

THE CONSTITUTIONAL UNITY OF THE EUROPEAN UNION: THE INCREASING IRRELEVANCE OF THE PILLAR STRUCTURE?

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1. INTRODUCTION: FROM POLARIZATION TO DEPILLARIZATION?

Although Europe may not be ready for a written ‘Constitution’, the new Treaty of Lisbon, which was signed on 13 December 2007, has adopted one of the key innovations offered by the 2004 Treaty on the establishment of a Constitution for Europe: the ‘depillarization’ of the European Union.¹ The Lisbon Treaty will replace part of the current Article 1 of the Treaty on European Union as follows:

“The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union. It shall replace and succeed the European Community”.

The Treaty thus aims at a merger of the European Community and the European Union into one single “European Union, on which the Member States confer competences to attain objectives they have in common.” The entry into force of the Lisbon Treaty will not only deprive us of the difficult task to explain the difference between the Community and the Union as well as their complex connection, but it will also put an end to the theoretical – and on some occasions even philosophical – academic debate on the relationship between the legal orders of the Community and the Union that started after the conclusion of the Maastricht Treaty and continues to this very day.² The debate concerns the legal

¹ See for an analysis with regard to the “second pillar”: “The CFSP under the EU Constitutional Treaty – Issues of Depillarization”, Editorial Comments, *CMLR*, 2005, pp. 325–329.

² See for a recent contribution Chr. W. Herrmann, “Much Ado about Pluto? The “Unity of the Legal Order of the European Union” Revisited”, *EUI Working Paper RSCAS 2007/05*; also to appear in M. Cremona and B. de Witte (Eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford: Hart Publishing, 2008 (forthcoming). Cf. also new Article 47 of the post Lisbon TEU: “The Union shall have legal personality.”

nature and structure of the Union,³ and in its heyday revealed the existence of quite extreme positions defending either a complete separation of the Unions' policies from the Community,⁴ or a complete merger in the form of a single organization that had absorbed the former three European Communities.⁵ In the absence of any relevant case-law, this polarization of the debate was mainly rooted in different theoretical perspectives (and preferences) that were all said to be based on a strict scrutiny of the treaty texts. Now the European Union legal order has had a chance to develop for fifteen years and the past years have offered us some case-law to help us understand the nature of the Union.⁶

The aim of the present contribution is not to revive the debate on the unity of the Union's legal order. Rather, it purports to take a fresh look at the differences between the pillars after fifteen years of development and in the presence of new – and on some occasions revealing – case-law. One outcome of this analysis could be that “one should abstain from drawing too heavily on such notions as ‘unity of the legal order’ when making a legal argument”, as recently proposed by Herrmann.⁷ Another could very well be that it is exactly this unity that provides the interpretative (constitutional) framework for everything that happens in either pillar of the Union. In that view the very fact that both the Common Foreign and Security Policy (CFSP) and the Police and Judicial Cooperation in Criminal Matters (PJCC) are not based on regular cooperation treaties, but together with the European Community form part of a European Union, had an impact on

³ See for some key contributions: D. Curtin, “The Constitutional Structure of the Union: A Europe of Bits and Pieces”, *CMLR*, 1993, pp. 17–69 (the “mother” of all contributions on the structure of the Union); B. De Witte, “The Pillar Structure and the Nature of the European Union: Greek temple or French Gothic Cathedral?”, in T. Heukels, N. Blokker, M. Brus (eds.), *The European Union after Amsterdam – A Legal Analysis*, The Hague, 1998, pp. 51–67; D. Curtin and I Dekker, “The EU as a “Layered” International Organization: Institutional Unity in Disguise”, in Craig, P. and De Búrca, G. (eds.), *The Evolution of EU Law*, Oxford: Oxford University Press 1999, pp. 83–136. See further, Curtin, D.M. and 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*. Oxford: Hart 2002, pp. 59–78; Dekker, I.F. and Wessel, R.A., “The European Union and the Concept of Flexibility. Proliferation of Legal Systems within International Organisations”, in Blokker, N.M. and Schermers, H.G. (eds.), *Proliferation of International Organisations*. The Hague, Kluwer Law International, 2001, pp. 381–414.

⁴ See in particular M. Pechstein and C. Koenig, *Die Europäische Union*, 3rd Ed., Tübingen, 2000, pp. 36 et seq. and 47 et seq.

⁵ See A. von Bogdandy, “The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System”, *CMLR*, 1999, pp. 887–910. An earlier A. von Bogdandy and M. Nettesheim, “Ex Pluribus Unum Fusion of the European Communities into the European Union”, *ELJ*, 1996, pp. 267–289.

⁶ Obviously, the development of Europe's foreign and security policy goes back to the years of the European Political Cooperation before the CFSP, which meant that CFSP did not have to start from scratch. See for instance M.E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation*, Cambridge University Press, 2004.

⁷ Herrmann, *op.cit.*, at 21.

their development. Over the past fifteen years it has become clear that – rather than being completely separate – EC, CFSP and PJCC form part of a single European Union legal order in which there is a clear interplay between the different policies.⁸ Although at the time of the formation of the European Union it was quite common to view the non-Community parts of the Union as “a legal framework based on international law”,⁹ these days a reference to international law as the basis for the internal cooperation sounds less familiar to EU lawyers and the term is mainly reserved to play a role in the Union’s external relations. Indeed, ‘European Union law’ has not only replaced ‘European Community law’ in the titles of the main text books, but it also seems to have become a more coherent academic discipline in which the non-Community pillars are not (or at least no longer) dealt with by international law experts, but taken into account by ‘hard core’ Community lawyers. It is this argument that will be pursued in this contribution. It is contended here that the development of the Union’s legal order over the past years paved the way for uniting the Union and the Community as foreseen by the Lisbon Treaty.¹⁰ Indeed, in the run-up to the entry into force of that Treaty, for which the term ‘Constitution’ will not be used,¹¹ the question is whether and to what extent the Union’s pillars can be still approached in isolation or whether the ‘constitutional’ development of the Union has rendered their separation already irrelevant.

With a clear focus on CFSP, an attempt will be made to put some of the original distinguishing features of the pillars into perspective on the basis of either their development or recent case-law. Section 2 will first of all focus on what the European Court of First Instance referred to as the ‘constitutional architecture of the pillars’ by addressing the institutional practice in CFSP. This is followed by a re-assessment of the legally binding nature of the CFSP primary and secondary law (section 3). Section 4 will analyse the ‘constitutional’ role of the Court in the

⁸ See more extensively R.A. Wessel, “The EU’s Foreign, Security and Defense Policy Fifteen Years after Maastricht: A Constitutional Momentum?”, in H.-G. Ehrhart, S. Jaberg, B. Rinke and J. Waldmann (Hrsg.), *Die Europäische Union im 21. Jahrhundert. Theorie und Praxis europäischer Außen-, Sicherheits- und Friedenspolitik*, Wiesbaden: VS Verlag für Sozialwissenschaften, 2007, pp. 302–316.; as well as (Director of the Legal Service of the Council) R. Gosalbo Bono, “Some Reflections on the CFSP Legal Order”, *CML Rev.*, 2006, pp. 337–394, who even refers to “progressive supranationalism” in relation to the development of CFSP (at 349),.

⁹ See E. Denza, *The Intergovernmental Pillars of the European Union*, Oxford: Oxford University Press, 2002, p. 5.

¹⁰ Irrespective of the fact that – as in the 2004 Constitutional Treaty – at least one of the current pillars (relating to the Union’s foreign and security policy) will still be clearly recognizable. Cf. M. Cremona, “A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty”, *EUI Working Paper*, LAW No. 2006/30; as well as her “The Draft Constitutional Treaty: External Relations and External Action”, *CMLR*, 2005, p. 1347.

