

# On ‘ring-fencing’ the Common Foreign and Security Policy in the legal order of the European Union

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## 1 Introduction

The European Union’s (EU) ‘unique’ and ‘supranational’ legal order is widely regarded among lawyers to be crucial to its policy successes. If the EU is to become a successful global actor, one would expect its foreign policy and external relations<sup>1</sup> to be similarly built on supranational law. The legal aspects of the external relations of the EU were indeed at the heart of the debates on changes to the EU’s constitutional structure in the Treaty of Lisbon 2007. But, unlike other policy areas, foreign policy was not brought within the ‘supranational fold’ by the Treaty text. On the contrary, the (then) UK Foreign Secretary characterised the position thus:

Common foreign and security policy [CFSP] remains intergovernmental and in a separate treaty. Importantly . . . the European Court of Justice’s [ECJ] jurisdiction over substantive CFSP policy is clearly and expressly excluded. As agreed at Maastricht, the ECJ will continue to monitor the boundary between CFSP and other EU external action, such as development assistance. But the Lisbon treaty considerably improves the existing position by making it clear that CFSP cannot be affected by other EU policies. *It ring-fences CFSP as a distinct, equal area of action.*<sup>2</sup>

As a statement by a UK politician to his national parliamentary chamber, this places a political spin on a significant legal development made by the Treaty of Lisbon to the Common Foreign and Security Policy (CFSP) and makes important assumptions about the development of the EU’s constitutional order. Through considering the legal changes to the

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1 A note on terminology: ‘external relations’ is the preferred term when speaking of the EU’s relationships and policies beyond its borders. ‘Foreign policy’ is generally only applied to analysis of the CFSP. The Treaty of Lisbon introduces ‘external action’ as an umbrella term covering both external relations and foreign policy. In this article, references are deliberately made to external action, external relations and foreign policy as appropriate.

2 Secretary of State for Foreign and Commonwealth Affairs (David Miliband), HC Debs 20 February 2008, col 378. Emphasis added.

CFSP and subsequent practices, this article examines the extent to which the CFSP is 'ring-fenced' from other aspects of EU competences, which also cover external relations, and what this means for the legal dimensions of the EU's capacity to act beyond its borders. In doing so, the article revisits fundamental questions about the nature and function of law within the CFSP and, in turn, its place in the EU's constitutional order. The article critiques the ring-fencing metaphor and contends that it is only partly useful in explaining the role and place of the CFSP, since the foreign policy the EU has committed itself to forge is unlikely to rely only on the CFSP, but also the myriad of other competences under the Treaties. As there have been only a few instruments used post-Lisbon which rely on CFSP competences, current practice shows that the development of EU foreign policy largely occurs outside the formal scope of the CFSP. Hence, the CFSP continues to serve as a political arena for the Member States seeking to prevent EU action on an issue of vital (national) importance and to show that Member States retain control over foreign policy, by pointing to the CFSP's ring-fenced nature. Yet foreign policy co-operation does not end with the CFSP. Rather, the consequence is that the EU institutions find ways of putting external policies into action via an increasing set of legal instruments. The downside, at least for those proponents of a more obviously workable EU foreign policy, is that the CFSP is likely to remain characterised as a failure because, although it occupies the most obvious Treaty-based 'heart' of the EU's external relations, it is not the legal basis for practical policy making.

The article proceeds as follows: after setting out the CFSP's position in the EU's post-Lisbon legal order, the article critiques the extent to which the ring-fencing is borne out in the text of the Treaty. Analysis of the jurisdiction of the Court of Justice (CJEU) and the Treaty-based loyalty clause suggests that the fence is not as secure as it may seem. The article then considers whether the ring-fencing in practice stands up to scrutiny, with emphasis on Lisbon's institutional innovations to ensure coherence and consistency, and contends that the practice is even further removed from the impression given in the text of the Treaty. The article concludes that the consequences for the CFSP are that it will remain largely declaratory in nature and closer to a model of classic international law. If this means attempting to separate a policy area from the 'normal' methods of integration, then there are significant consequences for the future of EU law as we know it.

## 2 The CFSP in the EU's post-Lisbon legal order: reinforcing a paradox?

The CFSP would, to a casual observer unfamiliar with the complexity of the EU's workings, lie at the central core of the EU's external relations. Indeed, the Treaty on European Union (TEU) lays down the expansive provision that: 'The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security.'<sup>3</sup> The provision was introduced in the very first version of the TEU 1992 as a means to strengthen the EU's voice in international affairs to a level consummate with its growing economic weight. The CFSP codified informal practices and discussions on foreign policy affairs between the Member States dating back to the 1970s, but with grand statements in the Treaty about the EU's aims that it has found difficult to live up to.<sup>4</sup>

The revised provisions and post-Lisbon practice emphasise the EU co-ordinating its external competences in a more coherent fashion. Even if the scope of the CFSP has not changed drastically, the position of the CFSP (and the institutional competences in it)

3 Article 24(1) TEU.

4 The earliest and most widely cited statement relating to this is that of C Hill and his 'capability-expectations' gap: C Hill, 'The Capability-Expectations Gap or Conceptualising Europe's International Role' (1993) 31 *Journal of Common Market Studies* 305–28.

within the Treaty arrangements has been significantly altered. The CFSP is also listed as a separate Union competence in Article 2(4) of the Treaty on the Functioning of the European Union (TFEU) to distinguish it from other, 'general' competences. This 'otherness' of the CFSP within the constitutional order is expressed in the ring-fencing metaphor. But it does not explain why the CFSP should be exceptional within the EU's legal order. In one sense there is an obvious answer: the tradition of otherness of the CFSP and legal expression of the Member States' fear of the encroachment on their sovereignty if the Court of Justice was able to extend supranational EU legal principles to foreign policy. The Treaty seems to stem the 'Brusselsization' of the CFSP where 'the member states have in practice entered a slippery slope of integration with decision-making competence "creeping" to Brussels'<sup>5</sup> with the Court in Luxembourg filling in the gaps. But given that other areas have been 'communitarianised' in the most recent Treaty, is the ring-fence likely to prove effective in keeping the CFSP separate from the rest of the EU's legal order? If, as demonstrated below through a discussion of post-Lisbon practice, this is highly unlikely, what are the potential consequences for both the EU's foreign policy and its constitutional/legal order?

The CFSP embodies a deep paradox at its core, which has been exacerbated by Lisbon. The amendments point to a strong, value-led approach to external relations.<sup>6</sup> Institutional innovations, notably the EU diplomatic service and foreign minister in all but name (the European External Action Service (EEAS) and the High Representative for Foreign and Security Policy), underline the importance of foreign affairs by attempting to improve institutional and representative 'practical' capacities. And yet, the Treaty maintains the legal inadequacy of the instruments provided for in the Treaty in order to meet these aims and objectives. In this respect, the position of the CFSP in the constitutional order is the most obvious area where stated aims lack the legal structures to bring about effective supranational policies.

### 3 The legal technicalities of ring-fencing the CFSP: pre- and post-Lisbon provisions

The creation of the CFSP in the TEU in 1992 led to the characterisation of the EU as formed by three 'pillars'. As the second pillar, the CFSP was accorded alternative instruments and processes distinct from the familiar first pillar regulations and directives and the 'Community method'. Due to the lack of extensive role of the supranational institutions, it was characterised as a largely intergovernmental pillar and lacking in legal dynamics.<sup>7</sup> The TEU also limited the Court's jurisdiction by the former Article 46 TEU which did not list the CFSP provisions as being within the Court's powers. This provision has been strengthened by Lisbon which mentions the Court specifically in the articles devoted to the CFSP.<sup>8</sup>

Yet, despite its intergovernmental tag, the variety and multilevel institutional actors involved in the CFSP, its complexity and its unpredictability<sup>9</sup> led to an increasingly

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5 H Sjursen, 'Not So Intergovernmental after All? On Democracy and Integration in European Foreign and Security Policy' (2011) 18 *Journal of European Public Policy* 1078, 1090.

