

The EU's Foreign, Security and Defence Policy Fifteen Years after Maastricht: A Constitutional Momentum?

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Fifteen years ago, on 7 February 1992, the Member States of the European Economic Community (EEC) entered a new phase in the ongoing process of intensifying their political cooperation. In signing the Treaty on the European Union (TEU) they officially embraced the foreign and security cooperation as an inextricable component of what they referred to as 'the Union'. From the entry into force of the Treaty on 1 November 1993 the Common Foreign and Security Policy (CFSP) was seen as one of the areas that served as the justification for the establishment of that Union.

This Common Foreign and Security Policy did not, however, appear out of the blue; its origins date back to the 1950s. The history of CFSP reveals an ongoing struggle to reach an agreement between the members of the EEC on political cooperation alongside their economic cooperation and, above all, on the legal institutional relationship between the economic and political issues.

Title V of the Treaty, in which the key provisions on CFSP are to be found, lists the provisions that govern the new form of cooperation. It is obvious that this cooperation can be studied from different angles. Ever since its conception in the early 1970s, the European Political Cooperation (EPC) between the members of the European Communities was regarded as an extra-legal phenomenon.¹ This focus on political factors was continued in the post-EPC period. Even to date, most studies dealing with CFSP – or as it is commonly referred to: the 'second pillar' of the European Union – do so from a non-legal viewpoint. They are written by political scientists and international relations experts who confront the CFSP cooperation with theories on integration and state power or who concentrate on a comparison of the different national foreign policies of the Member States. Despite the valuable insights offered by these studies, they usually refrain from providing an analysis of the precise competences and obligations of the various actors involved. In line with the point of view set out by their discipline, they consider the CFSP as a political event, rather than as a legal phenomenon.²

¹ This topic was extensively addressed in a dissertation by Jürgens, Th.: *Die gemeinsame Europäische Außen- und Sicherheitspolitik*. Köln: Carl Heymanns Verlag 1994, who himself also concluded: "Die vorstehenden Ausführungen bestätigen zunächst die überwiegend vertretene Ansicht, daß bei den Vereinbarungen der Politischen Zusammenarbeit mangels Rechtsbindungswillens keine rechtlichen Normen begründet worden sind" (p. 169). Apart from the alleged absence of an intention to be legally bound, Jürgens pointed at the absence of a Treaty basis and the terminology of the constituting documents of the European Council and the Reports of the Foreign Ministers. The Communiqués and Declarations of the Heads of State or Government were "programmatisch und damit nichtrechtlich" (emphasis added).

² According to Jürgens (ibid., p. 33), this can be blamed on the fact that CFSP is to be seen as a form of cooperation that "eine Sonderstellung zwischen Recht und Politik einnimmt und dahin tendiert, sich Juristen und rechtlicher

Indeed, it is not at all self-evident to view CFSP cooperation as operating within the framework of an individual legal order. In fact, over the past fifteen years, the question most frequently posed by both lawyers and non-lawyers alike was whether *anything* legally relevant could be said about a policy which is so clearly based on traditional diplomatic cooperation. As it was sometimes argued, the term 'policy' *ex definitione* would exclude the relevance of (international) law; if there would be binding norms at all, these would be 'politically binding', not legally.³

Nevertheless, something seems to have changed and CFSP is gradually being accepted as a grown-up study subject for lawyers and it is regarded too important to be left to political scientists and international relations experts – including the ones with an open eye for legal developments, such as Reinhard Meyers, to whom this book is devoted. While hard core European Community specialists still regard CFSP as a completely different form of cooperation, its development over the past fifteen years revealed many similarities between the first pillar (the European Community) and the second pillar (CFSP) of the European Union.⁴

The purpose of the present contribution is to present an overview of the main developments in CFSP over the fifteen years of its existence to point to the coming of age of this policy in an institutional sense.⁵ Whereas in 1992 most views stressed the 'intergovernmental' or 'political' dimension of CFSP, in 2007 we witness a debate on not only the legal aspects of CFSP, but even on a certain constitutionalisation of this area. The 2004 *Treaty on the establishment of a Constitution for Europe* (the 'European Constitution') triggered a constitutional analysis of the European Union in general and by now the unity of the Union's legal and political order seems to form the basis for any future plans. The current period provides a 'constitutional momentum' in which the development of CFSP over its first fifteen years of existence may be codified in a new treaty, in order to do justice to the fact that the difference between a 'supranational' European Community and an 'intergovernmental' CFSP is largely outdated.

Section 1 will first of all deal with the development of the position of CFSP within the Union. Section 2 will underline the distinction between the Union and its Member States in the allegedly intergovernmental CFSP. This is followed by an analysis of two relatively new dimensions, the Union's security and defence policy (section 3) and CFSP in the 2004

Analyse zu entziehen und diese nahezu auszuschließen". While it is indeed hardly possible to deny a certain indistinctiveness between law and politics in the area of CFSP at first sight, there is no a priori reason to regard the cooperation as occupying an exceptional position 'between law and politics'. However, as in almost every other area of international cooperation, both elements influence the final outcome.

