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Daniel Thym*

*Prof. Dr. Thym LL.M. holds the chair of Public, European and International Law at the University of Konstanz and is Co-Director of the Research Centre Inmigration & Asylum Law at the same University

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CEU *Ediciones*
Julián Romea 18, 28003 Madrid
Teléfono: 91 514 05 73, fax: 91 514 04 30
Correo electrónico: ceuediciones@ceu.es
www.ceuediciones.es

Instituto Universitario de Estudios Europeos
Avda. del Valle 21, 28003 Madrid
www.idee.ceu.es

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1. Introduction

With the Treaty of Lisbon a new institutional regime for European foreign policy formulation is being established. Under the responsibility of the High Representative (HR) the European External Action Service (EEAS) shall provide the bedrock for effective policy-formulation and implementation. Within this overall context my paper focuses on the rules governing the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP). Their analysis is of particular relevance, since the Lisbon Treaty's unitary system does not unmake the specificity of the CFSP and the CSDP which continue to be 'subject to specific rules and procedures' (Art. 24.1(2) TEU). The inspection of the CFSP and CSDP structures helps us to identify their executive character and consider appropriate mechanisms to hold the intergovernmental CFSP executive to account for its activities, thereby closing a potential accountability gap.

Among European lawyers, CFSP and CSDP did not gain much prominence for many years.[1] This limited attention stands in striking contrast to political science, which devotes considerable attention to the Union's activities in the former 'second pillar.'[2] Certainly, the lack of ECJ jurisdiction explains and justifies a lesser degree of legal scrutiny.[3] But this should not leave us with the impression of a legal ghetto. While the rules governing CFSP, which legally includes the CSDP,[4] are certainly specific, they need to find their place within the wider framework of European constitutional law reflecting the Lisbon Treaty's endeavour to combine the former pillars in a single legal order with one legal personality, an uniform institutional framework and overarching Treaty objectives.[5]

I will present my argument in three steps. First, the inspection of the new Treaty regime governing CFSP and CSDP in the light of the institutional practice helps us to identify their executive character. Foreign, security and defence policies are not about law-making but typified by their political, administrative and operational character (section II). Despite the abolition of the pillar structure the Lisbon Treaty continues legal and institutional intergovernmentalism through specific rules and procedures, whose relationship with the constitutional principles of Europe's supranational legal order requires clarification (section III). Having identified the intergovernmental executive character of the CFSP/CSDP Treaty regime we may conceptually explore the corresponding accountability of the EU's foreign, security and defence executive. In doing so, the article links the analysis of CFSP and CSDP to the on-going debate about the accountability of the EU's executive order (section III).

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1 Even most monographs on EU external relations confined the CFSP/CSDP to one, albeit important, chapter; for an early exception see R. Wessel, The European Union's Foreign and Security Policy (1999) and the contributions to M. Trybus/N. White (eds.): European Security Law (2007).

2 See, recently, the special issue of the *Journal of Common Market Studies* 2011/1.

3 Among legal authors the delicate delimitation between the supranational (first pillar) policies and CFSP/CSDP in the fields of dual use goods, sanctions, development cooperation and armament cooperation gained most attention; cf. the overview by M. Trybus, European Union Law and Defence Integration (2005).

4 Chapter 2 of the EU Treaty comprises two section with the 'common provisions' for CFSP *and* CSDP (Art. 23-41) and specific CSDP rules (Art. 42-46).

5 Cf. on legal unity Art. 1(3), 3, 21 and 47 TEU.

2. Expansion of Executive Power in CFSP and CSDP

During the European Convention and the Intergovernmental Conferences drafting the Constitutional Treaty and its offspring, the Lisbon Treaty, both institutional reform and the efficacy of foreign policy decision-making took centre stage.[6] Most minds were focused on the thorny issue of political leadership and the corresponding prerogatives of the European Council, the Commission and the High Representative (subsection 1). In contrast, the administrative CFSP infrastructure obtained much less attention, although the Lisbon Treaty certainly recognises its existence, thereby reflecting the expansion of executive capacities at Treaty level (subsection 2). But the new rules remain incomplete insofar as they follow the Community blueprint of formalised decision-making procedures. This contrasts with the prevailing informality of political and operational CFSP activities (subsection 3). Such counter-intuitive assessment of the Treaty articles acknowledges the specificity of foreign affairs and lays the basis for the designation of appropriate accountability mechanisms.

2.1. Political Executive Power

For more than a decade, the pursuit of a 'single voice' served as a symbol of CFSP reform. Indeed, personification of foreign policy may contribute to its visibility and efficacy, especially if the uniform representation is accompanied by structural changes which facilitate the emergence of collective policy preferences. In this respect, the enhanced status of the High Representative (HR) may facilitate the realisation of a common approach.[7] With the Lisbon Treaty the second High Representative, Catherine Ashton, formally steps into the limelight by assuming the functions which had hitherto been held by the rotating Council Presidency and the Commissioner with the portfolio for external relations. Whereas the Amsterdam Treaty confined the HR the junior function to 'assist' the Council and represent the CFSP 'at the request' of the Presidency,[8] Lisbon entrusts the post with extensive agenda-setting, decision-shaping and implementing powers.[9] Nonetheless, the HR's enhanced legal capacities stay short of the political prerogatives of most national foreign ministers.

2.1.1. Spokes –and chairperson– no foreign minister

The High Representative can also in future not autonomously decide the Union's foreign policy. Without consensus among the Member States there is no policy position which the HR may represent towards the wider public.[10] Catherine Ashton may rely on the EEAS to elaborate proposals and steer the Foreign Affairs Council, which she chairs, towards agreement, but without consensual approval she must, as a matter of legal principle, remain silent.[11] The EU's tardy reaction to the popular uprising in North Africa

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6 See G. Grevi, The Common Foreign, Security and Defence Policy, in: Amato et al. (eds.): Genèse et destinée de la Constitution européenne (2007), p. 807 at 811-7.

7 Cf. the analysis of media coverage in third countries by M. Rogahn et al., A Mediator on the World Stage?, ELJ 12 (2006), 680 at 695-6.

8 See Art. 18.3, 26 TEU-Amsterdam/Nice; in practice the first HR, Javier Solana, gained considerable influence and was entrusted with important diplomatic missions, such as the arbitration in the constitutional crisis in Serbia and Montenegro or the negotiations about Iran's nuclear programme; for more details see S. Duke/S. Vanhoonacker, Administrative Governance and CFSP, EFA Rev. 11 (2006), 163 at 168.

9 For an overview see J.-C. Piris, The Lisbon Treaty (2010), pp. 238-49.

10 On decision-making below section III.1.a.

11 Of course, there is an extensive grey zone between the autonomous conduct of foreign policy and the representation of positions decided elsewhere, especially in the case of political declarations, personal interaction and media interviews; but as a matter of principle the Treaty is clear: the HR chairs, proposes and represents under Art. 27.1+2 TEU, while the Council decides in accordance with Art. 31 TEU.

in early 2011 partly resulted from this need to establish a common line first.[12] Arguably, the appointment of a lesser known figure also signals that the Member States are intent on remaining at the helm.[13] Article 18(2) TEU adequately grasps the post's underlying tension: the HR 'shall conduct' the CFSP which he/she shall carry out 'as mandated by the Council.'[14] Given these shackles the Lisbon Treaty's modest designation of a 'High Representative' seems more adequate than the Constitutional Treaty's high-flying coronation of a 'Foreign Minister.'[15]

One crucial difference between the powers of Javier Solana and his successor, Catherine Ashton, is the extended portfolio. The title 'High Representative of the Union for Foreign Affairs and Security Policy' wrongly suggests that responsibilities are limited to CFSP and CSDP. Rather, the HR shall, as a Vice-President of the Commission, simultaneously preside over the supranational external relations department and '(coordinate) other aspects of the Union's external action.'[16] When acting under her Commission 'hat' the HR must respect supranational decision-making,[17] which the Commission seems eager to protect against intergovernmental contamination (section III.1.b). There is a consensus among most observers that the viability of this construction depends on human chemistry and the wider interinstitutional climate. Ideally, the HR's 'double hat' may result in fruitful complementarity – or leave the HR in a grey zone of overlapping political and institutional loyalties with the Council and the Commission mutually mistrusting a Trojan horse of the other institution.[18]

2.1.2. Plurality of external representatives

The institutional picture is complicated by the future President of the European Council which may represent the EU 'at his level and in that capacity'[19] and to which the Commission President will not want to play second fiddle. Thus, a new troika may emerge instead of the original ambition of uniform external representation.[20] While relations between both Presidents and the HR raise delicate legal problems,[21] they arguably reflect the general uncertainty about the allocation of political leadership. With the formal recognition of the European Council as an EU institution the Lisbon Treaty sanctions the latter's authority without however assigning the leadership function to heads of state or government alone. Lisbon rather seeks to advance the established EU practice of joint political leadership by strengthening all institutions involved. Governmental authority will also in future be vested in the (European) Council and the Commission.[22] The corresponding potential for overlap and friction is neither new nor amplified by the new set-up and does reflect, arguably, the Union's hybrid character between an international organisation and a federal state.

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12 C.f. the juxtaposition with the quick modification of the US standpoint in the Charlemagne column 'Out of the Limelight', The Economist of 3 February 2011, available online at http://www.economist.com.

13 See T. Barber, The Appointments of Herman van Rompuy and Catherine Ashton, JCMSt. 48 (2010), Supplement 55 at 61-2.

14 Legally, this general provision is specified by the detailed rules on the Council chairmanship, the right of initiative, decision-making and representation in Art. 27-32 TEU.

15 Legally, the powers of the HR under Art. 18 TEU-Lisbon are identical with the functions of the Foreign Minister under Art. I-28 Treaty establishing a Constitution for Europe of 24 October 2004 (OJ 2004 C 310/1), which never entered into force.

16 Art. 18.4 TEU.

17 Read the se.cond sentence of Art. 18.4 TEU.

18 See my earlier argument D. Thym, Reforming Europe's Common Foreign and Security Policy, ELJ 10 (2004), 5 at 21-2 and, similarly, D. Curtin, Executive Power of the European Union (2009), p. 102, Piris (note 9), p. 248 and Grevi (note 6), pp. 788-95.

19 Art 15.6 TEU.

20 A minor, but telling, example briefly after the establishment of the EEAS: the Joint statement by President Van Rompuy, President Barroso and High Representative Ashton on recent developments in Egypt of 11 February 2011.

21 See C. Kaddous, Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty, in: Griller/Ziller (eds.): The Lisbon Treaty (2008), p. 205 at 210-20 and C. Calliess, Die neue Europäische Union nach dem Vertrag von Lissabon (2010), pp. 122-4 & 401-2.

22 On joint leadership see P. Craig, The Lisbon Treaty (2010), pp. 101-8 and P. Dann, The Political Institutions, in: von Bogdandy/Bast (eds.): Principles of European Constitutional Law (2nd ed. 2009), p. 233 at 253-62.

