The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive[1]

Daniel Thym*

European Union – Common Foreign and Security Policy – Changes with the abolition of the pillar structure by the Lisbon Treaty – Common Security and Defence Policy – Executive order of the EU – Between supranationalism and intergovernmentalism – The role of the High Representative – Joint political leadership – The European External Action Service as an administrative infrastructure – Constitutionalisation of foreign affairs

Introduction

With the entry into force of the Lisbon Treaty, the EU's quest for international visibility and authority stands to benefit from a uniform institutional framework. The post of High Representative (HR) and the establishment of the European External Action Service (EEAS) are intended to allow the Union to move beyond institutional introspection and concentrate on 'reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.'[2] Whether the new structure facilitates the realisation of this grand Treaty objective remains to be seen. Our legal analysis may, however, shed light on the underlying constitutional choices. This contribution suggests to rationalise the constitutional features of the Common Foreign and Security Policy (CFSP), which includes the Common Security and Defence Policy (CSDP),[3] as the exercise of executive power based on legal intergovernmentalism.

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

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[2] Indent 11 of the Preamble to the EU Treaty (*OJ* [2008] C 115/13).

[3] Ch. 2 of the EU Treaty comprises two sections: the 'common provisions' for CFSP *and* CSDP (Arts. 23-41) and specific CSDP rules (Arts. 42-46).

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Amongst the original motivations which kick-started the constitutional reform process, the 'simplification of Treaties with a view to making them clearer and better understood without changing their meaning'[4] assumed a prominent role. Lisbon's abolition of the 'pillar structure' and the cumbersome distinction between EU and EC proves the success of this undertaking. CFSP is now an integral part of a uniform legal order with a single legal personality. But this newly accomplished unity came at a price: Article 24 TEU underlines prominently that CFSP shall be 'subject to specific rules and procedures.'[5] What does this mean in legal terms? Certainly, the vague assertion of an indefinite *sui generis* character cannot be the ultimate answer. In its place, we should positively define the constitutional concept underlying the Treaty rules governing CFSP and CSDP. Doing so allows us to explain their continued peculiarity and to identify their status within the EU's uniform legal order.

This contribution sets out to explain the persisting distinctiveness of the legal regime for CFSP and CSDP as the manifestation of intergovernmental executive power. This argument is presented in two steps. In its first part, the inspection of the new rules in the light of institutional practice supports the identification of their executive character. Such a counter-intuitive reading of the Treaty articles accepts that foreign, security and defence policies are not about law-making, but are typified by political, administrative and operational activities. The analysis in the second part illustrates that the EU Treaty maintains distinct institutional rules and constitutional characteristics which I analyse under the label of 'legal intergovernmentalism.' The heuristic category of legal intergovernmentalism is meant to describe the distinct decision-making procedures of foreign, security and defence coordination and designate their legal effects in relation to supranational Union law. On this basis, the constitutional peculiarity of CFSP and CSDP as an expression of intergovernmental executive power takes shape.

Generally speaking, the persistence of CFSP intergovernmentalism has a tangible advantage. Whether we like it or not, vertical coordination remains crucial. Why? Since the EU has no military and police capabilities of its own, CSDP operations depend upon the availability of national personnel and military resources, without which the Union simply cannot act.[6] On the diplomatic front, the knowledge, contacts and resources of the numerous member states' diplomatic and consular services are similarly valuable, not only as seconded national personnel within the EEAS.[7] In international organisations, such as the UN, where

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

[5] Art. 24.1(2) TEU.

[6] Cf. the appeal for their provision in Art. 42.3 TEU.

[7] Arts. 32(3), 35 TEU call upon the EEAS and national diplomats to coordinate their activities; for the number and status of national secondments within the EEAS in line with Art. 27.3 TEU,

the EU has no genuine representation the member states' presence also remains indispensable.[8] In short: coordination remains the lifeblood for Europe's compound executive order. In practice, member state dominance in CFSP supports and facilitates vertical coordination.

Intergovernmental CFSP executive

There is nothing new in describing foreign affairs as exercise of executive power. National governments play a central role in treaty negotiations, diplomatic relations, international organisations and military operations under most national constitutions. Indeed, classic authorities of state theory and modern constitutionalists alike have traditionally ascertained that foreign affairs favour executive action by their nature (notwithstanding parliamentary and judicial prerogatives).[9] At the same time, academics working on EU law[10] (and political scientists[11]) have recently scrutinized the EU's executive order. Their focus of attention, however, remains the supranational domain of the Commission, agencies and comitology. CFSP and CSDP bodies, by contrast, are usually mentioned at the side-lines only. This deficit should be corrected. Consideration of CFSP sheds light on the intergovernmental branch of the EU's compound executive order. Moreover, the presentation as CFSP as executive power provides a positive explanation of its constitutional specificity, which deviates from supranational law-making and persists despite the abolition of the pillar structure.

At an abstract level, executive power can be described as those state functions which are exercised by elected office-holders and their administrative infrastructure.[12] At the EU level, they did indeed take centre stage during the constitutional reform process which eventually resulted in the Lisbon Treaty.[13] Most minds

see S. Vanhoonacker and N. Reslow, 'The European External Action Service', 15 *EFA Rev.* (2010) p. 1 at p. 7.

[8] Cf. C. Tomuschat, 'Calling Europe by Phone', 47 *CMLR* (2010) p. 3 at p. 6; ECJ, Case C-45/07, *Commission* v. *Greece* [2009] ECR I-701, paras. 30-31 maintains that the member states should act as 'trustees' of the EU, if an issue is covered by Union competences; for the option and practice of letting the High Representative speak in the UN Security Council, *see* Art. 34.2(3) TEU and D. Thym, 'Die Europäische Union in den Vereinten Nationen', *Vereinte Nationen* (2008) p. 121 at p. 124-125.

[9] Cf. the references by G. Biehler, *Auswärtige Gewalt* (Mohr Siebeck 2005) p. 29-55.

[10] Most prominently D. Curtin, *Executive Power of the European Union* (Oxford University Press 2009); similarly, P. Craig, 'Institutions, Power, and Institutional Balance', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd edn. (Oxford University Press 2011) p. 41 at p. 78-83.

[11] *See,* e.g., J. Trondal, *An Emergent European Executive Order* (Oxford University Press 2010).

[12] In a national context, this relates to government, ministerial bureaucracy and other administrative support bodies; cf. Curtin, *supra* n. 10, at p. 28-40.

[13] *See* G. Grevi, 'The Common Foreign, Security and Defence Policy', in G. Amato et al. (eds.), *Genèse et destinée de la Constitution européenne* (Bruylant 2007) p. 807 at p. 811-817.

were focused on the thorny issue of political leadership with a view to the powers of the European Council, the Commission and the High Representative (first subsection). In contrast, the administrative CFSP infrastructure received much less attention, although 'Lisbon' has codified its considerable expansion in recent years (second subsection). But the new rules remain incomplete insofar as they replicate the Community model of formalised decision-making procedures. Institutional practice illustrates that this quasi-legislative conceptualisation of CFSP and CSDP contrasts with the prevailing informality of everyday CFSP activities. I therefore suggest a counter-intuitive assessment of the Treaty provisions as the exercise of executive foreign affairs power (third subsection).

Political executive power

For more than a decade, the pursuit of a 'single voice' served as a symbol of CFSP reform. Indeed, personification is its most visible outcome. With the Lisbon Treaty, the post of HR formally steps into the limelight by assuming the functions which had hitherto been held by the rotating Council Presidency and the Commissioner with the portfolio for external relations. Whereas the Amsterdam Treaty confined the HR to 'assist' the Council and represent the CFSP 'at the request' of the Presidency,[14] the Lisbon Treaty entrusts the post with extensive agenda-setting, decision-shaping and implementing powers.[15] But we should be careful not to equate personification with federalisation. The HR's legal capacities stop short of the political prerogatives of most national foreign ministers – and are also in future embedded into Europe's compound executive order.

A 'high representative' – no foreign minister

In contrast to most foreign ministers, the HR does not hold the power to decide autonomously the EU's standpoint. Where there is lack of consensus among the member states, there is no policy position which he/she may represent. Catherine Ashton may steer the Foreign Affairs Council, which she chairs, towards agreement and rely on the EEAS to elaborate proposals. Without approval she must, however, remain silent as a matter of legal principle.[16] The EU's tardy reaction to the popular uprisings in North Africa in 2011 partly resulted from this need to first

[14] *See* Arts. 18.3, 26 TEU-Amsterdam/Nice; in practice the first HR, Javier Solana, was entrusted with important diplomatic missions, such as arbitration during the separation of Serbia and Montenegro and negotiations over Iran's nuclear programme; *see* S. Duke and S. Vanhoonacker, 'Administrative Governance and CFSP', 11 *EFA Rev.* (2006) p. 168.