6 Article 21(1) TEU.

7 M Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 *Common Market Law Review* 553, 571.

8 Articles 24 TEU and 275 TFEU.

9 Hill has commented that 'one can never be sure where the next decision is going to come'; C Hill, 'Convergence, Divergence and Dialectics: National Foreign Policies and the CFSP' in J Zielonka (ed), *Paradoxes of European Foreign Policy* (Kluwer 1998) 43.

widespread view that the CFSP was engaged in a process of 'progressive supranationalism', making its distinction from other areas of EU integration less clear-cut.<sup>10</sup>

The pillar structure was abolished by Lisbon and replaced references to the 'Communities' by references to the 'Union'. By granting explicit legal personality to the *Union* rather than simply the *Communities*,<sup>11</sup> the Treaty gives the impression that the TEU had brought the two intergovernmental pillars within the framework of the EU and, hence, placed the CFSP on the same footing as other, more integrated areas, ending its 'otherness'. In reality, this merely removed the strange situation where the Union relied on the legal personality enjoyed by the Communities to conclude international agreements and join, for example, the World Trade Organization and formalised the existing consensus that the EU had already become an independent subject of international law.<sup>12</sup> The abolition of the pillar structure did not mean the end of 'intergovernmental' areas of EU policy.

A related innovation in the attempt to bring together the CFSP and other externally-focused competences was a new TEU section on the need for consistency and coherence.<sup>13</sup> Article 23 TEU makes the CFSP subject to new general provisions on the Union's external action.<sup>14</sup> The three Treaty articles which govern the entirety of the CFSP and non-CFSP dimensions to the Union's activities are wide in scope and give some indication to the values the EU holds dear, though only a few are aimed towards specific goals.<sup>15</sup>

The 'specific provisions' applicable to the CFSP show that the former second pillar has not been fully flattened. Rather, the specific provisions contribute to the ring-fencing away from other law and policy-making areas. The Treaty retains but rewords the previous Article 47 TEU (now Article 40 TEU), which states the CFSP specific provisions shall not affect the exercise of Union competences in Articles 3–6 TFEU, essentially the former Community competences which include common commercial policy,<sup>16</sup> development co-operation and humanitarian aid<sup>17</sup> and other areas which have an external dimension, including freedom, security and justice, environment and energy. The subtle, but important, change contained with the post-Lisbon Article 40 is that, whilst the CFSP may not affect other competences, the reverse is also now the case, i.e. the use of regulations or directives in areas where the EU enjoys exclusive or shared competence with the Member States may

10 R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 *Common Market Law Review* 337, 349.

11 Article 47 TEU.

12 A Sari, 'Between Legalisation and Organisational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy' in P J Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (Asser Press 2012) 77; N Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues' in M Trybus and N D White (eds), *European Security Law* (Oxford University Press 2010) 121. For further analysis of the organisations to which the EU is a party, see M Emerson, R Balfour, T Corthaut, J Wouters, P M Kaczyński and T Renard, *Upgrading the EU's Role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy* (Centre for European Policy Studies 2011) 22–36.

13 On coherence, see M Cremona, 'Coherence in European Union Foreign Relations Law' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011); C Hillion, 'Tous Pour Un, Un Pour Tous! Coherence in the External Relations of the European Union' in M Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008); M Broberg, 'Don't Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union's Development Policy' in Cardwell (n 12); and, within the context of the ENP, B Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Routledge 2012).

14 Articles 21–46 TEU.

15 For example, in Article 21(2)(e) TEU: 'the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade'.

16 Article 3(1)(e) TFEU.

17 Article 4(4) TFEU.

not be used instead of the specific provisions of the CFSP. This provision is likely to result in inter-institutional disputes before the CJEU which will be required to ascertain where the centre of gravity of a measure lies.<sup>18</sup>

The CFSP is the only area which applies to all Member States where 'specific provisions' for decision-making apply.<sup>19</sup> Unanimous voting in the Council remains the basis of the decision-making process (Article 24(1) TEU) and, even when abstaining, a Member State 'may qualify its abstention by making a formal declaration' (Article 31(1) TEU). The CFSP is alone within the Treaty therefore in retaining the 'Luxembourg compromise'<sup>20</sup> and permitting any Member State to free itself from the obligation to apply a CFSP decision, even though that decision will bind the EU.<sup>21</sup> In an enlarged Union of 28 Member States, one need look no further than the retention of unanimity in CFSP decision-making to illustrate its otherness in the legal order and the associated difficulties in decision-making. In the report of Working Group VII on External Action under the European Convention, it was noted that:

Some members . . . expressed the opinion that foreign policy issues were not adapted to decision making by voting since it would be difficult for a Member State to find itself in a minority position on an issue in which precisely its national interests were at stake. Some pointed out that QMV [qualified majority voting] in CFSP would also heighten third country awareness of internal EU disagreement, thus rendering CFSP less effective.<sup>22</sup>

It is quite a curious claim to make that outside actors may seek to take advantage of EU difference, since this could apply to any of the areas in which the EU operates, especially those which are 'sensitive' in terms of national sovereignty but which have nevertheless witnessed a growing amount of EU competence. Therefore, the choices in the Treaty reflect the 'super-sensitive' nature of foreign policy with a built-in safeguard mechanism to ensure that any decisions have been agreed by one and all.

The Treaty-based instruments were renamed by the Treaty of Lisbon<sup>23</sup> but remain deliberately separate from the more familiar instruments used elsewhere.<sup>24</sup> Common strategies, created in the Treaty of Amsterdam as a means of structuring EU action on areas of focus, remain unchanged, but in practice are hardly ever used. The EU has preferred to agree 'strategic' documents which do not rely on a specific legal basis, including the European Security Strategy (2003) and Stabilisation and Association Process for South-East

18 I am grateful to Peter Van Elswege for helpful discussions on this point.

19 Articles 136–38 TFEU are also defined as 'specific provisions' but only for those Member States whose currency is the euro: the specificity is due to their application to certain Member States only rather than the policy area itself, as for the CFSP.

20 R Schütze, *European Constitutional Law* (Cambridge University Press 2012) 207.

21 Piris notes that this provision has only been used once, by Cyprus in 2008 regarding the EU Rule of Law mission in Kosovo: J-C Piris, *The Future of Europe* (Cambridge University Press 2012) 77.

22 European Convention, *Final Report of Working Group VII on External Action* CONV 459/02 (2002) 20.

23 CFSP measures take the form of decisions which define 'actions to be undertaken' (formerly 'joint actions') and 'positions to be taken' (formerly 'common positions').

24 It is worth noting here that pre-Lisbon instruments retain their validity, as per Treaty on European Union, Protocol 36. In Case C-130/10 *European Parliament v Council of the European Union* (Judgment of the Court (Grand Chamber), 19 July 2012) the Court reinforced this point (at para 109) by stating that: 'the fact that the EU Treaty no longer provides for common positions but for decisions in matters relating to the CFSP does not have the effect of rendering non-existent those common positions adopted under the EU Treaty before the Treaty of Lisbon entered into force'.

Europe.<sup>25</sup> 'Actions to be undertaken' and 'positions to be taken' which are made on the basis of 'decisions of the European Council on the strategic interests and objectives of the Union' are adopted by qualified majority in the Council,<sup>26</sup> as an exception to the usual rule of unanimity.<sup>27</sup> For proponents of a less intergovernmental CFSP, this provision appeared to offer an opportunity for majority voting which could have developed into the 'norm' of CFSP decision-making. Article 32 TEU points to the possibility of a 'common approach' on CFSP matters which could therefore be used for a similar purpose. However, a Member State may block a decision taken by qualified majority, if it conflicts with 'important and stated reasons of national policy' (Article 23(2)). This is one of the clearest factors contributing to the ring-fenced nature of the CFSP since such a provision allowing a national veto despite majority voting taking place is found nowhere else in the Treaty.<sup>28</sup>

Significantly, no formal enforcement mechanisms are provided for in order to ensure Member State compliance. The lack of formal enforceability of the CFSP instruments leads some to conclude that they cannot be considered to be 'legal' at all.<sup>29</sup> Others have noted the 'lowest common denominator' character of the CFSP instruments as they seek to accommodate the divergent interests of all the Member States,<sup>30</sup> preventing even the type of enforceable minimum harmonisation found elsewhere in EU law.

