

Common Foreign and Security Policy

Introduction

In Chapter 5 the competences conferred upon the EU to conduct a foreign and security policy were analysed. That analysis revealed that the Common Foreign and Security Policy (CFSP) is to a large extent supplementary to the EU's other external policies, and that the actual terrain which it occupies consists mostly of forms of external action which cannot be undertaken under the TFEU, because there the necessary powers are lacking. In this chapter we return to the CFSP in order to take a closer look at the actual policies which the EU pursues. However, as this book focuses on the legal foundations of external relations, there is no attempt to review the CFSP from a pure policy perspective. That can be left to international relations and political science experts, many of whom have indeed scrutinized the CFSP.¹ Academic lawyers, by contrast, have in the past devoted less attention to the EU's foreign policy, but they are catching up.² That discrepancy is no coincidence. For a long time lawyers were at a loss when attempting to capture the CFSP in legal discourse. Law seemed to be kept out of the CFSP with a view to safeguarding its intergovernmental character and protecting it from supranational infection. The original TEU defined the objectives of the CFSP, and enabled the Council of Ministers to use legal instruments, in particular joint actions and common positions, but signally failed to clarify the nature and effect of those instruments. Even if the objective of their creation may have been to develop policy in a more systematic and formal way than under the preceding European Political Co-operation, as well as to reinforce the binding character of agreed policies,³ the adoption of strong legal instruments was clearly not the primary objective.⁴ The very terms 'joint action' and 'common position' did not evoke established legal instruments of either domestic, Community, or international law. The TEU provided that CFSP decisions were binding on the Member States, but it did not create any specific mechanisms

¹ See Ch 5, introduction.

² E.g. RA Wessel, *The European Union's Foreign and Security Policy—A Legal Institutional Perspective* (Kluwer, 1999); P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Hart Publishing, 2001) and *EU International Relations Law* (Hart Publishing, 2006) Ch 11; E Denza, *The Intergovernmental Pillars of the European Union* (OUP, 2002).

³ S Keukeleire, *Het buitenlands beleid van de Europese Unie* (Kluwer, 1998) 181.

⁴ Denza (n 2 above) 90.

of enforcement, other than supervision by the Council itself: the jurisdiction of the Court of Justice was not extended to CFSP matters, and the Commission was not made the guardian of the CFSP. The lack of Court jurisdiction also meant that little case law could develop on either the interpretation of certain TEU provisions or the effect of CFSP decisions. Could certain CFSP acts have direct effect? Does the principle of supremacy extend to the CFSP? The examination of such questions, interesting though they may be,⁵ remained a matter of pure speculation in the absence of an ultimate judicial voice. Even on the very juridical nature of the EU, as distinct from the EC, it was almost impossible to determine the correct parameters of legal debate, let alone find some degree of consensus.

However, the actual conduct of policy does not have to be obstructed by lawyers' failure to apply their legal categories. A lot of practice developed under the CFSP, even if it rarely managed to capture the international political limelight. The CFSP practice, together with the Amsterdam, Nice, and Lisbon Treaty modifications, allow for more significant legal analysis than was possible when the TEU entered into force.

This chapter focuses on the instruments and actors of the CFSP (but largely leaves aside the Common Security and Defence Policy (CSDP)).⁶ In the first part the various instruments which are at the EU institutions' disposal to enable them to conduct the CFSP are discussed, including the budgetary means. There is then an inquiry into the nature and legal effect of those instruments, on the basis not only of the TEU's language but also the actual content of CFSP acts. International agreements concluded on the basis of Article 218 TFEU are not covered, however, as the EU's treaty-making practice is discussed in previous chapters. Nor is there a specific analysis of the special case of what are now called restrictive measures (sanctions in common parlance) which may be adopted, pursuant to Article 215 TFEU, in conjunction with a CFSP decision: such sanctions will be given closer scrutiny in Chapter 12, on the connection between trade and foreign policy.

The second part of this chapter focuses on the role of the various institutions and authorities involved in CFSP decision-making. The Council and its various organs and agents—in particular the High Representative and the new European External Action Service (EEAS)—are the main players, but the analysis cannot be confined to them, in particular if one adopts a perspective of constitutionalism. Indeed, important questions of parliamentary and judicial scrutiny arise in connection with the CFSP, and require further examination.⁷ Those questions

⁵ On supremacy see CWA Timmermans, 'The Constitutionalization of the European Union' (2002) 21 YEL 9.

⁶ On CSDP see e.g. Koutrakos, *EU International Relations Law* (n 2 above) ch 13; M Trybus and N White (eds), *European Security Law* (OUP, 2007); S Keukeleire and S MacNaughtan, *The Foreign Policy of the European Union* (Palgrave Macmillan, 2008) ch 7.

⁷ See e.g. M Martín Martínez and I Lirola Delgado, 'Aspectos jurídico-constitucionales de la Acción Exterior de la Unión Europea en el Tratado por el que se establece una Constitución para Europa: reformulación o reinención?' in A Remiro Brotons and I Blázquez Navarro (eds), *El futuro de la acción exterior de la Unión Europea* (tirant lo blanch, 2006) 29–33, 46–9.

are not unconnected with the issue of the legal nature and effect of CFSP acts. Depending upon the strength and depth of commitments entered into, and on the legal force and effects of decisions, those may become burning questions in a constitutional polity. It is from those angles that the role of the institutions is studied, and there is no attempt to offer a definitive institutional analysis, which would require a stronger interdisciplinary approach and would move us beyond external relations.

Instruments

Introduction and overview

Article 25 TEU provides that the EU shall conduct the CFSP by:

- a) defining the general guidelines,
 - b) adopting decisions defining:
 - (i) actions to be undertaken by the Union;
 - (ii) positions to be taken by the Union;
 - (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii);
- and by
- c) strengthening systematic co-operation between Member States in the conduct of policy.

It may be useful to indicate how these provisions on the EU's CFSP instruments have evolved through the various Treaty amendments. The original version of the TEU did not contain the above enumeration as such. It spoke of systematic co-operation between the Member States and of the gradual implementation of joint actions in areas where the Member States had important interests in common (Article J.1(3)). Member States were to inform and consult one another, and the Council could define common positions to which national policies had to conform. Member States were also to co-ordinate their action in international organizations and at international conferences (Article J.2). The Treaty provided for a procedure for the adoption of joint actions, but did not define the concept itself (Article J.3). The original TEU appeared to have created some kind of halfway house between informal co-ordination of policies and the adoption of formal legal instruments with specific legal effects. CFSP acts were regarded as binding under international law,⁸ but, as mentioned, no particular methods of enforcement were provided for. The lack of legal precision led to uncertainty and confusion, particularly as regards

⁸ Denza (n 2 above) 55; M Eaton, 'Common Foreign and Security Policy' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law, 1994) 222.

the distinction between joint actions and common positions, which became the core CFSP instruments.⁹

The Treaty of Amsterdam attempted to create more precision through an enumeration, in (then) Article 12 TEU, which included principles and guidelines; common strategies; joint actions; common positions; and systematic co-operation between Member States. It also offered some type of definition of joint actions (they 'address specific situations where operational action by the Union is deemed to be required': (old) Article 14(1) TEU) and of common positions (which 'define the approach of the Union to a particular matter of a geographical or thematic nature': (old) Article 15 TEU). It introduced common strategies, decided by the European Council, and 'to be implemented by the Union in areas where the Member States have important interests in common' (old Article 13(2) TEU).

The Treaty of Lisbon again modified the list of available instruments. Instead of having to use the peculiar concepts of 'joint actions' and 'common positions' the Council now simply adopts 'decisions'. It is to be noted that the legal concept of an EU 'decision' is modified by Article 288 TFEU: former Article 249 EC implied that decisions were by definition addressed to particular persons,¹⁰ whereas Article 288 TFEU no longer requires a particular connection between a decision and an addressee, but also allows decisions of a general nature.¹¹ The use of decisions for the conduct of the CFSP also needs to be assessed in the light of the exclusion of legislative acts in the context of the CFSP (Articles 24(1) and 31(1) TEU). The scope of that exclusion, which was touched upon in Chapter 5, is further analysed below.

The replacement of joint actions and common positions with decisions does not mean that the distinction between actions and positions is abandoned. As set out above, Article 25 TEU speaks of decisions defining either actions to be undertaken or positions to be taken by the Union. That distinction is elaborated upon in Articles 28 and 29 TEU. The former provision addresses 'operational action', the latter concerns 'decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature'. As the CFSP decisions need to identify the TEU provisions on which they are based, the distinction between joint actions and common positions to some extent survives.

However, the post-Lisbon TEU removes 'common strategies' as a specific CFSP instrument. (Old) Article 13(2) TEU enabled the European Council to adopt common strategies. The ostensible purpose of common strategies was to create a general policy framework, in certain broader areas, leading to more coherent and unified CFSP actions. That idea is taken one step further by the current TEU, in the sense

⁹ S Nuttall, *European Foreign Policy* (OUP, 2000) 186; E Decaux, 'Le processus de décision de la PESC: vers une politique étrangère européenne?' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer, 2002) 42; Wessel (n 2 above) 129; G Edwards, 'Common Foreign and Security Policy' (1994) 14 YEL 545.

¹⁰ 'A decision shall be binding in its entirety upon those to whom it is addressed.'

¹¹ 'A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.'

that, what are now called 'decisions of the European Council on the strategic interests and objectives of the Union' cover both CFSP and other areas of EU external action. Article 22 TEU, which follows the TEU provision setting out the EU's overall objectives as regards external action, contains the relevant provisions.

