

# The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation

Ramses A. Wessel\*

[...] we have preferred the method of purported explication or exegesis of the particular textual passage considered as a directive of action, as opposed to the method of inference from the structures and relationships created by the constitution [...].<sup>1</sup>

*Charles L. Black, 1969*

Institutional and normative convergence – Common Foreign and Security Policy – Pillar Structure – External Relations – Role of the Court – Normative Consistency – EU Legal Order – Legal Nature CFSP – Treaty of Lisbon – Legal Instruments – Decision-Making

## INTRODUCTION

The 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.<sup>2</sup> 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.

\* Professor of the Law of the EU and other International Organizations, Centre for European Studies, University of Twente, The Netherlands.

<sup>1</sup> Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Louisiana State University Press 1969) p. 7.

<sup>2</sup> See for an analyses with regard to the ‘second pillar’: ‘The CFSP under the EU Constitutional Treaty – Issues of Depillarization’, Editorial Comments, *CMLR* (2005) p. 325-329.

The Treaty thus aims at a merger between 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 free us from the difficult task to explain the difference between the Community and the Union as well as their complex connection, but it will also make 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.<sup>3</sup> The debate concerns the legal nature and structure of the Union, and in its heyday revealed the existence of quite extreme positions defending either a complete separation of the Unions’ policies from the Community, or a complete merger in the form of a single organisation that had absorbed the former three European Communities.<sup>4</sup>

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. The aim of the present article is not to revive the debate on the unity of the Union’s legal order; the past fifteen years have shown an almost exhaustive exchange of opinions. Rather, it purports to take a fresh look at the differences between the pillars after fifteen years of development<sup>5</sup> and in the presence of new – and on some occasions revealing – case-law. It will be submitted that the convergence of the ‘bits and pieces’ that were originally said to make up the Union’s structure<sup>6</sup> has created a new institutional and normative situation. It is exactly this situation that presents the interpretative 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)

<sup>3</sup> 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*; which also appeared in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford, Hart Publishing 2008) p. 19-51. Cf. also new Art. 47 of the post Lisbon TEU: ‘The Union shall have legal personality’.

<sup>4</sup> See for references D. Curtin and I. 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) p. 83-136; as well as their ‘The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-In-Diversity’, in N. Walker, et al. (eds.) *Convergence and Divergence in European Public Law* (Oxford, Hart Publishers 2002) p. 59-78.

<sup>5</sup> 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, Cambridge University Press 2004).

<sup>6</sup> D.M. Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’, *CMLR* (1993) p. 17-69.

are not based on regular co-operation treaties, but together with the European Community form part of a European Union, had an impact on their development.<sup>7</sup> The past years not only revealed a clear interplay between the different Union policies, but also showed that the nature of the pillars can best be understood when their mutual relation is taken into account.<sup>8</sup> 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’,<sup>9</sup> these days a reference to international law as the basis for the internal co-operation 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.<sup>10</sup>

With a clear focus on the Common Foreign and Security Policy (commonly perceived as ‘the odd one out’), 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 area of CFSP on the basis of some recent case-law. These sections will also draw

<sup>7</sup> Compare for a political science perspective also S. Stetter, *EU Foreign and Interior Policies: Cross-Pillar Politics and the Social Construction of Sovereignty* (London/New York, Routledge 2007).

<sup>8</sup> See R. Gosalbo Bono (Director of the Legal Service of the Council), ‘Some Reflections on the CFSP Legal Order’, *CMLR* (2006) p. 337-394, who even refers to ‘progressive supranationalism’ in relation to the development of CFSP (at p. 349); and more extensively R.A. Wessel, ‘The EU’s Foreign, Security and Defence 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) p. 302-316.

<sup>9</sup> See E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford, Oxford University Press 2002) p. 5.

<sup>10</sup> Irrespective of the fact that – as in the 2004 Constitutional Treaty – at least one of the current pillars (CFSP) 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.

examples from the third pillar, the PJCC. Finally, in section 5 an attempt will be made to answer the question to what extent European Union Law can be seen as having created institutional and normative unity, in the sense that the connection between the different parts of the Union created a new interpretative framework which does no longer allow for the parts to be analysed in isolation.

#### INSTITUTIONS AND DECISION-MAKING: THE 'CONSTITUTIONAL ARCHITECTURE OF THE PILLARS'<sup>11</sup>

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 (Arts. 22 and 34(2) EU) it has barely used it.<sup>12</sup> Initiatives are usually taken by the member states and quite often by the Presidency during its six month term.<sup>13</sup> 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.<sup>14</sup> 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

<sup>11</sup> Case T-306/01, *Abmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3353, para. 156.

<sup>12</sup> *See* D. Spence, 'The Commission and the Common Foreign and Security Policy', in D. Spence (ed.), *The European Commission*, 3<sup>rd</sup> edn. (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).

<sup>13</sup> S. Duke and S. Vanhoonaeker, 'Administrative Governance in CFSP', *EFA Rev.* (2006) p. 163-182 at 166.