³ See for instance De Zwaan, J.: 'Community Dimensions of the Second Pillar', in: Heukels, T./Blokker, N./Brus, M. (eds): *The European Union after Amsterdam: A Legal Analysis*. The Hague: Kluwer Law International 1998, pp. 179-193 at 187: "[...] the second pillar concerns only politics and not legislation [...]". This view also seems to be widely held by political scientists. See for instance Keukeleire, S.: *Het buitenlands beleid van de Europese Unie*. Deventer: Kluwer, 1998 at 193 and 194: "Decisions on Common Positions or Joint Actions are first and foremost political obligations", which means that "deviations from these decisions are to be backed up by political rather than legal arguments" [translation RAW].

⁴ See an early publication in which I already argued that on a closer look the differences between CFSP and the European Community were less important than sometimes suggested: 'De 'tweede pijler' van de Europese Unie: een vreemde eend in de bijt?', in: *SEW Tijdschrift voor Europees en economisch recht* 9/1995, pp. 554-579.

⁵ As opposed to a 'substantive' approach, which would refer to the content of the Union's foreign and security policy. The overview is partly provided on the basis of articles I have published on these topics over the past years; see for a complete list: <http://www.mib.utwente.nl/legs/staff/wessel/Publications.doc>.

Constitutional Treaty (section 4). Section 5, finally, will be used to address the question of how to make use of the 'constitutional momentum'.

1 The Place of CFSP in the European Union

1.1 Towards Institutional Unity in the Union

In the early days of the European Union, it could be shown that regarding the existence and nature of a legal system of the European Union there was no clear legal picture at all and certainly no consensus of opinion. To this very day, one can observe the existence of largely isolated EC, CFSP and PJCC (Police and Judicial Cooperation in Criminal Matters, or 'third pillar') research communities, in which research is frequently 'content driven' rather than reflecting a more institutional approach.⁶ In 2002, the European Commission still noted the differences between the Union's pillars, but with no clear intention to make an end to this:

"The Union's external policy is not easy to define. It goes beyond the traditional diplomatic and military aspects and stretches to areas such as justice and police matters, the environment, trade and customs affairs, development and external representation of the euro zone. Our aim must be to integrate these different areas and make all the resources available work together well.' 'It is not a question of the 'communitarisation' of foreign policy, applying the traditional Community procedures, as this would not be compatible with the emergence of a European military dimension, but nor should we make external policy more 'intergovernmental' by extending the powers of the Member States or of the High Representative to the detriment of the Commission. Wholesale 'communitarisation' would not today make it possible to embrace the full political dimension of external policy, which is not a mere set of powers, instruments and areas of action; nor would it be able to cater fully for the military aspects."⁷

Nevertheless, ever since the creation of the European Union, a separate school of thought has laid emphasis on the unity of the Union's legal order rather than on the differences between the Union's three pillars. One research group in this school, in which the present author participated, concentrated on two main questions: whether the European Union could be qualified as an international organisation in legal terms, and, if so, whether its institutional legal system is developing in practice towards institutional unity, albeit in disguise. We analysed the Union as a legal institution and defended the thesis that the Union is an international organisation with a unitary but complex character. This conclusion was not only based on the analysis of the Union Treaties and other basic instruments, but also on so-called legal practices, i.e. forms of legal action that are – explicitly or implicitly – employed in order to make the legal institution an operational entity.⁸

⁶ For a general survey of the CFSP and PJCC, see Denza, E.: *The Intergovernmental Pillars of the European Union*. Oxford: Oxford University Press 2002 (quoted as: Denza: *Intergovernmental Pillars*).

⁷ Communication from the Commission, *A Project for the European Union*, COM (2002) 247 final, 22 May 2002, p. 12.

⁸ Curtin, D.M./Dekker, I.F.: 'The EU as a "Layered" International Organisation: Institutional Unity in Disguise', in: Craig, P./De Búrca, G. (eds): *The Evolution of EU Law*, Oxford: Oxford University Press 1999, pp. 83-136. See further, Curtin, D.M./Dekker, I.F.: 'The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-In-Diversity', in: Walker, N. et al., (eds): *Convergence and Divergence in European Public Law*.

With regard to the European Union as a whole, one can perceive a clear evolution towards more institutional unity across the spectrum of the European Union, which has taken place incrementally over the course of the past ten years. This evolution tends to manifest itself first in so-called legal and institutional practices of the institutions themselves and only later, when the manner of governance is more established, also in the normative provisions of the European Union (treaties and formal laws). Despite the fact that clear elements of such progress towards institutional unity are present, this evolution exists in unresolved tension with the fact that governance by the European Union is still characterised by (considerable) fragmentation in practice. Or, as one observer holds:

"[What] remains is a fragmented and divided structure, which fails to establish in the area of external powers, as for the internal, an organic and comprehensive framework and a clear allocation of competences between the Union and its Member States."⁹

This has become apparent in the area of the external relations in particular. The provision in Article 2 TEU that the Union is "to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy", leaves open the possibility of the Union acting outside the CFSP framework in its external relations. The objectives of the other two parts of the Union indeed imply a role for the Union regarding the external dimension of those issue areas as well, and it has proven to be far too simplistic to distinguish between a European Community in charge of external commercial policy, a CFSP dealing with foreign policy and an isolated PJCC policy for police and judicial matters. The overlapping of certain objectives has been unavoidable from the outset, as practice has refused to be forced into the straitjacket of treaty provisions. Third States and international organisations increasingly approach the Union as such, which has resulted in a practice in which the different modes of governance no longer coincide with the three original pillars. The fact that autonomous legal entities within the Union may have set their own external relations regime (as is the case, for example, with regard to Europol) adds immensely to this (institutional and substantive) complexity.