¹¹ See Presidency Conclusions, Brussels, 21–22 June, p. 16.

area of CFSP on the basis of some recent case-law. Finally, in section 5 an attempt will be made to give an answer to the question of whether there is constitutional unity without the constitution.

2. INSTITUTIONS AND DECISION-MAKING: THE ‘CONSTITUTIONAL ARCHITECTURE OF THE PILLARS’¹²

One of the key distinctions between Community law and the other Union pillars concerns the way decisions are made. The role of the institutions in the decision-making process, the different preparatory organs and the different voting rules all make it quite easy to point to the different nature of the non-Community pillars. Indeed, it is well known that the (near) monopoly of the Commission under Community law to propose legislation is absent in the other two pillars. Although the Commission has a shared right of initiative under CFSP and PJCC (Articles 22 and 34(2) EU) it has barely used it.¹³ Initiatives are usually taken by the Member States and quite often by the Presidency during its six month term.¹⁴ Nevertheless, the Commission is far from absent in CFSP; in fact, it is present at all levels of CFSP decision-making, from the working groups up to the Council itself and has therefore been portrayed as the ‘twenty-eighth’ Member State.¹⁵ In addition, the so-called RELEX Counsellors act as liaisons between the Commission’s DG RELEX and the Council bodies, such as the Political and Security Committee (see below). Within DG RELEX, a special Directorate A deals with all CFSP/ESDP related issues, and in practice this Directorate may even submit proposals to the Council or raise questions on CFSP issues; it may request the Presidency to convene an extraordinary Council meeting and may make suggestions to the Policy Unit at the Council’s Secretariat.¹⁶

¹² Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, para. 156.

¹³ See D. Spence, “The Commission and the Common Foreign and Security Policy”, in D. Spence (Ed.), *The European Commission* (3rd ed.), London: John Harper, 2006. Spence quotes former Commissioner Chris Patten on this issue to provide the reason: “Some of my staff [...] would have preferred me to have a grab for foreign policy, trying to bring as much of it as possible into the orbit of the Commission. This always seemed to me to be wrong in principle and likely to be counterproductive in practice. Foreign policy should not in my view [...] be treated on a par with the single market. It is inherently different” (at p. 360).

¹⁴ S. Duke and S. Vanhoonacker, “Administrative Governance in CFSP”, *EFA Rev.*, 2006, pp. 163–182, at 166.

¹⁵ S. Duke, “The Commission and the CFSP”, EIPA Working Paper 2006/W/01, 2006, at p. 10. Cf. F. Cameron, “Where the European Commission Comes in: From the Single European Act to Maastricht”, in E. Regelsberger, Ph. De Schoutete and W. Wessels (Eds.), *Foreign Policy of the European Union: From EPC to CFSP and Beyond*, London: Lynne Rienner Publishers, 1997, at 101, who at that time referred to the Commission as the “sixteenth” Member State in CFSP.

¹⁶ *Ibid.*, at 12.

The legal basis for the Commission's involvement is Article 27, which provides that the Commission "is fully associated with the work carried out in the common foreign and security policy field." Together with the High Representative for the CFSP (see below) and the Presidency, the Commission takes part in the Troika when the external representation is concerned. At the same time the Commission's missions in third countries and other international organizations in practice have become 'Union missions', paving the way for a full-fledged and cross-pillar External Action Service.¹⁷ Mostly, however, the influence of the Commission on CFSP is ensured through the interplay between the pillars and the need to ensure consistency in the overall external relations of the Union/Community (Article 3, par. 2).¹⁸ Quite often, the Commission is involved in the implementation of CFSP Joint Actions through executive measures. Indeed, as one observer holds: "The two Pillars, in regard to the Union's external activities as a whole, are in fact more integrated than is commonly known".¹⁹

Although the role of the Commission in CFSP agenda-shaping remains limited, it would be too easy to conclude on a completely different system compared to the Community. In fact, in the first pillar Member States do also devote much private effort to persuading the European Commission to make proposals and there is a continuous dialogue in all stages of the legislative process between Member States and the Commission, in which the Commission quite frequently takes Member States' wishes into account.²⁰ At the same time, in the practice of CFSP the Presidency is less free than often assumed, as its capacities are usually restrained by a number of factors as well: the extremely short term in office, making it difficult to realize foreign policy goals; the high degree of path dependency in CFSP, by which parts of the agenda of an incoming Presidency are already shaped; the need for consensus and the use of diplomatic skills; and the risk of the agenda being hijacked by external events.²¹

The key role in CFSP, however, is indeed not played by the Commission but by other institutions: the Council and – increasingly – the Political and Security Committee (PSC or COPS). Although it has been quite common to use this institutional difference to stress a large influence of the Member States on CFSP and, therefore, its distinction from the Community, recent research provides a

¹⁷ S. Duke, "The European External Action Service: A Diplomatic Service in the Making", *CFSP Forum*, 2004.

¹⁸ See more extensively R.A. Wessel "The Inside Looking Out: Consistency and Delimitation in EU External Relations", *CML Rev.*, 2000, pp. 1135–1171; and "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 Fred Kellermann, The Hague: T.M.C. Asser Press, 2004, pp. 123–140.

¹⁹ G. Müller-Brandeck-Bocquet, "The New CFSP and ESDP Decision-Making System of the European Union", *EFA Rev.*, 2000, pp. 257–282, at 261.

²⁰ Denza, *op.cit.*, at 10.

²¹ S. Duke and S. Vanhoonacker, *op.cit.*, at 167.

more nuanced picture. The predecessor of the PSC, the Political Committee (PoCo), was established in the beginning of the 1970s as part of the European Political Cooperation (EPC).²² It is well known that its *'esprit de corps'* resulted in a 'consultation reflex' which formed the basis for the EPC and later CFSP.²³ This spirit of cooperation clearly returned when the Political and Security Committee succeeded the Political Committee in the year 2000 as a standing committee based at the Council's premises in Brussels and meeting twice a week. In one of the first thorough analyses of the PSC,²⁴ Juncos and Reynolds, revealed the pivotal position of this body in both CFSP and ESDP (European Security and Defence Policy):²⁵

"Indeed, the creation of a permanent committee in Brussels and the gradual displacement of the political directors (based in the national capitals) as the gatekeepers of the CFSP/ESDP decision-making process best exemplifies the move to a more 'Brusselized' and operational CFSP/ESDP."²⁶

As Juncos and Reynolds argue, institutions do matter and the wide margin of manoeuvre of the PSC ambassadors, together with their willingness to reach an agreement rather than to fight for the strict defence of the national interest, defies a traditional rationalist and intergovernmentalist understanding of CFSP decision-making. Indeed, as they contend:

"From such a perspective, the national interest is not defended in an isolated manner in a national capital and brought to Brussels to be bargained over as intergovernmentalist approaches suggest. Instead it is constructed in an institutional context/space in which

²² See for instance M.E. Smith, *Europe's Foreign and Security Policy: The Institutionalisation of Cooperation*, Cambridge: Cambridge University Press, 2004 at pp. 77–84.

²³ One of the standard works is S. Nuttall, *European Political Cooperation*, Oxford: Oxford University Press, 1992. He defined the "consultation reflex" as an "automatic reflex of consultation brought about by frequent personal contacts with opposite numbers from the other Member States." (p. 312) See also P. de Schoutheete, *La coopération politique européenne*, Paris: Nathan, 1980.

²⁴ But see already S. Duke, "The Linchpin COPS", *2005/W/05 EIPA Working Paper*, Maastricht 2005.