The CFSP instruments are not within the scope of Article 288 TFEU and the effectiveness of CFSP measures in national courts has been debated since the entry into force of the TEU.<sup>31</sup> That is not to say that 'traditional' enforcement measures would necessarily be appropriate for use in the CFSP, as even the European Commission recognises,<sup>32</sup> but the lack of any enforcement mechanisms sets the provisions apart from the rest of the European integration process. To have no means of enforcing the provisions leaves a significant gap in the EU's legal order unless the measures taken are the type which do not lend themselves to enforceability; but this would sit uncomfortably with the wide scope of the Treaty provisions.

Taking the continuation of previous legal mechanisms surrounding the CFSP with newer initiatives emerging from Lisbon, at the formal level the text of the Treaty does

25 This is explored further in P J Cardwell, 'EuroMed, ENP and the Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean' (2011) 49 *Journal of Common Market Studies* 219. See also G De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press 2008) 115; S Hix, *The Political System of the European Union* (Palgrave Macmillan 2005) 391; P Koutrakos, *EU International Relations Law* (Hart Publishing 2006) 399; and S Keukeleire and J MacNaughtan, *The Foreign Policy of the European Union* (Palgrave Macmillan 2008) 154–56.

26 Article 31(2) TEU.

27 Article 31(1) TEU.

28 The closest provision is the 'emergency brake' found in Article 83(3) TEU concerning directives on criminal procedure pursued through Article 83(1)–(2), which allows for the ordinary legislative procedure (i.e. including QMV) to be suspended where a Member State has concerns that a draft directive 'would affect fundamental aspects of its criminal justice system'. However, this provision does not carry the same connotations as Article 23(2) TEU.

29 P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press 2004) 396.

30 J Zielonka, *Europe as Empire* (Oxford University Press 2007) 143.

31 Cf, for example, A Dashwood, 'The Law and Practice of CFSP Joint Actions' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008) and K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 287.

32 'While the "Union method" has been a great success in the internal market, it would simply not work for CFSP', M Šefčovič, Vice-President of the European Commission, 'The Treaty of Lisbon—One Year on Cooperation in a Mature Institutional Framework', speech delivered at the European University Institute, Florence, 12 November 2010 <[http://europa.eu/rapid/press-release\\_SPEECH-10-647\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-10-647_en.pdf)>.



indeed appear to ring-fence the CFSP away from mainstream EU law to a greater extent than was previously the case. However, three of the main innovations, or at least, more explicitly worded dispositions, require further analysis to discern whether the Treaty text does effectively ring-fence the CFSP.

#### 4 Testing the ring-fence

##### i) EXCLUSION OF THE JURISDICTION OF THE CJEU

The exclusion of the jurisdiction of the CJEU appears in the second paragraph of Article 24 TEU.<sup>33</sup> The previous, pre-Lisbon version of the TEU made no mention of the powers of the Court in the CFSP articles (Title V). Furthermore, the CFSP is further ring-fenced away from the reaches of the CJEU within the provisions dealing with powers of the CJEU, in Article 275 TFEU.<sup>34</sup>

Taken together, there appear to be two fences protecting the CFSP from judicial supervision. Not only do the new provisions exclude review of the substance of CFSP measures, but they also eliminate any supervision over *procedural* irregularity, since the jurisdiction is limited to monitoring the competence boundaries or the legality of 'restrictive measures'.<sup>35</sup> It would not seem possible that Article 263 TFEU could be used to mount a judicial review challenge to the way in which a CFSP decision, even one concerning 'restrictive measures' such as sanctions on an individual, was made. Neither (it seems) could the alternative judicial review process, via a preliminary reference from a national court, be used.<sup>36</sup> Human rights challenges cannot engage the Court with regards to CFSP measures, even though EU foreign policy has already given rise to cases in the European Court of Human Rights<sup>37</sup> and the Treaty foresees eventual EU adhesion to the European Convention.<sup>38</sup> Article 47 of the Charter of Fundamental Rights of the Union (on the right to an effective remedy) is difficult to square with the exclusion of the Court from CFSP matters, which could conceivably affect the legal rights of individual citizens.<sup>39</sup> In its 2012 judgment in *Parliament v Council*, the Court rejected an argument by the European Parliament that it would be contrary to EU law to adopt measures having a direct impact on the fundamental rights of individuals and groups which excluded the participation of the Parliament.<sup>40</sup> The Court stated that the Charter binds all institutions (and therefore also when institutions are acting under the CFSP) but did not elaborate on Article 47 specifically.<sup>41</sup>

33 'The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU.'

34 'The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.'

35 Article 215(3) TFEU.

36 Article 19(3)(b) TFEU gives the authority to the Court of Justice to give preliminary rulings 'on the interpretation of Union law or the validity of acts adopted by the institutions'. The Article does not mention the CFSP but says (in Article 19(3)) 'in accordance with the Treaties'. See also M Brkan, 'The Role of the European Court of Justice in the Field of Common Foreign and Security Policy after the Treaty of Lisbon: New Challenges for the Future' in Cardwell (n 12) 100.

37 M-G Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 ICLQ 77.

38 See further, C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 MLR 645; and T Lock, 'Accession of the EU to the ECHR' in D Ashagbor, N Countouris and I Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012) 109.

39 Brkan (n 36) 106.

40 Case C-130/10 *Parliament v Council* (n 24) para 83.

41 Ibid paras 83–84.

The Treaty does foresee an exception when individual rights are at stake in Article 275 TFEU, which now allows the Court to review decisions affecting rights of natural/legal persons (brought under Article 263 TFEU) but only in cases where restrictive measures are placed upon them.<sup>42</sup> In all other instances, even if an individual was able to satisfy the extremely high threshold of the standing requirements for a non-privileged applicant seeking judicial review of an act of the EU institutions, the Court would not have jurisdiction to hear the claim. The lack of jurisdiction to review CFSP measures characterises the policy firmly as an area of executive-led 'high politics' in which it is assumed that individual rights are unaffected.

Further, it is worth recalling that the CFSP covers *all* aspects of foreign policy and is not defined as merely a residual category. Comparisons with domestic systems of Member States also run into difficulty when bearing in mind the status of the Parliament, which has neither the legislative involvement in CFSP decisions, nor the ability to use its position to bring actions before the Court, even if dressed as procedural. Save for the exception in Article 275 TFEU relating to restrictive measures, the 'rule of law' which the Treaty attaches to both its own system, and the values it purports to promote beyond its borders, is thus diminished and replaced by 'a rule of the executive'.<sup>43</sup> Article 75 TFEU, which involves the ordinary legislative procedure, allows for sanctions against individuals, within the setting of combating terrorism within the area of freedom, security and justice.<sup>44</sup> Yet, under Article 215 TFEU, which is engaged when a decision has been taken under the CFSP, restrictive measures against third countries, or natural or legal persons, may be adopted by the Council acting alone. The Parliament's attempt to challenge the use of Article 215 TFEU as a basis for sanctions, by claiming that it would be contrary to EU law to adopt measures capable of impinging directly on fundamental rights, was recently rejected by the CJEU in *Parliament v Council* since it would make Article 215 TFEU redundant. The Court did underline the general obligation (as per Article 51(1) of the Charter and *Kadi*)<sup>45</sup> for all Union institutions to safeguard fundamental rights. Nonetheless, it is difficult to see from the decision in *Parliament v Council* what would be the case if the Court found that necessary safeguards on fundamental rights were not included in a measure taken under Article 215 TFEU.

The discussion thus far in this part suggests that the ring-fences around the CFSP appear relatively secure. However, whilst it might be challenging to envisage a situation where individual rights are affected by a CFSP measure other than restrictive measures, it should not be forgotten that the Court in *Kadi* found a solution to a complex legal conundrum which expressly confirmed that fundamental rights are protected by a 'constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement'.<sup>46</sup> It is not too much of a conceptual stretch to consider that the Court could refer to general principles of law and the protection of fundamental rights to engage in a more substantive review of CFSP

42 It is worth noting here that since this provision is new, it was not used in the famous *Kadi and Al Barakaat* cases (Cases C-402 and 415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351) which were brought on the basis of the implementation powers via a Regulation pursuant to a CFSP common position (formerly Article 60 and 301 EC, now found in Article 215 TFEU).