<sup>14</sup> 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 Schoutheete and W. Wessels (eds.), *Foreign Policy of the European Union: From EPC to CFSP and Beyond* (London, Lynne Rienner Publishers 1997) at p. 101, who at that time referred to the Commission as the 'sixteenth' member state in CFSP.

extraordinary Council meeting and may make suggestions to the Policy Unit at the Council's Secretariat.<sup>15</sup>

The legal basis for the Commission's involvement is Article 27 EU, 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 organisations in practice have become 'Union missions', paving the way for a full-fledged and cross-pillar External Action Service.<sup>16</sup> 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, para. 2 EU).<sup>17</sup> 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.'<sup>18</sup>

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.<sup>19</sup> 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 realise 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.<sup>20</sup>

<sup>15</sup> *Ibid.*, at p. 12.

<sup>16</sup> S. Duke, 'The European External Action Service: A Diplomatic Service in the Making', *CFSP Forum* (2004).

<sup>17</sup> *See* on consistency and coherence C. Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union', in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford, Oxford University Press 2008) p. 10-36; and R.A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations', *CML Rev.* (2000) p. 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) p. 123-140.

<sup>18</sup> G. Müller-Brandeck-Bocquet, 'The New CFSP and ESDP Decision-Making System of the European Union', *EFA Rev.* (2000), p. 257-282 at 261.

<sup>19</sup> Denza, *supra* n. 9 at p. 10.

<sup>20</sup> Duke and Vanhoonacker, *supra* n. 13, at p. 167.

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). While 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 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).<sup>21</sup> It is well-known that its *'esprit de corps'* resulted in a 'consultation reflex' which formed the basis for the EPC and later CFSP.<sup>22</sup> 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,<sup>23</sup> Juncos and Reynolds, revealed the pivotal position of this body in both CFSP and ESDP (European Security and Defence Policy):<sup>24</sup>

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.<sup>25</sup>

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:

<sup>21</sup> See for instance M.E. Smith, *Europe's Foreign and Security Policy: The Institutionalisation of Cooperation* (Cambridge, Cambridge University Press 2004) p. 77-84.

<sup>22</sup> 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).

<sup>23</sup> But see already S. Duke, 'The Linchpin COPS', 2005/W/05 *EIPA Working Paper*, Maastricht 2005.

<sup>24</sup> See also S. Duke and S. Vanhoonacker, *supra* n. 13 at p. 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) p. 634-651.

<sup>25</sup> A.E. Juncos and Chr. Reynolds, 'The Political and Security Committee: Governing in the Shadow', *EFA Rev.* (2007) p. 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 Müller-Brandeck-Bocquet, *supra* n. 18 at p. 261. Cf. also E. Regelsberger, 'The EU as an Actor in Foreign and Security Policy: Some Key Features of CFSP in an Historical perspective', 4 *CFSP Forum* (2007) p. 1-8 at p. 3.

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 the national cannot be easily separated from the international, nor the self from the other.<sup>26</sup>

This is also reflected in the voting behaviour in the 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 the 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 more free to negotiate towards a result that is acceptable for everyone and takes positions of smaller member states into account as far as possible.<sup>27</sup>

A particular 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.<sup>28</sup> 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.<sup>29</sup> With the increasing interplay between first and second pillar issues at

<sup>26</sup> Juncos and Reynolds, *supra* n. 25 at p. 145.

<sup>27</sup> *Ibid.*, at p. 141.

<sup>28</sup> Cf. A.E. Juncos and K. Pomorska, 'Playing the Brussels Game: Strategic Socialisation in the CFSP Council Working Groups', *European Integration Online Papers* (2006).

<sup>29</sup> Duke and Vanhoonaeker, *supra* n. 13 at p. 169-172.

all different levels, COREPER in particular has proven to play a key role in combining – and where necessary – delimiting cross-pillar issues.<sup>30</sup>

Final decisions, however, are adopted by the (General Affairs and External Relations) Council (Article 13, para. 3 EU), on the basis of general guidelines defined by the European Council. This ‘GEARC’ usually meets on a monthly 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 innovations 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’.<sup>31</sup>

The introduction of the possibility of qualified majority voting (Article 23, para. 2 EU) 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, para. 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. Theoretically, it is easier for a Council President to conclude on the adoption of a decision under Community law than under CFSP as 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. However, 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. The members of those bodies have a tendency to work towards a compromise, rather than to isolate themselves by maintaining strong national positions.<sup>32</sup> In addition, the distinction between Community and CFSP issues has become less clearly visible on the Council’s agenda. In many cases it is up to the legal service before, during and after Council meetings 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 en-

<sup>30</sup> *See* Müller-Brandeck-Bocquet, *supra* n. 18 at p. 265.

<sup>31</sup> *Ibid.*, at p. 260.