For the purposes of our analysis it should be underlined that the Lisbon Treaty does not establish clear-cut relations between the HR and the EEAS with the Commission and the (European) Council. While the HR is fully integrated into the Commission under her supranational 'hat', her formal status in CFSP remains unclear. The HR constitutes no institution in itself[23] and is positioned in a sort of legal limbo rather unsure whether it holds an institutional legitimacy in its own right or shall primarily serve the requests and instructions of the (European) Council.[24] This ambiguity extends to the EEAS as 'a functionally autonomous body of the European Union.'[25] This pragmatic formula resulted from the desire to keep an equal distance to the Commission and the Council,[26] but hints nonetheless at an underlying difficulty: the distinction between political and administrative executive power within the institutional set-up of the European Union. The post of HR and, to a certain extent, the EEAS fluctuate between political autonomy and administrative support.[27]

2.2. Lisbon's Recognition of the Administrative Infraestructure

In contrast to the political front-stage of the political institutions the administrative back-stage within the administration obtained much less attention, both during the Treaty drafting process and among legal academics.[28] Its reorganization was guided by the desire to 'avoid duplication of services' and provide the HR with 'sufficient staff.'[29] As a pragmatic compromise, the Constitutional Treaty and the Lisbon Treaty established the European External Action Service (EEAS), which 'shall comprise *officials from relevant departments* of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States.'[30] This broad description left the decision which 'relevant' departments should be integrated into the new service to the subsequent implementing decision, which was finally adopted in July 2010 after six months of protracted negotiations.[31]

2.2.1. Clarity, flexibility and rigidity of the Treaty regime

From a constitutional standpoint, the Lisbon Treaty should be welcome for its clarity. In contrast to earlier Treaty amendments the new rules reflect the considerable expansion of executive capacities within the realms of the Council at Treaty level.[32] They acknowledge that the HR 'shall be assisted' by the EEAS

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23 At the same time, the previous function as head of the Council Secretariat has been discontinued; cf. Art. 18.3 TEU-Amsterdam/Nice which also reflected the interinstitutional hierarchy of the Council Presidency vis-à-vis the HR and Curtin (note 18), pp. 101-2.

24 The appointment (and recall) procedure under Art. 18.1, 17-8 TEU indicate the primary dependence upon European Council in CFSP and CSDP.

25 Art. 1.2 Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service (OJ 2010 L 201/30).

26 See B. Van Vooren, A Legal-Institutional Perspective on the European External Action Service, CLEER Working Papers 2010/7, pp. 11-3.

27 If we accept the formal criterion of (in)direct election by a parliament and/or the European Council as a dividing line, the post of HR (but clearly not the EEAS) would be political; this ambiguity reflects the EU's wider institutional picture; see Curtin (note 18), ch. 4 (pp. 69-104) and Duke and Vanhoonacker (note 8), pp. 164-5.

28 Cf. the critique by B. de Witte, Executive Accountability under the European Constitution and the Lisbon Treaty, in: Verhey/Kiiver/Loeffen (eds.): Political Accountability and European Integration (2009), p. 137 at 149 and Curtin (note 18), pp. 18-22.

29 See the Final Report of Working Group VII 'External Action', CONV doc. 459/02 of 16 Dec 2002, available online at http://european-convention.eu.int, paras. 64-9.

30 Art. 27.3 TEU (emphasis added) which continues Art. III-296.3 Constitutional Treaty (note 15).

31 See the Council's EEAS Decision 2010/427/EU (note 25); on the course of the negotiations see A. Missiroli, The New EU 'Foreign Policy' System after Lisbon, EFA Rev. 15 (2010), 427 at 435-41 and D. Lieb/A. Maurer, Der Aufbau des Europäischen Auswärtigen Dienstes, Integration 2010, 195 at 199-202.

32 For their evolution see H. Dijkstra, The Council Secretariat's Role in the CFSP, EFA Rev. 18 (2008), 149-66, F. Terpan, La politique étrangère, de sécurité et de défense de l'Union européenne (2010), pp. 27-43, D. Thym, Europäisches Wehrverwaltungsrecht, in: Terhechte (ed.): Verwaltungsrecht der Europäischen Union (2011), § 17 paras. 32-3 & 42-8 and Duke and Vanhoonacker (note 8), p. 363.

staff (Art. 27.3 TEU) which also comprises Union delegations in third countries and with international organisations (Art. 221 TFEU). Extensive textual references indicate the scope of military and civil CSDP operations, the European Defence Agency and the improvement of military capabilities (Art. 42-6 TEU) and did not go unnoticed during the ratification process.[33] They may indeed overreach the potential of constitutional engineering, especially in the case of Permanent Structured Cooperation. While the Treaty text suggests the sweeping improvement of military capabilities 'with a view to the most demanding missions'[34], the small-print of Protocol No. 10 thwarts these high expectations.[35]

In contrast to the defence provisions the legal basis for the EEAS is characterised by a welcome generality. European lawyers should be careful not to overstretch the reach and detail of Treaty provisions, which run the risk of curtailing the room for political decisions and fail to guide political reality.[36] The EEAS set-up is a case in point. While the negotiations were tough and exasperating, they guarantee the flexibility of the its institutional set-up. The organisation of diplomatic staff and corresponding lines of command are also within national constitutional systems subject to working arrangements which can be adapted any time without recourse to cumbersome Treaty amendment procedures.[37] Moreover, the dichotomy between intergovernmentalism and supranationalism which pervades the EEAS (see section III.1.b) rendered interinstitutional disputes unavoidable. The delineation of spheres of influence is a legitimate concern in a political system based upon the principle of institutional balance.[38]

When it comes to the recognition of administrative CFSP and CSDP back-offices, the Lisbon Treaty does not stop at 'formal catch-up'[39] with earlier developments at sub-Treaty level, thereby making visible the executive responsibilities of the Council Secretariat which had been portrayed to govern 'in the shadow.'[40] The new regime moreover transforms the organisation of executive power by separating the EEAS from the Council's decision-making. CFSP and CSDP bodies are no longer assimilated with auxiliary support tasks of the Council's General Secretariat,[41] but are integrated into the EEAS as an executive entity in its own right. As a result, the Council loses its chameleonic identity.[42] It embraces much less covert administrative functions. The Council and its preparatory bodies retain their decision-making powers, while the administrative infrastructure steps into the open and becomes visible within in EEAS.

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33 In response to the initial Irish rejection of the Lisbon Treaty the Decision of the Heads of State or Government 'on the concerns of the Irish people', Council doc. 11225/2/09 of 10 July 2009, pp. 17-9 (Annex I, section C) struggles to counter the impression of the 'militarisation' of national defence policies through CSDP.

34 Art. 42.6 TEU.

35 Art. 46.6 TEU prescribes unanimity and Art. 1 Protocol No. 10 (OJ 2007 C C 115/275) substantively restricts the new mechanism to the pre-existing 'battle group'-concept and cooperation within the EDA and other multinational fora; for the underlying tensions see H. Bribosia, Les nouvelles formes de flexibilité en matière de défense, in: Amato et al. (note 6), p. 835 at 840-2 and J. Howorth, The European Draft Constitutional Treaty and the Future of the European Defence Initiative, EFA Rev. 9 (2004), 483 at 486-92.

36 See the argument put forward by B. de Witte, Too much Constitutional Law in the European Union's Foreign Relations?, in: Cremona/ibid., p. 3 at 11-3 and P. Koutrakos, Primary law and policy in EU external relations, EL Rev. 33 (2008), 666 at 670.

37 Any modification of the EEAS requires a modification of the EEAS decision under Art. 27.3 TEU; for the benefits of flexible institutional design see S. Vanhoonacker/N. Reslow, The European External Action Service, EFA Rev. 15 (2010), 1 at 16-7.

38 Similarly, G. Sydow, Der Europäische Auswärtige Dienst, Juristenzeitung 2011, 6 at 7; more critical: Koutrakos (note 36), p. 674.

39 D. Curtin/I. Dekker, The European Union From Maastricht to Lisbon, in: Craig/de Búrca (eds.): The Evolution of EU Law (2. Aufl. 2011), p. 155 at 182.

40 T. Christiansen, Out of the Shadows, Journal of Legislative Studies 8 (2002), 80-97.

41 See Art. 240.2, 236.4 TFEU.

42 Cf. the earlier criticism by Curtin (note 18), p. 81-2 and the description of its new role by M. Mangenot, The Invention and Transformation of a Governmental Body: the Council Secretariat, in: Rowell/ibid. (eds.): A Political Sociology of the European Union. Reassessing Constructivism (2010), pp. 46-67.

2.2.2. Continued complexity instead of monopolisation

In practice, most CFSP and CSDP support structures have been migrated to the EEAS. First, the foreign policy desks of the Council Secretariat's Directorate-General E and the initial 'Policy Unit', which served as a nucleus for the expansion of strategic foreign policy thinking, are an integral part of the EEAS' central administration.[43] Second, the Council's military bodies have similarly been transferred to the EEAS. In future, the expertise of the EU Military Staff (EUMS), the Situation Centre (SitCen) for information gathering and the various civil crisis management structures will perform their function as intergovernmental subunits of the EEAS under the control of the Council.[44] As a result, the Council Secretariat is relegated to its original function of preparing and assisting Council decisions, while the administrative CFSP and CSDP bodies put flesh on the bones of Europe's external action service which does not hide its executive vocation.

Also in future Europe's foreign policy executive will however be no monolithic body. Rather, CSDP agencies and centres which have been established in recent years, such as the Satellite Centre (SatCen), will continue their existence besides and in cooperation with the EEAS as institutional satellites in orbit.[45] This complementary coexistence extends to the European Defence Agency (EDA), whose function Articles 42.3, 45 TEU describe at some length without altering its decidedly intergovernmental governance structure.[46] It should however be noted that defence agencies, including the EDA, remain firmly under the control of the Member States and the Council. In contrast to 'first pillar' agencies they do not hold autonomous decision-making powers and do therefore not give rise to similar challenges as autonomous satellite bodies in other policy fields.[47]

The EEAS' exclusivity is compromised however by the persistence of alternative means and channels of communication both horizontally within the European Union and vertically in the relations with the Member States and international organisations. First, the Commission eagerly protected its prerogatives in trade, neighbourhood, development and humanitarian assistance policies pending the entry into force of the Lisbon Treaty (see section III.1.b). As a result, the EEAS does not monopolise foreign policy preparation and implementation, but needs to cooperate closely with the relevant General Directorates of the Commission, intergovernmental CFSP agencies and various other European and international actors, such as the Council of Europe, NATO and members of the 'UN family' which continue to be active in crisis management in parallel to the EEAS.[48]

This outcome need not constitute a disadvantage. Europe may benefit from foreign policy preparation and implementation through the EEAS in cooperation with other actors. Arguably, the concept of a diplomatic expert body for the uniform representation of (sovereign) nation-states contradicts the interdependent reality of today's world-order.[49] Whether we like it or not, cooperation will persist. In CSDP, vertical coordination with the Member States remains particularly crucial. Civil and military

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43 For the future 'strategic policy planning department' see Art. 4.3.b and for DG E Art. 4.3.a and the annex to the EEAS Decision 2010/427/EU (note 25).