43 Schütze (n 20); P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (2nd edn, Oxford University Press 2011) 499.

44 Article 75 TFEU refers to the aims set out in Article 67 TFEU.

45 Cases C-402 and 415/05 *Kadi and Al Barakaat* (n 42) paras 82–83.

46 *Ibid* para 316. See further, P J Cardwell, D French and N D White, 'Kadi and Al Barakaat International Foundation' [2009] 58 ICLQ 229, 232.



decisions and the continuation (as noted before in *Kadi* case) of an 'implicit or indirect jurisdiction' over the CFSP.<sup>47</sup>

The ring-fencing of the CFSP has also cast some doubt on the principles established by the Court in pre-Lisbon CFSP case-law. Prior to Lisbon, the EC Treaty enjoyed a superior place in the hierarchy between the two Treaties since the former Article 47 TEU prevented the TEU from affecting anything within the Community's competences. This is no longer the case: revised Article 1 TEU states that the two Treaties shall have equal legal value. The TEU's original intent was to prevent intergovernmental pillars from having an effect on the more integrated, Community pillar: the CFSP can no longer be subservient to former Community competences. This casts some doubt on the continued validity of the Court's view in *ECOWAS*,<sup>48</sup> where the Court said that 'the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community'.<sup>49</sup> The new Treaty arrangements appear to counter the approach the Court adopted in *ECOWAS* which required CFSP joint actions to be implemented not only by means of other CFSP decisions but also by Community decisions and thus forging a 'holistic' view of (external) competences. The Court rejected the UK's submission in *ECOWAS* that the CFSP provisions were entirely separate.<sup>50</sup> In the only post-Lisbon case to address this issue, Advocate-General (AG) Bot in *Parliament v Council* made an interesting and potentially far-reaching observation in referring to the competences outside the CFSP 'in which the European Union enjoys complete freedom'.<sup>51</sup> He also rejected the Council's view that, in the case of the EU competences on combating terrorism via restrictive measures, the deciding factor on competence is 'internal' v 'external'.<sup>52</sup> Craig's observation that '[T]he presumption that "normal" EU law should predominate is deeply ingrained in the judicial psyche and will not easily be shifted'<sup>53</sup> is implicit in the views of AG Bot which suggest that the CFSP only operates in defined areas, notwithstanding the wide definition of CFSP and the general obligation on EU institutions to act within their respective competences.

'Purely' political measures are difficult to isolate from the measures which can be taken under the competences of the EU. Therefore, it could be argued that any potential measure which covers interaction with the outside world could (or even should) be done under the CFSP, once again remembering that the CFSP covers 'all areas' of foreign policy.<sup>54</sup> The important word is therefore 'all'. Concluding a purely economic agreement with a third state implies that foreign policy choices have been made to engage with that country.<sup>55</sup> If this was the case before Lisbon, then it is even more pertinent now since there is no implication that the (former) Article 11 TEU is nonetheless subservient to the principle that the EC Treaty takes precedence (former Article 47 TEU). Faced with a situation where the Court, as it is permitted to do so under the Treaty, examines the legal basis of a measure to decide whether it belongs under the CFSP (which is hence not susceptible to judicial review) and a non-

47 D Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press 2009) 180–81.

48 Case C-91/05 *Commission v Council* (ECOWAS/Small Arms) [2008] ECR I-3651.

49 Curtin (n 47) 190.

50 Ibid.

51 Case C-130/10 *Parliament v Council* (n 24), Opinion of AG Bot (31 January 2012). The original French reads 'dans les domaines hors PESC dans lesquels l'Union a toute liberté' para 82.

52 Ibid para 75.

53 P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010) 415–16.

54 Article 24(1) TEU.

55 Garbagnati Ketvel (n 37) 84. See also Case C-124/95 *Centro-Com* [1997] ECR I-81, Opinion of AG Jacobs, para 41.

CFSP measure (which would be susceptible) it would seem logical to assume that the Court would have a natural preference for a measure which can be justiciable. Its reasoning could be derived from the commitment to the rule of law or the preamble of the Treaty underlying the integration of the EU as the ultimate goal. Reference could also be made to the Member States doing all they could to meet the aims of the Union, as distinct from the loyalty clause. A close reading of Article 40 TEU would suggest that the parity of the two Treaties protects the *acquis communautaire* built up in the former first pillar which cannot be undone by relying on the CFSP as a legal basis since this would potentially breach Article 40 TEU.<sup>56</sup>

Although one should be wary of predicting how the Court will use its discretion to police the boundary between the CFSP and other policies, there is little doubt that it will have the opportunity to do so, especially in cases similar to the post-Lisbon case of *Parliament v Council*, and the assertion here is that the ring-fencing is unlikely to exclude the Court as it might appear from an isolated reading of the Treaty text.

## ii) THE LOYALTY OBLIGATION

The loyalty obligation is a distinct, but related, issue on the Court's position vis-à-vis the CFSP. The obligation is expressed generally (since Lisbon, 'the principle of sincere cooperation') in Article 4(3) TEU, which has formed a crucial part of the Court's reasoning in its development of the EU's supranational legal order.<sup>57</sup> The Treaty obliges Member States to comply with the Union's actions and support the CFSP 'actively and unreservedly in a spirit of loyalty and mutual solidarity'.<sup>58</sup> In addition, Article 32 TEU expanded the previous Article 16 TEU, the first paragraph of which requires a high level of consultation within the Council and 'mutual solidarity'. Article 28(2) TEU states that decisions taken 'commit the Member States in the positions they adopt and in the conduct of their activity', which can be considered a dimension of the obligation, albeit one which operates differently to enforceable Community-developed concepts.<sup>59</sup>

Member States have become used to the interpretations by the CJEU on the duty of loyalty, including areas which fall within the sphere of external relations, albeit not explicitly on the CFSP.<sup>60</sup> The CJEU has continued to develop, and extend, the doctrine to promote consistency of EU external relations and the EU's legal order.<sup>61</sup> As Neframi has argued, the duty has shown both the potential and dynamics across the non-CFSP aspects of EU external dimensions for Member States to be bound by the Court of Justice's interpretation of the Treaties.<sup>62</sup> The *AETR/ERTA* case<sup>63</sup> established long ago the doctrine of implied external powers, a decision of high constitutional significance for the development of the

56 Garbagnati Ketvel (n 37) 91.

57 See, inter alia, Case 96/91 *Commission v Netherlands* [1982] ECR 1791; Case 14/83 *Von Colson and Kamann* [1984] ECR 1891; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135; and Case C-213/89 *R v Secretary of State for Transport ex p Factortame* [1990] ECR I-2433.

58 Article 24(3) TEU.

59 P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency' (2010) 47 Common Market Law Review 987, 911.

60 Case C-246/07 *European Commission v Sweden* [2010] ECR 3317. For detailed analysis, see G De Baere, "'O, Where is Faith? O, Where is Loyalty?'" Some Thoughts on the Duty of Loyal Cooperation and the Union's External Environmental Competences in the Light of the PFOS Case' (2011) 36 European Law Review 405.

61 For further, see Eeckhout (n 43) 59–64. For a discussion of a recent extension of the *AETR/ERTA* doctrine by the CJEU, Case C-45/07 *Commission v Greece* [2008] ECR I-701, see M Cremona, 'Extending the Reach of the AETR Principle' (2009) 34 European Law Review 754.