²⁵ See also S. Duke and S. Vanhoonaeker, "Administrative Governance in the CFSP: Development and Practice", *EFA Rev.*, 2006, pp. 163–182, at 164; and in general: K. Glarbo, "Wide-awake diplomacy: reconstructing the common foreign and security policy of the European Union", *Journal of European Public Policy*, 1999, pp. 634–651.

²⁶ A.E. Juncos and Chr. Reynolds, "The Political and Security Committee: Governing in the Shadow", *EFA Rev.*, 2007, pp. 127–147 at 135. "Brusselizing the CFSP means that while the relevant competencies do remain ultimately at the disposal of the Member States, the formulation and implementation of policy will be increasingly Europeanized and Brusselized by functionaries and services housed permanently at Brussels." See G. Müller-Brandeck-Bocquet, *op. cit.*, at 261. Cf. also E. Regelsberger, "The EU as an Actor in Foreign and Security Policy: Some Key Features of CFSP in an Historical perspective", *CFSP Forum*, 2007, no. 4, p. 1–8, at 3.

the national cannot be easily separated from the international, nor the self from the other.”²⁷

This is also reflected in the voting behaviour in PSC. Although the general CFSP rule is followed that decisions be taken by a unanimous vote, actual voting rarely takes place. Whenever ambassadors do not expressly object to a Presidency’s summary of the debate, a decision is believed to be taken. There is a tendency not to be isolated and to seek for a compromise that incorporates the concerns of a majority. In preparatory bodies of PSC – including the so-called Nicolaidis Group (which prepares the PSC meetings), the EU Military Committee (EUMC) and the Committee for Civilian and Crisis Management (CIVCOM) – representatives feel even freer to negotiate towards a result that is acceptable for everyone and takes positions of smaller Member States into account as far as possible.²⁸

A particularly important role in ensuring consistency is played by COREPER. This is the body in which the draft CFSP decisions (mostly) coming in through the PSC are combined with the external relations initiatives by the Commission. Possible inconsistencies or controversies that could not be solved at working group level or which simply occurred because of the relatively autonomous process in the PSC are usually solved by the Permanent Representatives in COREPER II before the documents are forwarded to the Council. All in all, up to 90% of the issues have been solved before they reach the Council level; and 70% even at the lower administrative levels, including in particular the working parties. About 36 working parties play a role in the preparation of CFSP decisions. Although a division between Community and CFSP issues is still maintained, working parties increasingly have to combine issues in different Union pillars because of their thematic focus. Cross-pillar consistency is in particular dealt with in the new Working Party of Foreign Relations Counsellors (the former CFSP or RELEX Counsellors), who examine the legal, financial and institutional aspects of horizontal CFSP and Community matters. The Commission is actively involved in this working party, as it is in the network of European Correspondents, based at the national capitals, which is used for day-to-day communication through the COREU network.²⁹ With the increasing interplay between first and second pillar issues at all different levels, COREPER in particular has proven to play a key role in combining – and where necessary – delimiting cross-pillar issues.³⁰

Final decisions, however, are adopted by the (General Affairs and External Relations) Council (Article 13, par. 3 TEU), on the basis of general guidelines defined by the European Council. This ‘GEARC’ usually meets on a monthly

²⁷ Juncos and Reynolds, *op.cit.*, at 145.

²⁸ *Ibid.* at 141.

²⁹ S. Duke and S. Vanhoonacker, *op.cit.*, at 169–172.

³⁰ See G. Müller-Brandeck-Bocquet, *op.cit.*, at 265.

basis. Although the central role of the Council in CFSP decision-making is traditionally seen as stressing the role of the Member States, the past decade revealed a number of innovation which, at least, underline, the continued 'Brusselization' of CFSP. Indeed, as contended by one observer: "[...] the treaty reforms of Amsterdam and Nice have introduced some new elements into the decision-making system of CFSP, now encompassing the ESDP, which make it no longer appropriate to call the Second Pillar simply 'intergovernmental'".³¹ The introduction of the possibility of qualified majority voting (Article 23, par. 2 TEU) is certainly a feature that puts the differences with the Community into perspective. This possibility will be extended on the basis of the Lisbon Treaty, which will give the European Council and the High Representative (see below) the right to initiate the possibility of QMV (Article 31, par. 2 new TEU). It is true that the Council has hardly ever decided by QMV, but even this comes close to the Council's behaviour whenever Community issues are on the agenda. In fact, the Council's hardly ever votes and as in the PSC, the members have a tendency to work towards a compromise, rather than to isolate themselves by maintaining strong national positions.³² It is true that for Community issues QMV has become the rule, whereas majority voting in CFSP can only be used for decisions based on European Council Common Strategies or previously adopted Council Joint Actions and Common Positions. Thus, theoretically, it is easier for a Council President to conclude on the adoption of a decision under Community law than under CFSP. On the other hand, one should keep in mind, that only in exceptional circumstances does the Council indeed need to vote, since almost all compromises have already been reached at the PSC or subsequent COREPER level. In addition, the distinction between Community and CFSP issues is not clearly visible on the Council's agenda. In many cases it is up to the legal service to keep an eye on the division and the correct legal basis.

The Amsterdam and Nice Treaties introduced two other possibilities that could be seen as stressing the Union's role in CFSP: constructive abstention and enhanced cooperation. Constructive abstention (Article 23, par 1) decisions that need to be taken by unanimity may also be taken without the affirmative vote of one or more Council members. In this case the Member State "shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position." Similarly, enhanced cooperation (Arts 27a-e TEU) allows a smaller group of (at least eight) Member States to use the Union's institutional infrastructure to work more closely together with regard to the implementation of a Joint Action or Common Position.

³¹ *Ibid.* at 260.

³² *Cf. ibid.* at 268.

Although one could have envisaged this to happen in the PSC, which after all has a large role to play in the implementation of CFSP decisions, the exclusion of “matters having military or defence implications” from CFSP enhanced cooperation limits this possibility. In fact, this latter provision may form a reason why the possibility has not yet been used.

Intergovernmentalism was further weakened by the creation of the position of a High Representative for the CFSP. This position coincides with that of the Secretary General of the (entire) European Union. Although Article 26 TEU seems to intend a clear subordination of the HR to the Council (he “shall assist the Council”), practice has revealed a pivotal role of this official in the external representation of the Union. There is no doubt that the development of the position of HR had something to do with the first person in office, Javier Solana. Solana has used his mandate to win the trust of the Member States, establish a good working relationship with the Commission for External Relations and to make full use of its competences at the same time.³³ On many occasions – as part of the new Troika, but increasingly on its own – Member States allowed the HR to represent the Union externally.³⁴ The positive evaluation of the position of the HR most certainly lies at the basis of a strengthening of his competences in the Lisbon Treaty. The idea of a Minister for Foreign Affairs has been abandoned, but the new ‘High Representative of the Union for Foreign Affairs and Security Policy’ will be the key figure in the future CFSP. His (or her) tasks will include chairing the Foreign Affairs Council, proposing new initiatives, ensuring implementation, representing the Union and giving guidance to the new diplomatic External Action Service (Arts 18 and 27 new TEU). Particularly striking will also be the HR’s competence to defend Union positions in the United Nations Security Council on behalf of its EU members (Article 34, par. 2 new TEU) The new High Representative may also ask for decisions to be adopted by QMV and plays a role in finding a solution whenever a Member States opposes QMV (Article 31, par. 2) and, in line with current practice, he consults and informs the European Parliament (Article 36 new TEU). Perhaps, most importantly in view of the topic of this contribution is the fact that the HR shall be one of the vice-Presidents of the Commission (Article 17, par. 4), in which position he will be able to combine CFSP and non-CFSP external relations.