The analysis below focuses on those three types of formal decisions. Beyond those instruments, there are other types of CFSP acts, such as international agreements (see Chapter 6); European Council guidelines, statements, and declarations; and CFSP implementing decisions (Article 31(2) TEU), which are not further studied. The analysis also focuses on the exclusion of legislative acts, and on the budgetary rules.

Decisions on Union actions

Article 28(1) TEU defines the Council's powers to adopt decisions on actions (former joint actions), in the following terms:

Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

If there is a change in circumstances having a substantial effect on a question subject to such a decision, the Council shall review the principles and objectives of that decision and take the necessary decisions.

The remaining paragraphs of Article 28 TEU address the duties of the Member States with respect to decisions on actions, which 'shall commit the Member States in the positions they adopt and in the conduct of their activity' (paragraph 2). That obligation is fleshed out in Article 28(3), which provides:

Whenever there is any plan to adopt a national position or take national action pursuant to a decision as referred to in paragraph 1, information shall be provided by the Member State concerned in time to allow, if necessary, for prior consultations within the Council. The obligation to provide information shall not apply to measures which are merely a national transposition of Council decisions.

Article 28(4) addresses 'cases of imperative need arising from changes in the situation and failing a review of the Council decision'; the Member States may then 'take the necessary measures as a matter of urgency having regard to the general objectives of that decision'. Further, Article 28(5) provides that, 'Should there be any major difficulties in implementing a decision as referred to in paragraph 1, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions', which 'shall not run counter to the objectives of the decision... or impair its effectiveness'.

It is also worth mentioning that decisions on actions may be used to implement decisions on strategic interests and objectives adopted by the European Council, and that the Council generally acts by taking decisions 'on the basis

of the general guidelines and strategic lines defined by the European Council' (Article 26(2) TEU).¹²

What can be learned from those Treaty provisions as regards the nature and legal effects of decisions on actions?¹³ The definition of such decisions as instruments addressing specific situations where operational action is required does not shed much light on their legal nature. Operational action is not a legal term of art, and appears to allow for various types of decisions and provisions. The qualification that the decisions shall lay down their objectives, scope, means, duration, and conditions is not of much further assistance.

With respect to legal effects the Treaty language does emphasize that decisions on actions are binding on the Member States, or at least 'commit' them, as regards 'the positions they adopt and in the conduct of their activity'. The Treaty refers to national positions and national actions, not to national law. That appears to confirm that joint actions are not intended to be used as a legislative instrument; that we should not look at joint actions from the perspective of the relationship between EU and domestic *law*, but rather from the perspective of political statements and action. As mentioned before, it is not clear whether doctrines such as direct effect and supremacy can extend to CFSP acts.

The Treaty does not provide that decisions on actions also commit the EU institutions—in particular the European Commission, which is responsible for much external 'action' under the TFEU. The absence of such a provision is no doubt linked to the relationship between the former pillars, and the tension between supranationalism and intergovernmentalism. As discussed in Chapter 5, the Commission is concerned that CFSP decisions may interfere with its powers and prerogatives under the TFEU. The Commission is none the less under an obligation, together with the Council, and assisted by the High Representative, to ensure the consistency of the EU's external activities as a whole (Article 21(3) TEU).

In the light of the lack of Treaty precision as regards the nature and effects of decisions on actions, it may be useful to take a closer look at the actual practice (including of course the practice under the former version of the TEU as regards joint actions). It is clear from that practice that decisions on actions are in many respects the key vehicle of the CFSP.¹⁴ It is in particular interesting to investigate what types of 'operational action' the Council undertakes. Joint actions and decisions on actions have concerned a wide range of acts and activities. They provide for financial expenditure and transfers.¹⁵ They involve sending missions, from election

¹² Wessel (n 2 above) 119 reports that in an initial phase, joint actions used to be based on European Council guidelines, but that this is no longer the practice.

¹³ See also, as regards the pre-Lisbon practice, 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) 53.

¹⁴ Cf E Paasivirta, 'The European Union: From an Aggregate of States to a Legal Person?' (1997) 2 *The Hofstra Law & Policy Symposium* 51.

¹⁵ E.g. Joint Action 2004/494 on European Union support to the establishment of the Integrated Police Unit in the Democratic Republic of Congo (DRC) [2004] OJ L182/41.

observers to military personnel, consisting mostly of persons seconded by the Member States.¹⁶ They have provided for diplomacy, consultations, démarches, representation, and conferences.¹⁷ Joint actions have instructed the Member States to take various forms of action, up to the adoption of legislation (including sanctions)¹⁸ and the ratification of international conventions.¹⁹ They may set up institutions and centres with legal personality.²⁰

The ill-defined nature of joint actions and decisions on actions therefore appears to permit virtually any type of government activity, with the exception of general normative action creating rights and obligations for citizens. It is only in the latter sense that joint actions and decisions on actions can be said to be non-legislative, and in material terms a number of joint actions do have legislative effect, albeit through legislative action which the Member States are instructed to take. This broad juridical scope of joint actions and decisions on actions needs to be borne in mind when considering the involvement of the various institutions. In particular, from a perspective of constitutionalism, the question arises of whether the current standards of parliamentary and judicial supervision of decisions on actions are satisfactory.

Decisions on Union positions

Article 29 TEU provides:

The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union's positions.

Article 29 TEU does not spell out the effects of these decisions on the Member States. However, Article 34 TEU, concerning action in international organizations and at international conferences, describes some of the Member States' obligations: 'They shall uphold the Union's positions in such forums' (Article 34(1)).²¹ The Treaty is thus equally taciturn on the nature and legal effects of decisions on actions and on positions, and academic literature in fact agrees that the distinction with decisions on actions is unclear in either theory or practice.²² Other than that

¹⁶ E.g. Council Decision 2010/279 on the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) [2010] OJ L123/4.

¹⁷ E.g. Joint Action 2007/805 appointing a European Union Special Representative to the African Union [2007] OJ L323/45.

¹⁸ E.g. Joint Action 2000/401 concerning the control of technical assistance related to certain military end-uses [2000] OJ L159/216. In recent years, however, that practice appears to have been abandoned.

¹⁹ E.g. Joint Action 96/588 on anti-personnel landmines [1996] OJ L260/1.

²⁰ E.g. Joint Action 2008/550 establishing a European Security and Defence College (ESDC) and repealing Joint Action 2005/575 [2008] OJ L176/20.

²¹ See also the provisions of Art 34(2) TEU as regards the work of the UN Security Council.

²² E.g. Nuttall (n 9 above) 186; Decaux (n 9 above) 42–3 (both addressing the former joint actions and common positions).

the emphasis appears to be on political positions rather than operational action, there is little that one can derive from the Treaty language. As can be seen from the above discussion of decisions on actions, the latter in practice have also involved the adoption of political positions, although in recent years that practice appears to have been abandoned.

What does the practice as regards common positions and decisions on positions show? They have broadly concerned the following activities and positions:

- restrictive measures, including economic and financial sanctions, often in implementation of UN Security Council resolutions, and in combination with EC regulations based on Articles 301 and 60 EC—now based on Article 215 TFEU, including also other sanctions, in particular travel bans and visa restrictions, and arms trade restrictions;²³
- objectives, priorities, and activities towards specific third countries;²⁴
- broad policy documents on general international problems, for example human rights and good governance in Africa;²⁵ conflict prevention, management, and resolution in Africa;²⁶ terrorism;²⁷
- support for democratic and peace processes;²⁸
- conflict prevention and non-proliferation;²⁹
- policy towards the international criminal courts and tribunals;³⁰ and
- temporary reception in Member States of particular persons.³¹

As can be seen, the range of subjects addressed through common positions and decisions on positions is as wide as that covered by joint actions and decisions on actions, and many subjects are similar, if not identical. There are, however, a number of differences in the content of the respective measures, and they have become more pronounced in recent years. Common positions and decisions on positions do not involve financial expenditure and transfers, the sending of missions, or the establishment of institutes or centres. Those are therefore clearly forms of 'operational action'

²³ E.g. Council Decision 2010/232 renewing restrictive measures against Burma/Myanmar [2010] OJ L105/22.

²⁴ E.g. Common Position 2002/830 on Rwanda and repealing Common Position 2001/799 [2002] OJ L285/3.

²⁵ Common Position 98/350 concerning human rights, democratic principles, the rule of law and good governance in Africa [1998] OJ L158/1.

²⁶ Common Position 2001/374 concerning conflict prevention, management and resolution in Africa [2001] OJ L132/3.

²⁷ Common Position 2001/930 on combating terrorism [2001] OJ L344/90.

²⁸ E.g. Common Position 2003/319 concerning European Union support for the implementation of the Lusaka Ceasefire Agreement and the peace process in the Democratic Republic of Congo (DRC) and repealing Common Position 2002/203 [2003] OJ L115/87.

²⁹ E.g. Common Position 2001/869 on participation by the EU in the Korean Peninsular Energy Development Organization (KEDO) [2001] OJ L325/1.

³⁰ E.g. Common Position 2003/444 on the International Criminal Court [2003] OJ L150/67.

³¹ Common Position 2002/400 concerning the temporary reception by Member States of the EU of certain Palestinians [2002] OJ L138/33.

for which a decision on a position is not the appropriate instrument. Common positions and decisions on positions have increasingly concerned all kinds of restrictive measures. Again one can say that the instrument is non-legislative because it does not directly regulate rights and obligations of citizens. Indirectly, however, and in a substantive sense, common positions and decisions on positions do have legislative character. This is particularly the case for restrictive measures, which acquire binding force through implementation, either under the TFEU, where the measures come within Article 215 TFEU, or by the Member States (mostly visa and travel bans, and restrictions on trade in military material and technologies).

