act) concerns the decision on the non-admission to the EU of government officials of Belarus in reaction to certain measures, by the Government of Belarus affecting the residences of ambassadors from several EU member states. As a first reaction the EU member states had already recalled their ambassadors from Minsk for consultations. See Common Position 98/448/CFSP of 9 July 1998 (repealed by Council Decision 1999/156/CFSP of 22 February 1999). Cf. also Common Position 98/725/CFSP of 14 December 1998 on restrictive measures against persons in the Federal Republic of Yugoslavia.

¹¹² Clear exceptions include the decisions on the imposition of an arms embargo. Examples include Council Decision 94/165/CFSP of 15 March 1994 concerning the imposition of an embargo on arms, munitions and military equipment on Sudan; Common Position 96/184/CFSP of 26 February 1996 concerning arms exports to the former Yugoslavia; Common Position 96/746/CFSP of 17 December 1996 concerning the imposition of an embargo on arms, munitions and military equipment on Afghanistan; Common Position 98/409/CFSP of 29 June 1998 concerning Sierra Leone; and Common Position 1999/206/CFSP of 15 March 1999 on the imposition of an embargo on the export of arms, munitions and military equipment on Ethiopia and Eritrea.

¹¹³ Because of the absence of an Article 301 EC counterpart in the ECSC Treaty, the ECSC decisions on economic sanctions were taken as a ‘Decision of the Representatives of the Governments of the Member States, meeting within the Council’.

¹¹⁴ See Council Decision 94/165/CFSP of 15 March 1994 concerning the imposition of an arms embargo on Sudan; Common Position 98/725/CFSP of 14 December 1998 on restrictive measures against persons in the Federal Republic of Yugoslavia; and Common Position 98/448/CFSP of 9 July 1998 (repealed by Council Decision 1999/156/CFSP of 22 February 1999) on Belarus. The Common Position on Nigeria of 20 November 1995 (95/515/CFSP) introduces and reaffirms a number of economic and political sanctions against that country.

A second category concerns more positive policies of the Union vis-à-vis third states. However, Regardless of what one might have expected on the basis of the Treaty text,¹¹⁵ Common Positions are used less frequently to define the policy of the Union vis-à-vis a particular third state. It has proven to be difficult to fix the policy of the Union in an actual decision. Nevertheless, the instrument has been used by the Union to express its attitude concerning particular events in the third country in question. Thus the Union for instance ‘condemns the human rights abuses’ (Nigeria), or ‘is concerned at the absence of progress towards democratization’ (Burma/Myanmar).¹¹⁶ More importantly, however, Common Positions concerning the policy of the Union vis-à-vis a third state in general contain the objectives of the Union, together with the measures to achieve these objectives. Examples of objectives are ‘to improve the situation in East Timor regarding respect for human rights’,¹¹⁷ ‘to support the dialogue’ or ‘to support the coordinated efforts of the international Community’ (Angola),¹¹⁸ ‘to assist the Burundi Government in organizing a national debate [...]’,¹¹⁹ ‘to support democratic development in Ukraine’ or ‘to continue to provide assistance for the process of nuclear disarmament’ (Ukraine).¹²⁰ Generally, the objectives of Common Positions have a wide scope and are rather ambitious. Objectives such as ‘to bring a sustainable peace in Afghanistan’ or ‘to encourage, stimulate and support the process of recovery from genocide, promotion of national reconciliation [...] and protection and promotion of human rights [...]’ (Rwanda) are not exceptional.¹²¹

5.2. Use of ‘Informal’ CFSP Legal Bases

However, apart from these formal instruments, the systematic cooperation which on the basis of Article 13(3) TEU is to take place between the member states, may result in some additional outcomes. The purpose of the systematic cooperation between the member states is ‘to ensure that their combined influence is exerted as effectively as possible by means of concerted and convergent action’ (the last part of Art. 16). The outcome of the systematic cooperation in this respect may be rather invisible to outsiders, since in many cases the agreement on concerted and convergent action is not laid down in one of the formal CFSP instruments. Decisions to that end are therefore to be discovered in Presidential Declarations, or in ‘Declarations’, ‘Conclusions’, ‘Decisions’ or ‘Action Plans’ of the Council that are not based on specific legal bases and are not always made public. Even oral agreements between

¹¹⁵ According to Article 15 Common Positions shall also be used to define the approach of the Union to a particular matter of a geographical nature.