A certain autonomy with regard to the gathering of relevant information was formed by the creation of the Policy Unit (PU), which draws its members from the Council Secretariat, the Member States and the Commission. On the basis of strategy- and policy-option papers, the Policy Unit sees it as its task to encourage the Presidency or other Member States to put certain issues on the agenda. This allowed the PU to become “increasingly pro-active and influential in shaping

³³ See on the close cooperation between the HR and the Commission S. Duke, *op.cit.*, at 13–15.

³⁴ Cf. Spence, *op.cit.*, at 368.

policy” and a “major policy entrepreneur”.³⁵ A similar, albeit less extensive, part is played by the Situation Centre (Sitcen) at the Council structures, which watches over a number of potential or actual trouble spots agreed on in a Watch list drawn up together with the Commission. In addition the Council Secretariat, and in particular its DG E (external economic relations and the CFSP), has gained a somewhat autonomous position where the continuity of CFSP is concerned. Presidencies may not always be completely up to date on all dossiers and smaller Member States in particular tend to rely on the Secretariat for tactical advice and may even welcome suggestions for a compromise. Occasionally, the Secretariat even provides itself with “opportunities to influence the final outcome for private gain, by, for example, shifting final agreement closer to its own preferred outcome.”³⁶ Together with the appointment of (currently around 10–15) Special and Personal Representatives, who are active in different parts of the world on behalf of the HR, these developments reveal the intensive institutionalization that took place in the second pillar over the past decade as well as the willingness of Member States to accept a partial taking over of their foreign policy by the Union’s bodies.

The High Representative also played a role in boosting the *de facto* competences of the European Parliament under CFSP. In view of the notion that the process of parliamentarization is part and parcel of the EU’s constitutional development,³⁷ the growth of EP’s role in relation to CFSP is an important development. Although formal influence of the European Parliament is limited to be consulted by the Presidency “on the main aspects and the basic choices of the common foreign and security policy”, to “be kept regularly informed by the Presidency and the Commission of the development of the Union’s foreign and security policy” and to “ask questions of the Council or make recommendations to it”, Solana has the habit of informing the EP’s Committee for Foreign Affairs after European Council and Council meetings, including the holding of several annual debates with the plenary EP.³⁸ But here also, the connection between the pillars and the necessary coherence in external relations have strengthened the EP’s influence on foreign policy. Although this influence was already clear on the basis of some classic treaty competences (e.g. related to larger issues such as membership and association of candidate states, the appointment of the Commission, budgetary

³⁵ S. Duke, *op.cit.*, at 16; and S. Duke and S. Vanhoonacker, *op.cit.*, at 168 and D. Spence, *op.cit.* at 369 respectively.

³⁶ D. Beach, “The Unseen Hand in Treaty Reform Negotiations: The Role and Influence of the Council Secretariat”, *Journal of European Public Policy*, 2004, no. 3, pp. 408–439, at 409–411. Cf. Spence, *op.cit.* at 368 and S. Duke and S. Vanhoonacker, *op.cit.* at 176.

³⁷ A. Mauer, D. Kietz and Chr. Völkel, “Interinstitutional Agreements in the CFSP: Parliamentarization through the Back Door?”, *EFA Rev.*, 2005, pp. 175–195.

³⁸ Cf. also Th. Frish, “Der Hohe Vertreter Für die GASP. Aufgaben und erste Schritte”, SWP-AP 3136, Ebenhausen, 2000, pp. 25–26.

issues and the debate on an annual report on CFSP),³⁹ the emergence of more cross-pillar issues (e.g. related to the anti-terrorism measures) allowed the European Parliament to become more active in CFSP. According to one study, approximately one-third of the reports adopted by the European Parliament (and usually initiated by its Committee of Foreign Affairs – AFET) is related more or less directly to CFSP issues.⁴⁰ In addition, Parliament uses its own Rules of Procedure to enlarge the scope of its powers. Irrespective of the absence of a treaty basis, in its own rules the European Parliament claimed the right to be involved in the appointment of the High Representative and of special representatives.⁴¹ In addition, and irrespective of its meagre formal treaty competences, the European Parliament has used the instrument of Interinstitutional Agreements to increase its powers *vis-à-vis* the Council and the Commission.⁴² All in all, this allows us to agree with the conclusion that “[i]n general, the European Parliament actively seeks information instead of waiting for its delivery and this corresponds to its pro-active strategy of fully exploiting the legal provisions of CFSP”. Although its position under CFSP cannot be compared to the role of co-legislator that it enjoys in almost all parts of the EC Treaty, the conclusion seems justified that CFSP issues are not immune to Parliamentary scrutiny and that the European Parliament itself approaches CFSP as part of the overall Union external relations regime. One could argue that this is necessary from a constitutional point of view as well. The coming of age of the European Security and Defence Policy in particular seems to call for supportive public opinions in Member States. An active role of the European Parliament could diminish the difference that still exists compared to parliamentary oversight of Community policies with a similar high public salience.⁴³

Although differences between the Community method and CFSP can still easily be highlighted, the developments described above at the same time reveal clear similarities between the pillars. Just as in the Community pillar, CFSP decision-making primarily takes place in Brussels, where organs with increasing autonomy

³⁹ See for a recent overview D. Thym, “Beyond Parliament’s Reach The Role of the European Parliament in the CFSP”, *EFA Rev.*, 2006, pp. 109–127.

⁴⁰ U. Diedrichs, “The European Parliament in CFSP: More than a Marginal Player?”, *The International Spectator*, 2004, no. 2, pp. 31–46, at 36.

⁴¹ Rules of Procedure of the European Parliament, 16th edition, June 2007, Rules 85 and 86.

⁴² A. Mauer, D. Kietz and Chr. Völkel, *op.cit.*, at 194, who even argue that “[t]he European Parliament acts as an autonomous supranational actor which pursues its own reform agenda over the long term and has various means of incrementally impacting the reform process, especially in the informal arena.”

⁴³ See K. Oppermann and A. Höse, “Public Opinion and the Development of the European Security and Defence Policy”, *EFA Rev.*, 2007, pp. 149–167, at 167: “We have come to a point where European defence in both constitutional as well as operational terms is transferring from an abstract project to an increasingly tangible undertaking touching upon issues in which people want to have a say.”

– both in the preparatory and the executive phase – play a key role in decision-making. The classic distinction supranational versus intergovernmental does not do justice to the close connections between the pillars on the basis of the ‘unity of institutions’ and to the clear Brusselization of CFSP. As Duke and Vanhoonacker put it with regard to the CFSP officials:

“Although their national diplomatic identity continues to be important, they are not merely representatives of the national interest. The strength of the socialization process that officials undergo by regular participation in meetings leads them also to take into account shared interests at the European level. In other words, when trying to come to a consensus, their reference framework is not only national but increasingly Europeanized.”⁴⁴

Even CFSP seems to be formed on the basis of an institutional – and perhaps even constitutional – framework which cannot be isolated from developments in the Union as a whole.

3. INSTRUMENTS: A COMPLEX BINDING NATURE

A second dimension which is traditionally mentioned as distinguishing CFSP from Community law concerns the available instruments. Indeed, Directives and Regulations cannot be used under CFSP. Instead Joint Actions and Common Positions are available to formulate secondary CFSP norms (Arts. 14 and 15 TEU). The Lisbon Treaty will rename Joint Actions and Common Positions as ‘Decisions’, but this is merely a change of title. Although the difference between the available instruments is obvious, one should keep in mind that also in Community law an increasing use is made of alternative instruments, and that, for instance, the open method of coordination is thought to be more effective than hard law instruments, such as Regulations.⁴⁵ At the same time, the CFSP instruments and procedures may be less soft than they seem. Elsewhere I already concluded on the obligation of Member States to inform and consult one another whenever issues are of general interest, in the sense that they reach beyond national interests (Article 16 TEU).⁴⁶ There, the conclusion was drawn that even under CFSP Member States

⁴⁴ S. Duke and S. Vanhoonacker, *op.cit.*, at 176.