Recent case law of the European Court of Justice seems to underline the unity of the Union's legal order and lays emphasis on the connections between the pillars. In the 1998 *Airport Transit Visa* case, the Court already implicitly held that the competences the Union has in its different pillars should be interpreted in the light of the interrelationship between the pillars. A similar argumentation was used in the 2005 *Environmental Sanctions* case, in which the Court allowed the Community to deal with the area of criminal sanctions in the first pillar, irrespective of the fact that this area also forms part of the third pillar. In the area of CFSP a similar case is pending, related to a CFSP decision to support the Economic Community of West African States (ECOWAS), whereas the Community claims that this policy may impair its first pillar initiatives. Even with regard to the different legal instruments that were created in the different pillars, in the 2005 *Pupino* case the Court held that third pillar Framework Decisions are to a certain extent comparable to first pillar Directives. However, the example *par excellence* is formed by the 2005 *Yusuf and Kadi* judg-

Oxford: Hart 2002, pp. 59-78; Dekker, I.F./Wessel, R.A.: 'The European Union and the Concept of Flexibility. Proliferation of Legal Systems within International Organisations', in: Blokker, N.M./Schermers, H.G. (eds): *Proliferation of International Organisations*, The Hague, Kluwer Law International 2001, pp. 381-414.

⁹ Cf. Tizzano, A.: 'The Foreign Relations Law of the EU', in: Cannizzaro, E.: *The European Union as an Actor in International Relations*, The Hague, Kluwer Law International 2002, pp. 135-147 at p. 137.

ments of the Court of First Instance. In these cases the Court argued that second pillar objectives (related to international peace and security) could form a legal reason for the European Community to impose first pillar economic and financial sanctions on individuals.¹⁰

1.2 *The Coming of Age of CFSP*

The modes of governance in CFSP seem to have evolved in an ad hoc manner, almost from Presidency to Presidency. At the same time, there has been a certain vulnerability to external influences from other international organisations (e.g. NATO in the second pillar) to third States (e.g. the United States with regard to the fight against terrorism and other issues) that sometimes drive the content. Nevertheless, there has been a development which has certainly narrowed the gap between CFSP and the Community. The subsequent treaty modifications introduced a number of innovations to strengthen the institutionalisation of CFSP:

- qualified majority voting for implementing CFSP decisions;
- the possibility of adopting decisions without an affirmative vote of all twenty-seven members (constructive abstention);
- the capacity of the Union to conclude international agreements with third states and other international organizations;
- the possibility to work together in smaller groups of Member States (enhanced cooperation);
- a High Representative to present the Union's foreign and security policy alongside the Commission's external policy; and
- the competence of the European Union to formulate a security and defence policy and to establish military missions.

In addition, the institutional practice within the Union resulted in:

- an acceptance of the fact that the Council, the Commission, the European Parliament and the European Court of Justice are institutions of the *Union*, rather than merely of the Community;
- an increased participation of the Commission in CFSP meetings to enhance coherence;
- a willingness of the Court to scrutinize decisions that partly find their base in CFSP; and
- a willingness on the side of the executive to keep the European Parliament informed, irrespective of the latter's exclusion from CFSP decision-making.

Some of these innovations will return in the following sections.

¹⁰ See respectively Case C-170/96 (Airport Transit Visa), Case C-176/03 (Environmental Sanctions), Case C-91/05 (ECOWAS), Case C-105/03 (Pupino), and Cases T-306/01 (Yusuf) and T-315-01 (Kadi). Judgments can be found at: <http://curia.europa.eu/>.

2 The Union and its Member States in CFSP

2.1 *The Distinction between the Union and its Member States*

Traditionally, CFSP is presented as an 'intergovernmental' form of cooperation. The majority view held that the European Union was merely to be seen as an umbrella under which the Member States could cooperate in the area of foreign and security policy. Indeed, the political cooperation that took place between the members of the European Economic Community during the 1970s and 1980s could not be regarded a formal treaty relationship. Nevertheless, even then (codified) custom already reflected a contractual legal relation between the participating states. The procedural agreements laid down in Declarations, and later on in the Single European Act (1986) reflected the emergence of a 'constitution' which increasingly posed procedural restraints on the participating states. Indeed, *participating* states; they only became *member* states after the entry into force of the EU Treaty.

The concept of 'Union' is not explicitly defined by the Treaty; it is said to be "founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty". Regardless of its imprecise definition, it follows from these descriptions that the 'Union' is not to be equated with the 'states' ('High Contracting Parties') by which it was established.¹¹ The objective of the *Union*, as stipulated in Article 2 TEU, is:

"to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might in time lead to a common defence"

Regardless of the fact that the Union is not presented as an international organisation anywhere in the TEU, the introduction of the term 'Member States' – which is still used throughout the entire text – underlines the fact that a new international legal entity was created of which it is possible to become a 'member'.