[15] For an overview, *see* J.-C. Piris, *The Lisbon Treaty* (Cambridge University Press 2010) p. 238-249.

[16] Of course, there is an extensive grey zone between the autonomous conduct of foreign policy and the representation of positions decided elsewhere, especially in the case of political declarations, personal interaction and media interviews; but as from a legal standpoint the Treaty is clear: the HR

establish a common line.[17] Arguably, the appointment of a lesser-known figure as the first post-Lisbon HR also signals that the member states are intent on remaining at the helm.[18] Article 18(2) TEU adequately grasps the post's underlying tension: the HR 'shall conduct' the CFSP which he/she carries out 'as mandated by the Council.'[19] Given these shackles, the modest designation of a 'High Representative' seems more adequate than the Constitutional Treaty's high-flying designation of a 'Foreign Minister.'[20]

For the purposes of our analysis, it should be underlined that the Lisbon Treaty eschews a clear-cut job description for the post of HR. While Catherine Ashton is fully integrated into the Commission under her supranational 'hat', her formal status in CFSP remains unclear. The post of HR constitutes no institution in itself (although Article 18 TEU lists the post besides the other institutions).[21] It is rather situated in institutional limbo – unsure whether it holds an institutional legitimacy in its own right or will primarily serve the requests and instructions of the (European) Council and, in the supranational domain, the Commission collegiate.[22] This construction results, as a pragmatic comprise, from the desire to keep the HR equidistant from both the Commission and the Council.[23] But it also hints at an underlying difficulty: the post of HR fluctuates between political autonomy and administrative support. The Treaty remains unsure whether to conceptualise the HR as an integral part of the government function or as administrative infrastructure. The distinction between political and administrative executive power remains, as often in the EU, blurred.[24]

chairs, proposes and represents under Art. 27.1+2 TEU, while the Council decides in accordance with Art. 31 TEU.

[17] Cf. the juxtaposition with the quick modification of the US standpoint in the Charlemagne column 'Out of the Limelight', *The Economist*, 3 Feb. 2011, <www.economist.com>.

[18] *See* T. Barber, 'The Appointments of Herman van Rompuy and Catherine Ashton', 48:55 *JCMSt.* (2010) at p. 61-62.

[19] This general rule is refined by Arts. 27-32 TEU.

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

[21] Institutions are enumerated in Art. 13.1 TEU; also the previous function as head of the Council Secretariat has been discontinued (*see* Art. 18.3 TEU-Amsterdam/Nice, which also reflected the interinstitutional hierarchy of the Council Presidency *vis-à-vis* the HR).

[22] The appointment (and recall) procedure under Arts. 18.1, 17-8 TEU indicate the primary dependence upon European Council in CFSP; *see also* Curtin, *supra* n. 10, p. 101-102.

[23] Cf. the considerations in the Final Report of Working Group VII 'External Action', 16 Dec. 2002, Doc. CONV 459/02, paras. 22-40, <european-convention.eu.int.>.

[24] If we accept the formal criterion of (in)direct election by a parliament and/or the European Council as a dividing line, the post of HR (but clearly not the EEAS) would be political; for a more general discussion, *see* Curtin, *supra* n. 10, ch. 4 p. 69-104, and Duke and Vanhoonacker, *supra* n. 14, p. 164-165.

The title 'High Representative of the Union for Foreign Affairs and Security Policy' wrongly suggests that the portfolio is confined to CFSP.[25] Rather, the HR shall, as a Vice-President of the Commission, simultaneously preside over supranational external relations and '[coordinate] other aspects of the Union's external action.'[26] This personal union of CFSP spokesperson and Commission Vice-President explains the infamous 'double hat': Catherine Ashton receives her instructions from the Council in CFSP, while she must respect supranational decision-making as Vice-President.[27] There is widespread consensus that the viability of this construction depends on human chemistry and the wider inter-institutional climate. Ideally, it may result in fruitful complementarity – or it could leave the HR in a grey zone of overlapping institutional loyalties, with the Council and the Commission mutually mistrusting what they perceive as a Trojan horse of the other institution.[28] Moreover, the 'double hat' continues one crucial feature of Europe's foreign affairs executive: joint leadership.

Joint political leadership

Uniform external representation is complicated by the President of the European Council, who may represent the EU 'at his level and in that capacity'[29] and to whom the Commission President will not want to play second fiddle. Despite the original aspiration of uniform representation, a new troika may thus emerge.[30] This plurality of spokespeople does, however, arguably reflect the general uncertainty about the allocation of political leadership in the European Union, within which no institution can claim to be the 'federal' government. Governmental authority remains vested in the (European) Council and the Commission.[31] As

[25] As it was the case prior to the Lisbon Treaty in accordance with Arts. 18.3, 26, 47 TEU-Amsterdam/Nice.

[26] Art. 18.4 TEU.

[27] Read the second sentence of Art. 18.4 TEU.

[28] *See* my earlier argument D. Thym, 'Reforming Europe's Common Foreign and Security Policy', 10 *ELJ* (2004) p. 5 at p. 21-22 and, similarly, Curtin, *supra* n. 10, p. 102; Piris, *supra* n. 15, p. 248; Grevi, *supra* n. 13, p. 788-795.

[29] Art 15.6 TEU; on the legal delimitation of its powers, *see* C. Kaddous, 'Role and Position of the High Representative under the Lisbon Treaty', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty* (Springer 2008) p. 205 at p. 210-220 and C. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon* (Mohr Siebeck 2010) p. 122-124 and p. 401-402.

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

[31] *See* P. Craig, *The Lisbon Treaty* (Oxford University Press 2010) p. 101-108 and P. Dann, 'The Political Institutions', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 2nd edn. (C.H. Beck 2010) p. 253-262; from a legal angle, the Commission with its extensive executive responsibilities in supranational policies clearly constitutes one element of 'government' irrespective of corresponding political-science qualifications.

far as this goes, Europe's foreign affairs constitution does mirror the situation in other policy fields – such as economic and monetary union – where heads of state or government similarly share government functions with the Commission, the European Central Bank and inter-state arrangements outside the Treaty framework.[32] The corresponding potential for overlap and friction is neither new nor (at least in foreign affairs) amplified by the new institutional set-up.

Many enthusiasts of the Community method had long diminished the role of (European) Council – or described its dominance in CFSP as a transitory arrangement which would sooner or later be assigned upon the Commission as the 'real executive.'[33] This strategy convinces no longer: With the formal recognition of the European Council as an institution and the persistence of intergovernmental decision-making in CFSP, described below, the Lisbon Treaty sanctions its authority. Procedural and legal intergovernmentalism are here to stay for the foreseeable future – as the HR's 'double hat' and the dual line of commands for the EEAS amply illustrate. But that is only one side of the coin: 'Lisbon' also confirms the Commission's well-established prerogatives in supranational external relations, including crucial policy fields such as development, enlargement, neighbourhood and association policies – or in the words of the Treaty: 'With the exception of [CFSP], it shall ensure the Union's external representation.'[34]

Instead of abolishing the dichotomy between supranational and intergovernmental executive power, the Lisbon Treaty tries to neutralise this latent dualism under the auspices of the HR and the EEAS. But their cross-cutting responsibilities do not guarantee uniformity either. Why? The EEAS focuses on traditional spheres of foreign policy, including the 'high politics' of security and defence, while other policy fields – such as trade, climate change, global migration or financial regulation – with an undeniable relevance for present-day international relations[35] remain the prerogative of other institutions and bodies. This need not be a disadvantage: arguably, the concept of diplomatic expert bodies for the uniform representation of (sovereign) states contradicts the interdependent reality of today's world order.[36] Given the limits of EU competence, moreover, the member states

[32] The debt crisis in the Eurozone provides ample example for European Council action (Art. 121 TFEU), the Commission's supervision of the stability pact (Art. 126 TFEU), Eurogroup activities (Art. 136 TFEU) and complementary activities of the intergovernmental EFSF.

[33] Cf. the original assessment by B. de Witte, 'The Pillar Structure and the Nature of the European Union', in T. Heukels et al. (eds.), *The European Union after Amsterdam* (Kluwer Law International 1998) p. 51 at p. 51: 'mal nécessaire.'

[34] The sixth sentence of Art. 17.1 TEU.

[35] Cf., among many, S. Keukeleire and J. MacNaughtan, *The Foreign Policy of the European Union* (Palgrave Macmillan 2008) p. 19-28.