⁴⁵ See on the use of soft law instruments in Community law L. Senden, *Soft Law in European Community Law*, Oxford: Hart Publishing, 2004; see on the OMC for instance the special issue of the *European Journal of Public Policy*, 2004, no. 2. Cf. also the Commission’s White Paper on European Governance, COM(2001) 428 final, Brussels, 27 July 2001.

⁴⁶ R.A. Wessel, *The European Union’s Foreign and Security Policy: A Legal Institutional Perspective*, The Hague, Kluwer Law International, 1999, Chapter 5; and more recently in C. Hillion and R.A. Wessel, “Restraining External Competences of Member States under CFSP”, in M. Cremona and B. de Witte (Eds.), *EU Foreign Relations Law – Constitutional Fundamentals*,

will have to take Union activities into account when they engage in relations with other (Member) States. We held that international agreements concluded by EU Member States *inter se*, or with third states, can be left out of the systematic CFSP cooperation *only if* the content of such agreements is of purely bilateral interest to the parties, and when no general (read: EU) interest is at stake. In view of the broad scope of CFSP envisaged in Articles 11 and 12 TEU, it can be suggested that most international agreements to be concluded by individual Member States should be notified and, if necessary, discussed by Council working parties. Arguably, this proposal is further supported by the loyalty that Member States must demonstrate towards the Union's CFSP, as stipulated in Article 11(2) TEU and which will be somewhat strengthened by the Lisbon Treaty.⁴⁷ This provision notably declares that Member States "shall work together to enhance and develop their mutual political solidarity" and "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations". The provisions of Article 16 TEU, and the obligation they encapsulate ought to be understood in the light of that principle.

Although the loyalty obligation may certainly limit the freedom of Member States under CFSP, the fact remains that CFSP treaty norms are largely *procedural* in nature. Further restraints on Member States' competences could depend on *secondary* CFSP measures. The binding nature of Common Positions, Joint Actions or other Decisions is only marginally dealt with in the Treaty,⁴⁸ however, the language used by the relevant Treaty provisions nonetheless suggests that those CFSP acts, once adopted,⁴⁹ do limit the freedom of Member States in their individual policies.⁵⁰ In particular, Joint Actions "shall commit the Member States in the positions they adopt and in the conduct of their activity" (Article 14, par. 3) and "Member States shall ensure that their national policies conform to the

Oxford: Hart Publishing, 2008 (forthcoming). Parts of this contribution have been based on this publication.

⁴⁷ See on the possible influence of the general loyalty obligation in Article 10 EC on CFSP obligations also C. Hillion and R.A. Wessel, *op.cit.* See also *infra*.

⁴⁸ No interpretation may be expected from the Court of Justice given that Article 46 TEU excludes Title V from its jurisdiction; as confirmed by e.g. Case T-201/99 *Royal Olympic Cruises Ltd and others v Council and Commission* [2000] ECR II-4005; Case T-228/02 *Organisation des Modjahedines du peuple d'Iran*, judgment of 12 December 2006 (para. 49); C-354/04 P *Gestoras Pro Amnistía and Others v Council*, judgment of 27 February 2007 (para. 50).

⁴⁹ The publication in the Official Journal of CFSP autonomous acts is decided on a case-by-case basis, by unanimous decision of the Council or the Coreper: see Article 17 of the Council Rules of Procedure; OJ 2002 L230/7.

⁵⁰ On CFSP Joint Actions specifically, see A. Dashwood, "The Law and Practice of CFSP Joint Actions", in Dashwood and Maresceau (Eds.), *The Law and Practice of EU External Relations – Salient Features of a Changing Landscape*, Cambridge University Press, 2008 (forthcoming), p. 154; F. Dehousse, "La politique étrangère et de sécurité commune" in J.-V. Louis and M. Dony (eds), *Relations Extérieures – Commentaire J. Mégret, Le droit de la CE et de l'Union européenne* (Bruxelles, Institut d'Etudes Européennes, 2005), p. 441, at 475; P. Koutrakos, *EU international relations law*, Oxford: Hart Publishing, 2006, pp. 399ff.

common positions” (Article 15).⁵¹ Hence, Member States are not allowed to adopt positions or otherwise to act contrary to Joint Actions.

In making a comparison with the Community instruments and with the general primacy attached to these instruments, it is important to recall that the existence of secondary CFSP norms does not automatically block the possibility for Member States to take individual policy initiatives in the same issue area. Practice reveals that, in most cases, the scope of CFSP decisions is limited, thereby leaving ample space for national policies. Thus, in practice, conflicts are primarily to be expected when Member States’ agreements directly violate core parts of CFSP decisions, or when Member States’ existing agreements clash with a subsequent CFSP decision. The above considerations nonetheless suggest that Member States have been prepared to accept restraints on their foreign policy competences. It is indeed questionable whether one can still maintain that under CFSP, no sovereign rights were transferred to the Union, and that therefore Member States have retained unfettered freedom to enter into international agreements on issues already covered by EU decisions.⁵²

But, what does this tell us about the possible application of the principles of direct effect and primacy that are traditionally thought to distinguish the Community norms from other Union norms? It has been contended that these principles cannot be said to be completely alien to the CFSP legal order:

“A regards to the principle of direct effect, the practice has started, especially in the EU’s fight against terrorism, to insert unconditional obligations in common positions which relate to physical and legal persons as opposed to governments. [...] As regards the principle of primacy, joint actions and common positions are legally binding upon Member States which are under a duty to abide by them ‘actively’ and ‘unreservedly’ (Article 11(2) TEU [...]).”⁵³

Indeed, both the legal nature and the content of CFSP decisions may form a good reason for Member States to allow for direct effect and primacy in their national

⁵¹ In the same vein, EU Common Strategies, envisaged in Article 13 TEU, bind not only the EU institutions but also the Member States. For instance the European Council 1999 Common Strategy on Ukraine provided that the Council, the Commission and Member States shall review, according to their powers and capacities, existing actions, programmes, instruments, and policies to ensure their consistency with that Common Strategy; see pt 41, Common Strategy on Ukraine; OJ 1999 L 331/1.

⁵² In this regard, see M. Brkan, “Exploring the EU competence in CFSP: Logic or contradiction?”, *Croatian Yearbook of European Law and Policy*, 2006, p. 173; Cf. the current position of the Member States, as reflected in the “Draft IGC Mandate”, annexed to the Presidency Conclusions, 21–22 June 2007, and particularly the insistence on the specificity of the CFSP in footnotes 6 and 22.

⁵³ Gosalbo Bono, *op.cit.*, at 378.

legal order.⁵⁴ However, so far the ECJ has refrained from turning this into an obligation. In fact, as well will see below, even with regard to the anti-terrorism decisions, the Court has annulled Community acts only, irrespective of the fact that the (sole) origin of some of these acts lies in CFSP Common Positions.

The post Lisbon EU Treaty explicitly stresses the binding nature of CFSP provisions by strengthening the loyalty obligation in new Article 24, par. 3: “The Member States shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity *and shall comply with the Union’s action in this area.*” In addition, not only the Council will be responsible to “ensure that these principles are complied with”, but the new Treaty also entrusts this task to the High Representative. On the other hand, a clear distinction with other policy areas will be maintained, as (new) Article 24, par. 1 TEU excludes “the adoption of legislative acts”, which in turn excludes the use of the legislative procedures (the ‘Community method’). Apart from the exclusion of the (continued) exclusion of the European Parliament and the Commission in the decision-making phase, as well as of the jurisdiction of the Court (*infra*), this does not settle the issue of the binding nature of CFSP decisions in national legal orders.