The question of the division of competences between the Union and the Member States (or the possible exclusivity of Union competences) is more difficult to answer. Most probably, the answer is to be found in the nature of the legal regime governing the non-Community parts of the Union. The CFSP obligations are largely procedural in nature and only foresee a common policy (read: Union policy) to the extent that this is supported by the Member States. The key principle underlying CFSP is Article 16 TEU, which provides enough leeway to the Member States to prevent issues from being placed on the Union's agenda in the first place. Irrespective of the obligation in Article 16 for Member States to "inform and consult one another within the Council on any matter of foreign and security policy", the subsequent words "of general interest" indicate a large margin of discretion on the side of (individual) Member States. And although there is an obligation to try and reach a Union policy, in the case of a failure to do so the Member States remain free to pursue their own national policies.

¹¹ This seems to be confirmed by Article 6, paragraph 3, which provides that "[t]he Union shall respect the national identities of its Member States".

2.2 *The Union's Legal Personality*

Despite the distinction between the Member States and the European Union and their different roles on the basis of the treaty, there has been a strong resistance in accepting the separate legal personality of the Union. While there are good reasons to assume that the Union already enjoyed an international legal status from the outset, the general perception is that the relationship between the European Union and its Member States in the 'second pillar' – and to a minor extent in the 'third pillar' – is at least clearly different from the relation the same Member States maintain with the European Community.¹² 'International legal personality' is nothing more or less than an independent status in the global legal order. As the subsequent Intergovernmental Conferences (Amsterdam 1997, Nice 2001) did not succeed in reaching consensus on the inclusion of a provision on the Union's legal personality, the view held by academics and practitioners alike has long been that the Union was not to be seen as a separate legal entity. Nevertheless, the distinct competences of the Union and its action at the international stage (for instance by the High Representative of CFSP, introduced by the Amsterdam Treaty), have by now led to a consensus among most legal experts in the area of the external relations of the Union: the European Union has a separate international legal status, which is not to be equated with the legal status of the European Community or the Member States.

Two developments were quite helpful in accepting the legal personality of the Union. The first one was the confirmation of the international legal personality of the Union in the 2004 Treaty on the establishment of a Constitution for Europe (Article I-7). While this treaty has not yet come into force, it may be seen as reflecting the consensus on this issue by the (then) 25 Member States. The second development concerned the conclusion of international agreements between the European Union (hence *not* the European Community or the Member States) and third states and other international organizations. By now the Union has become a party to some seventy international agreements and it is commonly acknowledged in international law, that only legal subjects can enter into legal agreements (treaties).¹³

With the increasing legal activity of the European Union on the international plane, particularly reflected in the coming of age of the European Security and Defence Policy (ESDP, *infra*),¹⁴ the question of its legal *accountability* becomes more prominent. Whereas the international legal responsibility of the European *Community* has been subject to extensive legal analysis,¹⁵ the same does not hold true for the European *Union*. Both the conclusion of international agreements by the Union and its international activities in relation to military missions as well as some decisions related to the suppression of international terrorism call for a fresh look at the relation between the Union and its Member States in terms of international responsibility. If Henry Kissinger would still be in office, he would have every reason to raise the question 'Whom should I sue?', now that his famous question on the telephone number of Europe has been answered by the availability of the number of the High Representative for CFSP, Javier Solana. It seems that responsibility should

¹² See in general Denza: Intergovernmental Pillars.

¹³ More extensively Thym, D.: 'Die völkerrechtlichen Verträge der Europäischen Union', in: ZaöRV 66/ 2006.

¹⁴ More extensively: Trybus, M.: European Union Law and Defence Integration, Oxford: Hart Publishing 2005.

¹⁵ See for a recent overview Eeckhout, P.: External Relations of the European Union. Legal and Constitutional Foundations, Oxford University Press 2005; or Koutrakos, P.: EU International Relations Law, Oxford: Hart 2006.

first of all be sought at the level of the EU as this is the only contracting party. International treaty law seems to point to the presumption that member states are not liable for any conduct of the organization. This presumption may, however, be rebutted and in the case of the EU no provisions or procedures on the non-contractual liability exist and a collective responsibility may be the result. While this may lead to a 'piercing of the institutional veil' in cases where the Union is simply not able or willing to answer any legitimate demands of a third party, the proper route for the Union would be to accept responsibility at the international level and to seek for compensation on the basis of internal EU law in relation to its own Member States. And, to conclude with a politico-legal statement:

"An entity discarding any notion of liability for its conduct could not be taken seriously in international dealings. As strange as it may seem, the capacity to incur international responsibility is an essential element of the recognition of international organizations in general and of the European Union in particular as entities enjoying personality under international law."¹⁶

3 The Development of a Security and Defence Policy

3.1 *The End of a Taboo*

Most of the agreements concluded by the European Union form part of the so-called European Security and Defence Policy (ESDP), as they concern either the status of the EU forces in the host state or the participation of third states in EU military missions. The lion share of agreements to which the EU is a party fall into this latter category. Thus agreements have been concluded with European (former) third states (Albania, Bulgaria, Ukraine, Norway, Turkey, Iceland, Switzerland, and Romania). With non-European third states (Canada, New Zealand, Argentina, Morocco, Chile, the Russian Federation) as well as with most states that acceded to the EU in 2004, prior to their accession.