<sup>32</sup> *Cf. ibid.*, at p. 268.

hanced co-operation. Constructive abstention (Article 23, para. 1 EU) 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.' It is this latter part that may have formed the reason for the adjective 'constructive': the procedure not only allows the Council to adopt the decision, but it may also not be ignored by those member states that did not vote in favour. Similarly, enhanced co-operation (Articles 27a-e EU) 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. While 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 co-operation 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 the one of the Secretary General of the (entire) European Union. Although Article 26 EU 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 Commissioner for External Relations and to make full use of his competences at the same time.<sup>33</sup> On many occasions – as part of the new Troika, but increasingly on its own – member states allowed the HR to represent the Union externally.<sup>34</sup> The positive evaluation of the position of the HR most certainly lies at the basis of a strengthening of his competences by 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 (Articles 18 and 27 new TEU). Particularly striking will

<sup>33</sup> See on the close co-operation between the HR and the Commission, Duke, *supra* n. 14 at p. 13-15.

<sup>34</sup> Cf. Spence, *supra* n. 12 at p. 368.

also be the HR's competence to defend Union positions in the United Nations Security Council on behalf of its EU members (Article 34, para. 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, para. 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 the present contribution is the fact that the HR shall be one of the vice-Presidents of the Commission (Article 17, para. 4), in which position he will be able to combine CFSP and non-CFSP external relations. In terms of institutional and normative convergence, this is certainly one of the most innovating parts of the Lisbon Treaty.

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 not only from the Council Secretariat and the member states, but also from 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 policy' and a 'major policy entrepreneur'.<sup>35</sup> 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 Watchlist 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.'<sup>36</sup> Indeed, and more in general, it has been observed that 'the Council Secretariat is no longer just a conference centre, a note-taker and a legal advisor; it is also a political counsellor to the presidency and an honest broker in the negotiations between member states.'<sup>37</sup> In relation to CFSP in particular, over

<sup>35</sup> S. Duke, *supra* n. 14 at p. 16; and Duke and Vanhoonacker, *supra* n. 13, at p. 168 and Spence, *supra* n. 12 at p. 369 respectively.

<sup>36</sup> D. Beach, 'The Unseen Hand in Treaty Reform Negotiations: The Role and Influence of the Council Secretariat', 3 *Journal of European Public Policy* (2004) p. 408-439 at 409-411. Cf. Spence, *supra* n. 12 at p. 368 and Duke and Vanhoonacker, *supra* n. 13 at p.176.

<sup>37</sup> H. Dijkstra, 'The Council Secretariat's Role in the Common Foreign and Security Policy', *European Foreign Affairs Review* (2008) p. 149-166 at p. 149. In general on the functions of the secretariat: T. Christiansen, 'Out of the Shadows: The General Secretariat of the Council of Ministers', *Journal of Legislative Studies* (2002) p. 80-97.

the past ten years the member states allowed the Secretariat to speak out on both political and military issues and, thereby, to play a role in policy formation.<sup>38</sup> 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 institutionalisation 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,<sup>39</sup> the growth of the EP's role in relation to CFSP is an important development. Although formal influence of the EP is limited to being 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.<sup>40</sup> 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 issues and the debate on an annual report on CFSP),<sup>41</sup> the emergence of more cross-pillar issues (e.g., related to the anti-terrorism measures) allowed the EP to become more active in CFSP. According to one study, approximately one-third of the reports adopted by the EP (and usually initiated by its Committee of Foreign Affairs – AFET) is related more or less directly to CFSP issues.<sup>42</sup> 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 EP claimed the right to be involved in the appointment of the High Representative and of special represen-

<sup>38</sup> T. Christiansen and S. Vanhoonacker, 'At a Critical Juncture? Change and Continuity in the Institutional Development of the Council Secretariat', *West European Politics* (2008) p. 751-770.

<sup>39</sup> A. Mauer, D. Kietz and Chr. Völkel, 'Interinstitutional Agreements in the CFSP: Parliamentarization through the Back Door?', *EEA Rev.* (2005) p. 175-195.

<sup>40</sup> Cf. also Th. Frish, 'Der Hohe Vertreter für die GASP. Aufgaben und erste Schritte', SWP-AP 3136 (Ebenhausen, 2000) p. 25-26.

<sup>41</sup> See for a recent overview D. Thym, 'Beyond Parliament's Reach The Role of the European Parliament in the CFSP', *EEA Rev.* (2006) p. 109-127.

<sup>42</sup> U. Diedrichs, 'The European Parliament in CFSP: More than a Marginal Player?', 2 *The International Spectator* (2004) p. 31-46 at p. 36.

tatives.<sup>43</sup> In addition, and irrespective of its meagre formal treaty competences, the EP has used the instrument of Interinstitutional Agreements to increase its powers *vis-à-vis* the Council and the Commission. All in all, this allows us to agree with the conclusion that '[i]n general, the EP 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.'<sup>44</sup> Although its position under CFSP cannot be compared to the role of co-legislator that it enjoys in almost all parts of the Community Treaty, the conclusion seems justified that CFSP issues are not immune to Parliamentary scrutiny and that the EP 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 the member states. An active role of the EP could diminish the difference that still exists compared to parliamentary oversight of Community policies with a similar high public salience.<sup>45</sup>

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 and the emergence of a new institutional set-up, in which different Union bodies are all part of a complex web in which decisions are being taken. Just as in the Community pillar, CFSP decision-making primarily takes place in Brussels, where organs with increasing autonomy – both in the preparatory and the executive phase – play a key role in decision-making.<sup>46</sup> 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

<sup>43</sup> Rules of Procedure of the European Parliament, 16<sup>th</sup> edn., June 2007, Rules 85 and 86.