62 E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 Common Market Law Review 323, 324.

63 Case 22/70 *Commission v Council (AETR/ERTA)* [1971] ECR 263.

EU's external relations across the board and one which found its basis in the duty of loyalty.<sup>64</sup> If *AETR/ERTA* was the first landmark, then *Pupino*<sup>65</sup> is its natural successor in terms of using the loyalty principle as a springboard to ensuring legal effectiveness in the former third pillar. The Court stated that:

It would be difficult for the Union to carry out its tasks effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters.<sup>66</sup>

Hence, the Court 'found' a binding loyalty obligation on the basis of the need for effectiveness of EU law. It thus prompted much discussion about whether this reasoning could be applied/extended to the CFSP too.<sup>67</sup> The Court did not have an opportunity to do so, although, on a case involving external relations, the Court found that Sweden breached the (then) Article 10 EC by acting unilaterally when a 'concerted common strategy' existed at EU level and that, contrary to Sweden's and others' views, the duty is not limited in scope.<sup>68</sup> The Court stated that it did not matter whether the area of competence under question was exclusive or shared, the important factor is whether a 'situation is likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power'.<sup>69</sup> This is suggestive of a *Pupino*-style analogy and demonstrates that external relations are not beyond the limits of the Court's view of the loyalty principle, but the question did not relate specifically to a CFSP measure and the refusal of a Member State to adhere to it. At the very least, however, the Court's decision in *Commission v Sweden* points to the obligation on the Member States to remain 'silent' on matters pertaining to foreign policy, even when the EU does not enjoy exclusive competence.<sup>70</sup>

Do the post-Lisbon provisions prevent a *Pupino*-style argument extending to the CFSP? The Italian and UK governments argued in *Pupino* that there was no loyalty clause which could be applied as Article 10 EC applied only in the *Community* pillar, but the CJEU found one on its own logic of interpreting the aims and scope of the Treaty and hence applying a definition which transcended the pillars. Reading across the *dicta* from the Court by analogy to the CFSP loyalty provision would, pre-Lisbon, have been a possibility, should the Court have had an opportunity. But, as examined in the previous section, the Treaty text *appears* to now prevent an opportunity for the CJEU to do so. But even if the ring-fence secures the CFSP from other policy areas on the substance, that is not necessarily the case for the loyalty provisions. Given that the loyalty provision applies across the EU's legal order, loyalty cannot remain outside the CFSP. The problem for the Court, should it adopt this position, is the lack of jurisdiction: in other words, the Court would be able to extend the same characteristics of loyalty as it found in *Pupino* to the CFSP, but would need to circumvent the jurisdictional problem.

The most conceivable way the Court might be able to take such a step would be to return to its boundary-policing function by resorting, as it did in *Pupino*, to 'a (thin) textual

64 This doctrine is now contained within Article 3(2) TFEU.

65 Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

66 Ibid para 42.

67 Gosalbo Bono (n 10) 366.

68 Case C-246/07 *European Commission v Sweden* [2010] ECR I-3317, para 70.

69 Ibid para 104.

70 A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *European Law Review* 524, 540–41.

argument as well as a more persuasive teleological one.<sup>71</sup> In this context, the Court could argue that it was not the *substance* of a CFSP measure but the *competence* at stake, and that (returning to the lack of hierarchy between the Treaties) that loyalty requires the more integrationist legal basis to be used. This scenario is most likely to arise in a situation where the Parliament claims that the CFSP provisions are being improperly used. However, it is possible that, especially in a case where individual rights are affected, a case could arise via the preliminary reference procedure from a national court. This prompts a further potential difficulty, however, since national courts would not be able to seek clarification on how to resolve a conflict between national law and a CFSP measure via this procedure and would therefore have to come to their own conclusions as to how to interpret the non-legislative character of the measure which nevertheless is said in the Treaty to be subject to a loyalty clause. This is similar to Schütze's characterisation of external competence restraint as a form of 'reverse' subsidiarity.<sup>72</sup>

Much here depends on whether situations arise where there is a doubt over competence, as in *ECOWAS*. The Parliament can be expected to be particularly vigilant in this regard and has already begun proceedings against a CFSP decision on an EU agreement with Mauritius on combating piracy, which the Parliament feels does not fall wholly within the CFSP.<sup>73</sup> As the guardian of the Treaties, the European Commission could be expected to also be vigilant but is in a more difficult position since the High Representative is a Vice-President of the Commission.

Further, the loyalty clause in *Pupino* was 'read across' from the EC Treaty (Article 10 EC): as Article 4(3) is now found in the TEU and, bearing in mind the collapse of the 'pillar' system, there is a strong case to suggest that it applies more directly to the CFSP.<sup>74</sup> In this context, therefore, even if not in others, the argument that the Lisbon text ring-fences CFSP away from the loyalty provision is a difficult one to make, especially if the CFSP provisions are used to get around other provisions where loyalty is much more firmly established.

### iii) THE NON-LEGISLATIVE CHARACTER OF THE INSTRUMENTS

The Treaty is now explicit that the instruments provided for under the CFSP cannot be considered 'legislative'.<sup>75</sup> CFSP decisions are excluded from the Article 289(3) TFEU procedure, 'Legal acts adopted by legislative procedure shall constitute legislative acts', which means that Article 24 TEU leaves open the question of what legal effect(s) CFSP decisions may have. A distinction must be made between 'legislative' and 'legal' since the former refers to the process of creating an instrument rather than its (legal) force. Article 289(3) does not refer to legal acts which might be adopted *outside* the scope of the legislative procedure.

This question of legal effects of the CFSP is not new, since the original TEU provisions were no clearer, only that the instruments were distinct from regulations, directives and

71 E Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*' (2007) 3 European Constitutional Law Review 5, 22.

72 Schütze (n 20) 217. This reference was mainly directed at the mixed agreements of the Union, but seems equally applicable to the CFSP if we are to take it as having a binding quality.

73 Case C-658/11 *European Parliament v Council of the European Union* (decision pending).

74 C Eckes, 'EU Counter-Terrorist Sanctions against Individuals: Problems and Perils' (2012) 17 European Foreign Affairs Review 113, 129.

75 Article 24 TEU.

decisions.<sup>76</sup> If the distinction between measures taken under the CFSP and the former first pillar was the supposed political, intergovernmental nature of the former, which do not lend themselves to the type of instruments that should be enforceable, then this was surely buried by the *Kadi* decision.

Whilst excluding the possibility of creating legislative acts, this should not be taken to mean 'non-binding' or 'non-legal',<sup>77</sup> particularly since they may indeed affect the legal rights of natural or legal persons.<sup>78</sup> The best characterisation remains Curtin's pre-Lisbon analysis of CFSP instruments as examples of 'binding non-legislation'.<sup>79</sup> After all, the Treaty does refer to the binding nature of the CFSP and, referring back to the *Pupino* decision, it was this type of provision that led the Court of Justice to find that the obligation could be read across. The lack of explicit mention of the principles of direct effect and supremacy/primacy in the Treaty and to which aspects of EU law it applies, does not help discover whether there is a possibility of these principles applying to the CFSP.

If the Court of Justice could find that, despite the wording of Article 24 TEU, the characteristics of a decision taken under the CFSP point to the same legal effects, then this is potentially significant in the choice of legal basis for measures. The *ECOWAS* case<sup>80</sup> demonstrated the extent to which the choice of legal basis for a particular measure is important, but complex. This is especially the case when there are multiple objectives pursued in a measure and the 'high politics' cannot be easily separated from the economic.<sup>81</sup>

Since the Treaties now have equal weight, this analysis leads back to the same argument about how the CFSP might be used in the future. If it is used only when a measure cannot be taken under another, non-CFSP legal basis then the legal situation will remain the status quo. But, if the non-legislative CFSP decisions begin to be used instead, then the Parliament in particular will make its voice heard through the judicial review procedure. Although unsuccessful, the Parliament has already demonstrated its will in this regard in its action against the Council, and invoked the democratic principles cited in the Treaty.<sup>82</sup> The Court would then be faced with a choice of putting aside its previous jurisprudence and what the Treaty used to say about the Treaty hierarchy, or find some inventive way of keeping the CFSP free of measures which could/should be found elsewhere. In short, the Court could conceivably be called upon to judge whether a decision taken under the CFSP should rather be a decision under non-CFSP Article 288 TFEU.<sup>83</sup> To do so would therefore circumvent the apparent lack of legislative qualities of CFSP instruments.

### 5 Post-Lisbon practice in the CFSP

The obvious starting point in examining post-Lisbon practice is the use of the instruments, which have been used very sparingly since the entry into force of Lisbon. The majority of

76 One might also note here that the characteristics of directives were developed by the Court, rather than the text of the Treaty, and there has been vigorous debate about whether the Court was justified in doing so: see T Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 Law Quarterly Review 95; and A Arnall, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 Law Quarterly Review 411.

77 Van Elsuwege (n 59) 1005.

78 Article 215(2) TFEU. But see also Article 75 TFEU and Eckes (n 74) 120.

79 Curtin (n 47) 124.

80 Case C-91/05 *Commission v Council (ECOWAS/Small Arms)* [2008] ECR I-3651.

81 P Koutrakos, 'Current Developments: European Union External Relations' (2010) 59 International and Comparative Law Quarterly 481, 483.