Since the end of 1998 the European Union has been actively developing its security and defence policy. The 1992 EU Treaty had already been an important first phase in the ongoing quest to consolidate Western European defence cooperation. A closer defence cooperation was planned in the original version of this treaty, albeit that its Article J.4 clearly reflected the compromise, as it referred extremely carefully to "the eventual framing of a common defence policy, which might in time lead to a common defence". Another international organization, the Western European Union (WEU), would be requested to "elaborate and implement decisions and actions of the Union which have defence implications". On the basis of this provision one could easily be led to believe that we would never witness the creation of a European Security and Defence Policy. Nevertheless, even this carefully phrased compromise obviously helped recalcitrant Member States (the United Kingdom in particular) to get used to the idea of a future role for the EU in this area. The Amsterdam Treaty (1997, entry into force in 1999) turned Article J.4 into Article 17, and took another subtle step forward by formulating a common defence policy as an *objective* of the European Union, rather than a mere *possibility*.

¹⁶ Tomuschat, Chr.: 'The International Responsibility of the European Union', in: Cannizzaro, E. (ed.): The European Union as an Actor in International Relations, The Hague: Kluwer Law International 2002, pp. 177-191, at 183.

On 15 November 1999, for the first time in its history, the Council of the European Union met informally in the composition of Ministers for Foreign Affairs and Ministers of Defence.¹⁷ While this may seem a logical step in the current developments, it highlights the revolution that has taken place within the European Union during the past few years. Previously, meetings of defence ministers were unthinkable within the EU framework. During this meeting France and the United Kingdom launched their plan for a rapid reaction force, an idea that was adopted by the European Council in Helsinki in December 1999 when it decided to develop an autonomous military capacity. Probably to reassure (the parliaments of) certain Member States, the somewhat ambiguous sentence was added that this does not imply the creation of a European army. Nevertheless, all developments pointed in the direction of a sincere attempt on the part of the EU to create a military force. The European Council formulated a 'headline goal' and decided that by the year 2003 Member States must be able to develop rapidly and then sustain forces "capable of the full range of Petersberg tasks, including the most demanding, in operations up to corps level; up to 15 brigades, or 50,000-60,000 persons." These forces should be self-sustaining with the necessary command and control and intelligence capabilities, logistics, and other combat support services and, additionally, appropriate naval and air elements. The readiness requirement is 60 days, with some units at very high readiness, capable of deployment within days or weeks.¹⁸ Indeed, in May 2003, the Council confirmed that the EU now has operational capability across the full range of Petersberg tasks. Nevertheless, the goals set in Helsinki in 1999 were not attained and in May 2004, the Council approved a new 'Headline Goal 2010'.¹⁹ This new capabilities commitment includes the establishment of so-called 'battle groups': "force packages at high readiness as a response to a crisis either as a stand-alone force or as part of a larger operation enabling follow-on phases." On decision-making, the ambition of the EU is to be able to take the decision to launch an operation within 5 days of the approval of the so-called Crisis Management Concept by the Council. On the deployment of forces, the ambition is that the forces start implementing their mission on the ground, no later than 10 days after the EU decision to launch the operation. While the composition of the foreseen battle groups is not yet clear (they will have to be ready by 2007), one may expect smaller groups of Member States cooperating in them.

The results of the developments found their way into the Treaty of Nice, which was adopted in December 2000. Based on that treaty, Article 17 of the Treaty on European Union was modified as follows: the second subparagraph of paragraph 1 on the relationship with the WEU was deleted; the same holds true for the first three subparagraphs of paragraph 3 on the role of the WEU in the implementation of EU decisions with defence implications. This means that the Union has been given the competence to operate within the full range of the Petersberg tasks: "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking" (Article 17, paragraph 2).

¹⁷ Conclusions of the General Affairs Council of 15 November 1999, Council Press Release No. 12642/99 (Presse 344). The first formal meeting of the Defence Ministers took place in May 2002; see Conclusions of the General Affairs Council, 13-14 May 2002.

¹⁸ See on the feasibility of this headline objective for instance De Wijk, R.: 'Convergence Criteria: Measuring Input or Output', in: *European Foreign Affairs Review* 2000, pp. 397-417.

¹⁹ Conclusions of the External Relations Council, 17 May 2004. On financing, see also the Athena mechanism: Council Decision 2004/197/CFSP of 23 Feb. 2004, OJ L 63, 28.02.2004, 68, as amended by Council Decision 2004/925/EC of 22 Dec. 2004, OJ L 395, 31.12.2004, 68 and by Council Decision 2005/68/CFSP of 24 Jan. 2005, OJ L 27, 29.01. 2005, 59.

