

4

Restraining External Competences of EU Member States under CFSP

CHRISTOPHE HILLION AND RAMSES WESSEL*

‘On security matters, the Treaty allocates sovereignty to member states.
But that sovereignty has to be compatible with our general interests in
security.’

Javier Solana, 29 March 2007, European Parliament, EU Observer, 29
March 2007.

I. INTRODUCTION

WHILE THE IMPACT of Community policies on Member States’ external powers has been extensively studied,¹ the effect(s) of another important area of the Union’s external action, namely the foreign and security policy, has hitherto been virtually neglected. One reason for this oversight could be that many Member States originally conceived the Common Foreign and Security Policy (CFSP) as an *intergovernmental* form of cooperation which, as such, would do no harm to States’ freedom to conduct their own foreign policy in general, and to their sovereign powers to conclude international agreements in particular.

On the occasion of the 15th anniversary of the Treaty on European Union (TEU), there are at least two reasons for reconsidering this basic proposition. First, it may be argued that CFSP has, since its inception,

* Christophe Hillion is Professor of European Law at the University of Leiden (thanks to Anne Myrjord for all her suggestions and support); Ramses A Wessel is Professor of the Law of the EU and other International Organisations at the University of Twente, the Netherlands.

¹ See P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, Oxford University Press, 2004); P Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing Ltd, 2006); A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000); M Dony and JV Louis, *Commentaire J Mégret: Le droit de la CE et de l’Union européenne—Relations extérieures*, vol 12 (Brussels, éd. de l’Université de Bruxelles, 2005).

developed into a set of procedural and substantive notions that come increasingly close to those which characterise the Community legal order. Second, it has become clear over the past 15 years that rather than being completely separate, the EC and CFSP interact within a unitary EU legal order.²

This Chapter envisages the impact of the CFSP normative framework on Member States' freedom to conclude international agreements, either *inter se* or with third parties. A first part examines the potential restraints that are based on CFSP primary and secondary norms. The second part analyses the nature of the EU competence to conclude international agreements in the field of CFSP, and the effects such EU agreements may have on Member States' foreign policy powers. The third part studies the possible influence that principles of the EU legal order more generally may have on the CFSP normative content, and the latter's ability to constrain Member States' foreign policy power.³

II. CFSP NORMS AS RESTRAINTS ON MEMBER STATES' EXTERNAL COMPETENCES

Possible restraints on Member States' freedom to conclude international agreements in CFSP fields can stem from CFSP treaty norms (A) and CFSP secondary measures (B).⁴ The degree of restraining effect of those CFSP norms is also determined by the potential role that the judiciary may play in ensuring that those norms are enforced (C), as well as the interpretation given to the specific CFSP principle of loyal cooperation (D).

² See also R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 *CML Rev* 337, who refers to 'progressive supranationalism' in relation to the development of CFSP (at 349); and P Koutrakos, *Trade, Foreign Policy & Defence in EU Constitutional Law* (Oxford, Hart Publishing, 2001); E Denza, *The Intergovernmental Pillars of the European Union* (New York, OUP, 2002); E Denza, 'Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-first Century* (Oxford, Hart Publishing, 2004) 259.

³ We will only occasionally refer to the Treaty of Lisbon, which is expected to enter into force in 2009. For an assessment of the impact of earlier, but on this terrain quite similar, Constitutional Treaty, see, eg, 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' (2003) 40 *CML Rev* 1347.

⁴ The question of whether a CFSP legal order exists will not be dealt with in this Chapter. On the basis of earlier research, we accept that CFSP norms are legal norms and that they can therefore be envisaged as such. See in this regard RA Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (The Hague, Kluwer Law International, 1999); MR Eaton, 'Common Foreign and Security Policy' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (London, Chancery Law Publishing, 1994) 221; F Terpan, *La Politique étrangère et de sécurité commune de l'Union européenne* (Brussels, Bruylant, 2003), and more recently Gosalbo Bono, above n 2, 367.

A. The Binding Nature of Primary CFSP Norms

In addressing the question of whether the CFSP *treaty* provisions may limit Member States' contractual competences, the cardinal CFSP obligation of 'systematic cooperation' falls to be examined. According to Article 16 TEU: 'Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that the Union's influence is exerted as effectively as possible by means of concerted and convergent action.'⁵

In principle, the scope of issues covered by the obligation of systematic co-operation is not subject to any limitation regarding time or space, as the provision talks of 'any matter of foreign and security policy [...]'. However, Article 16 immediately qualifies that obligation by adding the phrase '*of general interest*'. No further specification has been provided of what the notion of 'general interest' stands for in the context of CFSP.⁶ Hence, on the one hand, Member States are obliged to inform and consult one another whereas, on the other hand, they appear to enjoy individual discretion to decide whether or not a matter is of 'general interest'.⁷

Be that as it may, Member States nonetheless remain *obliged* to inform and consult one another whenever issues are of general interest, in the sense that they reach beyond national interests. Indeed, and as recalled by Article 12 TEU, the Member States have accepted this obligation as one of the means to achieve the CFSP objectives set out in Article 11 TEU.⁸ The binding nature of this obligation is indeed supported by the use of the word 'shall' in Article 16 TEU.⁹

Given the nature of the Member States' duty to inform and consult, it is unfortunate that the Treaty does not further articulate this obligation. In

⁵ There was an early consensus on the content of Art 16 (J2(2)) TEU; it was not modified throughout the negotiations of the TEU and already formed part of the Luxembourg Draft of 18 June 1991 (Art G of the CFSP provisions).

⁶ The legal nature of the CFSP obligations has been amply discussed ever since their creation but in view of the absence of judgments by the ECJ, conclusive answers have not yet been presented.

⁷ The principle of attributed competences as reflected in Art 5 TEC (but which is a general principle in international institutional law), implies that whatever has not been attributed to the organisation remains in the hands of the Member States.

⁸ Art 12 TEU reads:

The Union shall pursue the objectives set out in Article 11 by:

- defining the principles of and general guidelines for the common foreign and security policy;
- deciding on common strategies;
- adopting joint actions;
- adopting common positions;
- strengthening systematic cooperation between Member States in the conduct of policy.'

⁹ Cf also Gosalbo Bono, above n 2, 342, who argues that this language indeed imposes 'binding legal duties for the member States and the institutions and which contrast with the soft law nature of the EPC provisions in the SEA'.

82 *Christophe Hillion and Ramses Wessel*

order to establish its *content*, it is therefore necessary to turn to general descriptions of the obligation of consultation in international law. Broad definitions underline the duty not to adopt a position as long as the other partners have not been consulted.¹⁰ There appears to be no reason to assume that the notion of consultation used in Article 16 TEU deviates from these general definitions. EU Member States must therefore refrain from making national positions on CFSP issues of general interest public before having discussed them in the framework of the CFSP cooperation.

Hence, 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 proposition is further supported by the loyalty that Member States must demonstrate towards the Union's CFSP, as stipulated in Article 11(2) TEU. This provision notably states 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 obligations they encapsulate, ought to be understood in the light of that principle.¹¹

B. The Binding Nature of Secondary CFSP Norms

CFSP treaty norms are largely procedural in nature. Further restraints on Member States' external (or *inter se*) competences could depend on secondary CFSP measures. While the binding nature of common positions, joint actions (JAs) or other decisions is only marginally dealt with in the Treaty,¹² the language used by the relevant Treaty provisions nonetheless

¹⁰ Cf Th Jürgens, *Die gemeinsame Europäische Aussen- und Sicherheitspolitik* (Köln, Carl Heymanns Verlag, 1994) 210: 'das Gebot, von der endgültigen Festlegung einer eigenen Position Abstand zu nehmen, solange nicht die Anhörung des Konsultationspartners stattgefunden hat'.

¹¹ The principle of loyal cooperation is examined in detail below under section 2.D.

¹² No interpretation may be expected from the Court of Justice given that Art 46 TEU excludes Title V from its jurisdiction; as confirmed by, eg, 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); Case C-354/04 P *Gestoras Pro Amnistía and Others v Council*, judgment of 27 February 2007 (para 50).

Restraining External Competences of EU Member States 83

suggests that those CFSP acts, once adopted,¹³ do limit the freedom of Member States in their individual policies.¹⁴ In particular, joint actions ‘shall commit the Member States in the positions they adopt and in the conduct of their activity’ (Article 14(3)) and ‘Member States shall ensure that their national policies conform to the common positions’ (Article 15).¹⁵

Hence, Member States are not allowed to adopt positions or otherwise to act contrary to JAs. This was already clear in the first Luxembourg Draft, which stipulated that ‘each Member State shall be bound by the joint line of action in the conduct of its international activity’.¹⁶ It is indeed notable that the vague notion of ‘joint line of action’ was replaced by that of ‘joint action’, which more clearly entails a concrete decision by the Council. Moreover, the adjective ‘international’ before ‘activity’ was removed in the final text, thereby suggesting that *all* Member States’ activities should be aligned with the JAs. The reason may have been that the word ‘international’ gave the impression that Member States’ activities were relevant only where relations with third states were involved. This would have excluded relations *within* the Union. Arguably, such removal is an indication of Member States’ full awareness, at the time of the negotiations, of the binding nature of JAs. Indeed, some Member States’ insistence on unanimous voting provides additional evidence of such awareness.¹⁷

The nature of CFSP decisions as concrete norms of conduct, demanding a certain unconditional behaviour from the Member States, is typified by the strict ways in which exceptions to JAs are envisaged. A first possibility to depart from adopted JAs is offered by Article 14(2) TEU, which is

¹³ 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; [2002] OJ L/230/7.

¹⁴ On CFSP Joint Actions specifically, see A Dashwood, ‘The Law and Practice of CFSP Joint Actions’, ch 3, this volume; also: RA Wessel, *The European Union’s Foreign and Security Policy: a Legal Institutional Perspective* (Dordrecht, Martinus Nijhoff, 1999) 154; F Dehousse, ‘La politique étrangère et de sécurité commune’ in JV Louis and M Dony (eds), *Relations Extérieures—Commentaire J Mégret, Le droit de la CE et de l’Union européenne* (Brussels, Institut d’Etudes Européennes, 2005) 441, 475; P Koutrakos, above n 1, 399ff.

¹⁵ In the same vein, EU Common Strategies, envisaged in Art 13 TEU, bind not only the EU institutions but also the Member States. For instance the European Council 1999 CS 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; [1999] OJ L/331/1.

¹⁶ Draft Treaty on the Union from the Luxembourg Presidency, 18 June 1991, Article K in F Laursen and S Vanhoonacker, *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community* (Maastricht, EIPA, 2002) 401.

¹⁷ See, eg, the speech made by Prime Minister John Major in the House of Commons on 20 November 1991; *ibid*, 424.

84 *Christophe Hillion and Ramses Wessel*

similar to, but at the same time clearly departs from, the *rebus sic stantibus* rule as foreseen in Article 62 of the Vienna Convention on the Law of Treaties (VCLT).¹⁸ According to Article 14(2) TEU:

If there is a change in circumstances having a substantial effect on a question subject to Joint Action, the Council shall review the principles and objectives of that action and take the necessary decisions. As long as the Council has not acted, the Joint Action shall stand.¹⁹

Hence, even if the original circumstances constitute an essential determinant of the parties' consent to be bound, and even if the effect of the change is likely to transform radically the extent of obligations still to be performed, Member States may not invoke the change in circumstances as a ground for not complying with the particular decision. In that sense the CFSP provision cannot be regarded as a *clausula rebus sic stantibus*. Article 14(2) TEU provides that it is up to the Council to decide on possible modifications of the effect of the JA. Pending the Council's decision, no Member State is allowed to deviate from the JA.²⁰

On the other hand, the Treaty does not completely rule out that 'changes in the situation' may have an impact on the effects of the JA. Under certain strict conditions, such changes may constitute a valid reason for Member States to take 'necessary measures'. According to Article 14(6) TEU:

In cases of imperative need arising from changes in the situation and failing a Council decision, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of the Joint Action ...