<sup>44</sup> Mauer, Kietz and Völkel, *supra* n. 39 at p. 194, who even argue that '[t]he EP 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'.

<sup>45</sup> See K. Oppermann and A. Höse, 'Public Opinion and the Development of the European Security and Defence Policy', *EFA Rev.* (2007) p. 149-167 at p. 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.'

<sup>46</sup> See more in general S. Duke, 'Peculiarities in the Institutionalisation of CFSP and ESDP', in S. Blockmans (ed.), *The European Union and Crisis Management: Policy and Legal Aspects* (The Hague, T.M.C. Asser Press 2008) p. 75-105.

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.<sup>47</sup>

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.

### 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 (Articles 14 and 15 EU). The Lisbon Treaty will rename Joint Actions and Common Positions as ‘Decisions’, but this is merely a change of title. While 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 (OMC) is being applied in a vast number of fields.<sup>48</sup> 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 EU).<sup>49</sup> There, the conclusion was drawn that even under CFSP member states will have to take Union activities into account when they engage in relations with other (Member) States. International agreements concluded by EU member states *inter se*, or with third states, can be left out of the systematic CFSP co-operation *only if* the content of such agreements is of purely bilateral interest to the parties, and when no general (read: EU)

<sup>47</sup> Duke and Vanhoonaeker, *supra* n. 13 at p. 176.

<sup>48</sup> Including the information society, research policy, enterprise, pensions, education and vocational training, combating social exclusion and sustainable development. See D. Trubek, P. Cottrel and M. Nance, ‘Soft Law’, ‘Hard Law’, and *European Integration: Toward a Theory of Hybridity*, Jean Monnet Working Paper 02/05, 19. See on the use of soft law instruments in Community law also L. Senden, *Soft Law in European Community Law* (Oxford, Hart Publishing 2004). See on the OMC for instance the special issue of 2 *European Journal of Public Policy* (2004). Cf. also the Commission’s White Paper on European Governance, COM(2001) 428 final, Brussels, 27 July 2001.

<sup>49</sup> 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* (Oxford, Hart Publishing 2008) p. 79–121. Parts of this contribution have been based on this publication.

interest is at stake. In view of the broad scope of CFSP envisaged in Articles 11 and 12 EU, 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. This suggestion is supported by the loyalty that member states must demonstrate towards the Union's CFSP, as stipulated in Article 11(2) EU and which will be somewhat strengthened by the Lisbon Treaty.<sup>50</sup> 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 EU, 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, however, the language used by the relevant Treaty provisions nonetheless suggests that those CFSP acts, once adopted,<sup>51</sup> do limit the freedom of member states in their individual policies.<sup>52</sup> In particular, Joint Actions 'shall commit the member states in the positions they adopt and in the conduct of their activity' (Article 14, para. 3) and 'member states shall ensure that their national policies conform to the common positions' (Article 15).<sup>53</sup> Hence, member states are not allowed to adopt positions or otherwise 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

<sup>50</sup> On the possible influence of the general loyalty obligation in Art. 10 EC on CFSP obligations also Hillion and Wessel, *supra* n. 49. See also *infra*.

<sup>51</sup> 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 Art. 17 of the Council Rules of Procedure; *OJ* [2006] L 285.

<sup>52</sup> On CFSP Joint Actions specifically, see A. Dashwood, 'The Law and Practice of CFSP Joint Actions', in Cremona and de Witte, *supra* n. 3 at p. 53-77; 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 p. 475; P. Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing 2006) p. 399 et seq.

<sup>53</sup> In the same vein, EU Common Strategies, envisaged in Art. 13 EU, 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.

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 national decisions by member states or agreements concluded by them directly violate core parts of CFSP decisions, or when existing decisions or 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.<sup>54</sup>

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:

As 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) EU [...]).<sup>55</sup>

Indeed, both the legal nature and the normative content of CFSP decisions may form an obligation for member states to allow for direct effect and primacy in their national legal order in specific cases.<sup>56</sup> Once individuals are confronted with rights or obligations on the basis of CFSP decisions that are 'sufficiently clear and unconditional' it may become difficult for national courts to simply ignore an important EU decision simply because its status has not been regulated in as much detail as Community instruments. In a similar vein and again in very specific situations, national courts may be forced to give priority to EU decisions in order not to affect the rights of individuals (or companies). In the absence of any case-law

<sup>54</sup> 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.