A good example of a common position with strong legislative purpose is the common position on combating terrorism.³² Under Article 1 the wilful provision or collection of funds for terrorist purposes shall be criminalized. Article 2 concerns the freezing of funds held by terrorists. Article 8 provides that terrorists shall be brought to justice and that terrorist acts shall be established as serious criminal offences. Pursuant to Article 9 Member States must afford one another and third States assistance in connection with criminal investigations or proceedings. Article 10 requires that the movement of terrorists or terrorist groups be prevented by effective border controls. Article 14 provides that the Member States shall become parties as soon as possible to the relevant international conventions and protocols. These are just a number of examples of the kind of provisions that decisions on positions may contain. As with decisions on actions, the questions of parliamentary involvement and judicial supervision arise.

Decisions on strategic interests and objectives

Articles 22(1) and 26(1) TEU define the role of the European Council in the conduct of the CFSP. Article 22(1) provides that: 'On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union'. It further provides that the relevant decisions:

... shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

Article 26(1) TEU further provides that the European Council shall identify the Union's strategic interests, and determine the objectives of and define the general guidelines for the CFSP.

As was mentioned, the ostensible purpose of decisions on strategic interests and objectives (former common strategies) is to create a general policy framework, in

³² Common Position 2001/930 (n 27 above).

certain broader areas, leading to more coherent and unified CFSP actions. Indeed, the extension of this instrument to other areas of EU external action follows that same logic. The European Council is clearly an important actor in CFSP matters, and in EU external action generally. Nearly every European Council meeting devotes considerable time to international affairs and external relations, and the Presidency Conclusions invariably contain policy statements and guidelines for further EU action.

There is, however, also a significant institutional and decision-making dimension to decisions on strategic interests and objectives. Pursuant to Article 31(2) TEU the Council acts by qualified majority 'when adopting a decision defining a Union action or position on the basis of' such a European Council decision, by way of derogation from the standard unanimity requirement. Throughout the inception and life of the CFSP there has been intense debate about the voting rules in the Council. Unanimity is regarded as safeguarding national sovereignty, whereas qualified majority is advanced as indispensable for effective decision-making. This debate took place at Amsterdam and in the Convention on the Future of Europe. Decisions on strategic interests and objectives are thus also akin to a form of ceasefire in the constitutional politics of the EU as regards voting rules in CFSP matters.³³

The broad, inclusive nature of decisions on strategic interests and objectives raises questions concerning their relationship with TFEU policies. As with decisions on actions and positions, the Treaty does not clarify whether the EU institutions are bound by them when acting within the framework of the TFEU. Again this is left to the consistency requirement for which the Council, the Commission, and the High Representative are responsible.

The first common strategies adopted concerned Russia, Ukraine, and the Mediterranean region.³⁴ They were thus geographical in character. They were also broad in terms of subject matter, addressing overall policy towards the countries concerned, and making reference, to the entire gamut of external policies, conducted by the EU, by the Member States, and by the (then) EC. Those common strategies did not, however, contain strict instructions for the Community; the European Council rather 'call[ed] on the Council, the Commission and Member States', to 'review, according to their competencies and capacities, existing actions, programmes, instruments, and policies to ensure their consistency with this Strategy'.³⁵

Nor did they contain operational legal provisions, in contrast to joint actions and common positions. It is further notable that the three common strategies followed

³³ S Peers, 'Common Foreign and Security Policy' (1997) 17 YEL 546 suggests that this was the real purpose of introducing common strategies; A Dashwood, 'External Relations Provisions of the Amsterdam Treaty' in O'Keefe and Twomey (eds) (n 8 above) 212 speaks of the primary purpose.

³⁴ Common Strategy 1999/414 on Russia [1999] OJ L157/1; Common Strategy 1999/877 on Ukraine [1999] OJ L331/1; and Common Strategy 2000/458 on the Mediterranean region [2000] OJ L183/5.

³⁵ E.g. Common Strategy 1999/414 (n 34 above), Instrument and Means, Section 2.

rather than preceded significant Community policies and instruments. In the cases of Russia and Ukraine the strategies made ample reference to the partnership and co-operation agreements with those countries,³⁶ whereas the strategy on the Mediterranean region expressly built 'on the Euro-Mediterranean partnership established by the Barcelona Declaration and its subsequent *acquis*'.³⁷

The common strategies instrument was not highly praised. The former High Representative for the CFSP, Mr Solana, produced a critical report arguing that the common strategies were rhetorical and descriptive of existing instruments.³⁸ In academic literature, too, one finds criticism: common strategies were said to equal joint actions, but adopted by the European Council, and it was argued that the EU none the less remained the prisoner of divided competences.³⁹ According to Denza, however, an overview of existing and projected programmes was presentationally helpful for the country or region concerned as well as for those working in a narrow area of the Council or the Commission. By formulating policy and objectives agreed unanimously by the Member States, they opened the way to co-ordinated implementing decisions (by qualified majority within the Second Pillar). The practice was for each incoming presidency to draw up a work programme for each common strategy, and in these documents the allocation between pillars and legal bases was made clear.⁴⁰

Those three common strategies have now expired, and since 2003 the European Council has not formally adopted new strategies which were published in the EU Official Journal. However, the Presidency Conclusions report five more 'strategies', which are referred to in various joint actions and common positions. They are the European Security Strategy;⁴¹ the Strategy against Proliferation of Weapons of Mass Destruction;⁴² the Strategy on Small Arms and Light Weapons;⁴³ the Counter-terrorism Strategy;⁴⁴ and 'The EU and Africa: Towards a Strategic Partnership'.⁴⁵ In substance, those strategies appear to conform to the way in which the current TEU describes decisions on strategic interests and objectives. The reason for not formally adopting them as (then) common strategies may relate to the fact that each of those strategies also involved external action outside the scope of the CFSP.

³⁶ Agreement on partnership and co-operation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3 and Partnership and co-operation agreement between the European Communities and their Member States, and Ukraine [1998] OJ L49/3.

³⁷ Common Strategy 2000/458 (n 34 above) Part I, para 4.

³⁸ Europe Documents, No 2228; see Denza (n 2 above) 292.

³⁹ Decaux (n 9 above) 34–5, 37–40.

⁴⁰ Denza (n 2 above) 292–3.

⁴¹ 12 Dec 2003, Council Doc 78367.

⁴² 10 Dec 2003, Council Doc 15708/03.

⁴³ 17 Oct 2005, Council Doc 13066/05.

⁴⁴ 30 Nov 2005, Council Doc 14469/4/05 REV 4.

⁴⁵ 14 Dec 2005, Council Doc 15702/1/05 REV 1.

The exclusion of legislative acts

It is useful, at this point of the analysis, to examine the express exclusion of legislative acts in the context of the CFSP. Remarkably, the TEU twice contains exactly the same phrase, 'The adoption of legislative acts shall be excluded', in Articles 24(1) and 31(1). This exclusion was touched upon in Chapter 5, but there is scope for further observations concerning its meaning and effect. The analysis needs to be conducted in the light of CFSP practice, in particular as regards (former) joint actions and positions and (current) decisions on actions and positions.

The reference to 'legislative acts' finds its origins in the ill-fated Constitution for Europe, which would have introduced a general distinction between legislative and non-legislative acts.⁴⁶ Under its provisions, European decisions were labelled as non-legislative acts. The legislative acts encompassed European laws, and such an act was defined as a legislative act of general application, binding in its entirety and directly applicable in all Member States; and European framework laws, which were described as a legislative act binding, as to the result to be achieved, upon each Member State to which it was addressed, but leaving to the national authorities the choice of form and methods. The Constitution for Europe did not in terms exclude the adoption of legislative acts in the framework of the CFSP, but as it only allowed the adoption of CFSP decisions (as does the current TEU), it was obvious that legislative acts were excluded.

The current versions of the TEU and the TFEU are not of course identical to the Constitution for Europe. The Treaty of Lisbon largely abandoned the concepts of legislative and non-legislative acts, keeping the existing instruments of regulations, directives, decisions, recommendations, and opinions (Article 288 TFEU). However, it kept the denomination of ordinary and special 'legislative' procedures for the adoption of EU legal acts (Article 289(1) and (2) TFEU). All of those procedures involve at least the Parliament and the Council. Moreover, the TFEU specifies that 'Legal acts adopted by legislative procedure shall constitute legislative acts' (Article 289(3) TFEU).

The exclusion of legislative acts for the conduct of the CFSP could simply be understood, in accordance with the above TFEU provisions, as confirming that the ordinary or special legislative procedures do not apply to CFSP decision-making. However, such a straightforward reading is difficult to justify in the light of the principle of effective Treaty interpretation. Indeed, it is most clear from the TEU provisions on CFSP decision-making that CFSP decisions are not adopted in accordance with either the ordinary or a special legislative procedure, as the Parliament is not involved. There was therefore no need to confirm, twice, that legislative acts are excluded: the provisions on decision-making already implied such an exclusion.

⁴⁶ See Arts I-33 to I-35.

A purely formal reading of the exclusion of legislative acts is thus unpersuasive. There are, moreover, strong arguments in support of a more substantive reading⁴⁷—a reading which excludes general normative action in the framework of the CFSP.

The first argument is based on the democratic principles underpinning the EU, as now set out in Articles 9 to 12 TEU. Article 10, in particular, describes how the functioning of the Union shall be founded on representative democracy. It points out that citizens are directly represented at Union level in the European Parliament, and that Member States are represented in the European Council and the Council by their (heads of) governments, themselves democratically accountable to either their national Parliaments or their citizens. Article 10(3) confirms that every citizen shall have the right to participate in the democratic life of the Union and that decisions—a concept clearly used in a generic sense—shall be taken as openly and as closely as possible to the citizen.