[36] *See*, prominently, A.-M. Slaughter, *A New World Order* (Princeton University Press 2004).

will add their voice and muscle in regular circumstances (most prominently in the case of mixed agreements).[37]

Joint leadership of foreign affairs governance will persist and establish a complex web of national, supranational and intergovernmental governance structures, which together establish Europe's compound executive order.[38] The inherent coordination requirement may be tiring and sometimes compromise the EU's effectiveness on the international stage, but it remains an indispensable side effect of joint political leadership. In case of fruitful coordination it allows all actors to jointly benefit from 'the strength inherent in united action.'[39]

The Lisbon Treaty's recognition of the administrative infrastructure

During the Treaty drafting process and among legal academics the reform of the CFSP administration obtained little attention, since most minds were focused on political leadership.[40] Nonetheless, 'Lisbon' differs from earlier Treaty amendments: it formally reflects, at Treaty level, the considerable expansion of executive capacities within the realms of the Council in recent years[41] that had formerly been portrayed to govern 'in the shadow.'[42] In this respect, the creation of the European External Action Service (EEAS) is the crucial reform effort, which the Treaty rather vaguely depicts as a body that 'shall comprise officials from relevant departments'[43] of the Council's General Secretariat, the Commission and national diplomatic services. This broad description left the identification of 'relevant' departments to the implementing decision, which was adopted in July 2010 after six months of protracted negotiations.[44] In future, the EEAS is the most visible expression of Europe's foreign affairs administration.

[37] For further references, *see* D. Thym, 'Foreign Affairs', in A. von Bogdandy and J. Bast, *supra* n. 31, p. 338-342.

[38] *See* D. Curtin and M. Egeberg, 'Tradition and Innovation: Europe's Accumulated Executive Order', 31 *West European Politics* (2008) p. 639-361.

[39] J.H.H. Weiler, 'The External Legal Relations of Non-Unitary Actors', in ibid., *The Constitution of Europe* (Cambridge University Press 1999) p. 130 at p. 185.

[40] Cf. the critique by B. de Witte, 'Executive Accountability under the European Constitution and the Lisbon Treaty', in L. Verhey et al. (eds.), *Political Accountability and European Integration* (Europa Law Publishing 2009) p. 137 at p. 149 and Curtin, *supra* n. 10, p. 18-22.

[41] *See* the overview by H. Dijkstra, 'The Council Secretariat's Role in the CFSP', 18 *EFA Rev.* (2008) p. 149-166; F. Terpan, *La Politique étrangère, de sécurité et de défense de l'Union européenne* (La documentation francaise 2010) p. 27-43 and D. Thym, 'Europäisches Wehrverwaltungsrecht', in J. P. Terhechte (ed.), *Verwaltungsrecht der Europäischen Union* (Nomos 2011) § 17 paras. 32-33 and 42-48.

[42] T. Christiansen, 'Out of the Shadows', 8 *Journal of Legislative Studies* (2002) p. 80-97.

[43] Art. 27.3 TEU, which continues Art. III-296.3 Constitutional Treaty, *supra* n. 20.

[44] *See* on the establishment of the EEAS Council Decision 2010/427/EU (*OJ* [2010] L 201/30) and on the course of the negotiations A. Missiroli, 'The New EU "Foreign Policy" System after

Such flexibility of the Treaty regime must be welcomed. Academics writing on EU law should be careful not to overstretch the reach and detail of Treaty provisions, as they carry the potential to fail to guide reality and curtail the room for political decisions.[45] The EEAS set-up is a case in point. While the negotiations were tough and exasperating, the general wording of its legal basis guarantees the elasticity of future institutional profile. The organisation of diplomatic staff and corresponding lines of command are within national constitutional systems also subject to working arrangements which can be adapted at any time, without recourse to cumbersome (Treaty) amendment procedures.[46] Moreover, the dichotomy between intergovernmentalism and supranationalism which pervades the EEAS and is described later rendered inter-institutional disputes unavoidable. The delineation of spheres of influence is a legitimate concern in a political system based upon the principle of institutional balance.[47]

In practice, most CFSP and CSDP support structures have been migrated to the EEAS. First, the Council Secretariat's Directorate-General E has become an integral part of the central administration of the EEAS.[48] Second, the Council's military bodies have similarly been transferred. In future, the expertise of the EU Military Staff (EUMS) and diverse crisis management structures will act as intergovernmental subunits of the EEAS.[49] But 'Lisbon' does not stop at 'formal catch-up'[50] with earlier developments at sub-Treaty level and their rearrangement within the EEAS. It furthermore transforms the intergovernmental executive by distinguishing the EEAS from the auxiliary support function of the Secretariat of the Council, which had been rightly criticised as a chameleonic institution embracing both decision-making and covert administrative functions.[51] The Lisbon Treaty rather relegates the Council Secretariat to its original function of preparing

Lisbon', 15 *EFA Rev*. (2010) p. 427 at p. 435-441 and D. Lieband and A. Maurer, 'Der Aufbau des Europäischen Auswärtigen Dienstes', 3 *Integration* (2010), p. 195 at p. 199-202.

[45] *See* the argument put forward by B. de Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations?', in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals (Essays in European Law)* (Hart Publishing 2008) p. 3 at p. 11-13 and P. Koutrakos, 'Primary Law and Policy in EU External Relations', 33 *EL Rev*. (2008) p. 666 at p. 670.

[46] Any modification of the EEAS requires an amendment of the EEAS decision under Art. 27.3 TEU; for the benefits of flexible institutional design, *see* Vanhoonacker and Reslow, *supra* n. 7, p. 16-17.

[47] Similarly, G. Sydow, 'Der Europäische Auswärtige Dienst', *Juristenzeitung* (2011) p. 6 at p. 7; more critical: Koutrakos, *supra* n. 45, p. 674.

[48] For DG E, *see* Art. 4.3.a and the annex to the EEAS Decision, *supra* n. 44; for the 'strategic policy planning department' which replicates the 'policy unit', *see* Art. 4.3.b.

[49] *See* Art. 4.3.a.a and the annex ibid. and below.

[50] D. Curtin and I. Dekker, 'The European Union From Maastricht to Lisbon', in Craig and de Búrca, *supra* n. 10, p. 155 at p. 182.

[51] Cf. Curtin, *supra* n. 10, p. 81-82 and Mangenot, *infra* n. 57, p. 46-67.

and assisting Council decisions,[52] while the administrative support staff is integrated into the EEAS as an executive entity in its own right.

Exercise of executive power

Reading the Treaty articles on CFSP, the path dependency of European integration stands out. While the Treaties of Maastricht, Amsterdam, Nice and Lisbon certainly rejected the supranationalisation of CFSP, they followed the Community method insofar as they conceptualised CFSP as a quasi-legislative undertaking. The EU Treaty assumes that foreign policy is realised through the adoption of legal instruments (Articles 25, 26, 28, 29 TEU) on the basis of formalised decision-making procedures, which in specific circumstances provide for qualified-majority voting and parliamentary association (Article 31, 36 TEU).[53] This focus on procedures and legal instruments mirrors Europe's epic constitutional reform process, which stretched over the quarter century after the Single European Act. For many observers, it was a foregone conclusion that CFSP would go the way of other policy fields and be communitarised sooner or later[54] – with qualified majority-voting and parliamentary co-decision.[55]

Executive specificity of CFSP and CSDP

On closer inspection the initial plausibility of the Community method as a blueprint and model for CFSP blurs our understanding of its special character. Foreign affairs are much less about rule-making than the realisation of the single market is.[56] Supranational law-making, which characterises the Community method, cannot be projected to international diplomacy and military operations without modification. Even when all member states unreservedly comply with a CFSP position as if it was a directly applicable supranational legal act, the EU's policy standpoint would not necessarily prevail: Iran will not give up its nuclear weapons, only because the EU says so in its Official Journal. Successful foreign policy and effective military operations require adequate resources, the identification of strategic goals and the constant adjustment of methods for their realisation. The

[52] *See* Arts. 240.2, 236.4 TFEU.

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

[54] For regular calls for the 'normalisation' of CFSP see, *inter alia*, R. Bieber, 'Democratic Control of International Relations of the European Union', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer Law International 2002) p. 105 at p. 107-109 and P. Eeckhout, *Does Europe's Constitution Stop at the Water's Edge?* (Europa Law Publishing 2005) p. 4.

[55] For the debate in the European Convention drafting the Constitutional Treaty, *see* Thym, *supra* n. 28, p. 9-17.

[56] This paragraph reiterates my argument in Thym, *supra* n. 37, p. 333-334.

success of CFSP does not so much depend on the binding force of internal decisions, but its persuasiveness and support of the member states. In short: CFSP diplomacy and CSDP operations are not about rule-making, but typified by a predominantly executive character.[57]

Against this background, we understand why our analysis benefits from a counter-intuitive reading of the Treaty articles. The Council's daily practice illustrates that legal instruments are only adopted whenever the projection of personnel, the imposition of sanctions or the dispersal of funds require a formal legal basis in a Council Decision.[58] For other questions, informal vehicles and communication channels are regularly preferred. The adoption of legal instruments by the Council is the exception not the rule – even if the Treaty articles suggest otherwise (see the next subsection). It is true that military operations advance through a pre-defined line of command. But this does not unmake their executive character. CFSP diplomacy and CSDP operations presuppose political choices and operational decisions with a spontaneous and informal character, which evade the rigidity of ministerial decision-making by the Council.