In this case, '[t]he Member State concerned shall inform the Council immediately of any such measures' (paragraph 6, last sentence). While this provision comes again close to the *rebus sic stantibus* rule of Article 62 VCLT already mentioned, the criteria to be met are strict: (1) there must be a case of *imperative need*; (2) the situation must have been changed; (3) the Council has not (yet) come up with a decision to solve the matter; (4)

¹⁸ Vienna Convention on the Law of Treaties, Art 62, paras 1(a) and (b). The criteria to justifiably invoke this provision include: the fundamental change of circumstances was not foreseen by the parties and (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

¹⁹ This is a much stronger provision than the one originally foreseen by the Luxembourg Presidency: 'The Council shall adapt Joint Action to changes in the situation'. Luxembourg Draft, Article J, para 2, in Laursen and Vanhoonacker, above n 17, 410.

²⁰ After the entry into force of the treaty, Zoller pointed to an inherent practical danger of this procedure: 'Certes, en principe, l'État membre qui envisage de se désolidariser d'une action commune ne peut le faire qu'à défaut d'une décision du Conseil et en tenant compte des objectifs généraux de l'action commune. Mais les garde-fous semblent bien fragiles et il n'est pas exclu qu'en cas de crise grave, le Conseil soit paralysé et dans l'impossibilité de prendre une décision.' E Zoller, 'Titre V: Dispositions concernant une politique étrangère et de sécurité commune' in V Constantinesco *et al*, *Traité sur l'Union Européenne: Commentaire article par article* (Paris, Economica, 1995) 781, 794.

Restraining External Competences of EU Member States 85

measures will have to be *necessary*; and (5) must be taken as a *matter of urgency*; (6) the general objectives of the JA should be taken into consideration; and (7) the Council shall be immediately informed. It seems that the formulation of these explicit conditions purports to rule out any valid appeal to Article 62 VCLT to justify deviations from JA.

While in the case of common positions (generally used for measures lacking an operative dimension) the effects are not presented in detail by the Treaty makers, they too are meant to guide the behaviour of Member States in their external relations.²¹ It is clear, on the one hand, that a common position commands Member States *to do* something ('bring your conflicting national policies into line with the Common Position'), while, on the other hand, it requires them to *refrain* from doing something ('do not adopt any national positions that do not conform to the Common Position'). In this sense, the term 'position' is different from its usual meaning of (an attitude on) a state of affairs.²² The phrase 'shall ensure' in Article 15 TEU makes it clear that the provision does not simply envisage an inducement, but that it establishes a concrete obligation to create a particular situation or, what amounts to the same thing, to prevent a particular situation from occurring.²³

Given their characteristics, can CFSP secondary measures limit Member States' ability to engage in international agreements (either *inter se* or with third states), where the latter's content conflict with adopted CFSP decisions? In answering this question, 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

²¹ Another indication of the normative nature of Common Positions can be found in Art 19(1): 'Member States shall co-ordinate their action in international organizations and at international conferences. They shall uphold the Common Positions in such fora. In international organizations and at international conferences where not all Member States participate, those which do take part shall uphold the Common Positions.' This provision adds an external dimension to the basically internal obligations of the Member States.

²² Cf for the early discussion already I MacLeod, ID Hendry and S Hyett, *The External Relations of the European Communities: A Manual of Law and Practice* (Oxford, Clarendon Press, 1996) 416 and 421, who observe that this formal type of common position in practice has taken the form of a Council decision *sui generis* ('*Beschluß*' instead of an Art 249 EC '*Entscheidung*'). However, according to Zoller (above n 20, 788), a Common Position may still lack 'normative effects' when Member States have not expressed a clear consent. Nevertheless, she sees a Common Position as 'un acte juridique unilatéral qui leur [la Communauté (*sic!*) et ses États Membres] est imputable'.

²³ See in general on this issue, eg, O Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff Publishers, 1991) 98: 'There is an obvious difference between a text that uses language of obligation ('shall') in regard to future conduct and one that only "intends" or "plans" to take some action.'

States' agreements directly violate core parts of CFSP decisions, or when Member States' existing agreements clash with a subsequent CFSP decision.

In a recent article, Thym argued that the special nature of CFSP entails that Member States remain free to enter into international agreements—either *inter se* or with third states—even where these agreements conflict with their CFSP obligations, and that in the absence of a transfer of sovereign competences, the binding nature of Union norms should not easily be presumed.²⁴ While this conclusion would allegedly do justice to the intergovernmental dimension of CFSP, 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.²⁵

C. The Role of the Judiciary in enforcing CFSP Norms

In order to determine whether and how the CFSP primary or secondary norms can effectively restrict Member States in their external relations, the role of the judiciary falls to be examined. In this respect, it is well established that Article 46 TEU does not extend the jurisdiction of the European Court of Justice to the provisions of Title V of the TEU on CFSP. Nevertheless, Article 47 TEU offers the only basis for the Court to review CFSP acts, for the purposes of ascertaining that EU institutions have not acted in a way that would encroach upon the *acquis communautaire*.²⁶ Article 47 TEU provides that 'nothing in [the TEU] shall affect the Treaties

²⁴ D Thym, 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 904: 'Hiernach besitzen die Mitgliedstaaten die rechtliche Möglichkeit, innerstaatlich und im völkerrechtlichen Verkehr auch Regelungen zu treffen, die im Widerspruch zu ihren unionsrechtlichen Verpflichtungen stehen [...]'; cp K Lenaerts and T Corhaut, 'Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law' (2006) 31 *EL Rev* 287. See also below section III. B.

²⁵ In this regard, see M Brkan, 'Exploring the EU Competence in CFSP: Logic or Contradiction?' (2006) 2 *Croatian Yearbook of European Law and Policy* 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 fns 6 and 22.

²⁶ On the interpretation of the *acquis communautaire*, see, eg, 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 on the *Acquis Communautaire*' (1995) 32 *CML Rev* 1089.

Restraining External Competences of EU Member States 87

establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them'.²⁷

The Court's control, based on Article 47 TEU, was first exercised in the Airport Transit Visas case. *In casu*, the Commission sought the annulment, pursuant to Article 230(2) EC, of a Council Joint Action on airport transit arrangements, which was adopted under Title VI of the TEU. The Commission contended that the Council should have acted on the basis of the provisions of Title IV of the EC Treaty, and by not doing so, infringed the provisions of Article 47 TEU. In response, the Court held that it had jurisdiction 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'.²⁸ 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,²⁹ 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.

While the Airport Transit Visas and the Environmental Penalties cases concerned measures adopted on the basis of Title VI TEU, the pending ECOWAS case involves Commission proceedings against two Council acts adopted in the context of Title V TEU.³⁰ This case thus represents the first

²⁷ Even before the establishment of the Union, the preservation of the *acquis communautaire* 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'; see Case C-124/95 *Centro-Com* [1997] ECR I-81, para 41.

²⁸ Case C-170/96 *Commission v Council* [1998] ECR I-2763, paras 15-16.

²⁹ C-176/03 *Commission v Council* [2005] ECR I-7879 (Environmental Penalties case).

³⁰ Namely 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 European Union contribution to the West African organization ECOWAS (Case C-91/05, pending: see [2005] OJ C/115/10). It is interesting to note that the Commission refers to the joint action as 'an act of general legislative nature'. While it is tempting to regard this as a general qualification by the Commission of the legal nature of CFSP acts, the present authors realise that it may very well be a pragmatic argument.

opportunity for the Court to control the institutions' compliance with Article 47 TEU in a case involving the interplay between the first and second pillars.³¹

As it has been established, Article 47 allows the Court to protect the *acquis communautaire* against PJCC encroachment, and if need be to annul the contentious act. Though it may have been argued otherwise,³² the Court should most probably confirm that its jurisdiction under Article 47 TEU includes the review of CFSP measures to ascertain that they do not affect Community powers.

Recent case law also provides some additional indications of a possible outcome of the ECOWAS case. In its *Yusuf* and *Kadi* pronouncements, the Court of First Instance not only addressed the vertical hierarchy between the national, EU and UN legal order, but also the horizontal relation between the Union's pillars. At least in relation to the imposition of economic and financial sanctions to individuals (which is not expressly foreseen 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 Community pillar after the Council has adopted a common position or a joint action under the CFSP.³³

The CFI *Yusuf* and *Kadi* judgments offer a clear example of an explicit, albeit exceptional, 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.³⁴ At the same time, it recalls that the EU

³¹ 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 a visa on the basis of a CFSP act.

³² It has been argued that it is 'doubtful whether the combined effect of Arts 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'; 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, 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) 51, who suggested that the Court could also rule on the 'irrelevance or inefficacy of such an act in the Community order'.

³³ Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533; and T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649, (para 161 *Yusuf* case).

³⁴ See more extensively on this issue RA Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' (2000) 37 *CML Rev* 1135; as well as RA Wessel, 'Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas

Restraining External Competences of EU Member States 89

judiciary can only adjudicate *indirectly* on CFSP provisions.³⁵ While these cases suggest a certain willingness from the Courts not to ignore CFSP when related to Community law, it still does not provide any answer to the question of the extent to which it is competent to review actions by Member States if these conflict with established Union policies.

The case law examined hitherto consists of cases involving judicial review by the Court of Justice on the basis of Article 230 EC. 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 measure is being questioned. Obviously, they are not bound by a *Foto-Frost* duty to refrain from invalidating EU decisions as this case law is clearly related to Community law.³⁶

In that respect, the recent judgment of the Court in the *Segi* case is instructive. The case 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.³⁷ The decision under attack in this case is a Common Position (2001/931/CFSP) with a legal basis in both the second (Article 15 TEU) and the third pillars (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. In the event, the two organisations were placed on a list of terrorist organisations, annexed to Common Position 2001/931/CFSP. The Court thus found that that common position had produced legal effects in relation to the two organisations, and concluded:

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

and the New Constitution for Europe' in JW de Zwaan *et al.*, (eds), *The European Union—An Ongoing Process of Integration*, Liber Amicorum Fred Kellermann (The Hague, TMC Asser Press, 2004) 123.

³⁵ This is also reflected in cases 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: Case T-14/98 *Hautala v Council* [1999] ECR II-2489, paras 41-2; see also earlier with respect to third-pillar documents Case T-174/95 *Svenska Journalistförbundet* [1998] ECR II-2289.

³⁶ Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199. See, however, for arguments to apply the *Foto-Frost* reasoning to Union law: DM Curtin and IF 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, 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 Comments' (2005) 42 *CML Rev* 325.

³⁷ 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, nyr.

90 *Christophe Hillion and Ramses Wessel*

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.³⁸

In addition, the Court confirmed for the first time the binding nature of common positions, examined earlier:³⁹

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.⁴⁰

It is tempting, though not perhaps entirely justified, to transpose the above findings to the second pillar. On the one hand, the common position in question could also be regarded as a CFSP decision since it was equally based on both Article 15 and Article 34 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*).⁴¹ 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.

The *Segi* judgment therefore only partly helps in answering the question of the possible legal restraints on the Member States' external actions.⁴² As the Court's jurisdiction on CFSP provisions is likely to remain limited in the future Treaty settlement,⁴³ and given the ambiguity of the possible application of the principles of primacy and direct effect to CFSP,⁴⁴ a

³⁸ Case C-355/04 P *Segi and Others v Council*, judgment of 27 February 2007, paras 54–55.

³⁹ See above section II.A.

⁴⁰ Case C-355/04 P *Segi and Others v Council*, judgment of 27 February 2007, para 52.

⁴¹ This would also be in line with Art 275 of the new TFEU, which confers jurisdiction on the ECJ to review 'the legality of European decisions providing for restrictive measures against natural or legal persons [...]'].

⁴² See further below, part IV.B.

⁴³ See the reference in n 41 above.

⁴⁴ 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' (2004) 41 *CML Rev* 355, 363 and 379; as well as his 'The EU

Restraining External Competences of EU Member States 91

relationship with either Community law or the third pillar will continue to be helpful to interpret the scope of the CFSP legal restraints.

One way of approaching this issue could be to focus on what the Court in *Segi* referred to as ‘the principle of the duty to cooperate in good faith’. While the Court used this line to establish the binding nature of common positions, the EU Treaty formulates this as a general principle in the second pillar.