<sup>55</sup> Gosálbo Bono, *supra* n. 8 at p. 378.

<sup>56</sup> Irrespective of the fact that the original provision of the Constitutional Treaty concerning the primacy of (all) EU law (Art. 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.

of the Court there may be a difference between monist and dualist states in this sense. However, as we will see below, the Court has started to show a willingness to annul non-Community acts in view of their place and role in the EU legal order and more far-reaching judgments related to the status of CFSP decisions in the national legal orders are not at all incomprehensible.<sup>57</sup> The point made here is that the development of the Union legal order has an impact on the latent primacy and direct effect of CFSP norms, in the sense that their connection to other Union norms may force national Courts and legislators to take them into account.

This 'latent' legal nature may become more manifest after the entry into force of the new EU Treaty, which explicitly stresses the binding nature of CFSP provisions at the national level by strengthening the loyalty obligation in new Article 24, para. 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.*' Although in relation to Community law, the Court has continuously held that obligations for member states imply an active role of national legislative as well as judicial bodies.<sup>58</sup> In addition, and at the level of the EU, 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. At the same time, a clear distinction with other policy areas will be maintained, as (new) Article 24, para. 1 EU excludes 'the adoption of legislative acts', which in turn excludes the use of the legislative procedures (the 'Community method') in CFSP matters. The impact of this explicit rule on the future legal assessment of CFSP norms is not yet clear as the qualification relates primarily to the exclusion of certain decision-making procedures and the Court may very well develop its own opinion on the nature of CFSP norms.

A first step in that regard was already taken in the *Segi* case in 2007, when the Court for the first time confirmed the binding nature of Common Positions:

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

<sup>57</sup> Nevertheless, 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', *CML Rev* (2005) p. 355 at p. 363 and 379; as well as his 'The EU Constitution: What will Really Change?', *Cambridge Yearbook of European Legal Studies* (2005) p. 33 at p. 34. See also Editorial Comment, *CMLR*, *supra* n. 2 at p. 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.

<sup>58</sup> It is admitted that in cases such as *Simmenthal* (Case 106/77 [1978] *ECR* 629) the Court took the special nature of Community law as a starting point.

Member States are to take all appropriate measures, whether general or particular to ensure fulfilment of their obligations under European Union law.<sup>59</sup>

This interpretation certainly underlines the notion that the non-Community instruments result in obligations for the member states and that these obligations are based on ‘European *Union* law’. The case primarily concerned the third pillar, but a transposition of the above findings to the second pillar may be legitimate. 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) EU. 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*).

Support for this view may also be found in the more recent *ECOWAS* case.<sup>60</sup> It is interesting to note that in that case the Commission refers to a CFSP Joint Action as ‘an act of general legislative nature’.<sup>61</sup> Although this may very well have been a pragmatic argument rather than a general qualification by the Commission of the legal nature of CFSP acts, the Court used similar wordings in its judgment. *ECOWAS* was about the delimitation of competences between the Union and the Community and the Court held 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’.<sup>62</sup> Obviously, in the eyes of the Court, CFSP measures can have legal effects and this had not been established this clearly in earlier judgments.<sup>63</sup>

The recent-case-law of the Court also revealed another dimension. 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, 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

<sup>59</sup> Case C-355/04 P, *Segi and Others v. Council* [2007] ECR I-1657, para. 52.

<sup>60</sup> Case C-91/05, *Commission v. Council*, Judgment of 20 May 2008 (a.k.a. ‘Small Arms and Light Weapons’). *See also infra*.

<sup>61</sup> *See* QJ C 115/10, 14.5.2005.

<sup>62</sup> Para. 60. *See also* para. 33, where the Court holds that it is its ‘task [...] to ensure that acts [...] which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the EC Treaty on the Community’ (emphasis added).

<sup>63</sup> The question remains how the Court will deal with this after the entry into force of the Lisbon Treaty. After all, as we have seen the new TEU Art. 24, para. 1 explicitly excludes ‘the adoption of legislative acts’ in the CFSP area. An obvious solution may be that even non-legislative acts may have legal effects.

recent cases, in which the connection between the pillars proved to be crucial for the interpretation.

### JUDICIAL SCRUTINY: 'INTEGRATED BUT SEPARATE LEGAL ORDERS'<sup>64</sup>

From the outset the Community was a legal order dominated and in many aspects shaped by the ECJ, which asserted strongly its role as a constitutional court.<sup>65</sup> Although a role of the Court in CFSP continues to be largely excluded, case-law over the past few years seems to indicate a constitutional role of the Court beyond the Community.<sup>66</sup> 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.<sup>67</sup> In the Lisbon Treaty the limited role of the Court in relation to CFSP has been maintained. An exception has been formulated for review of the legality of foreign policy sanction measures against natural or legal persons.<sup>68</sup>

The Court's starting point has been Article 47 EU, which calls for the preservation of the *acquis communautaire*,<sup>69</sup> 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.'<sup>70</sup> Even before the establish-

<sup>64</sup> Case T-306/01, *Abmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, para. 156.