44 See Art. 4.3.a.a and the annex to the EEAS Decision 2010/427/EU (note 25).

45 See the Council Joint Actions: 2001/555/CFSP for SatCen (OJ 2001 L 200/5), 554/2001/CFSO on the EUISS (OJ 2001 L 200/1), 2005/575/CFSP for the ESDC (OJ 2005 L 194/15); for details see Dijkstra (note 32), pp. 155-164; Art. 3.4 EEAS Decision 2010/427/EU (note 25) mandates the EEAS to extend 'appropriate support and cooperation' to these institutions (and any other Union body).

46 Art. 4 Council Joint Action 2004/551/CFSP (OJ 2004 L 245/17) and Art. 45.1, 31.4 TEU maintain the unanimity requirement for all major EDA activities; for the underlying (legal) intergovernmentalism see, *e.g.*, H. Sjursen, Integration without democracy?, RECON Online Working Papers Series No. 19 (2007), pp. 6-7.

47 Contrast the Council's prerogatives vis-à-vis the EDA with the extensive autonomy of 'first pillar' agencies described by Curtin (note 18), ch. 6 (pp. 135-75).

48 On this plurality and the corresponding need for cooperation see P. Norheim, Beyond Intergovernmentalism, JCMSt. 48 (2010), 1351 at 1353-5 and S. Graf von Kielmannsegg, Die Verteidigungspolitik der Europäischen Union (2005), pp. 216 *et seq.*

49 See, prominently, A.-M. Slaughter, A New World Order (2004).

missions depend upon the availability of national capabilities without which the Union simply cannot act.[50] On the diplomatic front, the knowledge, contacts and resources of the Member States' diplomatic and consular services are similarly valuable, not only as seconded personnel within the EEAS.[51] The Member States' presence remains indispensible in international organisations, such as the UN, where the EU has no genuine representation.[52] In short: coordination remains the lifeblood for Europe's compound executive order also in the fields of foreign, security and defence policies.[53]

2.3. Exercise of Executive Power

Reading the Treaty articles on CFSP the path dependency of European integration stands out. While the Treaties of Maastricht, Amsterdam, Nice and Lisbon certainly rejected the CFSP's supranationalisation, they followed the Community method insofar as they conceptualise CFSP as a quasi-legislative undertaking: The EU Treaty assume that foreign policy is being realised through the adoption of legal instruments (Art. 25, 26, 28, 29 TEU) on the basis of formalised decision-making procedures, which in specific circumstances provide for qualified-majority voting and parliamentary association (Art. 31, 36 TEU).[54] This focus on procedures and legal instruments mirrors Europe's epic constitutional reform process stretching over the quarter century after the Single European Act. For many observers, it was a foregone conclusion that CFSP would follow the example of other policy fields and be communitaurised sooner or later[55] –with the extension of quality majority– voting and parliamentary co-decision.[56]

2.3.1. Executive specificity CFSP and CSDP

At closer inspection, the initial plausibility of the Community method as a blueprint and model for CFSP blurs our understanding of its specificity. Foreign affairs are much less about rule-making than the realisation of the single market.[57] Supranational law-making characterises the Community method; this model cannot however be projected to international diplomacy and military operations without modification. Even when all Member States unreservedly comply with a CFSP position as if it was a directly applicable supranational legal act, the EU's policy standpoint would not necessarily prevail: Iran will not give up its nuclear weapons, only because the EU says so in its Official Journal. Successful foreign policy and effective military operations require the availability of adequate resources, the identification of strategic goals and the constant adjustment of methods for their realisation. The success of CFSP primarily depends on the persuasiveness and credibility of its policies, the support of the Member States and its perception in third states less on the binding force of internal decisions. In short: CFSP diplomacy and CSDP operations are not primarily about rule-making but predominantly executive in nature.[58]

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50 Cf. the appeal for their provision in Art. 42.3 TEU.

51 Art. 32(3), 35 TEU calls upon the EEAS and national diplomats to coordinate their activities; for the number and status of national secondments within the EEAS in line with Art. 27.3 TEU see Vanhoonacker and Reslow (note 37), p. 7.

52 Cf. C. Tomuschat, Calling Europe by Phone, CML Rev. 47 (2010), 3 at 6; ECJ, Case C-45/07 (*Commission vs. Greece*) [2009] ECR I-701, paras. 30-1 maintains that the Member States should act as 'trustees' of the EU, if an issue is covered by Union competences; for the option and practice of letting the High Representative speak in the UN Security Council see Art. 34.2(3) TEU and D. Thym, Die Europäische Union in den Vereinten Nationen, Vereinte Nationen 2008, 121 at 124-5.

53 On the compound, multi-level character see, generally, the contributions to E. Schmidt-Aßmann and B. Schöndorf-Haubold (eds.): Der Europäische Verwaltungsverbund (2005) and H. Hofmann and A. Türk (eds.): EU Administrative Governance (2006).

54 In particular the Treaty of Amsterdam followed this path with the reform of legal instruments, qualified majority voting and 'constructive abstention'; one step further, enhanced cooperation was extended to CFSP by Art. 27a TEU-Nice (now Art. 329.2 TFEU).

55 For regular calls for the 'normalisation' of CFSP by means of supranational parliamentary and judicial oversight see, *e.g.*, R. Bieber, Democratic Control of International Relations of the European Union, in: Cannizzaro (ed.): The European Union as an Actor in International Relations (2002), p. 105 at 107-9 and P. Eeckhout, Does Europe's Constitution Stop at the Water's Edge? (2005), p. 4.

56 For the debate in the European Convention drafting the Constitutional Treaty see Thym (note 18), pp. 9-17.

57 This paragraph reiterates my argument in D. Thym, Foreign Affairs, in: von Bogdandy/Bast (note 22), p. 309 at 333-4.

58 Similarly, Curtin/Dekker (note 39), p. 179-84 and Mangenot (note 42).

Against this background, we understand why our analysis benefits from a counter-intuitive reading of the Treaty articles. The Council's daily practice illustrates that legal instruments are only adopted whenever the projection of personnel, the imposition of sanctions or the dispersal of funds require a formal legal basis in a Council Decision.[59] For other questions, informal vehicles and communication channels are regularly being preferred (see the next subsection). It is true that the alignment and dissemination of foreign policy standpoints require mechanisms for intra –and extra– European coordination and communication. Also, civil and military missions advance through a pre-defined line of command. But the success of CFSP diplomacy and CSDP operations does not usually depend on the legal characteristics. The adoption of legal acts by the Council is the exception not the rule even if the Treaty articles suggest otherwise. Instead, foreign and defence policy require political choices and operational decisions which often have a spontaneous and informal character which evades the rigidity of ministerial decision-making by the Council.

The classification of CFSP and CSDP as 'executive' is not meant to describe the dominance of national governmental actors (which may similarly exist in international law-making), but rather designates the political and operative character of CFSP and CSDP. Within most national constitutions 'foreign affairs' are similarly treated as a specific activity which is subject to governmental discretion due to its inherent need for flexibility and confidentiality.[60] The Lisbon Treaty stays short of positively describing this executive character. Also the generic statement that '[t]he adoption of legislative acts shall be excluded'[61] does not support a different conclusion. Since the Lisbon Treaty follows a procedural understanding of legislative act,[62] the proclamation self-referentially confirms the Council's predominance in CFSP decision-making. While the Treaty positively describes the Commission's traditional 'coordinating, executive and management functions'[63], the Council's corresponding powers are vaguely described as 'policy-making and coordinating.'[64] Such circumvention strategy cannot guide the analytical categorisation however, which should acknowledge and portray CFSP and CSDP as the exercise of executive power.

2.3.2. Foreign-policy making under the Living Constitution

From the Treaty's viewpoint, every CFSP decision must, at least in principle, be taken by the Council. Articles 25-31 TEU make a noteworthy effort to distinguish different legal instruments and decision-making procedures. Non-legal forms of cooperation are not mentioned explicitly. Such informal instruments and communication channels do however take centre stage in Brussels (and Luxembourg[65]). The Council's established practice illustrates that important policy statements are regularly being promulgated through the informal vehicle of Council Conclusions, HR Declarations and internal strategy papers instead of adopting formal Council Decisions.[66] The European Security Strategy as the central political reference document of CFSP remains a prominent example in this respect.[67] Other foreign-policy events

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59 For a legal analysis of the Council's practice see G. De Baere, Constitutional Principles of EU External Relations (2008) and A. Dashwood, The Law and Practice of CFSP Joint Actions, in: Cremona/de Witte, p. 53 at 55-65.

60 See the argument and references in Thym (note 57), pp. 311-4.

61 Art. 24.1(2) TEU, which, as one consequence, entails that Council sessions may be closed to the public under Art. 16.8 TEU.

62 See M. Cremona, The Draft Constitutional Treaty: External Relations and External Action, CML Rev. 40 (2003), 1347 at 1356-7.

63 Art. 17.1 TEU.

64 Art. 16.1 TEU.

65 Council meetings in April, June and October are held in Luxembourg in accordance with the Protocol (No. 6) on the Location of the Seats of the Institutions (OJ 2008 C 115/265).

66 Art. 25.a+b TEU continue the earlier differentiation between Common Strategies, Joint Actions and Common Positions under Art. 13-5 TEU-Amsterdam/Nice, but regroup the measures as 'decisions' within the meaning of Art. 288 TFEU.

67 Legally, 'A Secure Europe in a Better World – The European Security Strategy', Council doc. 15895/03 of 8 Dec 2003 constitutes a non-binding elaboration of the HR which was politically approved by the European Council; an adoption of Common Strategy within the meaning of Art. 13 TEU-Nice, Art. 25.b TEU-Lisbon would have allowed for the adoption of implementing decisions by qualified majority under Art. 31.2 TEU-Lisbon.

provide numerous examples of similar dealings.[68] Only situations which require a firm legal basis, such as sanctions, are subject to formalised Council decisions.[69] Other important developments such as the negotiations on Iran's nuclear programme are not reflected in the Official Journal the substantive policy standpoint is coordinated informally.