82 Case C-130/10 *Parliament v Council* (n 24).

83 Eeckhout suggests that if there was such a material difference between the two, then 'CFSP decisions ought not to be as detailed as they usually are': Eeckhout (n 43) 483.

the decisions taken under the CFSP since the Treaty are related to imposition of restrictive measures on third states or third parties. The principal exceptions are the decisions on humanitarian assistance in Libya<sup>84</sup> and reform of the security sector in the Democratic Republic of the Congo.<sup>85</sup> Therefore, the impression given by the Treaty that legislative acts are excluded since they are not needed or applicable to the domain of high politics is not borne out in practice.

Despite the lack of use of the CFSP instruments at their disposal, calls by Member States for the CFSP to take on a fully legislative character are few and far between. The report by the 'Group of Europe' of 11 Member State foreign ministers in their future-oriented plan for Europe in September 2012<sup>86</sup> listed as a priority, after resolving the euro crisis, strengthening the EU's act on the world stage. However, it did not call specifically for legislation in CFSP but rather majority voting in *decisions*. The report also noted the need to reduce the ability of a single Member State to block decisions but also to 'develop the concept of constructive abstention'.<sup>87</sup> What this tells us is that even the Member States who most favour integration as a means to make the EU work better stop short of including the CFSP wholeheartedly within the integration process. That is not necessarily to say that these Member States are immune to the prospect of greater co-operation, or even supranationalism, but that the institutional focus remains on the Council, where it is not just the Member States but the executives of the Member States which hold the reins.

The quotation at the outset suggests that the CFSP is subservient to the will of the Member States acting in a collective manner and completely separately from the other areas of EU integration where the supranational institutions are allowed to act. But if this was the case, then the CFSP would not be an 'equal area of action' but should take priority over all other externally focused areas. The practice shows that this is not the case. Rather, the CFSP serves a function for action on matters which fall within the CFSP as a residual category. If this were not the case, then there would be little achieved by inserting provisions which apply across the EU's external actions nor insisting on the need for coherence and consistency in external relations. Even then, the perspective of the CFSP as being intergovernmental is not only out-dated but misleading because it stresses that the Member States are the only significant actors in it and that anything which concerns the world beyond the borders of the EU must take place within CFSP. The critique of the ring-fencing does not, as would seem at first glance, demonstrate that a claim (official or otherwise) that the CFSP is more intergovernmental since Lisbon is justifiable in practice.

That the EU needs to act more coherently in external relations is almost universally agreed, even if the extent to which the EU should have a global role (and with what powers) is not. The 'face' of a more coherent CFSP is, according to the Treaty, the High Representative for CFSP; a role which was downgraded from the proposal in the Constitutional Treaty for a Union Minister for Foreign Affairs. Though modelled on an executive concept of foreign policy, the title was changed as part of the jettisoning of

84 Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) [2011] OJ L89/17.

85 Council Decision 2010/576/CFSP of 23 September 2010 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo) [2010] OJ L254/33.

86 *Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain* (17 September 2012) <[www.auswaertiges-amt.de/cae/servlet/contentblob/626322/publicationFile/171798/120918-Abschlussbericht-Zukunftsgruppe.pdf](http://www.auswaertiges-amt.de/cae/servlet/contentblob/626322/publicationFile/171798/120918-Abschlussbericht-Zukunftsgruppe.pdf)>.

87 Ibid 7.



constitutional/state-like features of the Constitutional Treaty. Nevertheless, the development of the pre-Lisbon post of High Representative who functioned as Secretary General of the Council merits consideration, since the new institutional arrangements do not bear out a CFSP which is effectively ring-fenced from other policy areas.

There are two reasons for this. The first is that the High Representative, inheriting her role from the pre-Lisbon High Representative, who was only a servant of the Council, is also a Commission Vice-President. This innovation is indicative of the porous nature of the institutional arrangements which is designed to promote coherence of action, but does not reflect the decision-making structure of the CFSP as laid down in the Treaties.<sup>88</sup> The Commission is therefore to be more involved in the CFSP than the 'specific provisions' would suggest. This is a strong element of the requirement of consistency, but also a paradox when it comes to ring-fencing: the High Representative is presumed to keep separate the respective roles and to be vigilant when matters discussed in the Commission pertaining to non-CFSP areas do not impinge on competences which should be within the CFSP. The 'double-hatted' High Representative is somehow expected to wear different intergovernmental/supranational hats depending on the circumstances. The post of High Representative does not constitute an EU institution in itself, although Article 18 TEU lists the post besides the other institutions, and thus the Treaty leaves room open to institutional practice to define where the fence lies.<sup>89</sup> The effectiveness of the CFSP ring-fencing is brought into question by the High Representative herself, who in her own words states that: 'my first impressions for the 18 months are that this [role of High Representative] is a huge role, created without deputies and created on paper without any reference to look back on of a description of how it would actually be in practice',<sup>90</sup> or indeed 'like flying a plane while you are still building the wings and somebody might be trying to take the tail off at the same time'.<sup>91</sup> This is partly as a result of the way in which CFSP came into the reform process, which was not because of difficulties in the way in which the High Representative's role worked but to enable institutional oversight over the drive for coherence which emerged during the reform process.<sup>92</sup> As such, neither the theory nor practice of this institutional innovation supports the ring-fencing of the CFSP.

The second is the development of the EEAS. Article 27(3) TEU defines the role of the EEAS to assist the High Representative and the principle of staffing it by officials drawn from the Council and Commission, and seconded from Member States.<sup>93</sup> This was a dramatic departure from the previous practice of external representation of the EU in third countries through Commission delegations and co-operation between EU/Member State officials without being physically situated in the same building. The Council Decision

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88 I am grateful to Peter Van Elsuwege for helpful discussions on this point.

89 D Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security and Defence Executive' (2011) 7 *European Constitutional Law Review* 453, 457.

90 House of Lords Select Committee on the European Union, Evidence Session with Baroness Ashton of Upholland, High Representative for Foreign Affairs and Security Policy, Vice-President of the European Commission, Evidence Session No 1, 14 June 2011, 3.

91 *Ibid* 4.

92 Sari (n 12) 79.

93 'In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and 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. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.'

establishing the EEAS<sup>94</sup> requires all staff (which is to include a ‘meaningful’ presence of nationals from all Member States)<sup>95</sup> to act *only* in the interests of the EU.<sup>96</sup> The role of the EEAS is to assist in the fulfilment of the mandate relating to CFSP and other external competences belonging to the Commission and Council<sup>97</sup> and to help the High Representative ‘ensure overall political coordination of the Union’s external action, ensuring the unity, consistency and effectiveness of the Union’s external action’.<sup>98</sup>

Although the Council Decision establishing the EEAS was based on a CFSP provision (Article 27(3) TEU), it appears from the procedural aspects of the way it was adopted that its nature and scope are not limited to the CFSP only.<sup>99</sup> In particular, the EEAS is not the servant of the Council but an ‘inter-institutional service’ and subject to influence exerted on it by the Commission too.<sup>100</sup> Here again, we see a holistic view of EU external relations being carried out in a way which should not fall foul of the EU’s (internal) institutional divisions. But the institutional arrangements do not support the carrying out of EU external relations according to a strict separation of CFSP from non-CFSP matters. Despite the delicate ‘balancing act’ reflected in the Council Decision which founded the EEAS between the institutional conduct of CFSP versus other external relations,<sup>101</sup> in reality there are few conceptual or practical lines which can be drawn between what is (or should be) CFSP or not. In particular, whilst approximately one-third of the staff of the EEAS should be drawn from the diplomatic services of all the Member States,<sup>102</sup> the Council Decision does not imply that the work of the staff should be divided across CFSP and non-CFSP lines. Indeed, this would practically be impossible in most cases given the wide definition of CFSP aims, but policies that exist under other competences.