As the European Parliament has no direct say in CFSP matters (see further below), the CFSP decisions benefit from only one type of representative democracy: through Member State representation in the European Council and the Council. It could well be argued that this explains the exclusion of legislative acts, understood as general normative action. The latter clearly affects European citizens directly, and should therefore only result from decision-making involving the Parliament, which directly represents those citizens. Regulations and directives adopted under the TFEU involve such general normative action, even if directives are not directly applicable and require national implementation: they are nevertheless binding as to the results, which more often than not encompass creating rights and obligations for EU citizens (as well as other persons subject to EU jurisdiction). CFSP decisions should not involve that kind of normative action. Such an understanding of representative democracy justifies a reading of the exclusion of legislative acts for the conduct of the CFSP which precludes general normative action, in particular action which purports to create rights and obligations.

A second argument in support of such a reading is derived from the principle that the Union is founded on the rule of law (Article 2 TEU).⁴⁸ In the conception of the Court of Justice, that principle implies that all acts of the institutions are subject to review as regards their conformity with the basic constitutional charter, the (then) EC Treaty.⁴⁹ Clearly, the exclusion of the Court's jurisdiction over CFSP decisions (see below) constitutes a breach in this foundational principle. However, it is a breach which is more tolerable if general normative action is excluded in the context of the CFSP.

⁴⁷ Cf A Türk, *The Concept of Legislation in European Community Law—A Comparative Perspective* (Kluwer Law International, 2006) 77–185; K Lenaerts and M Desomer, 'Simplification of the Union's Instruments' in B de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (RSCAS, 2003) 110–11.

⁴⁸ Cf R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 CML Rev 347, where he states that the principle of the rule of law is applicable to the CFSP.

⁴⁹ Case 294/83 *Les Verts v. European Parliament* [1986] ECR 1339, para 23, as confirmed in Joined Cases C-402 and 415/05P *Kadi and Al Barakaat v. Council and Commission* [2008] ECR I-6351, para 281.

There are signs that the Court itself shares such a conception. In *Segi* it was confronted with a challenge, by way of an action in damages, against a common position listing Segi, a Basque group, as a terrorist organization. The common position was based on the pre-Lisbon TEU provisions concerning CFSP (Second Pillar) and concerning Police and Judicial Co-operation in Criminal Matters (Third Pillar). Segi's listing was in fact characterized as a Third Pillar act. The case had first been brought to the (then) Court of First Instance (CFI), which had established that the then TEU did not provide for an action in damages against the institutions, and therefore dismissed the application. On appeal, the Court of Justice could only confirm that finding. However, as to whether this finding was in conformity with the right to effective judicial protection, the Court made the following analysis. The background to this analysis is that, at the time, the Court had some jurisdiction for Third Pillar measures: it could hear actions for annulment brought against framework decisions and decisions, and references from national courts on the interpretation and validity of framework decisions and decisions, but it could not hear such actions or references as regards common positions.

The Court first admitted that the system of remedies as regards the Third Pillar was less extensive than that under the (then) EC Treaty. Nevertheless, the appellants could not validly argue that they were deprived of all judicial protection. As was clear from (then) Article 6 TEU, the Union was founded on the principle of the rule of law and it respected fundamental rights as general principles of Community law. It followed that the institutions were subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implemented the law of the Union. Here it was to be noted that (then) Article 34 TEU provided that the Council could adopt acts varying in nature and scope. Under Article 34(2)(a) TEU the Council could 'adopt common positions defining the approach of the Union to a particular matter'. A common position required the compliance of the Member States by virtue of the principle of the duty to co-operate in good faith, which meant in particular that Member States were to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under EU law. However, a common position was not of itself supposed to produce legal effects in relation to third parties. That is why, in the system established by the then TEU, only framework decisions and decisions could be the subject of an action for annulment before the Court of Justice. The Court's jurisdiction, as defined by Article 35(1) TEU, to give preliminary rulings also did not extend to common positions but was limited to rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI, and on the validity and interpretation of the measures implementing them.

Article 35(1) TEU, in that it did not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treated as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council

and intended to produce legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings was designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) TEU narrowly. The right to make a reference to the Court of Justice for a preliminary ruling therefore had to exist in respect of all measures adopted by the Council, whatever their nature or form, which were intended to have legal effects in relation to third parties. As a result, it had to be possible to make subject to review by the Court a common position which, because of its content, had a scope going beyond that assigned by the TEU to that kind of act. Therefore, a national court hearing a dispute which indirectly raised the issue of the validity or interpretation of a common position adopted on the basis of Article 34 TEU, and which had serious doubts whether that common position was really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 TEU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position was intended to produce legal effects in relation to third parties, to accord it its true classification, and to give a preliminary ruling.⁵⁰

The Court thus displayed a willingness to review the use of common positions under the then Third Pillar, and considered that such common positions were precluded from producing legal effects in relation to third parties. That was the justification, and indeed the condition, for its exclusion of jurisdiction to be justified.

Those considerations can easily be transposed to current CFSP decisions. The only justification, and indeed a condition, for the exclusion of the Court's jurisdiction is that CFSP decisions cannot produce legal effects in relation to third parties. The amended TEU and TFEU recognize this, because the Court does have jurisdiction, pursuant to Article 275 TFEU, to review 'the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union' (the CFSP chapter). This exception confirms the principle that, in a Union governed by the rule of law, all acts of the institutions producing legal effects in relation to third parties must be reviewable. It does not, on the other hand, imply that general normative action is permitted under the CFSP. Article 275 TFEU talks about restrictive measures against natural or legal persons, and clearly recognizes that such decisions are adopted in the context of the CFSP. However, such restrictive measures do not of necessity involve general normative action. They may be in the nature of administrative decisions concerning individual cases.

General normative acts can therefore only be adopted under the TFEU, where the Court has full jurisdiction. The exclusion of legislative acts for the conduct of the CFSP, thus understood, is the counterpart of the exclusion of the Court's jurisdiction.

⁵⁰ Case C-355/04P *Segi v. Council* [2007] ECR I-1657, paras 50-54.

It should furthermore be noted that, pursuant to current Article 40 TEU, it would be open to the Court to advance such an understanding of the nature and indeed limitations of CFSP acts, and to police it. Article 40 clarifies that the CFSP shall not affect the procedures and the extent of the powers of the institutions for the exercise of Union competences under the TFEU. Clearly, if the treaties are to be read as precluding CFSP decisions from producing legal effects in relation to third parties by way of general normative action, such acts being reserved to decision-making under the TFEU, then this concerns the procedures and the powers of the institutions for the exercise of Union competences under the TFEU.

The conclusion at this point, on the basis of the EU's democratic principles and of the principle of the rule of law, is that the exclusion of legislative acts for the conduct of the CFSP is to be understood as an exclusion of general normative action producing legal effects in relation to third parties. If that conclusion is correct, two further questions arise. First, what is the scope of this limitation; what kind of acts does it preclude? Secondly, does the current CFSP practice conform to the limitation?

As regards the first question, clearly, a CFSP decision cannot contain general provisions producing legal effects in relation to third parties which are directly applicable in the Member States. In other words, they cannot have an effect equal to that of general regulations adopted under the TFEU. This appears to imply that CFSP decisions cannot have direct effect, and that the principle of the primacy of EU law does not extend to them, at least not in the meaning normally attributed to those concepts in EU law. Indeed, direct effect means that, of its own force, a provision of EU law has effect in national law. The principle of primacy means that such a provision prevails over any inconsistent national law. Unavoidably, a general act which has such effects in and on national law will produce legal effects in relation to third parties. It is therefore arguable that the exclusion of legislative acts for the conduct of the CFSP implies that CFSP acts do not have direct effect and do not prevail over national law.

That may not be the end of the matter, however. CFSP decisions (or former joint actions and common positions) do not in terms purport to have direct effect or to prevail over inconsistent national law. They do not define their legal effects. The TEU itself only clarifies that the Member States are under an obligation to comply. It is the Member States which are bound by the CFSP decisions (also pursuant to the duty of sincere co-operation in Article 4(3) TEU—see further the Court's statements on the binding nature of Third Pillar common positions in *Segi*, as set out above). Is that sufficient for the purpose of the exclusion of legislative acts? Since CFSP decisions do not of themselves have any effect in and on national law, are they, by definition, not legislative acts? It is submitted that that would be an approach which is too formal. The analogy with directives comes to mind. Directives are not directly applicable in the laws of the Member States, but need to be transposed. Nevertheless, most directives clearly have a strong legislative scope. They purport to produce legal effects for third parties, subject to their transposition

into national law, which in any event, as a matter of law, is a foregone conclusion: Member States need to achieve the directive's result and are under an obligation to transpose. CFSP decisions, even if equally binding, are not permitted to have legislative scope. They cannot, to use a non-hypothetical example, provide that Member States need to ensure that acts of terrorism shall be established as serious criminal offences. The exclusion of legislative acts must extend to the normative content of the decisions in issue. An analysis of that content cannot be avoided on the mere basis that a CFSP decision is only binding on the Member States and is not as such directly applicable.