As a result of the prevailing informality, our perspective on the EEAS and the Council's subordinate structures must change. They are no preparatory bodies only, but assume executive functions in their own right. The role of the Political and Security Committee (PSC), the CFSP twin of COREPER which is composed of national representatives at ambassadorial level, illustrates this extended autonomy in the day-to-day management of CFSP. The PSC is formally mandated to 'monitor the international situation [and] contribute to the definition of policies'[70] and has during the past decade established itself as the 'executive board' for CSDP and CFSP.[71] Many issues are being discussed in the PSC only, especially when the urgency or minor relevance of the topic does not lend itself to the overcrowded agenda of the monthly Council meetings, not even as an 'A point' for adoption without discussion.[72] The same applies to the PSC's preparatory bodies, such as the EU Military Committee (EUMC) or the Committee for Civilian Aspects of Crisis Management (CivCom),[73] which similarly discuss and coordinate their policy position on a daily basis.

Of course, the Council and national capitals may at any time assume their residual decision-making power and may control the activities of their agents in the subordinate Council bodies and the EEAS through national instructions (see below section III.1.b). But this does not unmake the institutional practice that many decisions are being prepared and taken at sub-Council level and that the PSC, its preparatory bodies and the EEAS play a dominant role in the day-to-day management of CFSP and CSDP. The institutional school of political science explains that the institutionalisation of CFSP and CSDP can –even without supranationalisation– result in the *de facto* 'Brusselisation'[74] of European foreign policy making. Regular contacts between national and European policy actors, the reorganisation of national foreign ministries and the formation of dedicated staff facilitates the gradual alignment of national foreign policy preferences and leads to a collegial impulse.[75] As the 'mind' and 'brain cells' of foreign policy decision-making the EEAS and the PSC play a crucial role in identifying common positions and methods for their realisation.

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68 For an early assessment see Wessel (note 1), pp. 108-15 who rightly points at the present Art. 26.2 TEU as a textual reference to informal definition and implementation of CFSP standpoints; more recently Duke and Vanhoonacker (note 8), pp. 377-8.

69 See the references above in note 59.

70 Art. 38.1 TEU.

71 See A. Juncos/C. Reynolds, The PSC: Governing in the Shadow, EFA Rev. 12 (2007), 127-47.

72 Insofar as CFSP standpoints do not require legal force, there is no need for the 'A point' practice, which guarantees formal Council involvement in legislative, supranational decisions; cf. C. Harlow, Accountability in the European Union (2002), p. 34.

73 For a list of preparatory bodies after the entry into force of the Lisbon Treaty see Annex II to Council Decision 2009/908/EU (OJ 2009 L 322/28).

74 D. Allen, Who Speaks for Europe?, in: Petersen/Sjursen (eds.): A Common Foreign and Security Policy for Europe? (1998), p. 41 at 48.

75 For further refection see J. Howorth, Security and Defence Policy in the European Union (2007), pp. 129-46 and K. Glarbo, Reconstructing a CFSP, in: Christiansen/Jørgensen/Wiener (eds.): The Social Construction of Europe (2001), pp. 140–57.

3.Persistence of Legal Intergovernmentalism

Only in the early years of its existence European foreign policy coordination was 'intergovernmental' in the literal sense of meetings between government officials without institutional infrastructure.[76] Intergovernmental cooperation in this sense has long been abandoned. Various committees and bodies within the realm of the Council play a crucial role in the formulation and implementation of CFSP and CSDP, which also provides for the, albeit limited, involvement of the supranational institutions. My choice of terminology does not to diminish these changes. The description of persisting CFSP 'intergovernmentalism' does not negate that institutions matter through the socialisation of CFSP staff, reformulation of national interests and the ideational impact of values.[77] Nor does the terminology imply that key players are primarily motivated by national interests or that non-state actors are irrelevant.[78] My choice of terminology rather follows the legal impetus to conceptualise the constitutional specificity of executive CFSP power in the age of the Lisbon Treaty.

Among the original motivation which kick-started the constitutional reform process the 'simplification of Treaties with a view to making them clearer and better understood without changing their meaning'[79] assumed a prominent role. From this viewpoint, the abolition of the 'pillar structure' and the cumbersome distinction between the EU and the EC was a central objective.[80] The Lisbon Treaty's unitary framework proves the success of this undertaking. Nevertheless, CFSP is 'subject to specific rules and procedures'[81] within the single EU legal order. CFSP continues to be characterised by distinctive decision-making procedures (subsection 1) and legal effects (subsection 2). These specificities shall be analysed in this section under the label of 'legal intergovernmentalism.' While there is no uniform legal concept of 'intergovernmentalism'[82], the use of well-established terminology facilitates the heuristic description of CFSP specificity.[83]

3.1. Decision-Making Procedures

Lisbon's merger of the pillar structure is characterised by institutional pragmatism. The new Treaty combines the intergovernmental CFSP with supranational policies such as development cooperation without altering the underlying inter-institutional balance. Due to its 'double hat' the HR is fully integrated into supranational decision-making as the Commission's Vice-President, while she receives her instructions from the Council in CFSP.[84] But how does the Council decide specific CFSP positions? And does the dichotomy between supranational and intergovernmental policies infiltrate the EEAS with its supposedly uniform institutional structure as the European foreign affairs bureaucracy?

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76 M. Smith, Europe's Common Foreign and Security Policy (2004), pp. 67–83 descres the early practice before the Single European Act.

77 See the overview by J. Øhrgaard, International Relations or European Integration, in: Tonra/Christiansen (eds.): Rethinking European Union Foreign Policy (2004), p. 26 at 28-34.

78 Cf. the classification by J. Trondal, An Emergent European Executive Order (2010), pp. 6-8 and the 'governance' perspective of Norheim (note 55), pp. 1354-5.

79 Indent 3 of the original Declaration (No. 23) on the future of the Union (OJ 2001 C 80/85) attached to the Nice Treaty which opened the reform process.

80 See the Final Report of European Convention's Working Group III 'Legal Personality', doc. CONV 305/02 (note 29) of 1 October 2002.

81 Art. 24.1(2) TEU.

82 See the arguments put forward by E. Denza, The Intergovernmental Pillars of the European Union (2002), ch. 1 (pp. 5-32) and M. Pechstein, Die Intergouvernementalität der GASP nach Lissabon, Juristenzeitung 2010, 425 at 426-7.

83 An heuristic approach evades the deduction of legal consequences from the prior assumption of CFSP intergovernmentalism and uses the term as an analytical description instead to signal procedural and legal characteristics of the Treaty regime.

84 See above section II.1.a.

3.1.1. Inter-institutional balance

Manifest is the particularity of CFSP when we consider the dominance of national governments in decision-making. Both the deliberation and the ultimate decision are almost exclusively limited to the (European) Council which exercises full control over the contents and reach of CFSP. Within the (European) Council the Lisbon Treaty moreover perpetuates Member State dominance. All policy positions can be traced back to a basic consensus among national capitals, even in the rare situations in which the Treaty allows for qualified-majority voting.[85] The Lisbon Treaty shies away from allowing CFSP activities against the firm opposition of any Member State; 'vital and stated reasons of national policy'[86] would always necessitate a European Council decision on the subject-matter by unanimity. It is true that Article 31.3 TEU introduces an explicit *passerelle* option, which provides for the expansion of qualified-majority voting at a later point.[87] This option has however been categorised as a Treaty amendment for the purposes of national constitutional law by the German constitutional court, which renders its realisation unrealistic in the foreseeable future.[88] For the time being, the Treaty therefore stops at water's edge: without consensus among the Member States, CFSP cannot proceed.

Conceptually, the *passerelle* option designates a crucial threshold. If qualified-majority voting was permitted in situations in which no collective preference has been established beforehand, CFSP would cease to be characterised by consensus-based 'intergovernmental' cooperation and evolve towards a supranational polity.[89] At this moment, such considerations may appear visionary (or illusionary, depending on the point of view). In ten or twenty years, the world might look different; an activation of the *passerelle* could emerge as a logical step forward.[90] At present, the legal situation is quite different: Leaving aside peer pressure in the Council, which already nowadays limits the factual influence of the (smaller) Member States on unanimous decision-making, each Member State does retain full legal control over CFSP. The Member States' foreign policy minds are only merged on a case-by-case basis when they can agree on a common approach by consensus. One result of this arrangement is CFSP's 'reactive' disposition, which often responds to outside events with some delay instead of shaping and directing future policy scenarios.

Reading the Treaty provisions on CSDP the prevalence of 'flexibility' stands out. Forms of flexibility extend from multinational forces, such as the 'Eurocorps' (Art. 42.3(1) TEU), to military actions by a 'coalition of the willing' (Art. 44 TEU), permanent structured cooperation (Art. 46 TFEU) and the general mechanism of enhanced cooperation (Art. 20 TEU, Art. 326-44 TFEU).[91] It should be noted though that these flexibility instruments concentrate on the preparatory phase of capability improvement and the

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85 Art. 31.2 TEU adds the European Council request (which requires consensus under Art. 15.4 TEU) to the list for majority voting, in line with Art. III-300.2(b) Constitutional Treaty (note 15); similarly, the specification of strategies (Art. 31.2 TEU, indent 1) and implementing decisions (indent 3) require prior unanimity in the Council.

86 Art. 31.2(2) TEU; this variation of the infamous 1966 Luxembourg compromise, which had been introduced on the occasion of CFSP reform in the Amsterdam Treaty, was not abandoned during the constitutional reform process.

87 Confusingly, the general *passerelle* provision of Art. 48.7(1) TEU also mentions CFSP explicitly, but differs from Art. 31.3 TEU concerning the veto power of national parliaments, which Art. 31 TEU does not mention; in practice, the different procedure should not make a difference in the light of German case-law, discussed below.

88 German 'Lisbon Judgment' (note 88), paras 320-1 requires prior parliamentary consent, most probably a two-thirds majority, before the consent at EU level.

89 Similarly, the argument by R. Wessel, The Multi-Level Constitution of European Foreign Relations, in: Tsougaris (ed.): Transnational Constitutionalism (2007), p. 160 at 198-9.

90 In practice, the absence of formal decision-making in the day-to-day management of CFSP, discussed above in section II.3.b, leaves room for the extension of consensus-oriented politics on the basis of unanimity, if Member States insist less on national positions; consensus-building does however happen in the shadow of the veto option; the experience of supranational policies suggests that qualified-majority voting serves as a trigger, directing the Member States towards agreement, once the veto option disappears.

91 For further comments see D. Thym, The Evolution of Supranational Differentiation, WHI–Paper 3/2009, http://www-whi-berlin.eu, section VII.2 and R. Wessel, Differentiation in EU Foreign, Security and Defence Policy, in: Trybus/White (note 1), pp. 225–48.

implementing stage of crisis management. These new rules do therefore not fundamentally alter the picture, since CSDP has always depended upon national capabilities.[92] Limiting CSDP flexibility to the preparation and implementation stages does crucially assure that no military action occurs on behalf of the European Union against the express will of any Member State (notwithstanding the option of *constructive* abstention[93]). In particular, the Council and the PSC also exercise political control and strategic direction of CSDP operations, which being implemented by a group of Member States.[94] The different flexibility mechanisms ensure that the EU is not split in two or more groups pursuing divergent views externally. In situations of internal political rupture, the EU remains silent.