The classification of CFSP and CSDP as 'executive' is not meant to imply the dominance of national governmental actors, but refers to the political and operative character (we should not confuse the modus of intergovernmentalism with the qualification of CFSP as executive power[59]). Within most national constitutions, 'foreign affairs' are similarly treated as a specific activity which benefits from different discretion due to its need for flexibility and confidentiality.[60] It also helps us to rationalise the Treaty rules on CFSP. Unfortunately, the Treaty itself only hints at this conclusion of executive character with the generic statement that in CFSP '[t]he adoption of legislative acts shall be excluded'[61] (in the light of the Treaty's procedural understanding of the legislative act, the statement self-referentially confirms the Council's predominance in decision-making[62]). Also, Article

[57] Similarly, Curtin and Dekker, *supra* n. 50, p. 179-184; G. De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press 2008) p. 123-124 and M. Mangenot, 'The Invention and Transformation of a Governmental Body: The Council Secretariat', in J. Rowell and M. Mangenot (eds.) *A Political Sociology of the European Union: Reassessing Constructivism (Europe in Change)* (Manchester University Press 2011).

[58] For a legal analysis of the Council's practice, *see* A. Dashwood, 'The Law and Practice of CFSP Joint Actions', in Cremona and de Witte, *supra* n. 45, p. 53 at p. 55-65.

[59] Both executive and legislative functions can be realised in different (intergovernmental or supranational) modes; national governments may control law-making in the same way as the Commission could theoretically command CSDP operations.

[60] *See* the argument and references in Thym, *supra* n. 37, p. 311-314.

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

[62] Art. 288.3 TFEU defines legislation on the basis of procedure (not substance); the exclusion of CFSP 'legislation' therefore implies the absence of 'legislative' procedure.

16 TEU describes the Council's powers rather vaguely as 'policy-making and co-ordinating'[63] in contrast to the formal recognition of the Commission's 'coordinating, executive and management functions.'[64] Such circumvention strategy cannot determine our analytical conclusion, which should acknowledge CFSP and CSDP as the exercise of executive power.

Foreign policy under the living Constitution

From the viewpoint of the Treaty, CFSP decisions are taken by the Council. Articles 25-31 TEU make a noteworthy effort to distinguish different legal instruments and decision-making procedures. Non-legal forms of cooperation are not mentioned explicitly. Informal instruments and communication channels do however take centre stage in Brussels (and Luxembourg[65]). The Council's established practice illustrates that policy statements are regularly promulgated through the informal vehicles of Council Conclusions, HR Declarations and internal strategy papers – instead of through adopting formal Council Decisions.[66] The European Security Strategy as the central political reference document of CFSP remains a prominent example in this respect.[67] More specific foreign policy questions provide numerous examples of similar dealings.[68] Only situations requiring a firm legal basis, such as sanctions, are subject to formalised Council decisions.[69] Other important developments, such as the negotiations on Iran's nuclear programme, are not reflected in the Official Journal – the substantive policy position is coordinated informally.

As a result of the prevailing informality, our perspective on the EEAS and the Council's subordinate structures must change. They are not only preparatory bodies, but assume executive functions in their own right. The role of the Political and Security Committee (PSC), the CFSP twin of COREPER, which is composed of

[63] Art. 16.1 TEU.

[64] Art. 17.1 TEU.

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

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

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

[68] For an early assessment, *see* R. Wessel, *The European Union's Foreign and Security Policy* (Kluwer Law International 1999) p. 108-115 who rightly points at the present Art. 26.2 TEU as a textual reference to informal definition and implementation of CFSP standpoints; more recently Duke and Vanhoonacker, *supra* n. 14, p. 377-378.

[69] *See* the references *supra* n. 58.

national representatives at ambassadorial level, illustrates this extended autonomy in the day-to-day management of CFSP. The PSC is formally mandated to 'monitor the international situation [and] contribute to the definition of policies'[70] and has during the past decade established itself as the 'executive board' for CSDP and CFSP.[71] Many issues are discussed in the PSC only, especially where the urgency or minor relevance of the topic does not lend itself to the overcrowded agenda of the monthly Council meetings – not even as an 'A point' for adoption without discussion.[72] The same applies to the PSC's preparatory bodies, such as the EU Military Committee (EUMC) or the Committee for Civilian Aspects of Crisis Management (CivCom),[73] which similarly discuss and coordinate their policy positions on a daily basis.[74]

Of course, the Council and national capitals may at any time assume their residual decision-making power, and may control the activities of their agents in the subordinate Council bodies and the EEAS through national instructions.[75] But this does not unmake the institutional practice that many decisions are being prepared and taken at sub-Council level. The PSC, its preparatory bodies and the EEAS play a dominant role in the day-to-day management of CFSP and CSDP. Indeed, the institutional school of political science explains that the institutionalisation of CFSP and CSDP can – even without supranationalisation – result in the *de facto* 'Brusselisation'[76] of European foreign policy-making. Regular contact between national and European policy actors, the reorganisation of national foreign ministries and the formation of dedicated staff all facilitate the gradual alignment of national foreign policy preferences and leads to a collegial impulse.[77] As the

[70] Art. 38.1 TEU.

[71] *See* D. Thym, 'Reflections on the Political and Security Committee (PSC)', in H.-J. Blanke and S. Mangiameli (eds.), *The European Union after Lisbon* (Springer 2011) p. 517-532 and A. Juncos and C. Reynolds, 'The PSC: Governing in the Shadow', 12 *EFA Rev.* (2007) p. 127-147.

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

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

[74] Since the EEAS or other bodies do not hold formal decision-making powers within the meaning of Arts. 25-31 TEU nor formal delegation of decision-making occurs; indeed, it seems that the ECJ's *Meroni* doctrine does not fir the concept of executive foreign affairs activities; *see also* B. Van Vooren, 'A legal-institutional perspective on the European Union External Action Service', 48 *CMLR* (2011) p. 475 at p. 490-491.

[75] *See* the subsection on the administrative line of command below.

[76] D. Allen, 'Who Speaks for Europe?', in J. Petersen and H. Sjursen (eds.), *A Common Foreign and Security Policy for Europe?* (Routledge 1998) p. 41 at p. 48.

[77] For further reflection, *see* J. Howorth, *Security and Defence Policy in the European Union* (Palgrave Macmillan 2007) p. 129-146 and K. Glarbo, 'Reconstructing a CFSP', in T. Christiansen et al. (eds.), *The Social Construction of Europe* (Sage Publications 2001) p. 140-157.

'mind' and 'brain cells' of foreign policy decision-making, the EEAS and the PSC with their officials play a crucial role in identifying common positions and the methods for their realisation.

Persistence of legal intergovernmentalism

Only in the early years of its existence was European foreign policy coordination 'intergovernmental' in the literal sense of meetings between government officials without institutional infrastructure.[78] Intergovernmental cooperation in this sense has long been abandoned. Various committees and bodies within the realm of the Council play a crucial role in the formulation and implementation of CFSP and CSDP with the involvement, albeit limited, of the supranational institutions. My choice of terminology does nothing to diminish these changes. The description of persisting CFSP 'intergovernmentalism' does not, in particular, side with the intergovernmental school of political science, which implies that key players are primarily motivated by national interests and that non-state actors are irrelevant. Nor does the terminology negate the ideational impact of values or the relevance of institutions for the socialisation of CFSP staff and the reformulation of national positions.[79] My choice of terminology rather follows the distinctly legal impetus to conceptualise the constitutional specificity of executive CFSP power in the age of the Lisbon Treaty.

This section presents the particularities of the CFSP Treaty under the label of 'legal intergovernmentalism.' While legal academia has developed no uniform concept of 'intergovernmentalism,'[80] the use of the well-established terminology facilitates the heuristic description of CFSP specificity.[81] It signals in particular that the well-established principles of legal 'supranationalism' cannot be extended to CFSP without modification, reflecting the general claim that the former second pillar continues to be 'subject to specific rules and procedures.'[82] Indeed, the

[78] M. Smith, *Europe's Common Foreign and Security Policy* (Cambridge University Press 2004) p. 67-83 describes the early practice before the Single European Act.