<sup>65</sup> Denza, *supra* n. 9 at p. 16.

<sup>66</sup> See more specifically on this point also D.M. Curtin and R.A. Wessel, 'Rechtseenheid van de Europese Unie? De rol van het Hof van Justitie als constitutionele rechter' [Legal Unity in the European Union: The Court of Justice as a Constitutional Court], 10 *SEW Tijdschrift voor Europees en economisch recht* (2008) p. 371-378.

<sup>67</sup> See <<http://curia.europa.eu/fr/content/outils/tm.pdf>>; the *Yusuf* and *Kadi* cases discussed below form an example.

<sup>68</sup> See new Art. 275 TFEU. Another exception is the (already existing) possibility of the Court to rule on the borderline between foreign policy and other measures (Art. 40 new TEU). At the same time the new provision on personal data protection in CFSP matters is excluded of the Court's jurisdiction (Art. 24). See also A. Hinarejos, 'Judicial Control of CFSP in the Constitution: A Cherry Worth Picking?', in P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2006* (Oxford, Oxford University Press 2007) p. 363.

<sup>69</sup> See Art. 2 EU. 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) p. 153; or C. Curti Gialdino, 'Some Reflections of the *Acquis Communautaire*', *CMLR* (2005) p. 1089.

<sup>70</sup> See recently on the role played by Art. 47 R.H. van Ooik, 'Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences', *EuConst* (2008) p. 399-419; and A. Dashwood, 'Article 47 TEU and the Relationship between First and Second Pillar Competences', in A. Dashwood and M. Maresceau (eds.), *The Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge, Cambridge University Press 2008) p. 70-103.

ment of the Union – in relation to the predecessor of CFSP, the European political co-operation – 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.’<sup>71</sup> This was confirmed by the Court when it had a chance to interpret Article 47 EU in a number of third pillar cases, starting with *Airport Transit Visa*. In this case 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 EU ‘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’.<sup>72</sup> In the event, the judges found that the Council was justified in choosing Title VI EU 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 *Environmental Criminal Law*,<sup>73</sup> 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.<sup>74</sup>

Perhaps even more interesting, in view of the argument being pursued in this contribution, is the fact that – irrespective of the main purpose of Article 47 – the Court has decided that there may be situations in which the Community encroaches upon competences of the *Union* in other pillars. In the *PNR* case, the Court held that the EU-US agreement on Passenger Name Records should not have been based on Article 95 EC (internal market) but on the third pillar.<sup>75</sup> Hence, in determining the ‘centre of gravity’ of a Community instrument, the Court is no longer restricted to the legal bases offered by the Community treaty itself, but it is compelled to use the overall Union legal order as the interpretative framework.

<sup>71</sup> Case C-124/95, *Centro-Com* [1997] ECR I-81, para. 41.

<sup>72</sup> Case C-170/96, *Commission v. Council* [1998] ECR I-2763, paras. 15-16.

<sup>73</sup> Case C-176/03, *Commission v. Council* (*‘Environmental Criminal Law’*) [2005] ECR I-7879.

<sup>74</sup> This was not the case in a similar situation in the *Ship-Source Pollution* case, where the Framework Decision prescribed the type and level of the criminal sanctions, which went beyond the scope of Art. 175 EC; Case C-440/05 *Commission v. Council* [2007] ECR I-9097.

<sup>75</sup> Joined Cases C-317/0 and C-318/04 *European Parliament v. Council* [2006] ECR I-4721.

On 21 February 2005 this was confirmed in relation to CFSP as well. In the *ECOWAS* case (*supra*) the Commission initiated proceedings against two CFSP decisions adopted by the Council, a Joint Action on the Union's contribution to combating the destabilising 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 European Union contribution to the West African organisation ECOWAS.<sup>76</sup> 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.<sup>77</sup> 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 co-operation measures which would lead to disregarding the distribution of competences in the framework of the pillar architecture of the European Union' (paras. 169-170).<sup>78</sup> In his opinion 'the purpose of the contested decision [combating the proliferation of small arms] is, at least mainly, of a security nature.' (para. 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 ruled 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 co-operation policy' (para. 88). What is important in the context of this contribution is that the Court points to the interrelationship between instruments in different pillars and even to the possible need to implement CFSP instruments through Community acts.<sup>79</sup> The outcome depended on an assessment of the facts (devel-

<sup>76</sup> Case C-91/05, *supra* n. 60.

<sup>77</sup> 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.

<sup>78</sup> Opinion of AG Mengozzi in Case C-91/05, 19 Sept. 2007.

<sup>79</sup> More extensively: Van Ooik, *supra* n. 70, as well as C. Hillion and R.A. Wessel, 'Competence Distribution in EU External Relations after *ECOWAS*: Clarification of Continued Fuzziness?', *CMLR* (2009) p. 551-586; and F. Hoffmeister, 'Entwicklungszusammenarbeit und andere Politikbereiche', *Europarecht*, Beiheft 2 (2008) p. 55-101. See earlier R. Baratta, 'Overlaps between European Commu-

opment co-operation or security policy), which lead to a division of competences on the basis of Union law.