¹¹⁶ Common Position 95/515/CFSP of 20 November 1995 and Common Position 96/635/CFSP of 28 October 1996 respectively.

¹¹⁷ Common Position 96/407/CFSP of 25 June 1996.

¹¹⁸ Common Position 95/413/CFSP of 2 October 1995.

¹¹⁹ Common Position 95/91/CFSP of 24 March 1995.

¹²⁰ Common Position 94/779/CFSP of 28 November 1994.

¹²¹ See Common Positions 98/108/CFSP of 26 January 1998 and 1999/73/CFSP of 25 January 1999 (Afghanistan) and Common Position 98/252/CFSP of 30 March 1998 (Rwanda).

member states or statements made by the Presidency and tacitly accepted by the member states may serve as a source for concerted action.¹²²

The systematic cooperation can subsequently be implemented by either the member states individually (for instance through similar diplomatic *démarches* by their representatives in third states), by a combination of national initiatives and Union initiatives (for instance when national *démarches* are supported by a Presidential declaration or *démarches* by the Troika), or by autonomous actions of the Union (when member states decide to leave a particular issue to be dealt with by the Presidency or the Troika, in which case a third state is believed to be confronted with a single, but strong actor).¹²³

Practice has shown a divergent picture of actions and reactions, but the systematic cooperation is nevertheless considered to be one of the most important elements of CFSP by the policy-makers involved.¹²⁴ The 'informal' decisions of the Council are not by definition less influential than Common Positions or Joint Actions.¹²⁵ Thus, a concerted action towards the human rights situation in Turkey, because of its structural nature, is of extreme importance not only for the future relationship between the EU and Turkey, but also for the relationship between the EU and Iran, Russia and the CIS republics in the region. And, the failure to reach consensus on a declaration on the human rights situation in China in 1997 had all to do with the position of the EU vis-à-vis China and with the battle between Japan and the US concerning access to the Chinese market (and even more concretely with the planned visit of the French President to China, the question whether China would buy Boeing or Airbus aircraft, employment in Airbus-producing EU member states, the competition between American and European industries, and the survival of a European high-tech industrial cooperation project).¹²⁶

An outstanding example of a decision which may partly be based on Article 13, paragraph 3, is the 'Declaration'. Most opinions of the European Union concerning CFSP issues are not presented in one of the formal decision types mentioned in Article 12; instead they are expressed as 'Declarations'. It is striking that, now that the Treaty explicitly mentions the types of decisions in which the opinions of the Union are to be expressed, the instrument of 'Declaration' has not lost the popularity it gained in the period of European Political Cooperation (EPC). In fact, each year shows a larger number of CFSP Declarations leading up to the current average of one Declaration almost every three days.¹²⁷

In practice, CFSP systematic cooperation as well as concerted and convergent action has also proved important with regard to the so-called 'political dialogues' with third countries. Political dialogues as such cannot be found in the Treaty on European Union, but are established on the basis of general association treaties, de-

¹²² S. Keukeleire, *supra* note 35, at 186.

¹²³ *Ibidem*, p. 185.

¹²⁴ *Ibidem*, p. 230.

¹²⁵ Ph. Willaert and C. Marques-Ruiz, *supra* note 106, p. 70.

¹²⁶ Taken from S. Keukeleire, *supra* note 35, at 230.

¹²⁷ Joint Actions and Common Positions are together adopted on average 27 times yearly, which means one CFSP Decision every two weeks.

cisions, declarations, or simply on the basis of an exchange of letters.¹²⁸ Since the entry into force of the TEU, political dialogues take place in the framework of CFSP. They are seen as a means of attaining the objectives in Article 11 and may cover:

- an exchange of views and information on political questions of mutual interest;
- the identification of areas suitable for an enlarged cooperation on the basis of a greater confidence between the different actors on the international scene;
- the adoption of joint positions and actions in relation to existing international problems.¹²⁹

Dialogue meetings can take place at different levels. The highest level is that of the Presidency (together with the President of the Commission). Lower levels are the ministerial level, the level of political directors, the senior official or expert level and the parliamentary level. Due to agenda difficulties there is a growing tendency to send lower deputies to dialogue meetings. Thus the ministers often send junior ministers, and political directors increasingly send deputy political directors or even more junior officials.¹³⁰

Another trend is a preference for dialogue with regional groupings, for instance with the countries of Central and Eastern Europe (CEEC). Despite the fact that these states all have their own 'Europe Agreement' with the European Community, political dialogues are often combined for reasons of efficiency. Since in the Europe Agreements political dialogues are meant to facilitate the associated country's full integration into the Community, the group meetings are very much against the will of the individual CEEC, who generally does not like its cooperation with the Union to be dependent on relations with other states.¹³¹ In the case of the CEEC, political dialogues are institutionalized in the Association Council – the ministerial body to supervise the association agreements – which sometimes fuses with ordinary General Affairs Councils. Agenda problems are also the reason behind the fact that more and more meetings take place along the margins of other international gatherings, such as OSCE summits or the opening of the United Nations General Assembly.