D. The Principle of Loyal Cooperation under Title V TEU

The potential constraining character of primary and secondary CFSP obligations, analysed above, ought to be examined also in the light of the specific principle of loyal cooperation, included in Title V TEU. Article 11(2) TEU provides:

The Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall 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.⁴⁵

Placed in the first Article of Title V, this loyalty principle appears to underpin the whole development of CFSP, and govern the relationship between the Member States and the Union in this area. Hence, Member States’ specific obligations under the CFSP title should be interpreted in the light of that general obligation to support the Union’s CFSP. Indeed, the inclusion of ‘shall’ makes Member States’ loyalty and cooperation clearly mandatory, while suffering little exception, as suggested by the expressions ‘actively’ and ‘unreservedly’.

Although it may be conceived as a mere expression of the general international law principle of *pacta sunt servanda*,⁴⁶ the principle of loyalty enshrined in Article 11(2) nevertheless seems more specific. Member States are bound by a *positive* obligation actively to develop the

Constitution: What will Really Change?’ (2004–2005) 7 *Cambridge Yearbook of European Legal Studies* 33, 34. See also Editorial Comments (2005) 42 *CML Rev* 325, 327. In this respect, see the Declaration concerning primacy, adopted by the Lisbon Intergovernmental Conference.

⁴⁵ The principle returns in the new TEU in Art 24(3) in even stronger terms: ‘Member States shall actively and unreservedly support the Union’s common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. They shall refrain from action contrary to the Union’s interests or likely to impair its effectiveness’. See also M Cremona, above n 3, 19, on the confusion between this provision and the general statement of the principle in Art 4(3) new TEU.

⁴⁶ H Wehberg, ‘Pacta Sunt Servanda’ (1959) 53 *AJIL* 775.

92 *Christophe Hillion and Ramses Wessel*

Union's CFSP, which since the Amsterdam Treaty encompasses the Member States' duty to 'work together to enhance and develop their mutual political solidarity'. In addition, Article 11(2) contains a *negative* obligation for the Member States not to undertake 'any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations'. Article 11(2) TEU also foresees in its last indent that the Council is to ensure that these principles are complied with.

Indeed, it is notable that these positive and negative obligations echo the obligations related to the principle of loyal cooperation expressed in Article 10 EC which,⁴⁷ falling within the jurisdiction of the Court of Justice, have been extensively explicated and developed.⁴⁸ Suffice to recall that the principle of loyal cooperation expressed in Article 10 EC has been held by the Court to include: (1) the obligation to take all appropriate measures necessary for the effective application of Community law; (2) the obligation to ensure the protection of rights resulting from primary and secondary Community law; (3) the obligation to act in such a way as to achieve the objectives of the Treaty, in particular when Community actions fail to appear; (4) the obligation not to take measures which could harm the *effet utile* of Community law; (5) the obligation not to take measures which could hamper the internal functioning of the institutions; and (6) the obligation not to undertake actions which could hamper the development of the integration process of the Community.⁴⁹

⁴⁷ 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of [the EC] Treaty'. This subsection is partly based on RA Wessel, above n 4, Section 4.3.1.2.

⁴⁸ See further J Temple Lang, 'The Core of the Constitutional Law of the Community—Art 5 EC' in L Gormley (ed), *Current and Future Perspectives on EC Competition Law* (The Hague, Kluwer Law International, 1997) 41; K Mortelmans, 'The Principle of Loyalty to the Community (Art 5 EC) and the Obligations of the Community Institutions' (1998) 5 *Maastricht Journal of European and Comparative Law* 67; M Blanquet, *L'article 5 du traité CEE—Recherches sur les obligations de fidélité des Etats membres de la Communauté* (Paris, LGDJ, 1994).

⁴⁹ See rather extensively A Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union* (Baden-Baden, Nomos, 2001). Central to Hatje's conception is the thesis that loyalty serves the creation of unity, which is characterised by the general institutional autonomy of both the Member States and the EU on the one hand and the duty of cooperation in order to implement the objectives of the EU on the other. The mediation of conflicts on the political and legal levels thus becomes one of the most important tasks of the principle of loyalty; see S Bitter, 'Loyalty in the European Union—A Review' (2002) 3 *German Law Journal*; see also Case C-339/00 *Ireland v Commission* [2003] ECR I-11757, paras 71 and 72, and case law cited.

Restraining External Competences of EU Member States 93

Moreover, in relation to the conclusion and implementation of international agreements in particular, recent case law points to various procedural obligations based on Article 10 EC. For instance, Member States have an obligation to consult the EU institutions when they negotiate bilateral agreements in a sphere where the Community has not yet concluded an agreement, but where 'there is a start of a concerted Community action at international level'.⁵⁰ Procedural obligations derived from Article 10 EC in relation to Member States' international commitments also encompass, within the specific framework of a mixed agreement, a duty to inform and consult the competent Community institutions.⁵¹

Given the proximity between the provisions of Article 11(2) TEU and Article 10 EC respectively, there are reasons to interpret the former in the light of the latter's interpretation. As illustrated by the *Pupino* judgment, the Court seeks inspiration in its interpretation of EC provisions to interpret similar EU provisions.⁵² Indeed, the same judgment suggests that 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.⁵³

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 Union's objectives'.⁵⁴ The Court thereby suggested that the principle of loyalty has a trans-pillar definition and application. A fortiori, the principle of loyal cooperation should apply also in the context

⁵⁰ In Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, the Court held that: '[t]he adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation'; see also C-433/03 *Commission v Germany* [2005] ECR I-6985.

⁵¹ Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

⁵² 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 TEU); paras 33-34 (similarity in the wording of Art 249 and Art 34(2)(b)).

⁵³ Case C-105/03 *Pupino* [2005] ECR I-5285, para 42. Emphasis added.

⁵⁴ *Ibid*, para 36.

of CFSP given the inclusion in Title V of a specific provision containing obligations similar to those laid down in Article 10 EC.⁵⁵

Transposed to the CFSP context, the Court's interpretation of the principle of loyal cooperation could entail far-reaching obligations for the Member States, particularly with respect to their power to conclude international agreements in the field of CFSP. In the light of the Court's 2005 pronouncement in *Commission v Luxembourg*,⁵⁶ it could be argued that, although not prevented from acting, Member States are expected under Article 11(2) TEU to inform and consult the EU institutions in areas where there is the start of a concerted Union CFSP action at international level.⁵⁷ Indeed, given that each CFSP instrument in principle expresses a concerted action of the Union at the international level, the procedural obligations linked to the CFSP principle of loyal cooperation would not only apply in situations where negotiations of an agreement based on Article 24 TEU are envisaged by the Presidency,⁵⁸ it could also apply where the start of a concerted action leads notably to a JA or a common position. Thus, Member States should inform and consult EU institutions, even prior to the adoption of a CFSP autonomous act or the conclusion of an EU agreement, as soon as an EU concerted action at international level emerges.

Although the application of the principle of loyal cooperation to the CFSP context appears to be supported both by the terminology of Article 11(2) TEU and by the Court's case law, it could be argued that the inclusion in Title V TEU of a *specific* expression of such principle of cooperation prevents, or at least qualifies the full transposition of the Court's interpretation of the principle of loyal cooperation expressed on Article 10 EC to the CFSP context. After all, the application of the principle of loyal cooperation as a principle of Union law may be explained by the absence of any specific expression of that principle in the context of Pillar III. In other words—and following the Court's line of reasoning in *Pupino*—the default principle of loyal cooperation based on the interpretation of Article 10 EC would apply where the Treaty does not provide for a specific expression of such principle. Conversely, the inclusion of a specific duty of cooperation in the CFSP context would prevent the *full* transposition of the interpretation of Article 10 EC therein. Thereby, Member States and the EU institutions would be subject, in the context of

⁵⁵ Further on the *Pupino* ruling: E Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*' (2007) 3 *Eu Const* 5.

⁵⁶ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; also C-433/03 *Commission v Germany* [2005] ECR I-6985. See further M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance', ch 5, this volume.

⁵⁷ Such a procedural obligation would indeed echo the obligation of systematic cooperation foreseen in Art 16 TEU.

⁵⁸ See further below.

Restraining External Competences of EU Member States 95

CFSP, to obligations derived from Article 11(2) TEU specifically, to be interpreted taking account of the specific objectives and nature of, and place within the system of, Title V.

Indeed, the proposition that the interpretation of Article 10 EC is not automatically transferable to the context of CFSP seems to be supported by the provisions of the post-Lisbon Treaties. Despite the formal ‘depillarisation’ of the Union that it intends to operate, the Lisbon Treaty will maintain a distinction between the principle of loyal cooperation expressed notably in Article 4 of new TEU, therein re-branded ‘sincere cooperation’,⁵⁹ and the specific principle related to CFSP, foreseen in Article 24 new TEU.⁶⁰ At first sight, this dual loyalty is surprising given the Community’s amalgamation with the Union,⁶¹ which should have entailed that the principle of sincere cooperation would have generally applied between the Member States and the *Union institutions*, over all areas corresponding to the objectives of the Union, thus including CFSP. Arguably, the inclusion of the CFSP principle of loyalty, alongside the general principle of Article 4, in the new treaty typifies the intent still to distinguish the CFSP and other EU provisions, and suggests that the two principles are perhaps meant to operate differently.⁶²

While this *lex specialis* duty of cooperation could lead to a more specific interpretation of the Member States’ duty of cooperation in relation to CFSP, it does not mean that the latter may prevent or limit the application of the principle of Article 10 EC itself. In view of the general primacy of Community law over the law of the other two pillars, based on Article 47 TEU, Article 11(2) cannot, in principle, serve as a tool to limit or prevent the application of the principle of loyal cooperation with the Community institutions. In other words, Member States could not rely on the specific provisions of Article 11(2) to justify an infringement of their obligations under Article 10 EC. Only in exceptional situations does the TEU foresee that EC law may be subject to CFSP instruments. As it will be suggested in

⁵⁹ ‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.’

⁶⁰ ‘Member States shall actively and unreservedly support the Union’s common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. They shall refrain from action contrary to the Union’s interests or likely to impair its effectiveness.’

⁶¹ See Arts IV-437 and IV-438 TCE.

⁶² Even if the Court of Justice, which would have jurisdiction on both provisions, could give them an equivalent interpretation.

96 *Christophe Hillion and Ramses Wessel*

the last section of this paper, it could be argued, on the contrary, that Article 10 EC could serve to force Member States to comply with their CFSP obligations.⁶³

Summing up, Title V on CFSP includes a specific expression of the duty of cooperation between the Member States and CFSP. If interpreted in the light of the general duty of loyal cooperation encapsulated in Article 10 EC,⁶⁴ the CFSP principle of loyalty, which constitutes another expression of the same principle, could entail far-reaching restrictions for the Member States' freedom in the fields covered by CFSP.

III. EU INTERNATIONAL AGREEMENTS AS RESTRAINTS ON MEMBER STATES' EXTERNAL COMPETENCES

Examining primary and secondary CFSP norms, it has become clear that Member States have accepted restraints on their autonomy. This section looks at the impact of the EU treaty-making competence (A), and the nature of this external power (B), on the Member States' foreign policy freedom.

A. The Treaty-making Competence of the EU

The EU competence to conclude agreements with third states and other international organisations in the non-Community areas has been the subject of intense debate ever since the negotiations on the Treaty of Maastricht. The controversy stems from the unclear legal status of the Union. While the abandoned 2004 TCE⁶⁵ as well as the Reform Treaty expressly confer international legal personality on the Union,⁶⁶ the current

⁶³ See Section IV.A below.

⁶⁴ Indeed, Art 10 EC is only but one expression of the general principle of loyal cooperation, operating within the EU legal order. See in this regard what the Court says about the principle in the context of mixed agreements; see eg *Opinion 2/91 (ILO Convention)* [1993] ECR I-1061; *Opinion 1/94 (WTO Agreement)* [1994] ECR I-5267; Case C-25/94 *FAO* [1996] ECR I-1469; C-459/03 *Commission v Ireland* [2006] ECR I-4635 (*MOX Plant*); *Opinion 1/03 (Lugano Convention)* [2006] ECR I-1145.

⁶⁵ Art I-7 TCE.

⁶⁶ Art 47 of the new TEU.