Does CFSP practice conform to those limitations?⁵¹ It is not clear that it does. In particular the practice as regards restrictive measures stands out as a cause for concern. Decisions on restrictive measures (formerly common positions) contain detailed and extensive provisions which, in substance, have a normative content.⁵² The best example is the latest decision (at the time of writing) concerning Iran.⁵³ That decision involves restrictions on imports and exports; on technical assistance; on investment; on financial services; on the transfer of funds; on the entry into and transit through the Member States of listed persons; and on the freezing of funds. It is true that such decisions are usually implemented, at least in part, by means of regulations adopted under Article 215 TFEU. That, however, does not mean that the CFSP decisions have no legislative scope, or that such scope is justified. Not all aspects of the relevant CFSP decisions acquire a TFEU counterpart: restrictions on the sale and export of arms, and on the entry and transit of persons, are never incorporated in the Article 215 regulations (or their Articles 301 and 60 EC predecessors). Moreover, even if one were to accept that the principle of the exclusion of legislative acts is somehow remedied by also taking action under the TFEU, the CFSP decisions ought not to be as detailed as they usually are, for then the TFEU regulations constitute a mere transposition of what is effectively CFSP legislative action.

Budget

Many CFSP joint actions involve considerable expenditure, and the question therefore arises of how financing is organized. When the TEU was negotiated it was not envisaged that the EU, as distinct from the (then) EC, would require its own budget and financial resources. Article J.11 of the original TEU provided that administrative expenditure was to be charged to the EC budget. As regards operational expenditure, the Treaty left two options: either the Council decided unanimously that

⁵¹ Dashwood (n 13 above) 54 and 64 notes that certain pre-Lisbon joint actions had legislative purposes 'presumably as the least inappropriate instrument available'.

⁵² Cf Gosalbo Bono (n 48 above) 364.

⁵³ Council Decision concerning restrictive measures against Iran and repealing Common Position 2007/140 [2010] OJ L195/39.

such expenditure was to be charged to the EC budget, in which case the relevant EC Treaty provisions were applicable, or it could determine that such expenditure be charged to the Member States, where appropriate in accordance with a scale to be decided. It may be noted that the first option effectively implied a measure of communitarization, as the Commission and the Parliament have significant powers and functions in relation to the budget.

These financial arrangements were criticized from the outset as showing that the EU lacked any financial autonomy, and in practice they soon proved to be divisive and time wasting.⁵⁴ The lack of automatic financial cover for CFSP decisions either led to prolonged wrangling or even prevented action.⁵⁵ The financing option created tension between the objective of keeping the CFSP intergovernmental and the concern to spare national budgets.⁵⁶ Gradually the practice moved towards the systematic use of the EC budget, but this in itself did not solve the issue of which institution would control the decision to finance a joint action, or who would control and oversee implementation.⁵⁷ In 1997, the Parliament, the Council, and the Commission concluded an inter-institutional agreement on provisions regarding the financing of the CFSP.⁵⁸ This agreement provided that CFSP expenditure was to be regarded as non-compulsory. It arranged for an overall structure of CFSP financing in the EC budget, with a particular CFSP chapter to be subdivided into certain categories. Transfers within the chapter were to be allowed, but any additional overall CFSP expenditure that proved necessary during the year was to be agreed under an urgent procedure. In the event of disagreement between the Council and Parliament, an ad hoc concertation procedure was to be set up to expedite agreement, and the Parliament extracted significant commitments on information and consultation.⁵⁹

The Treaty of Amsterdam amended the TEU provisions on CFSP financing, effectively confirming actual practice. (Old) Article 28(3) TEU modified the provisions on operational expenditure, by providing that operational expenditure was to be charged to the EC budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decided otherwise.

In the meantime the above inter-institutional agreement had been replaced by the (general) inter-institutional agreement on budgetary discipline and improvement of the budgetary procedure,⁶⁰ but without material modification of the arrangements on CFSP expenditure. (Current) Article 41 TEU confirms this approach. However, it also makes room for the Council to establish specific

⁵⁴ Denza (n 2 above) 57.

⁵⁵ J Monar, 'The Financial Dimension of the CFSP' in M Holland (ed), *Common Foreign and Security Policy—The Record and Reforms* (Pinter, 1997) 34.

⁵⁶ Wessel (n 2 above) 98; Nuttall (n 9 above) 265.

⁵⁷ Peers (n 33 above) 542. ⁵⁸ [1997] OJ C286/80.

⁵⁹ See also Peers (n 33 above) 544. ⁶⁰ [1999] OJ C172/1.

procedures for guaranteeing rapid access to appropriations in the Union budget for the urgent financing of initiatives within the framework of the CFSP, and in particular for the preparatory activities for CSDP tasks (see Articles 42(1) and 43 TEU). Such preparatory activities which are not charged to the Union budget shall be financed by a start-up fund made up of Member States' contributions.

The most notable dimension of the CFSP financing saga is that it has led to greater Commission and Parliament involvement in CFSP matters than that for which the TEU expressly provides (see also below).⁶¹

Actors

European Council

The role and function of the European Council in EU policy-making are ever increasing. That is also the case with the CFSP. The original TEU referred to the European Council in the last part of the CFSP title. Article J.8(1) confined the role of the European Council to defining the principles of, and general guidelines for, the common foreign and security policy. The Treaty of Amsterdam enhanced the European Council's position and input, by enabling it to adopt common strategies and to decide an EU common defence, as the ultimate outcome of the EU's defence policy.⁶² The Lisbon Treaty further modified the nature of the European Council by turning it into a formal EU institution (Article 13(1) TEU). Its task is to provide the Union with the necessary impetus for its development and to define the general political directions and priorities thereof. It cannot, however, exercise legislative functions (Article 15(1) TEU). The institutionalization is strengthened by the creation of the office of the President of the European Council (Article 15(5) TEU).

As the European Council has been re-baptized as an EU institution in its own right, it has been granted specific powers, in particular as regards the CFSP. Reference has already been made to Article 22(1) TEU, which enables the European Council to take decisions on the Union's strategic interests and objectives, encompassing both the CFSP and other areas of external action. Article 26(1) TEU builds on that power, by providing that the European Council shall identify the Union's strategic interests, and determine the objectives of and define the general guidelines for the CFSP, including for matters with defence implications. Furthermore, if international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the

⁶¹ And see the Interinstitutional Agreement between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management [2006] OJ C139/1, in particular paras 42–43.

⁶² Dashwood (n 13 above) 212.

strategic lines of the Union's policy in the face of such developments. Article 31(1) determines that the European Council acts unanimously. As regards the CSDP, Article 42(2) provides that this policy 'will lead to a common defence, when the European Council, acting unanimously, so decides'.

As mentioned above, at every European Council meeting a substantial amount of time is devoted to international affairs and external action, and Presidency conclusions invariably contain long passages on the EU's external policies, which indeed serve as guidelines for the daily work of the other institutions, in particular the Council. Council CFSP decisions regularly refer to the European Council's deliberations, although there does not appear to be a fixed pattern. The common strategies instrument has been less frequently used (see above), and it is not yet clear whether the new instrument of European Council decisions on strategic interests and objectives will form a significant contribution to policy-making, and whether it effectively increases the European Council's involvement.

However, the European Council's most important role is probably at constitutional and institutional level. For example, one of the most significant CFSP developments over the years has been the construction of the CSDP, which forms part of the CFSP, but with a clear, separate identity. This process has been driven by the European Council, in an attempt to strengthen the EU's crisis-management and conflict-prevention capabilities. The construction of the CSDP required significant institutional action, and it is at the level of the European Council that decisions were taken to convert the Political Committee into a Political and Security Committee; to create a European Union Military Committee (EUMC); and to set up a European Union Military Staff Organization (EUMS).⁶³

The European Council President also has a role to play in the conduct of the CFSP. Article 15(5) TEU provides that the President 'shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy'. It is not wholly clear what is meant by the phrase 'at his or her level and in that capacity'. Clearly, there is no dearth of actors who may represent the EU externally: the European Council President and the High Representative, but also the Commission as regards non-CFSP issues (see Article 17(1) TEU), as well as the EEAS and the Union delegations.⁶⁴

Council

The Council is by far the most important institution for the conduct of the CFSP. Whereas policy-making under the TFEU is characterized by a strong division of powers between the Council, the Commission, and the Parliament,

⁶³ Nice Presidency Conclusion, Annex IV; see <<http://ue.eu.int/en/Info/eurocouncil/index.htm>>.

⁶⁴ Cf J-C Piris, *The Lisbon Treaty—A Legal and Political Analysis* (CUP, 2010) 208.

requiring constant co-operation between those institutions, the Council clearly dominates the CFSP. However, more than in any other area the Council is not merely the meeting of members of national governments. As the Council's functions in CFSP matters are to a large extent executive, many of its acts require a lot of further activity of different types, i.e. institutional, diplomatic, and military. Also, the preparation of Council decisions requires a strong administrative framework. In performing its functions the Council is therefore served by other actors, bodies, and organs. It will of course need to interact closely with the High Representative and with the EEAS, which are discussed in a separate subsection, below. Accordingly, this subsection first addresses the Council's powers under the relevant Treaty rules, it then looks at decision-making within the Council, and lastly discusses those other actors within the Council framework.

Powers

Article 24(1) TEU provides, in general terms, that the CFSP shall be defined and implemented by the European Council and the Council. Article 26(2) TEU further provides that the Council shall frame the CFSP and take the decisions necessary for defining and implementing it on the basis of the general guidelines defined by the European Council. The Council must also, with the High Representative, ensure unity, consistency, and effectiveness of action by the Union. Articles 28 and 29 TEU lay down the provisions on, respectively, decisions on Union actions and on Union positions (see above). Article 30 provides that any Member State, the High Representative, or the High Representative with the Commission's support, may refer any question relating to the CFSP to the Council and may submit to it initiatives or proposals. The Council, together with the European Council, is also the forum where Member States consult one another 'on any matter of foreign and security policy of general interest in order to determine a common approach' (Article 32). A further power of the Council is to appoint, on a proposal of the High Representative, a special representative with a mandate in relation to particular policy issues (Article 33 TEU).