Irrespective of a more clear description of the legal nature of the CFSP instruments in the treaty texts, in February 2007, the Court confirmed for the first time the binding nature of Common Positions in the *Segi* case:

“A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular to ensure fulfilment of their obligations under European Union law”.⁵⁵

This interpretation certainly confirms the constitutional nature of the non-Community parts of Union law. The case primarily concerned the third pillar, but it is tempting, though not perhaps entirely justified, to transpose the above findings to the second pillar. After all, the Common Position in question could also be regarded a CFSP decision since it was equally based on both Article 15 (CFSP) and Article 34 (PJCC) TEU. Indeed, as suggested by previous practice, the subject matter – economic and financial sanctions against groups and individuals – is primarily a second pillar issue, and in that capacity closely linked to the Community legal order (*viz. Yusuf infra*).

⁵⁴ Irrespective of the fact that the original provision of the Constitutional Treaty concerning the primacy of (all) EU law (Article I-6) will not be inserted into the TEU on the basis of the Lisbon Treaty. There is a declaration on primacy, but this merely refers to previous case-law of the ECJ, which of course does not relate to CFSP.

⁵⁵ *Segi* case, para. 52.

Nevertheless, the *Segi* judgment only partly helps in answering the question of the binding nature of CFSP instruments. As the Court's jurisdiction on CFSP provisions is likely to remain limited in the future Treaty settlement, and given the ambiguity of the possible application of the principles of primacy and direct effect to CFSP,⁵⁶ a relationship with either Community law or the third pillar will continue to be helpful to interpret the scope of the CFSP legal restraints. This, however, is exactly what the Court confirmed in some recent cases, in which the connection between the pillars proved to be crucial for the interpretation.

4. JUDICIAL SCRUTINY: 'INTEGRATED BUT SEPARATE LEGAL ORDERS'⁵⁷

These days, the 'constitutional' nature of the Community Treaty is hardly ever questioned. To quote the European Court of Justice: "[...] the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law".⁵⁸ Indeed, the Community was from the outset a legal order dominated and in many aspects shaped by the ECJ, which asserted strongly its role as a constitutional court.⁵⁹ Although a role of the Court in CFSP continues to be excluded, case-law over the past few years seems to indicate a constitutional role of the Court beyond the Community. Indeed, the Court has shown a willingness to apply some of the classic Community reasoning on a Union-wide basis and irrespective of the absence of competences in the area; 'Common foreign and security policy' is an official ECJ collection of keywords which frequently appear at the opening of judgments.⁶⁰ The Lisbon Treaty will not change this situation. An exception has been formulated for jurisdiction over the legality of foreign policy sanction measures against natural or legal persons.⁶¹ At the same time the new provision

⁵⁶ Most commentators have argued that there are many reasons (including the special nature of CFSP, the general absence of ECJ jurisdiction, the relation with established case-law and the probable absence of direct effect) not to apply the principle of primacy to CFSP. See in particular A. Dashwood, "The Relationship between the Member States and the European Union/ European Community" (2005) *CML Rev* 355, at 363 and 379; as well as his "The EU Constitution: What will Really Change?" (2005) *Cambridge Yearbook of European Legal Studies* 33, at 34. See also Editorial Comment, *CML Rev.*, *op.cit.* 325 at 327. In this respect, see the Declaration on Primacy envisaged in footnote 1 of the 2007 Draft IGC Mandate, annexed to the Presidency Conclusions, 21–22 June 2007.

⁵⁷ Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, para 156.

⁵⁸ Opinion 1/91 (*First EEA Opinion*) [1991] ECR 6079, par. 211.

⁵⁹ Denza, *op.cit.*, at 16.

⁶⁰ See for instance the *Yusuf* and *Kadi* cases, discussed below.

⁶¹ See new Article 275 TFEU. Another exception is the (already existing) possibility of the Court to rule on the borderline between foreign policy and other measures (Article 40 new TEU). See also A. Hinarejos, "Judicial Control of CFSP in the Constitution: A Cherry Worth Picking?",

on personal data protection in CFSP matters (arguably a ‘constitutional’ innovation) is excluded of the Court’s jurisdiction (Article 24 TEU).

The starting point has been Article 47 TEU, which calls for the preservation of the *acquis communautaire*,⁶² by providing that “nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them”. Even before the establishment of the Union, this latter principle was already applied by the Court in relation to the external competences of Member States when in *Centro-Com* it held that these “must be exercised in a manner consistent with Community law.”⁶³ This was confirmed by the Court when it had a chance to interpret Article 47 TEU in *Airport Transit Visa*, in which the Commission challenged a Council act adopted under Title VI of the EU Treaty with the argument that a Community legal basis in Title IV of the EC Treaty should have been used. The Court held that it could exercise its powers under Article 47 TEU “to ensure that acts which, according to the Council, fall within the scope of [Title VI] of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community”.⁶⁴ In the event, the judges found that the Council was justified in choosing Title VI TEU as the relevant decision-making framework for adopting the measure under review, since the situation governed by the Joint Action did not entail the crossing of Member States’ external borders by third country nationals, a domain that is covered by Community competence. By contrast, in the *Environmental Penalties* case,⁶⁵ the Court annulled a Council Framework Decision laying down environmental offences, in respect of which the Member States were required to lay down criminal penalties. The Court found that ‘on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC’. Since the Framework Decision encroached upon powers conferred upon the Community, it infringed Article 47 EC, and was therefore annulled.

in P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2006*, Oxford University Press, 2007, p.363.

⁶² See Article 2 TEU. On the interpretation of the *acquis communautaire* see for instance S. Weatherill, “Safeguarding the *acquis communautaire*” in T. Heukels, N. Blokker and M. Brus (Eds.), *The European Union after Amsterdam: A Legal Analysis* (The Hague, Kluwer Law International, 1998) 153; or C. Curti Gialdino, “Some Reflections of the *Acquis Communautaire*” (1995) *CML Rev* 1089.

⁶³ Case C-124/95, *Centro-Com* [1997] ECR I-81, para. 41.

⁶⁴ Case C-170/96, *Commission v. Council* [1998] ECR I-2763, paras. 15–16; more recently confirmed in Case C-176/03, *Commission v. Council*, 13 September 2005 n.y.r. De facto, Article 47 can also work the other way around. In the *Passenger Name Record* case of 30 May 2006 the ECJ forced the Council to chance a Community legal basis (a Directive) into Articles 24 and 38 TEU. Joint Cases C-317/04 and C-318/04, *Parliament v. Council*, [2006] ECR-I 4721.

⁶⁵ C-176/03, *Commission v Council (Environmental penalties)* [2005] ECR I-7879.