[79] *See* the overview by J. Øhrgaard, 'International Relations or European Integration', in B. Tonra and T. Christiansen (eds.), *Rethinking European Union Foreign Policy* (Manchester University Press 2005) p. 26 at p. 28-34, the classification by Trondal, *supra* n. 11, p. 6-8 and the 'governance' perspective of P. Norheim, 'Beyond Intergovernmentalism', 48 *JCMSt.*(2010) p. 1351 at p. 1354-1355.

[80] *See* the arguments put forward by E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press 2002) ch. 1, p. 5-32 and M. Pechstein, 'Die Intergouvernementalität der GASP nach Lissabon', 65 *Juristenzeitung* (2010) p. 425 at p. 426-427.

[81] An heuristic approach evades the deduction of legal consequences from the prior assumption of CFSP intergovernmentalism – instead, the term is used as an analytical category to signal procedural and legal characteristics of the Treaty regime.

[82] Art. 24.1(2) TEU.

newly-accomplished unity of the Treaty does not establish institutional and constitutional uniformity. CFSP proceeds along distinctive procedural lines (first subsection) and evades full supranational legal effects (second subsection).

Decision-making procedures

Lisbon's merger of the pillar structure is characterised by institutional pragmatism. The new Treaty combines the intergovernmental CFSP with supranational policies, such as development cooperation, without altering the underlying inter-institutional balance. This partial continuation of the *status quo ante* was a deliberate choice: simplification was not meant to erase all distinctions between the former pillars.[83] The post of HR, described earlier, underlines the persistent dichotomy between supranational external action and CFSP/CSDP. Due to her 'double hat' the HR is fully integrated into supranational decision-making as Vice-President of the Commission, while she receives her instructions from the Council in CFSP. But how does the Council decide CFSP positions? And does the dichotomy between supranational and intergovernmental decision-making infiltrate the EEAS with its supposedly uniform institutional structure as the European foreign affairs bureaucracy?

Inter-institutional balance

The special character of CFSP procedures is manifest when we consider the dominance of national governments. Both the deliberation and the ultimate decision remain the almost exclusive prerogative of the (European) Council, which exercises full control over the contents and reach of CFSP. Lisbon shies away from disregarding the firm opposition of any member state: All policy positions can be traced back to a consensus among national capitals, even in the rare situations in which the Treaty allows for qualified-majority voting.[84] It is true that Article 31.3 TEU introduces an explicit *passerelle* option for the expansion of qualified-majority voting in CFSP at a later point.[85] This option has, however, been categorised as a Treaty amendment for the purposes of national constitutional law by the Ger-

[83] *See* the Final Report of European Convention's Working Group III 'Legal Personality', Doc. CONV, *supra* n. 23, 305/02 of 1 Oct. 2002, para. 18.

[84] Art. 31.2 TEU adds the European Council request (which requires consensus under Art. 15.4 TEU) to the list for majority voting, in line with Art. III-300.2(b) Constitutional Treaty, *supra* n. 20; similarly, the specification of strategies (Art. 31.2 TEU, indent 1) and implementing decisions (indent 3) require prior unanimity in the Council.

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

man constitutional court.[86] Going even further, the latest version of the British European Union Act even requires a popular referendum.[87] The activation of the *passerelle* therefore remains a distant option in the foreseeable future. For the time being, the Treaty stops at the water's edge: without consensus among the member states, CFSP cannot proceed.

Conceptually, the *passerelle* option delineates a crucial threshold. If qualified-majority voting was permitted in situations where no collective preference had been established beforehand, CFSP would cease to be characterised by consensus-based 'intergovernmental' cooperation, and would gradually evolve towards a supranational polity[88] (even if 'vital and stated reasons of national policy'[89] would still necessitate a unanimous decision by the European Council). But such considerations remain a distant vision (or illusion) at the moment. Still, the absence of formal decision-making in the day-to-day management of CFSP described earlier may facilitate the emergence of consensus even without majority vote; also peer pressure may limit the factual influence of (smaller) member states. But such convergence occurs in the shadow of the veto option: legally each member state retains full control. Joint activities require consensus.[90] This may explain CFSP's 'reactive' disposition, which often responds to outside events with some delay instead of shaping and directing future policy scenarios.

CFSP decision-making is therefore much less impressive than the abolition of the pillar structure would suggest: the member states acting by consensus remain in full control. Moreover, the Council's prerogatives correlate with the almost complete segregation of the supranational institutions. The Court of Justice continues to have no jurisdiction on core CFSP matters.[91] Similarly, the Parliament is only consulted on major developments[92] (although it extracted some remarkable political concessions on its enhanced involvement from the Council during

[86] The Federal Constitutional Court, Judgment of 30 June 2009, Case 2 BvE 2/08 et al. ('*Lisbon*'), BVerfGE 123, 267, para. 320-1 requires prior parliamentary consent, most probably a two-thirds majority, before the consent at EU level.

[87] *See* section 6(5)(a)+(b) European Union Act 2011 and, for Art. 48.6 TEU, section 4(1)(f)(ii) ibid.

[88] Similarly, the argument by R. Wessel, 'The Multi-Level Constitution of European Foreign Relations', in N. Tsagourias (ed.), *Transnational Constitutionalism* (Cambridge University Press 2007) p. 160 at p. 198-199.

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

[90] The experience of supranational policies suggests that qualified-majority voting serves as a trigger for convergence, directing the member states towards agreement, once the veto option disappears.

[91] *See* Art. 275 TFEU.

[92] *See* Art. 36 TEU and my earlier analysis D. Thym, 'Beyond Parliament's Reach?', 11 *EFA Rev.* (2006) p. 109-127.

the negotiation of the EEAS framework[93]). The Commission's role has formally even been diminished, since its 'full association' has been replaced by the HR's involvement, who in CFSP acts outside the Commission's ambit[94] – although the Commission continues to be associated through its actual presence at Council meetings.[95] We should nevertheless be careful not to confuse actual presence with institutional muscle: in CFSP, the Commission has no monopoly of initiative, does not control the intergovernmental units of the EEAS and cannot challenge non-compliance at the Court. It is difficult to conceive more pronounced procedural intergovernmentalism within the wider framework of the EU's complex inter-institutional balance.

Administrative line of command

The intergovernmentalism of CFSP extends to the EEAS. As a functionally autonomous body, it does not hold any residual powers but 'assists'[96] the HR in the exercise of her functions. In so doing, the EEAS is, in the same way as the HR, legally subordinated to the Council in CFSP and to the supranational institutions in other policy fields. Although the EEAS benefits from an extended factual autonomy in day-to-day management of foreign affairs described earlier, it does, from a legal perspective, prepare and implement decisions which are taken by the institutions in accordance with the rules governing the policy field concerned. One example: when CSDP is concerned, ultimate authority rests with the Council, while the Commission remains in charge of supranational policy fields. Its description as 'a functionally autonomous body'[97] does not imply political independence, but signals its organisational separation from the Council and the Commission.[98]

What does functional autonomy imply in practice? Both the Council and the Commission may not treat the EEAS like a Directorate-General in their ambit, but must respect its functional independence. Instead of issuing policy instructions

[93] Cf. the Draft Declaration by the High Representative on Political Accountability and Statement on the Basic Structure of the EEAS Central Administration (*OJ* [2010] L 210/1) and Van Vooren, *supra* n. 74, p. 479-480.

[94] Arts. 27, 22.1 TEU-Amsterdam/Nice have been discontinued, while the corresponding powers of the HR under Arts. 30.1, 27.1 TEU are, as CFSP powers, outside the reach of the fourth sentence of Art. 18.4 TEU; *see also* Craig, *supra* n. 31, p. 413-414.

[95] Despite the HR's chair function (Art. 27.1 TEU) the Commission continues to be represented autonomously in meetings of the Foreign Affairs Council and its preparatory bodies; *see*, e.g., the minutes of the 3069th Council meeting on 21 Feb. 2001, Council Doc. 6763/11, p. 5-6; for the earlier practice, *see* Duke and Vanhoonacker, *supra* n. 14, p. 163.

[96] Art. 27.3 TEU, whereas Art. 2.1 EEAS Decision, *supra* n. 44 entrusts the EEAD to 'support' the HR.

[97] Art. 1.2 EEAS Decision, *supra* n. 44.

[98] For an intensive discussion, *see* Van Vooren, *supra* n. 74, p. 486-491.

directly to the EEAS unit responsible, they are channelled through the HR, who transmits them within the EEAS's internal line of command. This may sound rather cumbersome, but reflects the original rationale of its creation. The EEAS is meant to overcome the protracted turf battles between the Council and the Commission on the delimitation of the respective fields of influence.[99] It shall guarantee peaceful co-existence between CFSP and supranational policies, which is also supported by the recalibration of the Treaty article on their delineation.[100] It is true that diverging lines of commands for different policy fields continue. But disputes will arguably be mitigated by EEAS and broil below the surface.