When it comes to decision-making, the Lisbon Treaty is much less impressive than the abolition of the pillar structure suggest: the Member States remain in full control. Moreover, the Council's prerogatives correlate with the almost complete segregation of the supranational institutions. The Court of Justice continues to have no jurisdiction on core CFSP matters[95], whereas the Parliament is only consulted on major developments.[96] The Commission's role has even been diminished from a legal perspective, since its 'full association' has been replaced by the HR's involvement who in CFSP does act outside the Commission's ambit.[97] In practice, however, the Commission continues to be associated through its actual presence at Council meetings.[98] But we should be careful not to confuse actual presence with institutional muscle: in CFSP, the Commission has no monopoly of initiative, does not control the intergovernmental units of the EEAS and cannot challenge non-compliance with Union law at the Court.

3.1.2. Administrative line of command (EEAS/CSDP)

The intergovernmentalism of CFSP extends to the EEAS. As a functionally autonomous body, it does not hold any residual powers but 'assists' the HR in the exercise of her functions.[99] In so doing, the EEAS is, in the same way as the HR, legally subordinated to the Council in CFSP and the supranational institutions in other policy fields. The EEAS may enjoy an extended factual autonomy in day-to-day management (see above section II.3.b). From a legal perspective, it does however prepare and implement decisions which are taken by the institutions in accordance with the rules governing the policy field concerned. As a result, the dividing line between intergovernmentalism and supranationalism pervades the EEAS. Protracted turf battles between the Commission and the Council, which lead to quarrels including court cases prior the Lisbon Treaty, may therefore persist although the uniform institutional framework and the recalibration of the Treaty article delineating CFSP and supranational policies may lead to a new equilibrium.[100] Disputes may continue, but will arguably be mitigated by the HR and broil behind the surface of the uniform EEAS.

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92 See above section II.2.b; similarly, NATO or UN military missions are not being implemented by all Member States at all times.

93 'Constructive abstention' under Art. 31.1(2) TEU allows EU decisions without binding force for the Member State concerned, which however must not engage in 'unconstructive' national action conflicting with the EU position; if a state is not willing to respect this, it can veto EU action; constructive abstention cannot legally be forced upon a Member State; see also I. Pernice and D. Thym, A New Institutional Balance for European Foreign Policy?, EFA Rev. 7 (2002), 369 at 380–6.

94 The precise division of labour between the political and strategic authority of the Council (and the PSC) and operative control of the 'coalition' remains unclear, notwithstanding the 'coordination' obligation under Art. 44.2 TEU.

95 See Art. 275 TFEU and below section IV.2.b.

96 See Art. 36 TEU and below section IV.1.b.

97 Art. 27, 22.1 TEU-Amsterdam/Nice have been discontinued, while the corresponding powers of the HR under Art. 30.1, 27.1 TEU are, as CFSP powers, outside the reach of the fourth sentence of Art. 18.4 TEU; see also Craig (note 22), pp. 413-4.

98 Despite the HR's chair function (Art. 27.1 TEU) the Commission continues to be represented autonomously in meetings of the Foreign Affairs Council and its preparatory bodies; see, *e.g.*, the minutes of the 3069th Council meeting on 21 February 2001, Council doc. 6763/11, p. 5-6; for the earlier practice see Duke and Vanhoonacker (note 8), p. 163.

99 Cf. Art. 1 and 2 EEAS Decision 2010/427/EU (note 25).

100 See ECJ, Case C-91/05 (*Commission vs. Council*) [2008] ECR I-3651 and the assessment of the symmetric orientation of Art. 40 TEU by B. Van Vooren, The Small Arms Judgment in an Age of Constitutional Turmoil, EFA Rev. 14 (2009), 231-48.

Its establishment was indeed accompanied by open conflict. Both, the Commission, the Council and the Parliament tried to swing the inter-institutional pendulum in their favour. This became apparent after the entry into force of the Lisbon Treaty, when the Commission President preserved specific portfolios for neighbourhood policy, development cooperation and humanitarian assistance and resisted attempts to integrate the corresponding Commission departments into the EEAS.[101] Similarly, the Council decided[102] to regroup its civil *and* military crisis management planning staff to ensure that the Commission's extensive development and humanitarian bureaucracies would not finally succeed in absorbing the civil dimension of CSDP.[103] With regard to development cooperation the tensions resulted in cumbersome lines of command for the programming cycle of financial support instruments and their implementation by Union delegations.[104] In short: Within the uniform EEAS the dichotomy between supranationalism and intergovernmentalism survives and may surface any time.

How does the Council control the EEAS executive in practice? Formal instructions will rarely be issued by the ministers themselves, but emanate from the PSC and the working groups and committees which report to it, including the military committee EUMC and the civil crisis management counterpart CivCom.[105] Since these bodies are composed of national representatives, Member States remain conceptually in control: capitals may issue instructions to their delegates, which in turn control the everyday CFSP activities with or without Council involvement. In the case of CSDP operations, the Treaty formally sanctions the PSC's supervision authority: '(T)he PSC shall exercise … the political control and strategic direction of the crisis management operations.'[106] This is no legal illusion. Military commanders regularly report back to the PSC, which issues operational instructions with the support of the EUMC and military staff within the EEAS.[107] In other policy fields, the practice is similar. Substantive policy standpoints are being decided by the Council, the PSC and its subordinate bodies with the assistance of the EEAS.

3.2. Intergovernmental Union Law?

With the entry into force of the Lisbon Treaty the pillar structure has been abandoned. The EU remains one organisation with a single legal personality.[108] As a result, the earlier argument that the 'second pillar' constitutes a legal order in its own right cannot be maintained.[109] For proponents of the earlier 'separation thesis', which portrayed the second pillar as classic international law outside the reach of Community law, Lisbon represents a turning point which revises the earlier situation[110] whereas champions of the 'unity thesis', which pointed at the overlap between the pillars, may argue that Lisbon formally sanctions substantive unity which their analysis had unearthed before.[111] Be it as it as, the legal examination of CFSP should accept the unity of Union law and explore its implications. We shall see that the merger of the pillars

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101 See Missiroli (note 31), pp. 435-6.

102 J. Lieb/A. Maurer, Der Aufbau des Europäischen Auswärtigen Dienstes: Stand und Perspektiven, Integration 2010, 195 at 200 report that it was a deliberate choice.

103 Art. 4.3 EEAS Decision 2010/427/EU (note 25) states ambiguously that the recently established Crisis Management and Planning Directorate (CMPD) shall support CFSP 'in accordance with Art. 40 TEU' whose scope was contested with regard to civil crisis management under the wider Art. 47 TEU-Nice; cf. F. Hoffmeister, Inter-pillar coherence in the European Union's civilian crisis management, in: Blockmans (ed.): The European Union and International Crisis Management (2008), pp. 157–80.

104 See Art. 5.3, 9 EEAS Decision 2010/427/EU (note 25) and their criticism by Sydow (note 38), pp. 9-10.

105 See above section II.3.b.

106 Art. 38(2) TEU.

107 See for the operation ATALANTA before the coast of Somalia Art. 6-7 Council Joint Action 2008/851/CFSP (OJ 2008 L 301/33).

108 See Art. 1, 47 TEU.

109 On different lines of argument before the entry into force of the Lisbon Treaty see R. Gosalbo Bono, Some Reflections on the CFSP Legal Order, CML Rev. 43 (2006), 337 at 370–6 and Thym (note 57), p. 336-8.

110 See, *e.g.*, Pechstein (note 82), pp. 425-6.

111 The most prominent 'prediction' of unity had been voiced by A. von Bogdandy, The Legal Case for Unity, CML Rev. 36 (1999), 887-910.

exposes CFSP without doubt to constitutional control standards such as fundamental rights (subsection 1), while the application of supranational legal characteristics, such as primacy and direct effect, remains questionable (subsection 2).

3.2.1. Unity of the legal order

One core difference between the 'constitutional' character of Union law and the 'international' features of classic international law concerns the hierarchy of legal norms. Within the EU legal order, secondary law must respect the procedural and substantive imperatives of primary law. This 'legal constitutionalism' remains the backbone of the Court's famous description of the EU Treaties as the 'a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter.'[112] With the Lisbon Treaty this assumption applies to CFSP alike. Indeed, the most important consequence of the abolition of the pillar structure may be normative: constitutional control standards, such as human rights, apply to all areas of Union action. Foreign, security and defence policies are, as an integral part of Union law, no exception in this respect. Primarily establishes substantive guidelines for CFSP in the same way as it guides the Common Commercial Policy.

In contemporary constitutionalism, human rights serve as the central point of reference for the substantive control of state action. As a matter of principle, the Lisbon Treaty does not leave any doubt that foreign affairs must respect human rights; CFSP is not generally excluded from their field of application. Article 51 of the Charter of Fundamental Rights states paradigmatically: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union.' This extension of human rights to all Union action mirrors, *mutatis mutandi*, the introductory formulation of Article 1 ECHR which mandates that the 'High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in … this Convention.'[113] When it comes to human rights, CFSP and CSDP are no ghetto or in the words of the ECJ in its seminal *Kadi* judgment on the implementation of UN Security Council resolutions: secondary law 'cannot have the effect of prejudicing the constitutional principles of the (EU) Treaty, which include the principle that all Community acts must respect fundamental rights.'[114] The Lisbon Treaty extends this principle to the former second pillar. CFSP and CSDP must respect human rights.

We should be careful not to overstate the implications of our initial conclusion. The extension of human rights to foreign affairs does not necessarily entail the application of the domestic protection regime; the application of human rights to foreign requires adjustments, especially in cases of military action (see section IV.2.a). Moreover, few courts have unfettered jurisdiction to enforce the human rights accountability of CFSP and CSDP (see section IV.2.b). But these limitations do not unmake the conceptual relevance of Lisbon's constitutionalisation of foreign affairs. CFSP and CSDP may be subject to specific rules and procedures, but are not absolved from the respect for EU human rights as a matter of principle.

Human rights are the most pronounced expression of the EU's constitutional identity, but are not the only substantive control standard for CFSP measures. First, all policy choices must be guided by the Treaty objectives of external action, which the Lisbon Treaty combines in one overarching provision (even if most

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112 ECJ, Case 294/83, *'Les Verts'*, [1986] ECR 1339, para. 23.

113 Art. 6.2 TEU calls upon the EU to accede to the ECtHR, thereby formally submitting the EU institutions to the same obligations as the Member States; for the ECtHR's interpretation of the provision see below section IV.2.a.