In its role as a ‘constitutional court’, the ECJ thus adopts a holistic perspective on the Union legal order,<sup>80</sup> which is also revealed in the decision of the Court to actually annul a non-Community act. The interpretation of the CFSP Common Position and of other CFSP Decisions played an important part in the Court’s judgment. The Court could only come to a final judgment by taking 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. This is not to say that *ECOWAS* opened the door to a more general (Article 230 EC) jurisdiction of the Court in pure CFSP matters.<sup>81</sup> Recent case-law on sanctions against individuals in the fight against terrorism confirmed that no legal basis exists for the Court to annul CFSP Common Positions other than on the basis of Article 47 EU. For instance, 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.<sup>82</sup>

A new light was shed on the connection between the different part of the Union by 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.<sup>83</sup>

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

nity 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 p. 51, who suggested that the Court could also rule on the ‘irrelevance or inefficacy of such an act in the Community order’.

<sup>80</sup> See also Curtin and Wessel, *supra* n. 66. In that respect it is also interesting to note that the post Lisbon Art. 40 TEU takes a more balanced stance by not only protecting the *acquis communautaire*, but also the CFSP *acquis*.

<sup>81</sup> See M.-G. Garbagnati Ketvel, ‘The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy’, *ICLQ* (2006) p. 77-120 at p. 90: ‘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’.

<sup>82</sup> Cases T-47/03 *Sison* [2003] *ECRI*-2047 and T-327-03 *Al-Aqsa*. See earlier also Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006] *ECR* II- 4665.

<sup>83</sup> Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] *ECR* II-3353; and T-315/01, *Yassin Abdullab Kadi v. Council and Commission*, 21 Sept. 2005 *ECR* II-3649; (para. 156 *Yusuf* case).

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 Community pillar after the Council has adopted a common position or a joint action under the CFSP.<sup>84</sup>

This is a clear example of an explicit subordination of the Community to CFSP decision-making and an indication of the new institutional and normative setting in which the Court operates.<sup>85</sup> At the same time, it also 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.<sup>86</sup> This reveals a certain willingness of the Court to at least not ignore CFSP when there is a relation with Community law.

In the absence of an appropriate procedure, there is no legal basis for institutions, member states or individuals to start proceedings at the level of the EU once the actions by member states are believed to conflict with established Union policies.<sup>87</sup> This leaves open the question of whether *national* courts can play a role. Do they 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.<sup>88</sup> But does this imply a complete freedom of national courts to judge the validity of CFSP norms? Recently, Van Ooik argued that in view of the purpose served by both Article 230 and Article 234 EC

<sup>84</sup> Ibid., para. 161 *Yusuf* case. Cf. also P. Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit', *EUConst* (2007) p. 183.

<sup>85</sup> Nevertheless, in the appeals judgment in *Kadi*, the Court made clear that the objectives of the Union cannot serve as a basis for widening the scope of Community powers. Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 Sept. 2008, para. 203. See for a recent analysis also S. Griller, 'International Law, Human Rights and the European Community's Autonomous legal Order: Notes on the European Court of Justice Decision in *Kadi*', *EUConst* (2008) p. 528-553; and the special forum 'Perspectives on the *Kadi* case', 2 *International Organizations Law Review* (2008).

<sup>86</sup> 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.

<sup>87</sup> Art. 46 EU excludes Title V from the Court's 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 Modjabadines du peuple d'Iran*, judgment of 12 Dec. 2006 (para. 49); C-354/04 P *Gestoras Pro Amnistia and Others v. Council*, judgment of 27 Feb. 2007 (para. 50).

<sup>88</sup> Case 314/85 [1987] *ECR* 4199.

in this respect, 'national courts may, or even must, ask for a preliminary ruling on the validity of second- and third-pillar acts, at least if the national judge questions whether the EC Treaty should have been used as the legal basis for the second- or third-pillar act concerned.'<sup>89</sup> Indeed, this latter point may offer a way to national courts to raise the issue (keeping in mind Article 47 EU) even in the absence of a direct jurisdiction of the Court in CFSP matters. The question, however, remains in which type of situations national courts may be confronted with these type of questions.

With regard to the possibility of using the preliminary procedure, the judgment by the Court in *Segi* – referred to above – is quite revealing. This judgment concerns an appeal by Segi (and in a similar case by another Basque organisation, Gestoras Pro Amnistía) to set aside an earlier order of the Court of First Instance.<sup>90</sup> 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 EU) and the third pillar (Article 34 EU). Although Article 35(1) EU 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 organisations were placed on a list with terrorist organisations 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 organisations. The Court continued:

As a result, it has 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.<sup>91</sup>

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

<sup>89</sup> Van Ooik, *supra* n. 70, p. 405-406. Earlier in the same vein: Curtin and Dekker (1999), *supra* n. 4 at p. 123.

<sup>90</sup> *Segi* case, *supra* n. 59.