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

How does the Council control the EEAS executive in practice? Formal instructions will rarely be issued by the ministers themselves, but emanate from the PSC and the working groups and committees which report to it, including the military committee EUMC and the civil crisis management counterpart CivCom.[104] Since

[99] See D. Thym, 'Foreign Affairs', in von Bogdandy and Bast, *supra* n. 31, p. 309 at p. 483-487.

[100] *See* the assessment of the symmetric orientation of Art. 40 TEU, which no longer shields supranational policies against CFSP interference only, by B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil', 14 *EFA Rev.* (2009) p. 231-248.

[101] *See* Missiroli, *supra* n. 44, p. 435-436.

[102] Lieb and Maurer, *supra* n. 44, p. 200 report that it was a deliberate choice; Art. 4.3 EEAS Decision, *supra* n. 44, states ambiguously that the recently established Crisis Management and Planning Directorate (CMPD) shall support CFSP 'in accordance with Art. 40 TEU'; for earlier disputes, *see* F. Hoffmeister, 'Inter-Pillar Coherence in the European Union's Civilian Crisis Management', in S. Blockmans (ed.), *The European Union and International Crisis Management* (T.M.C. Asser Press 2008) p. 157-180.

[103] *See* Arts. 5.3, 9 EEAS Decision, *supra* n. 44, and their criticism by Sydow, *supra* n. 47, p. 9-10.

[104] *See* the description of foreign-policy under the living constitution above.

these bodies are composed of national representatives, member states remain conceptually in control: capitals may issue instructions to their delegates, which in turn control the everyday CFSP activities with or without Council involvement. In the case of CSDP operations, the Treaty formally sanctions the PSC's supervision authority: '[T]hePSC shall exercise … the political control and strategic direction of the crisis management operations.'[105] This is no legal illusion. Military commanders regularly report back to the PSC, which issues operational instructions with the support of the EUMC.[106] In other policy fields, the practice is similar. Substantive policy positions are decided by the Council, the PSC and its subordinate bodies with the assistance of the EEAS.

Intergovernmental Union Law?

With the entry into force of the Lisbon Treaty, the pillar structure was abandoned. The EU obtained a single legal personality.[107] As a result, the earlier argument that the 'second pillar' constitutes a legal order in its own right cannot be maintained.[108] For proponents of the earlier 'separation thesis', which portrayed the second pillar as classic international law outside the reach of Community law, 'Lisbon' represents a turning point which revises the earlier situation[109] – those who championed the 'unity thesis', which pointed at the overlap between the pillars, may argue that the Lisbon Treaty formally sanctions substantive legal unity which their analysis had unearthed before.[110] Be this as it may, the legal examination of CFSP must accept the Lisbon Treaty's legal unity as the starting point and explore its implications. We shall see that there are important arguments against the application of supranational legal characteristics such as primacy and direct effect, although the merger of the pillars exposes CFSP to constitutional control standards such as human rights.

Six arguments against vertical 'supranationalisation'?

The existence of a single legal order does not imply the pervasive supranationalisation of all policy fields. Even within core areas of the former EC Treaty, primary law distinguishes between different categories of Union action. While some areas

[105] Art. 38(2) TEU; for more detail, *see* Thym, *supra* n. 71, p. 522-524.

[106] *See* for the operation ATALANTA on the coast of Somalia Arts. 6-7 Council Joint Action 2008/851/CFSP (*OJ* [2008] L 301/33).

[107] *See* Arts. 1, 47 TEU.

[108] On different lines of argument before the entry into force of the Lisbon Treaty, *see* R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', 43 *CMLR* (2006) p. 337 at p. 370-376 and Thym, *supra* n. 99, p. 336-338.

[109] *See*, e.g., Pechstein, *supra* n. 80, p. 425-426.

[110] The most prominent 'prediction' of unity had been voiced by A. von Bogdandy, 'The Legal Case for Unity', 36 *CMLR* (1999) p. 887-910.

are based on (exclusive or shared) legislative competences, other policy fields are subject to non-binding coordination measures only.[111] The legal framework for employment policy coordination has, for example, always been 'weaker' than the harmonisation option in the field of the environment.[112] Indeed, unity of the legal order does conceptually not require substantive uniformity, but allows for sector-specific variations.[113] Within this overall picture, we need to identify the status of the CFSP provisions, thereby substantiating the Treaty's generic claim that they are 'subject to specific rules and procedures.'[114] The following considerations may guide this undertaking and illustrate my claim of enduring 'legal intergovernmentalism' of Europe's CFSP constitution.

Direct and supreme effect are defining features of the Community legal order, which are central to the ECJ's assumption that supranational Union law transcends the characteristics of classic international law. Instead of creating obligations between states, the former E(E)C constitutes a supranational organisation, which acts in place of the member states by exercising original competences, which have been transferred to the European level by the member states. The legal obligations arising from such transfer of supranational powers have well-known legal effects, which are the backbone of legal supranationalism: Community law permeates directly into domestic legal systems with direct effect and claims supremacy over national laws in cases of conflict.[115] Does CFSP command such direct and supreme effect? There are six reasons that it does not:

First, we should be careful not to overstate the significance of the EU's express international legal personality (Article 47 TEU). It does not imply that the EU moves closer to statehood, since legal personality is a common feature of contemporary international organisations.[116] It rather seems that the protracted dispute about the EU's legal status in the 1990s wrongly equated legal personality with

[111] Cf. Arts. 2-6 TFEU.

[112] Contrast Arts. 2.3, 5.2, 145-50 TFEU with Arts. 2.2, 4.2(e), 191-3 TFEU

[113] As has been convincingly argued by C. Herrmann, 'Much Ado About Pluto?', in Cremona and de Witte, *supra* n. 45, p. 20 at p. 34-36.

[114] Again, Art. 24.1(2) TEU which was introduced in the Lisbon Treaty in order to underline, together with the continued placement of CFSP in the EU Treaty (instead of the TFEU), that CFSP differs from other aspects of external action – in contrast to Arts. III-294-331 Constitutional Treaty (*supra* n. 20), which positioned CFSP alongside CCP without however the same procedural and institutional rules.

[115] The ECJ has never explained the reasons for supremacy expressly, but points at the particularity of the EU legal order and its distinction from public international law; the corresponding concept of a transfer of competences resonates with national constitutional rules in many member states; cf. M. Claes, 'Constitutionalising Europe at its Source', 24 *Y.E.L.* (2005) p. 81-125.

[116] *See* J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn. (Cambridge University Press 2009) p. 46-50 and M. Ruffert and C. Walter, *Institutionalisiertes Völkerrecht* (C.H. Beck 2009) section 5.

supranationalisation, which would explain the quasi-ideological objection of EU legal personality by some authors.[117] That is not the case: bodies such as the International Criminal Court or the WTO possess legal personality[118] – without being a state (one may on the contrary perceive Article 47 TEU as a drafting technique which designates the EU as an international organisation[119]). Also, international organisations exercise their own competences, whose exercise result in international legal obligations. But these obligations – unlike supranational EU law – do not benefit from direct and supreme effect.[120] Our debate does not concern legal personality, but the character of the CFSP powers.

Second, the new categories of competences enshrined in Article 2-6 TFEU indicate that the CFSP does not encompasses 'real powers stemming from a limitation of sovereignty or a transfer of powers.'[121] Rules governing CFSP are in particular not associated with the category of exclusive or shared competence, which characterise supranationalism and with regard to which the Lisbon Treaty explicitly pre-empts conflicting national action. Instead the EU Treaty simply lists CFSP as a category in its own right, which apparently differs from other policy fields.[122] The silence of the Treaty may not stop the academic analysis from reconstructing a transfer of powers also in CFSP, but the absence of formal exclusive or shared competence remains a strong indication that CFSP is meant to differ. A declaration attached to the Lisbon Treaty goes even further when it claims the continuation of the *status quo ante*: the Treaty 'will not affect the existing legal

[117] After 2001 the EU (not the EC) concluded almost hundred agreements with third parties or international organisations on the basis of Art. 24 TEU-Nice which arguable established the legal personality which earlier Treaty amendments had shied away from designating explicitly; for more detail, *see* D. Thym, 'Die völkerrechtlichen Verträge der Europäischen Union', 66 *ZaöRV/Heidelberg Journal of International Law* (2006) p. 863 at p. 864-899 and R. Wessel, 'The European Union as a Party to International Agreements', in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations* (Cambridge University Press 2008) p. 152-187.

[118] Cf. Art. 4.1 of the Rome Statute (UNTS vol. 2187, p. 3) and Art. 8.1 of the WTO Agreement (*OJ* [1994] L 336/3).