114 ECJ, Joined Cases C-402 & 415/05 P (*Kadi/Council & Commission*) [2008] I-6351, para. 285; it should be noted that the judgment considered the first pillar aspects of the case only and shied away from embracing CFSP – despite the presence of a second pillar decision in the background which was not annulled.

objectives will usually not entail hard legal obligations mandating specific policy positions).[115] Second, the ECJ has during the past fifty years developed general principles of Union law, such as proportionality, which extend to CFSP without doubt.[116] In the same vein, the obligation of loyal cooperation (Art. 4.3 TEU) and the principles of attributed power and subsidiarity (Art. 5 TEU) embrace the former second pillar as a matter of written primary law. This conclusion may have unforeseen consequences. Loyal cooperation, for instance, may serve as a trigger for the gradual 'supranationalisation' of the former second pillar.[117]

3.2.2. Inter-state obligations or transfer of sovereign powers?[118]

The existence of a single legal order does not imply the pervasive supranationalisation of all policy fields. Even within core areas of the former EC Treaty, primary law distinguishes different categories of Union action. While some areas are based on (exclusive or parallel) legislative competences, other policy fields are subject to non-binding coordination measures only.[119] The legal framework for employment policy coordination has, for example, always been 'weaker' than the harmonisation option in the field of the environment.[120] Within this overall picture, we need to identify the status of the CFSP provisions, thereby substantiating the Treaty's generic claim that they are 'subject to specific rules and procedures.'[121] Instead of aligning CFSP with supranational policies without hesitation, we have to conclude on a case-by-case basis whether CFSP argues for or against the transfer of supranational legal principles. This contribution cannot replace this analysis. Some assumptions shall nevertheless be pointed out.

Defining features of Community law include its supranational legal effect on the basis of the transfer of sovereign powers whose exercise permeates into the domestic legal systems whenever supranational rules are directly applicable. Intergovernmental Union law by contrast has no direct effect; no competences are being transferred to the European level.[122] This follows already from the wording of the Member States' obligation to respect the CFSP Joint Actions 'in the positions they adopt and in the conduct of their activity.'[123] The Lisbon Treaty states expressly: 'The adoption of legislative acts shall be excluded.'[124] Conceptually, the CFSP does indeed concern the identification and implementation of foreign policy positions, not legislative impact on individuals. The transfer of competences to the European level is neither provided for nor required under the present and future constitutional arrangements underlying the CFSP. Member States are legally obliged to respect Union law, but maintain the competence to behave differently in their domestic laws and in relation to third states though with the consequence of breaching the law.

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115 See Art 21 TEU.

116 For a similar, earlier argument see von Bogdandy (note 111), p. 889.

117 Cf. the Court's argument with regard to the former third pillar in ECJ, Case C-105/03 (*Pupino*) [2005] ECR I-5285, paras 39-42 and, more generally, Wessel (note 89), pp. 178-86 and P. Van Elsuwege, EU External Action after the Collapse of the Pillar Structure, CML Rev. 47 (2010), 987 at 1012-7.

118 This section build upon Thym (note 57), p. 336-8.

119 Cf. Art. 2-6 TFEU.

120 Contrast Art. 2.3, 5.2, 145-50 TFEU with Art. 2.2, 4.2(e), 191-3 TFEU

121 Again, Art. 24.1(2) TEU which was introduced in the Lisbon Treaty in order to underline, together with the continued placement of CFSP in the EU Treaty (instead of the TFEU), that CFSP differs from other aspects of external action – in contrast to Art. III-294-331 Constitutional Treaty (note 15), which positioned CFSP alongside CCP.

122 See, e.g., Franklin Dehousse, La Politique étrangère et de sécurité commune, in: Dony and Louis (eds), Commentaire J. Mégret 12 - Relations extérieures, 2nd edition (2005), 439 at 469–79.

123 Art 28 TEU.

124 Art 24(1)(2) TEU.

While the Treaty expressly underlines the institutional intergovernmentalism of CFSP decision-making, our legal analysis concludes that the constitutional characteristics differ from the supranational blueprint, which applies to other areas of European foreign policy. The characteristics of intergovernmental Union law are based on the absence of transferred national competences which are capable of having direct and supreme effect and pre-empt the exercise of national powers. Or, in the words of the German constitutional court: 'Also after the entry into force of the Treaty of Lisbon, the (CFSP), including the (CSDP), will not fall under supranational law.'[125] These constitutional characteristics of the intergovernmental foreign and security policies underline that European integration does not lead towards the unmitigated federalisation of European foreign affairs, thereby not generally calling into question the sovereign independence of the Member States in their international relations.[126]

In order to evaluate the Lisbon Treaty's reform steps we need to understand their inherent pragmatism, which on the one hand abolishes the pillar structure by extending the powers of the High Representative and creating the European External Action Service, while at the same time ascertaining that they 'will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy.'[127] In short: The Treaty of Lisbon does not revolutionise the former second pillar but rather continues the tradition of incremental changes which have characterised the evolution of the CFSP and the CSDP during the past two decades. The new rules build upon past reform steps without undoing the underlying dichotomy between the intergovernmental and supranational branches of the Union's foreign affairs constitution.

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125 German 'Lisbon Judgment' (note 88), para. 390 under reference to Art. 24.1, 40 TEU, Art. 2.4 TFEU and Declaration (No. 14) attached to the Lisbon Treaty.

126 The protection of national sovereignty identify as the main reason for the intergovernmentalism of the CFSP Denza (note 82), p. 19, and C. Hillgruber, Der Nationalstaat in der überstaatlichen Verflechtung, in: Isensee and Kirchhof (eds), Handbuch des Staatsrechts (2004) vol III, § 32, para 91; different A von Bogdandy, Die Europäische Union als supranationale Föderation, Integration 22 (1999), 95 at 98–9.

127 Declaration (No. 14) concerning the Common Foreign and Security Policy (OJ 2008 C 306/255) specifying in how far the CFSP 'is subject to specific rules and procedures' (Art. 24(1)(2) TEU).

4. Accountability

One difference between the EU Treaties and classic international law is Europe's normative bias. The Lisbon Treaty is unequivocal in its ambition to render EU decision-making more accountable. Democratic responsiveness, transparency, human rights protection, financial responsibility and judicial review feature prominently in the provisions of the new EU Treaty, mirroring its origins in the constitutional reform process.[128] Most provisions do however focus on the relationship between the Commission and the European Parliament, while the Council appears as a by-stander. This trend coincides with a growing amount of academic literature by legal scholars and political scientist tracing the accountability of the EU institutions.[129] They similarly focus on the Commission and the Parliament and take a particular interest in comitology committees and agencies.

These areas deserve the attention which they receive, but should not monopolise the accountability debate. Our conclusion that foreign policy is primarily about the exercise of executive power implies that the Council's activities in CFSP and CSDP should be similarly scrutinised for their accountability footprint.[130] Instead of associating the new rules with legislative functions we should explore the achievements and pitfalls of the attempts to hold the EU's intergovernmental foreign affairs executive to account. The Lisbon Treaty facilitates this undertaking. By rendering the CFSP executive visible within the EEAS under the authority of the HR it helps us to identify the target. Political scientists will assess the Council's activities on a qualitative or quantitative empirical basis. As a lawyer, I cannot anticipate endeavour, but may indicate legal implications which the Lisbon Treaty and the initial institutional practice has brought about.

4.1. Political Accountability

4.1.1. National Parliaments

When it comes to political accountability parliaments do, of course, take centre stage. Insofar, two options are on the table: national parliaments and the European Parliament. From the Treaty standpoint, national parliaments ought to take centre stage. Why? At least in theory, the intergovernmental decision-making procedures and lines of command, described earlier, guarantee the ultimate control of the Member States over CFSP. Via the Council and its preparatory bodies, the Member States may, in theory, control and direct all CFSP action. Capitals can issue instructions to their delegates in the Council and its subordinate bodies such as PSC, which in turn control the administrative infrastructure in the EAS and other bodies (see above section II.1). The line of command may be long and not always function in practice. As a legal-procedural construct it does however exist and provides a viable explanation of CFSP accountability.

Indeed, national parliaments have strong supporters. Let me give you one prominent example: the German constitutional court. Under CSDP rules even a Member State which votes in favour of a military operation in the Council is legally not obliged to contribute specific troops. Instead, the deployment of armed forces remains a 'sovereign decision'[131], which may require the consent of national parliaments.

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[128] Cf., in particular, Art. 3, 6, 9-10, 19.1 TEU, Art. 16, 310.4-6 TFEU and the Charter of Fundamental Rights.

[129] See, *e.g.*, Harlow (note 72) and M. Bovens/D. Curtin/P 't Hart (eds.): The Real World of EU Accountability. What Deficit? (2010).

[130] See the monograph by Curtin (note 18), which scrutinises the Council as an institution, but does not concentrate on CFSP.

[131] European Council of 10/11 December 1999 in Helsinki, Presidency Conclusions, Annex I to Annex 4; for the conventional legal standpoint see S. Graf von Kielmannsegg, The European Union's Competences in Defence Policy, EL Rev. 32 (2007), 213 at 223-4 and J. Auvret-Finck, in: Burgorgue-Larsen et al. (eds.): Traité établissant une Constitution pour l'Europe – Commentaire, Tome 1 (2007), Art. I-41 para. 15.

Notwithstanding the political consensus the wording of the Lisbon Treaty lacks clarity in this respect and might notionally even be read to comprise deployment obligations[132] an ambiguity which motivated the German constitutional court to proclaim that such reading of the Treaty would violate German sovereignty. In its Lisbon judgment, it vigorously defends the role of the German *Bundestag*. EU law would violate German sovereignty if the European institutions were given the power to mandate the deployment of armed forces.[133] In short: national parliamentary control is here to stay.

There are good reasons for the description of the status quo by the German court. On the aftermath of the initial Irish rejection of the Lisbon Treaty, the European Council similarly clarified the legal situation by stating unequivocally: 'It will be a matter for Ireland or any other Member State, to decide, in accordance with any domestic legal requirements, whether or not to participate in any military operation.'[134] But defending the position of national parliaments under the current legal regime does not imply that their primary responsibility for defensive policy progresses without any problems.[135] Political science teaches us that national parliamentary CFSP oversight remains constrained for structural reasons.

First, national parliaments are eager not to stand in the way of European cooperation. This may be illustrated by the improvement of military capabilities. CSDP does not establish a 'European army'; EU mission depend on the (voluntary) deployment of national military capabilities.[136] There are indeed various fora for bi- or multilateral cooperation outside the formal EU framework, such as the Eurocorps or the European Armaments Agency OCCAR, which coordinates the joint purchase of the Airbus A400M military transport aircraft.[137] Their activities are voluntarily coordinated within the EU whose 'Headline Goal 2010' and 'battle group'-concept are intended to guide national decisions on defence restructuring.[138] While the Member States retain the legal capacity 'to determine the nature and volume of its defence and security expenditure'[139], the informal coordination nonetheless exercises political pressure not to stand in the way of the European project. If a government does, for example, justify the purchase of the Airbus A400M military transport aircraft with European solidarity, this erects a political hurdle for national parliaments not to block the funding. Precisely that happened in Germany some years ago.[140]

Second, national parliaments may have to overcome information asymmetries in comparison to national governments which are better equipped to understand and act on the international stage (especially if many decisions are *de facto* taken at sub-Council level with the PSC and the EAS enjoying an extended executive autonomy in practice). Academic literature has long identified factual difficulties for national

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132 See in particular Art. 42.3(1), 43.2 TEU.