<sup>91</sup> *Ibid.*, paras. 54-55.

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, which seems to render a relation to a norm in another Union-pillar necessary for the Court to be able to deal with those types of acts.

As illustrated by the earlier *Pupino* judgment, the Court seeks inspiration in its interpretation of EC provisions to interpret similar EU provisions.<sup>92</sup> 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 co-operation, 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.<sup>93</sup>

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 co-operation binds the member states in relation to the Union, 'in order to contribute effectively to the pursuit of the Union's objectives.'<sup>94</sup> The Court thereby suggested that the principle of loyalty has a trans-pillar definition and application.<sup>95</sup> 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.<sup>96</sup> The Court reached this conclusions by looking at the similarities between Framework Decisions and Di-

<sup>92</sup> Case C-105/03 *Pupino* [2005] ECR I-5285, paras. 19, 21 and 28 (similarity between the system established by Art. 234 EC and that of Art. 35 EU); paras. 33-34 (similarity in the wording of Art. 249 and Art. 34(2)(b)).

<sup>93</sup> *Ibid.*, para. 42. Emphasis added.

<sup>94</sup> *Ibid.*, para. 36.

<sup>95</sup> Further on the *Pupino* ruling: E. Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*', *EuConst.* (2007) p. 5-24.

<sup>96</sup> See B. Kurcz and A. Łazowski, 'Two Sides of the Same Coin? Framework Decisions and Directives Compared', in P. Eeckhout and T. Tridimas (eds.), *supra* n. 68, p. 177-203 at 179. 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) p. 74.

rectives. Such a comparison would be more difficult with regard to CFSP instruments.

In all cases the solution seems the same: the Court either interprets the provisions in either pillar in the light of overall Union law (*Yusuf/Kadi*, *ECOWAS*, *Environmental Criminal Law* or *PNR*), 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.

### CONCLUSION: A NEW INSTITUTIONAL AND NORMATIVE SITUATION

The question raised in this contribution was whether the evolution of the European Union's legal order resulted in a new institutional and normative situation in which the Union's pillars can no longer be approached in isolation. Over the past fifteen years we have witnessed a development of the Union that was more based on – what Germans would refer to as – 'Eigendynamik', than on deliberate choices made in treaties. After all, many treaty innovations to improve the functioning of CFSP (including the use of QMV, the possibility of constructive abstention or enhanced co-operation) have barely been used in practice, 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 Herrmann 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.'<sup>97</sup> Although this is a truism, it has been possible to point to an evolution of the Union's legal order which has led to a new institutional and normative setting in which the role of the institutions, the decision-making procedures, the legal nature of the instruments, and the application of key principles (in particular direct effect, primacy and loyalty)<sup>98</sup> have an effect which may go beyond the strict legal regime to which they originally belonged. The European Union is not just an umbrella to provide shelter to distinct supranational and intergovernmental policies; it has developed into an interpretative framework which has made it impossible for each pillar to be approached in isolation. The main conclusion could be that the Union's pillars are still distinct but

<sup>97</sup> Herrmann, *supra* n. 3 at p. 18.

<sup>98</sup> See also J. Bast, 'The Constitutional Treaty as a Reflexive Constitution', *German Law Journal* (2005) p. 1433-1452.

inseparable. Whatever happens in either one of them, has an impact on developments and on the interpretation of norms in the other.

With regard to CFSP, the absence of a ‘Communitarisation’ 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 fully-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.<sup>99</sup> In the process of decision-making, the role of the administrative level in CFSP, in particular concentrated around the Council, proves to be essential. While there is still an obvious influence from the capitals, in particular through the working parties and the Policy Unit, the ‘Brusselization’ makes clear that it is the European Union (rather than the states in an intergovernmental co-operation) taking the decisions, through fixed decision-making procedures on the basis of a largely institutionalised process.<sup>100</sup> With regard to the area of police and judicial co-operation (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, but 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 and to annul CFSP acts on the basis of Article 47 EU.

One could argue that it is the ‘constitutional architecture of the pillars’ referred to by the Court that forms the basis of a new setting in which norms in different pillars cannot be interpreted within the safe boundaries of their own legal subsystem. At the same time this is – what Bast coined – an ‘incomplete constitutional unity’: there is still both formal and substantive incoherence as principles (including the most important ones: direct effect and primacy) are not equally applicable in all parts of the Union and the institutional balance differs in the distinct policy areas.<sup>101</sup> The Lisbon Treaty will certainly give a new impetus to the further development of the Union’s legal order, but as we have seen, this order has a strong tendency to develop itself, irrespective of treaty arrangements.



<sup>99</sup> Gosalbo Bono, *supra* n. 8 at p. 393.

<sup>100</sup> Cf. Duke and Vanhoonaeker, *supra* n. 13 at p. 180: ‘Although civil servants in the national capitals still are very important, the centre of gravity is clearly moving to Brussels’.

<sup>101</sup> Bast, *supra* n. 98 at p. 1438.