¹²⁸ See on the political dialogue for instance J. Monar, 'Political Dialogue with Third Countries and Regional Political Groupings: The Fifteen as an Attractive Interlocutor', in E. Regelsberger *et al.* (eds.), *Foreign Policy of the European Union: From EPC to CFSP and Beyond*, Boulder, Lynne Rienner, 1997, p. 263-274. Many political dialogues were already established in the EPC period.

¹²⁹ Draft conclusions of the Council, adopted by the Political Committee on 7 June 1996, Doc. 8255/96.

¹³⁰ J. Monar, *supra* note 128, p. 271.

¹³¹ *Ibidem*, p. 270 and in general on the relations and political dialogue with the CEEC: B. Lippert, 'Relations with Central and Eastern European Countries: The Anchor Role of the European Union', in E. Regelsberger *et al.* (eds.), *Foreign Policy of the European Union: From EPC to CFSP and Beyond*, Boulder, Lynne Rienner, 1997, p. 197-218.

5.3. Use of Community Competences

In practice, however, these CFSP competences have not changed the fact that the larger part of the EU's democracy and human rights policies are based on Community legal bases. The most notable competences of the Union in this respect can be found in the use of economic and financial sanctions on the basis of Articles 301 and 60 EC, and in the 'essential element clause' which forms part of treaties concluded between the Community and third states.

While the political decision to impose a sanction on a third state is based on a CFSP provision, the economic or financial implications can be found in an EC Regulation. Although one may question the idea of enforcing good governance in third countries through punitive action, this instrument is often used. In particular sub-Saharan Africa has been substantially subjected to this type of instrument, often in response to coups.¹³² In many cases, however, the sanctions are combined with the use of conditionality clauses in treaties with the respective states. Since 1995 a uniform clause included in almost all treaties concluded between the EC and third states. This essential element clause reads: 'Respect for the democratic principles and human rights [...] inspires the domestic and external policies of the Community and of [the third country concerned] and constitute an essential element of this agreement'.¹³³ However, democratic conditionality has not been systematic and indeed is often a reaction to a negative development in a country, rather than a reason to establish a structural and more positive policy towards building democracy.¹³⁴

This is not to say that there has not been any positive democracy assistance. On the basis of a study by Young it can be concluded that European political aid even increased threefold during the 1990s. Furthermore, funding has moved away from election monitoring towards support for NGOs. 'Good governance initiatives' these days incorporate democracy-related components. The stated aim has been to pursue governance work in a way that facilitates broader democratic enhancement mostly without such efforts being labelled overtly as democracy-focused. Public administration reform programmes have sought to link the strengthening of policy-making capability to issues of access and accountability. Central to the EU's approach has been a new holistic reasoning, linking together economic reform, social change, strategic diplomacy and democratization.¹³⁵

6. Conclusion

The purpose of the present contribution has been to investigate whether and to what extent the European Union meets the challenge set by the Commission in its

¹³² See R. Youngs, 'European Union Democracy Promotion Policies: Ten Years On', *European Foreign Affairs Review*, 2001, p. 355-373, at p. 356.

¹³³ See more extensively on the use and function of this clause: M. Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?*, Antwerp, etc., Intersentia/Hart Publishing, 2001.

¹³⁴ R. Youngs, *supra* note 132.

¹³⁵ *Ibidem*.

White Paper on European governance in the area of foreign, security and defence policy. Regarding the principle of participation, in the Union's legal system a clear choice has been made in favour of democratic representation of the citizens of the Union through the European Parliament. However, the competences of the EP are extremely limited. One of the major shortcomings follows from the lack of possibilities for Parliament to hold the two main decision making organs in CFSP – the Council and the European Council – accountable. While the subsequent treaty modifications do reflect a somewhat increased interference by the EP regarding CFSP, possibilities in this respect remain limited to indirect interventions only, by making use of budgetary powers or through an influence on the Community dimensions of CFSP decisions. National parliaments only marginally compensate these shortcomings as the traditional prerogatives of the executive in most member states limit the parliamentary competences to an *ex post facto* scrutiny. Moreover, in the initiatives to stimulate the involvement of national parliaments in EU decision making – exchange of information between national parliaments and the EP, improving access to timely information or cooperation between national European Affairs Committees – CFSP is a largely neglected area.