133 German 'Lisbon Judgment' (note 88), paras 254-5 & 381-8; since German sovereignty is, in the eyes of the Court, protected by the constitution's 'eternity clause' the judgment seems to prescribe German parliamentary approval in perpetuity; for a discussion of this issue see D. Thym, Integrationsziel europäische Armee?, Europarecht Beiheft I/2010, 171–91 (also available through the author).

134 Section C of the Declaration of the Heads of State or Government (note 33), which is meant to be transformed into a legally binding Protocol on the occasion of the next Accession Treaty; similarly, the position of the Final Report of European Convention's Working Group VIII 'Defence', doc. CONV 461/02 (note 29) of 16 December 2002, para. 73.

135 The European Council does not mandate national parliamentary involvement, but leaves the Member States the leeway to apply their national rules; for a comparative account of different Member States see G. Nolte/H. Krieger, Comparison, in: ibid. (eds.): European Military Law Systems (2003), p. 19 at 58-63.

136 See Art. 42.3 TEU and Graf von Kielmannsegg, at 221.

137 For details see J. Auvret-Finck, Les Moyens de la force armée, in: Azoulai/Burgorgue-Larsen (eds.): L'Autorité de l'Union européenne (2006), p. 183 at 190-206.

138 See Thym (note 32), paras. 19-24

139 Section C of the Declaration of the Heads of State or Government (note 33) after the initial Irish rejection of the Lisbon Treaty.

140 For the example of the Airbus A400M which the German parliament did not unravel for reasons of European cooperation see D. Thym, Beyond Parliament's Reach?, EFA Rev. 11 (2006), 109 at 122-3.

parliaments to effectively control the national governments at European level.[141] This is not to say that national parliamentary oversight should be abandoned. National parliaments are –in contrast to the European Parliament– embedded in functioning democratic discourse and better equipped than other institutions to control national ministers in the Council. It certainly presents a consistent theoretical model to link CFSP back into the national political arena. But theoretical consistency need not entail practical feasibility.

In exercising their control function, national parliaments may of course agree on various forms of horizontal cooperation such as interparliamentary conferences on matters of CFSP and ESDP, mirroring the COSAC example of European affairs committee meetings.[142] In the same vein, national parliaments may reinforce their coordination and dialogue with the EP through joint committee meetings, an exchange of best practices or a common dialogue with Council representatives.[143] Practical problems remain, however, and call into question the sustainability of exclusive national parliamentary CFSP oversight. Instead, an enhanced role for the European Parliament may be considered as a viable alternative.

4.1.2. European Parliament

Reading the wording of the EU Treaty, the almost complete exclusion of the European Parliament from CFSP and CSDP decision-making stands out. Although the Lisbon Treaty considerably extends its powers in supranational external relations,[144] the constitutional reform process did not alter CFSP rules. From the standpoint of the EU Treaty, the Parliament is not even consulted before the adoption of specific CFSP instruments. Rather, it is being kept regularly informed through periodic policy reports and shall be heart 'on the main aspects and the basic choices.'[145] Repeated calls for an extension of parliamentary control powers remained fruitless the degree of parliamentary involvement reflects by and large the status quo of the 1985 Single European Act, which codified the earlier practice of European Political Cooperation.[146] That however is the standpoint of Treaty only. In the past few months the institutional practice has moved on.

In one of the most remarkable institutional developments since the entry into force of the Lisbon Treaty, the European Parliament managed to get a foot in the door of CFSP decision-making. Although the legal basis for the EEAS makes a deliberate effort to exclude MEPs from its establishment, the Parliament used its co-decision powers in budgetary affairs and regarding the staff regulation to extract considerable concessions from the other institutions mirroring its earlier experience with 'parliamentary blackmail' to get a foot in the door of CFSP decision-making.[147]

In a 'Declaration by the High Representative on Political Accountability', which had been negotiated like a legal instrument in parallel to the EEAS decision[148], the High Representative guarantees the Parliament's

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141 For an overview see Dann (note 22), pp. 263-5 and A. Maurer, National Parliaments in the European Architecture, in: *ibid.*/Wessels (eds.): National Parliaments and their Ways to Europe: Losers or Latecomers? (2001), pp. 27–76.

142 Cf. Art 10 of the Protocol (No. 1) on the Role of national Parliaments in the European Union (OJ 2008 C 115/203).

143 As is being called for by the EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the SCDP, EP doc. P7_TA(2010)0061, para. 13.

144 In particular with regard to the Common Commercial Policy and the conclusion of international agreements under Art. 207.2+3, 218.6+10 TFEU.

145 Art. 36 TEU continues Art. I-40/41.8, III-304 Constitutional Treaty (note 15), which does not alter extensively the earlier Art. 21 TEU-Amsterdam/Nice.

146 See my earlier analysis in Thym (note 140), pp. 110-3.

147 See, again, Thym (note 140), pp. 113-7 and J. Monar, The Finances of the Union's Intergovernmental Pillars, JCMSt. 35 (1997), 57-78.

148 Cf. Missiroli (note 31), pp. 435-6.

prior consultation before the launch of military missions and the adoption of strategies[149] and will discuss on going business with MEPs in regular 'question hours.'[150] It also promises, *inter alia*, regular exchanges of view both with the High Rep and EU ambassadors in third countries. EU ambassadors may even appear in the Parliament's foreign affairs committee (AFET) before their appointment although the Council rejected calls for US-style Congressional hearings and indicated that it is not willingly to grant the European Parliament further concessions in the near future.[151]

This remarkable extension of parliamentary oversight is not the first time the European Parliament successfully uses its budgetary and regulatory muscle to get hold of CFSP. I would not be surprised if this development continued. One reason for this expectation is the limited institutional legitimacy of both the HR and the European Council President. As far as CFSP is concerned their nomination and recall depends almost exclusively upon the Member States.[152] The European Parliament may censure the High Rep as the Vice-President of the Commission, but she would retain her CFSP hat when the Commission resigns.[153] Both the High Rep and the European Council President may be tempted to counter-balance their dependence upon the Member States by establishing a close working relationship with the European Parliament thereby again strengthening its impact.

4.2. Legal Accountability

4.2.1. Substantive control standards

The abolition of the pillar structure creates a unitary legal order. This implies the application of uniform constitutional principles, such as proportionality or human rights (see above section III.2.a). The identification of control criteria does not absolve us however from the sound academic analysis which identifies appropriate control standards for specific situations. This shall be illustrated with the example of military CSDP missions. In cases of military conflict, the application of the European human rights regime is subject to certain caveats and open questions, which lead us to an alternative forum for ex post review: non-contractual liability.

Article 51 of the Charter lies down unequivocally that EU institutions are bound by the Charter. Thus, the Council or the PSC are not allowed to authorise military activities, such as the identification of television stations as legitimate military targets in a combat situation, if we concluded that the decision concerned violated human rights. Not the applicability of human rights, but their substantive scope is the crucial question in such circumstances. When it comes to military missions, the identification of the appropriate standard is indeed problematic. In cases of military conflict, international humanitarian law provides an alternative benchmark, which the EU is similarly bound to respect on the basis of its internal guidelines[154] and under international custom.[155] These considerations of international humanitarian law must be

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149 See the Declaration by the High Representative on Political Accountability and Statement on the Basic Structure of the EEAS Central Administration, Annex to EP doc. P7_TC1-NLE(2010)0816 of 8 July 2010, which cannot alter the Treaty and which also does not promise formal co-decision, but rather consultation, which legally implies that the Council and/or the Commission are not obliged to follow EP recommendations.

150 Cf. Framework Agreement on relations between the European Parliament and the European Commission (OJ 2010 C 304/47), para. 46.

151 Van Vooren (note 26), p. 30 reports that the HR rejected the EP claim for a 'debate' with the EU ambassador to Japan prior to its formal appointment.

152 See Art. 15.5, 18.1 TEU.

153 See the second sentence of Art. 17.8 TEU.

154 Although the EU has never committed itself formally by means of a unilateral declaration under public international law, it is bound to respect the obligations of the Member States under the Geneva Conventions as a matter of Union law with a view to Art. 351 TFEU – in line with the soft-law guidelines on international humanitarian law (OJ 2005 C 327/4); for further reflection see F. Hoffmeister, The Contribution of EU Practice to International Law, in: Cremona (ed.): Developments in EU External Relations Law (2008), p. 37 at 100 and S. Bartelt, Der rechtliche Rahmen für die neue operative Kapazität der Europäischen Union (2003), pp. 161 *et seq.*

155 The ECJ maintains that the EU must comply with the unwritten rules of international customary law; see ECJ, Case C-162/96, *Racke* [1998] ECR I-3655, para. 45 and ECJ, Case C-308/06 *Intertanko* [2008] ECR I-4057, para. 51.

reconciled with human rights in order to identify the appropriate legal standards for specific situations an undertaking which is far from straightforward in specific conflict scenarios.[156]

The identification of control standards is a first step only. Unfortunately, Article 51 of the Charter is crystal clear solely when it comes to the obligations of the EU institutions. Insofar as the Member States are concerned the legal picture is less straightforward, since the Member States are bound by the Charter 'only when they are *implementing* Union law.' This raises the legal question whether the participation in CSDP operations must be qualified as the 'implementation' of Union law? A definite answer for situations of military conflict remains difficult, since Article 51 has been designed for legislative activities (*e.g.* the transposition of directives). Whether and, if yes, which operative police or military action must be qualified as 'implementing' activity remains an open question. The answer will probably also depend on the ECJ's general approach to the scope of the Charter in other policy fields. If the ECJ opts for an extensive interpretation (and national courts abide), national constitutional autonomy would be curtailed.[157] In this case, the Charter would not only apply to the Council and the PSC, but similarly to national troops participating in CSDP operations, for example in the fight against pirates off the coast of Somalia.

Besides human rights also the principle of non-contractual liability under Article 340(2) TFEU does now extend to CFSP.[158] This has important repercussions, since in cases of armed conflict, non-contractual liability is a central instrument for the *ex post*-control of state action. Let me give you one example: During the Kosovo war and NATO forces destroyed a bridge across the Danube near the town of Vavarin across which a passenger train was, unfortunately, running. People died and a few years later several relatives of the victims sued the German state for non-contractual liability. In future, the same may be possible with a view to the EU institutions in cases of CSDP operations[159] and it might even be argued that the ECJ holds the jurisdiction to decide these cases.