The Council may also conclude international agreements with one or more States or international organizations (see Chapter 6). Lastly, the Council shall, in accordance with Article 16 TFEU (on data protection), adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of the CFSP (Article 39 TEU). This provision confirms that data protection must be maintained throughout the Union's activities, and completes the competences under the TFEU to provide for such protection.⁶⁵

⁶⁵ Cf Joint Cases C-317 and 318/04 *European Parliament v. Council and Commission (PNR)* [2006] ECR I-4721.

Decision-making

Article 31 TEU contains the provisions on Council decision-making in CFSP matters. The rule is unanimity. There is one qualification to that rule, so-called constructive abstention, and three exceptions, where the Council decides by qualified majority.

Article 31(1) provides that the Council acts unanimously. There is, however, room for a Member State to abstain. The Treaty clarifies that, when abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration. It provides that in that case the member in question shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, that Member State shall refrain from any action likely to conflict with or impede Union action based on that decision, and the other Member States shall respect its position. However, no decision can be adopted where the Member States qualifying their abstention represent at least one-third of the Member States comprising at least one-third of the population of the Union.

This mechanism of constructive abstention is unique in Council decision-making under the Treaties. It is clearly intended to lower, in some cases, the high hurdle of unanimous decision-making. Whether, however, it has much practical relevance is unclear. In 2001, Peers reported that the mechanism had never been used,⁶⁶ and this appears not to have changed in the meantime, as far as joint actions and decisions on actions, and common positions and decisions on positions, are concerned.

Since the Treaty of Nice there have been three types of decisions which the Council adopts by qualified majority, pursuant to Article 31(2) TEU:

- when adopting a decision defining a Union action or position on the basis of a European Council decision relating to the Union's strategic interests and objectives;
- when adopting any decision implementing a decision defining a Union action or position;
- when appointing a special representative in accordance with Article 33.

The Treaty of Lisbon has inserted a further instance of Council qualified majority voting:

- when adopting any decision defining a Union action or position, on a proposal which the High Representative has presented following a specific request from the European Council, made on its own initiative or that of the High Representative.

Moreover, the TEU now enables the European Council to extend the cases of qualified majority voting: it may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in other cases (Article 31(3)).

⁶⁶ Peers (in 33 above) 537.

There are, however, two exceptions to the use of qualified majority (Article 31(4) TEU). First, it does not extend to decisions having military or defence implications. Secondly, every member of the Council has a kind of veto right:

If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.

Hitherto, qualified-majority voting primarily took place as regards the implementation of joint actions and decisions on actions, and common positions and decisions on positions.⁶⁷ There is also an example of a joint action being adopted by qualified majority on the basis of a common strategy.⁶⁸

It is obvious that the rule of unanimity may make it difficult for the EU to develop common policies on matters of general interest. For example, if one examines the joint actions and common positions of 2002 and of the first half of 2003, one finds no trace of the conflict in Iraq, which will come as no surprise to all those who have followed the events in question. The Member States simply could not reach a consensus on their attitude towards the Iraqi regime. Whether, however, the EU is ripe for more extended use of qualified-majority voting in the most sensitive areas of international politics is another matter.

Other actors

The Council is chaired by the High Representative, whose powers are described below. The Council and the EU institutions are, in general, greatly assisted by committees consisting of national representatives, often from national administrations (so-called comitology).⁶⁹ The most important of those committees is Coreper, the Committee of Permanent Representatives of the Member States. Its role is described in Article 16(7) TEU and Article 240(1) TFEU as preparing the work of the Council and as carrying out the tasks assigned to it by the Council. Coreper is active throughout the work of the Council, but in CFSP matters there is a second committee, originally called the Political Committee and since the Treaty of Nice the Political and Security Committee (PSC), in order to reflect increasing activity in the field of security and defence. Article 38 TEU describes the role of the PSC:

Without prejudice to Article 240 of the [TFEU], a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at

⁶⁷ Ibid, 538–9. ⁶⁸ Joint Action 1999/878 establishing an EU Co-operation Programme for Non-Proliferation and Disarmament in the Russian Federation [1999] OJ L331/11.

⁶⁹ See in general M Andenas and A Türk (eds), *Delegated Legislation and the Role of Committees in the EU* (Kluwer Law International, 2000); C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, 1999).

the request of the Council or of the High Representative . . . or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative.

Within the scope of this Chapter, the Political and Security Committee shall exercise, under the responsibility of the Council and the High Representative, the political control and strategic direction of crisis management operations referred to in Article 43.

The Council may authorize the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation.

In the literature the Political Committee has been described as the backbone of foreign policy co-ordination since the inception of European Political Co-operation.⁷⁰ It has also been noted that there have been power struggles between Coreper and the Political Committee, and that co-ordination between them is not straightforward.⁷¹

The second and third paragraphs of Article 38 TEU were inserted by the Treaty of Nice, and were immediately applied in the EU's military operations in the former Yugoslav Republic of Macedonia (FYROM) and Congo. Both joint actions contained provisions reflecting the language of those paragraphs, and they conferred on the PSC the powers to amend the operation plan, the chain of command, and the rules of engagement.⁷² That has remained the practice for EU military and other missions.

Commission

Upon a mere reading of the TEU the Commission's role in CFSP matters appears strictly limited. Indeed, the Commission is hardly ever mentioned in the TEU chapter on the CFSP. Article 27(3) TEU provides that the Commission has to give its consent to the Council decision establishing the EEAS, and that the EEAS shall also comprise Commission officials. Article 30 TEU enables the High Representative, either on his or her own, or 'with the Commission's support', to refer any question relating to the CFSP to the Council.

That is all the Treaty provides for. The actual role of the Commission is, however, much more extensive. Because the High Representative is at once also a Commission Vice-President, there is an institutional link with the conduct of the CFSP. Of course, the High Representative, when acting within the scope of the CFSP, has no responsibilities towards the Commission and takes no instructions from it. However, the CFSP is but one segment of the EU's overall external action. As discussed in other chapters, the CFSP cannot be dissociated from external action

⁷⁰ Peers (n 33 above) 551.

⁷¹ Nuttall (n 9 above) 245 *et seq.*; Edwards, 'Common Foreign and Security Policy' (1993) 13 YEL 499; Wessel (n 2 above) 79.

⁷² Art 4(1) Joint Action 2003/92 [2003] OJ L34/26 and Art 7(1) Joint Action 2003/423 [2003] OJ L43/5.

under the TFEU, where the Commission generally plays a much more important role. It negotiates most of the international agreements which the EU concludes. It represents the EU for matters coming within the scope of the TFEU, such as trade, where it acts for the EU in the WTO. The Commission is also very active in the area of development co-operation, other forms of co-operation with third countries, humanitarian aid, and external environmental policies. All of those policies need to be co-ordinated with the CFSP, and the fact that the High Representative has been made a member of the Commission is precisely intended to ensure such co-ordination, and will thereby contribute to associating the Commission with the CFSP.

Even in strict CFSP matters the role of the Commission is more extensive than it may appear at first sight. Under Article 317 TFEU it is the Commission that implements the budget, and, as analysed above, that budget is increasingly used to finance the CFSP. Decisions on Union actions requiring expenditure therefore invariably refer to the Commission as the institution responsible for implementing the policy in question. Indeed, some joint actions, which were limited to financial support for a particular cause or country, referred almost exclusively to the Commission.⁷³

In practice, therefore, the Commission is represented at all levels in the CFSP structure.⁷⁴ The Commission has also made use of its right to make proposals to the Council (modified now as a right to support a proposal by the High Representative), and some of those have been accepted (even if in much modified form).⁷⁵

High Representative

The Treaty of Lisbon has introduced the office of the High Representative of the Union for Foreign Affairs and Security Policy, a major institutional innovation in the sphere of external action.⁷⁶ It has its origin in the Constitution for Europe, and the original name of EU Minister for Foreign Affairs indicates the ambition of the Treaty drafters. It is clear from the work of the Convention on the Future of Europe that this so-called double-hatted office was introduced mainly to ensure coherence and efficiency between the various institutions and actors.⁷⁷ Indeed,

⁷³ E.g. Joint Action 1999/878 (n 68 above).

⁷⁴ Wessel (n 2 above) 91.

⁷⁵ Peers (n 33 above) 540.

⁷⁶ See also Piris (n 64 above) 243–9; J Wouters, D Coppens, and B De Meester, 'The European Union's External Relations after the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty—EU Constitutionalism without a Constitutional Treaty?* (Springer-Verlag, 2008) 150–6; C Kaddous, 'Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty' in Griller and Ziller (above) 206; D Curtin, *Executive Power of the European Union—Law, Practices, and the Living Constitution* (OUP, 2009) 100–103.

⁷⁷ European Convention, Final Report of Working Group VII on External Action, CONV 459/02, at 4–5.

because of the constitutional and institutional gap between the CFSP and other areas of EU external action, the EU had developed parallel administrations, in the Council and the Commission, dealing with external policies. Previous chapters have illustrated the scope for inter-institutional strife to which this gap gave rise. As was analysed in Chapter 5, the Treaty of Lisbon in no sense removes the special character of the CFSP and its awkward relationship with other EU external policies. Instead, it attempts to create an institutional bridge, through the office of the High Representative and indeed the creation of the EEAS. It remains to be seen whether that institutional bridge will be effective in reducing inter-institutional tension and conflict, or whether the creation of a new office and a new institution, the EEAS, will increase the scope for infighting.