In that respect it is odd that Article 17 still refers to the "progressive framing of a common defence policy" after that same policy has entered into force on the basis of the same article. Provisions like these reveal the fact that, although a final consensus was reached on a European Security and Defence Policy, some Member States are more eager to lay everything down in treaty arrangements than others. Nevertheless one cannot overlook the gradual development from the first provision in the Maastricht Treaty ("the *eventual* framing of a common defence policy, which *might in time* lead to a common defence"), to the Amsterdam Treaty ("the *progressive* framing of a common defence policy, which *might* lead to a common defence"), and finally to Nice were all references to the WEU were deleted, thereby making the EU itself responsible for the elaboration and implementation of decisions and actions which have defence implications. In the 2004 Constitution Treaty this arrangement returns in Article I-16.

By now the ESDP provisions have been put into practice and the Union is, and has already been, engaged in some twenty operations.²⁰ The first operation was operation 'Concordia'. On 31 March 2003 the EU formally took over NATO's Operation Allied Harmony in the former Yugoslav Republic of Macedonia, an operation contributing to a stable, secure environment. This decision has been made possible following the agreements reached by the EU and NATO concerning EU-led operations.²¹ Regarding the financing of military operations the Council had already agreed on a solution in June 2002: costs lie where they fall. In other words: contributing Member States pay their own expenses, although certain expenses (for instance arising from communication, medical arrangements and the appointment of local personnel) will be charged in accordance with the GNP scale.²²

3.2 *The Union as a Collective Defence Organization?*

A particularly sensitive issue concerns the so-called 'collective defence obligation' that is laid down in the NATO and WEU treaties, but was so far left out of the EU treaty. The Nice Intergovernmental Conference did reach an agreement on "the progressive framing of a common defence policy", but Article 17 continues to refer to a "common defence" as a future possibility. At the same time all references to the Western European Union as the 'defence arm' of the EU were deleted. Is this the end of the Western European Union and hence of a European collective defence arrangement? No, since no consensus could be reached on the transfer of the original core function of the WEU to the EU, the collective assistance agreement laid down in article V of the modified Brussels Treaty is untouched. This provision reads: "If one of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power." The WEU decided to have its residual functions and structures in place by 1 July 2001 so as to enable the Member States to fulfil the commitments arising from articles V and IX (on the WEU Assembly). This

²⁰ See for an updated list the Council's website: <http://www.consilium.europa.eu>, under Policies.

²¹ See Reichard, M.: 'Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement', in: *Nordic JIL* 2004, pp. 37-68.

²² Conclusions of the General Affairs Council of 17 June 2002. With regard to the EU Police Missions, however, it was also agreed that certain costs will be financed out of the community budget; see Council Joint Action 2003/141/CFSP of 27 January 2003, OJ EU L 53, 28.2.2003. See also Article III-313 of the Constitutional Treaty.

means that by now the WEU is essentially returned to the organization that was originally set up to deal with collective defence matters between the Benelux countries and the United Kingdom and France in 1948: the Brussels Treaty Organization. Although the 1948 Brussels Treaty was also intended to intensify the economic, social and cultural collaboration between the Member States,²³ the collective self-defence paragraph (at that time article IV) soon proved to be the key provision.

In the current EU Treaty a future transfer of the collective – or ‘common’ in perhaps somewhat more supranational EU terms – defence provision from the WEU to the EU is made dependent on a decision by the European Council only (which may nevertheless need to be adopted by the individual Member States in accordance with their respective constitutional requirements – Article 17). An inclusion of the defence clause in the Union treaty would not only be in line with the established defence policy, but also with the goals the EU has set for itself: “to organise, in a manner demonstrating consistency and *solidarity*, relations between the Member States and between their peoples” (Article 1); “to safeguard the common values, fundamental interests, independence and integrity of the Union ...”; and “to strengthen the security of the Union in all ways” (Article 11).

This seems to be acknowledged by the Treaty legislator, as the European Constitution, finally seems to include a common defence clause, albeit somewhat hidden in Article I-41, paragraph 7:

“If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.”

This comes close to the current obligation in Article V of the WEU Treaty. Therefore, it is striking that the same provision, in paragraph 2, still refers to ‘common defence’ as an aim to be achieved:²⁴

“The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.”

Taking into account that according to the Helsinki (1999) and Laeken (2001) Declarations the “the development of military capabilities does not imply the creation of a European army”, it is puzzling what it is the European Council will have to decide on. Nevertheless, it is a fact that the original draft presented by the Convention included a possibility for closer cooperation as regards mutual defence. Draft Article I-40 (7) stated that “[u]nder this cooperation, if one of the Member States participating in such cooperation is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all means in their power, military or other, in accordance with Article 51 of the

²³ The official name of the WEU Treaty is still: Treaty of Economic, Social and Cultural Collaboration and Collective Defence.

²⁴ Nevertheless, Art. I-16(1) still uses the term “might lead”, thereby suggesting a possibility rather than an objective. See also Naert, F.: ‘European Security and Defence Policy in the EU Constitutional Treaty’, in: *Journal of Conflict & Security Law* 2/2005, pp. 187-207, at 192.