Although these cases are related to a third pillar act, on 21 February 2005 the Commission initiated proceedings against two CFSP decisions adopted by the Council, a Joint Action on the Union's contribution to combating the destabilizing accumulation and spread of small arms and light weapons (2002/589/CFSP) and the Decision implementing this Joint Action (2004/833/CFSP) with a view to the EU contribution to the West African organization ECOWAS.⁶⁶ It is interesting to note that the Commission refers to the Joint Action as “an act of general legislative nature”.⁶⁷ It is tempting to regard this as a general qualification by the Commission of the legal nature of CFSP acts; however, the present author realizes that it may very well be a pragmatic argument. In any event, the *ECOWAS* case provided an opportunity for the Court to rule on the interpretation of Article 47 in a cross-pillar case involving the first and second pillar.⁶⁸ Advocate General Mengozzi had argued that the “connection between the preservation of peace and strengthening of international security, [...] and the prevention of violent conflicts on the one hand and development on the other hand” [...] cannot lead to including in the scope of development cooperation measures which would lead to disregarding the distribution of competences in the framework of the pillar architecture of the European Union” (paras. 169–170).⁶⁹ In his opinion “the purpose of the contested decision [combating the proliferation of small arms] is, at least mainly, of a security nature.” (par. 212) and it was therefore rightfully based on CFSP. The Court, in its judgment of 20 May 2008, did not reach the same conclusion and argued that “[...] a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of Article 47 EU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences” (para. 60). In this case “[...] the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP” (para. 108). According to the Court the CFSP Joint Action should therefore have been implemented “both by the Union, under Title V of the EU Treaty, and by the Community, under its development cooperation policy” (para. 88). Thus, Article 47 seems to allow the Court to protect the *acquis communautaire* also in relation to possibly conflicting CFSP acts. Yet, and even more important in the context of this contribution: the Court points to the interrelationship between instruments in different pillars and even to the possible need to implement CFSP instruments through Community acts.

⁶⁶ Case C-91/05, Judgment of 20 May 2008, nyr.

⁶⁷ See OJ C 115/10, 14.5.2005.

⁶⁸ In Cases T-349/99 *Miskovic* and T-350/99 *Karic*, the Court of First Instance missed the opportunity when the Council amended the decision challenged by two individuals who had been refused visa on the basis of a CFSP act.

⁶⁹ Opinion of AG Mengozzi in Case C-91/05, 19 September 2007.

The role of the ECJ as a ‘constitutional court’, adopting a holistic perspective on the Union legal order,⁷⁰ is also revealed in the competence of the Court to actually annul a non-Community act. This is not to say that *ECOWAS* opened the door to a more general jurisdiction of the Court in CFSP. Indeed, “it remains doubtful whether the combined effect of Article 46(e) and 47 may result in the conferral upon the ECJ, in respect of provisions of Title V of the EU Treaty, of the same powers of judicial review which it enjoys under the Community Treaty.”⁷¹ Recent case-law on sanctions against individuals in the fight against terrorism confirms the unwillingness of the Court to annul CFSP Common Positions. In *Sison* and *Al-Aqsa* the Court of First Instance could merely annul the Community Regulation, but not the Common Position on which this Regulation was based.⁷² At the same time, however, the interpretation of the CFSP Common Position and of other CFSP Decisions plays an important part in the Court’s judgment. The Court can only come to a final judgment when it takes the second pillar measures into account. Irrespective of the formal exclusion of the Court in CFSP matters, it cannot ignore what has been decided in the non-Community pillars, but a relationship between the subject matter of the pillars seems to be necessary.

This became already clear on the basis of the 2005 *Yusuf* and *Kadi* cases, in which the CFI not only addressed the vertical hierarchy between the national, EU and UN legal order, but also “the constitutional architecture of the pillars”:

“In particular, the Court considers that the coexistence of Union and Community as integrated but separate legal orders.”⁷³

At least in relation to the imposition of economic and financial sanctions to individuals (which is not covered by Articles 60 and 301 TEC), the CFI held that the Union’s objectives could only be attained by making use of Community competences and that

“[u]nder Articles 60 EC and 301 EC, action by the Community is therefore in actual fact action by the Union, the implementation of which finds its footing on the

⁷⁰ In that respect it is interesting to note that the post Lisbon Article 40 TEU takes a more balanced stance by not only protecting the *acquis communautaire*, but also the CFSP *acquis*.

⁷¹ See M.-G. Garbagnati Ketvel, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy” (2006) *ICLQ* 77–120 at 90. See also R. Baratta, “Overlaps between European Community Competence and European Union Foreign Policy Activity” in E. Cannizzaro (Ed.), *The European Union as an Actor in International Relations*, The Hague: Kluwer Law International, 2002, at 51, who suggested that the Court could also rule on the “irrelevance or inefficacy of such an act in the Community order”.

⁷² Cases T-47/03 *Sison* and T-327–03 *Al-Aqsa*, 11 July 2007, n.y.r.. See earlier also Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council*, 12 December 2006, nyr.

⁷³ Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*; and T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, 21 September 2005, n.y.r. (para 156 *Yusuf* case).

Community pillar after the Council has adopted a common position or a joint action under the CFSP.⁷⁴

This is a clear example of an explicit subordination of the Community to CFSP decision-making and an indication that the unity of the Union's legal order cannot be neglected by the Court. At the same time, however, it still merely reflects the *indirect* adjudication on CFSP provisions we know also from a case such as *Hautala* in which the Court of First Instance argued that it could adjudicate on the legality of a Council decision on the public access to documents even if this decision extended to CFSP documents.⁷⁵ Although these cases reveal a certain willingness of the Court to at least not ignore CFSP when there is a relation with Community law, it does not yet help us in answering the question to what extent it is competent to judge actions by Member States once these conflict with established Union policies. So far, we have only seen examples of direct actions based on Article 230 TEC. This leaves open the question of whether national courts have complete freedom to decide on the validity of a CFSP act whenever the legal basis of a national implementation act is being questioned. Obviously, they have no *Foto-Frost* duty to refrain from invalidating EU decisions as this case-law was clearly related to Community law.⁷⁶ In that respect, the recent judgment by the Court in *Segi* is quite revealing. This judgment concerns an appeal by *Segi* (and in a similar case by another Basque organization, *Gestoras Pro Amnistía*) to set aside an earlier order of the Court of First Instance.⁷⁷ The decision under attack in this case was a Common Position (2001/931/CFSP) with a dual legal basis in both the second (Article 15 TEU) and the third pillar (Article 34 TEU). Although Article 35(1) does not enable national courts to refer a question to the Court for a preliminary ruling on a Common Position, the relevant question according to the Court is whether or not the decision produces legal effects in relation to third parties (individuals or entities). In this case the two organizations were placed on a list with terrorist organizations which was annexed to Common Position 2001/931/CFSP which led the Court to conclude that this particular Common Position had produced legal effects in relation to the two organizations. The Court continued:

⁷⁴ *Ibid.*, para 161 *Yusuf* case.

⁷⁵ Case T-14/98, *Hautala v. Council* [1999] ECR II-2489, paras. 41–42. See also earlier with respect to third pillars documents Case T-174/95, *Svenska Journalistförbundet* [1998] ECR II-2289.

⁷⁶ Case 314/85 [1987] ECR 4199. See, however, for arguments to apply the *Foto-Frost* reasoning to Union law: D.M. Curtin and I.F. Dekker, "The EU 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) 83, at 123. See for this question, and others in relation to the impact of the 2004 Constitutional Treaty also "The CFSP under the EU Constitutional Treaty – Issues of Depillarization", Editorial Comment (2005) *CML Rev* 325–329.

⁷⁷ See Cases C-355/04 P, *Segi and Others v. Council* and C-354/04 P, *Gestoras Pro Amnistía and Others v. Council*, judgments of 27 February 2007, n.y.r.

“As a result, it had to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU [...] and which has serious doubt whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. [...] The Court would also have jurisdiction to review the lawfulness of such acts when an action has been brought by a Member State or the Commission under the conditions fixed by Article 35(6) EU.”⁷⁸

One could argue that this reasoning should also be maintained when a common position would have a single CFSP legal basis. After all, there is no difference in principle between all types of common position whenever they produce legal effects in relation to individuals. On the other hand, the only reason why the Court concludes on a legal remedy in this case seems to be the presence of a judicial competence in the third pillar in relation to other instruments (decisions and framework decisions). There is no comparable role for the Court in relation to acts with a single CFSP legal basis.