Restraining External Competences of EU Member States 97

treaty remains silent in this respect.⁶⁷ Be that as it may, the EU has nonetheless engaged actively in legal relations with third states and other international organisations.⁶⁸

The conclusion of international agreements by the Union is governed by the provisions of Article 24 TEU,⁶⁹ which are partly modelled on Article 300 TEC.⁷⁰ Cross-references included in Articles 24 (CFSP) and 38 (PJCC) TEU indicate that the procedure foreseen in Article 24 TEU is used also for concluding EU international agreements in the PJCC sphere. In other words, Article 24 TEU represents the general legal basis for the Union's treaty-making power, including for concluding cross-pillar (second and third) agreements.⁷¹

⁶⁷ Nevertheless, 'As time goes by, the debate seems ever more irrelevant', as Eeckhout rightly observes. Eeckhout also points to the consensus on this issue in academic circles. P Eeckhout, above note 1, 155. Cf also the views by (the Council's Legal Counsel) Gosalbo Bono, above n 2, 354–5.

⁶⁸ By now (early 2007) the Union has become a party to some 90 international agreements. See more extensively RA Wessel, 'The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities', in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge, Cambridge University Press, forthcoming). Parts of this section have been based on that article. The Agreements may be retrieved through the Council's Agreements Database.

⁶⁹ Art 24 TEU provides:

1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency.
2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.
3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Art 23(2).
4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Art 34(3).
5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.
6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.'

⁷⁰ Cp Art 24(6) TEU with Art 300(7) TEC. Art 24 has undergone changes with the Nice Treaty revision, namely the inclusion of para 6 and an extension of qualified majority voting. See, eg, Editorial Comments (2001) 38 *CML Rev* 825; E Regelsberger and D Kugelmann, 'Art 24 EUV para 1' in R Streinz, *EUV/EGV* (Munich, Beck, 2003); as well as I Österdahl, 'The EU and Its Member States, Other States, and International Organizations—the Common European Security and Defence Policy after Nice' (2001) 70 *Nordic Journal of International Law* 341.

⁷¹ See the 2006 Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data, which is based on Decision 2006/729/CFSP/JHA of the Council of 16 October 2006 (OJ, 2006, L 298, 27.10.2006) and refers to both Arts 24 and 38 TEU.

The provisions of Article 24 TEU epitomise the multi-level character of the EU external relations regime in which both the Union and the Member States have a role to play.⁷² The Nice Treaty foresees the distinct competence of the Union to conclude international treaties. According to modified paragraphs 2 and 3 of Article 24, the Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions, but it will act by a qualified majority whenever the agreement is envisaged to implement a JA or common position. Moreover, paragraph 6 sets out that the agreements concluded by the Council shall be binding on the institutions of the Union. In other words, the Union is capable of contracting obligations under international law that are distinct from those of the Member States.⁷³

Indeed, the debate on whether agreements concluded on the basis of Article 24 TEU are concluded by the Council on behalf of the Union or on behalf of the Member States⁷⁴ has been superseded by practice. In effect, the Union has become a party to an increasing number of international agreements based on Article 24 TEU.⁷⁵ One of the main issues in the debate relates to the provisions of Article 24(5) TEU:

No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.

⁷² See more extensively RA Wessel, 'The Multilevel Constitution of European Foreign Relations' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge, Cambridge University Press, 2007).

⁷³ Nevertheless, some Member States (still) hold on to the view that the Council concludes agreements on their behalf, rather than on behalf of the Union. See on this issue also S Marquardt, 'La capacité de l'Union européenne de conclure des accords internationaux dans le domaine de la coopération policière et judiciaire en matière pénale', in G De Kerchove and A Weyembergh (eds), *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne* (Brussels, Edition de l'Université de Bruxelles, 2003) 179, 185. See the same contribution for arguments underlining the view that the Council can only conclude these agreements on behalf of the EU. Cf also S Marquardt, 'The Conclusion of International Agreements under Art 24 of the Treaty on European Union' in V Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, TMC Asser Press, 2001) 333; D Verwey, *The European Community, the European Union and the International Law of Treaties: a Comparative Legal Analysis of the Community and Union's External Treaty-making Practice* (The Hague, TMC Asser Press, 2004) 74; and RA Wessel (2000), above n 34.

⁷⁴ See more extensively RA Wessel, 'The International Legal Status of the European Union' (1997) 2 *EFA Rev* 109; as well as 'Revisiting the International Legal Status of the EU' (2000) 5 *EFA Rev* 507.

⁷⁵ And even before that, it was clear that 'it would hardly be persuasive to contend that such treaties are in reality treaties concluded by individual Member States'; see C Tomuschat, 'The International Responsibility of the European Union' in E Cannizzaro (ed), above n 32, 181. Cf also Eeckhout, above n 1, 159; P Koutrakos, above n 1, 406–9 and Gosalbo Bono, above n 2, 354–6. It should, however, be recalled that some early agreements mentioned 'The Council of the European Union' as the contracting party, including the 1999 Agreement with Republic of Iceland and the Kingdom of Norway, and the 2000 Agreement with the Republic of Iceland and the Kingdom of Norway.

Restraining External Competences of EU Member States 99

This provision was often read in conjunction with Declaration no 4 adopted at the Amsterdam IGC:

The Provisions of Article J.14 and K.10 [now Articles 24 and 38] of the Treaty on European Union and any agreements resulting from them shall not imply any transfer of competence from the Member States to the European Union.

However, neither in theory nor in practice have these provisions limited the EU treaty-making capacity. Article 24 TEU provides that the Council concludes international agreements after its members (the Member States) have unanimously agreed that it can do so.⁷⁶ On the basis of paragraph 5, Member States may invoke their national constitutional requirements to prevent becoming bound by the agreement, but this does not affect the conclusion of the agreement by the Union.⁷⁷ While on some occasions the issue was raised,⁷⁸ it has obviously not prevented the conclusion of such agreements.

Indeed, one may argue that when agreements are not binding on Member States that have made constitutional reservations, *a contrario*, agreements *are* binding on those Member States that have not made this reservation. While this may hold true for the relation between the Member State and the EU, it cannot be maintained vis-a-vis the third state or other international organisation. After all, no treaty relationship has been established between the Member States and this party, and unless the agreement explicitly involves rights and/or obligations for Member States in relation to the other party, there is no direct link between them. In case Member States' participation is necessary for the Union to fulfil its treaty obligations, the other party seems to have to address the Union, which, in turn, will have to address its Member States.⁷⁹

The above-mentioned Declaration no 4 does not seem to conflict with the EU distinct treaty-making capacity. Since the right to conclude treaties

⁷⁶ The explicit reference to the unanimity rule (as a *lex specialis*) seems to exclude the applicability of the general regime of constructive abstention in cases where unanimity is required as foreseen in Art 23 TEU. Furthermore, as indicated by G Hafner, 'The Amsterdam Treaty and the Treaty-Making Power of the European Union: Some Critical Comments' in G Hafner *et al*, *Liber Amicorum Professor Seidl-Hobenveldern—in Honour of his 80th Birthday* (The Hague, Kluwer Law International, 1998) 279, the application of the constructive abstention to Art 24 would make little sense, since Art 24 already provides the possibility of achieving precisely the same effect insofar as Member States, by referring to their constitutional requirements, are entitled to exclude, in relation to themselves, the legal effect of agreements concluded by the Council.

⁷⁷ Art 17 of the Council Rules of Procedure foresees that, in principle, international agreements concluded in accordance with Art 24 TEU are published in the OJEU, 'unless the Council decides otherwise on the grounds of Arts 4 and 9 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents', [2002] OJ L/230/7.

⁷⁸ See S Marquardt (2003), above n 73, 182, who refers to Germany and France.

⁷⁹ See more extensively on these issues D Verwey, above n 73.

is an original power of the Union itself, the treaty-making power of the Member States remains unfettered and, indeed, is not transferred to the Union. Therefore, the Declaration can only mean that this right of the Union must not be understood as creating new substantive competences for it.⁸⁰ Through the Council Decision, Member States have been provided with an opportunity to set limits to the use by the Union of its treaty-making capacity, both from a procedural and a substantive perspective.

The fact that the EU becomes a party to the agreement (and not its Member States) is underlined by the way the agreements come into force. Many agreements use the following provision in this respect⁸¹:

This agreement shall enter into force on the first day of the first month after the Parties have notified each other of the completion of the internal procedures necessary for this purpose.

However, so far, the ‘internal procedures’ on the side of the Union seem to relate to the necessary decision of the Council and not to any national constitutional procedure in the Member States. In other cases, the entry into force is even simpler⁸²: ‘This Agreement shall enter into force on the first day of the month after the Parties have signed it.’

It goes beyond the scope of this Chapter to investigate the parliamentary procedures related to Article 24 agreements in all 27 Member States. Suffice to say that Member States generally do not consider it expedient to submit EU external agreements to their regular parliamentary procedure.⁸³ As ratification by the governments of the Member States is not required for agreements concluded by the Union, their constitutional requirements simply do not apply. In the Netherlands for instance, parliamentary approval of Article 24 agreements is not considered necessary given that the Kingdom of the Netherlands is not party to those agreements. For the same reason, EU agreements are not published in the *Traktatenblad*, which is the national review of treaties concluded by the Kingdom. An exception was made for two agreements concluded with the United States in the area of PJCC, for these could be considered to complement or even amend existing bilateral treaties with the US. However, the position of the

⁸⁰ As also submitted by Hafner, above n 76, 272. In this respect, see the Declarations on the CFSP annexed to the Lisbon final Act.

⁸¹ See, eg, the 2005 Agreement between Romania and the European Union on security procedures for the exchange of classified information, [2005] OJ L/118/48.

⁸² See, eg, the 2006 Agreement between the International Criminal Court and the European Union on cooperation and assistance, [2006] OJ L/115/50.

⁸³ This is confirmed by G De Kerchove and S Marquardt, ‘Les accords internationaux conclus par l’Union Européenne’ (2004) *Annuaire Français de Droit International* 803, 813: ‘[...] dans la pratique suivie jusqu’à présent, aucun État membre n’a invoqué le respect de ses règles constitutionnelles lors de la conclusion par le Conseil d’accords dans le domaine de la PESC.’

Restraining External Competences of EU Member States 101

Netherlands was not exceptional: all Member States—save Austria, Estonia, France, and Greece—made a constitutional reservation. The same situation occurred in relation to the conclusion of the EU agreements with Iceland and Norway, while eight Member States invoked Article 24(5) TEU in relation to the agreement with Switzerland.⁸⁴ This clearly differentiates the third-pillar agreements from the ones concluded under CFSP.⁸⁵

While on the basis of the current treaty regime the *existence* of an EU treaty-making power is established, the provisions of Article 24 TEU do not, in themselves, shed any light on the *scope* of such EU power. Paragraph 1 of Article 24 TFEU merely stipulates that ‘conclud[ing] an agreement with one or more States or international organisations in implementation of this Title’ must be ‘*necessary*’,⁸⁶ leaving it the Member States to establish that necessity. The scope of the EU treaty-making power thereby remains undetermined, in contrast to that of the Community, which is legally provided by the EC Treaty itself.⁸⁷

In what appears to merge the two scenarios of Article 24 TEU and Article 300 EC respectively, Article 216 new TEU not only foresees that the ‘conclusion of an agreement is necessary in order to achieve [...] one of the objectives’, but also establishes a competence when the conclusion of an agreement ‘is provided for in a legally binding Union act or is likely to affect common rules or alter their scope’. Although this provision does not give any guidance as to the limits of this competence, it seems that it should, at least, be read in conjunction with the principle of conferral in 5 new TEU.⁸⁸ Indeed, as argued by Cremona, the new treaty-making provision ‘introduces a confusion between the existence of competence and exclusivity’ as it does not address the situation where, although an agreement is perhaps not necessary to achieve a Union objective, its conclusion *by a Member State* might ‘affect common rules or alter their scope’.⁸⁹ Therefore in a situation of parallel competences, the nature of the EU competence should first and foremost be considered and in particular its possible pre-emptive exclusivity.