The lack of democratic accountability can be said to form part of a more general 'accountability deficit' when judicial competences are taken into account. The European Court of Justice may only be called in when there is a threat to the *acquis communautaire*; internal CFSP arrangements and decisions are explicitly excluded from the competences of the Court. In addition, the direct applicability of CFSP decisions is far from commonly accepted, although it seems possible for a national court to accept the (in)direct effect of a CFSP provision whenever its national legal system allows it to do so. Finally, the theoretical competence which the International Court of Justice may have in certain cases lacks a practical value.

European polls reveal that a European Union that is more active in the world meets the wishes of the EU citizen,¹³⁶ but the ambitions of the Union in the area of security and defence have had a negative impact on public access to documents in that area and on the transparency of decision making. On a positive note, the Court made clear that no distinction is to be made between EC and other Union documents when access to documents is concerned. However, the new regime on access to documents that has been developed during the last few years and which finally resulted in a new Regulation in 2001 makes a clear exception for 'sensitive documents', thus allowing the Institutions (and even obliging the member states) to refuse access to a document where disclosure would undermine the protection of public interests as regards public security, defence and military measures. In itself this is a logical consequence of the establishment of a European Security and Defence Policy in which close cooperation with NATO (the source of the strict regime on sensitive documents) is thought to be essential. Ironically, the EU citizen pays a price for lifting the ambitions of the Union to a higher level.

¹³⁶ In the spring of 2003 the Eurobarometer showed 67% support for a common foreign policy and 77% for a common security and defence policy. Average figures are quite stable around 70%.

This brings us to the question of the competences of the Union to meet another objective listed in the Commission's White Paper: to make a contribution to global governance. The Treaty indeed lists a number of instruments to be used by the Union to meet this objective. However, in most cases the instruments are not used to their full extent. They have a strong declaratory nature and their implementation relies on financial economic Community measures. Thus, instruments to contribute to 'global governance' certainly form part of CFSP, but the overall picture remains one of a Union relying on its economic potential ('wallet diplomacy'), in which the CFSP procedures function as a means to establish a political consensus to make financial donations out of the Community budget possible.

So far, the implementation of the principles of good governance as phrased in the Commission's White Paper in the area of foreign, security and defence policy seems to be hampered by the distinction that is still being made between the Community and the other areas of the Union. While it seems fair that member states should not be forced to allow more openness and scrutiny at the European level than they are used to at home with regard to these issues, the special arrangements regarding parliamentary and judicial scrutiny as well as the special status of sensitive CFSP and ESDP documents does not take the unity of the Union's legal order into full account.

In that respect the reorganization and unification of the treaties – as a result of the new Treaty establishing a Constitution for Europe – does not seem to change much with respect to CFSP. In fact, the noted problems related to good governance in the CFSP area are here to stay, as neither the involvement of the European Parliament, nor the competence of the Court has been subject to improvement. Not being qualified as legislative acts, the CFSP decisions will not be adopted through the default procedure, which includes co-decision by the EP (Art. I-40, par. 6 and 8) and public deliberations of the Council (Arts. I-24 and I-50). By the same token, the jurisdiction of the Court will remain to be excluded (Art. III-376), although the possibility for persons to challenge restrictive measures against them as well as the role of the Court in the preservation of CFSP (Art. III-308) may be seen as improvements.¹³⁷ However, keeping in mind the statement in the Commission's White Paper that the first step should be to reform governance successfully at home in order to enhance the case for change at an international level, we have no choice but to maintain a critical attitude towards action of the Union in this field.

¹³⁷ See for a survey of the changes foreseen by the draft Constitutional Treaty of 2003: M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action', *Common Market Law Review*, 2003, p. 1347-1366. Cf. also R.A. Wessel, 'Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe', in J.W. de Zwaan, et al. (eds.), *The European Union – An Ongoing Process of Integration, Liber Amicorum Alfred E. Kellermann*, The Hague: T.M.C. Asser Press, 2004, pp. 123-140.