As illustrated by the earlier *Pupino* judgment, however, the Court seeks inspiration in its interpretation of EC provisions to interpret similar EU provisions.⁷⁹ Not only does the Court make an explicit comparison between third pillar Framework Decisions and Community Directives in terms of their legal effects, but it also suggests that Community principles – in this case the principle of loyal cooperation, expressed particularly in Article 10 EC – may have a trans-pillar application. In particular, the Court held that:

“[i]t would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not *also* binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions.”⁸⁰

Unconvinced by the Italian and United Kingdom Governments’ argument that the TEU contains no obligation similar to that laid down in Article 10 EC, the Court held that the principle of loyal cooperation binds the Member States in relation to the Union, “in order to contribute effectively to the pursuit of the

⁷⁸ *Segi*, paras. 54–55.

⁷⁹ Case C-105/03 *Pupino* [2005] ECR I-5285, paras 19, 21 and 28 (similarity between the system established by Article 234 EC and that of Article 35 TEU); paras 33–34 (similarity in the wording of Article 249 and Article 34(2)(b)).

⁸⁰ *Ibid.*, para. 42. Emphasis added.

Union's objectives".⁸¹ The Court thereby suggested that the principle of loyalty has a trans-pillar definition and application.⁸² Even the lack of direct effect of Framework Decisions proved to be irrelevant and did not stop the Court from extending the principle of indirect effect to the third pillar legislation.⁸³ It should, however, be kept in mind that the Court reached this conclusions by looking at the similarities between Framework Decisions and Directives. Such a comparison would be more difficult with regard to CFSP instruments. Moreover, unlike in the second pillar, the jurisdiction of the Court in the third pillar is not completely excluded.

Nevertheless, it has been argued that *Yusuf* and *Kadi*, as well as the subsequent cases, show a paradigm shift by which the Court (of First Instance) forces itself to follow UN obligations and pay allegiance to its own principles at the same time.⁸⁴ A fact is that in the recent cases – from *Pupino*, via *Yusuf/Kadi* to *Segi*, the Court is confronted with the question of the protection of human rights of individuals in Union-pillars that do not provide for the same legal protection as the Community. In all cases the solution seems the same: the Court either interprets the non-Communitarian provisions in the light of overall Union law (*Yusuf/Kadi*), or it uses *Community analogy* to establish the outcome it considers necessary from a constitutional point of view (*Pupino*, *Segi*). Thus, the Court has turned itself into a constitutional Court of the Union, which does not shy away from combining different Union norms to reach a preferred outcome.⁸⁵

5. CONCLUSION: CONSTITUTIONAL UNITY WITHOUT THE CONSTITUTION

The question raised in this contribution was whether and to what extent the Union's pillars can still be approached in isolation and whether the 'constitutional' development of the Union has rendered their separation already irrelevant. After the failure to put into effect the Constitution, one question was whether this implied a denial of the constitutional status of the Union's legal order. We have seen that the development of the Union over the past fifteen years was more based on – what Germans would refer to as – 'Eigendynamik', rather than on deliberate choices made in treaties. After all, many treaty innovations to improve the

⁸¹ *Ibid.*, para. 36.

⁸² Further on the *Pupino* ruling: E. Spaventa, "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*", *EuConst.*, 2007, 5.

⁸³ See B. Kurcz and A. Lazowski, "Two Sides of the Same Coin? Framework Decisions and Directives Compared", in P. Eeckhout and T. Tridimas (eds.), *op.cit.*, pp. 177–203 at 179.

⁸⁴ M. Nettesheim, "U.N. Sanctions against Individuals – A Challenge to the Architecture of European Union Governance", *CML Rev.*, 2007, pp. 567–600.

⁸⁵ Cf. R. Barents, who compared the impact of the reasoning in *Pupino* to the one in *Van Gend & Loos*. Annotation Case C-105, *Pupino*, *SEW*, 2006, no. 2, p. 74.

functioning of CFSP (including the use of QMV, the possibility of constructive abstention or enhanced cooperation) have barely been used, while at the same time the deliberate distinction made between the Community and the other two pillars has gradually become less obvious. This does not mean that all differences between the Community and the other pillars have disappeared and that by now 'Union law' can be equated with 'Community law'. Indeed, as Hermann argues, "Given the deliberate placing of the second and third pillar outside the Community framework by the Member States, it would be difficult to argue in favour of an identical legal nature of the pillars only on the basis of a claimed unity".⁸⁶ Although this is a truism, it is also obvious that the constitutional unity referred to in this contribution does merely concern the application of the Community characteristics and principles (in particular direct effect, primacy and the 'community method' in decision-making)⁸⁷ to the non-Community pillars, but also to the effect of the integration in the Community on CFSP and on the impossibility of approaching this pillar in isolation. The main conclusion could be that the Union's pillars are still separate, but inseparable.

With regard to CFSP, the absence of a 'Communitarization' was clearly compensated by a 'Brusselization', in which actors work within the framework of the 'Union', on the basis of 'Union law' which knows clear rules and procedures. Indeed, "[...] CFSP has evolved from a purely intergovernmental system based on consensus and general international law into a full fledged system based on treaty law which includes institutions that operate under the rule of law and which have been given law-making powers and which have produced a considerable body of secondary law."⁸⁸ In the process of decision-making, the role of the administrative level in CFSP, in particular concentrated around the Council, proves to be essential. There is still an obvious influence from the capitals, in particular through the working parties and the Policy Unit; however, the 'Brusselization' makes clear that it is the European Union (rather than the States in an intergovernmental cooperation) making the decisions, through fixed decision-making procedures on the basis of a largely institutionalized process.⁸⁹ A related question concerning the difficulties to hold the administrative actors in Brussels to public account falls outside the scope of this contribution, but may very well become an issue of political concern in the coming years.⁹⁰

⁸⁶ Hermann, *op.cit.*, at 18.

⁸⁷ See for the importance of the "Community method" to constitutional unity also J. Bast, "The Constitutional Treaty as a Reflexive Constitution", *German Law Journal*, 2005, pp. 1433–1452.

⁸⁸ Gosalbo Bono, *op.cit.*, at 393.

⁸⁹ Cf. S. Duke and S. Vanhoonaeker, *op.cit.*, at 180: "Although civil servants in the national capitals still are very important, the centre of gravity is clearly moving to Brussels."

⁹⁰ See already D. Curtin, "Holding (Quasi-) Autonomous EU Administrative Actors to Public Account", *European Law Journal*, 2007, pp. 523–541.

With regard to the area of police and judicial cooperation (the third pillar), the Court has already used its competences to interpret third pillar provisions in the light of similarities with Community law or principles. With regard to CFSP the role of the Court remains more difficult, recent cases have already shown the Courts willingness to base its judgments on Union law, taking into account primary and secondary CFSP norms. Indeed, the formal exclusion of CFSP has not prevented the Court from applying 'Community' principles in the legal protection of citizens.

Is this constitutionalism? Although there are of course many dimensions of this concept,⁹¹ one could argue that it is at least the 'constitutional architecture of the pillars' referred to by the Court that forms the basis of a constitutional unity in which norms in different pillars cannot be interpreted within the safe boundaries of their own legal sub-system. At the same time this is – as Bast puts it – an 'incomplete constitutional unity': there is still both formal and substantive incoherence as principles (including direct effect and primacy) are not equally applicable in all parts of the Union and the institutional balance differs largely in the distinct policy areas.⁹² The Lisbon Treaty will certainly strengthen constitutional unity, but as we have seen, the European constitution has a strong tendency to develop itself, irrespective of treaty arrangements.

⁹¹ See for a recent survey N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives*, Cambridge University Press, 2007.

⁹² Bast, *op.cit.*, at 1438.