⁸⁴ *Ibid*, 813 and 823. In these cases the Council decided to have a procedure in two stages, allowing for Member States to follow domestic parliamentary procedures. See Conclusions of the Council of 6 June 2003, Doc 10409/03 of 18 June 2003. Cf also J Monar, ‘Editorial Comment—Mostar: Three Lessons for the European Union’ (1997) 2 *EFA Rev* 1; and T Georgopoulos, ‘What Kind of Treaty-Making Power for the EU?’ (2005) 2 *EL Rev* 190, 193.

⁸⁵ In these cases, it may be wondered why the Union and its Member States have not opted for the same construction that has proved its value under Community law: the ‘mixed agreement’.

⁸⁶ Emphasis added.

⁸⁷ The provisions of Art 300 EC stipulate that the Community concludes agreements with one or more States or international organisations ‘where this [ie EC] Treaty provides’.

⁸⁸ See more extensively on the possible interpretations of Art 216 TFEU, M. Cremona (2006), above n 3, 9–12.

⁸⁹ *Ibid*, 11.

B. The Nature of EU Competence to conclude International Agreements

The potentially broad scope of EU treaty-making power based on Article 24(1) TEU raises the question of whether, and to what extent, the exercise of EU competence may pre-empt Member States' powers in a particular area. Put differently, what if international agreements concluded by Member States 'affect CFSP rules or alter their scope'?

With respect to EC external powers, the Court of Justice emphasised, notably in its *Opinion 1/75*, that Community policies consist of the combination and interaction of internal and external measures.⁹⁰ Stressing that it was impossible for the Member States to exercise powers concurrent to those of the Community, as this would risk compromising the effective defence of the latter's common interests, the Court established the exclusive Community power over the common commercial policy (CCP).⁹¹ The rationale behind the Court's decision was to prevent Member States' individual actions from infringing a common policy that was deemed necessary to make the system work.⁹² The Court also stressed the principle of Member States' loyalty towards the Community. The exclusivity of Community powers in relation to a key area of Community competence—trade—was thereby conceived as an essential device to ensure consistency in Community external relations. While *Opinion 1/75* was specifically related to the CCP, the way the Court handled the question posed there could perhaps help addressing a similar problem under CFSP.

Like the CCP, CFSP consists of a coherent set of rules aimed at establishing a common policy. Indeed, the 'common commercial policy was conceived in (current) Article 133 EC in the context of the operation of the common market, for the defence of the common interests of the Community, within which the particular interests of the Member States had to endeavour to adapt to each other'.⁹³ This description comes close to the purpose of CFSP, in which Member States' particular interests are also subjected to the notion of a common policy.

However, the question of division of competences between the Union and the Member States is more difficult to characterise than the division of competence between the Community and the Member States. The Court's

⁹⁰ *Opinion 1/75 (re Understanding on a Local Cost Standard)* [1975] ECR 1355.

⁹¹ In particular, the Court found that unilateral Member States' actions would lead to unacceptable distortions of competition in the internal market. Moreover, accepting the possibility that Member States adopt positions which differed from intended Community positions, would distorting the institutional framework call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest (*Opinion 1/75*, 1363–4)? See more extensively A Dashwood and C Hillion, 'Introduction' in A Dashwood and C Hillion (eds), above n 1, v–vi; and P Eeckhout, above n 1, 12–14.

⁹² *Opinion 1/75 (re Understanding on a Local Cost Standard)* [1975] ECR 1355.

⁹³ P Eeckhout, above n 1, 13.

Restraining External Competences of EU Member States 103

jurisprudence related to effects of EC law on Member States' powers derives explicitly from its view that the EC Treaty establishes a new legal order. Given the specific regime governing the non-Community parts of the Union, that Court's jurisprudence cannot be applied, *mutatis mutandis*, to the interplay between the EU and the Member States. Indeed, the CFSP obligations are largely procedural in nature and only foresee a common policy (read: Union policy) to the extent that this is desired and supported by the Member States.⁹⁴ The key principle underlying CFSP is encapsulated in Article 16 TEU, which provides enough leeway for the Member States to prevent issues from being placed on the Union's agenda altogether. Irrespective of the obligation for Member States to 'inform and consult one another within the Council on any matter of foreign and security policy', the subsequent words 'of general interest' indicate, as suggested earlier, a large margin of discretion on the side of (individual) Member States. Indeed, although there is an obligation to try and reach a Union policy, in case of failure, the Member States remain free to pursue their own national policies.

While 'mixity' has become the solution to overcome the division of competences between the EC and its Member States,⁹⁵ the international agreements concluded under CFSP are—perhaps ironically⁹⁶—*exclusively* concluded by the European Union.⁹⁷ This is in line with the Amsterdam amendment to Article 11 TEU, on the basis of which CFSP is no longer

⁹⁴ Cf P Koutrakos, 'Constitutional Idiosyncrasies and Political Realities: The Emerging Security and Defence Policy of the European Union' (2003) 10 *Columbia Journal of European Law* 69.

⁹⁵ On mixity, see J Heliskoski, *Mixed Agreements as a Technique for organizing the International Relations of the European Community and its Member States* (The Hague, Kluwer, 2001); P Eeckhout, above n 1, ch 7; A Dashwood, 'Why Continue to Have Mixed Agreements At All?' in JHJ Bourgeois *et al* (eds), *La Communauté européenne et les accords mixtes* (Brussels, Presses Interuniversitaires Européennes, 1997) 93–9; A Rosas, 'Mixed Union—Mixed Agreements', in M Koskenniemi (ed), *International Law Aspects of the European Union* (The Hague, Martinus Nijhoff Publishers, 1998) 125–48; NA Neuwahl, 'Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements' (1991) 28 *CML Rev* 717–40; and on responsibility in these cases in particular E Neframi, 'International Responsibility of the European Community and of the Member States under Mixed Agreements' in E Cannizzaro (ed), above n 32, 193–205.

⁹⁶ Indeed, the multilevel dimension is at least as self-evident as in the Community, with regard to which Dashwood rightfully held: 'It is an inescapable aspect of the constitutional character of the Community that the competence conferred by the EC Treaty in external as well as internal matters is limited, and usually shared with the Member States. Mixed agreements are a natural and practical mechanism to enable the Union, with its character as a constitutional order of States, to function effectively on the international plane.' A Dashwood, 'Opinion 2/00, Cartagena Protocol on Biosafety' (2002) 39 *CML Rev* 367–8.

⁹⁷ As the 2004 Agreement with the Swiss Confederation concerning the latter's association with the so-called Schengen *acquis* shows, combined EC/EU agreements are possible (see below section 4.C). A similar construction has been debated for the 2006 Cooperation Agreement with Thailand. In the end, however, the agreement was concluded as a traditional Community/Member States mixed agreement; see D Thym, above n 24, 909. A similar debate

defined and implemented by ‘the Union and its Member States’, but merely by the Union. Nevertheless, it would be going too far to conclude on an exclusive competence for the Union on this basis, in the line of Opinion 1/75. In fact, the whole system of CFSP as described above seems to point to the existence of ‘shared’, if not ‘parallel’ competences: both the Union and its Member States appear to be competent to conclude treaties in the area of CFSP (including ESDP). In that sense, the effect of CFSP norms on Member States’ powers could be envisaged in the light of the Court’s pronouncements on the effects of Community powers in the fields of development cooperation or humanitarian aid. This case law suggests that since the Community competence in these fields is not exclusive, the Member States are accordingly entitled to enter into commitments themselves vis-a-vis non-Member States, either individually or collectively, in the Council or outside it, or even jointly with the Community.⁹⁸

Does this mean that the ‘exclusivity’ issue plays no role at all in relation to CFSP? Lisbon Treaty envisages the application of the principle of pre-emption to shared competences (Article 2(2) TFEU). However, the CFSP competence is therein described separately from the other types of EU competences, and is not listed under the shared competences. As Cremona argues, this would amount to acknowledging that Member States under CFSP are not pre-empted from concluding international agreements in areas already covered by Union agreements. In other words, it is unlikely that the conditions contained in Article 3(2) on exclusive Union competences would apply in a CFSP context.⁹⁹ Article 3(2) TFEU reads: ‘The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope’. Indeed, CFSP rules will not find their basis in a ‘legislative act’.

That being said, when this provision is read in conjunction with the loyalty principle enshrined in Article 28(4) new TEU, it seems too early completely to rule out exclusivity in the field of CFSP, particularly in view of the fact that the Court would have jurisdiction in respect of this Article. After all, even in the current period, the Union’s external activities in the form of the conclusion of international agreements are booming and

took place on the EU accession to the ASEAN Treaty of Amity and Cooperation. As the relevant documents (such as Council Doc 15772/06) are not in the public domain, these developments are difficult to follow.

⁹⁸ Joined Cases C-181/91 and C-248/91 *European Parliament v Council of the European Communities and Commission of the European Communities* [1993] ECR I-3685 (Bangladesh case); Case C-316/91 *European Parliament v Council of the European Union* [1994] ECR I-625 (EDF case).

⁹⁹ M Cremona (2006), above note 3, 18–19.

Restraining External Competences of EU Member States 105

Member States' actions increasingly risk affecting common rules or altering their scope. While the creation of CFSP norms depends on the political will of the Member States, once these norms have been established, their very purpose is to restrict the freedom Member States traditionally enjoy in their external relations. Allowing Member States to affect—or even act contrary to—common norms established by EU international agreements would amount to rendering most of the provisions in Title V of the EU Treaty nugatory.

The emerging question, then, is whether a hierarchy of competences can be established: to what extent are Member States bound by agreements concluded by the Union, and do these agreements restrict their individual freedom in external relations? In this respect, there appears to be no reason not to apply the so-called *Haegeman* doctrine to EU agreements and to regard them as forming 'an integral part of Union law'.¹⁰⁰ This view is supported by the reference in Article 24(6) TEU that the agreements bind the institutions.¹⁰¹ The question remains, however, whether the Member States are automatically bound by the agreements as a matter of EU law, and indeed whether perhaps a 'direct effect' of the agreements could even be construed. This would place the Member States in a different position towards the agreements than in other international organisations.

In the EC, Member States do have special obligations on the basis of agreements concluded by the Community.¹⁰² Article 300(7) TEC clearly provides that agreements shall be binding on the institutions *and* the Member States and, in *Kupferberg*, the Court held:

In ensuring respect for commitments arising from an agreement concluded by the Community Institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement.¹⁰³

Irrespective of the fact that the past 15 years have blurred the distinction between Community law and the law of the other Union pillars, Court judgments such as *Haegeman* and *Kupferberg* explicitly referred to the 'autonomous legal order' of the Community. Such jurisprudence cannot therefore be easily transposed to the law of the other EU sub-orders, since

¹⁰⁰ As provided by the ECJ in relation to international agreements concluded by the European Community: Cases C-181/73 *Haegeman* [1974] ECR 449 and C-104/81 *Kupferberg* [1982] ECR 3641. See in the same line Thym, above n 24, 900.

¹⁰¹ *Ibid.*

¹⁰² See in general on this issue for instance V Lowe, 'Can the European Community Bind the Member States on Questions of Customary International Law?' in M Koskenniemi, above note 95, 149–68.

¹⁰³ Case C-104/81 *Kupferberg* [1982] ECR 3641, para 13.

all differences between the pillars have not disappeared.¹⁰⁴ Notwithstanding the *Pupino* line of case law,¹⁰⁵ Union law can still be distinguished from Community law, thereby suggesting that the legal nature of agreements that form part of Union law should be judged, first and foremost, with due regard to the specific nature of the Union legal order.

In other words, Article 300(7) TEC and Article 24(6) TEU cannot be interpreted in a similar fashion. The latter provides that EU agreements are binding on the institutions, and no reference is made to the Member States. While there are good reasons to assume that decisions in the non-Community sub-orders of the Union are also binding on Member States, and that such decisions cannot be ignored in their domestic legal orders,¹⁰⁶ particularly in view of the principle of Article 11(2) TEU, it is not obvious that the principles of ‘direct effect’ and ‘supremacy’ form part of Union law.¹⁰⁷ This implies that the domestic effect (applicability) of the agreements depends on national (constitutional) arrangements. As we have seen, the practice of the PJCC agreements indeed reveals that Article 24(5) TEU is used in a way to allow national parliaments to let their governments approve the treaty before the Union adopts the final ratification decision.