[119] State constitutions usually refrain from mentioning explicitly that the state shall be a subject of public international law; in the 19th century the definition of 'federation' (*Bundesstaat*) and 'confederation' (*Staatenbund*) included legal personality as an feature of the former – a distinction which predates the recognition of other international legal subjects than states and can therefore not be maintained in the age of international organisations, which nowadays a confederation might establish.

[120] Pechstein, *supra* n. 80, p. 427-428 misses the difference between international competences, whose exercise create obligations under public international law (such as within the WTO), and the supranational transfer of sovereign state powers to the EU.

[121] ECJ, Case 6/64, *Costa* v *E.N.E.L.* [1964] ECR p. 1251 at p. 1269.

[122] Art. 2.4 TFEU, in the same way as Art. I-12 Constitutional Treaty (*supra* n. 20), deliberately avoids to align CFSP with the supranational exclusive or shared competences.

basis, responsibilities, and powers of each member state in relation to the formulation and conduct of its foreign policy.'[123]

Third, the supremacy doctrine entails the obligation to set aside national rules. In cases of conflict, EU law prevails. We may also call it pre-emption: the member states shall only act, if the Union has not done so;[124] conflicting national rules are 'automatically inapplicable.'[125] Member states hence lose the capacity to legislate in fields which the supranational institutions have occupied. This effect is most pronounced under the *ERTA* doctrine of exclusive treaty-making powers: insofar as EU legislation exists, member states must refrain from the conclusion of international agreements.[126] It is true that CFSP rules oblige the member states to 'unreservedly support' CFSP and 'refrain from any action which is contrary'[127] – reflecting the general obligation of loyal cooperation, which one may use as a trigger for partial supranationalism.[128] But closer inspection of CFSP and CSDP legal instruments indicates that these have not been designed to replace national activities with supreme and pre-emptive effect.

Fourth, CFSP instruments 'commit the Member States in the positions they adopt and in the conduct of their activity' and define the Union's approach, in relation to which member states must 'ensure that their national policies conform.'[129] This clearly signals that CFSP decisions are legally binding in line with earlier ECJ case-law on criminal matters[130] (a conclusion which is confirmed by the reorganisation of old-style joint actions and common positions as 'decisions' within the meaning of Article 288 TFEU[131]). Member states therefore act ille-

[123] Declaration (No. 14) concerning the Common Foreign and Security Policy (*OJ* [2008] C 306/255).

[124] Art. 2.1+2 TFEU define these limits of national competences (without extending them to CFSP); on pre-emption more generally, *see* R. Schütze, 'Supremacy without pre-emption?', 43 *CMLR* (2006) p. 1023 at p. 1032-1046.

[125] ECJ, Case 106/77, *Simmenthal* [1978] ECR 629, para. 17.

[126] *See* Art. 3.2 TFEU and M. Cremona, 'External Relations and External Competence', in Craig and de Búrca, *supra* n. 10, p. 217 at p. 244-251.

[127] Art. 24.3 TEU; *see also* the obligation for procedural coordination in Art. 32 TEU.

[128] Cf. the general obligation in Art. 4.3 TEU, which the ECJ has referred to in cases reinforcing supranational legal effects, also in the former third pillar in ECJ, Case C-105/03, *Pupino* [2005] ECR I-5285, paras. 39-42; more generally Wessel, *supra* n. 88, p. 178-186, C. Hillion and R. Wessel, 'Restraining External Competences of EU Member States under CFSP', in Cremona and de Witte, *supra* n. 45, p. 79 at p. 108-112 and P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure', 47 *CMLR* (2010) p. 987 at p. 1012-1017.

[129] Arts. 28.2 and 29 TEU.

[130] On common positions under Art. 34.2.a TEU-Nice see ECJ, Joint Cases C-354/04 and C-355/04 P, *Gestoras Pro Amnistía & Segi* v *Council* [2007] ECR II-1579, para. 52-4.

[131] Before Lisbon, Joint Actions and Common Positions were two distinct CFSP instruments, which by name and substance differed from supranational legal acts; most commentators nonetheless concluded that they were legally binding; cf., among many, F. Dehousse, 'La Politique étrangère

gally if they violate CFSP positions (in the same way as they can violate UN or WTO law). But do conflicting national policy instructions to diplomats or military orders have to be automatically disapplied, since CFSP obligations have direct and supreme effect? The textual description of CFSP decisions[132] and the exclusion of supranational regulations (and directives) support my hypothesis that CFSP instruments have not been designed for supranational legal effects.[133]

Fifth, the specificity of CFSP instruments can be explained with conceptual differences to supranational law-making.[134] As has been argued above, foreign policy and military operations are defined by their executive character – not legislative impact on individuals. That is a pivotal difference to the former third pillar on cooperation in criminal matters. Domestic court cases concerning the application of EU regulations in the legislative domain can be resolved on the basis of direct and supreme effect, which 'negatively' sets aside conflicting national rules. But CFSP differs: Supremacy does not guarantee successful CFSP diplomacy and CSDP operations, whose *effet utile* rather requires 'positive' political support and the provision of military capacities by the member states (notwithstanding the specific case of CFSP sanctions[135]). This executive character may have been one motivation for the explicit exclusion of 'legislative acts.'[136] CFSP diplomacy and CSDP operations aim at active member state support and do not replace national action pre-emptively. The supranational transfer of law-making powers does not conceptually fit executive coordination.

Sixth, national constitutional law supports my hypothesis. In its judgment on the Lisbon Treaty the German constitutional court deliberately states:

et de sécurité commune', in M. Dony and J.-V. Louis (eds.), *Commentaire J. Mégret 12*, 2nd edn. (Université de Bruxelles 2005) p. 439 at p. 469-470.

[132] Art. 28-9 TEU describe the binding character on the member states without any indication of intra-state supremacy, which matters insofar as 'decisions' are binding on the designated addressee (Art. 288(3) TFEU).

[133] Similarly, Curtin and Dekker, *supra* n. 50, p. 171-172; for a more nuanced assessment, *see* Craig, *supra* n. 31, p. 418 and p. 432-433, Van Elsuwege, *supra* n. 128, p. 989-991; Wessel, *supra* n. 88, p. 174-178 and p. 189-195 and K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', 31 *EL Rev.* (2006) p. 287 at p. 290-292.

[134] For a similar argument *see* P. Eeckhout, *External Relations of the European Union*, 2nd edn. (Oxford University Press 2011) p. 171; De Baere, *supra* n. 57, p. 123-124, Gosalbo Bono, *supra* n. 108, p. 364 and 378 and Pechstein, *supra* n. 80, p. 428.

[135] Such as entry bans or arms embargoes, with regard to which Art. 275 TFEU provides for ECJ jurisdiction in specific circumstances; one might possibly support a different conclusion in these cases following Curtin, *supra* n. 10, p. 186-187 and ECJ, Case 9/70, *Grad* [1970] ECR 825, although CFSP excludes the adoption regulations, the usual instrument for directly applicable supranational sanctions.

[136] Art. 24.1(2) TEU, which – in the light of Art. 289.3 TEU – does primarily indicate the confirmation of Council predominance in decision-making (as described in the section on the executive specificity of CFSP above).

> Also after the entry into force of the Treaty of Lisbon, the [CFSP], including the [CSDP], will not fall under supranational law… [T]here is no provision for legal acts to which Declaration No. 17 on Primacy would apply. The Treaty does not provide the Union with any sovereign powers that would permit supranational access to the Member States legal orders.[137]

This assertion may not prevent different academic conclusions, but hints at a more fundamental concern: If we accept that self-determination in foreign policy and matters of war and peace directly impacts upon state sovereignty,[138] we should be careful not to overstretch the dogmatic reinterpretation of Treaty provisions. Also academics that politically or conceptually dislike CFSP intergovernmentalism should recognise the tangible effort in the Lisbon Treaty not to federalise European foreign affairs.

Finally, a caveat: the analysis follows the traditional distinction between interstate obligations with an intergovernmental character and legal supranationalism with direct and supreme effect based on a transfer of powers – in line with ECJ case-law and national constitutional positions on the distinction of Union law from classic international law. This categorical distinction matters most for dualist countries, such as Germany and many new member states, where only the founding myth of supranationalism may explain mandatory direct and supreme effect.[139] In monist jurisdictions, nuanced positions supporting an intermediate status between international and supranational legal obligations can be more easily defended – in line with those authors who emphasise the international legal roots of the European legal order in its entirety by pointing out that all supranational legal principles may be construed as the expressions of a highly specialised self-contained regime of public international law.[140]

In short: member states are legally obliged to respect Union law, but CFSP legal acts do not command direct and supreme effect (member states retain the

[137] German 'Lisbon Judgment' (n. 86), paras. 390 (first sentence) and 342 (second and third sentence) under reference to Arts. 24.1, 40 TEU, Art. 2.4 TFEU and Declaration (No. 14); for more detail, *see* D. Thym, 'Integrationsziel europäische Armee?', *Europarecht Beiheft* (I/2010) p. 171-191 (also available through the author).