Whether the influence of the intergovernmental CFSP within the conduct of external relations by the High Representative permeates other policies, or vice versa, will be evident over time and will depend on a variety of factors (including the working culture of the section of the EEAS, the delegation in a third country or the nature of the relationship with the third country or issue under question). Since all EEAS staff are required to work in the interests of the EU, this suggests a sidelining of the CFSP given the extensive external assistance instruments in place in relation to many third countries.<sup>103</sup> Previous work on the socialisation of officials working in European institutions, including pre-Lisbon CFSP, suggests that CFSP is already much less ‘intergovernmental than this term allows’<sup>104</sup> and,

94 Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the EEAS.

95 Ibid preamble point 8.

96 Ibid preamble point 9.

97 Ibid Article 2.

98 Ibid Article 9(2).

99 S Blockmans and C Hillion (eds), *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU Establishing the Organization and Functioning of the European External Action Service* (Centre for European Policy Studies 2013) 2.

100 M Furness, ‘Who Controls the European External Action Service? Agent Autonomy in EU External Policy’ (2013) 18 *European Foreign Affairs Review* 103, 112.

101 J Wouters, G De Baere, B Van Vooren, K Raube, J Odermatt, T Ramopoulos, T van den Sanden and Y Tanghe, ‘The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities’ (2013) European Parliament, Directorate-General for External Policies Study EXPO/B/AFET/2012/07, 25.

102 Council Decision 2010/427/EU, Article 6(9).

103 Ibid Article 9.

104 A Juncos and K Pomorska, ‘Invisible and Unaccountable? National Representatives and Council Officials in EU Foreign Policy’ (2011) 18 *Journal of European Public Policy* 1096; and A Héritier, *Explaining Institutional Change in Europe* (Oxford University Press 2007) 6–7.

given the longevity of co-operation already existing within the institutions on foreign policy, has already evolved into something akin to law.<sup>105</sup>

The role of the Commission goes beyond the High Representative herself. It would be futile to suggest that, even before Lisbon, the Commission was wholly divorced from the workings of the CFSP. Indeed, as former External Relations Commissioner Chris Patten has himself said, a great deal of his time was devoted to the CFSP.<sup>106</sup> If the ring-fencing in the Treaty was supposed to limit the supranational influence of the Commission as well as the Court of Justice and the Parliament, then this is a message which has not reached the Commission itself. Indeed, since the entry into force of the Treaty of Lisbon, a new inter-institutional agreement between the European Parliament and the Commission foresees the involvement of the former by the latter in the CFSP: 'Within its competences, the Commission shall take measures to better involve Parliament in such a way as to take Parliament's views into account as far as possible in the area of the Common Foreign and Security Policy.'<sup>107</sup>

If the Commission was intended to play no role in the post-Lisbon CFSP, then this provision would be meaningless. Rather, it is demonstrative of the Commission's informal role in the CFSP and the inadequacy of the Treaty provisions to account for or reflect what actually occurs in the CFSP, or external relations more generally. A similar point has been raised in relation to the European Parliament, which has more indirect influence over the institutional workings of the CFSP than is commonly assumed.<sup>108</sup> These observations are closely linked to the need for coherence, which in itself implies unitary action, despite the legal 'fences' put in place. It does not seem likely that the Court is seen as a more supranational 'threat' than the Commission. Rather, it can be said that the Commission is uniquely able to promote the coherence of EU external relations since it is responsible for the non-CFSP common commercial policy. At the one level, CFSP should concern 'political' foreign policy issues which are not, or cannot be, dealt with via binding legal measures. But this distinction had been shown to be unworkable before Lisbon. Post-Lisbon, with the requirement to ensure consistency, is the CFSP to be reduced to 'purely' political issues which are ring-fenced? As stated above, under the previous arrangements, if there was a doubt over which legal basis a measure should be based upon, then the general answer was clear.<sup>109</sup> But add to this the increasing number of examples of where 'cross-pillar' policies took place, such as the European Neighbourhood Policy (ENP), which have transcended the formal divisions in the Treaties and which the High Representative (for CFSP) emphasises as a priority area. Given the requirement for consistency in the Treaty, it seems likely that, should the EU continue to seek for coherent policies towards third countries/regions/issues, wide-ranging policies which are not simply based on one particular legal basis will become the norm.

This point is supported by an analysis of the decisions which have been taken under the CFSP since the entry into force of the Treaty of Lisbon. Despite the all-encompassing foreign affairs the Treaty is supposed to cover, in fact the vast majority of outputs from the CFSP are concerned with economic sanctions on third states and individuals. The *Kadi*

105 M E Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge University Press 2004) 117.

106 C Patten, *Not Quite the Diplomat* (Penguin 2005) 16.

107 Framework Agreement on Relations between the European Parliament and the European Commission (2010) 20.11.2010 OJ 304/47, Article 10.

108 E Wisniewski, 'The Influence of the European Parliament on the European External Action Service' (2013) 18 *European Foreign Affairs Review* 81.

109 Brkan (n 36) 101.

situation would still arise, since it affects legal rights of third parties. Furthermore, Article 215 TFEU puts in place measures agreed under 'general' policy of CFSP.<sup>110</sup> The two logical conclusions to draw from this observation are that (again, given the wide-ranging nature of the CFSP provisions) EU foreign policy is redundant, or that it is alive and well, but the instruments under CFSP are not being used. The contention here is that it is the latter.

Ring-fencing risks effectively restricting the CFSP's scope to a 'nucleus' of purely 'political' measures. If so, there are two potential consequences. First, that the CFSP could be used for a general agreement on a (possibly) high-profile international issue on which the Member States are agreed and which to announce their common view to the world. This would provide a springboard to further actions taken under other EU competences, and would reflect the line of reasoning from *Parliament v Council*.<sup>111</sup> Second, the CFSP would, with the exception of the sanctions measures, continue to become even more declaratory in nature, meaning that decisions taken under CFSP would simply give an indication as to the level of agreement existing between the Member States on a certain issue. But the problem with this assertion is that it suggests that a neat distinction exists between 'high politics' and 'low politics', which is superficial.<sup>112</sup> If it was the case that the Member States had pooled aspects of foreign policy such as recognition of new states, then the CFSP could be used in this way. But as recent examples show, the declaration of independence of South Sudan, or the recognition of the Libyan or Syrian rebel forces as the legitimate governments of those countries, Member States have not taken the opportunity collectively. An alternative, which recalls Lavenex's 'concentric circles' of EU external governance, is that the CFSP is retained for measures on the very outer limit of what Member States are prepared to commit themselves.<sup>113</sup> *Parliament v Council*<sup>114</sup> can be read as supporting the view that CFSP is simply there to 'scope' general aims and then flesh out the actions via other competences.

The Council also maintains that it does not follow from the fact that listed persons and entities may now bring an action for the annulment of decisions taken in the sphere of the CFSP imposing restrictive measures on them that any amendment to an existing regulation must necessarily be preceded by the adoption of a new CFSP decision.<sup>115</sup>

And yet, the argument of the CFSP being at the centre of foreign policy from which other initiatives flow does not support this proposition. According to the High Representative, the foreign policy 'core' is provided by the ENP and 'recognising the importance of the bilateral connections that we have' in strategic partnerships with the USA, Russia, China, India, Brazil or South Africa.<sup>116</sup> In evidence given to the House of Lords EU Select Committee, the High Representative does not even mention the CFSP.<sup>117</sup> Rather, the 'priority' relationships are not defined by CFSP instruments and the lack of use of common strategies pre- and post-Lisbon suggests that Member States do not foresee the use of CFSP in this way. Therefore, if these core relationships and their legal bases are found elsewhere, then the ring-fencing does not suggest that the CFSP occupies a 'higher' place in the legal hierarchy from which initiatives may flow. There has been no call for a

110 Eckes (n 74) 120.

111 Case C-130/10 *Parliament v Council* (n 24).

112 Van Elsuwege (n 59) 988.

113 S Lavenex, 'Concentric Circles of Flexible "EUropean" integration: A Typology of EU External Governance Relations' (2011) 9 *Comparative European Politics* 372.

114 Case C-130/10 *Parliament v Council* (n 24).

115 *Ibid* para 99.