The new office of the High Representative has its own pedigree. For some time there had been a growing desire to put a face to the CFSP through the appointment of a distinguished politician responsible for moving the CFSP forward and for representing the EU in CFSP matters. The Treaty of Amsterdam thus created the position of High Representative for the CFSP, occupied by Mr Solana, who was at the same time Secretary-General of the Council. The creation of that position was already an important development.⁷⁸ Whereas the (old) TEU described his or her role as that of assisting the rotating Presidency of the Council, the practice in the context of implementing joint actions went further. They did not, as a rule, provide for an important role for the Presidency, but instead conferred powers on the High Representative and on the PSC. In the EU's military operations, the role of the PSC was preponderant. In other matters there was a more important role for the High Representative.

The new office of the High Representative builds on that practice. However, the powers of the High Representative are much more extensive than those of her pre-Lisbon predecessor. An analysis of the provisions of the TEU referring to the High Representative show that there are, broadly speaking, five types of powers (understood in a broad sense as encompassing responsibilities and duties).

The first is a power to make proposals. Article 18(2) TEU, which speaks about the office in general terms, provides that the High Representative shall contribute by his proposals to the development of the CFSP. Further provisions refer to more specific rights of proposal. Article 22(2) TEU, concerning European Council decisions on the Union's strategic interests and objectives, provides that the High Representative and the Commission may submit joint proposals. Article 27(1) instructs the High Representative to contribute, through his proposals, towards the preparation of the CFSP. Along the same lines, Article 30(1) provides that the High Representative may refer any question relating to the CFSP to the Council. More specific rights of proposal concern the appointment of a special representative with a mandate in relation to particular policy issues (Article 33 TEU), and the setting-up of a start-up fund for the urgent financing of CFSP initiatives (Article 43(3) TEU).

⁷⁸ Decaux (n 9 above) 20.

The second power is that of chairing the Foreign Affairs Council (Article 27(1)). Part of that power is the right to convene extraordinary Council meetings, in an emergency (Article 30(2)). There is no further indication of the role of the chair, but it is clear in any event that it is an important one, if only because the chair sets the agenda.

The third power is one of implementation and supervision. Article 18(2) TEU already indicates that the High Representative 'shall conduct the Union's [CFSP]'. Article 24(1) similarly provides that the CFSP 'shall be put into effect' by the High Representative (and by the Member States), a phrase which is repeated in Article 26(3) TEU. Similarly, Article 27(1) provides that the High Representative shall ensure the implementation of the decisions adopted by the European Council and the Council.

A further indication of what implementation of the CFSP involves is given by Article 24 TEU. That provision determines that the CFSP must be conducted within the framework of the (general) principles and objectives of external action, and that the policy must be based on the development of mutual political solidarity among Member States, the identification of questions of general interest, and the achievement of an ever-increasing degree of convergence (Article 24(2)). The Member States must support the Union's policy actively and unreservedly in a spirit of loyalty and mutual solidarity and must comply with Union action; they must also work together to enhance and develop their mutual political solidarity and refrain from any action contrary to the Union's interests or likely to impair its effectiveness as a cohesive force in international relations (Article 24(3)). The provision ends by stating that the Council and the High Representative 'shall ensure compliance with these principles' (also Article 24(3); see also Article 26(3) TEU).

There is therefore also a supervisory and enforcement role for the High Representative, to some degree similar to the role which the Commission has, in other areas of EU policy, 'to ensure the application of the Treaties' (Article 17(1) TEU). However, in contrast with the Commission, the High Representative has no legal means to ensure Member State compliance with the CFSP, such as the opportunity to bring an action before the Court of Justice. It remains to be seen whether the limited political instruments in the hands of the High Representative will be sufficient for this purpose.

The High Representative also supervises the special representatives which may be appointed (Article 33 TEU). In the context of the CSDP tasks referred to in Article 43(1) TEU (joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, etc.), the High Representative shall ensure co-ordination of the civilian and military aspects of such tasks.

Lastly, under the heading of implementation and supervision one may also refer to the High Representative's duty regularly to consult the European Parliament on the main aspects and the basic choices of the CFSP and to inform it.

A fourth power—or duty in fact—concerns the Holy Grail of ensuring consistency in the EU's external action. Article 18(4) indicates that the fact that the

High Representative is also one of the Commission's Vice-Presidents, responsible for Commission responsibilities in external relations, is aimed at ensuring such consistency. Article 21(3) TEU again emphasizes the need for consistency between the different areas of external action and between these and other EU policies, and instructs the Council and the Commission, assisted by the High Representative, to ensure that consistency and to co-operate to that effect.

A fifth power concerns the external representation of the EU as regards the CFSP, and co-ordination of external action by the Member States. Article 27(2) provides that the High Representative shall represent the Union for CFSP matters, and that he shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organizations and at international conferences. Furthermore, Article 34(1) instructs the High Representative to organize the co-ordination of Member States' action in international organizations and at international conferences. Article 34(3) envisages that the High Representative will be invited to present the Union's position before the UN Security Council, when that position concerns a subject which is on the Security Council's agenda.

As can be seen, this is a tremendous range of powers and responsibilities. There can be serious doubts as to whether one person could ever accomplish all of those tasks. The High Representative is of course assisted, in particular by the EEAS, which was in the process of being set up at the time of writing. Delegation of some of the High Representative's functions will no doubt take place. Nevertheless, the combination of participation in the Commission's work, the chairing of the Foreign Affairs Council, and the external representation of the EU would seem to be a very tall order indeed.

European External Action Service

Article 27(3) TEU provides that the High Representative shall be assisted by a European External Action Service (EEAS), which shall work in co-operation with the diplomatic services of the Member States and 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.⁷⁹ The article further provides that the organization and functioning of the EEAS shall be established by a decision of the Council, acting on a proposal of the High Representative after consulting the European Parliament and after obtaining the consent of the Commission. As with the office of the High Representative, the idea is clearly to bridge the gap between the Commission and Council departments responsible for

⁷⁹ See also Wouters, Coppens, and De Meester (n 76 above) 156–60; S Vanhoonaeker and N Reslow, 'The European External Action Service: Living Forwards by Understanding Backwards' (2010) 15 EFA Rev 1.

external action. However, the inclusion of diplomatic staff from the Member States also shows that this new EU diplomatic service is intended to build on and work in close co-operation with national administrations.

The EEAS was set up in July 2010 by Council decision,⁸⁰ after an intense negotiation between the various institutions. It is beyond the scope of this overview to provide a full analysis of its genesis. It will no doubt take some time to see what the effects of the creation of this EU 'Foreign Office', 'State Department', or 'Ministry for Foreign Affairs' will be on EU external action and what kind of role it may come to play.

The EEAS is set up as 'a functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives' (Article 1(2) of the decision). It is placed under the authority of the High Representative (Article 1(3)) and is made up of a central administration and of the Union delegations to third countries and to international organizations (Article 1(4)). The inclusion of Union delegations is not as such provided for in the Treaties: Article 221 TFEU simply provides that Union delegations in third countries and at international organizations shall represent the Union, and that they shall be placed under the authority of the High Representative. However, it clearly makes institutional sense to integrate the Union delegations with the Brussels 'Foreign Office'.

As regards staff, the EEAS comprises officials and other servants of the EU, including personnel from the diplomatic services of the Member States appointed as temporary agents (Article 6(2)). As regards the Council, the departments and staff transferred are those covering the CFSP and the CSDP. As regards the Commission, the transfer includes nearly the entire Directorate-General (DG) for External Relations and parts of the DG for Development. This reflects to some extent the Commission portfolio of the current High Representative, which is limited to external relations. The Commission continues to have its own DGs for Development; Enlargement; Humanitarian Aid and Civil Protection; and Trade.

The task of the EEAS is, first of all, to support the High Representative (a) in fulfilling his or her CFSP and CSDP mandate; (b) in his or her capacity as President of the Foreign Affairs Council; and (c) in his or her capacity as Vice-President within the Commission (Article 2(1) of the EEAS decision). However, the EEAS shall also assist the President of the European Council, the President of the European Commission, and the Commission in the exercise of their respective functions in the area of external relations (Article 2(2)). When fulfilling those tasks, the EEAS must also co-operate with a range of institutions and actors. It must support, and work in co-operation with, the diplomatic services of the Member States, as well as the General Secretariat of the Council and the services of the Commission, in order to ensure consistency between the different areas of the Union's external

⁸⁰ Council Decision 2010/427 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30.

action and between those areas and its policies (Article 3(1)). The EEAS and the Commission services must consult each other on all matters relating to EU external action, except on matters covered by the CSDP. The EEAS must also extend appropriate support and co-operation to the other institutions and bodies of the Union, in particular to the European Parliament (Article 3(4)). The preamble to the EEAS decision emphasizes that the Parliament will fully play its role in the external action of the Union, including its functions of political control as provided for in Article 14(1) TEU, as well as in legislative and budgetary matters.

The EEAS decision also contains specific provisions on EU delegations. Such delegations shall comprise EEAS staff and, where appropriate for the implementation of the Union budget (which is a Commission responsibility) and Union policies other than those under the remit of the EEAS, Commission staff (Article 5(2)). The delegations therefore serve both the EEAS and the High Representative, on the one hand, and the Commission, on the other. This is exemplified by the provision which enables not only the High Representative and the EEAS to give instructions to heads of delegations, but also the Commission, 'in areas where the Commission exercises the powers conferred upon it by the Treaties' (Article 5(3)). Moreover, the Union delegations 'shall have the capacity to respond to the needs of other institutions of the Union, in particular the European Parliament, in their contacts with the international organizations or third countries to which the delegations are accredited'.