[138] The protection of national sovereignty is identified as the main reason for the intergovernmentalism of CFSP by Denza, *supra* n. 80, p. 19 and C. Hillgruber, 'Der Nationalstaat in der überstaatlichen Verflechtung', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts* (C.F. Müller 2004) vol. III, § 32, para. 91.

[139] For dualist countries, the core question is not whether CFSP measures can be directly relied upon in national courts, but whether Union law dictates this result irrespective of national constitutional rules; similarly, Dashwood, *supra* n. 58, p. 55-56 and Herrmann, *supra* n. 113, p. 46.

[140] Cf. A. Pellet, 'Le fondements juridiques internationaux du droit communautaire', in 2 *Collected Courses of the Academy of European Law* (1997) p. 193 at p. 245-267, as well as Denza, *supra* n. 80, p. 5-33, T. Hartley, 'International Law and the Law of the European Union', 72 *BYIL* (2001) p. 1 at p. 10-17 and Gosalbo Bono, *supra* n. 108, p. 370-376.

legal capacity to behave differently – albeit with the consequence of breaching Union law). This deviation of the supranational model reflects the executive specificity of CFSP diplomacy and CSDP operations, whose *effet utile* aims at the activation of political and military support instead of pre-empting conflicting national legislation.

'Constitutionalisation' of foreign affairs

One core difference between the 'constitutional' character of Union law and the 'international' features of classic international law concerns the hierarchy of norms. Within the EU legal order, secondary law must respect the procedural and substantive imperatives of primary law. This 'legal constitutionalism' remains the backbone of the Court's famous description of the EU Treaties as the 'a Community based on the rule of law, inasmuch as … its institutions can[not] avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter.'[141] This contention does not contradict my earlier finding that CFSP has no direct and supreme effect, since the vertical weight of the Union law in domestic legal orders must be conceptually distinguished from the horizontal subordination of CFSP to intra-European constitutional rules.[142] While Lisbon eschews the vertical 'supranationalisation' of CFSP, it proceeds with its horizontal 'constitutionalisation.'

Against this background, the most important consequence of the abolition of the pillar structure may be normative: constitutional control standards, such as human rights, apply to all areas of Union action. Foreign, security and defence policies are, as an integral part of Union law, no exception in this respect. Primary law guides and restricts CFSP and CSDP in the same way as it controls the Common Commercial Policy.

In contemporary constitutionalism, human rights serve as the central point of reference for the substantive control of state action. As a matter of principle, the Lisbon Treaty does not leave any doubt that foreign affairs must respect human rights. Article 51 Charter of Fundamental Rights (CFR) states paradigmatically: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union.' This extension of human rights to all Union action mirrors, *mutatis mutandis*, Article 1 ECHR which mandates that the 'High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in … this Convention.'[143] When it comes to human rights, CFSP and CSDP are no exclave – or in the words of the ECJ in its seminal *Kadi* judgment on sanctions against individuals: secondary law 'cannot have the effect

[141] ECJ, Case 294/83, *Les Verts* [1986] ECR 1339, para. 23.
[142] *See also* Curtin and Dekker, *supra* n. 50, p. 170-171.
[143] Art. 6.2 TEU calls upon the EU to accede to the ECtHR.

of prejudicing the constitutional principles of the [EU] Treaty, which include the principle that all Community acts must respect fundamental rights.'[144] After 'Lisbon', this principle extends without doubt to the former second pillar. CFSP and CSDP must respect human rights.

We should nonetheless be careful not to overstate the implications of our initial conclusion. The extension of human rights to foreign affairs does not necessarily entail the application of the domestic protection regime; the interpretation of human rights in foreign affairs requires adjustments, especially in cases of military action. Their interpretation is, also outside the EU framework, subject to a number of caveats which include the necessary accomodation to international humanitarian law.[145] Moreover, few courts have unfettered jurisdiction to enforce the human rights accountability of CFSP and CSDP.[146] But these limitations do not diminish the conceptual relevance of Lisbon's constitutionalisation of foreign affairs. CFSP and CSDP may require procedural and normative adjustments, but, as a matter of principle, are not absolved from the requirement to respect EU constitutional law, including human rights. Future research will have to fine-tune the degree of human rights accountability.

Human rights are the most pronounced expression of the EU's constitutional identity, but are not the only substantive control standard. First, all CFSP policy choices must be guided by the uniform Treaty objectives of external action, which the Lisbon Treaty combines in one overarching provision (even if most objectives will usually not entail hard legal obligations mandating specific policy positions).[147] Second, the Court maintains that the EU must respect customary international law, which includes the rules of international humanitarian law and the prohibition of force.[148] Third, the ECJ has during the past fifty years developed general principles of Union law, such as proportionality, which after Lisbon unquestionably extend to CFSP.[149] Such modifications may – even without ECJ jurisdiction – have unforeseen consequences. European integration provides ample illustration that 'constitutionalisation' is no one-off event but designates a process whose consequences are gradually being discovered.

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

[145] For further reflection, *see* F. Naert, 'Accountability for Violation of Human Rights law by EU Forces', in Blockmans, *supra* n. 102, p. 375-394.

[146] Even in the absence of ECJ jurisdiction (Art. 275 TFEU) national implementation decisions may possibly be challenged in national courts, which may even have to apply EU human rights standards in line with Craig, *supra* n. 31, p. 343-344.

[147] *See* Art. 21 TEU and S. Oeter, in Blanke/Mangiameli, *supra* n. 71.

[148] Cf. ECJ, Case C-162/96, *Racke* [1998] ECR I-3655, paras. 45-46.

[149] For a similar, earlier argument, *see* von Bogdandy, *supra* n. 110, p. 889.

Conclusion

CFSP diplomacy and CSDP operations differ from law-making and should be described as executive power instead. This may appear as a trivial conclusion, but allows us to read the Treaty regime for CFSP correctly. It explains why institutional practice follows the Treaty concept of formalised decision-making by the Council only when the projection of personnel or the dispersal of funds require a formal legal basis in a Council Decision. By contrast, everyday foreign policy business is often managed without Council involvement through informal instruments or direct contact with third country representatives. Thus, the EEAS and other administrative support bodies gain momentum of their own as Brussels-based executive institutions. These administrative CFSP bodies support the Council, the High Representative, the Commission and the member states, which jointly constitute Europe's compound executive order.

Despite the abolition of the pillar structure CFSP continues to be subject to 'specific rules and procedures' (Article 24.1 TEU). This assertion hints at the intergovernmental set-up of the Treaty regime. Both the High Representative's 'dual hat' and the administrative line of command within the EEAS illustrate the persistence of intergovernmental decision-making procedures. The member states acting by consensus within the Council retain full control over the direction of CFSP. This persistence of procedural intergovernmentalism explains why the legal capacities of the HR and the EEAS fall short of the political prerogatives of most national foreign ministers and ministries. Without consensus among the member states, there is no foreign policy position to represent. CFSP continues to differ from supranational policy fields in this respect. The dichotomy between intergovernmental and supranational policies is mitigated but not overcome behind the façade of cross-cutting HR and EEAS responsibilities.

Whereas the intergovernmentalism of decision-making is laid down in explicit Treaty rules, the identification of intergovernmental legal effects requires an abstract analysis. Six arguments support my hypothesis that CFSP is not persuasively supranationalised within the single EU legal order. Legal instruments, categories of competences, national constitutional law and the executive character of CFSP argue against the extension of supreme and direct effect. Formal CFSP decisions are legally binding, but are in regular circumstances not based on a transfer of sovereign powers to the European level. This state of affairs reflects the present structure of security and defence policies, whose *effet utile* requires political support by the member states – not the disapplication of national policies with supreme and pre-emptive effect. Like the coordination of macro-economic policies, CFSP is a variation on the supranational integration model.

This sober outlook concerns the rejection of vertical 'supranationalisation' of relations between the EU and the member states only. By contrast, the new unity

of the EU legal order results in the horizontal 'constitutionalisation' of CFSP, which in future will be subject to Europe's constitutional control standards, including human rights. Thus, the most important consequence of the uniform Treaty framework does not concern institutions or procedures, but is normative, in the 'thick' understanding of European constitutionalism: EU primary law is substantively biased towards the legal and political accountability of all Union action. CFSP is no exception in this respect. The effects of this constitutional revolution remain to be discovered. Academics working on CFSP should consider substantive control standards and institutional mechanisms to hold CFSP executive power to account for its action without ignoring its continued specificity, which involves the persistence of legal intergovernmentalism.

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