A related question concerns whether the EU *acquis* (viz CFSP and/or PJCCM *acquis*) runs the risk of being affected through the conclusion of agreements by the Union and/or its Member States. Indeed, ‘much of the external relations case law of the Court serves to shield the *acquis communautaire* [...]’.¹⁰⁸ In fact, as recently confirmed by the Court in Opinion 1/03: ‘The purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law and the proper functioning of the systems established by its rules’.¹⁰⁹ In a recent study, Klabbers pointed out that to shield the *acquis*, the Community makes use of a variety of primacy clauses in mixed agreements, either by providing that in cases of conflict between the external agreement and Community law, Community law shall prevail, or by inserting a clause to assure that Member States in their mutual relations apply Community law rather than the external agreement.¹¹⁰

¹⁰⁴ Irrespective of the *prima facie* Union-wide application of the principle of primacy in the 2004 Constitutional Treaty (Art I-6), one may doubt whether CFSP measures may produce direct effect and enjoy supremacy over national norms on the basis of the Lisbon Treaty. See also ‘Editorial Comments’ (2005) 42 *CML Rev* 325.

¹⁰⁵ Case C-105/03 *Pupino* [2005] ECR I-5285; see further below.

¹⁰⁶ See more extensively RA Wessel (1999), above n 4, ch 5.

¹⁰⁷ Cf also K Lenaerts and T Corhaut, ‘Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law’ (2006) 31 *EL Rev* 287.

¹⁰⁸ J Klabbers, ‘Safeguarding the Organizational *Acquis*: the EU’s External Practice’ (2007) 4 *International Organizations Law Review* 57.

¹⁰⁹ Above n 54, para 131.

¹¹⁰ J Klabbers (2007), above n 108.

Restraining External Competences of EU Member States 107

About nine different ‘*acquis*-saving clauses’ can thus be found in the agreements, ranging from a ‘disconnection clause’ (in their relations *inter se*, the Member States shall continue to apply Community law) to a ‘conditioned territorial application clause’ (restricting the scope of application of the agreement to the territory of the Community and the third partner). Similar clauses may be located in EU agreements as well. Hence, the 2003 EU–US Extradition Agreement provides that it ‘shall not preclude the conclusion, after its entry into force of bilateral Agreements between a Member State and the United States of America consistent with this agreement’. Indeed, as Klabbers observes: ‘The Member States remain free to add further refinements with the treaty partner (in this case the US), but the basic regime is laid down by the Union: the Union determines, in conjunction with its treaty partner, what room to move the Member States have left.’¹¹¹

A CFSP example is formed by the Agreement between the EU and Ukraine on the Security Procedures for the Exchange of Classified Information, which foresees that ‘[t]his Agreement shall in no way prevent the parties from concluding other agreements relating to the provision or exchange of classified information subject to this Agreement *provided that they do not conflict with the provisions of this Agreement*.’¹¹² A similar ‘consistent further agreement clause’ may also be found in the NATO–EU Agreement on Security of Information.¹¹³

It should, however, be kept in mind that in these cases, the ‘parties’ referred to in the clause do not include the EU Member States. Again, any possible restriction on Member States’ freedom to conclude agreements in the same area would have to be based on internal Union law. Perhaps on that basis we could agree with Klabbers that ‘[...] while not parties to the agreements strictly speaking, nonetheless departing from such treaties by individual Member States would be difficult to justify; therewith, such clauses would also provide the limits as to what individual Member States can legitimately do’.¹¹⁴ After all, if—as in Community law—shielding the *acquis* is the primary purpose of these clauses, then they would be deprived

¹¹¹ *Ibid.* See Art 18 of the EU–US Extradition Agreement, [2003] OJ L/181/27; as well as the EU–US Agreement on Mutual Legal Assistance, OJ L 181/34, 19.7.2003. See more extensively Georgopoulos, above n 84.

¹¹² Art 14 (emphasis added); [2005] OJ L/172/86. Similar clauses can be found in the security of information agreements concluded between the EU and other states, including Croatia ([2006] OJ L/116/74) and Macedonia ([2005] OJ L/94/39).

¹¹³ [2003] OJ L/80/36.

¹¹⁴ Cf Klabbers (2007), above n 108. See earlier with a focus on Community law his ‘Restrains on the Treaty-Making Powers of Member States Deriving from EU Law: Towards a Framework for Analysis’ in E Cannizzaro, above n 32, 151–75.

of any effect if they would allow Member States to conclude agreements, either *inter se* or with third parties, which would depart from established Union law.¹¹⁵

IV. THE NORMATIVE CHARACTER OF CFSP IN THE LIGHT OF ITS PLACE WITHIN THE EU LEGAL ORDER

The foregoing sections scrutinised the potential restraining effects of CFSP norms (treaty provisions, secondary measures and agreements) on Member States' foreign policy powers, by interpreting Member States' obligations in the light of the Court's case law and legal scholarship. This section examines whether the inclusion of CFSP into the broader EU legal order could affect its normative character. It will be argued that Member States' CFSP obligations might be coloured by provisions of the other two EU sub-orders, the Community and the third pillars, respectively. First, Article 10 EC itself could compel the Member States to comply with their CFSP obligations, at least in some specific circumstances (A). Second, the restraining effect of EU agreements on Member States powers might be strengthened by the Court's widening jurisdiction on third pillar instruments (B). This, in turn, may have an effect on the use of external competences Member States have retained on the basis of the EC Treaty (C).

A. The Effect of Article 10 EC on Member States' CFSP Obligations

It has been suggested earlier that the duty of loyal cooperation expressed in Article 10 EC may inspire the way in which the Member States' duty of loyal cooperation under Article 11(2) TEU could be conceived. This section suggests that Article 10 EC *itself* may oblige Member States to comply with their CFSP obligations, as a way to fulfil their EC obligations.

As established by the Court of Justice, notably in the *Centro-Com* judgment,¹¹⁶ Member States must comply with their obligations under EC law, even when they act in the context of their reserved powers. They have

¹¹⁵ See on the role of the *acquis* in external relations also L Azoulay, 'The *Acquis* of the European Union and International Organisations' (2005) 11 *ELJ* 196.

¹¹⁶ Case C-124/95, *Centro-Com* [1997] ECR I-81. See also Case 466/98 *Commission v UK* [2002] ECR I-9427, para 41; also in Case C-221/89 *Factortame and Others* [1991] ECR I-3905, para 14 and Case C-264/96 *ICI v Colmer* [1998] ECR I-4695, para 19.

Restraining External Competences of EU Member States 109

to act consistently with, and respect, Community law.¹¹⁷ These Community law obligations include those derived from Article 10 EC. As emphasised by the Court, the duty of cooperation of Article 10 EC 'is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries'.¹¹⁸ This case law entails that, even outside the sphere of Community powers, Member States must not only refrain from infringing EC law, they must also abstain from acting in a way which would make the Community's tasks more difficult or jeopardise the attainment of the objectives of the EC Treaty.¹¹⁹

Hence, if Member States' acted, or omitted to act, in violation of their CFSP obligations with the effect of making the Community's achievement of its tasks more difficult, those actions or omissions would, arguably, also constitute an infringement of Article 10 EC. For example, if the conclusion by a Member State of a bilateral agreement with a third country was to contradict the CFSP provisions of an existing EC-EU cross-pillar agreement concluded with the same country, the Community could ultimately suffer from this Member State's infringement of the CFSP instrument. In particular, given the customary absence, in mixed agreements, of a clause defining the precise division of powers on the EU side,¹²⁰ the third party could, if the dispute settlement consultations failed to reach an amicable settlement, decide to take retaliatory measures against the EU and EC jointly,¹²¹ or even specifically in areas relating to Community powers,¹²²

¹¹⁷ On this point, see M Cremona, 'External Relations and External Competence: the Emergence of an Integrated Policy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, OUP, 1999), 137; see also Opinion of AG Jacobs in the *Centro-Com* case, above note 27, paras 40–4.

¹¹⁸ Emphasis added. Cases C–266/03, *Commission v Luxembourg* [2005] ECR I–4805 and C–433/03 *Commission v Germany* [2005] ECR I–6985.

¹¹⁹ On the application of Art 10 EC beyond the scope of Community competence, see eg Blanquet, above n 48, 306; CWA Timmermans, 'Organising joint participation of EC and Member States' in A Dashwood and C Hillion (eds), above n 1, 239.

¹²⁰ In this regard, see eg HG Schermers, 'The Internal Effect of Community Treaty-Making' in D O'Keefe and H Schermers (eds), *Essays in European Law and Integration* (Deventer, Kluwer, 1982) 167, 170; J Heliskoski, above n 95, 11 and 69.

¹²¹ In the absence of clear allocation of powers between the Community and the Member States, it has been suggested that the principle should be that Community and Member States are jointly liable; see, eg, Opinion of Jacobs AG in Case C–316/91 *European Parliament v Council* [1994] ECR I–625, para 69, Case C–53/96 *Hermès* [1998] ECR I–3603, para 24. Further: C Tomuschat, 'Liability for Mixed Agreements' in D O'Keefe and HG Schermers (eds), *Mixed Agreements* (Deventer, Kluwer, 1983) 125; G Gaja, 'The European Community's Rights and Obligations under Mixed Agreements' in D O'Keefe and HG Schermers (eds), *Mixed Agreements* (Deventer, Kluwer, 1983) 133, 137ff; and R Kovar, 'La participation des Communautés européennes aux conventions multilatérales' (1975) 20 *AFDI* 903, 916–17.

¹²² As Christian Tomuschat pointed out, if the Community and its Member States wilfully and purportedly refrain from formally publicising their demarcation line between their respective areas of jurisdiction, their partners cannot be expected to make the necessary inquiries themselves; see C Tomuschat, above n 121, 130.

110 *Christophe Hillion and Ramses Wessel*

thereby affecting the Community rights under the agreement.¹²³ In these circumstances, the Member State's failure to comply with its CFSP obligations would make the achievement of Community's tasks more difficult, and would jeopardise the attainment of the objectives of the EC Treaty, in violation of the principle of loyal cooperation under Article 10 EC.

If this reasoning holds true, it could be argued that on the basis of Article 10 EC, the Member State concerned could be required, as a matter of Community law, to comply in good faith with its CFSP obligations, as they notably derived from the cross-pillar agreement, in order to forestall potential negative implications for the Community. Indeed, the Court emphasised in *Commission v Luxembourg* that the Member States also have 'to abstain from *any* measure which could jeopardise the attainment of the objectives of the [EC] Treaty'.¹²⁴ The Commission would thus be entitled, under the enforcement procedure of Article 226 EC, to sue the Member State for failing to comply with its Article 10 EC obligation, as a result of a violation of the CFSP obligations flowing from the cross-pillar agreement.¹²⁵ At any rate, it could be argued that the Member State concerned ought to consult and inform the EU institutions of its intentions,¹²⁶ in order to facilitate the achievement of the Community's tasks.¹²⁷ Indeed, as Article 10 EC not only binds the Member States, but also the institutions,¹²⁸ it could be argued that the Council is under an 'Article 10'

¹²³ Indeed, if the Union itself was held liable as a result of a Member State violation of the EU-related provisions of the agreement, this liability could have implications for the Community. Art 28(3) TEU provides that, in principle, operating expenditure to which the implementation of CFSP measures gives rise is charged to the budget of the European Communities. Assuming that reparations are part of the implementation of the agreement, reparations resulting from EU non-compliance with the agreement resulting from a Member State's infringement would indirectly affect the Community.

¹²⁴ Emphasis added. Cases C-266/03, *Commission v Luxembourg* [2005] ECR I-4805 and C-433/03 *Commission v Germany* [2005] ECR I-6985.

¹²⁵ C-D Ehlermann, 'Mixed Agreements—A list of Problems' in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Deventer and Boston, Kluwer, 1983), 3, suggests that the Community should thus have the right to take preventive steps against the Member State whose action risks engaging the Community's responsibility. In particular, he considers that 'it would be unavoidable to allow the Community to use the infringement procedure in spite of the fact that the Member State acts within its sphere of competence. As regards enforcement proceedings in situations involving Member States' obligations, under mixed agreements, which relate to areas that are not entirely covered by Community law, see Case C-239/03 *Commission v France* [2004] ECR I-9325, para 25; Case C-13/00 *Commission v Ireland* [2002] ECR 2943; Case C-459/03 *Commission v Ireland* [2006] ECR I-4635 (MOX Plant case).