116 House of Lords Select Committee (n 90) 8.

117 *Ibid*.

re-evaluation of existing external policies on the grounds of their legal basis. If Member States are responsible for ring-fencing the CFSP in this way, and assuming that the UK is the 'sceptical' benchmark for any integration of foreign policy, then the UK's enthusiasm for EU-led external initiatives such as an EU–US free-trade agreement<sup>118</sup> means that a link between the ring-fenced CFSP and all other areas is not what was intended. Rather, the non-CFSP competences will continue to develop of their own accord whilst the CFSP is left as a residual character: something which is not entirely reflected in the words of the Treaty.

The reasoning set out above leads to a conclusion that the practice of the CFSP, beyond sanctions, remains declaratory in nature. 'Declaratory' is a criticism that has been levelled at the CFSP since its creation, and whilst declarations may have some foreign policy impact, it is curious that these are the hallmark of the policy, instead of the instruments which have been specifically created for its use. The extent to which non-CFSP measures are used already suggests that actions and policies toward third countries or issues are there but not badged as such under the CFSP. The ENP is good example of this, as a document issued jointly by the Commission and High Representative notes that CFSP engagement 'will continue to be part and parcel of the ENP'<sup>119</sup> and the roadmaps of actions to take within the framework of the ENP do not mention the use of CFSP instruments.<sup>120</sup> This seems to be at odds with Article 29 TEU which suggests that the Union's approach to a particular geographical or thematic issue will be taken via a CFSP decision and Article 40 TEU. A better way to explain the ring-fencing with reference to the Member States is, rather than to suggest that they are immune to foreign policy co-operation (or even/rather integration), that the CFSP can remain declaratory but free of 'legalism'. This is also suggestive of a continued development of EU external relations which does not depend on Treaty changes as a catalyst but rather incremental, institutional development.<sup>121</sup> Taken together, these observations place the CFSP in a category of executive actions for which a court (here, the Court of Justice) would be unable to find any binding characteristics. The immunity of foreign policy from judicial control is reflected in the national constitutional arrangements of Member States. A strong argument against democratic oversight would be that there is no (legal) substance to a purely political policy area and the previous sections in this article have demonstrated that strictly separating what is or should be CFSP or not is, at best, extremely difficult and liable to focus attention on internal divisions with the EU rather than the co-ordinated common foreign policy the CFSP is designed to further.

Another consequence of a declaratory CFSP is that, in terms of both legal certainty and meeting the aims of the Treaty, the use of the CFSP provisions itself is only going to have a marginal effect on the development of EU foreign policy. This is also regrettable because the two 'new' features within the Treaty relating to foreign policy (coherence and the promotion of values) suggest that the EU is going to be measured according to these as well as its general capacity to forge a common policy. The focus of attention is likely to remain on what is being done under the CFSP rather than anything else. By attempting to ring-fence the CFSP in this way, in a way which appears theoretically possible but practically

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118 David Cameron, speech to the World Economic Forum in Davos, Switzerland, 24 January 2013 <[www.number10.gov.uk/news/prime-minister-david-camerons-speech-to-the-world-economic-forum-in-davos/](http://www.number10.gov.uk/news/prime-minister-david-camerons-speech-to-the-world-economic-forum-in-davos/)>.

119 Commission/High Representative of the European Union for Foreign and Security Policy, *European Neighbourhood Policy: Working Towards a Stronger Partnership* JOIN (2013) SWD (2013) 79 final.

120 Commission/High Representative of the European Union for Foreign and Security Policy, *Eastern Partnership Roadmap 2012–2013* JOIN(2013) SWD (2013) 108 final.

121 M Smith, 'Still Rooted in Maastricht: EU External Relations as a Third-Generation Hybrid' (2012) 34 *European Integration* 699, 704.

unworkable, the CFSP itself risks being marginalised to the extent that even the High Representative, when characterising the priorities of European foreign policy, does not seem to identify it as a means by which EU foreign policy can be led, but rather the opposite.<sup>122</sup>

## 6 Conclusion

Major EU treaty negotiations have become ever more cumbersome, complex and time-consuming as the political demands of Member States translate into legal provisions which make the EU constitutional animal an even stranger beast. No more so is this the case than for the CFSP. The reforms brought about by the Treaty of Lisbon do two conflicting things: strengthening the visibility and capabilities of the EU to act on the international plane in a more consistent and coherent manner, whilst also at least purporting to set clearer institutional lines which cannot be crossed, but which, if they could be crossed, would be an integral part of helping the EU achieve its goals based on the EU's experience in other areas. If the provisions of the CFSP can be characterised as more 'political' than 'legal', then this suggests that the intention of the Treaty of Lisbon reforms is to ring-fence the CFSP around the most sensitive areas in terms of state sovereignty. This has a dual function; on the one hand, those Member States concerned with selling the Treaty to (sceptical) domestic populations could point to the ring-fencing as a form of protection of national sovereignty away from the integrationist EU institutions. On the other hand, it allows the competences of the rest of the Treaty provisions to be used for the actual conduct of the EU's external relations. This article has also shown that, rather than the CFSP being the starting point for EU policy towards a thematic or geographical issue in external relations, in practice it is unlikely to be used as such for initiatives in foreign policy which can then be followed up by using other Treaty competences.

Ring-fencing to ensure that the Member States are the only significant actors on key areas from which all else follows is not borne out in the institutional practices permitted (or even promoted) under the Treaty. In the 'real' exercise of the EU's external action, a more complex picture emerges. From a strict rule of law perspective, one might consider that this frustrates the aims of the drafters of the Treaty since the letter of the law is not being obeyed if the CFSP instruments are ignored in favour of measures found elsewhere to pursue what should be CFSP goals. From the perspective of consistency and coherency of EU external action, this practice might be a welcome development in terms of satisfying the general goals of the Treaty. As a result, the boundaries between CFSP and other areas are likely to continue to provide a fertile ground for analysis by legal scholars, who, like the Court of Justice, must at the same time unpick the political reasoning behind the paradox of a ring-fenced CFSP, which is more porous than it would seem. To fully understand where the law in CFSP is, scholars must continue to look beyond the Treaty-based instruments and see where the goals are fulfilled via other means.

However, the implications for the nature and role(s) of law in relation to the EU more generally are not limited to arguments based on competences. Rather, the position of the CFSP in the EU's Treaty arrangements and attempt to ring-fence is indicative of an attempt to further remove this policy area from the influence of what has become 'normal' in EU law and what is known to be effective in making the law work across so many different Member States. The Treaty's reforms tell us that there is a fear of EU law applying to this area beyond almost all others and that the possibilities for further integration by law in this area may have passed. The reticence to allow, within the text of the Treaty, the supranational institutions to carry out the work they have done in areas of European integration seen as

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<sup>122</sup> House of Lords Select Committee (n 90).



most successful (such as the internal market) pushes the CFSP back towards the realm of classic international law. The problem of doing so, as is well known, is that decision-making processes and the decisive action on world affairs so frequently called for are unlikely to be forthcoming within this type of legal framework.

Since some Member States publicly support the greater use of majority voting in CFSP (though not necessarily the extension of the 'normal' legislative decision-making process), it might be thought possible that CFSP becomes part of a 'multi-speed' or differentiated pattern of integration where certain Member States integrate further. But insofar as the CFSP represents the view of the Union as an emerging international actor, it is surely in a different situation from a policy-making area which applies only internally within the EU. The overall effectiveness argument, whilst certainly present whenever multi-speed Europe is discussed, is more significant in the CFSP since its *raison d'être* is to enable the EU (and not only a part of it) to be a more effective *global* actor and therefore its significance relies on the unity and collective weight of all its Member States. The consequence for the EU's legal order is that it would be difficult to see how the aims of consistency and coherence could be met with differentiated patterns of integration in this area, and hence possibly other areas too.

Conversely, in the wider debates about what the EU should be, how far (and in what areas) it should integrate and what type of 'law' is fit for purpose, ring-fencing other areas might prove attractive to Member States seeking to 'repatriate' powers away from the supranational institutions. This might conceivably be in the areas of freedom, security and justice; migration (especially insofar as third-country nationals are concerned); or even the internal market. If this does occur, then it may be that the traditional method of legal integration via regulations and directives loses ground to a model of EU law where Member States ring-fence certain areas. The result would be a fragmentation of the EU's legal order and the calling into question of one of the most fundamental dimensions of the 'new legal order' which has been at the core of the integration process.