United Nations Charter.” Despite the fact that this would allow the ‘neutral’ states Austria, Finland, Ireland and Sweden, not to participate, they opposed this clause because, as they said “Formal binding security guarantees would be inconsistent with our security policy or constitutional requirements.”²⁵ If one compares the draft provision with the final text in the Constitution, one may wonder whether there is much difference in practice. Even now there seems to be quite a strict mutual defence obligation and in both cases account has been taken of the special position of the neutral states.

This is even more the case when the so-called ‘solidarity clause’ in Article I-43, is taken into account. This clause does not restrict common defence to ‘armed aggression’, but in fact extends the obligation to terrorist attacks:

“The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) – prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- (b) – assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.”

Paragraph 2 refers to Article III-329 for more detailed arrangements. There we can find a coordinating role of the Council as well as the procedure: the arrangements for the implementation of the solidarity clause shall be defined by a European decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs.

However, after the Madrid terrorist attacks in March 2004, the European Council issued a ‘Declaration on Solidarity Against Terrorism’,²⁶ in which Article III-329 of the Constitution is already incorporated, although the Declaration does not refer to a role for the Union as such, but refers to the ‘Member States acting jointly’. In addition, the Declaration leaves it to the Member States to “choose the most appropriate means to comply with this solidarity commitment.” Irrespective of the legal nature of this Declaration,²⁷ one may see this as a possibility for Member States to opt out. At least until the entry into force of the Constitution, the Union as such will not have a role to play in this regard and it is up to (groups of) Member States to organize their responses in a rather *ad hoc* manner.

Nevertheless, it seems fair to conclude that fifteen years after the careful formulation of an ‘eventual’ common defence policy in the Maastricht Treaty, the Union is well on its way to become a full-fledged military organization.

²⁵ See their letter of 4 December 2003, in: Misseroli, A.: *From Copenhagen to Brussels: European Defence: Core Documents*. Chaillot Paper No. 67, Paris: Institute for Security Studies 2003, p. 432.

²⁶ Brussels European Council 25-26 March 2004, Presidency Conclusions.

²⁷ See on this question: Reichard, M.: ‘The Madrid Terrorist Attacks: A Midwife for EU Mutual Defence?’, in: *ZEUS* 2004, pp. 313-334.

4 The European Constitution and CFSP

The *Treaty establishing a Constitution for Europe* (hereinafter, 'the Constitution') – which was finalised by the Convention on the Future of Europe in July 2003 – was signed by all twenty-five Member States on 29 October 2004. The most important structural change is that the Constitution puts an end to the pillar structure. We are left with one international organisation – the Union – with competences in the former Community areas as well as in the areas of the CFSP and PJCC. In the area of external relations, moreover, no division is made between economic and political (foreign affairs) issues. Title V of Part III of the Constitution is labelled 'The Union's External Action' and covers *all* the Union's external policies. In addition, the external objectives of the Union are no longer scattered over different treaties. Instead, Article I-3(4) provides:

"In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter."

Other provisions also add to the idea of the integration of the different external policies. Thus, Article III-194 codifies the existing practice that the former 'Common Strategies' (the term is no longer used) may cover all aspects of the Unions' external action; they are no longer restricted to the CFSP. Secondly, consistency is being sought in the introduction of the Minister for Foreign Affairs, who will not only chair the Foreign Affairs Council, but will also be Vice-President of the Commission. Thirdly, the legal personalities of the Community and the European Union are merged into one legal personality of the new Union. This will certainly simplify matters in relation to the conclusion of treaties and questions of accountability and responsibility. Article III-227 applies to all agreements concluded by the Union and no distinction is made, either in procedure or in legal nature, between the different external policies. Finally, the Constitution puts an end to the different types of instruments that can be used for the CFSP. Common Strategies, Joint Actions and Common Positions make way for the 'European decision', an instrument that may also be used in other (former Community) issue areas.

While these modifications can certainly be regarded as an acknowledgment of the unity of the Union's legal order as it has developed over the years, a number of other provisions indicate that the drafters of the Constitution were not willing to go all the way where the integration of the pillars is concerned. While Community and third pillar issues indeed seem to have been placed on an equal footing (e.g. international representation by the Commission and expansion of qualified majority voting), CFSP continues to have a distinct nature under the new Treaty.²⁸ A first element concerns the kind of competences in the CFSP area. Article I-11 lists the competences of the Union in the different areas as exclusive, shared or supporting and supplementary. However, none of these competences relates to the CFSP, as Article I-11 includes a separate paragraph referring to a "competence to

²⁸ For an evaluation of the external relations under the new Constitution, see in general Thym, D.: 'Reforming Europe's Common Foreign and Security Policy', in: *European Law Journal* 2004, pp. 5-22, and Cremona, M.: 'The Draft Constitutional Treaty: External Relations and External Action', in: *CMLRev.* 2003, pp. 1347-1366.

define and implement a common foreign and security policy, including the progressive framing of a common defence policy". As Cremona has already indicated, it is a little difficult to see what kind of competence it could be, if not one of the other categories.²⁹ But the simple fact that a special status has been introduced again is striking.