¹²⁶ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; see also case C-433/03 *Commission v Germany* [2005] ECR I-6985.

¹²⁷ Indeed, given that the Member State action or omission has implications for the implementation of the cross-pillar agreement, the Member State action or omission would have a 'general interest' dimension in the sense of Art 16 TEU, and would thus entail that that Member State must inform and consult other Member States; see Section II.A above.

¹²⁸ Further, see K Lenaerts and P van Nuffel, *Constitutional Law of the European Union* (London, Sweet & Maxwell, 2005), 115–23.

Restraining External Competences of EU Member States 111

duty to ensure that the Member States comply with their CFSP obligations so as not to make the achievement of Community's tasks more difficult.

Similarly, if some Member States were to prevent the establishment by the Community of economic sanctions towards a third state, as required by a prior CFSP common position or joint action, it could be posited that the Commission would be entitled, not only to sue the Council on the basis of Article 232 EC for failing to adopt the relevant EC measure under Article 301 EC, but it could also rely on Article 10 EC against the recalcitrant Member States which, by failing to act in accordance with the CFSP instrument, prevented the Community from fulfilling its tasks.

The foregoing hypothetical examples typify the proposition that Member States have to comply with the duty of cooperation of Article 10 EC also when acting in the context of CFSP. In addition, on the basis of Article 10 EC, Member States might be sanctioned for infringing their CFSP obligations where such violation makes the achievement of Community tasks more difficult, or jeopardises the attainment of the objectives of the EC Treaty.¹²⁹ These examples also epitomise the interconnections between the different sub-orders within the Union, in the sense that failure to comply with obligations undertaken in one order could have effects on the law of another order.¹³⁰ The Community thus has an interest, not only in Member States' compliance with their EC obligations, but also in the observance of their CFSP obligations. To be sure, Member States' compliance with their CFSP obligations is not only a requirement under the provisions of Title V, Article 11(2) in particular, it is also a means to fulfil the overall objective of the EU, foreseen in Article 2 TEU, of asserting its identity on the international scene. As a constitutive part of the Union, the Community contributes to fulfilling this EU objective, through its external policy, within its sphere of competence.¹³¹ Arguably, this contribution would be made more difficult if Member States, as actors in the system of EU external relations, infringed their EU obligations under CFSP. The principle of loyal cooperation based on Article 10 EC plays a key role in ensuring the consistency and coherence of the overall Union's external activities, as required by Article 3 TEU.¹³² It could indeed be argued that a failure to comply with the requirement of Article 3 TEU could, at least in

¹²⁹ See in this sense, Timmermans, above n 119, 241; see also M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance', ch 5, this volume.

¹³⁰ Heliskoski, above n 95, 211; Gaja, above n 121, 140 also points out that matters can be interlinked, even if apparently relating to clearly different legal authorities.

¹³¹ Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533; and T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649, (para 161 *Yusuf* case).

¹³² Further: 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 Collected Courses of the Academy of European Law* (Oxford, OUP forthcoming).

112 *Christophe Hillion and Ramses Wessel*

certain cases, be seen as a breach of Article 10 EC, thus constituting grounds for the justiciability of consistency and coherence.¹³³

The foregoing suggested that the normative character of the CFSP sub-order is not only determined by the CFSP provisions themselves, but that it is also coloured by other principles underpinning the EU legal order. In particular, the Member States' ability to conclude international agreements *inter se* or with third countries in areas of CFSP might be affected by the principle of loyal cooperation established by Article 10 EC. The next section argues that the third pillar can also have an impact on the Member States' obligations under CFSP.

B. Article 35 TEU and Member States' Obligations to comply with EU Agreements

As recalled earlier, Article 46 TEU does not extend the jurisdiction of the Court of Justice to the provisions on CFSP contained in Title V of the TEU.¹³⁴ In other words, Member States cannot be forced to the same extent as in the context of the EC external agreements to comply with their obligations under an EU agreement. However, the apparent freedom that Member States thereby enjoy should not be overstated. While the principle of loyal cooperation based on Article 10 EC constrains the Member States when acting in non-EC related fields, their freedom therein can also be limited by the Court's widening jurisdiction within the third pillar. As this section argues, the *Pupino* and *Segi* line of case law could have the effect of enhancing the effectiveness of Member States' obligations deriving from EU agreements concluded on the combined bases of Articles 24 and 38 TEU.

The *Segi* judgment explored earlier recalls that,¹³⁵ under Title VI of the TEU, the Court's jurisdiction is limited by the provisions of Article 35 TEU notably in terms of EU acts that can be the subject of preliminary references, or judicial review. It also points out that since the Union is founded on the rule of law principle and respects fundamental rights as general principles of Community law, institutions, just like the Member States when they implement Union law, are subject to review of the

¹³³ On the interactions between Art 10 EC and Art 3 TEU, see HG Krenzler and HC Schneider, 'The Question of Consistency' in E Regelsberger *et al*, *Foreign Policy of the European Union: From EPC to CFSP and Beyond* (Boulder, Lynne Rienner, 1997) 133, 147; Heliskoski, above n 95, 64; R Frid, *The Relations between the EC and International Organisations. Legal Theory and Practice* (The Hague, Kluwer, 1995) 149.

¹³⁴ Case C-354/04P *Gestoras Pro Amnistía and Others v Council*, judgment of 27 February 2007; Case T-228/02 *Organisation des Modjahedines du peuple d'Iran*, judgment of 12 December 2006.

¹³⁵ 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, nyr.

Restraining External Competences of EU Member States 113

conformity of their acts with the Treaties and the general principles of the law. In this context, Article 35(1) TEU establishes a preliminary procedure to guarantee observance of the law in the interpretation and application of the Treaty. Contending that it would be counter to that objective to interpret Article 35(1) narrowly, the Court found that the right to make a reference for a preliminary ruling must therefore exist ‘in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties’.

Since the Court refers to ‘all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties’, it could be wondered whether third pillar instruments other than common positions, and notably EU agreements based on Articles 24 and 38 TEU, could equally be the subject of a preliminary reference. After all, such EU agreements are instruments concluded by the Council, and they may have legal effects in relation to third parties, as notably illustrated by the EU Agreement with the US on the processing and transfer of passenger name record (PNR) data by air carriers to the US Department of Homeland Security,¹³⁶ or the Agreements between the EU and the US on extradition and mutual legal assistance in criminal matters.¹³⁷

Following the Court’s approach, it cannot be excluded that the provisions of EU agreements based on Articles 24 and 38 TEU could also be the subject of a preliminary reference, at least in so far as the provisions relate to the third pillar, and they produce legal effects in relation to third parties. If that holds true, national courts would be in a position to obtain an interpretation, or indeed question the validity of such EU agreements. In the light of the Court’s pronouncement in *Pupino*, and particularly in view of the principle of loyal cooperation, the national courts would then be compelled to refer to the content of the EU agreement when interpreting the relevant rules of its national law, or indeed international agreements.

In other words, the *Segi* jurisprudence, combined with the *Pupino* decision, could well entail that Member States’ freedom to conclude external agreements might be affected by EU agreements based on Articles 24 and 38 TEU. Of course, the effect of an EU agreement, as envisaged above, would only concern the third-pillar-related provisions of that agreement but not its CFSP aspects, nor a fortiori the provisions of ‘pure’ second pillar agreements. If this reasoning holds true, it would become decisive to distinguish what belongs to CFSP and what belongs to PJCC in cross-pillar EU agreements, a task which arguably could be performed by the Court under Article 35 TEU.

¹³⁶ [2006] OJ L/288/27.

¹³⁷ [2003] OJ L/181/25.

It appears therefore that the ‘judicialisation’ of the third pillar may have implications for the second. It triggers a need to distinguish different categories of EU agreement, as their effects on Member States and the jurisdiction of the Court may differ from one to the other. Moreover, it could require that the outer limits of CFSP be policed, not only in relation to the EC Treaty on the basis of Article 47 TEU, but also in relation to the third pillar given the Court’s jurisdiction on the basis of Article 35 TEU. More generally, the foregoing also supports the proposition that the interplay between CFSP and other norms of the EU legal order may influence, if not affect the nature or effects of, Member States’ CFSP obligations, and their freedom to conclude international agreements in the areas covered by CFSP.

C. Member States’ Interactions with the EC in Areas relating to CFSP

This final section raises the question of whether one may envisage situations in which CFSP norms engender restraints on Member States’ actions in areas of external competence they have retained under the EC Treaty. Only limited external powers fall within the Community’s exclusive competence. In most cases the Member States have retained at least part of their original external competences, resulting in ‘mixity’ as a key feature of the Community’s external relations. The question then is whether the CFSP norms entail an obligation of conduct for the Member States to act through the CFSP machinery, thus *qua* Council of the EU in areas relating to foreign and security policy, and particularly when acting in relation to, or jointly with, the Community. In other words: do the Member States remain entirely free to ignore the procedural CFSP obligations in areas in which the EC Treaty does not affect their individual external competences? This question will be approached from three different angles. First, Member States’ freedom will be tested when they take action in areas where the Community has no exclusive powers, actually or potentially (ie complementary powers). Member States’ discretion will then be examined in the context of mixed agreements, classical or cross-pillar, covering inter alia foreign policy issues. Finally, it will be wondered whether Member States may be subject to CSFP obligations when they act in the context of Article 297 EC.

The first scenario relates to the question of whether, beyond their obligations to comply with Community law (including obligations derived from Article 10 EC), Member States have unlimited discretion when they act in areas where the Community cannot have exclusive competence, and where, as a consequence, they remain free to act alone or collectively. More particularly, do the CFSP norms force Member States to use the Council as

Restraining External Competences of EU Member States 115

an EU institution in areas where they have kept their ability to act *qua* Member States, individually or collectively? Or is there at least a possibility to use CFSP to this end?

This question could indeed be raised in the context of the pending ECOWAS case.¹³⁸ To recall the facts, the Commission notably challenges the legality of Council Decision 2004/833/CFSP, which provides for an EU contribution to the Economic Community of West African States (ECOWAS) in the framework of the Moratorium on Small Arms and Light Weapons. Because this decision has been adopted as a CFSP decision, the Commission argues that it infringes Article 47 TEU, since it affects Community powers in the field of development aid.¹³⁹ In particular, the Commission contends that Article 11(3) of the Cotonou agreement concluded with the ACP countries covers actions notably against the spread of small arms and light weapons. It also points out that it had concluded, pursuant to Article 10(2) of Annex IV of the Cotonou agreement, a Regional Indicative Programme for West Africa with the ECOWAS and the West African Economic and Monetary Union (WAEMU), which gives support to a regional policy of conflict prevention and good governance, and announces support in particular for the moratorium on the import, export and production of light weapons in West Africa.

In order to determine whether the impugned act should have been adopted as a Community act, the Court may follow its Environmental Penalties approach, and examine the aim and content of the measure in order to establish the main thrust of the measure, eventually to determine its appropriate legal basis. The outcome of the case would thereby depend on the scope of the development cooperation competence of the Community, and incidentally that of CFSP. Arguably, the outcome could also be determined by the nature of that Community competence, and of the potential existence of an *EU* (read CFSP) power to act in areas where competence is shared between the Community and the Member States. As evoked earlier, the Court has made clear in the EDF case that the Community does not have exclusive powers in the field of development cooperation, and that the Member States 'are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community'.¹⁴⁰ Similarly in relation to humanitarian aid, the Court pointed out that since the Community does not have exclusive competence in this field, 'Member States are not precluded from exercising their competence in that regard collectively

¹³⁸ C-91/05 *Commission v Council* (ECOWAS case), pending: see [2005] OJ C/115/10.

¹³⁹ The Commission is also seeking a declaration of illegality against Council Joint Action 2002/589/CFSP on the same basis and for the same reasons.