Parliament

Under the terms of the TEU the Parliament's role in the conduct of the CFSP is very limited.⁸¹ Article 36 TEU addresses that institution:

The High Representative... shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament.

The European Parliament may ask questions of the Council or make recommendations to it and to the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.

The above provisions limit the High Representative's consultation duty to 'the basic choices', and do not provide for a right of consultation on all Council CFSP acts. The Parliament has the right to ask questions and make recommendations, but

⁸¹ It may be noted that national parliaments may also, through Conference of Community and European Affairs Committees of Parliaments of the European Union, debate CFSP matters, pursuant to Protocol No 1 on the role of national parliaments; see Piris (n 64 above) 13.

there could hardly be any doubt that a democratically elected legislature has those rights anyway, whether or not confirmed in the Treaty.

The Parliament is none the less very active in CFSP matters; it exercises considerable influence, and the Council follows many of its views and recommendations.⁸² It also manages to have a say in CFSP decisions through its budgetary powers (see above). As most CFSP operational expenditure is charged to the EU budget, the Parliament is automatically involved. As described above, an inter-institutional agreement contains further provisions on budgetary matters. Given that CFSP expenditure is classified as non-compulsory, the Parliament has the right to amend the draft CFSP budget.⁸³ Commentators agree that the budget has been a vital means for the Parliament to gain a wider role in the CFSP.⁸⁴ It is none the less the case that the Parliament has no formal legislative or decision-making powers in CFSP matters, and that the Council is not truly accountable before the Parliament. CFSP power is clearly concentrated in the executive.

Court of Justice

The Court of Justice and the General Court have but limited jurisdiction in CFSP matters.⁸⁵ Article 24(1) TEU provides that the Court of Justice of the European Union (which comprises both the Court of Justice and the General Court as well as specialized courts—see Article 19(1) TEU) shall not have jurisdiction with respect to the CFSP provisions, with the exception of its jurisdiction to monitor compliance with Article 40 TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU.

The Court's jurisdiction under Article 40 TEU was analysed in Chapter 5. It was noted there that the Court must delimit the CFSP from other EU policies, and that such delimitation must focus on respect for the applicable Treaty procedures and powers of the institutions for the exercise of the respective EU competences. Article 275 TFEU, on the other hand, provides:

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.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality

⁸² Denza (n 2 above) 337.

⁸³ PJG Kapteyn and PVerLoren van Themaat, *Introduction to the Law of the European Communities* (3rd edn, by LW Gormley, Kluwer Law International, 1998) 227.

⁸⁴ Edwards (n 72 above) 13; Wessel (n 2 above) 99.

⁸⁵ See also 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; G De Baere, *Constitutional Principles of EU External Relations* (OUP, 2008) 177–200.

of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

This provision constitutes an innovation. The Court is now capable of hearing actions for the annulment of CFSP decisions providing for restrictive measures against natural or legal persons. Before Lisbon, the Court's jurisdiction was limited to regulations adopted under Articles 60 and 301 EC seeking to implement CFSP common positions. The famous *Kadi and Al Barakaat* judgment came about pursuant to that jurisdiction.⁸⁶ That jurisdiction remains of course intact, in the sense that the Court may review restrictive measures which are implemented under the successor to Articles 60 and 301 EC, i.e. Article 215 TFEU, paragraph 2 of which also allows the Council to adopt restrictive measures against natural or legal persons and groups or non-State entities. However, Article 275, second paragraph, clearly extends the Court's jurisdiction to hear actions for annulment—but not, for example, actions in damages or preliminary rulings cases—concerning CFSP acts entailing restrictive measures against natural or legal persons. As indicated in Chapter 5 and above in this chapter, CFSP decisions on Union positions often contain such restrictive measures which have no counterpart under the TFEU, such as restrictions on entry and transit of certain persons. The Court's jurisdiction now extends to such measures, which implements and confirms the principle of the rule of law.

There are further ways in which CFSP acts are subject to Court jurisdiction. First, it is arguable that the Court has full jurisdiction as regards international agreements which include CFSP matters. Such agreements are concluded on the basis of Article 218 TFEU, and are therefore acts adopted, in part, on the basis of the TFEU, and not exclusively on the basis of the TEU's provisions on the CFSP. This argument finds support in Article 218(11) TFEU, concerning requests for an Opinion (see Chapter 8), which makes no distinction according to the subject matter of an agreement. It would follow that actions for the annulment of a decision to conclude a CFSP agreement, and preliminary references on the interpretation and effects of such agreements, are within the Court's jurisdiction.

Secondly, the EU law rules and principles on transparency and access to documents extend to all Council documents, including those which come within the scope of the CFSP. The (then) Court of First Instance decided this in *Svenska Journalistförbundet*, and the ruling has since been confirmed.⁸⁷ This does not, however, mean that access must be granted to all CFSP documents. The current regulation on access to documents provides for exceptions where disclosure would undermine the protection of the public interest as regards, *inter alia*, public security, defence and military matters, and international relations (Article 4(1)).⁸⁸ The Courts none

⁸⁶ N 49 above.

⁸⁷ Case T-174/95 *Svenska Journalistförbundet v. Council* [1998] ECR II-2289, para 81 and Case T-14/98 *Hautala v. Council* [1999] ECR II-2489, para 42; see further A Tomkins, 'Transparency and the Emergence of a European Administrative Law' (1999/2000) 19YEL 231.

⁸⁸ Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council, and Commission documents [2001] OJ L145/43.

the less show willingness to construe the principle of access to documents broadly, by applying the principle of proportionality and obliging the institutions to grant partial access where only parts of a document are protected.⁸⁹

The jurisdiction of the Court has therefore been expanded by the Lisbon Treaty, but continues to be limited. According to Denza, there were essentially two reasons for the exclusion of jurisdiction in the original TEU. The first related to the nature of CFSP instruments, which were short term in character, potentially both wide-ranging and sensitive, and which were not designed to establish a permanent framework of mutual legal obligations. Measures to enforce compliance were not envisaged. The insistence on the continuation of ultimately sovereign policies, together with the need for speed in the resolution of differences, meant that the conditions for the judicial resolution of disputes did not exist. The second reason concerned the nature and record of the Court, whose rulings in the sphere of external relations laid much more emphasis on the integrationist purpose of the Treaties and less on presuming a minimum derogation from individual sovereign powers. There was concern that doctrines such as that of exclusive external powers might find their way into the CFSP.⁹⁰

The case for limited Court jurisdiction in CFSP matters is not persuasive. In a Union governed by the rule of law there ought to be no acts of the institutions which are outside the Court's jurisdiction.

Conclusions

The analysis of the actors and instruments of the CFSP shows that this policy continues to be in a somewhat precarious state, from a legal and institutional perspective. There is a range of legal instruments, but they are ill-defined and the practice does not bring much clarity. The precise legal effects are uncertain, be it in relation to the Member States, to the EU institutions, or to individuals. The institutional lacuna of lack of Court jurisdiction has prevented authoritative clarification. The overall institutional arrangements are complex, with a variety of actors with uncertain remits, including the President of the European Council, the High Representative, the EEAS, Coreper, and the PSC, and with more subcutaneous involvement by the Commission and the Parliament through the linkages with, respectively, TFEU policies and the EU budget. In the eyes of the general public the CFSP is not credited with much success. This is partly due to lack of knowledge about its achievements, but one can indeed doubt whether the current constitutional framework is conducive to effective policy-making, even if one disregards the flagship unanimity/majority issue.

⁸⁹ Curtin (n 76 above) ch 8.

⁹⁰ Denza (n 2 above) 312.

The Treaty of Lisbon aimed to bring relief by homogenizing the institutional framework. The creation of the High Representative, heading a unified EEAS, appeared to make sense. The previous existence of parallel central administrations in the Council and the Commission was bound to be unproductive and to lead to turf battles rather than effective policy-making. There is, however, a risk that, instead of simplifying matters, the new framework has merely created a set of new institutional actors, and may not lead to greater inter-institutional harmony.

However, it is at the level of parliamentary involvement and judicial scrutiny that much remains to be done. Here, unfortunately, the Treaty of Lisbon made only limited progress. The current state of affairs, it is submitted, is unacceptable in a polity governed by the rule of law. CFSP policies show signs of significant expansion, in particular in their natural terrain of security and defence policies. There are now a string of decisions on actions involving military operations. The analysis above reveals, moreover, the many different objects of CFSP decisions in particular, some of which appear to have indirect legislative scope. All these policies are excessively dominated by the executive. The focus of debate should not continue to be the well-worn battle between supranationalism and intergovernmentalism, but should turn to issues of accountability. The latter is clearly no luxury in times when the EU is involved in military operations and the war against terrorism. The exclusion of legislative acts, introduced by the Lisbon amendments, is to be taken seriously.

Parliamentary and judicial scrutiny is fortunately not as limited as the Treaty language suggests. In legal terms the scope of the CFSP is restricted to areas not covered by the TFEU (see Chapter 5). The Parliament has impact through its budgetary role, and the Court has jurisdiction as regards restrictive measures (see also Chapter 12). That is not, however, sufficient. There is no reason in principle to exclude CFSP policies from full parliamentary involvement and judicial scrutiny, even if there are difficult questions in terms of finding room for executive discretion. The exercise of arranging for such involvement and scrutiny would force the EU polity to come to terms with the reality of the attempt to construct a meaningful and workable CFSP. The often lofty ideals and objectives of CFSP policies need to be matched with strong constitutionalism.