Similar confusion results from the available instruments. Indeed, the CFSP is going to be developed on the basis of one type of instrument, the 'European decision', which is defined in Article I-32(1) as "a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them." Apart from the inherent complexity of this description, the implications are that the choice of this instrument allows for differentiation, as non-legislative acts are not subject to the legislative procedure laid down in the Treaty. The procedure for adopting European decisions in the area of the CFSP indeed still differs from other areas of external relations and comes close to the current situation: a limited role for the Commission and the European Parliament and an important (even enhanced) role for the European Council and the Council of Ministers. The Court's jurisdiction with regard to CFSP continues to be excluded. Despite the overall simplification of the instruments, the Treaty even seems to hold on to the former CFSP instruments, albeit disguised as 'European decisions'. Thus, we can easily find Common Strategies ('European decisions on the strategic interests and objectives of the Union', Arts. I-39 and III-194), Common Positions ('European decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature', Art. III-199) and Joint Actions ('Where the international situation requires operational action by the Union, the Council of Ministers shall adopt the necessary European decisions', Art. III-198(1)). The chances are high that in practice the current fragmentation of instruments will continue to exist.

This idea is strengthened by the fact that the CFSP still occupies a separate position in the new Constitution. Title V of Part I contains a separate Chapter II entitled 'Specific Provisions', in which the institutional provisions and procedures in the area of the CFSP and the Common Defence and Security Policy are laid down. In addition, Article III-209 underlines this separation by providing that the implementation of the CFSP shall not affect the other competences of the Union, and vice versa. Apart from the fact that with this provision the new Treaty purports to prevent not only the 'PESCalisation' of other policies,³⁰ but also the 'communitarisation' of the CFSP, this clearly echoes the current text of Article 47 TEU. Finally, fragmentation returns in the external representation of the Union. Whereas the general task of the Commission is to "ensure the Union's external representation" (Art. I-25), this role is excluded in CFSP policies, where the new Minister for Foreign Affairs will take the lead. One could argue that consistency is ensured with the 'double-hatting' construction (the Minister for Foreign Affairs is at the same time a member of the Commission). On the other hand, given the fact that the preparation of CFSP policies will continue to be distinct from other policies, there remains a potential for conflicting policies. Moreover, practice will have to reveal if the Foreign Minister will be able to avoid schizophrenia while serving the Commission and the Council at the same time.

²⁹ *Ibid.*, p. 1353.

³⁰ PESC is the French translation of CFSP.

5 Conclusion: A Constitutional Momentum?

In 2005 both France and The Netherlands were unable to ratify the 2004 *Treaty establishing a Constitution for Europe* as a result of negative referenda. Research on the reasons for the 'no' vote reveals that it could only partially be contributed to the content of the Constitutional Treaty and that lack of information (The Netherlands) and social concerns (France) formed the main reasons. In fact, the dilution of the pillar structure – which could be seen as the major institutional innovation of the Constitutional Treaty – does not seem to have formed a reason for the public to turn down the whole idea.³¹ For the yes-voters in both the Netherlands and France the perseverance of the European construction was even the main reason for their vote and 82 per cent of all the Dutch and 88 per cent of the French still support the membership of the Union. In addition, half of the Dutch population and 75 per cent of the French consider a Constitution Treaty essential to pursue European construction.

A special declaration (No. 30) adopted by the Intergovernmental Conference lays down how to proceed in case not all instruments of ratification have been submitted by October 2006: "if two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council." Based on both public opinion and the developments since July 2003, when the debates in the 'European Convention' to prepare the Constitutional Treaty were concluded, we may look at this opportunity as a 'constitutional momentum'. In line with the development of the unity of the Union's legal order ever since Maastricht, the past few years have revealed an ongoing growing together of the Union's pillars. In the area of CFSP some of the Court's case law as well as developments in the area of anti-terrorism measures and economic sanctions underlined the artificial separation in the Union's external relations of political and security cooperation on the one hand and economic and trade relations on the other. The different decision-making procedures, legal instruments and actors seriously hamper a coherent external policy. In addition, the coming of age of the Union's security and defence policy and the conclusion of international agreements in this area with many third states calls for a recognition of this policy as an integral part of the Union's 'constitution'.

Whereas the 2004 Constitutional Treaty refrains from a full integration of CFSP and ESDP into the Union's system of competences (as both policies are still in different sections), a revised treaty could make use of the new developments by making an end to the continued separate position of these policies in the Union's framework. Both 'intergovernmental' and 'supranational' elements can be found in the Community as well as in CFSP. This does not necessarily mean that the 'Community method' should be applied to all parts of CFSP; the Constitutional Treaty allows for many different procedures and instruments in the different policy areas. It does, however, mean that account is being taken of the connections between all dimensions of the Union's external policy and the need to perceive them as forming part of a single constitutional framework.

³¹ See for the Dutch context in particular: Aarts, C./Van der Kolk, H.: 'Understanding the Dutch "No": The Euro, the East, and the Elite', in: PS: Political Science and Politics 2006, pp 243-246. See also the Eurobarometer reports The European Constitution: Post-referendum survey in France and The Netherlands, at: http://ec.europa.eu/public_opinion/flash/fl171_en.pdf and http://ec.europa.eu/public_opinion/flash/fl172_en.pdf respectively.