4.2.2. Judicial accountability fora

This leads me to a last consideration. We need to distinguish between the applicability of normative standards and the availability of accountability procedures. Even if human rights and non-contractual liability apply, we need a forum which exercises control. Intuitively, we consider the European Court of Justice as the primary forum in this respect. But I have to disappoint you. Article 275(1) TFEU states rather unmistakably: The ECJ 'shall not have jurisdiction with respect to the provisions relating to the (CFSP) nor with respect to acts adopted on the basis of those provisions.' It is true that there is an explicit exception for decisions imposing sanctions against individuals, which closes one loophole which became evident in the *Kadi* case.[160] But this exception does not unmake our general conclusion that ECJ jurisdiction is generally excluded in CFSP. But this does not imply the absence of other channels of legal accountability.

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156 The application of international humanitarian law requires the existence of an armed conflict which in the case of rather benign military peace-keeping missions will usually not be fulfilled; for further reflection see A. Orakhelashvili, The Interaction between Human Rights and Humanitarian Law, EJIL 19 (2008), 161-82 and R. Provost, Human Rights and International Humanitarian Law (2002).

157 The application of EU human rights implies in countries such as Germany that national constitutional courts lose the monopoly and/or ability to control the national measures concerned, while in countries such as the UK national courts would gain the power to set aside acts of parliament, which EU law implies but national legal systems do not permit; in any case, the application of the Charter changes the national constitutional system.

158 Prior to the Lisbon Treaty, the separation of the pillars implied that EC law provisions had to be incorporated into the EU Treaty – otherwise they would not apply; Art. 28.1 TEU-Amsterdam/Nice did however not provide for the applicability of Art. 288 EC, the predecessor of the present Art. 340 TFEU.

159 Again, difficult questions relating to the delimitation of responsibility between the EU institutions and the Member States may arise, if we need to ascertain for instance, whether the authorisation of certain military targets by the Council or the PSC caused certain damages (for which the Union may be liable) or whether the primary responsibility rests with the Member States (under their domestic legal regimes); similar questions had to be answered by the German courts; see Federal Court of Justice (BGH), Judgment of 2. November 2006, Case III ZR 190/05 (*Varvarin*) and A. Dutta, Amtshaftung wegen Völkerrechtsverstößen bei bewaffneten Auslandseinsätzen deutscher Streitkräfte, AöR 133 (2008), 191–234.

160 See Art. 275(2) TFEU; ECJ, Joined Cases C-402 & 415/05 (note 114) reviewed first pillar 'implementing' measures of a CFSP decision, about which the Court remained silent; this indirect review of CFSP does however remain unsatisfactory, esp. in cases where certain questions, such as travel bans, are not necessarily subject to supranational follow-up measures; for more detail see A. Hinarejos, Judicial Control in the European Union (2009), pp. 149-64.

First, the ECJ may be tempted to test the limits of Article 275 TFEU. In earlier cases, it has already extended its power to access to CFSP documents[161] and effectively controlled the borderline between the pillars.[162] In future, it may use new rules on the judicial scrutiny of international agreements[163], the guarantees of the Charter of Fundamental Rights[164] or ambiguous formulations about non-contractual liability[165] to stretch its control function further. It would not be the first time that the ECJ extends its jurisdiction in the light of general constitutional principles.[166] The judges will not set aside Article 275 TFEU entirely, but a careful expansion to corollary aspects of foreign, security and defence policies, for instance non-contractual liability, would not come as surprise.

Second, the exclusion of ECJ jurisdiction does not prevent national courts from filling the gap – and they might even be obliged to do so under the EU's overarching constitutional rules. In a remarkable follow-up judgment to its first *Kadi* judgment the General Court (then still the Court of First Instance) held that the Member States are obliged to provide judicial protection at national level and that they should set aside national rules preventing national courts from performing review of foreign affairs.[167] Additionally, we may nowadays point at the new obligation of the Member States in the Lisbon Treaty to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'[168] It is true that there is, at this moment in time, a lot of uncertainty about the conditions of national judicial CFSP oversight, but I would not be surprised if the legalisation of foreign affairs within the European Union was soon extended to security and defence with national courts exercising basic control of foreign policy in general and military missions in particular.

Third, legal accountability may be enhanced by non-judicial fora. Here, the abolition of the pillar structure has tangible side-effects. The new unity of the Union legal order implies that the Ombudsman, the Court of Auditors and Committees of Inquiry may in future scrutinise CFSP action.[169] Their responsibilities include legal aspects and complement the corresponding powers of national accountability fora.

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161 See M.-G. Garbagnati Ketvel, The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy, ICLQ 56 (2006), 77 at 82-3.

162 See ECJ, Case C-91/05 *Commission vs. Council* [2008] ECR I-3651 and the analysis by Van Elsuwege (note 117), pp. 1002-8.

163 Art. 218.11 TEU continues the earlier Art. 300.8 EC, but is broader insofar as it includes CFSP agreements (it remains unclear how this rules interacts with art. 275 TFEU).

164 Whenever CFSP action directly affects the legal position of individuals, Art. 47 of the Charter arguably grants a right of access to the Court which conflicts with Art. 275 TFEU.

165 While the extension of liability under Art. 340 TFEU is beyond doubt (see above section IV.2.a), the corresponding rule on ECJ jurisdiction (Art. 268 TFEU) will have to be reconciled with the exclusion of ECJ jurisdiction under Art. 275 TFEU.

166 Remember the '*Les Verts*' judgment (note 112).

167 See General Court (CFI), Case T-253/02 & 49/04, *Ayadi vs. Council* [2006] ECR II-2139, esp. paras. 151-2.

168 Art. 19.1(2) TEU.

169 This follows, again, from the merger of the pillars in place of the partial incorporation of some EC provisions under Art. 28.1 TEU-Amsterdam/Nice discussed above in note 158,

5. Conclusion

With the Treaty of Lisbon a new institutional regime for European foreign policy formulation is being established. Under the responsibility of the High Representative (HR) the European External Action Service (EEAS) shall provide the bedrock for effective policy-formulation and implementation. Within this overall context my paper focuses on the rules governing the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP). Their analysis is of particular relevance, since the Lisbon Treaty's unitary system does not unmake the specificity of the CFSP and the CSDP which continue to be 'subject to specific rules and procedures' (Art. 24.1(2) TEU).

The inspection of the CFSP and CSDP structures helps us to identify their executive character. At a political level, decisions are being taken by the Council and the HR, while the subordinate CFSP and CSDP bodies, which have now been integrated into the EEAS, perform administrative functions in the diplomatic, security or military domain. In order to evaluate the Lisbon Treaty's reform steps we need to understand their inherent pragmatism, which on the one hand abolishes the pillar structure, while at the same time ascertaining that they will not affect the earlier responsibilities and powers of the Member States. The new rules build upon past reform steps without undoing the underlying dichotomy between the intergovernmental and supranational branches of the Union's foreign affairs constitution. As a pragmatic merger of the pillars, both the 'double-hatted' HR and the EEAS continue the dualism between the supranationalism and intergovernmentalism behind the surface of external unity.

From the Treaty standpoint, every CFSP decision must at least in principle be taken by the Council. In practice, however, European foreign policy evolves differently. The Council's daily practice illustrates that legal instruments are only adopted whenever the projection of personnel or the dispersal of funds require a formal legal basis in a Council Decision; for other foreign policy questions the Council prefers the informal vehicles. Moreover, the everyday foreign policy business is usually being dealt with in Declarations of the High Representative, internal strategy papers or through direct contacts with third country representatives. Hence, some questions are never being discussed in the Council. Hence, the HR, the PSC and the EEAS do not only fulfil a simple support function for the Council's legislative activities. Instead, they gain a momentum of their own as Brussels-based executive institutions.

As a result, the public lawyers' perspective must change: if the CFSP executive exercises executive functions in its own right, public lawyers should consider institutional mechanisms to hold this intergovernmental branch of the Union's foreign affairs executive to account; controlling the national representative in the Council alone will no longer suffice. We should rather shed light on the executive responsibilities of the HR and the EEAS. We need to identify mechanisms to hold the executive to account vis-à-vis national and European oversight bodies. My analysis considers the corresponding role of both national parliaments and the European Parliament as well as national and European courts in performing these review functions with a view to CFSP. Thus, the most important consequence of the abolition of the pillar structure may not concern institutions or procedures, but may be normative, in the 'thick' understanding of European constitutionalism: Within the EU legal order uniform legal principles apply, enhancing the accountability of Europe's foreign affairs executive.

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Resumen: Con la entrada en vigor del Tratado de Lisboa la Unión Europea busca aumentar su visibilidad y autoridad a través de un marco institucional uniforme. La elección de la Alta Representante de la Unión y el establecimiento del Servicio Europeo de Acción Exterior son instrumentos que permiten a la Unión moverse más allá de su introspección institucional y concentrarse en reforzar la identidad europea y su independencia para promover la paz, la seguridad y el progreso en Europa y en el mundo. Aún está por comprobar que la nueva estructura facilite la realización de este gran objetivo. Nuestro análisis legal puede sin embargo dilucidar las opciones constitucionales que subyacen. Mientras que el Tratado de Lisboa reconoce el carácter ejecutivo de la política exterior de la Unión, no deshace sin embargo la dicotomía entre la acción exterior supranacional y la Política Común de Seguridad y de Defensa. Con respecto a la primera, el Tratado de la UE preserva un intergubernamentalismo legal e institucional que abre un nuevo capítulo en el debate sobre el déficit de legitimidad de la Unión.

Palabras clave: Alto Representante; Servicio Europeo de Acción Exterior; intergubernamentalismo legal e institucional; legitimidad; Política Exterior y de Seguridad Común (PESC); Política Europea de Seguridad y Defensa (PESD); Ejecutivo intergubernamental de asuntos exteriores, seguridad y defensa de la UE.

Abstract: With the entry into force of the Lisbon Treaty the EU's quest for international visibility and authority benefits from a uniform institutional framework. The post of the High Representative (HR) and the establishment of the European External Action Service (EEAS) are meant to allow the Union to move beyond institutional introspection and concentrate on 'reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world (indent 11 of the Preamble to the EU Treaty). Whether the novel structure facilitates the realisation of this grand Treaty objective remains to be tested. Our legal analysis may however shed light on the underlying constitutional choices. While the new Treaty acknowledges the executive character of the Union's foreign policy, it does not unmake the dichotomy between supranational external action and the common foreign, security and de-fence policies (CFSP/CSDP). With regard to the latter the EU Treaty preserves a legal and institutional intergovernmentalism which opens a new chapter in the debate about the Union's accountability gap.

Keywords: High Representative (HR); European External Action Service (EEAS); legal and institutional intergovernmentalism; accountability; Common Foreign and Security Policy (CFSP); Common Security and Defence Policy (CSDP); EU's Intergovernmental Foreign, Security & Defence Executive.

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Universidad CEU San Pablo
Avda. del Valle 21, 28003 Madrid
Teléfono: 91 514 04 22 | Fax: 91 514 04 28
idee@ceu.es, **www.idee.ceu.es**

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