¹⁴⁰ Case C-316/91 *European Parliament v Council* [1994] ECR I-625 (EDF case); para 26.

in the Council or outside it'.¹⁴¹ The Court was thus ready to admit that in those areas, Member States' and Community acts may co-exist. In the light of this case law, it may be wondered whether, in case the Court establishes that the aim and content of the measure do concern development aid, this would automatically entail that the measure ought to be adopted as an EC measure. Conversely, does the fact that development cooperation is an area where Member States are entitled to act individually or collectively or indeed within the Council, alongside the Community, entail that the measure could (or perhaps should) be adopted by the EU Council on the basis of Title V, instead of the Member States?¹⁴²

Without attempting to give a full answer to this question, it would appear that, while the Member States remain free to act individually or collectively, including within the premises of the Council (ie meeting of the representatives of the Member States acting, as representatives of their governments, and thus collectively exercising the powers of the Member States, but not in their capacity as members of the Council), this freedom does not seem to include Member States' discretion to choose between a CFSP and an EC legal basis when action is to be taken at EU level.¹⁴³ In particular, the provisions of Articles 2, 3 and 47 TEU, read together, tend to suggest that should the Member States decide that action should be taken at EU level in the field of development policy, they may have to do it through the Community decision-making procedures, wherever the Community has the power to act. Conversely, and it may sound partly absurd, the logic of the Treaty provisions seems to suggest that Member States are still entitled to act on their own behalf, individually, collectively, in the Council or outside it, but not *qua* Council, acting on the basis of Title V. Once it becomes clear that there is an EU competence, it simply does not seem to be up to the Member States to opt for an EU (viz CFSP or PJCC) rather than an EC competence.

In a similar vein, one may wonder whether aspects of mixed agreements relating to Member States' powers could be, or even ought to be, dealt with by the EU *qua* CFSP, following the provisions of Article 24 TEU. For instance, if the Member States have the common wish to include a political dialogue, or an extensive cooperation in security and defence matters in an external agreement jointly concluded with the Community, should the CFSP/ESDP-related provisions *require* that the Union become party to the

¹⁴¹ Joined Cases C-181/91 and 248/91, *European Parliament v Council and Commission* [1993] ECR I-3685 (Bangladesh case).

¹⁴² A Dashwood, 'The Interface between EC External Relations and the CFSP' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge, Cambridge University Press, 2007); A Dashwood, 'The Law and Practice of CFSP Joint Actions', ch 3, this volume.

¹⁴³ Cp the argument of the Danish Government in the *Airport Transit Visa* case referred to above, n 28 (Case C-170/96 *Commission v Council* [1998] ECR I-2763).

Restraining External Competences of EU Member States 117

agreement rather than the Member States, alongside the Community? The advantage of that approach would be to allow the agreement possibly to be concluded as a cross-pillar EC/EU agreement, rather than a classical mixed agreement, and thus to avoid the heavy ratification process at the national level. However practical it may look, this approach would not mean that classical mixity would be disposed of. Indeed, EU participation does not seem to be legally mandatory.

First, a cross-pillar agreement could not replace a classical mixed agreement where the latter contains, alongside CFSP provisions, provisions related to powers shared between the Community and the Member States. In areas of shared powers, the EU cannot replace the Member States acting on the basis of Article 24 TEU, given the obligation enshrined in Article 47 TEU, and the objective of Article 2 TEU. As suggested above, in areas of shared powers, including areas of co-existent powers such as development cooperation, the Member States do not appear to have a choice between acting in the EC framework or in the CFSP framework.

Second, in relation to areas of a mixed agreement relating to CFSP, the provisions of Article 24 TEU and practice thereof suggest that using the CFSP treaty-making machinery is not mandatory. In legal terms, the EU concludes an agreement on the basis of Article 24 TEU when the Member States deem it 'necessary ... in implementation of [the CFSP] title', in contrast to the provisions of Article 300 EC which instead envisages the Community's exercise of its treaty-making power '[w]here this [EC] Treaty provides ...' Thus, the common will of the Member States to include provisions related to CFSP in a mixed agreement does not automatically lead to the negotiation and conclusion of an agreement partly based on Article 24 agreement, for it may not be deemed 'necessary' for the Union itself to conclude the agreement. Arguably, the Union's objective of asserting its identity on the international scene (Article 2 TEU), combined with the loyalty principle of Article 11(2) TEU, should nevertheless be considered, when assessing the 'necessity' of an Article 24 agreement.

Moreover, it should be noticed that since the introduction of Article 24 TEU by the Treaty of Amsterdam, there has only been one agreement concluded both by the Community and the Union on the bases of Articles 300 EC and 24 TEU, respectively.¹⁴⁴ Agreements involving areas of EC competence and cooperation in CFSP matters are still concluded as 'classical' mixed agreements by the Community and the Member States,

¹⁴⁴ Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* concluded in 2004 by the EU, on the basis of Arts 24 and 38 TEU (Council Decisions 2004/849/EC; [2004] OJ L/368/26) and the EC, on the basis of Art 62, point 3 of the first subparagraph of Art 63, Arts 66 and 95, in conjunction Art 300(2) (Decision 2004/860/EC; [2004] OJ L/370/78). The Agreement (13054/04) is available at the Public Register of the Council only.

acting jointly. Indeed, both the Commission and some Member States tend to favour classical mixity. The Commission fears that the EU as a party may overshadow Community external powers while, on the other hand, some Member States fear that their international posture would be hampered by too prominent a Union.¹⁴⁵ One could also add that the conclusion of a mixed agreement by the EU in place of the Member States would have the effect of subtracting the areas covered by the EU from any democratic control. Presently this democratic control is still partly ensured at the level of ratification by the Member States' parliaments.

The last angle from which to study Member States' potential obligation to act in the framework of CFSP is that of Article 297 EC. This provision foresees situations where Member States have to consult each other with a view to taking together steps needed to prevent the functioning of the common market being affected by Member States measures, taken in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

Since a Member State may use these provisions as justifications for not complying with its internal market obligations, it may be suggested that such justification, particularly given the subject matter it relates to, ought to be discussed and assessed, if not addressed in the context of CFSP. In particular, it could be wondered whether that State's concerns ought to be validated by a decision taken in the context of CFSP for them to be lawfully invoked, in the EC context, as justification for derogations to the internal market rules.¹⁴⁶ On the other hand, one may argue that this debate is perhaps too academic as both Article 297 EC and Article 16 EU foresee a possibility for Member States to consult one another on these issues in the Council and there is no necessity to define the exact legal basis, or framework. In addition, both provisions use similar mandatory language ('Member States shall ...') to establish the consultation obligation. The only difference is that Article 297 seems to allow Member States to consult each other outside the Council.

This section has attempted to demonstrate that the inclusion of CFSP in the broader context of the EU legal order has implications for the normative content of CFSP. It has been suggested that the obligations of Article 10 EC may colour Member States' obligations under CFSP. It was

¹⁴⁵ This seems to be the background to the failure to conclude a cross-pillar agreement in the context of the EU accession to the ASEAN Treaty of Amity and Cooperation (TAC) as suggested by Council Doc 16042/06 of 30 November 2006 entitled 'Draft Council authorization to the Presidency and the Commission to negotiate the accession to ASEAN Treaty of Amity and Cooperation (TAC) by the EU and EC respectively'.

¹⁴⁶ Further on Art 297 EC, see P Koutrakos, 'Is Art 297 EC a "Reserve of Sovereignty"?' (2000) 37 *CML Rev* 1339.

Restraining External Competences of EU Member States 119

also argued that the recent case law of the Court of Justice in relation to the third pillar instruments, developed in the context of Article 35 TEU, could also affect the way in which Member States apprehend their obligations under EU agreements, at least those agreements which include third pillar provisions. Finally, the section has attempted to shed light on the limits to Member States' discretion to use CFSP mechanisms where interacting with the Community.

V. CONCLUSION

The aim of this Chapter was to examine the possible restraints on the basis of the CFSP primary and secondary norms and—in the line of these general notions—to analyse the possible effects of agreements concluded by the EU on Member States' foreign policy competences. At the time of the conclusion of the Treaty on European Union—now 15 years ago—it was widely held that the very *rationale* underlying the creation of CFSP as a separate pillar within the new Union was to be found in the leeway offered to Member States to continue developing their own foreign policy. In fact, CFSP (just as the cooperation in the area of Justice and Home Affairs) was to develop outside the Community legal order, in order for it not to become affected by the notions characterising that order, notably primacy, direct effect and an allegedly 'unbounded' role of the European Court of Justice. At the same time, however, CFSP was legally connected to the European Community as both of them became part of a new entity, the European Union. Hence, the pillars were separate, but nonetheless clearly inseparable. It is this nearness that formed the basis of our analysis.

With the ongoing interplay between the pillars, the normative character of CFSP may increasingly be coloured by principles originating in the other pillars. While 'cross-pillar mixity' is scarce,¹⁴⁷ it is assumed that at least in those cases, for instance, the full scope of Article 10 EC is applicable. Similar 'spill-over' effects have proved to be possible from the third to the second pillar as revealed by the *Pupino*, and in particular the *Segi* line of case law. Hence, where a cross-pillar legal basis is used, developments in one pillar (either on the basis of legal practice or of case law) can hardly be blocked from the other pillar.

Partly on the basis of this case law we have argued, however, that this development is of a more general nature and is not confined to cross-pillar decision-making. Thus, in interpreting the CFSP loyalty obligation laid down in Article 11(2), its proximity to Article 10 EC should be taken into account, in particular in relation to the conclusion of agreements. The

¹⁴⁷ In this respect, see P Eeckhout, above n 1, 184.

potential impact of the loyalty principle (which despite existing ‘pillar-specific’ characteristics could be seen as a ‘principle of Union law’) on Member States’ freedom under CFSP should not be underestimated.

On the basis of the limited availability of case law related to CFSP no final conclusions can be drawn on a number of issues. One of those issues concerns the primacy, direct effect and justiciability of CFSP decisions and agreements. While we have argued that EU agreements are to be regarded as forming ‘an integral part of Union law’, it is also clear that ‘Union law’ is not to be equated with ‘Community law’. And even when ‘Union law’ is concerned, the far reaching *Segi* qualification of common positions with a partial CFSP legal basis indicates that specific pillar characteristics (in this case of the third pillar) should be taken into account. At the same time, however, *Segi* revealed (as *Pupino* did earlier) the Court’s approach in interpreting the legal nature and scope of non-Community Union instruments in the light of the overarching Union legal order, for the development of which traditional Community principles prove to play an important role.

Our overall conclusion is that the CFSP normative order does indeed restrain the external competences of the Member States, thus putting its alleged ‘intergovernmental’ nature into perspective. First of all, the primary CFSP norms entail a consultation obligation which cannot be ignored by Member States without a complete denial of the *rationale* behind CFSP. In addition, Member States’ specific obligations under the CFSP title should be interpreted in the light of the general loyalty obligation to support the Union’s CFSP (Article 11(2) TEU). This obligation becomes more substantive once the Union has acted, and given the proximity between the provisions of Article 11(2) TEU and Article 10 EC respectively, there are reasons to interpret the former in the light of the latter’s interpretation.

A second related conclusion concerns the competence of the Union to conclude international agreements with third states or other international organisations. We have argued that, in a situation of parallel competences, the nature of the EU competence involved should be considered, and in particular its possible pre-emptive effect. Indeed, it seems too early completely to rule out exclusivity in the field of CFSP. After all, the (international) legal status of agreements concluded by the Union could be deprived of any effect if they would allow Member States to conclude agreements, either *inter se* or with third parties, which would depart from established Union law.

Third, the interplay between the pillars reveals an increasing need to use cross-pillar instruments (or to connect different EU and EC instruments). This, in turn, makes it difficult to approach the CFSP obligations in isolation. Member States’ CFSP obligations might be coloured by provisions of the other two EU sub-orders. While the connection between CFSP and EC issues in particular may lead to a different perception of CFSP

Restraining External Competences of EU Member States 121

constraints, it is nevertheless difficult to argue that Member States retained powers in the area of foreign affairs (eg development cooperation) should be exercised specifically in the framework of CFSP, as Member States are not able to choose between a CFSP and an EC legal basis when action is to be taken at EU level.

